Penalties of $100 Per Day Due to Failure to Withhold Child Support Including the 2012 Amendments and Case Law Through 2019

By: Gunnar J. Gitlin
The Gitlin Law Firm, P.C., Woodstock, Illinois

www.gitlinlawfirm.com

Introduction Re the Changing Legislation: The potential penalty of $100 per day had been one of the best remedies in obtaining compliance with child support. But the 2012 amendments put serious limits that dramatically change the landscape in a way unfavorable to people trying to enforce compliance with child support through withholding of income.

$10k Limit Per Occasion and 1 Year Effective Statute of Limitations: The amendments in the 2012 legislation (PA 97-994) are underlined. Since 2004, the legislation had provided (with the newest 2012 amendments underlined):

> (750 ILCS 28/35) Sec. 35. Duties of payor (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 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 withheld 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 total penalty for a payor's failure, on one occasion, to withhold or pay to the State Disbursement Unit an amount designated in the income withholding notice may not exceed $10,000.** 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. An action to collect the penalty may not be brought more than one year after the date of the payor's alleged failure to withhold or pay income. A finding of a payor's nonperformance within the time required under this Act must be documented by a certified mail return receipt **[note the 2009 amendments adding 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...

The Problem with Font Size: New requirements add to what the withholding notice must state at Section 20(7) of the IWSA:

> ... (7) in bold face type, the size of which equals the largest type on the notice, state the duties of the payor and the fines and penalties for failure to withhold and pay over income and for discharging, disciplining, refusing to hire, or otherwise penalizing the because of the duty to withhold and pay over income under this Section.

Additional Duties: Finally, there are new paragraph (j) to Section 45 regarding "Additional Duties:"

> (j) If an obligee who is receiving income withholding payments under this Act does not receive a payment required under the income withholding notice, he or she must give written notice of the non-receipt to the payor. The notice must include the date on which the obligee believes the payment was to have been made and the amount of the payment. The obligee must send the notice to the payor by certified mail, return receipt requested.
>
> After receiving a written notice of non-receipt of payment under this subsection, a payor must, within 14 days thereafter, either (i) notify the obligee of the reason for the non-receipt of payment or (ii) make the required payment, together with interest at the rate of 9% calculated from the date on which the payment of income should have been made. A payor who fails to comply with this subsection is subject to the $100 per day penalty provided under subsection (a) of Section 35 of this Act.

It is these additional duties that struck the wrong balance. I had urged a veto of this legislation by the Governor. My letter to had pointed out:

> This legislation places the burden on the party who will not have the information regarding potential non-payment. For example, the recipient of child support will often not know the frequency of payments. An employer may be paying over monthly while the support may be paid biweekly. Or perhaps there was service of a withholding notice on an employer but there was no knowledge that the employee was re-employed. There are a variety of other situations in which the "obligee" would not have knowledge regarding "non-receipt of payment." So the burden in this legislation clearly is placed on the wrong person.

Introduction to Case Law: As discussed below, before the amendments become fully effective, the 2007 Illinois Supreme Court *Miller* decision had demonstrated the significance of the use of this tool – even where the penalty was over $1 million. It is rare when the Illinois Supreme Court weighs in on two family law decisions on a narrow issue within a period of two years. And never had the Illinois legislature backtracked so significantly regarding a law that had been favorable to the collection of support. But it did so with the 2012 amendments.

A few years before the 2004 amendments, when in providing a presentation to the Illinois Institute for Continuing Legal Education on child support enforcement (when I gave my original presentation on the subject of the $100 per day penalty), I had the opportunity to review the law regarding penalties applied to an employer for their failure to withhold. In reviewing the case law, I stated that because of a strict construction of the statute by the Illinois appellate courts, the provision in the statute for $100 per day penalties had been generally meaningless because it applied only to the failure to pay over amounts already withheld. Usually, when an employer does not honor an order for withholding, the employer fails or refuses to withhold the pay from the employees' wages in the first place. For example, this often occurs for an individual who manages his own company and wishes to avoid full compliance with the support order. For this reason I submitted legislation amending the withholding statute to address this gap and the legislation was amended the following year.

Pre- 2004 Amendment Case Law:
One of the first Illinois appellate court cases to address the $100 per day penalties was eye-opening to many Illinois family lawyers. In *Dunahee v. Chenoa Welding & Fabrication, Inc.*, 273 Ill.App.3d 201 (4th Dist. 1995) the Illinois appellate court case held that the penalties of $100 per day [under former IMDMA §706.1(G)(1)] must be imposed against an employer who withheld child support but failed to remit the support payments. The *Dunahee* court emphasized that the statute was meant to impose a penalty and should be strictly construed. The employer, therefore, did not have a valid defense by urging that the $100 per day penalty would be an undue hardship. The case stated:

> [T]he fact the Illinois legislature placed this penalty within the larger mandated enforcement scheme indicates an intent the penalty provision be strictly enforced, to help combat the crisis of child support delinquency.

But the *Dunahee* court's review of the legislative debate indicated that an inadvertent violation of the statute should not be punished: "[T]he legislative history indicates the legislature intended the penalty to be applied where an employer **knowingly failed** to make a timely payment of withheld child support . . ." (Emphasis added.)

