October 27, 1970

Time

November 19 - 10:00 a.m. - 5:00 p.m.
November 20 - 9:00 a.m. - 5:00 p.m.

Place

State Office Building
455 Golden Gate Ave., Room 1157
San Francisco 94102

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

November 19-20, 1970

1. Minutes of October 22-23 Meeting (to be sent)

2. Administrative Matters

3. Study 39 - Attachment, Garnishment, Execution

Research Study Prepared by Professor Warren (to be sent)

Note: The November 19-20 meeting will be devoted entirely to a presentation by Professor Warren of his background study and recommendations.

✓ 4. Study 71 - Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Matters

Memorandum 70-115

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 20, 1970

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on November 20, 1970.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
Noble K. Gregory
John N. McLaurin
Marc W. Sandstrom

Absent: Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
George H. Murphy, ex officio

The Commission was informed that Professor Joseph T. Sneed has submitted his resignation to the Governor, the resignation to take effect immediately. Professor Sneed has been appointed Dean of Duke University School of Law.

Messrs. John H. DeMoully, Jack I. Horton, E. Craig Smay, and Nathaniel Sterling, members of the Commission's staff, also were present. Professor William D. Warren, U.C.L.A. Law School, consultant on the study on attachment, garnishment, and exemptions from execution, also was present. Sitting with the Commission during consideration of Study 39 (attachment, garnishment, and exemptions from execution) was Edward N. Jackson, San Francisco, of the Special State Bar Committee on Attachment and Garnishment.

The following observers were present:

John D. Bessey, Dahl, Hefner, Stark, Marios & James, representing California Association of Collectors
Harvey M. Freed, San Francisco Neighborhood Legal Assistance Foundation

Paul Homrighausen, Morrison, Foerster, Holloway, Clinton & Clark, representing California Bankers Association
Steve Martini, Staff writer, Los Angeles Daily Journal
Herbert Nobriga, Assembly Committee on Judiciary
Andrea Ordin, State Attorney General's Office, Los Angeles
David L. Price, Assistant Legislative Representative, State Bar
Gary L. Sweet, Rosenberg, Wiseman & Sweet, Commercial Law League of America, Western Region

ADMINISTRATIVE MATTERS

Approval of Minutes of October 22-23, 1970, Meeting. The Minutes of the October 22-23, 1970, meeting were approved as submitted. (This approval was of pages 1-13 of the Minutes. The Exhibit to the Minutes was not approved or disapproved.)

Schedule for future meetings. The following schedule was adopted for future meetings:

Date	Time	Place
December 3	7:00 p.m. - 10:00 p.m.	State Bar Building
December 4	9:00 a.m. - 5:00 p.m.	1230 W. Third Street
December 5	9:00 a.m. - 1:00 p.m.	Los Angeles 90017
	1971	
January 15	9:30 a.m. - 5:00 p.m.	State Bar Building
January 16	9:00 a.m. - 4:00 p.m.	601 McAllister Street
		San Francisco 94102
February 12	9:30 a.m. - 5:00 p.m.	State Bar Building
February 13	9:00 a.m. - 4:00 p.m.	1230 W. Third Street
		Los Angeles 90017
March 11	7:00 p.m. - 10:00 p.m.	State Bar Building
March 12	9:00 a.m. - 5:00 p.m.	601 McAllister Street
March 13	9:00 a.m. - 3:00 p.m.	San Francisco 94102
April 16	9:30 a.m. - 5:00 p.m.	State Office Building
April 17	9:00 a.m. - 4:00 p.m.	107 S. Broadway
		Los Angeles 90012
May 14	9:30 a.m. - 5:00 p.m.	State Bar Building
May 15	9:00 a.m. - 4:00 p.m.	601 McAllister Street
		San Francisco 94102
June 10	10:00 a.m. - 5:00 p.m.	State Bar Building
June 11	9:00 a.m. - 5:00 p.m.	1230 W. Third Street
June 12	9:00 a.m. - 3:00 p.m.	Los Angeles 90017
July 9	9:30 a.m. - 5:00 p.m.	State Bar Building
July 10	9:00 a.m. - 4:00 p.m.	601 McAllister Street
		San Francisco 94102

Minutes
November 20, 1970

STUDY 39 - ATTACHMENT, GARNISHMENT, EXECUTION

The Commission heard a presentation by Professor Warren, one of its consultants on Study 39, and discussed his background study and other related matters. An edited transcription of Professor Warren's presentation is attached to these Minutes as an Exhibit (yellow pages).

The Commission considered Professor Warren's Memorandum of October 26, 1970 ("Wage Garnishments") with the attached "Summary of Proposed Earnings Execution Act" (pink pages) and the attached "Earnings Execution Act" (yellow pages).

The Commission considered and discussed the 10 matters noted in Professor Warren's Memorandum:

(1) Desirability of continuing levy procedure. The Commission agreed that a continuing levy procedure would be a significant improvement.

(2) Abolition of common necessaries exception and the exception for a former employee of debtor. The Commission agreed that both of these exceptions should not be continued.

(3) Obtaining exemption from federal enforcement. The Commission agreed that it would be desirable to obtain an exemption from federal enforcement.

(4) Improvement in manner in which debtors may assert their rights to exemptions. The Commission agreed that something along the lines of what Professor Warren recommends would be desirable. However, the procedure should place the duties upon the creditor (or his attorney) rather than upon the county clerk.

(5) Granting debtors private remedies for enforcement of garnishment restrictions. The Commission discussed whether debtors should be given private remedies. The matter was considered to be one that needed to be investigated further, but there was no agreement on whether debtors should be given private remedies in the statute itself.

(6) Giving administrative enforcement powers to state officials. The Commission discussed what state agency might be given enforcement powers. The staff is to prepare a memorandum for a future meeting that will indicate the possible existing agencies that might be given enforcement powers and which one the staff recommends should be given the enforcement powers.

(7) Businesslike methods of making collections. The Commission agreed that marshals should not be used as high-priced messengers when the mail can be used for the same job.

(8) Requiring employers to make payments directly to judgment creditors rather than to public officials. The Commission agreed that it would be a better procedure to have the employer make payments directly to the creditor rather than sending the payments to the clerk.

(9) Discharge from employment. The Commission discussed various creditor abuses but determined that the proposed statute should have nothing more than the federal statute in terms of regulations, and the question whether a civil penalty should be included as well as a criminal penalty was not resolved.

(10) Execution versus supplemental proceedings. The Commission determined that the proposed statute should be restricted to earnings

and should not include other forms of income. A separate statute will be needed to deal with problems of other income.

The Commission discussed the proposed legislation (yellow sheets) attached to Professor Warren's Memorandum. Professor Warren is to prepare a revised statute for the next meeting. The following suggestions were made for inclusion in the revised statute:

(1) The name of the act should be "Earnings Protection Act."

(2) The use of the term "execution" or "writ of execution" should be avoided. The term "earnings withholding order" was suggested.

(3) Section 102 was revised to read:

> A judgment creditor may levy upon earnings of a judgment debtor in accordance with this act.

(4) Consideration should be given to Section 104 (exclusions) in light of the fact that this provision in the federal act leaves states free to deal with the excluded matters but does not necessarily mean that it would not be appropriate for support orders, for example, to be dealt with according to the procedure provided in the new act. The existing provisions relating to support orders should be checked to determine whether they are adequate.

(5) Section 202(2) was disapproved.

(6) Section 301(2) should recognize that an earnings withholding order can be terminated by release of the order or something similar to that.

(7) Other suggestions were made.

Minutes
November 20, 1970

STUDY 71 - COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION, AND RELATED MATTERS

The Commission considered Memorandum 70-115. The only portion of the Memorandum that was discussed was the joinder of causes of action against a cross-defendant. (See pages 6-7 of Memorandum.) After discussion, the Commission determined that Section 428.30 and the Comment thereto should be revised as set out on page 7 of the Memorandum.

Minutes
November 20, 1970

EXHIBIT

EDITED TRANSCRIPT OF PORTION OF THE MEETING OF THE CALIFORNIA LAW REVISION COMMISSION ON NOVEMBER 20, 1970, RELATING TO THE STUDY OF ATTACHMENT AND GARNISHMENT

Note: The letter W indicates a statement by Professor Warren. The letter C indicates a comment, question, or suggestion by either a Commissioner, staff member, or one of the observers present at the meeting.

[There was a brief introduction of those persons present. Professor Warren then started his presentation.]

Introduction: Professor Warren's initial recommendations

W Mr. Chairman, I would like to make a preliminary statement and then invite everyone to comment on what I have done here. I was asked to look at the wage garnishment area in the light of Sniadach and the Consumer Protection Act and make some recommendations concerning this area. I thought, rather than regurgitate the body of law review articles and books and so forth on the subject matter, which is enormous, I would try at this point to make some recommendations to the Commission of a more or less specific nature in the hope that, maybe, by the end of the day, you would be able to tell me whether any of these recommendations are worth going further with. I have put these recommendations together in a draft statute, a very rough draft. I would like to go through the recommendations with you and mention each one briefly and then invite your questions and discussion.

Continuing levy procedure

I call your attention to the memorandum of October 26, 1970, the first of three pieces of material that was sent out to you. On page 2 of this memorandum, I recommend that we abandon the present procedure in California calling for a multiple levy, that is, having to levy each time to get a dollar from an employer and instead go to a system of continuing levy. You might think off-hand that this is an earth-shaking change. But I think it is one that you ought to consider very seriously for these reasons: First, I think it is a much more businesslike way of collecting money from debtors. Second, you have to realize what Title 3 of the Consumer Credit Protection Act does. This now limits the creditor to 25% of disposable income. For example,

you have a debtor who has a weekly wage of $150. If you take $30 out of that for taxes and social security and so forth, you are down to $120. That means that all the creditor can garnish, under optimum circumstances, is $30 or 25% of $120. Now you take a case in Los Angeles in which the employer is 10 miles from the marshal's office. The creditor would pay $5.00 to have a levy, plus 70¢ a mile. I think that 70¢ is standard. If it is 10 miles, that would be $7.00 for mileage, and the creditor would be paying $12.00 to have a levy to collect $30. And that cost, of course, is passed on to the debtor. Our marshals take 1% of the take also so, if you recover $30.00, they would take 30¢ or 1% of $30.00. In those states that limit the amount the creditor can take to a very small amount--like New York, where it is limited to 10%--they have a continuing levy procedure in which a creditor has a writ served on an employer, and that employer pays each pay period automatically until the debt is discharged. This is a much more businesslike way because it allows an employer like Chevrolet or Douglas to program this on their computer. The garnishment procedure becomes a way of collecting money and not just running up costs. Under our present systme--a scramble system, you might call it--everybody goes after the debtor's earnings each payday. But the creditor has a difficult time getting his debt paid off through garnishment proceedings. And you wonder if the debtor ever gets all his debts paid off because the costs run up higher and higher. So, I suggest that one thing you ought to look at very carefully is whether you should not put garnishment on a much more businesslike basis. I was serious in this report when I suggested that I think you ought to have a management consultant firm look at whatever you do with the garnishment procedure. I think it ought to be the most effective, efficient, businesslike procedure you can have. That may mean adopting business forms and requiring the use of those business forms, but I think everybody will be better off--the creditor, the debtor, and certainly employers. The employer today is bothered a great deal by garnishments. All you have to do is ask them. There must be a better way to do this. I think the continuing levy, although not in the California tradition, is something you ought to look at. I do not say we ought to look at it because New York has it; I am not terribly impressed by what other states have. I think we ought to look at it because I believe conditions have changed and that it is something that California and very modern technological states ought to consider.

Abolition of common necessaries exception

The second recommendation is on page 3. This is a highly controversial one. This is one which the debtors and the creditors have been fighting about for some time. To put it in as simple a way as possible, under our present law, a creditor who has extended

credit for a so-called common necessary has a right to take the debtor's earnings even though the debtor can show that he needs those earnings to support his family. In each county, a body of common law has grown up telling us what each particular judge believes a common necessary is. I suggest that the sky is not going to fall in if you have a procedure where a debtor is entitled to a hearing, and, if he can show--and he has the burden of proving it--that he has to have this money to support his family, then the creditor's right should be postponed, whether that creditor's rights grow out of the sale of a common necessary or not. We are one of a handful of states that has this common necessary preference. I do not think you can sustain that preference by looking at what is happening in California. I do not think the evidence that we can find tells us that there is any particular policy that is being furthered by the common necessary exception which prefers one creditor over another. My own feeling is, although we should make garnishment much more modern and we should make it much more businesslike, that here is a place where you have to make it more human. Consumer people are after garnishment. The Uniform Consumer Credit Code is being introduced in the Connecticut Legislature this January with a flat prohibition of all wage garnishments. Not just consumer cases, all wage garnishments. This is pretty well agreed to by members of the establishment. In the District of Columbia, the Uniform Consumer Credit Code, or a version thereof, is going to be recommended in the district uncluding a flat prohibition of all wage garnishments. There is similar agitation in Massachusetts. I just do not think, when the debtor has to have his money to keep his family going, keep himself off welfare, and so on, that the policy of this state should be that the creditor is entitled to that money before the debtor's children, wife, and family, and so forth, or that we are long going to have this particular remedy. So I recommend that some very serious consideration be given to this "common necessary" problem. I realize it is very controversial. But I think there has to be a humanizing effect in our garnishment law. I think that the tremendous criticism of garnishment received, for example, from the AFL and CIO, is indicative of what is going on all over this country.

