

# WAGE JUSTICE: WORKERS' RIGHTS AND COMMERCIAL DEBT COLLECTION

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## I. INTRODUCTION: THE INTRACTABLE PROBLEM OF UNPAID WAGES AND POVERTY

In 2007, my colleague, Melvin Yee, and I founded the Wage Justice Center, a Los Angeles based nonprofit organization that provides legal assistance to low-income workers seeking to collect unpaid wages, including undocumented immigrants who are ineligible for traditional legal aid due to federal funding guidelines<sup>1</sup>.

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1. 45 C.F.R. § 1626.3 (2009).

The nonpayment or underpayment of wages is not a new concern for those who provide legal assistance to low-income communities. The caseload of early legal aid organizations consisted largely of wage claims for immigrant workers.<sup>2</sup> According to a 1928 history of the New York Legal Aid Society, the first client served by the Society when it opened its doors in 1876 was most likely an immigrant worker seeking help with a wage claim.<sup>3</sup>

A 1938 comment in the *University of Chicago Law Review*,<sup>4</sup> expressing frustrations that are commonplace today, lamented the prevalence<sup>5</sup> and obstinacy<sup>6</sup> of the unpaid wage problem. The comment also described the large unmet need for effective assistance in collecting these wages.<sup>7</sup> It is striking to read the text of this article from seventy years ago:

The problem of the collection of claims for wages past due has been long recognized. The statute books of many states, the statistics of labor commissioners and of legal aid societies bear evidence of the effort advanced to assist the unpaid laborer. Underlying this concern are certain facts—today almost truisms. Non-payment of wages results in dependency which, in turn, affects the economic welfare of the community; ordinary judicial process does not offer relief to the unpaid laborer. The action of the unscrupulous or improvident employer who refuses to pay wages justly due provokes for the employee the problems

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2. See Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 *MCGEORGE L. REV.* 603, 605 (2007) (at “New York Legal Aid’s East Side branch around the turn of the century, the majority of cases involved unpaid wages by Lower East Side sweatshop owners to newly-immigrated workers.”).

3. JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY, 1876-1926*, 27 (Wm. S. Hein Publ’g ed., 1982) (1928). This supposition by Maguire was based on the fact that more than half of the cases handled by the New York Legal Aid Society in its first year were wage claims: “Of 212 complaints laid before the Society’s attorney during his first year of activity 113 were wage claims.” *Id.*

4. Alex Elson, *Collection of Unpaid Wages and Financial Responsibility of Employers*, 5 *U. CHI. L. REV.* 609 (1937-38).

5. *Id.* at 609-10. Working from the Bureau of Labor Statistic’s 1932 wage claim average of \$41.00, Elson estimates that more than \$12,300,000 in unpaid wage claims were handled by the nation’s legal aid agencies between 1924 and 1933 and reports an additional \$1,450,000 in unpaid wage claims were handled by twenty state labor departments. *Id.*

6. A vast number of unpaid wage claims, perhaps the majority, were left unhandled. *Id.* at 610.

7. “It is reasonable to believe that in large areas of this county today many unpaid wage earners look in vain for effective assistance.” *Id.*

of the unemployed worker. The worker, his faith in government and justice undermined, goes his way embittered against society.<sup>8</sup>

Despite the antiquated language, the concerns raised are largely identical to those facing low-income workers and advocates struggling with wage claims seventy years later. Unpaid wages can push low-income workers over the financial cliff, having a ripple effect on the economic welfare of the wider community and leading to additional harms, such as evictions and difficulty supporting children.<sup>9</sup> The existing legal remedies for collecting unpaid wages tend to be inadequate because they often fail to deliver on the promises of wage rights and because of the glacial pace of the legal process.<sup>10</sup> The failure to provide an effective remedy for unpaid wages tends to undermine workers' confidence that the legal system—or society itself—has any real intention of protecting their rights.

More striking still, the author suggests a number of remedies that are identical to those under consideration (or used) by workers' advocates today. Examples include suggestions to concentrate "responsibility [for collecting wages] in the labor commissioner" and to give the labor commissioner "power to take assignment of wages" for the purpose of enforcing claims.<sup>11</sup> Additionally the author suggests imposing criminal penalties on general contractors for failure to pay wages, holding them responsible as guarantors "for the pay-rolls of the sub-contractors."<sup>12</sup> Another suggestion is to require employers, as a condition of operating, to post bonds that could be used to satisfy unpaid wage debts.<sup>13</sup>

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8. *Id.* at 609.