In applying these principles, the *Dunahee* court stated:

> [Employer], however, argues the penalty is unjust as applied against a small business such as itself, and would result in hardship. [Employer] overlooks noncompliance with a child support withholding order by an employer places a substantial burden on a child support obligee, who might be forced to postpone purchasing essentials such as food or medicine for a child until the overdue payment arrives. Thus an employer defendant cannot be heard to complain about hardship to itself caused by payment of a penalty to a plaintiff where that employer defendant's noncompliance with a court order caused hardship on the plaintiff. * * *
>
> Indeed, without the application of a penalty, employers would have an incentive to not send in a withheld child support payment in a timely manner. The longer a withheld child support check is not mailed to the obligee, the longer those funds are available for the employer to use to its own advantage, either to help support the operation of its business activities, or to allow invested money to yield a higher return.

The *Dunahee* court addressed the legislative reason for the provision for $100 per day penalties. It was meant to discourage employers from withholding pursuant to an order for withholding but then have

the advantage of the use of those funds for some period of time. But the legislation, as originally drafted, failed to give the employer a pecuniary or punitive reason to fully comply with a notice or order to withhold income for support.

Vrombaut v. Norcross Safety Products, 298 Ill.App.3d 560 (3d Dist. 1998), held that the provision of the statute **before its amendment** did not impose penalties for failing to withhold income initially. According to that case, the penalties apply only to payor's failure to tender payment of withholding once they have already been withheld. Because of the challenge presented by *Vrombaut* and the failure of the matter to be addressed by the legislature in the five years after the decision, I proposed to my legislator an amendment to the statute to be more child support recipient "friendly." Anticipating the potential opposition by small businesses to a statute which would impose a penalty that could amount to tens or hundreds of thousands of dollars, I further picked up the language of §508(b) of the IMDMA. It had placed the burden on the non-complying party to show a **compelling** cause or justification for non-compliance in order to avoid the imposition of attorney's fees due to a failure to comply with a court's order. This language seemed to strike the correct balance in promoting greater compliance with income withholding notices and orders while allowing an employer to avoid penalties if there was an extremely good reason for the failure to withhold. One such example I considered was a self-employed individual whose business has had significant losses and the business owner has filed a petition to reduce his child support obligation.

Part of the reason that the draft bill allowed the avoidance of $100 per day penalties in an appropriate case is the nature of how the $100 per day penalty provisions works. *Grams, f/k/a DeRoo v. Autozone, Inc.*, 319 Ill. App. 3d 567 (3d Dist. 2001), held that the provisions apply each time a child support payment is mailed late to a recipient. In that case, an income withholding order was served on January 19th but the employer did not pay over the amounts until April 24th when it complied in full with the withholding order.

The trial court found that the employer mailed the checks late as follows: the first check was mailed 69 days late; the second check was mailed 55 days late; the third check was mailed 41 days late; the fourth check was mailed 27 days late; the fifth check was mailed 13 days late; and the sixth check was mailed 2 days late. The sum total of all days late for all pay periods was 207 days. Based on 750 ILCS 28/35, the trial court fined the employer $20,700. The employer urged that the support recipient's construction of the statute would provide for a windfall to the support recipient.

The *Grams* court ruled that if the legislature had intended the fine calculation to be as suggested by the employer, the statute would have used plural language stating the fine was based on a failure to timely mail "all withheld amounts." Instead, the use of the following singular language, "shall pay a penalty of $100 for each day that the withheld amount" indicates the legislature intended for the fine to be assessed based on $100 per day for each missed payment.

It is critical to understand the nature of the two parallel clauses within the 2004 amended legislation. They state:

> 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 withheld 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.

Based upon standard rules of statutory construction, the knowing presumption applies only to the failure to pay over amounts withheld. For a failure to initially withhold, based upon the language as amended, the petition would still need to demonstrate the knowing failure.

Post-First Set of Amendments Case Law:

Thomas: A post-amendment case addressing the $100 per day penalty issue is *Thomas v. Diener*, 351 Ill. App. 3d 645 (4th Dist. 2004). *Thomas* addressed the use of the income withholding for support act against an individual who had his own business. The ex-husband was served with a notice to withhold income for support. In 2001 the ex-wife brought suit against her former husband seeking penalties in the amount of $153,500 because she alleged that several payments were timely withheld but were mailed 1,535 days late. In short, there were two checks which were ultimately at issue. The court in *Thomas* approved of the *Grams* decision and stated that *Grams*, "set forth guidance on how the statutory penalty in Section 35 should be addressed." Several holdings were significant. One involves the definition of what constitutes mailing. Following the customary business practice for placing documents in the mail was sufficient to create a presumption that mailing occurred. There was a dissent at to this issue. The second holding was as to the definition of business days and the case defined business days as set forth in Income Withholding for Support Act (IWSA) Section 28/15(b-5) as days when State offices are open for regular business -- and therefore the Saturdays and holidays are not included.