Exemption from federal law

My third recommendation, on the bottom of page 3, is that we ought to join the eight states that have already applied for an exemption from the federal law. As you know, the federal government in 1968 passed Title 3 of the CCPA. Title 3 has the garnishment restrictions, that is, the 25% restriction and a few other things. Title 3 specifically invites a state to adopt a statute similar to Title 3. The effect of a state adopting a statute similar to Title 3

is that that state can enforce its own restrictions. My feeling is that garnishment is about as local as you can get, and, if a state like California cannot enforce its own garnishment provisions, then I do not know what we are doing sitting around this table. I noted the other day in looking through the Federal Register that Illinois has now joined seven other states that have applied for an exemption from federal enforcement. Right now, Wages and Hours Division of the Department of Labor is supposed to be enforcing Title 3. My feeling is that employers, creditors, debtors, everybody would be better off if that were enforced by some state agency in California. Apparently a lot of other states think so too. To get an exemption, there are some problems. I think you have to have a statute very similar to Title 3, and you have to be able to show that there is an administrator in your state who has powers comparable to that of the Secretary of Labor who is supposed to enforce Title 3. In other words, you cannot get an exemption from federal enforcement unless you can show that there is an administrative officer in California who has some administrative powers over this agency. Certainly that is the lesson we learned in getting exemptions from the federal Truth-in-Lending Act.

Improvements in procedure for debtor's claim of exemption

I have suggested on page 4 that we make a rather obvious change --one the debtors have been contending for for a long time--that is, that there be an improvement in the manner in which debtors may assert their right to exemptions. One of the persistent debtor complaints is that a writ has been served reaching the earnings, but the debtor does not know how to claim his exemption. Recent A.B. 2240 goes a step in that direction in that now, at least, the debtor is served with a copy of the execution. I am simply suggesting that, anytime you send out an order, a notice, or anything else to the debtor--in which you say to that debtor that, "You have certain rights; something is going to happen to you, but you have a right to claim an exemption"--you ought to send out a form in very simple language with the order or notice, which the debtor can fill in and send back. This is the approach that they take under the Truth-in-Lending Act. This is the approach that is taken under some of the other consumer protection laws today. It seems to me that it is elementary fairness to say that a debtor should be able to communicate easily with creditors, employers, and the courts. I think that this can be done fairly simply, and I really think our laws are at fault today for not making it more simple.

Private enforcement of the law

In recommendation 5, you will find that one of the rather remarkable things about Title 3 of the CCPA is that nothing is said about what happens when it is violated. There is a complete void. You talk to the people in the Wages and Hours Division and they say, "We cannot explain that. We hope that states, in attempting to be exempt from Title 3, will write in some moderate penalties for violating the Title." It is not much use having a statute on the books that has no penalties in it; nothing happens to you if you violate it. I suggest here that you provide some very simple remedies where a debtor can sue an employer if the employer withholds too much, or he can sue the creditor if the creditor receives too much, with knowledge, and so forth, as a deterrent.

Administrative enforcement of the law

My sixth recommendation is that some administrative officer in California should have administrative watchdog powers in this area. I am not, for one minute, suggesting that we erect another huge bureaucracy somewhere. I do not think of this administrator as the auditor or bookkeeper type of administrator. I am not thinking of another Corporations Commissioner or Small Loans Commissioner. I am thinking of a prosecutor who, when things get bad, can come in and, if this statute is being abused--wages are pretty important to people--if there are abuses in this area, he can come and effectuate administrative remedies. I think he has to have that power if the state is to get an exemption from the federal act. I have not tried to add controversy to these recommendations by designating some state official. I will tell you quite frankly the kind of state official I have in mind is the Consumer Frauds Division of the Attorney General's office. You can give those people the additional duty of the enforcement of this act, by fines or otherwise. If creditors are not obeying this act, employers are not paying any attention to this act, then they should enforce it.

Now, one reason I feel very strongly about California getting exemption from the federal law is that the people who have to obey federal restrictions right now are getting very poor information on what they are supposed to do. Creditors, employers, debtors --nobody can figure out what the law is today. The marshals in Los Angeles County, when they are asked about the restrictions under Title 3 of the CCPA, will say as little as possible about it because they do not want to get in trouble. It is really not part of their responsibility. I would hope that you could have a

central office which would, over a period of years, develop an expertise in this area and could give some guidance to local courts by way of communications to them, notifying them of what procedures they should adopt so that, in each local area, all that the employer or creditor or debtor would have to do would be to pick up the phone and call the clerk's office or the marshal's office--however it is set up--and get some helpful advice on how to work with this complicated area of garnishment restriction. The federal statute now provides a very complicated procedure for the employer, and he has no real help from anybody unless he wants to get in touch with the Wages and Hours Division of the Department of Labor.

Execution of levy by mail

I said a while ago that, to get a writ served, you pay $5.00 to the marshal and 7¢ a mile. You ask the marshal, "What do you say when you serve that writ?" The ones I have talked to answer, "As little as possible." I suggest that you could use the mails to send those writs and all the other papers under this act. We might want to send them certified with a return receipt requested. I would think that any administrator of this act might make that a requirement. I realize there are problems in mail delivery, but it seems to me that, particularly under our multiple levy system, to keep adding on the costs of these very high-priced messengers, is just not at all in keeping with our modern way of doing business. Not very many businesses send personal messengers to conduct all their business. I suggest that the marshal's office or the clerk's office in the particular county ought to be a sort of secretariat in which you have people at a desk--at a telephone--telling employers and creditors and debtors what this act means, what our wage garnishment laws mean, what the rights of the parties are under the law as best you can in an administrative way, and they should be sending out papers the way any business enterprise sends out papers--by mail. I think a lot of money could be saved. And I think it would be a welcome modernization.

Direct creditor payment

I have suggested on page 6 that you probably could convert this so that you would have the creditor receiving payments directly from the employer. The employer would not make payments, under the statute I recommend, first to the marshal and then have the marshal wait until the check clears and then pay that over to the creditor. I think that this can be worked out so that the employer receives a writ. He makes inquiry, if he needs to, of the clerk or the marshal.

Then he makes payment directly to the creditor for each pay period until the debt is paid. No doubt there are some bugs in this procedure, but this is also something that I think you ought to consider very seriously.

Discharge from employment

Under the federal statute, there is a prohibition that says, in effect, that you cannot fire a debtor for one garnishment, although they do not say it very expertly. But there is no penalty for firing a debtor for one garnishment except a criminal penalty. I cannot find anybody who thinks that a criminal penalty is the slightest bit effective in an area like this. Everyone thinks that the Congress made a terrible mistake. I think, to get an exemption from the federal law, you have to have a criminal penalty in your statute. But I suggest that we should do what some of the other states have done and what the Uniform Consumer Credit Code has done, that is, have a simple civil penalty so that, if a debtor is wrongfully discharged, he gets the back wages. I have used the one from the Uniform Consumer Credit Code here, which, in turn, is based on the New York one. We have another method in our Labor Code of getting civil damages which is probably equally as good. (Frankly, I had forgotten about the latter when I wrote this, and I just looked back at it later and would be quite willing to see that the formula we have in our Labor Code be the one used here. I wish I could recall exactly what that formula is. It is a damages formula.)

Execution versus supplemental proceedings

Professor Riesenfeld has been talking--since we have been working on this--about having supplemental proceedings beefed up a little bit and using them as the focus for execution on wages. I really have not pushed that, and I see some problems with it. It is quite possible when Professor Riesenfeld meets with you the next time he could make a little better argument on that than I could make for him. So, Mr. Chairman, there are a lot of recommendations here, and I am open for any discussion.

Federal versus local enforcement

C Well, I think that they are very sound recommendations.

C I think the key to the whole thing is whether we should try to be exempt from federal requirements. Someone that I sent this

out to took a dim view of that. Maybe we could talk a little bit more about the advantages to everyone concerned and what the possible disadvantages there might be.

C Isn't the question really whether we want to control it at a local level or not? We have got to comply with federal standards anyway, as I understand it. The only question is whether we want an exemption from federal enforcement. The subsidiary question is whether we want to go beyond the federal law.

W The real issue is whether you want to enforce your own statute or whether you have Wages and Hours do it. The way it is now, you have got one form of enforcement of part of your garnishment law, and the other part of the garnishment law is enforced by somebody else. Local officials just will not make pronouncements on it because they say, "This is not our problem." It seems to me that it is a very unhappy situation that it puts your employers into and your creditors as well as the debtor. But I have to admit I am rather prejudiced here, and I am inclined to think that local things should be locally enforced.

C What are the arguments against endeavoring to get an exemption?

C Well, one argument was that we would have more employees at the state level and would have another prosecutor enforcing laws.

C Well, I agree that that is going to be a problem. You have to--

C Of course, if you are going to have to comply with the federal law, it is a question of which level you have enforcement.

W I do not honestly think you would have more employees.

C Even if you get an exemption, doesn't the federal government retain continuing jurisdiction? If they came up with any violations, wouldn't they move in? They have a complete club over the employer, don't they?

W They have retained continuing jurisdiction in only one respect as far as I can tell. In the Federal Register, they have a regulation that they put out that says that, if the employer wrongfully withholds too much, they are going to treat that as not being wages under the Fair Labor Standards Act. Therefore, the employer would be in violation of the Fair Labor Standards Act.

C That carries a severe penalty, doesn't it? They could put him out of business immediately.

W I really do not know. Frankly, they were looking around for some remedies. They were very embarrassed by the fact that the statute has no remedies. I do not think that they were trying to keep the states from adopting statutes because, in conversations I have had with them over the phone, they have been very eager to have states adopt statutes and particularly to enact some penalties. Their feeling is that there is a Fair Labor Standards Act aspect to this and that is their baby. No matter what a state does, they will want some control over employers. I think the state enforcement really is going to go more to the creditor.

C Which are the eight states? Are there any big commercial states which have applied?

W Illinois, Virginia, Kentucky, Kansas, Ohio, North Carolina, South Carolina, and New Hampshire. I guess you could say Ohio and Illinois are the big ones.

C Which states have applied depends on which legislatures were in session. It requires a certain lag time to get state government acting on something like this.

C And it depends also on what their law is. If they have their law pretty much in compliance, it takes less time. But California has a real problem. We could not do it that quickly.

W Frankly, I was surprised that so many had already applied. The federal statute did not go into effect until July. This must mean they passed laws last session.

C They probably just adopted the federal act.

C Do the states that applied have administrative agencies to enforce it?

W I just found this out a couple of days ago, and I have not yet checked that point. Frankly, I would like to see their applications; they are on file in Washington, and they are just not accessible unless you go to Washington. It might be that the Commission staff could get some copies of these applications from some of these states. We could find out on what basis they think they comply. I thought I would check that very point that you mentioned, but I have not had a chance yet to see if there is an administrator. The reason I am so sensitive about this administrator point is I have worked with the Federal Reserve Board for some time on exemptions under the Truth-in-Lending Act, and that was the point on which they were most hard-nosed. The idea was that we are not going to exempt the state if it just has the statute on the books, and nobody is going to enforce it. And they even went into the question of what appropriations the administrator had.

C Well, it seems to me the Labor Commissioner's Office is the logical administrator. Whether there would be political opposition to it, I do not know. But, particularly when you are dealing with the wage earner in the lower income brackets.

C Well, it depends on who you want to look to. You might go to the consumer protection division if you are trying to make something that is very visible to the employee, too.

C What division is this?

C The Consumer Protection something or other.

C Whose jurisdiction are they under?

C State of California. It is a state department, and they issue regulations, and they investigate auto dealers, TV dealers, and so on down the line. They govern the medical examiners, all

the boards are underneath their jurisdiction. They have a central investigative body, and they are a prosecutor in the sense of being an administrative prosecutor. The AG steps in and takes their cases at the trial level.

C That is the kind of problem I hate to resolve--to draft a bill saying what agency gets it.

C I do not think we will make the final decision.

