CHILD SUPPORT WITHHOLDING--PAYOR BEWARE

With the number of cases under the Income Withholding for Support Act ("Withholding Act") [750 ILCS 28/1 et seq.] on the rise, payors must be especially mindful of their duties and responsibilities under the Withholding Act. Under 750 ILCS 28/50, the obligee, the public office or the obligor may file a complaint with the Court to enforce the statutory penalties of the Withholding Act. Generally the cases involve one or both of the following issues: "Who is a payor?" and "How and when will a penalty under the Withholding Act be assessed for failure to withhold or to timely remit the child support?"

"Illinois has a strong interest in preserving and promoting the welfare of children. Indeed, it is difficult to imagine a more compelling State interest than the support of children. Illinois also has a general interest in effective enforcement of judgments." Sheppard v. Money, 124 Ill.2d 265, 529 N.E.2d 542, 547 124 Ill.Dec. 561 (1988) [citations omitted] Illinois recognizes the significant impact of the payment of child support on Illinois' families and strives to ensure that child support payments are collected and distributed in a timely and reliable fashion.

Who is a payor?

Under 750 ILCS 28/15(g), the Withholding Act defines payor as "any payor of income to an obligor." The Courts have broadly defined "income" in determining who is a "payor." In In re the Marriage of Vaughn, 403 Ill.App.3d 830, 935 N.E.2d 123, 343 Ill.Dec. 483 (First Dist., 2010), the child support obligee served an income withholding notice (IWN) upon Blue Cross. The child support obligor was a chiropractor who received weekly payments from Blue Cross for the services he provided to his patients insured through Blue Cross. The child support obligor was a sole proprietor operating under the fictitious or assumed name of "Vaughn Center." Blue Cross issued checks to Vaughn Center.

The Vaughn Court looked to the definition of income in 750 ILCS 28/15(d) to define a payor. 750 ILCS 28/15(d) is an inclusionary provision, that states:

> "Income" means any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary, commission, compensation as an independent contractor, workers' compensation, disability, annuity, pension, and retirement benefits, lottery prize awards, insurance proceeds, vacation pay, bonuses, profit-sharing payments, severance pay, interest, and any other payments, made by a person, private entity, federal or state government, any unit of local government, school district or any entity created by Public Act; however, "income" excludes:

> (1) Any amounts required by law to be withheld, other than creditor claims, including, but not limited to, federal, State and local taxes, Social Security and other retirement and disability contributions;
> (2) Union dues;
> (3) Any amounts exempted by the federal Consumer Credit Protection Act;
> (4) Public assistance payments; and
> (5) Unemployment insurance benefits except as provided by law.
>
> Any other State or local laws which limit or exempt income or the amount or percentage of income that can be withheld shall not apply.

The Vaughn Court found that Blue Cross paid income to the child support obligor, was a payor within the definition of the Withholding Act and was subject to provisions of the Withholding Act. The Court added that "Blue Cross cannot avoid the Withholding Act by merely stating that it is not allowed to offer a 'convenience' to a provider when it is required by statute to do so and has received proper notice." Vaughn, 935 N.E.2d at 130. Further, the Court stated in dicta that "even if a payor does not realize that its payee is in fact the obligor named in the notice, that fact would not provide a valid defense that would exempt it from the Withholding Act's penalty provision." Vaughn, 935 N.E.2d at 129.

This language requires the recipient of an IWN to take proactive steps to determine whether it pays income to the named child support obligor. After receipt of the IWN, a business entity should determine if the obligor listed in the notice receives any form of income from the business entity. The business entity will likely be required to withhold and timely remit the appropriate child support deduction from the income payment to the obligor.

However, it is significant that the Vaughn case involved a child support obligor who was a sole proprietor. The Court may have reached a different opinion if the payments from Blue Cross had been issued to a partnership or corporation.