Knowing Versus Inadvertent Failures: But the more important issue that *Thomas* addressed was the issue of strict liability versus whether the failure was "knowing." The appellate court reviewed the pre-amendment *Dunahee* case discussed above and then stated:

> We held the mandatory nature of the statute, coupled with the legislative intent, made application of the statute reasonable since that was the type of behavior the statute was meant to redress. Such is not the case here. Danny and Darrell testified they complied with the statute by mailing each check within the required seven business days of paying Jean. The evidence demonstrated that if the check was not written or mailed within the seven business days (like the check paid in October 2001 for the child support due January 2000, and the "missing" check from November 2000), it was an oversight and not a knowing violation of the Support Act. Darrell testified that he knew the child support needed to be paid and took care of it whether Jean earned it or not.
>
> Thus, we find the trial court erred in imposing a 622-day penalty on the January 2000 check and an 11-day penalty on the November 2000 check. Neither constitutes a "knowing" violation under the Support Act. We find Darrell's testimony regarding the importance of paying child support regardless of whether Jean earned it indicated he did not intentionally disregard his obligation on either occasion.

The review of the earlier *Dunahee* case illustrates the importance *Thomas* placed on the knowing requirement. It further stated:

> In *Dunahee*, we analyzed the House debates on the then-applicable statute. Representative Dunn was concerned that a penalty imposed upon an employer at the rate of $100 a day was unduly harsh and could be unfair to smaller employers, especially those who had more than one employee subject to an order to withhold. Representative Frederick attempted to ease Representative's Dunn's concerns by indicating that the penalty would not apply to an innocent or negligent employer, but to one who intentionally withheld a child support payment from the custodial parent. *Dunahee*, 273 Ill. App. 3d at 207-08.
>
> Because the employer in *Dunahee* **knew** it was not forwarding **the checks within 10 calendar days of payday, the penalty was properly imposed. Here, the employer was, at worst, negligent**. He was cognizant of forwarding the child support within the required seven business days and, except for a few innocent exceptions, the evidence did not demonstrate that he failed to do so. Mailing two checks every other Saturday complied with the statute. The check held from the first week was mailed, according to Darrell, within five business days of when Jean was paid. *** To permit plaintiff to recover a windfall of $87,300 from Jean's employer is an onerous burden and should be found only if it is clear that the legislature intended that burden. *** Neither the express legislative intent, the language of the statute, nor the evidence presented supports application of the penalty here. We find it was improper to impose a penalty against Danny, and we reverse the trial court's judgment therefor. (Out of state citation omitted.)

***Chen* – Knowing Vs Inadvertent Failure**: Another case after the first set of amendments to address the issue of knowing versus inadvertent failures is *IRMO Chen and Ulner*, 354 Ill. App. 3d 1004 (2d Dist. 2004). This case illustrates the seriousness of failure to properly withhold support. The appellate court reversed the trial court's determination of $38,100 and determined that a figure of $90,600 was properly due. As in *Thomas*, the appellate court focused on the term "knowing." The appellate court commented that IWSA does not define "knowingly" and there then were only four decided and that only two were significant regarding the knowing issue -- *Dunahee* and *Thomas* (both Fourth District cases).

The *Chen* court stated:

> While Auto Mall claims that there was no "knowing" violation in this case, we cannot agree. The trial court expressly found that Auto Mall knowingly failed to pay over amounts withheld from Greg's final three paychecks. According to the facts, Wanshek received notice of the $100-per-day penalty provision when he was properly served with the 2000 support order. Wanshek acknowledged that, at some point, he became aware that the money that was being withheld from Greg's paychecks was not being paid over. As a result, he wrote a $933.42 check encompassing six pay periods on August 23, 2000. **Despite his effort to correct the situation, the check was apparently "lost" on Wanshek's desk, mailed in late December, and not received until January 5, 2001.** Further, Auto Mall failed to pay over amounts withheld from

> Greg's final two checks. A check for $311.42 was not received until October 2, 2001. **In short, this case does not present a situation similar to *Thomas*, where the employer was complying with the statute save for a few innocent exceptions. Instead, the facts of this case more closely resemble *Dunahee*, where the employer offered no compelling excuse for consistently failing to comply with the statute**.

The appellate court then continued:

> More important, Auto Mall's actions in this case raised the presumption of a knowing violation, since it failed, on more than one occasion, **to pay amounts withheld** to the SDU within the seven-business-day period. While Auto Mall argues that this presumption may not apply to the checks issued prior to its receipt of the 2000 support order, this argument is of no consequence since the presumption was clearly raised by Auto Mall's failure to pay over support withheld from Greg's final three paychecks. Based on this evidence, we cannot say that the trial court's finding of a "knowing" violation was against the manifest weight of the evidence.

Keep in mind the exact language of *Chen*. *Chen* focused on the presumption regarding knowing payments applying when there is a failure to pay over amounts withheld – consistent with the language of the statute as amended.

***Miller* – Illinois' Supreme Court Affirms $1.172 Million Penalty**: An important $100 per day penalty case was when the Illinois Supreme Court in *IRMO Miller*, 227 Ill. 2d 185, 194. (2007), reversed the first District's appellate court decision and upheld the trial court's award of $1,172,100. The appellate court decision had raised questions regarding the continued validity of this legislation. In *Miller* the Defendant, H.E. Miller, Sr., appealed from the trial court's judgment ordering him to pay a $1,172,100 penalty to the plaintiff, Lenora Miller, for knowingly failing to timely remit child support payments withheld from his employee's wages. The appellate court reversed and remanded the matter. The Illinois Supreme Court reversed the appellate court's decision and affirmed the trial court's judgment.