W Is it within the realm of possibility that you could have two agencies sharing this? The reason I raised that is that, if you had the labor people involved, presumably they would be interested in the employer-employee relationship. If you have the consumer frauds people involved, they are most interested in creditors. There are some set-ups throughout the country in which there are different administrators who have powers over consumer credit law. Different laws generally state they have to consult with each other before issuing regulations or something like that. But actually, the way it works is each one stakes out a preserve. What I suggest would not be an important increase to the powers of the consumer frauds people. They are looking at these people all the time now. This is just another way to get to them.

C They are looking at whom?

W The creditors. They are looking at the worst possible creditor. Let us put it that way. I do not want to suggest that reputable creditors are people that they are particularly concerned with.

C Well, but the Labor Commissioner enforces the penalty you mentioned. He enforces the prevailing wage law. He enforces the kick-back features of the prevailing wage law. He has a legal department which is familiar with dealing with employers and unions in this area.

C I wonder if we might not benefit by a short resume or study by the staff on this. It is not a particularly urgent decision.

C I think we have to know ahead of time whether the particular agency we suggest is going to resist our recommendations.

[BREAK IN TRANSCRIPTION]

W State enforcement would ensure that there would be some central source of information for the localities, and the localities would be up on that information through either the clerk's office, the marshal's office, or some other local office, so that the whole state of California is doing the same thing at the same time.

C And the second reason would be that we could then have some state department, e.g., the Attorney General, be responsible for taking care of abuses under the law, and that would be more desirable than having the federal people doing that.

W As I understand it, there are state officials in California who are right now looking very carefully at the kinds of creditors who would be likely to violate this act for a number of different reasons. Since they are already looking at them for a number of different reasons, this would be simply one additional reason to look at them. If you give them this additional authority, it would seem to me to make a lot of sense rather than to bring in federal authority with a completely different perspective. I talked to the consumer administrator in Oklahoma once, and he said he had never seen anyone from the FTC enforcing truth-in-lending in Oklahoma. He had literally never seen an FTC man. When you talk about the staff the FTC has to enforce these laws, it is ridiculous. And I suppose Wages and Hours is going to be the same way on this. I frankly think you get better enforcement at the local level. I think, when President Nixon talks about creative federalism, that states have a little obligation to create some federalism as well.

C I think that, if we are going to recommend any significant reform in this area, we are going to have to struggle with this problem. The federal act says this: "No court of the United States or any state may make, execute, or enforce any order or process in violation of this section." Now this is just a one-sentence provision, but, if I were a judge faced with this, I would start denying any sort of execution unless I had some pretty clear affidavits that would establish the right to this remedy. And how is the creditor going to establish that right? All he can do is say, "I

want to garnish," and then the question is what your garnishment reaches. And that is only really determinable by the employer who is going to have a hell of a job, particularly where a debtor works for two employers.

W Have you seen a copy of what the employers are given now? They are now given a little chart. I have it here.

C How do they resolve this multiple employer thing? First-in-time; the creditor who gets there first gets the 25% if that is all there is, or do they--

W The way they resolve it now in Los Angeles County is very simple. They will not allow any creditor to get from any one employer any more money than he could have gotten if that were the only employer. In other words, the creditor--under practice by the marshal--is precluded from getting what he legally is entitled to get because the marshal quite rightly cannot figure out any way to do it. The hypothetical that I give you here is that the debtor has three jobs, and he gets $50 from each job per week. Under the CCPA, the creditor is entitled to 25% of the whole $150 or $37.50. Now the creditor is entitled to that $37.50 from any one of those three employers. But there is no administrative way under our present law for the creditor to get more then $2.00 from each of the three.

C Yes. I understood that example. What I am getting at is where you have, say, just one employer, but several attaching creditors. Does the creditor first-in-time get it all if his total demand exceeds more than the 25%? I was particularly interested in your continuing levy procedure.

W The employer would get one writ first, and the rule would be first-in-time, first-in-right. Professor Riesenfeld and I argued about that as to whether you should base it on the time the affidavit gets to the clerk. There is something to be said for that, but how can the creditor prove his priority?

C I had some other problems, too, where you had multiple employers and this idea of holding the employer responsible if he takes too much money out. How does the employer know if he has

taken too much money out when there is one creditor attaching two different employers? If the employee has more than one job, the employer can easily take out too much under this continuing levy and never know it.

W That is right, but I think I have taken care of that in my draft.

C It seems to me that, from the views expressed, the Commission thinks that it would be desirable to pursue further this idea of state enforcement and exemption from the federal law.

C I would move that we pursue further the possibility of seeking an exemption. I agree with Professor Warren that California should be able to enforce this and do it much more efficiently and expeditiously for both the debtor and the creditor at the local level.

[Motion seconded and passed.]

C I would move that the staff or Professor Warren prepare a memo indicating the list of appropriate agencies which could act as the administrator of the statute.

C I wonder if we would not be in a better position to write that memo if we knew what the requirements were going to be that were going to have to be enforced.

C I am not suggesting that we cannot go on until we have the memo. I just think we need more to know what the agencies are and what they do now. You should correspond with these seven other states and see what they are doing. I am not saying that there is an immediate urgency.

The professor suggests that you may have to have an administrator, but, as I understand it, this is not an absolute certainty. Maybe you will find that some of these other seven states have received approval without an administrator named.

C Professor, wouldn't you have to have someone with regulatory authority to keep up with the regulations issued under the federal

act? As I remember all these exemption laws, you not only have to have state statutes similar to the federal law, but you have to keep in tune with the regulations which are authorized under the federal statute.

W Yes, there is a specific regulation now that says that, when a state gets an exemption, it has to have an administrative official who will deal with the Labor Department and will make sure that the Labor Department knows of all acts of the Legislature concerning the subject and all decisions of that state's highest court. Apparently, what they want is some liaison, and you have to have some administrative official to do that. Incidentally, that requirement is in my statute. This is virtually a copy of the regulation. The statute says: "The designated official shall have the power and the duty (1) to represent and act on behalf of the State of California in relation to the Administrator of the Wage and Hour Division," and so forth. Somebody has got to have some administrative authority. But I think that I would have to say in all honesty that that is the only specific reference that the Wages and Hours Division has made to the administrator.

C The motion is then that the staff, working with Professor Warren to the extent necessary, is to prepare some material that would indicate the agencies that might administer this act and the type of related functions that they now engage in. Then also we will try to see what other states do, too, if we can get that information.

[Motion seconded and passed.]

C In connection with that, I think, when the staff checks the Labor Code, you will find that the Labor Commissioner has a variety of activities of this general nature, including various devices by which he practically becomes the arbiter of certain issues between employer and employee or employee and employment agency. There may be some devices there that you might give some thought to.

Necessity for any garnishment procedure at all

C I would like to raise one other issue. To what extent do we eliminate all these problems by simply arbitrarily saying that a creditor cannot garnish the wages of a wage earner and then

define the wage earner as a fellow whose disposable wages are under such and such a limit. In other words, I think the man who earns a substantial amount of money should not be free from the reach of his creditors, even as to his earnings. But for the man who has a relatively small amount of money, in effect, what we are talking about is a compulsory assignment of his wages. I may be wrong in my recollection, but it seems to me that there is an absolute prohibition against assignment of wages to be earned in the future except for specified purposes. Am I wrong in that? Maybe my premise is wrong.

W We have Section 300 of the Labor Code which says, as I understand it, that you can assign wages now due but for future wages, you have a "common necessary" test.

C At any rate, it seems to me there are special policies that are raised by this issue. If we were to decide to recommend a minimum earning that cannot be reached by creditors, perhaps we do not get into as complicated a statute as we would otherwise.

C Why wouldn't we? It would seem to me that that would be just an exemption. It might cut out a lot of levies but, if you are going to have any garnishment of wages at all, aren't we going to have to provide an entire procedure anyway?

C Aren't you also cutting off wage earners from credit if you do that? After all, for the average person who is working, that is his only source of credit--his wages. He cannot assign them, but the law assigns them. Otherwise he does not have any security. The person I think you are visualizing who probably needs the protection the most also needs the credit.

C There is no question he is cut off from credit so he cannot buy and--

C So he quits his job and goes on welfare.

C All right, but on the other hand, aren't you, in effect, making the assignment of future wages compelled by law?

C Here is what he is saying. If the person earns less, for example, than $300 a month, you just cannot garnish, you cannot execute on his wages.

C That is what the federal law says now; it just provides a different level. It says it in a different way.

C If he does not like the federal level, he should just change the level.

C I just had this question: shouldn't we consider raising the federal level to something a little more in keeping with--

C But you originally suggested that it might cut through a lot of the details that we would otherwise have. I do not think it would cut through anything. It may be an exemption that, in practice, would cull out a whole host of individuals.

C It reduces the volume of what is going to go on, but it would not reduce--

C You would still have to have a procedure for the higher levels.

C But it might make a difference as to the agency that we put it in the hands of.

C It might, but the other thing that you said was that it would continue the assignment of wages and that is the thing I do not tie in with the limit.

C Well, that was in a way a tangent. But I think, when you analyze it, you will find that it is in effect an assignment of future wages.

C That is what garnishment is today.

C But it is rather painful and difficult generally to enforce assignment of future wages.

C More painful to the debtor than it is perhaps to the creditor because the creditor just keeps filing and piles up the costs of the repeated execution on the debtor.

C I imagine we will hear different views as to that factual premise because, if the procedure is so difficult, the creditors will just forgo it. Whereas, if they can serve once and plan on having some recovery come in every month, they may very well do so. You see, the creditor has to advance these costs that he pays to the sheriff and the marshal so he may just write somebody off rather than go through with it.

C In other words, the creditor might be willing to accept less over a period of time if he is sure it is going to be coming in than try to go out and grab a lot at one time.

C Sure, these burdens work both ways.

W My understanding is that New York has done just what you have suggested; they raised this $48 floor to $85. I think, however, the way they did it was to abandon the disposable income figure and just use $85 of income. They did not want the employer to have to deal with this troublesome problem of what is disposable income. They thought that $85 over $48 would always take care of the question what is disposable and what is not. But they went your route.

C I like that because it is so simple.

C I move that we consider some higher limit than the federal limit, the higher limit based on gross income. This will avoid this disposable income problem and other problems.

[Motion seconded and passed.]

Limitation of procedure to earnings; other types of assets excluded

C Your report has been limited to earnings. What about other types of property? For example, the money which a contractor owes to a subcontractor. Now, that can be a continuing thing--assuming you get there early enough. Is this a principle that, perhaps, should go beyond earnings?

W My report is limited to earnings as defined in the federal statute. Because again I am looking toward exemption from the federal statute, and you have just got to meet at least those requirements. You can have something in addition to that as you have suggested. I have not gone into this other problem. Professor Riesenfeld has some feelings about this other income problem and has given me some advice, the full significance of which I do not entirely comprehend. He is interested in going further along the lines you suggest in trying to make some provision for future income coming out of business transactions. I guess my own feeling on that is that there were enough fish to fry in this. It would, I think, be helpful to do something about that. Professor Riesenfeld feels very strongly that our law is all fouled up on that right now.

C Professor Riesenfeld sent me a copy of a provision of another state where they had combined something like this to pick up other types of income. And he said this is something you could consider, but it was not his recommendation that you broaden Professor Warren's statute. He thinks it is better to deal with earnings as a specific thing and then work on other income as a separate thing.

But it is very important. The case that really disturbs him was where the fellow invented a dental device and had royalties coming in. The creditor levied and sold the right to the royalties for a song and recovered a big windful to pay off a small debt. A better solution would have been to put a lien on the royalties and pay the creditor until he is paid, and then let the debtor have the rest. It is a problem that we need to look at; but, although Professor Riesenfeld thought it was something to consider, he did not think that it would be good to contaminate this act with it.

W I think the federal act is very much oriented toward the consumer-debtor. It does not fit the businessman-debtor as I see it. That is, this $48 floor would not fit the business transactions. I do not really think the debtor's remedies--if you are going to

have civil remedies in here--would fit business transactions. I do not think at least some kinds of administrators would be very appropriate for looking into business transactions.

Continuing levy procedure

W The idea of a continuing levy is a matter which I would like to have your advice on today.

C What are the Commissioners' views with regard to that issue --the desirability of the continuing levy procedure?

C I have not heard anything against it that amounts to much except your suggestion that, perhaps, there might be some great advantage to creditors that we do not know about. On its face, it certainly appears that it is advantageous to everybody to have a continuing levy. I would like to know what the arguments are against it.

C I wonder if anyone in the audience, speaking from experience in this field, has any reaction to this particular suggestion?

C Mr. Chairman, we have the same basic type of provision for a garnishment of an employee of the state right now. I believe you just file an abstract--for example, if he works for a college, you file with the bursar's office--and it becomes a continuing levy up to the amount of the judgment. In this situation, the writ does not expire in 60 days as it does now on execution. So we do have a type of provision right now in California that is comparable to this.