9. *See, e.g.*, KIM BOBO, WAGE THEFT IN AMERICA, 21-22 (New Press ed. 2009).

10. *See, e.g.*, David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 475 (2006) (describing Jennifer Gordon's frustrations about inadequate remedies and collection on judgments for unpaid wages while involved in the Workplace Project in Long Island).

11. Elson, *supra* note 4, at 613.

12. *Id.* This suggestion is not unlike the garment manufacture guarantor provisions enacted in California in 1999 as part of AB 633. *See* CAL. LAB. CODE § 2673.1 (2009).

13. Elson, *supra* note 4, at 613-14. This last suggestion has much in common with the registration-fee-based state funds that have recently been created in California to satisfy unpaid wages for garment workers, *see* CAL. LAB. CODE §§ 2675-84 (2006), and carwash workers, *see* CAL. LAB. CODE §§ 2054-65 (2006, repeal effective Jan. 1, 2010).

One of the key remedies ignored by the author of this 1938 comment is the development of worker-driven organizations, such as unions, through which workers can take a lead role in enforcing wage rights on the job. The author's failure to consider union organizing as part of the solution likely results from the longstanding schism between the rights-based employment law approach to improving work place conditions and the collective-action-based labor law approach.<sup>14</sup>

In recent years many steps have been taken to bridge the divide between employment law and organizing.<sup>15</sup> Much has been written on the relationship between wage claims and worker organizing.<sup>16</sup> I do not doubt that both as a practical matter<sup>17</sup> and as a matter of social justice, the aim of workers' advocates should generally be to promote genuine worker-power in the form of worker-driven organizations.

That said, my primary goal in this article is not to consider these matters, but to conceptualize the prosecution of wage claims as a form of commercial debt collection and explain how we have experimented with this approach over the last few years to increase the effectiveness of wage collection. Part II of this article describes the large gap in services for California workers seeking to enforce wage judgments issued by the state labor commissioner, which led to the founding of the Wage Justice Center. Part III develops the concept of wage rights enforcement as a form of commercial debt collection. Part IV provides a brief sketch of the practical ramifications of viewing wage claims in this way. In Part V, I offer some reflections on the potential integration of this commercial-debt

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14. See, e.g., William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 263-65 (2002) (discussing and criticizing this schism).

15. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (discussing the use of wage claims at worker centers for organizing purposes).

16. See, e.g., *id.*; Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles*, 35 FORDHAM URB. L.J. 339 (2008). Note the Narro article provides a good listing of articles written on this subject. *Id.* at 339 n1.

17. Public interest attorneys and the government could never muster the resources to police millions of private employment relationships.

based approach with worker organizing, observing both genuine opportunities and serious potential drawbacks.

## II. THE WAGE JUSTICE CENTER

In 2007, Melvin Yee and I co-founded the Wage Justice Center, a nonprofit organization dedicated to recovering unpaid wages for low-income workers and holding bad faith employers accountable for underpayment or nonpayment of wages.<sup>18</sup> We were motivated to by the vast wage claim “collections” problem faced by workers in California: workers who win judgments for unpaid wages often find themselves unable to collect the money the court awarded them.<sup>19</sup> Employers who ignore their moral and legal obligations to workers also tend to ignore court orders to pay wages.

By all accounts, the size of this problem is immense. In 2004 the California State Auditor reported that the state government (via the Franchise Tax Board) was only able to collect 20 percent of the wage claims that workers had entrusted to it.<sup>20</sup> These claims took an average of twelve or more months to process—a delay that the Auditor acknowledged diminished the likelihood of successfully collecting the workers’ claims.<sup>21</sup> As of February 2004, the Franchise Tax Board had a backlog of 6,187 wage claims, totaling over \$47 million dollars.<sup>22</sup> Moreover, these numbers only accounted for claims that had been assigned by workers to the state for collection.<sup>23</sup>

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18. It is also a key part of our mission to collaborate with workers, organizers, and community groups to promote greater equality for low-income workers in California. In particular, this means providing legal support to organizing campaigns.