In a case from the State of Minnesota, the Court found that "[a] religious institution providing in-kind benefits to a church member is a 'payor of funds' under Minn.Stat. Section 518.6111 (2002)." In re the Marriage of Rooney, 669 N.W.2d 362, 365 (Court of Appeals, 2003) In the Rooney case, the child support obligor joined a church which required its members to give all their property and material possessions to the church and in exchange, the church supported its members. The church provided the child support obligor with room, board, in-kind benefits and a small stipend of $39.80 bi-weekly.

The Rooney court quotes from the Minnesota statute, which states, "A 'payor of funds' is 'any person or entity that provides funds to an obligor, including an employer as defined under chapter 24 of the Internal Revenue Code, section 3401(d), an independent contractor, payor of worker's compensation benefits or unemployment benefits, or a financial institution as defined in section 13B.06.'" Rooney, 669 N.W.2d at 372. After examining the definition of employer within the Internal Revenue Code (26 USCA Section 3401(d)), the Minnesota Court concluded, "for purposes of Minn.Stat. Section 518.6111, a 'payor of funds' includes an entity for which a support obligor performs services and which provides the obligor with remuneration, cash-based or otherwise." Rooney, 669 N.W.2d at 372.

After receipt of the IWN and determination of payor status, the recipient of the IWN must initiate income withholding from the obligor within 14 days. Failure to properly initiate income withholding may result in the imposition of a penalty for failure to withhold. The penalty for failure to withhold or to timely remit is discussed in more detail in the next section.

How and when will a penalty under the Withholding Act be assessed for failure to withhold or to timely remit the child support?

Once a business entity determines it pays income to the obligor and is a payor under the Withholding Act, the payor has certain mandatory duties under the Withholding Act. 750 ILCS 28/35[i], requires the recipient of an IWN to comply with the following duties: a) initiate income withholding within 14 days after receipt of the IWN and b) remit child support payments within 7 business days after the date the payment would have been paid to the obligor.

Upon receipt of the IWN, the payor must initiate child support deductions within 14 calendar days from the date the IWN was mailed to the payor. Further, the Withholding Act states that a payor must "pay the amount withheld to the State Disbursement Unit (SDU) within 7 business days after the date the amount would have been paid or credited to the obligor." The statutory penalty under the Withholding Act requires a payor to "pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit." Many of the cases under the Withholding Act address the failure of the payor to timely withhold and remit child support.

The Illinois Courts have consistently found that when a payor knowingly fails to remit the child support payment on a timely basis, the payor will be subject to the statutory penalty for failure to remit. In the first Illinois case to examine the statutory and legislative history of the mandatory requirements for income withholding for child support, the Appellate Court in the Fourth District stated, "the employer penalty provision seeks not only to ensure a child support

obligee receives the owed child support payments, but also that the obligee receives the support payments ***in a timely manner***." Dunahee v. Chenoa Welding & Fabrication, Inc., 273 Ill.App.3d 201, 652 N.E.2d 438, 209 Ill.Dec. 898, (Fourth Dist, 1995) [Emphasis in original text]

Although Dunahee was decided under the former withholding provisions of the Illinois Marriage and Dissolution Act [750 ILCS 5/706.1], the analysis remains the same. The legislature consolidated the various income withholding provisions under the Illinois Public Aid Code, the Illinois Marriage and Dissolution of Marriage Act, the Non-Support of Spouse and Children Act and the Illinois Parentage Act into the Withholding Act. (750 ILCS 28/5) The most significant change in the statute is the Withholding Act includes a penalty for failure to withhold the child support, in addition to failure to timely remit after withholding the child support payment.

In Vrombaut v. Norcross Safety Products, L.L.C., 298 Ill.App.3d 560, 699 N.E.2d 155, 232 Ill.Dec. 708, (Third Dist., 1998), also decided under the prior withholding provisions, the Court declined to impose a statutory penalty upon a payor who failed to withhold child support payments from the obligor's paycheck. The Income Withholding for Support Act, which was effective January 1, 1999, imposes a penalty on the payor for failure to withhold child support payments. The previous withholding provisions contained under the various Acts did not mandate a penalty for failure to withhold.