The $1.172 million liability stemmed from a May 2001 divorce judgment requiring the ex-husband to pay $82 weekly in child support. Shortly, thereafter, an order for withholding was served on the Defendant. The issue was the $100 per day penalty of 750 ILCS 28/35(a). In a stipulation as to the facts, the parties agreed that between April 2002, and October 2004, the defendant withheld 128 child support payments from the husband's wages, but failed to timely remit the payments to the State Disbursement Unit. The parties also agreed that the penalties for the defendant's delay equaled $1,172,100. The circuit court entered a judgment against the defendant for $1,172,100 in statutory penalties pursuant to §35 of the Act.

The question before the appellate court was whether the defendant's affirmative defense of laches alleged facts sufficient to constitute a legally cognizable defense. The trial court had granted a motion to strike the affirmative defense of laches. The appellate court had addressed whether the $100-per-day penalty provision, as applied to the facts of this case, violated due process.
The appellate court then stated:

> In enacting section 35 of the Act, the legislature sought to provide a simple and speedy method of obtaining payments from the wages of employees owing child support.

> *[*Citing *Dunahee.]* On its face, the $100-per-day penalty provision rationally advances the State's legitimate interest in encouraging the prompt payment of child support. However, when compared to the other penalties provided by the legislature for similar misconduct, we cannot conclude that the $1,172,100 penalty imposed in this case is constitutional.
>
> Under the Non-Support Punishment Act, the legislature has authorized a maximum fine of $25,000 for the criminal offense of a spouse's willful failure to pay child support. Thus, the $1,172,100 penalty imposed against the defendant in this case is approximately 47 times greater than the maximum criminal fine the legislature has found necessary to ensure a spouse's compliance with a child support obligation. The gross disparity between the penalty applied in this case and the maximum criminal fine demonstrates that the $1,172,100 penalty is wholly disproportionate to the defendant's offense and obviously unreasonable. [Citation omitted]. Consequently, we conclude that section 35 of the Act is unconstitutional as applied to this case.

Then the appellate court stated, "Accordingly, we remand this cause with directions to the circuit court that it hold a hearing to determine an appropriate penalty."

This author had drafted the original legislation which was ultimately enacted regarding the failure to withhold and pay over the amounts withheld. The Illinois Supreme Court's language shows the nature of this extraordinary remedy. The Supreme Court stated:

> We note, too, that the harm suffered by custodial parents and their children where payments are not received on a regular and timely basis is not necessarily susceptible of precise measurement, and that the eventual receipt of a child support payment may not adequately compensate the family for the delay. See *Dunahee*, 273 Ill. App. 3d at 208 (recognizing that an employer's noncompliance with its support obligation may force the custodial parent to postpone purchasing essentials such as food or medicine). Thus, the need for uniform adherence to the Withholding Act is paramount.

I liked the paragraph which reads:

> Although inferentially conceding that the statute is constitutional on its face, *Miller* maintains that the statutory penalty, as applied to him, is grossly exaggerated and out of proportion to the severity of his conduct and the amount of child support involved. *Miller* likens the penalty here to the imposition of a life sentence for a series of speeding tickets. In short, "the punishment does not fit the crime."

Miller then points out that:

> During the 2½-year period relevant to this litigation, Miller, **by his own admission**, violated the Withholding Act on 11,721 separate occasions. This figure does not include the thousands of violations Miller allegedly committed prior to Lenora filing suit. **Although Miller continuously withheld the required support from Harold's weekly wages, Miller waited five weeks after suit was filed before mailing another child support payment to the SDU**, and failed to mail any further payments for another 20 weeks. A 10-month delay preceded the next payment. In all, during the 128

> weeks at issue, Miller mailed the weekly support on only 11 occasions. His sporadic payment practice resulted in the payment of child support which was, on average, 90 days late, and as much as 10 months late.

So, keep in mind that it would have been extraordinarily difficult to mount a legitimate defense in *Miller* to the knowing element because of the fact that it was clear that there was a failure to pay over amounts withheld on more than one occasion. Accordingly, the presumption clearly arose. The case continued:

> Significantly, Miller was aware of his statutory obligations, and equally aware of the $100-per-day penalty, as set forth in the withholding notice delivered to him in May 2001. Miller was reminded of his obligations and the statutory penalty by Lenora's counsel in his October 2001 letter. Nonetheless, Miller repeatedly and knowingly violated the statute and his noncompliance continued, as indicated above, even after suit was filed. Miller's disregard of the Withholding Act persisted even after the circuit court twice ordered him to stay current, and even after Lenora filed two petitions for rule to show cause.
>
> We recognize that the individual daily penalties amassed by Miller produce a weighty sum when aggregated. 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.

Regarding the more than $1 million penalty the Supreme Court's decision contained the following language:

> This aside, we decline to judge the constitutionality of the penalty here with reference to Miller's assets. Our lawmakers are under no obligation to make unlawful conduct affordable, particularly where multiple statutory violations are at issue. Based on the important societal interests at stake and the concomitant need for adherence to the Withholding Act, coupled with the egregiousness of Miller's conduct, we cannot say that the statute is unconstitutional as applied to Miller. Were we to hold otherwise, then "[a]ll an employer would have to do to evade any penalty is nothing, as Miller did here. It could pile up the nonpayments and, when called to account under the penalty provisions, contend it cannot be required to pay because the mandatory penalty is unconstitutionally excessive." 369 Ill. App. 3d at 54 (Wolfson, P.J., dissenting).