19. *See, e.g.*, CAL. STATE AUDITOR, BUREAU OF STATE AUDITS, FRANCHISE TAX BOARD: SIGNIFICANT PROGRAM CHANGES ARE NEEDED TO IMPROVE COLLECTIONS OF DELINQUENT LABOR CLAIMS (2004), available at <http://www.bsa.ca.gov/pdfs/reports/2003-131.pdf>.

20. *Id.* at 1.

21. *Id.*

22. *Id.* at 14.

23. Pursuant to a 1994 law, workers who win wage claims through the California Labor Commissioner are given the option to assign their claims to the Franchise Tax Board for collection. *See* CAL. REV. & TAX. CODE § 19290 (West 2009). The Labor Commissioner’s office sends letters to successful claimants offering them this option and giving them fifteen days to return a form authorizing the state to take assignment of the judgment. Once the judgment is assigned, the state steps into the claimant’s shoes and has the same power to enforce the judgment as the claimant. *See* CAL. CIV. PROC. CODE § 680.240 (West 2009) (defining “judgment creditor” for the purpose of the Enforcement of Judgments Law as including an assignee).

From our experiences at clinics in law school and our discussions with other advocates, we knew that many more claims were never assigned to the state. Legal advocates in Los Angeles had long recognized this collections gap and it had been a longstanding topic of discussion at coalition meetings of Los Angeles workers' advocates.<sup>24</sup>

We knew that at least part of the collections gap problem derived from unscrupulous employers who intentionally engaged in deceptive practices, as well as from the expectation of impunity that the general lack of enforcement had fostered.<sup>25</sup> Thus, in part, this was a systemic problem of lack of accountability. A legal regime that imposes few consequences on employers who are disinclined to abide by basic workers' rights laws, such as minimum wage, effectively nullifies these rights. Without these rights, the floor for labor standards drops away.

Exploitative employers depend on the impotence of these laws. When faced with large wage claims, a number of low-wage employers resort to legal maneuvering to hide their wealth—such as changing business names, transferring assets to family members, creating fraudulent trusts, and establishing shell corporations.<sup>26</sup> Thus, approaches to collecting wages from these employers must be informed by the law of remedies, an understanding of business and

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24. See, e.g., meeting minutes of California Low-Wage Immigrant Workers Advocates (CLIWA), on file with author; meeting minutes of Los Angeles Workers Advocates Coalition (LAWAC) on file with author.

25. We were perhaps less aware of the extent to which this problem is created by genuinely insolvent employers who had simply proven incapable of managing their businesses. Wage claims may push such business over the edge into bankruptcy. Holding these employers accountable may serve the justifiable function of forcing incompetent businesses to shut down even if the employers are not intentionally dishonest. However, justice in such cases necessarily requires an attempt to obtain a compromised workout of the unpaid wage debt.

26. See, e.g., Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 *YALE L.J.* 2179, 2189 (1994); David Lazarus, *Sweatshop Owners Shift Assets*, *S.F. CHRON.*, Jan. 22, 2003, at B1. The California legislature recognized this problem in the garment industry when it enacted the garment worker law in 1999: "The Legislature finds and declares that persons who are primarily engaged in sewing or assembly of garments for other persons engaged in garment manufacturing frequently close down their sewing shops to avoid paying their employees' wages and subsequently reopen under the conditions described in subdivision (b), and are more likely to do so than are other types of persons engaged in garment manufacturing." *CAL. LAB. CODE* § 2684(a) (West 2009).

corporations law, and familiarity with trusts and estates law—areas of law not traditionally used by low-wage worker advocates.

To address this problem, Melvin and I began the process of establishing the Wage Justice Center in 2005 shortly after graduating from law school. From 2005 to 2007, while planning the formation of the Wage Justice Center and seeking funding, we represented a handful of workers in cases involving the enforcement of wage judgments to develop a better grasp of the legal and practical issues presented by these cases. In September 2007, we founded the organization and began assisting workers full-time.