C Mr. Chairman, I believe the gentleman was talking about Code of Civil Procedure Section 710, which is the abstract provision allowing you to mail an abstract to a public entity employer. But, unless I am mistaken, I do not believe it is continuing. I believe it merely catches the income then owing. I might point out at this time, from the creditor's standpoint, we are very much in favor of the continuing levy, and I think from the debtor's standpoint the ultimate costs to him are going to be a great deal less. We also sponsored a bill that was introduced last year, A.B. 939, which would allow the abstract type of levy against the private employer as it is now available against a public entity. This passed the

Assembly unanimously and got to the Senate Judiciary. But it was bogged down there and sent to interim study. I do understand that there is definitely going to be an interim study of it next month or the following month.

C Who objected to the bill?

C Of course, the marshals and sheriffs had a self-serving objection. But the main objection was from the clerks because they did not feel they had the personnel to handle the monies coming in through this procedure. This is a problem. However, they are handling funds under the present Section 710, although certainly not in the volume that this would create. We suggested that--and this is still something that we are exploring--if we add an extra dollar to the fee and give this to the clerks, perhaps this will fund additional personnel. I have not pursued this in detail with them. I plan to next week, but I believe they are favorably disposed towards it. Maybe this will solve their problem.

C Under this scheme that Professor Warren has devised, the money does not go through the clerk's office. You just send it to the creditor. You do not bog down the scheme with a lot of bookkeeping and extra public people. You might find that this procedure turned out to be a better and more effective one than yours, at least as far as the mechanics of reducing the cost.

C Any further comments from the audience?

C Yes. I am Andrea Ordin from the Attorney General's office. We went over basically the same policy questions when we were discussing whether to support A.B. 939 that you have already discussed. We considered whether, if it is more difficult for the creditor to have to put in a new levy, do we thereby cut out a lot of levies on wages which would be oppressive to the debtor. Our position has been that, even after judgment, the taking of wages causes such catastrophes to the debtor that it is a procedure not generally acceptable. So we start from the position that, perhaps, it would be a good idea not to have a continuing levy. However, we did not have facts to support a reasoned decision either way as to whether the present, more burdensome procedure is really knocking out levies that should not be run. So we did not oppose A.B. 939. To answer your question, I do not think there was any debtor opposition to A.B. 939 on those grounds.

C What is your view on the issue whether there should be any garnishment of certain wage earners at least? Do you have any figures indicating to what extent garnishments result in people simply going on welfare? Are there families going on welfare?

C We do not have good figures to support the allegation that people will go on welfare. Certainly, the "one garnishment" rule does not solve the employer-employee problem. The employer is often going to get more than one garnishment and, therefore, there will be no prohibition on firing. In any event, the employer will fire him on other grounds. And so, the debtor is now without a job, jobs are difficult to find anywhere, so I would not be surprised if he goes to welfare.

C But if this proposal works so that, for many employers, it is just a matter of putting the garnishment in his IBM machine, the problem might be solved.

C I think taking the burden off the employer is a very laudable goal.

C Mr. Chairman, our AB 939 had another provision in it that gave the employer a dollar or two from each abstract levy. It was the hope, and we had the support of large corporate employers in this, that this would sweeten the bill a bit and cut out the harsh result of having the added bookkeeping expenses and so on.

C Of course, if we can avoid having a lot of paperwork where we have to add fees on to cover the costs, that would be the most ideal way to simplify the system. This is just another recommendation, but I cannot see why the check has to go to the county clerk and then he sends the check to the employer.

W It shrinks when it goes to the county clerk.

C Yes, and the debtor has to pay the cost of that, and there is a delay in getting your money, and it just--

C Does your proposed bill include not only an abstract but some other directions from the court or clerk that this money is in fact due or has not been satisfied?

W Under this rough proposal that I have made, there would be two situations. One is where there has already been a hearing and, in that case, the court would tell the employer the exact amount to pay during a pay period. The other case, in which there would not be a hearing, the clerk would tell the employer what the marshals are telling them now and would give them the schedule. But the main thing is to tell the employer that, if the schedule does not fit in exactly here--and particularly if he has any questions about disposable income--, he should pick up the telephone and call the marshal; he should call somebody who knows, which will probably be the marshal. Because this is a difficult decision. The way it is now, the employer is getting very little assistance. That is the weakest point in the federal act, and I would hope that you could do something to help the employer so that he can get the right amount deducted.

C The thing I am concerned about is when there is a question, either by the employer or by the employee, who is going to answer that question? Is there going to be a new separate office created, or are we going to use the present clerk's office with an additional clerk, or is it going to be the marshal's or the sheriff's office?

C We haven't answered that.

W It would have to be local. I am convinced it has to be local, and I do not know enough about it to know whether it should be the clerk's office or the marshal's office or to what extent they are connected. I have a feeling that, if you pass something like the statute I have drawn, it would evolve maybe in different ways in different localities. It would be preferable, I think, to indicate clearly who has the responsibility of issuing information on this. I was telling the group that, in Los Angeles, the marshal has been very reluctant to give information. For one good reason: they do not know. I am taking the marshal out as a messenger. I would leave him open as a possibility for, in effect, being the secretariat here.

C I think what would happen is you would name some official to be responsible for administering this act. He would have some in-service training sessions for these local people and he would give them the information and train them so they knew enough about it. Certainly, we would be better off if that were done than if nothing is done.

W The way it is now, you have to pick up the phone and call Wages and Hours. God knows what they would tell you.

Further discussion of the total exclusion of wage garnishment

C There was an implication to an early question that there is some question about whether there should be any wage garnishment at all. I am not sure that that is a really valid method of shifting the responsibility for the poor. That is, I don't think it is sound to say we are not going to have a creditor remedy because it puts people on welfare. Because, if we do not have the remedy, that creditor will have to swallow the apple. I am not so sure that is a good approach to it, but what about the experience in other states? You mentioned a while ago one state--Connecticut--has proposed that there be no wage garnishment at all. Are there any that now have this?

W Texas has never had wage garnishments. There are two other states that have not had wage garnishments. Pennsylvania is one. As I said a while ago, Connecticut and the District of Columbia will have versions of the Uniform Consumer Credit Code which completely abolished wage garnishment. And I know the people in Massachusetts are acting along that way; Andrea may be able to tell you more than that.

C The ones you mention are the ones that I recall. It has obviously been the position of our office that this is a matter that needs serious study. Perhaps wages should be exempt from all garnishment and attachment. Unless there are facts and figures--and we do not have them, and I do not think the creditors have them--indicating that the low-income consumer would be unable to get the credit that he needs if we eliminate wage garnishment.

C What security could he put up other than his wages?

C The trouble is when he lives in the future like that, he gets himself in such a bad shape that maybe he--

C We are involved in the field of social policy and--

C I know we do not have figures to submit to you in this area. We see unfortunately so much of the abuses, we sue people who are selling to low-income consumers, selling five-year old refrigerators for $900.

C Debtors buy these cars and then creditors repossess and sell them and try to get deficiency judgments. You have cases where somebody has a hundred dollars and they buy a car worth two hundred and end up paying nine hundred and then still do not have the car.

C Yes, but on some jobs they might need the car and if we deprive them of the right--they need the car.

C Doesn't the proposal provide an escape valve by creating a simple procedure where the debtor can come in and say, "I need all my money, you can't have 25% or any amount."?

C That is the way I feel. I think, if the debtor has the money he should pay, unless he cannot live if he does pay. That is another thing. But I would not totally exempt him.

C We are not foreclosing further study of the possibility of total exclusion.

C I don't think I would give serious consideration to a total exclusion of execution of wages.

C Well, I don't know how it would work. I cannot believe that it would benefit the poorer people--not the poor people who do not have any work at all, that are already on welfare. I am concerned about the man who works and makes a minimum living. Like the school teacher who goes on welfare for two months of the year.

C What we are going to do is going to have only a limited effect on credit--if any at all--because the federal law has the significant limitations that affect the availability of credit. We are not going to be be able to avoid the effect on credit that results from the federal law.

C I am suspicious of the idea that total exclusion really benefits anybody, but I would not think we would foreclose that if somebody has some evidence to justify it.

W I just want to second what Mrs. Ordin said. I have looked at the literature and it is inconclusive on the matter of the effect on credit. I would say, for present purposes in the State of California that, if you give a debtor a good shot at coming before a judge and saying, "It is a disaster to me" and showing that in his particular case he has to have this money to support his family, I would settle for that.

I do not think California is ready to abolish garnishment right now. I would say, however, that there are a lot of people--including some very respectable businessmen--who say you have to put more humanity into our garnishment law than it has now. I was talking to a retailer the other day who said garnishment gives him a very bad name.

[BREAK IN TRANSCRIPTION]

C I am Harvey Freed, San Francisco Neighborhood Legal Assistance Foundation. As you know, we see thousands of poor people, and the area of real concern to us is that most people caught in the circumstances which we are discussing here in fact never get to counsel. This is due either to their inability to speak English or their ignorance or the fact that they have been sufficiently intimidated so that they resolve the problem on their own. We would hope that the Commission would consider a minimum level of exemption and an automatic recognition of the exemption that would not necessitate the individual's going to court. Most of the people, we feel, never get to counsel and never know about their remedies even if the form is printed in English, and even if they speak English. Therefore, their only relief will be what is automatic under the law. We feel, in short, that in most of these instances counsel does not represent these people in claim of exemption procedures or any of the remedies available to them under current laws.

C What about the 75% exemption rule? Is that too little?

C Well, we feel that, for our clients, it is too little. It is certainly an improvement, but it is still too little. It is still sufficiently coercive in most circumstances that the relief they get is not sufficient. We do not have the statistics. I would love to say we have the statistics that you are looking for. We do not have. We just have our day-to-day experiences.

C If we had an automatic procedure where the debtor simply fills out a card and gets a hearing. Are you saying that you do not see these people--

C They just do not do it.

C Well, it is not in that form to do right now. But if they could sign, do you think that, as an automatic thing, they would all sign it? Just to get to the next pay period? How does the procedure work under this act? If the debtor signs the request for a hearing, is the money held in limbo for 10 days? The money is held, isn't it?

W Under this proposed act, you do not even contact the employer until you have contacted the debtor and asked him if he wants the hearing.

C If he says there is a hearing then--

W Then it is not paid out and you have a hearing hopefully as promptly as possible.

C You do not even contact the employer at this point?

W You do not contact the employer until you have notified the debtor that he has a right to a hearing.

C Well, what happens if he says I do; you still do not contact the employer until after the hearing, right?

W If he says nothing, then you contact the employer immediately and immediately start taking the money. If he says he wants a hearing then as quickly as possible you have a hearing. I would hope you would have the hearing as quickly as you have on the common necessaries today. After the hearing, you send out an order to the employer, saying "Pay this amount" if there is any amount to be garnished.

C Isn't it going to be a common thing--if there is a 10- or 15-day period which is often going to encompass another pay period, and there is no withholding of wages--for the debtor to automatically sign every one of these so that he will get another pay check.

W You would get a short delay under this statute.

C I am just saying that every debtor is going to sign this automatically because that will cause a 15-day delay or whatever and mean another pay period when he gets the whole pay check instead of three-quarters even if he knows he is going to lose on the question of a showing of need.

C Who says, though, that he is going to take a day off from work and go to the hearing?

C He is not even going to show up.

W The case that bothers me is where he does not show up. If he is serious enough about a hearing to take a day off from work and go through what apparently is a trying--

C I am just worried about the mechanics of the thing.

W If he just does not show, then I think he has taken us for a short stay.

C Maybe it should be like a traffic ticket where you post bail which you forfeit if you do not go.

C The hearing is the whole problem. Many of these people do not want to go to the hearing because they cannot afford the hearing. So they will do whatever they can to resolve the problem. They cannot afford to lose the work. They would rather favor that creditor. In other words, whichever creditor got them, they will take care of that creditor.

C What kind of an exemption would you need in terms of gross wages? Would $325 a month cover these cases?

C I am not in a position to give you direction on that. I do not have the statistics available to quote. We would like to see a complete exclusion, but the state is not ready to give--

C You would exclude the guy making net $2,000 a month?

C No. I realize that you cannot do that. The problem is the dollar level, and I certainly cannot say what that dollar level should be.

C I wonder whether you know of any studies that would indicate a level. It might be simpler for the creditor, the employer, and the employee if we had, as was suggested earlier, a fairly high exemption. But we would certainly like to have any information that is available for review.

C If we want to deal with the problem, we need to know what you are suggesting in terms of a dollar level. A realistic level. One that covers your people but does not let the lawyers or doctors avoid paying their bills, for example.

C We would certainly be willing to put some effort into determining what studies have been made. There are a lot of activities that are taking place in our area. There may be a study that has been made that I cannot think of at this moment, but I could check on it.