The Supreme Court then rejected the comparison between the $25,000 maximum criminal penalty under the IWSA and the comment that the result in this case was 47 times that amount. The Supreme Court in effect stated that it was an apples to oranges comparison because the criminal provisions allow may provide for a jail term in addition to a penalty.

***Gulla* -- UIFSA and Penalties to be Of Law of State of Employer**: The Illinois Supreme Court in 2009 addressed the issue in the context of an out of state employer in *IRMO Gulla and Kanaval*, 382 Ill. App. 3d at 503 (2009). The Mississippi employer was ordered to pay the ex-wife penalties of $100

per day based upon their failure to withhold and pay over. The trial and appellate court's applied Illinois law in Section 35(a) of the IWSA. The Illinois Supreme Court in *Gulla* overruled the decision determined that the penalty for failure to comply with the withholding order had to be based upon Mississippi law.

Regarding the appellate decision, I had commented:

> It did not appear at the appellate court level that the issue of choice of law was addressed. The choice of law should have been the law of the state of Mississippi. This is because orders or notice of withholding are subject to withholding in each of the 50 states. However, the penalties of the state of the employer should have applied. The trial and appellate court's applied Illinois law in Section 35(a) of the IWSA.

The *Gulla* Illinois Supreme Court stated:

> In the present case, Suzanne calculated 3,690 alleged penalties, reflected in the circuit court's March 26, 2007, order, resulting in a judgment of $369,000. In contrast, the Mississippi income withholding statute provides that where a payor willfully fails to withhold and remit income pursuant to a valid income withholding order, the payor shall be liable for a civil penalty of not more than $500, or $1,000 where the failure to comply is the result of collusion between the employer and employee.

The Supreme Court noted that the issue is controlled by the UIFSA:

> Specifically, section 502 of Model UIFSA provides: "The employer shall treat an income withholding order issued in another State which appears regular on its face as if it had been issued by a tribunal of this State." Further: "An employer who willfully fails to comply with an income-withholding order issued by another State and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this State.

Two Year Statute of Limitations – / Now One Year: *IRMO Stockton*, (2d Dist. May 2010) addressed for the first time when the statute of limitations applies for seeking $100 per day penalties and ruled that a two year statute of limitations applies. This complex factual case (including problems with the State Disbursement Unit's manner of record keeping) regarding timing of payments is necessary reading for an in depth knowledge of how the provisions of the Income Withholding for Support Act (IWSA) operate.

The appellate court stated:

> The threshold question this case turns on is not whether the distribution in the problematic line should be credited to Rockwell, but whether the information contained in the problematic line indicates that an outstanding payment remains under the 1998 withholding order. It is the answer to this question that dictates the parameters of our statute-of-limitations analysis, and we conclude that no outstanding payment remains under the 1998 withholding order. The Withholding Act does not set

forth a statute of limitations for an action to collect an arrearage amount or for an action to collect penalties.

The appellate court first ruled that 735 ILCS 5/12--108 does not apply to penalties under the IWSA – §12-108 providing that ""[c]hild support judgments, including those arising by operation of law, may be enforced at any time."

The appellate court ruled that a two year statute of limitations applied. "two years under section 13--202 of the Code (735 ILCS 5/13--202) ("Actions *** for a statutory penalty *** shall be commenced within 2 years next **after the cause of action accrued**"). Accordingly, the ex-wife's action was time-barred.

But as of the newest set of amendments, the limitations period is effectively only a year.

***Vaughn* and Service on the Self-Employed**: The recent *IRMO Vaughn* case (1st Dist. 2010) held that Blue Cross may be required to withhold child support when making payments to a private physician's practice. In various presentations I have urged that service of an income withholding notice on a self-employed individual can be effective with the question then being what constitutes wages subject to withholding.

The issue in this case was whether Blue Cross payments to a sole proprietorship (in this case the ex-husband was a chiropractor) would fall within payments subject to withholding under the IWSA. On a weekly basis, Blue Cross had remitted payments for the services the ex-husband provides to its insureds via an electronic funds transfer account that was established several years earlier. The ex-wife served Blue Cross with a withholding notice. Blue Cross responded to the withholding notice by stating, in part: "Please be aware we do not become involved in personal cases and are not allowed to set up this type of convenience for the provider." The ex-wife then sent Blue Cross another withholding notice, a copy of the order of support, and a copy of the relevant portion of the IWSA. She also informed Blue Cross that she would pursue statutory penalties under the IWSA if Blue Cross continued to disregard its duty to comply with the withholding notice. Blue Cross again responded that it was "not allowed to set up this type of convenience for the provider."

The ex-wife then brought a complaint seeking $100 per day penalties for failure to withhold. Blue Cross moved to dismiss Jill's complaint because it alleged that it did not pay income to the ex-husband. Alternatively, it moved to dismiss the ex-wife's complaint because it alleged that it did not knowingly violate the Withholding Act. Blue Cross further stated that it made payments not directly to the ex-husband but to "Vaughn Center" for the ex-husband's treatment of Blue Cross' insureds. The ex-wife presented an affidavit of the ex-husband which stated that Vaughn Center was a pseudonym under which he did business. he also stated that Blue Cross transmits the payments directed to Vaughn Center into his personal checking account.