Although some of what we do at the Wage Justice Center is traditional employment law—in particular wage and hour cases<sup>27</sup>—focusing on the vindication of individual rights in the workplace,<sup>28</sup> much of what we do is really a subset of commercial litigation involving activities such as the creation and enforcement of liens and business torts (for example, misappropriation of corporate funds, alter ego, fraudulent transfer)

In the first year of its existence, the Wage Justice Center collected more than \$250,000 on behalf of low-income workers. Most of these back wages were collected in cases that community groups, legal services groups, and the State of California had written off—cases involving the sort of highly unscrupulous and exploitative businesses that are rampant in the underground economy. Indeed, several of our successful cases had already gone through the state tax collection system and had been returned to workers as uncollectible no-asset cases.<sup>29</sup>

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27. The Wage Justice Center mainly takes on wage and hour cases either involving undocumented workers, who cannot be represented by federally funded legal aid organizations, or in the context of community organizing campaigns where individual employment law cases can have a broader impact on improving the conditions for low income workers in an industry.

28. See, e.g., Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 165-170 (2007) (discussing the traditional distinctions between employment law, labor law, and employment discrimination law); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again* 23 BERKELEY J. EMP. & LAB. L. 259, 263-265 (2002).

29. As explained above, at note 23, workers who win wage claims are given the option of assigning their judgments to the California Franchise Tax Board for collection. If the Franchise Tax Board is unable to collect any funds it reassigns the judgment to the worker. In my experience, it usually takes one to two years for the state to process the judgment, deem it uncollectable and reassign it to the worker.

For example, we litigated a garment shop case involving five workers to enforce unpaid wage judgments entered by the Labor Commissioner in 2005. Prior to our representation, the workers had assigned the enforcement of their judgments to the State of California, but after approximately a year, the State returned the judgments stating they could not be enforced because the defendants had no assets. In fact, three months after judgment was entered, the former employers, a husband and wife who ran the garment factory, had transferred over \$800,000 worth of assets including their home and businesses to their son for no consideration. We filed a fraudulent transfer suit and were able to obtain the unpaid wages relatively quickly.

Similarly, we represented another garment worker to enforce a 2006 judgment for unpaid wages entered against a seemingly defunct garment factory. Investigation into the public records revealed that during the pendency of the administrative wage claim, the defendants had dissolved the garment shop corporation, claiming that the business had no known debts--despite their awareness of the pending wage claim. During our representation, we discovered the defendants had created a new garment shop corporation at the same address as the dissolved corporation during the labor commissioner proceeding and apparently continued engaging in the business of garment contracting. We filed a civil suit that included causes of action for fraud, fraudulent transfer, alter ego, and improper distribution of corporate assets to shareholders and directors. Shortly after filing and serving the complaint, the defendants agreed to pay almost the entire amount of the judgment, including all unpaid wages.

Part of the Wage Justice Center's mission is to file affirmative wage claims and enforce judgments for unpaid wages on behalf of workers who cannot find other representation—particularly undocumented workers who cannot avail themselves of federally-funded legal aid.<sup>30</sup> Through our experience, we have come to believe it is useful to reconceptualize the whole process of filing wage claims as a form of debt collection in order to focus attention on

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30. 45 C.F.R. § 1626.3 (2009).

those aspects of the cases that are most likely to lead to a successful outcome for the clients. This has made the filing of affirmative claims an important strategic priority for the organization.

### III. COLLECTION OF WAGES AS A FORM OF COMMERCIAL DEBT COLLECTION

“Commercial collections” is a subset of the debt collection industry that involves the collection of debts arising from the operation of a business, as distinguished from consumer collections, which focuses on debts arising from consumer transactions.<sup>31</sup> Not surprisingly, commercial debtors are given less protection under the law than consumer debtors. A key example of this disparity in treatment is that the Federal Fair Debt Collection Practices Act<sup>32</sup> does not apply to debts arising from the transaction of a business, but only debts “primarily for personal, family, or household purposes.”<sup>33</sup>

It is not a figure of speech to describe collection of unpaid wages as a form of commercial debt collection. Unpaid wage cases, including wage and hour cases, are claims for debts—definite sums of money based either on an explicit contract or a contract implied by law.<sup>34</sup> These wage debts generally arise from the operation of a business, not individual consumer transactions. We do not usually think of wage cases in these terms because we concentrate on the moral imperative of the rights involved—the right to be paid fairly for one’s work.<sup>35</sup>

When we first began the process of establishing the Wage Justice Center, we did not think of unpaid wages as a commercial collections problem. Although we recognized that enforcing

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31. See generally description and mission of Commercial Law League of America, Sections, <http://www.clla.org/sections/ccaa.cfm> (last visited Month, day, 2008).