C If you could find some, would you send it to us?

C To what extent are your clients members of unions?

C Not to a great extent.

C Yet they are wage earners?

C Yes. Many of the people we have are from minority groups --Spanish, Chinese, Blacks, and so forth. Many of these people do not belong to unions. They are excluded from unions for one reason or another. They are really on the lowest rung of our economic ladder. Most people who come into us who belong to the unions are not qualified for our services as it turns out. We refer them to the private bar.

C It seems to me that the class you are talking about is a special class that needs special treatment, and maybe that could be given. I do not mean by segregation of race or creed, but by segregation of wages. On a low income, the amount of exemption could be greater.

C This is one of the things we wanted to consider--a blanket exemption at a level that would cut out a lot of these problems.

C If my personal experience is of any use to you, I am not in a position to give you numbers, but we have maybe two to five claims of exemptions every Tuesday of every week. It is rare that the defendant does not appear. I represent six collection agencies. Rarely does the defendant not appear. Now, I may be talking about a class of people who do not get to O.E.O. at all.

W How prompt are those hearings after levy is made?

C Well, you have 15 days. You have 10 days' notice and then 5 days for the hearing.

W Is the hearing usually held within that time?

C Oh, yes. They are held in the morning on a law and motion calendar before a judge, not a referee.

C I think the sense of the Commission is general approval of the continuing levy procedure, but I hope we will give some further attention to the problem of the first-come, first-serve rule.

C That is a change in the system because now the creditor tries to get what he can on one levy and this does not preclude somebody else from trying to grab his share the next pay period. This new procedure is going to tie all the assets up for one creditor for who knows how long.

Abolition of "common necessaries" provision

C What are the reactions of the Commissioners to the abolition of the common necessaries exception?

C Was the purpose of the necessaries exception the thought that this exception would stimulate credit where credit was necessary when this was enacted in 1870 or whenever it was?

W There are different views on that. But that is my understanding of it.

C It encourages grocery stores presumably to give credit to people who need the groceries to eat, which is a system that probably made more sense in 1890 than it does today.

W I have seen different views of it. The only one that makes any sense to me is the one you have just expressed. Since it goes to the question of what the credit is granted for, it must be to induce the granting of certain kinds of credit.

C It is probably analogous to the exemption from the minor's disability. As I recall, there is a similar type of arrangement where a minor may be liable after a certain age for necessaries, but he cannot be held liable for other debts.

W My point on this is that, whatever its purpose is, it does not serve much good. I guess one of the things I object to is that it seems a rather arbitrary way of distinguishing between the priorities of creditors. I think you can get some pretty disreputable creditors who are selling something that would be considered a necessary of life, like certain kinds of furniture.

C I think you might define "common necessary" more narrowly. But, if you are concerned with the question of what will or will not force an individual to go on welfare--if he can raise credit and can buy food and clothing and shelter that may be some inducement to him to keep going instead of maybe giving up and throwing in the sponge in adverse circumstances.

C I have heard--I do not know whether it is true--that, in some more impoverished areas, people pay about twice as much for their food because they have to buy it on credit. I suppose it is also because they buy small quantities. But in areas where a wage earner has to rely on his credit, he is paying a lot more than if he could go to Safeway and buy his food with cash. Of course, in the more wealthy areas, they may want to get credit for other reasons, but those people can afford to pay it.

C I think that, if we got rid of this exception, nothing would change. People who need food would go get food stamps or something else. They would be better off doing that than they are spending twice as much buying on credit. Actually, the proposal would be to the advantage of the debtor, except that it might affect his credit for food and the necessities of life. But the federal law deprives the debtor of credit in this kind of case anyway. Because of the federal exemption, the creditor is limited in garnishing the debtor's wages no matter what the debt is for.

C In other words, the argument is that people are not going to be able to get credit, and they are going to starve and go unclothed. But the federal law, having no provision like this in

it, is going to preclude the person who is going to loan the money for food from doing levying anyway, isn't it?

W The federal law applies to all creditors whatever the source of his debt. It sets up a floor if a man makes less than $48 disposable earnings; there is no way you can reach any of his earnings. Above that, you can reach part of his earnings. But, to the extent that the federal law restricts what a creditor can get, to that extent the federal law presumably limits the extension of credit. Presumably. But, I think, only six states have this peculiar provision we have which tends to favor one creditor over another. Now, the basic objection I have to the exception is that I think you tend to lose sight of the most important point. And that is, what effect does it have on the debtor?

C You say the federal act does not touch this. You could not give the creditor any more than the 25% in any case.

C That is why I say the impact of this change on getting credit would be nothing because the federal law is the thing that has the impact. If we have this exception to our exemptions, it will not work because the federal law will be the floor anyway. Above that floor, it is not worth having.

W My argument is that you should eliminate this exception which permits garnishing in hardship cases. One thing we do know in this area is that there are hardship cases. That is indicated by the writing and testimony that you get. You get these horrible cases, and people say--"Can this be allowed under our system of government?" I think, and there are some reputable leaders in business who are willing to say--"Okay, we think that is too tough. We think, if the debtor can come in and persuade a court that he has got to have this in order to support his family, there ought to be a little give there."

C Does the abolition of the common necessaries exception also include the abolition of the "wages to other workmen" exception?

W I would like to virtually withdraw from the discussion on that because I cannot find whether that other exception is used or not. I thought that maybe the people here would help us on that.

I do not know whether that other exception applies to anything or whether it is just a dead-letter on the books. I guess for the kind of case we normally think of in garnishment--the really low income employee--the exception has no application because he does not have employees. But it might apply to other cases quite validly.

C Well, it could apply in the construction industry. Many times carpenters will have a fling at being a contractor and find they cannot make it and then go bust and owe a lot of wages, and then they go back to earning wages. This could affect them, I think. Does anyone in the audience have any experience with this particular exemption which allows a preference to a creditor who is a former employee of the debtor?

W This act only applies if there are earnings from the debtor's personal services. The debtor has personally earned that money. There has to be a case where, after the debtor has personally earned that money, he has an employee that he owes money to. I would guess, in the great bulk of the cases, the exception is just inapplicable.

C It might apply to domestic help or a woman's babysitter.

C The only illustration I know of is the man who has gone out and contracted and employed men, and then he goes bust and goes back--as they say--to working with the tools. This happens with some frequency in the construction industry, but generally the people left holding the bag nowadays are the Health and Welfare funds and the pension funds. They are amply able to take care of themselves.

C Where is this provision?

C Well, Section 690.6 of the Code of Civil Procedure provides for this exemption from the exemption (1) for debts for common necessaries and (2) for money owed to an employee--"debts . . . incurred for personal services by an employee or former employee."

C We do see in the office various types of businesses that fold up. Often, of course, they have a corporate structure. But sometimes an individual will employ salesmen selling encyclopedias door-to-door and so on. These individuals, when they close down the business, then of course, do go and become employed elsewhere. The former employees file their wage claims with the state, but generally they are not enforced that strongly. It could happen that there are employees who would want to go after an employer. But, it seems to me to be a complication in the law that does not seem to protect too many debtors or consumers. I am sure we could all find a hypothetical.

C If the debtor has got a lot of employees, each employee is not going to get much anyway.

C Under our present scheme, if we simply adopt the federal exemption, then everybody would be entitled to 25% above a certain level unless the debtor can show a special need to keep more. But for the needs of the debtor, every creditor, regardless of the nature of the credit he extended, would be entitled to 25%. Even if we were going to create an exception to that, we could not go below the 25%, and we would have to say the other creditors get something less than 25%. In effect, we would have two classes of creditors, and I do not see that we want to complicate our statute that way.

C I would move we approve the abolition of the "common necessaries" exception and the "former employee" exception.

[Motion seconded and passed.]

Improvement in manner in which debtors may assert their rights to exemption

W The principal thing I have done here is, when you notify the debtor that his pay is going to be taken, you tell him that, if he wants a hearing, he may simply fill out a form that you have sent him with the notification. He does not have to go out and get a form from a lawyer. He does not have to find the levying officer. He does not have to do any of those things. All he has to do is fill out this form and put it in the mail and send it back to the address that is indicated there. Now, that is the simplest way for him to claim his rights. As I said a while ago, the debtors have been complaining for years about the difficulty of claiming their rights and exemptions. This is the simplest way that I could think of claiming it.

C What exemptions are you thinking about?

W The hardship exemption.

C That is the only exemption. The others are automatic. The federal amount is automatic.

W The federal government has one guiding principle, that is, that their restrictions are automatic. Under no circumstances does the debtor have to claim them.

C What if there is an improper garnishment? In other words, the debt has been paid. The creditor has already been paid. You have not provided a place for the debtor to raise other problems. The creditor's bookkeeping may be fouled up or something.

W I did not, but there ought to be some way in which the debtor can indicate other objections he might have.

C I do not think he is going to get this notice before the creditor has tried in some other way to get the money paid.

C No, but there are mistakes made. The creditor's IBM machine may not have worked properly, just like when you try to cancel a subscription. I know of a hospital in the very same situation. They tried to execute on the bill, but the debtor had paid it. They did not know it. He could not speak English, but he had written a check, fortunately.

C There may be another thing you might want to cover. We have a form, but there is nothing in the form for the situation where the debtor has appealed and bonded the appeal so that the creditor would not be entitled to execution.

C You do not want to complicate the procedure or the form so much that nobody will understand it. The debtor would not have filed an appeal without a lawyer, and he will not be that ignorant. We do not have to worry much about that. Aren't we trying,

primarily, to protect the man who does not have an attorney--who has got this notice that he is going to be in default if he does not do anything about it?

C I do not know how small these things are. It does not take much to appeal a small claims case. You cannot have any attorneys in there.

C Maybe the statute will not be completely accurate but, if you make it completely accurate, then nobody can understand it.

C You could have another box covering "other reasons."

C What about the attorney situation? Suppose you have a contested trial which goes to judgment, the judgment is in favor of the creditor, and the creditor starts executing on his judgment. Is the creditor going to be able to deal directly with the debtor?

C I hope he is. Why not?

C Why do we break down the relationship between--

C If he has got a judgment now under existing law, he does not have to go out and ask the debtor's attorney if he can execute on it. He just goes out and does it.

C Well, are we in favor of improvement, and then we will get into the details at a later date?

C The principle everyone agrees with.

Granting debtor's private remedies for enforcement of garnishments

W This is another controversial issue. The debtors' counsel now are looking at the federal act to see whether they can imply a remedy into that act. Some very intelligent counsel believe that they can use the precedents under the Civil Rights Act and the precedents under the SEC to imply a civil remedy and sue. I suggest

that you have an express statement that, if the employer withholds too much, the employee can recover it, which he can probably do in some contract action now. If the creditor receives too much, the debtor could recover it from him as well as a return. Now I have put something in here that says, in effect, that, if the creditor knows he is holding money in violation of this statute, if he is really a bad guy, then the debtor is encouraged to bring suit against him to recover a hundred-dollar penalty. This is the Truth-in-Lending approach to this issue. The idea here would be to answer the question--what are your remedies? Why can't we set them out in the statute rather than have people thrashing around and trying to apply private remedies, abuse of process, and all that sort of thing? Why don't we have an express remedy? If we have an express remedy--the people presumably that we want to get here would not be the employer but rather the creditor who is flagrantly abusing the statute--there ought to be some "kicker" to get an attorney to file suit in that case.

C I am not sure that a hundred dollars would be much of a "kicker." I would provide in the Comment at least that this is not to be the inclusive remedy and, if you could show fraud, malice, and oppression, you might be able to get punitive damages.

W I agree; I would want to indicate that this would not be the exclusive remedy. The fraud remedies would be an appropriate thing in such case.

C The employer is caught in the middle of one of these things.

C I know, but we are talking about two categories. I was only talking about the creditor who knowingly is withholding more than he is entitled to. I think that the employers are entirely different.

C Well, the creditor cannot get it unless the employer pays it.

C But the employer does not necessarily know. He is following a mechanical formula. The creditor may be proceeding in two or three different ways to satisfy his judgment. This may be just one of several ways. The debtor may pay off and the employer, without knowing this, may continue to send out the money. The creditor should know that he has received it. Maybe the creditors will not know, but

maybe they will have to have devices which will tell them when they have been paid. If the creditor actually knew that the debt was fully paid and he continues to accept payment, then you have got a fairly good case of fraud.

C We will see the statute provision in a while, but, as a matter of philosophy, private remedies are the best way of enforcing this.

C They are probably available anyway. Debtors do not have the hundred-dollar penalty, but I think that they have an abuse of process remedy.

C Or punitive damages for fraud anyway. But there is no harm in putting something in.