The trial court granted Blue Cross' motion to dismiss under §2-619 of the Code finding both that it did not knowingly fail to comply with the IWSA and that the ex-wife did not present credible evidence that Blue Cross "had knowledge that the funds that they were transferring were going to an individual who was [a] child support obligor." The ex-wife appealed and the appellate court reversed and remanded.

The appellate court stated:

> [B]ecause a determination of whether the word "individual" in the Withholding Act includes a sole proprietorship is a question of law, our standard of review is de novo, and we do not give the trial court's interpretation any deference.

The issue was whether Blue Cross was the ex-husband's payor. The IWSA defines a "payor" as "any payor of income to an obligor." 750 ILCS 28/15(g):

> Thus, in order for Blue Cross to be a "payor," it must pay Ronald income." The Withholding Act defines "income," in pertinent part, as "any form of periodic payment to an individual, regardless of source." 750 ILCS 28/15(d).

The *Vaughn* appellate court then reasoned:

> Blue Cross argues that it does not pay Ronald income because it pays Vaughn Center. Blue Cross further contends that Vaughn Center is not an "individual" under the Withholding Act's definitions of "income" and "obligor." However, the affidavit submitted by Ronald establishes that Ronald is a sole proprietor and Vaughn Center is a legal nonentity. "[A] sole proprietorship has no legal identity separate from that of the individual who owns it." *Vernon v. Schuster*, 179 Ill. 2d 338, 347, 688 N.E.2d 1172, 1176-77 (1997). Moreover, even if a sole proprietor does business under a fictitious name, the sole proprietor has not created a separate legal entity. *Vernon*, 179 Ill. 2d at 347-48, 688 N.E.2d at 1176-77. Thus, the word "individual" in the Withholding Act's definition of "income" includes a sole proprietorship. See *Shively v. Belleville Township High School District No. 201*, 329 Ill. App. 3d 1156, 1165-66, 769 N.E.2d 1062, 1070 (2002) (interpreting "individuals" in the School Code's professional services exemption (105 ILCS 5/10-20.21(a)(i)) to refer "to the ones performing the service, not the ones with whom the contract is made" because, if "individuals" referred to the latter, sole proprietorships, but not corporations, would fall under the exemption). *** Consequently, because Blue Cross pays Vaughn Center income, it was required to comply with the withholding notice that it received from Jill.

Regarding the §2-619 motion, the appellate court then addressed the trial court's ruling that Blue Cross did not knowingly violate the IWSA. The appellate court noted that a "§2-619 admits the legal sufficiency of the plaintiff's claim but asserts 'affirmative matter' outside of the pleading that defeats the claim." But the court then noted that "where the affirmative matter is merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint, §2-619(a)(9) should not be used." It stated that the trial court must resolve any factual disputes in a complaint that is brought against a payor under the Withholding Act and thus improperly granted Blue Cross' motion on the merits – based solely upon affidavits:

> However, in deciding the motion's merits, "a trial court cannot determine disputed factual issues solely upon affidavits and counteraffidavits. If the affidavits present disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing." (citation omitted). Alternatively, the trial court "may deny the motion without prejudice to the right to raise the subject matter of the motion by answer."

The appellate court stated that:

> [I]f the trial court dismisses the cause of action on the pleadings and affidavits, as was the case here, our duty on appeal is to determine "whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law." ***
>
> Blue Cross submitted an affidavit stating that it made payments to Vaughn Center. Jill then submitted an affidavit from Ronald stating that the payments from Blue Cross were directly deposited into Ronald's personal checking account. We agree with Jill that if this dispute had been properly before it, and if this fact was material, the trial court should not have granted a §2-619 motion where the counteraffidavits raised a factual dispute and no evidentiary hearing was held to resolve the dispute.

The court then stated that the issue of a knowing violation of the IWSA could not be properly raised in a §2-619 motion because 1) it is not an affirmative matter but the negation of essential element of the ex-wife's case and because the argument that it did not knowingly violate the IWSA because it did not know it was paying the ex-husband was not a defense. Regarding the second point, the appellate court stated:

> The Withholding Act imposes a penalty on a payor "[i]f 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." 750 ILCS 28/35(a) (West 2006). However, "knowingly" refers to a payor's omissions that occur after the payor receives a withholding notice and presumably recognizes that it pays income to the individual. *** In other words, the Withholding Act's penalty provision assumes that a withholding notice is served on an actual payor and that the payor realizes that it pays income to the individual designated in the notice.

The appellate court concluded:

> Therefore, 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. ***
>
> However, instead of complying with the notice or filing a declaratory judgment action to challenge its identification as a payor in the underlying case, Blue Cross sent a response to Jill in which it stated that it is "not allowed to set up this type of convenience for the provider." This is analogous to the employers in *Miller*, 227 Ill. 2d at 202, 879 N.E.2d at 302, and *Gulla*, 382 Ill. App. 3d at 503, 888 N.E.2d at 589, who disregarded the withholding notices they received. 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. Thus, because whether Blue Cross knew it was paying the obligor is not a valid defense to this action, the trial court erroneously granted Blue Cross's motion to dismiss. Finally, we note that the statutory penalty for a knowing violation of the Withholding Act is mandatory, not discretionary.

As stated this case goes exactly to a point that I have made over the years in various seminars. A sole proprietorship would be subject to withholding income for his own support if properly served. Only weeks before this decision was made I observed a trial court's finding that a sole proprietorship was not subject to $100 per day penalties as it may bankrupt him, i.e., it could simply not pay these penalties. This should not be a defense to the statutory penalties.