32. 15 U.S.C. §§ 1692-1692p (2009). This act provides a number of protections to debtors, such as controlling the time and manner of communications by creditors, *id.* at § 1692c, requiring notification of rights to dispute the debt, *id.* at § 1692g, dictating venue requirements for legal action, *id.* at § 1692i, and creating civil liability against overreaching creditors, *id.*, at § 1692k.

33. 15 U.S.C. § 1692a(5) (2009).

34. An example of an implied by law contract is the agreement that a worker engaged to do a job is being hired at no less than the minimum wage.

35. Additionally, the lopsided balance of power in the employee-employer relationship tends to discourage thinking about labor as a service supplied on credit—it is not as though most workers have the bargaining power to demand payment of their wages in advance.

judgments for unpaid wages was a form of debt collection, the first conceptual framework that we adopted was that of unpaid child support: a form of debt collection that should arguably receive priority status over other debts the parent may owe.<sup>36</sup>

It seemed to us that a “deadbeat boss” campaign could invoke some of the same public outrage that the “deadbeat parent” has. This public outrage could be used to prioritize the collection of unpaid wages under the law and invoke additional remedies, such as the suspension of drivers’ licenses or the involvement of the District Attorney’s office where appropriate, on behalf of workers. Indeed, to some extent, wages are already a prioritized form of debt under existing laws. For example, under the bankruptcy laws, employees owed wages have higher priority than other unsecured creditors in the distribution of the assets of a bankrupt business.<sup>37</sup> Likewise, under the California wage garnishment laws, it is impossible to claim a cost of living exemption if the debt underlying the garnishment is for child support or unpaid wages.<sup>38</sup>

Nonetheless, as we have developed the Wage Justice Center it has become apparent that, from the standpoint of legal action, collecting unpaid wages is more akin to commercial debt collection than collection of unpaid child support. At this point in time family law debts are still prioritized significantly higher under the law than wage debts.<sup>39</sup> However, unlike family-law debtors, employers are directly involved in a commercial activity<sup>40</sup> and have used their

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36. There is a reason to reject the analogy to child support at the outset—such an analogy has disturbingly patronizing implications, reinforcing the social prejudice that workers are essentially the dependents of their employers who, like a parent, has a kind of patrician responsibility.

37. *See, e.g.*, 11 U.S.C. § 507a(1)(A), a(4)(A) (2009) (listing priority of payment of unsecured creditors in the distribution of bankruptcy estate). Among the ten listed priorities, domestic support obligations receive first priority while wages receive fourth priority. *Id.* These protections could be improved. Canada has considered amendments to its bankruptcy laws to provide greater protection for unpaid wages. *See* MARGARET SMITH, PARLIAMENTARY RESEARCH BRANCH, PROTECTING EMPLOYEE WAGES IN BANKRUPTCY, LAW & GOV’T DIV. PRB 01-34E (2002), available at <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/prb0134-e.htm>. *See also* Elson, *supra* note 4, at 614-15 (suggesting amending bankruptcy laws to make wage debts non-dischargeable).

38. CAL. CIV. PROC. CODE § 706.051(c) (West 2009).

39. For example, domestic support obligations received first priority under the bankruptcy laws. 11 U.S.C. § 507a(1)(A), a(4)(A) (2009).

40. Of course there are some exceptions, such as some as those hiring domestic workers.

workers to produce things with commercial value. Because the legal action—and the debt—arises directly from this commercial activity there are strategies and options available to workers litigating wage claims that are not available to those seeking unpaid child support. Thinking about unpaid wage cases as a form of commercial debt collection provides powerful tools for the enforcement of wage rights.

There is a robust set of legal tools —statutory and case law— to deal with the collection of commercial debts. Those with significant access to the legal system, such as banks, merchants, and investors, have developed these tools over the centuries to provide a certain amount of assurance that those with whom they do business cannot escape payment for funds and goods they have supplied. Five key examples of legal tools that we have adopted for collecting wages are: prejudgment remedies,<sup>41</sup> the provisions of the Uniform Commercial Code (and in particular the Bulk Sales Law),<sup>42</sup> corporations code provisions designed to protect creditors of a corporation,<sup>43</sup> the law of fraudulent conveyances,<sup>44</sup> and equitable theories for holding related businesses or individuals liable as alter egos and successors.<sup>45</sup>

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41. *See, e.g.*, CAL. CIV. PROC. CODE §§ 481.010-493.060 (West 2009) (the California Attachment Law).