C I would like to echo the proviso that the hundred-dollar penalty should not be an exclusive remedy. Civil Code Section 3369 now gives us the power to enjoin unfair business practices or things that are violative of the law, and there are also the traditional tort theories that you have. All of those would be ways that our office and the neighborhood legal assistance offices would enforce any pattern of violations of this law.

C The typical problem, as I see it, that you are going to have in practice is that it is very easy to charge fraud if a creditor has relied on one of these mechanical devices. I suppose creditors, as well as employers, are going to go to that more and more. It is the same thing as trying to cancel a subscription. But that is a matter of proof.

C I have a basic question as to the desirability of proliferating these private actions for every prohibition we make. Subject to checking the Labor Code, I think there are penalties and misdemeanors if you willfully withhold the wages of an employee or you do not pay him when they are due. I frankly would rather see those remedies used than for us to enact a whole new set.

C What are the recommendations? The recommendations are (1) you have a right to sue the employer if he did not pay you what he should have paid you and (2) you have a right to sue the creditor if he received money that you are entitled to get and he was not. The

additional suggestion is that there be a minimum punitive damage provision of a hundred dollars in the event that the creditor keeps the money when he knows it is yours. Now, what is radical about that?

C The difficulty always is that this can be used to harass the creditors improperly, too. It is not true that people do not file faulty law suits; they file them all the time.

C Well, they can file a phony law suit anyway. They only get the hundred dollars if they win it.

C This hundred dollars is not against the employer, is it?

W No. There is no penalty against the employer. In fact, I think, when you look at this draft, you should build in some protections which specifically state that the employer never has to pay anything more than the amount of an order if an order is issued or the amount that he can determine from the formula the writ contains.

C You know, what bothers me is, if the employer does pay pursuant to that and makes no mistake, he should be completely protected; the employee should not be able to do anything.

W I tried to say that, but I think you can make it clearer.

C Have in mind that you are dealing with a continuing employer-employee relationship, and we are trying to maintain this relationship. You are talking about 25% of this man's wages. If, by mistake, more than 25% is deducted one month or one pay period, an adjustment can be made in the future.

C What do you think the employer will do to the employee after the employee has sued him?

C He is probably going to find ways to get rid of him.

C I have been surprised sometimes the extent to which a lot of employers go to protect their employees. I have had more experience with having an employer ask me how he can protect this man than I have on the other side.

C I do not disagree with that, but I do not want to provide penalties that can be enforced by employees who are disgruntled.

C I agree with you. I think it ought to be explored to see if there are enough protections for the employer who is acting in good faith. But this idea that employers are firing their employees for this is, I think, not as normal as is assumed. But if you make garnishment so difficult that the employer cannot operate--particularly a small employer--then he is going to fire the employee. But there is a lot of sympathy on the part of many employers for their employees in this situation.

C Incidentally, going back to our continuing levy procedure--we have to give some thought to whether by such a procedure we give the creditor an interest in the continued employment of this employee. We certainly would not want that to be implied.

C Are creditors still using the execution device on wages to a considerable extent?

C I think so. I do not think there has been any let-up.

C Do you find the debtor will, in any demonstrative percentage of cases, take bankruptcy or quit his job or flee the jurisdiction?

C I personally have never been able to determine a single instance where garnishment forced a man into bankruptcy. It might figure in with other things. A single garnishment on a man's wages, in my experience, has never forced a man into bankruptcy.

C This continuing thing might be a little different though.

C Yes, that is right. He might decide to quit his job and go find another one and see if he could conceal himself.

W That would be a little tough to do right now.

C But that would be one objection to the continuing levy--that the employee might quit his job.

C The continuing levy does not really change anything. Now, if the debtor is still working there, you keep going back. He is, therefore, under the same inducement to move now.

C Wouldn't it be possible, where the debtor has a hearing, to have either a commissioner or whoever would be in charge of this matter determine that, if there is a continuing levy, it would be limited to a certain amount less than the 25% if necessary?

C Yes, that would be the purpose of the hearing.

C Professor Warren says that remedies are effective in providing an incentive to employers and creditors to comply. Does that mean employers are subject to a penalty?

C No. The employer is responsible for the payment of what the employee is actually due. But he is not responsible for the hundred-dollar penalty. That was against the creditor.

C What would the employee's remedy be if the creditor failed to notify the employer that the debt was paid, and the employer went ahead and took some money out and sent it to the creditor? Can the employee do anything against his employer in that case?

C That is the kind of case where you get a problem. But it is more a detail than it is something that ought to be considered now.

[BREAK IN TRANSCRIPTION]

C If we do not make the statutory remedies exclusive, we do not make anything clear. That again might require a little investigation.

C If you have remedies in the statute, even if they are not exclusive, people will tend to use them because it is easier.

C It is desirable to make the remedies exclusive as to the rights of the employee. I am not talking about the rights of the Attorney General to do anything. But, if you are satisfied that the remedies are adequate, it might be better to make them exclusive. It might simplify the whole thing.

C You might not want to make them exclusive if the debtor can show actual malice on the part of the creditor.

C You might want to write in the statute that the employee is entitled to exemplary damages.

C Are we talking about a penalty if a creditor negligently levies?

C There would be a liability, obviously. If he did not pay back any excess, you could sue him. He would have to give the money back.

C Are we going to impose a statutory penalty for negligent use of court process?

C No. There would be a civil action, and the debtor would get back the money the creditor got in error. You have that today.

C If it is not intentional, that is all that I understand is contemplated. That you have the normal remedy. Whether you put it in the statute or not, the creditor is obviously going to have to give back the money that he took that did not belong to him.

W I put this in as a desirable clarification. I gave a talk last year in the East to a number of lawyers on Title 3, and I think the questions that were most prevalent were, "What are the remedies?" Each man in each state has his own set of remedies that he would suggest. It seemed to me that it would be a welcome

clarification to at least state that the employee has a right to get his money back. All that is saying is that, for whatever reason the money has been taken from the debtor, too much has been taken, and he clearly has the right to get it back. The only instance in which any attempt has been made to impose a penalty is the one case in which the creditor knowingly retained that money in violation of the statute. There, it seems to me, rather than fight about whether some civil remedy is implied, there should be a statement that there is a penalty in that case. It is a troublesome question to what extent that should be exclusive. I suppose, in the case of real malice, a debtor would feel very put out if he did not have a right to ask for some form of exemplary damages or punitive damages, if he can get them, in addition to that. But this is a very modest proposal, actually.

C This is the minimum you could give. This is the weakest possible one, other than a criminal penalty which you could never get anyone to enforce.

C My suggestion is that we might write it out clearly, make it the exclusive remedy, and put in the provision for exemplary damages. There might be some advantages to this if it can be drafted properly.

C Do you want to try and codify the existing law on wrongful execution? Would the statute affect the abuse of process liability, for example?

C That is something I think we will probably have to study. It might well be easy to codify it if it were for wage earners only. I am not talking about it for anybody but wage earners, but it might be ill advised. I do not know enough about it to say now.

C I question the whole desirability of getting into the matter of remedies and trying to legislate on that subject when we do not have it in the law now.

C Why don't we see what we can come up with on it?

C Does the present proposal have anything to do with attorney fees and costs in the action to recover?

W It says the debtor can recover attorney fees.

C It does not say anything about the creditor if the debtor abuses his rights to try and go for punitive damages. I think the right should be reciprocal.

C I do not think, in a wrongful attachment suit or a wrongful execution suit now, you get your attorney fees if you prevail.

C I think that is purely a common law remedy without attorney fees.

C Do you think if a fellow wants to get punitive damages and he loses then he should be punished for making that claim?

C There is a lot to be said for that.

C We have a lot of people out hustling litigation now. It is costing somebody a lot of money to defend these suits. I doubt it if the recovery of attorney fees whould do you much good though in a wage case.

C This is getting back to the basic issue we faced in eminent domain. What reason have we really got to award attorney fees in this case more than in any other case?

Giving administrative enforcement powers to state officials

C The next issue is one that we have already discussed, but I do not think the representative of the Attorney General's office was here at the time. It was suggested that the Attorney General might be this "watchdog" state official. Would you care to react to that?

C I think, right now, we are extraordinarily understaffed, particularly in the consumar fraud area. Under the new Attorney General, whether the staff will expand or contract. is hard to know. It seems to make sense; we would be watching for abuses

of this law in any event. Were the Legislature to feel that we were the appropriate agency and give us the money and the manpower and the clerks, it would seem to be all right. Certainly, I do not think that setting up a consumer control to protect this law would be desirable.

C No, I think we are in general agreement that we should not have any new agencies viewing this. But Professor Warren indicated that, unless we had something of this nature in our statute, we would not get an exemption from the federal act.

C We had that same thing in the health care plan. We are enforcing that also as an adjunct in our budget to the consumer fraud area. So it is the kind of thing that we have taken on in the past.

C What other agencies would be possibilities for enforcing a statute like this?

C Somewhere in Professional and Vocational Standards, I suppose. There is a new office there under a new consumer affairs name.

C Would they do something that would be related to this area that we are talking about here?

C Not directly related, but it is the only other agency that supposedly has a consumer orientation with civil servants, clerks, secretarial help, and investigators.

C How about the Department of Labor?

C That has been raised. We were going to look into that.

Abolition of levy of writs by marshals

W I do not know how practical this is, but I would certainly urge you to investigate the possibility of whether--when all you are trying to reach are a debtor's wages and the creditor knows

where that debtor's employer is and what the address of the debtor is--you could not have service by mail with a return receipt requested. By doing that, you could avoid the considerable expense that we now have with the marshals. I do not purport to have the practical know-how to say yea or nay on this. But I put this before you because I think it is something you ought to consider very seriously. I think that somebody who has intimate personal experience with those officers should probably give you some further advice.

C One advantage you have when you are dealing with employees of the courts is that the Judicial Council is a coordinating body, and they would provide training. You have an agency that could coordinate this. I do not know if you have anything like that with the marshals.

W Maybe I am over-optimistic about this, but I think the staff of the clerk could be taught to do this work. I do not know how you would try this out. The trouble is, I guess, that you either go for it or you do not go for it. But it certainly seems to me that something that would be worth looking into is whether we could not simply avoid the problem of having the marshal. Of course, in some states, it is worse than this. In Chicago, you have to accompany the fee with a $10 bill.

C What is the procedure now? The debtor is not served at all, is he?

W No, he is not. He gets a copy of the writ when it is served on the employer. A.B. 2240, passed in the last session, says that the debtor gets a copy of the writ.

C How does he get the copy? Does the marshal call on him, too?

W In the mail.

C So they have started a mailing system.

W The principal change that I am suggesting here is that I think the clerk--or rather the creditor's lawyer working through the clerk--would have the process mailed first to the debtor and tell the debtor he is going to garnish. Then, subsequently, when

you are ready to reach the earnings, he mails the writ or order to the employer with some assurance that it got there. You do ask the employer for a return under this statute, just as you ask him for a return under our present statute. He mails the return in now. So it really, perhaps, is not as revolutionary as it sounds, and it seems to me that it would be a much more modern system than what we presently have.

C Who is the employer of the marshal? If he a court officer, or what?

C He is a city officer. The sheriff is a county officer. They are in competition with each other.

C The marshal is appointed by the court, though?

C Right.

C Is that a political or--

C It is supposed to be nonpolitical.

C How do you get to be a marshal?

C This depends on what county you are talking about.

C In Santa Barbara, it is elective.

C It is the marshal of a judicial district, not of the city.

C Are there a lot of employees of marshals who are going to be affected if we did this?

C I was wrong earlier when I said if we do this, either the marshal or the sheriff would be out of business. They really will not be. They will still be needed in all situations where they go

out and physically attach the assets. Maybe we have jumped just a little bit too fast in thinking about ruling a marshal out. They are still going to be in the business of handling attachments or executions generally. Maybe they are the logical persons to put in to do this to.

W They are going to have plenty to do.

C Yes. This is not going to put them out of business at all, because we are just talking about wages now.

C I am just trying to figure out politically--if you take the function away entirely--will we have a lobby against the bill.

C I think I can answer that because I drafted and fought through this A.B. 939. Yes, they do have a lobby, a fairly strong one, and so do the sheriffs. They were quite effective in the many hearings in the Senate Judiciary, I think primarily, because it was right before elections. But they do, and they will actively oppose it. Their objections are very self-serving; there is no other explanation. They do not have any valid argument against the procedure except that it takes some of their men's jobs away from them and takes sources of revenue away from them.

C On the other hand, the clerk's office and the clerks are generally loath to take on more work.

C Yes, but this procedure is the kind you can automate and use other kinds of good business practices, and I think the county clerks are more equipped to do that and are doing that more and more.

C Yes, but right now, the sheriff and marshal have been doing this for ages, and it makes good sense not to rock the boat if these offices are going to still remain where they are for other purposes.

C Wouldn't the notice go to the court though, not to the marshal? If you are going to have a hearing, you are going to send the notice to the court.

