

The Consumer Finance Podcast: Garnishment Practices: Has the Dust Settled or Is It Still Flying?**Host: Chris Willis****Guests: Lori Sommerfield and Mary Zinsner****Date Aired: January 18, 2024****Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm glad you've joined us, because we're going to be talking today about garnishments in the wake of a CFPB consent order that came out about a year and a half ago. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://www.TroutmanPepperFinancialServices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.ConsumerFinancialServicesLawMonitor.com).

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Now, as I said, today we're going to be talking about garnishments, and I'm going to be joined by two of my partners, Lori Sommerfield and Mary Zinsner. Lori and Mary, thanks for being on the podcast today.

Lori Sommerfield:

Thanks for having us, Chris.

Chris Willis:

What we're going to be talking about today is there was a 2022 consent order between the CFPB and a large bank dealing with garnishments. And in particular, the subject matter of the consent order had to do with what we refer to as cross-border garnishments. It was an issue that I think most banks weren't really paying attention to, but it was premised on the idea that a bank account is sort of domiciled in some specific place, and that might be a place different from the state where the garnishment is being issued, where the judgment supposedly is being collected on. And so there was a lot of confusion, I think, in the wake of that consent order, and

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a lot of worries by banks about what exactly they needed to do with these cross-border garnishments.

Lori and Mary are today going to talk about sort of where the dust has settled over the past year and a half in the wake of that consent order. Lori, let me just start with you. What kind of impact has the CFPB consent order had on other financial institutions since the time that the Bureau entered it in 2022?

Lori Sommerfield:

Well, Chris, I think the impact of the consent order is the Bureau's new regulatory expectation that financial institutions should develop a compliance program around garnishment processes. Garnishment operations were previously viewed as more of a back office operational function, so this is new. So after this consent order came out, we found that financial institutions were undertaking a review of their garnishment processes and reviewing their operations for compliance with these new Bureau expectations, not only about cross-border garnishment law issues, but also compliance with state garnishment laws generally.

In particular, we saw financial institutions seeking to develop 50-state law surveys either in-house or with assistance of outside counsel to better understand state garnishment laws and specifically this concept of restriction states. And they also reviewed their garnishment processing guides to ensure that they complied with those laws.

As you pointed out, the CFPB initially identified only five restriction states and suggested there could be more. So then that put the onus on financial institutions to do their own research to determine whether or not there could be other states that fell into that category. And while we've seen that there is some disagreement among financial institutions about which states are actually restriction states, I think it's safe to say that four of the restriction states identified by the CFPB in that consent order likely are. That would include Alabama, Arizona prior to 2019, California and Oregon. But it's notable that the CFPB had identified Florida as a restriction state, but it no longer is because there was a decision that came down by the Florida Supreme Court called *Shim v. Buechel* that post-dated the consent order and basically repudiated that concept that Florida would be a restriction state.

Chris Willis:

Okay, got it. And Lori, since the Bureau came out with this consent order, have we seen the Bureau addressing this cross-border garnishment issue either in supervision or otherwise?

Lori Sommerfield:

Absolutely. We saw the CFPB conduct horizontal deposits exams back in late 2021 and early 2022. Primarily, those exams were focused on large banks and regional banks, and they were focused on garnishment processes during the Covid-19 pandemic. And a particular area of emphasis by the Bureau was how financial institutions treated unemployment compensation payments during the pandemic, and whether those funds may have been unlawfully withheld from depositors as part of the garnishment process.

Several of our clients received MRAs as a result of those exams, and in part, the MRAs required development and maintenance of 50-state garnishment law surveys as well as consumer restitution for unlawful garnishment fees. We are aware that the Bureau is now in the process of conducting follow-up exams to ensure that financial institutions that received MRAs have actually addressed them by engaging in corrective action. So state garnishment law compliance is clearly an ongoing topic of interest to the CFPB.

Chris Willis:

Okay, well that's very interesting. But speaking of ongoing interest, Mary, your world here is the litigation world because you do all kinds of deposit account related litigation. What have you been seeing on the litigation front in the wake of the Bureau's consent order?

Mary Zinsner:

Thanks, Chris. Great question. Because most garnishments are handled at the general district court level, there aren't a lot of reported opinions. The issues are being decided typically by courts not of record. So it's really difficult to track the litigation and any impact the CFPB order is having. Savvy lawyers for judgment creditors and judgment debtors are definitely aware of the order, but how much it's being used as a sword or a shield is hard to gauge. And also you need to keep in mind that a CFPB consent order is not controlling precedent on a court. It's not a case law which a court is obligated to follow.