Note: Read the well-written *Vaughn* concurring opinion by Justice O'Brien.

The 2013 Supreme Court Case: The 2013 Illinois Supreme Court case involving the penalty is *Schultz v. Performance Lighting*, 2013 IL 115738. The Court ruled that trial court correctly dismissed the complaint to recover child support that should have been withheld from the paychecks of plaintiff's former husband. The Court reasoned that Plaintiff failed to strictly comply with the requirement of §20(c) of the Income Withholding for Support Act - requiring that her former husband's social security number be included in the notice of withholding served on his employer. And, according to the Illinois Supreme Court, this rendered the notice invalid.

The key portion of the Illinois Supreme Court decision summarizing the state of the current law provides:

> We conclude that irrespective of the parties' failure to communicate, the statute is unambiguous in providing that the lack of the obligee's social security number rendered the notice invalid and that the employer, at the time of the relevant events in this case, was not burdened with any statutory duty to contact the obligee of the notice's invalidity. We note that recent amendments to the statute seem to address the problem at issue here. We further note, however, that it is well settled that an amendment of an unambiguous statute creates a presumption that the amendment has worked a change in the law, while the amendment of an ambiguous statute creates no such presumption and might instead indicate that the legislature intended a clarification of the law....
>
> The recent amendments to the Act, effective August 17, 2012, now place the duty on the recipient of support to timely contact the employer for an explanation as to why support is not being withheld. 750 ILCS 28/45(j) (West 2012). Specifically, a recipient of support must notify the employer in writing if a support payment is not received. 750 ILCS 28/45(j) (West 2012). Then, within 14 days of receiving this written notice of nonreceipt of payment, the payor must either notify the obligee of the reason for the nonreceipt of payment, or make the payment with 9% interest. A payor who fails to comply with this provision is subject to the $100 per day penalty in section 35 of the Act. 750 ILCS 28/45(j) (West 2012)

Consider, however, the fact that in Illinois there are also what are titled Uniform Orders for Support. There was no mention of a uniform order for support in this case and accordingly it is anticipated that the uniform order of support was not served on the employer as accompanying the notice for income withholding. The uniform order for support is in actuality supplemental to the notice/order to withhold income for support and provides a great deal of other identifying information.

2015 Illinois Case Reaffirming Inadvertent Failures are Not Penalized: IRMO Solomon, 2015 IL App (1st) 133048, involved a 2010 divorce. Ralph was ordered to pay $2,200 per month in child support. From facts in the opinion, it appears that he was actually ordered to pay $1,015.38 bi-weekly. Ralph was paid bi-weekly basis. Ralph's employer, Provident Hospital of Cook County was ordered to deduct and pay the deducted child support from Ralph's wages. Provident's wage garnishment processor, Deidre Williams, received and processed this Solomon notice to withhold. Williams' position requires that she accurately process child support orders and other garnishments for hospital employees. Williams testified that she knew Ralph was paid bi-weekly. Williams testified that when an employee is paid bi-monthly, rather than bi-weekly, she enters a code into Profident's system which directs that the withholdings are to come out of only the employee's first two pay checks should a given month consist of three pay dates. Williams further testified that after she received the Solomon notice to withhold, she "probably" put the bi-monthly code in the system, a clerical error.

Iren Solomon, the petitioner in the divorce proceedings, argued the evidence at the hearing showed that no code was actually entered to change the withholding pay cycle for Ralph from bi-weekly to bi-monthly, and therefore Provident's failure to pay her the child support was knowing. Williams testified that withholdings of the incorrect amounts had been a mistake. In October, 2011 Iren filed her petition seeking to hold Provident responsible for "knowingly" failing to pay child support on more than one occasion, seeking the $100 per day penalty. Williams testified that she complied with the notice to withhold but mistakenly entered the withholdings as bi-monthly instead of bi-weekly. Williams' clerical error caused the child support payments not to be deducted from Ralph's third pay check of the month in December 2010 and June 2011. Provident rectified the error and paid the missing child support to Iren within two days of being notified of the failure to pay. The trial court found Williams' explanation credible. Williams stated she did not know of the error until August 2, 2011 and then immediately rectified it:

> The trial court found the evidence sufficient to overcome the presumption that Provident's failure to with hold was a "knowing violation." Our review of the record indicates the statutory presumption was overcome. The trial court's conclusion that Provident did not knowingly fail to withhold the support payments owed to petitioner is not against the manifest weight of the evidence and therefore, must be upheld.

2018 *Schmidgall* Decision and Proof of Delivery:

The most recent case to address the 100 per day penalty provisions, *In re Marriage of Schmidgall*,[1] addressed several issues including the issue of whether the employer who refuses delivery of a certified notice to withhold could be held responsible for the $100 per day penalty. In this case, the postmaster was brought before court in order to testify that only the business could have written "refused" on the rejected envelopes and there was further proof that only officers of the business had keys to the post-office box. The trial court and the appellate court upheld the statutory penalties but remanded for proper calculation. The appellate court stated:

> In reviewing the record in this case, we conclude that there was sufficient proof within meaning of section 35(a) of the Act that Shives was served with the Notice to Withhold via the certified mailing of May

[1] In re Schmidgall, 2018 IL App (3d) 170189.