C No, I think the marshal and the sheriff now file the returns in the action, too. I mean, they put the papers into the clerk's office.

C They serve it, and they file it with the court, or they return it to the attorney, and he files it. I am not sure which. On service of process, they return it to the attorney, and he files it.

C But wage execution is going to be a completely separate, independent type of procedure with its own rules. I think, if I had my preference, I would rather have the court clerk do it.

C Mr. Chairman, we are going to reintroduce our A.B. 939, although we would prefer, of course, something acceptable that was recommended by the Law Revision Commission. So there is going to be at least something in the legislative hoppers next year. We intend to make some modifications to try to pacify the clerks or maybe even to eliminate their function as Professor Warren has done. The following might give you a little different viewpoint on how you want to approach this. We can see no real valid purpose for involving the sheriffs and marshals in this particular type of levy. The cost, which is ultimately borne by the debtor, is catastrophic when you are dealing in a large amount of levies. I do not know if you have it in your bill, but we do advise you to stick in a dollar at least that the creditor pays to the employer for handling this. This is one reason we got strong organized employer support for our bill.

W I do not have that. I thought about it. I wondered to what extent it just goes back upon the debtor.

C It does go back to the debtor, but still the total cost of getting the abstract and paying the dollar is $4.00. The average levy right now runs, we estimated, $12.00 to $15.00.

C So it is a net saving.

C However, what is a dollar to the employer compared to the dollar to the employee?

C With a large employer, it is a lot of money.

C Yes, but I am thinking about the employee who is in all kinds of hot water. There are all kinds of costs to an employer just because he has employees--this is just another one.

C I would think the employers, if they could get a simpler procedure, would be so much happier about the cost.

C I would say also that it would cost more to handle the dollar than it would help them.

C It would be an administrative problem. I think that there have been surveys recently that showed that, just to draw a check and put it in an envelope, and mail it, costs two dollars.

C It would cost them more than that to program their IBM machines if they are using that for their payrolls.

C That is why you need a dollar exemption in there that is significant because that protects the employer, too.

C Another thing that is interesting is that a representative from the University of California came to us, and they wanted us to back a proposed bill by them to increase the fee under the present Code of Civil Procedure Section 710, which allows the abstract mailing levied on public entities. I forget what the fee is presently, but they wanted to just about double it. This is the fee that goes to the public entity employer under the present law. Their reason was that their statisticians or someone over there in Berkeley had figured out how much it was costing them, and they were being underpaid to handle these cases. There is a considerable cost to the large employers to deal with these levies. A dollar was quite significant because they do not get anything now.

C Maybe they thought it was a foot in the door.

C How are they going to take this dollar out? I just cannot believe that, by the time the employer gets the dollar in the bank, writes it down, and puts in on his books, it means anything. If they can do that for a dollar, I would be surprised.

C I think it is a matter of principle, I think, if they get the dollar in the law, that, in the next session, they will come and say that the cost is really $20. The fee is now a dollar. We want to raise it to $5.00. I do not like that kind of foot in the door. The employer has got to withhold union dues and health benefit charges and taxes, and all kinds of things. I would rather help the employer some other way. To give them the dollar is giving them nothing. I think it would be better if you could make the procedure simpler.

C The really significant thing is to put a high enough dollar limit on the right to execute, and that will eliminate a lot of these levies.

W Mr. Chairman, I think, on this particular point, there is not much more I can say. I do not think that I am at all equipped to give this Commission advice on what office should do this work or what office is best equipped for it and I am not sure that any of us is equipped to make a recommendation on exactly the most efficient method of doing this. I am sort of stumped on this. I have just thrown out an idea here, that, at least, you try this mailing procedure and have given a rather rough idea of how I think it should work. I really don't know how to go further on it.

C It may be that, when we get something drafted up, we can get one of the interim committees to hire a management consultant firm to study how to best put this into operation.

C Of course, other states have clerks collecting alimony payments.

C Where clerks have been doing something, it is one thing. But it is the change that always causes difficulties.

C They call it a court trustee in Los Angeles who handles these domestic relations things. Is that a part of the clerk's office?

C That would be part of the clerk's office. The payment goes through the court. The court trustee does that, either that or it is part of the probation department.

C I do not think it is too important who administers it. All I think that Professor Warren says is that we should have somebody who is competent to give information and who the debtor is notified is the fellow to call. I do not think it makes a whole lot of difference whether this is the marshal or the sheriff or the clerk.

C My experience is that, if a change affected the sheriff's office, he did not want to lose it; if it affected the clerks, they did not want to take it. But I do not see how we can write a bill in the initial stages from that point of view. I think we have to recommend what we think is best.

[BREAK IN TRANSCRIPTION]

C We anticipated the marshals' and the sheriffs' opposition. The clerks' opposition came at the last minute. I think we really could have compromised it if we had known it was coming. I might also say the Judicial Council had some opposition, but I think theirs was primarily the same as the clerks'. That is, there would be an additional workload that they thought they were not prepared to do. However, I heard indirectly later that, if we had added a dollar fee for them, they might have had a different viewpoint.

C Yes, but this paying everybody off--

C I am just telling you of a few practicalities, and how these bills get through.

C What is the procedure under the present proposal? I have a judgment; now what do I do? I send a notice to the debtor--

W You bring in an affidavit to the clerk in which--

C To the clerk. So I have to go to the clerk's office anyway.

W You tell the clerk you have a judgment and that you want to garnish the pay of a judgment debtor. And you tell him where that judgment debtor is employed. At that point, some judicial officer--presumably the clerk--sends out a notice to the debtor. At this point, I have to rely on your experience on this; you may prefer to have the creditor's lawyer send the notice out.

C I was wondering whether that would not satisfy much of the clerk's objection. The clerk is used to taking an affidavit of mailing from the lawyer or creditor or somebody else. It might remove some of the opposition in the clerk's office if the creditor or his lawyer would mail the notice and give the clerk a copy with the affidavit of mailing which the clerk has to file.

W The debtor should receive a notice that he is going to be garnished and a copy of that affidavit. As pointed out, it seems to me that it could be mailed out by the judgment creditor's lawyer. Now, at this point, the debtor either has got to fill out and send in the accompanying form, indicating that he wants a hearing, or do nothing.

C Okay, he does nothing; then what?

W If he does nothing, then as soon as the notice period is up the clerk sends the employer an order to pay.

C Could you have the creditor go to the clerk at that point with an affidavit that he mailed the notice and get the clerk to do what he has to do then? Get the order or whatever it is on the basis of an affidavit that the creditor has given the notice?

W No, let me see if I understand. The clerk--once this notice of being garnished has been mailed to the debtor--will either hear something within X number of days or he won't hear anything. If he hears nothing, he is then to issue the writ of execution on earnings. If he hears that the debtor wants a hearing, then he has to set it down for a hearing and, at that point, he has to notify the creditor.

C The problem, if the lawyer mails the notice out, is that the clerk is going to be getting these forms in and not know what they relate to.

C No, the lawyer will mail the notice and then file the copy of the notice with an affidavit that he has mailed it. But there is no point in having the marshal in there yet because the clerk has got to set the hearing. A marshal cannot set the hearing.

C The point was the marshal could be the place to call for information.

C Yes, but the clerk is handling everything and has the records. Why would you want to call somebody else for the information? I don't want to arouse any opposition and I would like to have the marshals have it, all things being equal, but I don't think it is.

C What happens when the mail comes back refused? Which it will start doing the minute debtors learn that these notices are coming out certified. They will refuse to accept it, and then you will have to have a marshal go out and serve it on them.

C But service would be at the expense ultimately of the debtor so why would they refuse?

C We have not decided what type of mail we are going to want. Why are we going to need to certify the mail?

C The statute should say whether certification would be required or not. I think you would want certified mail. But, in any event, you would want to say whether you want return receipt requested, to the addressee only, and all this sort of thing.

C In the driver's license cases, they get an awfully high percentage back where the licensee has refused the mail or is "not at this address." The Supreme Court has said that you have got to have personal service in that case before you can later convict him of driving without a license. I would think, at some point, the Supreme Court would step in here and say that, unless the debtor got actual notice, there can be no garnishment. Therefore, you are going to have to have a positive receipt of some sort coming back.

C I would hope that you wouldn't need personal service, but I think you will.

C Under the long-arm statute now, you do not need personal service, do you? You can mail it and presume that the guy has received it. You have got to try, I think, to serve it within the state. But, if you cannot do this, can't you mail it?

C Maybe you could have a system where the creditor sends the notice by ordinary mail with a return envelope acknowledging receipt, and just tell the debtor that, if he does not send it back, the sheriff will have to come out and serve him at his expense. In other words, the system would be that the creditor mails the form to the debtor with a notice that, if he acknowledges this notice and returns the signed copy that he received the notice, then we can go ahead. If he does not return the acknowledgment, it will be necessary to have all this other procedure.

C It makes it more complicated.

C Do you have to do this? It depends on whether this is a constitutional requirement that we are talking about. Today, under the law, you can execute on wages without giving the debtor any notice at all.

C Yes, but the courts are going to require that in due course.

C After judgment, I don't think so.

C There is no constitutional requirement, nor would there be, after you have secured a judgment against him.

C Certainly, I don't think we would want to have a self-defeating system whereby we send the debtor a nice little note saying, "If you don't return this, we are going to send a marshal out after you." The result of that would be that the personal service that they have to try to make would be twice as expensive because the debtor has been forewarned.

C Why would personal service be necessary? Assume that the creditor's attorney sends the notice out first-class mail and files the certificate of mailing with the clerk. Now, if the debtor never receives the notice--he has moved or just skipped--or if there is no response to the notice, the clerk will issue the writ, or the attorney under the proposed system will notify the employer that the wages are to be paid to him. At that point, the debtor is certainly going to know about it. He is either going to come in and say, "I didn't get the notice," or he is not going to come in at all.

C I don't think it is a constitutional requirement, but I do think there should be something in the act which establishes the principle that the debtor gets notice first. Then, if he does not appear, his 25% exemption is gone and the creditors get to take 25% of his wages. I would also provide that the debtor can later come in and show he did not get the notice. That is, there should be a provision in the statute for him to reassert this hardship exemption. There would be a presumption that he got the notice but, if he establishes that he did not, then he could try to claim his exemption.

C If we do that, then we do not need certified mail, and we save some expense.

C You know, I am not sure you should really preclude the debtor from later raising the hardship claim anyway. But the order will be issued, and the money will come out of his wages until the claim is granted.

W I have a provision that allows the debtor to come in later and assert the hardship claim after a given period of time. And I think I would tinker with that a little bit.

C What about the second part of this procedure where the clerk is required to do a new job if the debtor does not send back the request for hearing? The clerk is supposed to then notify the creditor's attorney who then notifies the employer. Could we simplify this by requiring the debtor, when he sends a request for a hearing to the clerk to send a copy to the creditor's attorney? Then, if the creditor's attorney does not get any notice at a certain time, he himself can give the order to the employer to pay.

C That would be abused. I would rather have the order to the employer go from the clerk than I would from the creditor. The clerk is involved now in making some kind of an order, so he is not going to have a big additional job here.

W If this statute were enacted as it is now, the clerk would have to have some way of knowing how many days have gone by after a notice has been sent out and knowing what to do with the return when he got it.

C Here is what the clerk would get. He would get a copy of the notice to the debtor from the creditor's lawyer, together with an affidavit that the creditor's lawyer had mailed the notice and the date it was mailed. Then 15 days after the date of mailing, the clerk--if he had not heard anything--would automatically and routinely issue that order. Now, that is no big burden.

C The heck it isn't. It is quite a burden on the clerk to be certain that there is an order issued on the 15th day. It would never work that way in Los Angeles County, I can tell you that.

C Well then, let's say that the creditor has to go in and ask for the order; that is going to be the practical effect, anyway. What more burden would the clerk have under that system than he now has?

C You are going to have to put the burden on the creditor and his attorney to get out all of these orders. Whether you put it in the statute or not, that is going to be the practical effect. If the creditor wants to get his order, he will have to see that it gets done. The attorney is going to search the file after so many days and see if any notice has been filed. He is going to have to be careful that he does not slip up because of the penalties for an improper execution. Then he is going to prepare another affidavit requesting the clerk to issue the order.

C Aren't collection agencies the ones who are going to be using this? All they will do is go in each day and check out--

C That does not solve the problem if the debtor's request for a hearing has not found its way into the file yet. The creditor can be as conscientious as you want. That is why I say you have the debtor send the notice to the creditor's attorney. Then he is going to know that he cannot proceed because a hearing is required.

C Perhaps you could have a two-part form: the first part is the notice to the debtor and the second part is the order. The clerk tears off the notice and, if that is not back within 20 days, he forwards the order out.