42. *See* CAL. COM. CODE §§ 6101-11 (West 2009) (Bulk Sales law). Much of the Uniform Commercial Code is designed primarily for the purpose of securing commercial transactions—which is really to say ensuring effective remedies to businesses faced with the prospect of collecting commercial debts. *See generally* CAL. COM. CODE §§ 2402, 2702-25 (West 2009) (dealing with remedies in commercial sales contract), 5101-5118 (dealing with letters of credit to secure payment for goods), 6101-11 (West 2009) (Bulk Sales law), 9101-9709 (West 2009) (Secured Transactions). Thus, it is not unthinkable that certain parts of the UCC might be borrowed and reworked into labor statutes meant to enhance workers' ability to collect wages.

43. *See, e.g.*, CAL. CORP. CODE §§ 316, 2009 (West 2009).

44. *See* CAL. CIV. CODE §§ 3439-3439.12 (West 2009) (California version of the Uniform Fraudulent Transfer Act).

45. *See, e.g.*, *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825 (1976) (analyzing alter ego allegations made by commercial landlord against tenant and finding that enough distinctions between the new and old entities existed as to nullify alter ego accusations, the court laid out factors to distinguish alter egos from new entities); *Econ. Refining & Serv. Co. v. Royal Nat'l Bank of N.Y.*, 20 Cal. App. 3d 434, 439-40 (1971) (successor theory was upheld where a fraudulent foreclosure by insider controlling buyer was used to avoid paying investors).

#### IV. PRACTICAL RAMIFICATIONS OF VIEWING WAGE RIGHTS IN TERMS OF COMMERCIAL DEBT COLLECTION

Our shift to a commercial debt collection framework, rather than employment law, has shifted our strategic emphasis, in addition to providing us with more legal tools in our arsenal. Rather than focusing on abstract worker rights *per se* and demonstrating violations of these rights, the focus of the case becomes preserving assets, understanding the psychology of the debtor-employer, and analyzing the legal and financial structure of the debtor's business.

This shift in perspective has a number of practical ramifications for the prosecution of wage claims. What I describe below is not a complete detailing of all the ramifications, but only an attempt to briefly sketch some of what has been important to us in thinking through cases involving the collection of unpaid wages. Much of what I discuss will not be new information to advocates who are regularly involved in pursuing wage claims. The legal tools and practices suggested have been used for a number of years to some extent by many of the advocates we work with in Los Angeles.

The strategic changes implicated by conceptualizing wage claims as a form of commercial collections is only a slight shift in emphasis and perspective. Nonetheless, I think this change opens up new ideas that may make the wage claims more effective.<sup>46</sup>

Reconceptualizing wage claims as debt collection cases immediately shifts the focus of the case from identifying wage violations to maximizing the assets available for collecting the eventual judgment for unpaid wages. We attempt to create strategic enforcement plans, which, much like discovery plans, can be used as a guide to the timing, steps and strategy of collecting the unpaid funds. In these plans we consider the effect that specific legal steps will have on the debtor—disappearance, movement of assets, bankruptcy, etc.—and the pressure-points of the debtor-employer.

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46. On the other hand (as is discussed more thoroughly in the Section IV below), this change in emphasis may detract from certain other goals of workers' advocates because it tends to reduce the basic right to fair wages to a mundane pragmatic question of collecting a debt. Thinking about it this way could present a double-bind for workers and organizers: on the one hand aggrieved workers who understand their claims as debt collection may find it easier to obtain some recompense; but on the other hand, they find it harder to believe that what is at stake is a basic right.

This asset-maximization method creates psychological pressure on the debtor-employer to encourage voluntary payment.<sup>47</sup>

At the beginning of the case, prior to filing any litigation or administrative claim, we attempt to do in-depth research into the financial health and available assets of the employer/defendant. This research involves identifying available assets to satisfy the judgment, investigating other claims and liens against the defendant (especially tax liens) that may indicate financial problems, and examining the overall financial condition of those involved in the business, even if the assets of these individuals are not likely to be available to satisfy the judgment. This latter avenue provides an indication of the likelihood that the business could ever muster the funds to pay the debt.