In the first case to be decided under the consolidated and revised Withholding Act, Grams v. Autozone, Inc., 319 Ill.App.3d 567, 745 N.E.2d 687, 253 Ill.Dec. 564, (Third Dist., 2001), the payor failed to remit several different child support payments on a timely basis and the Court found that "[a] separate violation occurs each time an employer knowingly fails to remit an amount that it has withheld from an employer's paycheck." The $100 per day penalty was assessed on each individually unremitted child support payment. While Autozone argued that the penalty could be devasting to the payor, the Court stated, "the penalty is justified on the basis that noncompliance with a child support withholding order by an employer may place a substantial burden on a child support obligee, who could be forced to miss mortgage payments or postpone purchasing necessities for a child until the overdue payment arrives." Grams at 691. "[T]he purpose of the Act [which] is to promote self-enforcement and to deter future noncompliance by the employer." Grams at 691.

The Second and Fourth District Appellate Courts both addressed issues arising under the Withholding Act in 2004. Both cases addressed whether the payor knowingly violated the duties of the Withholding Act. In Thomas v. Diener, 351 Ill.App.3d 645, 814 N.E.2d 187, 286 Ill.Dec. 537 (Fourth Dist, 2004), the issues were whether the payor had complied with the mailing requirement and whether the payor had knowingly failed to remit child support payments. The payor testified that the child support checks were mailed every two weeks to the

SDU. The SDU did not receive the child support checks within a reasonable time after the obligor was paid, nor after which the employer testified it mailed the payments. The trial court attributed the delay to the employer based on the date the payment was received by the SDU. It is significant that the case involved penalties arising from two late child support remittances: one from January 2000 remitted in October 2001 and a second one from November 2000 remitted in December 2000. Based on the uncontradicted testimony of the payor, the Court found that the payor's conduct "was an oversight and not a knowing violation of the Support [Withholding] Act." Thomas, 814 at 196. Further, the Court found the payor's conduct "was, at worst, negligent." Thomas, 814 at 196. It is significant that the payor avoided the imposition of the penalty by making every effort to timely and substantially comply with the Withholding Act when notified of the withholding and remittance discrepancies.

In Chen v. Ulner, 354 Ill.App.3d 1004, 820 N.E.2d 1136, 290 Ill.Dec.69 (Second Dist., 2004), the court found that the payor had knowingly violated the Withholding Act and increased the statutory penalty imposed by the trial court from $38,100.00 to $90,600.00. Based on representations from the obligor, the payor commenced the income withholding for child support before the IWN was received, but failed to remit any payments to the SDU. The payor received an official IWN from the obligee and realized that the child support payments had not been remitted to the SDU. The payor was placed on actual notice of the duties to withhold and timely remit under the Withholding Act.

The payor "offered no compelling excuse for consistently failing to comply with the statute." Chen, 820 N.E.2d at 1148. The payor was further notified of the discrepancies when the child support obligee filed a complaint to enforce the penalty provisions of the Withholding Act in October 2000. Despite receiving actual notice of the failure to remit, the payor failed to timely remit the missing child support payments despite having adequate time to mitigate the damages. By remitting the child support payments upon notification of the discrepancies, the payor could have reduced the penalty. The final child support payments from the payor were remitted in October 2001, nearly a year after the obligee's complaint.

The Illinois Supreme Court heard its first case involving the Withholding Act in 2007. The Illinois Supreme Court stated, "Our lawmakers are under no obligation to make unlawful conduct affordable, particularly where multiple statutory violations are at issue." In re the Marriage of Miller, 227 Ill.2d 185, 202-203, 879 N.E.2d 292, 303, 316 Ill.Dec.225, 236 (2007

In the Miller case, the payor knowingly failed to timely remit a large number of child support payments for a minimum of 11,721 days and amassed a large statutory penalty of $1,172,100.00. The penalty imposed by the court did not include penalties which may have occurred prior to April 15, 2002 or after

October 4, 2004. The parties stipulated to review the withholding period from April 15, 2002 through October 4, 2004, or approximately 128 weeks.