> 28, 2014, where the evidence showed that Shives knew that it would have to withhold income for Troy as support payments resulting from his divorce from Julie; Shives had been sent a regular mailing to the attention of its payroll department containing the Notice to Withhold; Shives knew, by way of the notices in the post office box, that the law firm of Julie's attorney was attempting to send its payroll department a certified letter (at the same time the Notice to Withhold was sent via regular mail and presumably also placed in the post office box); and Shives refused the certified mailing.[2]

The appellate court noted that the business failed to assert a proper technical defense, i.e., that is that the potential duties and fines of the payer were included but were not set forth "in bold face type," as required under the amendments to the Act that had become effective on August 17, 2012. The appellate court refused to offer precedent in dicta and disclaimed, "Consequently, [because of waiver by the business] we take no position on whether the failure to provide the requisite bold-face type in the Notice to Withhold would render the notice invalid."[3] The appellate court also commented, "We also take no position on whether section 45(j) of the Act requires a written notice to be sent to the payor for each separate pay period where the obligee did not receive payment."[4]

On cross-appeal the former wife disputed the amount of penalties assessed by the trial court of $66,700 and asserted that the amount should have been $150,000. The appellate court noted that the employer failed to withhold support on 15 applicable pay periods, beginning with the pay period of June 15, 2015. The issue in the case was at what point should the court stop assessing the $100-per-day penalties in light of what constitutes a knowing failure to withhold support. The case noted that the Income Withholding for Support Act does not define the term "knowingly." Section 35(a) provides, "a withheld amount shall be considered paid by payor on the date it is mailed by the payor, [or when an electronic funds transfer has been initiated], or on the date delivery of the amount has been initiated by the payor." The appellate court then stated:

> However, the Act is silent as to the scenario that has arisen in this case, wherein an obligee (Julie) has repeatedly accepted direct payments from the obligor (Troy) rather than receiving payments through the State Disbursement Unit but still seeks $100-per-day penalties against the payor/employer (Shives) for its failure to withhold and turn over payments to the State Disbursement Unit, even for the time after the obligee (Julie) had accepted those funds directly from the obligor (Troy).[5]

The appellate court provided an overview for the purposes behind the penalty provisions of the IWSA:

> The $100-per-day penalty provision under which Julie is seeking $100-per-day penalties against Shives was enacted to ensure a simple and speedy method of withholding wages in response to the nationwide crisis

[2] In re Schmidgall, 2018 IL App (3d) 170189, ¶ 46, citing Helland v. Larson, 138 Ill. App. 3d 1, 4-5 (1985) (deeming a tenant to be in constructive receipt of a notice to terminate his tenancy and finding the owners complied with the applicable statute requiring a return receipt from the addressee as constituting proper notice where the tenant was aware that he would be sent a notice of termination, the postal service notified the tenant of the certified letter, and the tenant did not pick up the certified letter at the post office).
[3] In re Schmidgall, 2018 IL App (3d) 170189, ¶ 47.
[4] In re Schmidgall, 2018 IL App (3d) 170189, ¶ 49.
[5] In re Schmidgall, 2018 IL App (3d) 170189, ¶ 55.

> of delinquent child support.[6] The purpose of allowing a plaintiff to recover the $100-per-day penalty for each day of a knowing violation is to punish parties that violated the Act and to discourage future violations. In re Marriage of Murray, 2014 IL App (2d) 121253, ¶ 45. Given that section 35(a) is penal in nature and creates a new liability on the part of payor, we will strictly construe the Act in favor of the persons sought to be subjected to its operation and will not extend the Act beyond its terms. See Schultz, 2013 IL 115738, ¶ 12.

Therefore, the appellate court limited the penalties to payments that were not accepted by the former wife and stated:

> Under our reading of the Act, strictly construing the Act in favor of Shives and not extending the Act beyond its terms, we must disagree with Julie's position that Shives should continue to be assessed $100-per-day penalties for each period of nonperformance until Shives forwards every payment to withhold to the State Disbursement Unit that it had failed withhold and forward previously, even though Julie had already accepted those payments directly from Troy and failed to provide notice to Shives pursuant under section 45(f) regarding her receipt of those payments or notice to Shives pursuant section 45(j) upon any initial nonreceipt of payment. See id. §§ 45(g), 45(j). Thus, based on the circumstances of this case, when we construe section 35(a) strictly in favor of Shives, we cannot say that Shives "knowingly" failed to withhold and pay over to the State Disbursement Unit funds after the point that Julie had accepted those same funds directly from Troy.[7]

Ultimately, the appellate court remanded the case for proper calculations as to the amount of penalties and vacated the trial court's order judgment of $66,700 making it clear that strategically that the former wife's counsel may have erred in bringing her cross-appeal.

The Gitlin Law Firm
Practice Limited to Family Law
663 East Calhoun Street
Woodstock, IL 60098
815/338-9401
Last Updated: March 15, 2019
G:\Docs\Writings\Illinois CS Enforcement 100 Per Day Withholding.wpd

[6] Citing Chen, 354 Ill. App. 3d at 1015, in turn which had cited Dunahee v. Chenoa Welding & Fabrication, Inc., 273 Ill. App. 3d 201, 205 (1995).
[7] In re Schmidgall, 2018 IL App (3d) 170189, ¶ 59.