This investigation is also used to identify other possible defendants—including business associates, family members involved in the business, possible joint employers, successor and predecessor businesses, and possible alter ego businesses—with an eye toward naming as many defendants as is justifiable.<sup>48</sup> The more defendants we name, the more avenues for collection of a judgment that may eventually be obtained. Similarly, the investigation should be used to ensure defendants' names and capacities are properly reflected in the complaint, as many post-judgment remedies depend on having the defendant/judgment debtor correctly titled. For example, sheriffs in Los Angeles will only do till taps (i.e., take money from the cash

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47. In some cases, where the employer lacks any assets, this may mean that nothing more can and should be done other than sending a demand letter and placing a phone call. This effectively puts the worker or advocate in the position of a being a collection agent. A colleague of mine has told me that he found, when running wage claim clinics for day laborers, that the probability of ever collecting any money went down with each subsequent contact made with the debtor-employer and each subsequent step in the wage claim process. He noted that the greatest chance a day laborer had of collecting funds occurred after the first telephone call or letter to the employer and that it was important to be upfront about this with day laborers. I suspect that this sense of decreasing probability of recovery is shared by most collection agents who regularly deal with no-asset debtors.

48. There are ethical and legal limits to the ambit of named defendants. Attempting to name defendants with no good faith theory for holding them liable would constitute malicious prosecution. Thus, part of the goal of pre-litigation investigation is to uncover sufficient factual support to back up good faith allegations constituting a cause of action against named defendants—including individuals and entities that may not at first glance be obvious defendants. This may require digging into public records and interviewing witnesses who may be aware of the employers' associates and related businesses.

register of a running business) when the name of the defendant-business is identical to the name listed on the city business license.<sup>49</sup>

Most importantly, assets investigation is essential to provide the client with a realistic idea of the likelihood of recovering unpaid wages. Since many wage claim cases may be relatively easy to prove, such as where the employers' absence of records shifts the burden of proof regarding hours and pay to the employer, the asset investigation may be more helpful in determining the practical strength of a case, rather than evidence on the merits of the wage claims. Thus, pre-litigation asset research allows us to give workers an informed diagnosis regarding the strength of the case.

In addition to changing the strategic focus of the case, viewing wage claims as commercial debt suggests increased use of prejudgment remedies. One prejudgment remedy that is particularly helpful is prejudgment attachment, a "remedy [that] was intended largely for routine commercial 'collection' cases—the kind of debt for which businessmen send each other bills before they sue."<sup>50</sup> Prejudgment remedies allow workers to encumber employer assets at the outset of the litigation. This secures the workers' rights against dissipation of assets or sale of the business, and in some circumstances bankruptcy,<sup>51</sup> and provides workers with significant bargaining leverage in negotiations.

Another consequence of reconceptualizing wage claims as commercial debt is better settlement assessments. Our assessment of collectability plays a key role in negotiating settlement and engaging in creative debt workouts that are attuned to the actual financial resources of the debtor-employer. For example, even with strong substantive claims, low settlements are absolutely necessary when the employers are on the verge of bankruptcy or the collectability of

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49. See CAL. STATE SHERIFFS' ASS'N, CIVIL PROCEDURAL MANUAL 4.09 (Revised 2001) ("A suggested procedure [when performing a keeper levy] is to check business licensing agencies to determine whether judgment debtor has an interest [in the business property], and if so, if issued in a manner that would permit the levy as instructed."). I have been told by Los Angeles County Sheriff personnel that they will only perform the levy if the name on the business license matches the judgment debtor's name.

50. *Great Am. Ins. Co. v. Nat'l Health Servs, Inc.*, 62 Cal. App. 3d 785, 792 (1976).

51. The bankruptcy trustee has the power to avoid certain liens and transfers in order to protect all the creditors who have an interest in the bankruptcy estate. See, e.g., 11 U.S.C. §§ 545, 547 (2009).

the full amount of debt is questionable. Workers must be advised that in settlement negotiations, collectability is as much, or more, of a factor than uncertainty about winning a case.<sup>52</sup>

Our shift in perspective has also required us to gain expertise in areas of the law outside employment law. For example, we need to develop enough familiarity with commercial law, the law of corporations and business organizations, remedies law, and property and trusts to be able to issue spot in these areas and see potential leverage points when they come up in our cases.