The Miller case, like the Chen case, involved a payor who failed to fully comply with the provisions of the Withholding Act to timely remit child support even after actual knowledge of the potential penalty for failure to timely remit. The court pointed out that the payor "mailed the withheld child support in a timely fashion on only three occasions" during the 128 weeks. Miller, 879 N.E.2d at 297. The payor in Miller also blatantly failed to timely remit the child support payments despite efforts by the obligee to enforce the order for timely remittance of the child support payments and compliance with the Withholding Act.

The Court stated, "Miller, however, could have avoided the imposition of any penalties simply by complying with his statutory obligation upon service of the withholding notice or at least after suit was filed. Miller chose to do otherwise. Because Miller controlled the extent of the penalty, he cannot now complain that the penalty is harsh when compared to the amount of child support at issue." Miller, 879 N.E.2d at 302.

The second case under the Withholding Act to be reviewed by the Illinois Supreme Court was Gulla v. Kanaval, 234 Ill.2d 414, 917 N.E.2d 392, 334 Ill.Dec. 566 (2009). Both the Supreme Court and Appellate court upheld the trial court's finding that the payor knowingly violated the Withholding Act. The payor in Gulla was a Mississippi corporation. After review of both the Withholding Act and the Uniform Interstate Family Support Act (UIFSA) [750 ILCS 22/100 et seq.], the Supreme Court remanded the case to the trial court to recalculate the penalty pursuant to the law of the State of Mississippi. "UIFSA establishes a uniform procedure for enforcing an out-of-state child support order. However, it uniformly directs the employer-violator to the law of its State for the appropriate sanction." Gulla, 917 N.E.2d at 400.

The most recent case under the Withholding Act was heard by the Second District Appellate Court in 2010. In the case of In re the Marriage of Stockton, 401 Ill.App.3d 1064, 937 N.E.2d 657, 344 Ill.Dec. 634 (Second Dist., 2010), the parties' dispute involved one child support payment. The Court found that the payment had been made and that any claim to the "statutory penalty" in the Act "must commence within two years after the action accrues." Stockton, 937 N.E.2d at 666. However, the Stockton Court expressly stated, "we leave for another court to determine the effect on the statute of limitations of an outstanding payment that continues to accrue penalties." Stockton, 937 N.E.2d at 667.

From the line of cases examined under the Withholding Act, the Courts have broadly defined income for determining who are payors and have consistently applied the statutory penalty to payors who knowingly fail to withhold or timely remit the child support payments. The Courts will not hesitate to

impose a statutory penalty upon a payor's knowing and egregious disregard for its duties under the Withholding Act. Payors must be mindful of their responsibilities and duties under the Withholding Act and fully comply to avoid the imposition of a penalty.

Further, should a payor become aware of a non-compliance issue, they should take proactive steps to avoid or minimize the statutory penalty. Once the payor becomes aware of a potential non-compliance issue, the payor should review its records and promptly remit any unremitted child support withholdings. The payor can reduce or avoid the potential statutory penalty by remitting the child support to stop the accrual of the penalty. While the statutory penalties are mandatory, the obligee or public office may forego the filing of a complaint to collect the statutory penalty under the Withholding Act if the payor takes proactive measures to comply with timely remittance of child support payments.

Finally, many of these types of income withholding issues could be resolved through effective communication between the payors, obligors, obligees, public offices and their respective attorneys. Obtaining compliance with an IWN may be as simple as a polite phone conversation between the interested parties. Justice O'Brien, in a concurring opinion in the Vaughn case, states, "A phone call and agreed order could have solved this problem. Instead, countless hours and dollars were spent on this case." Vaughn, 935 N.E.2d at 130.