I think what's telling from the CFPB order is one of the important provisions is the language on page eight, which says, to garnish a bank account lawfully, a state court must have jurisdiction over the garnishee, the bank that holds the deposit account, and the property to be garnished the deposit account. This language invokes principles of personal jurisdiction and in rem jurisdiction issues, which are sometimes not easy in courts really have to grapple with them.

It's also important to understand that when a bank is served with a garnishment summons as a garnishee, it's a disinterested stakeholder. So while the CFPB provides banks guidance on what to do with garnishments in cross-border situations, it's not the role of the bank to fight the garnishment or take a side and articulate an advance, lack of personal jurisdiction or lack of in rem jurisdiction arguments.

As a consequence, you're not really seeing many banks or garnishees getting into the fray. A bank will make a decision if it has funds on deposit that can be subject to a cross-border garnishment and disclose to the court creditor and judgment debtor and it's answer about what funds it's holding and disclose any required information about the debtor such as the debtor's last known address or any other information the bank is required to disclose. And then it's up to the parties to push our issues further and make the arguments about lack of personal jurisdiction or in rem jurisdiction. It's not the bank's obligation to do that.

The difficult issue really we're seeing is whether to freeze funds when dealing with cross-border garnishments. And what we see our clients doing in these, so-called restriction states, is really evaluating the issues on a case-by-case basis. There can be a significant exposure in a garnishment arena if a bank fails to freeze funds on deposit. And so if a bank is unsure about the applicability of cross-border issues and unsure whether it should freeze the account and

their substantial sums on deposit, banks are also more apt to consider remedies such as interpleading the funds if the amount is significant and there are cross-border issues present.

Chris Willis:

Okay. Are courts focusing on any particular issues following the consent order?

Mary Zinsner:

The CFPB order is really of great interest to us, the lawyers and the bank subject to CFPB supervisory jurisdiction, but it's not really controlling precedents that the courts need to follow. So we're not seeing it tremendously widely used, but we are seeing these principles of in rem jurisdiction and personal jurisdiction coming up in the cases.

There's an interesting case from the Southern District of Texas involving a foreign bank issued in Saudi Arabia, which was served with a garnishment order in Texas, and the parties litigated whether the funds in an international account in Saudi Arabia could be subject to in rem jurisdiction, merely because an international bank could be served in Texas. The foreign bank in question had a license to do business in Texas, but had no branches, real property or accounts in Texas. All of its bank accounts were in Saudi Arabia.

In a report and recommendation to the U.S. district court, a magistrate judge held that the court did not have jurisdiction over the res or the in rem part or the bank accounts. It's important to stress that when considering garnishment issues, counsel for the banks needs to look both at the statutes where the law about garnishment is found, as well as the case law for that particular jurisdiction, which addresses issues such as personal jurisdiction and in rem jurisdiction because the case law really can shed light on how courts in that state treat cross-border accounts. It's not enough to say we've looked at the statute and there's no territorial restriction in a particular state. You also need to look at the case law of the foreign state.

Chris Willis:

Okay, that makes sense. Let's get kind of down to the bottom line, and I'd love to hear from both of you on this. What should our financial institution clients be doing to comply with the Bureau's regulatory expectations with regard to processing garnishment orders that they receive on a going-forward basis?

Lori Sommerfield:

Well, Chris, I'll go first. I think importantly, financial institutions should treat the garnishment operations area as part of their compliance management system and implement appropriate controls to ensure that state garnishment laws are followed in order to mitigate risk. And that pertains both to garnishment laws generally as well as cross-border situations. Also, financial institutions should make sure that they're staying abreast of any changes in state garnishment laws. They are constantly changing. They often change at the end of the year in anticipation of being implemented at the beginning of a calendar year. So it's really important to follow any changes there that may occur legislatively. And finally, as I mentioned earlier, it's a good idea to review your garnishment processes to make sure that you develop 50-state legal surveys to understand restriction states and state garnishment laws generally, as well as review your

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garnishment processing guides to make sure that they comply with state garnishment laws, which periodically change. Mary, do you have additional ideas?

Mary Zinsner:

Yeah, thanks, Lori. I'll add that clients should stay apprised of case law by setting up a case tracker that notifies you when garnishment decisions involving in rem or personal jurisdiction are issued. And similarly, if you have a 50-state survey, keep it up to date. The law is not static, it's fluid. There's always new cases, new legislative changes, to make sure that any legislative changes in the garnishment statutes are tracked.

Chris Willis:

Okay. Well, that has been some really very good practical advice about an issue that I know is of great interest to our bank clients and the banking community as a whole. So Lori and Mary, I want to thank you for being on the podcast today and of course, look forward to having you back again when other developments happen with respect to these issues. And of course, thank you to our audience for tuning in today. Don't forget to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com.

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