#### V. CONCLUSION: BUT CAN COMMERCIAL DEBT COLLECTION PROMOTE WORKER POWER?

Viewing enforcement of wage rights as a form of commercial debt collection may increase the likelihood that workers successfully recover money they are owed. But this conceptualization of wage rights also presents potential problems for those who are concerned about larger issues, such as the interaction between law, organizing, and the promotion of power in marginalized communities. What follows is an attempt to begin reflecting critically on some of the problems and opportunities presented.

At some level, looking at wage rights as unpaid commercial debt necessarily adds a layer of technical complexity to the issue of workers' rights. While this may be gratifying to us as lawyers, it may also serve to discourage worker power and encourage dependence on lawyers, which, in turn, may undercut genuine worker-led movements to enforce wage rights.<sup>53</sup> Likewise, the commercial collections frame of mind tends to more fully integrate

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52. In one case we recently saw a worker who came to us with a judgment. He had rejected a settlement offer for approximately 20% of the unpaid wages at the labor commissioners' office (before we became involved in the case). With some investigation, we found that the employer's business had been shut down, his house was in foreclosure, and he had almost \$100,000 in past due credit card bills. After the judgment had been issued, the employer declared bankruptcy and the bankruptcy trustee found there were no assets to distribute to creditors. This bankruptcy wipes away the judgment for unpaid wages and means the worker will never collect any money at all.

53. See generally Gordon, *supra* note 15. See also William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 466 (1994) ("If empowerment is the end, creating dependence on a lawyer is not the means.");

questions of wage rights with standard commercial and corporate law concepts that may inherently militate against grass-roots worker power.<sup>54</sup> By its very nature, this debt-collection frame of mind tends to undermine the idea of abstract, inviolate workers rights as human rights, perhaps compromising some of the core ideas that embolden workers as they campaign for improved industry conditions.

On the other hand, the debt collection perspective can increase actual collection of unpaid wages, which offers a tangible benefit for organizing campaigns that utilize wage claims. Wage claims that lead to uncollectible judgments disempower workers, leaving them demoralized and dubious that the legal system has any relevance to them. Thus, the debt collection perspective can benefit organizing campaigns if it increases the efficacy of the wage claims process.<sup>55</sup>

There are also ways that a debt collection paradigm may encourage worker participation and organizing. Conceptualizing wage rights as the imposition of debt on one's employer evokes a more nuanced vision of the financial realities and limits of the business and industry, even if it detracts from faith in the purity of workers' rights as human rights. This kind of focus on the realities of a particular business as a piece of the wider economy may even promote collective action since it encourages awareness of factors that tie all of those involved in the industry together. These factors may include: the profitability or lack of profitability of a particular business or industry, the legal impotence of individual wage claims as a method of reforming the practices of a business or industry, and the legal structures (subcontracting, corporations law, etc.) that affect the distribution of power and poverty in an industry.

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54. Of course, this use of business and commercial law for promoting the rights of low income workers also tends to have a slightly subversive effect on this body of law itself. It was designed, after all, for the primary purpose of securing banks and commercial suppliers against defaults by other business. *See, e.g., Great American Ins. Co.* 62 Cal. App. 3d at 792 (describing prejudgment attachment as a "remedy [that] was intended largely for routine commercial 'collection' cases—the kind of debt for which businessmen send each other bills before they sue.").

55. Increasing the efficacy of wage claims would mean both increasing the likelihood that wage claims result in some money for the workers who bring them *and* discouraging workers who are unlikely to collect (e.g., where the defendant lacks any real assets) from putting great amounts of effort into pursuing claims.

Thus, when wage rights are understood as a form of debt collection, workers and advocates can more readily see the impact that the assertion of these rights has on the collective interests of a group of workers. In many ways, this view of wage rights better harmonizes with traditional labor law concerns—i.e., organizing workers and creating solidarity—than the employment law perspective, which like civil rights, focuses on guarding the sanctity of a specific individual right. This view of wage rights as a form of debt collection is a way to reach for bargaining parity between workers and employers in the negotiation of working conditions and the distribution of the profits. The workers stand in the shoes of a commercial creditor attempting to negotiate debts with their debtor-employer, rather than as a group of isolated individuals asserting their separate rights.