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[i] 750 ILCS 28/35 states:

(a) It shall be the duty of any payor who has been served with an income withholding notice to deduct and pay over income as provided in this Section. The payor shall deduct the amount designated in the income withholding notice, as supplemented by any notice provided pursuant to subsection (f) of Section 45, beginning no later than the next payment of income which is payable or creditable to the obligor that occurs 14 days following the date the income withholding notice was mailed, sent by facsimile or other electronic means, or placed for personal delivery to or service on the payor. The payor may combine all amounts withheld for the benefit of an obligee or public office into a single payment and transmit the payment with a listing of obligors from whom withholding has been effected. The payor shall pay the amount withheld to the State Disbursement Unit within 7 business days after the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor. If the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any amount withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor, then the payor shall pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not

withheld by the payor) is not paid to the State Disbursement Unit after the period of 7 business days has expired. The failure of a payor, on more than one occasion, to pay amounts withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts. This penalty may be collected in a civil action which may be brought against the payor in favor of the obligee or public office. A finding of a payor's nonperformance within the time required under this Act must be documented by a certified mail return receipt or a sheriff's or private process server's proof of service showing the date the income withholding notice was served on the payor. For purposes of this Act, a withheld amount shall be considered paid by a payor on the date it is mailed by the payor, or on the date an electronic funds transfer of the amount has been initiated by the payor, or on the date delivery of the amount has been initiated by the payor. For each deduction, the payor shall provide the State Disbursement Unit, at the time of transmittal, with the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor.

After June 30, 2000, every payor that has 250 or more employees shall use electronic funds transfer to pay all amounts withheld under this Section. During the year 2001 and during each year thereafter, every payor that has fewer than 250 employees and that withheld income under this Section pursuant to 10 or more income withholding notices during December of the preceding year shall use electronic funds transfer to pay all amounts withheld under this Section.

Upon receipt of an income withholding notice requiring that a minor child be named as a beneficiary of a health insurance plan available through an employer or labor union or trade union, the employer or labor union or trade union shall immediately enroll the minor child as a beneficiary in the health insurance plan designated by the income withholding notice. The employer shall withhold any required premiums and pay over any amounts so withheld and any additional amounts the employer pays to the insurance carrier in a timely manner. The employer or labor union or trade union shall mail to the obligee, within 15 days of enrollment or upon request, notice of the date of coverage, information on the dependent coverage plan, and all forms necessary to obtain reimbursement for covered health expenses, such as would be made available to a new employee. When an order for dependent coverage is in effect and the insurance coverage is terminated or changed for any reason, the employer or labor union or trade union shall notify the obligee within 10 days of the termination or change date along with notice of conversion privileges.

For withholding of income, the payor shall be entitled to receive a fee not to exceed $5 per month to be taken from the income to be paid to the obligor.

(b) Whenever the obligor is no longer receiving income from the payor, the payor shall return a copy of the income withholding notice to the obligee or public office and shall provide information for the purpose of enforcing this Act.

(c) Withholding of income under this Act shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments, or any other claims or creditors. Withholding of income under this Act shall not be in excess of the maximum amounts permitted under the federal Consumer Credit Protection Act. Income available for withholding shall be applied first to the current support obligation, then to any premium required for employer,

labor union, or trade union-related health insurance coverage ordered under the order for support, and then to payments required on past-due support obligations. If there is insufficient available income remaining to pay the full amount of the required health insurance premium after withholding of income for the current support obligation, then the remaining available income shall be applied to payments required on past-due support obligations. If the payor has been served with more than one income withholding notice pertaining to the same obligor, the payor shall allocate income available for withholding on a proportionate share basis, giving priority to current support payments. A payor who complies with an income withholding notice that is regular on its face shall not be subject to civil liability with respect to any individual, any agency, or any creditor of the obligor for conduct in compliance with the notice.

(d) No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.