C Mechanically, it can be worked out. Most clerk's offices will stamp a receipt stamp on anything that comes in. Then you are just going to have to have some practical way of having the file reviewed by the creditors or their attorneys.

C I am sure that a procedure could be worked out that would be efficient and cheap and that will protect everybody. But we do not want to have a lot of paperwork.

C The solution is to place the duty of compliance on the clerk but to put the duty of seeing that it is done on the creditor or his attorney. That is the way the clerk's office works today on almost everything. You have got to recognize that the clerk is not going to make any decisions. He is not going to do anything unless somebody comes out and tells him that something has got to be done.

C Where you are really going to have a problem is where you create a staff of experts. That is where you are going to have the opposition. The clerks do not want this; they want to do routine jobs.

C Is it possible to give some consideration to this form that you are going to have? Perhaps a self-addressed, stamped postcard because the debtor won't know where to send this, even if it says on the form.

C What is so bad about having the debtor, if he asks for a hearing, send a copy of the self-addressed form to the creditor's attorney? Then the creditor will know. If there are enough sanctions to this thing, the creditor is not going to abuse this procedure.

W I had assumed the creditor's lawyer would bear the real responsibility here, but I did not know whether the statute could be drafted specifically to indicate that. I gather from what you people have said now that the statute should simply say specifically that the creditor shall be responsible for certain acts.

Requiring employers to make payments directly to judgment creditors rather than to public officials

C We have one serious problem here. We are talking about earnings. I think Professor Warren may have overlooked the fact that, even though earnings are deposited in a bank, they are still going to be earnings for a certain period of time. Will the bank be required to make the same--

C This doesn't deal with banks.

C That is something I have talked to Professor Riesenfeld about. We need a bill for the next session, dealing with paid earnings because the federal law says that they are protected. Our California law does not now provide protection, and we have got to do something about that right away, or we are going to have some serious problems. At the last meeting, we talked about extending the blanket exemption on savings and loans over to banks. If the creditor could show that there were no earnings in the account, he could get it but otherwise he could not. But Professor Riesenfeld does not think that is going to satisfy the federal officials. He thinks that some type of exemption, larger than the single wage payment but still related to wages, should be protected. But you want to make an automatic exemption. You do not want to have to make the debtor come in and ask for that exemption. Professor Riesenfeld is going to work on this. I asked him to have something for the December meeting if he could because I think that that has to go in the next session if we can get the bugs out of it.

C Are you saying then that the federal act covers earnings paid as well as payable?

W Let me comment on that. The federal act specifically says that it covers wages paid or payable. When I last talked to the people in Wages and Hours several months ago, they did not know what that meant. They thought it was an interesting idea, that it might include bank accounts. I asked them if they were going to clarify it and they said, "Well, maybe." In Los Angeles County, I can tell you what it means. In Los Angeles County, the marshal serves a blue form on the bank. He does not serve the green form. The green form is the federal restrictions. The marshal serves the blue one that says nothing about federal restrictions. The marshal has decided on his own that CCPA does not cover bank accounts. He is not going to apply it to bank accounts until somebody orders him to.

C I think the federal court will be doing that.

W The marshal says it is impractical to do so, and he has a point.

C I got a letter from a lawyer in San Francisco who said that he had two cases. In one case, the judge quashed the order and, in the other case, a different judge did not.

C We just finished a case where the Sacramento Appellate Department refused to quash an attachment of a bank account on the Sniadach rationale. A petition has been filed or will be filed directly before the California Supreme Court to decide that issue. But, the problem with bank accounts is that the deposit of money is made with no identity attached to the money, and I just do not see how you can ever say for sure that it is wages.

W I do not see how you can impose the obligation on a bank. The obligation should be imposed on the employer. The bank does not have that kind of information.

C I think what you have to have is an exemption of some kind, based on a fixed, limited amount.

C If the reason the debtor is exempt is that he needs the money for the necessities of life, the fact he has got so much money in the bank is pretty good evidence that he is not in that desperate a position.

C I think that we have to recognize the fact that today a man needs a bank account so that his wife can write her checks and pay monthly bills.

C Quite frankly, I had hoped that, before we got to this point, the Wages and Hours people or somebody would tell us what the answer is in this area, but they have not.

C Maybe the courts will.

W It might be forthcoming from some authoritative court, maybe by the first of the year; I don't know.

C Professor Riesenfeld is going to propose something along the line, I trust, of an arbitrary amount rather than on the specific wages of the employee. I do not see how a bank can know what the wages of a particular depositor are.

C My view is that there should be one exemption in a certain amount for all the bank accounts that a debtor may have. And I think a thousand dollars is an awful lot of money to exempt from payment of debts that are due and owing where the creditor has a judgment.

C I do not think you can do it any other way. The exemption may be made flexible in terms of the minimum wage or something like that, but you cannot do it on the specific wages of the individual and expect banks to handle it.

C And then you might not apply the exemption where it is a corporation.

W The way I originally drafted this statute was to define earnings and unpaid earnings. This would not be similar to the federal provision and that would mean you would have to pick up the federal provision--if there is anything there to pick up.

C Well, in any event, the bank account is something we can deal with separately. This statute would not work for banks.

W Bank people speak loudly in Washington, too. It is just conceivable there might be some clarification before long. I do not know.

C Perhaps you could key the dollar limit on the bank account to whatever figure you end up picking as the exempt dollar figure for wages. Let us say you ended at $85 a week; the bank account would be a multiple of that figure--say four times that figure or 4.3 times that figure. That would be a rational and reasonable solution.

C Well, that was the thinking, and I think we are going to get something from the consultants along those lines.

C We are then in general agreement with the concept of requiring employers to make payments directly to judgment creditors.

Discharge from employment

W Here we have a provision in the CCPA that I presume we have to copy. The CCPA says, "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for one indebtedness." Our Legislature in 1969 enacted that language in the Labor Code, but they added to it "prior to a final order or judgment of the court." However, I question whether that section we now have in the Labor Code means anything.

C Because we have already exempted all prejudgment wage garnishment.

W I would assume that is a dead letter. In the statute I have prepared, I have copied the federal language, and, if you have a continuing levy, the garnishment for one indebtedness means something. If you do not have a continuing levy, then you can have multiple levies for one indebtedness, and you should still not permit discharge.

C How about multiple levies from multiple creditors?

C In that case, you can discharge. If there is more than one creditor, under the federal statute, you can discharge.

C To what extent does an employer have to put up with this kind of thing before he can get rid of the employee? If there is one indebtedness, that is one thing. But maybe we do not want to go any further than that.

W I am morally certain that Congress is thinking about levying for one indebtedness--one judgment.

C Yes, but the way it is worded, it does protect the debtor in California where the same creditor has levied 3 or 4 times. That is still one indebtedness. And I think the employer would be running a great risk if he discharged an employee even though he had 5 or 6 levies by the same creditor. Don't you?

C They probably were not thinking of the California practice of separately levying each time--

W I would suggest that, if you are interested in the federal exemption, you are going to have to have this in the act somewhere. It would come out of the Labor Code. You are going to have to have a criminal penalty for it, and I suggest that here is the most appropriate place, I think, for an additional civil penalty.

C Put the criminal penalty in to satisfy the federal; put in the civil penalty to make it work.

C And you never use your criminal penalty--because, if the civil penalty were there, the DA's would say well go sue them under the civil remedy.

C What about the one indebtedness language--do you have any problem where you have a single creditor, but the item is an open book account or maybe 4 or 5 items make up the total that he is suing for against this particular debtor?

W I do not think so, but it is certainly possible. The way I would do it is copy what the federal government says in their statute at least until they change it, and then pick up whatever regulations they have. I think here eventually they are going to tell you what this means. And, incidentally, when they promote their regulations you are going to have to toe the line on that regulation.

C Yes, but let us say it is one creditor who has gotten four judgments on four indebtednesses; you would not have to get four different levies on the four judgments, would you?

W No.

C Then you could have one execution on wages for the four judgments, and the employer should not be able to discharge because of that.

C I agree. It is no more strain on the employer.

C Well, I think we could draft the thing so it would be clear.

C Why do we permit discharge at all? I mean, it is just like saying a dog could have one bite. I do not think dogs ought to bite at all.

C No, there may be many reasons--when a guy starts going sour for one reason, he may go bad in a lot of different directions. He has got 4 or 5 creditors; it may be indicative that he is having real problems of some kind. He may not be any good on the job. And there is a chance here, if you make this too broad, that you just hamstring the employer; he is afraid to discharge a guy that deserves to be discharged for independent reasons.

C You could go so far that you could have a man go into debt in order to make his employer afraid to fire him. This has happened in some instances where there are charges of racial discrimination or otherwise. Sometimes it is hard to fire the man for a real cause. You do not want to carry it too far.

C You get sandbagging in this type of thing.

C But the way we do it and the way the federal government did is to issue an open invitation to employers to fire a man after one levy.

C You have got to remember, though, that there is never going to be a levy if the debtor can go in and convince the judge that he needs the money. In other words, you never go to the employer in that case. He never even hears about it.

C This should be on the basis of what comes to the employer and not whether it is one debt or seven debts. If it is only one transaction as far as the employer is concerned, that should protect the employee.

C I will just bet that the problem of firing is not so bad. Nevertheless, there have been some really bad cases, and that is how this got in the law.

C My interest is in a specialized area with the people at the bottom of the economic bracket. But, from our experience, there is

a real problem. What certain creditors and collection agencies do is, they will contact the employer in connection with the debt--some do it in a more onerous manner than others--and the employer will then talk with the employee. The mere fact of the conversation has a coercive effect upon the employee, particularly when he is concerned about his job being placed in jeopardy. So, from our viewpoint, from what we see happening to our clients, the mere fact that this man runs the risk of discharge due to continuing attachment of his wages, is a serious problem. Ideally, we think, the employee should not be subject to discharge solely due to the fact that his wages are the subject of legal process by the creditor as opposed to some other reasons, for example, he is not an efficient worker in the factory. If the employer has a basis for otherwise singling him out, well, then, fine, but simply to permit the employer to discharge a man after one execution leaves the poor man in a very exposed position.

C What if the employee handles the cash register, and the employer is concerned that the guy is so far in debt all the time that it is a tremendous temptation for him to equalize that at the till?

C I have no problem with that. It depends upon a man's function on the job.

C But all these things may be drawn together. You have a steady employee, and all of a sudden, he becomes an alcoholic. He is missing work, and that is why he is going in debt; that is why he cannot make his payments, then they garnish his wages. The employer wants to fire him.

C But it does not work that way. As a practical matter, employers will not want to be bothered with this. So they will keep him on because they will be afraid to be accused of discharging him for being subject to garnishment. I think it is not unlike--

C It is the employee who is terrified. Again, I say I am talking about the very poor, not the middle-income man.

C To me, the solution to your problem is, partly, the extent to which you exempt wages. If we put in a $300-a-month exemption, then you are only talking about people who make more than $300 a

month. I would rather tamper with that than I would tamper with this.

C I think New York, which, I understand, has no garnishment or execution provisions, has recently passed a law that the creditors cannot even talk to the employers. They have passed this just recently, within the last couple of weeks.

C That was in Massachusetts.

C Maybe we should put that in.

W Let me say this. I am working for the Commission on Uniform State Laws on a project which entails the writing of a harassment law, and that is a tough area in which to draft. There are more practices that you have to take into consideration in this area. I would not try to work any kind of harassment statute into this. The problem you get into there is a bottomless pit.

C There is a limit to what we can do in this area. We are trying to regularize some procedures, and, if there are other abuses in the credit and collection field, this is no place to deal with it. If somebody wants to solve those things, they can put their own bill in.

C It may be an empty remedy, but the employee still has the remedy of the Fair Labor Practices Board to which he can complain if he has been improperly discharged by reason of attachment or any other reasons. That is right in the federal act.

C We can put in here, I guess, that this does not preclude any other remedy or protection. We probably should do that in some way. Maybe we could have a general provision in the act saying that the provisions of this act do not deprive him--

C Yes, but you may get an interpretation of that as meaning something that you do not mean.

C What the consultant is really recommending is that we put the same limitation on discharge in our statute that the federal has in theirs, and that we provide a civil penalty to supplement the criminal one. The criminal penalty would not be a good penalty if it were enforced. Moreover, it probably will not be effective because it will not be enforced. If we put in a civil penalty, the DA would just tell the debtor--"Go use your civil penalty, I am not going to prosecute this kind of case." We would comply with the federal law. We would provide the employee with protection and a means to see that this is not violated and that would be all we would do. We would not try to expand the protection.

C I suppose this issue will come back again, but I have deep reservations as to whether we should say anything at all about it. I question the wisdom of the federal provisions.

C We have to have the federal penalty to get the federal exemption. You have to have that penalty in the state law. But it is much better to also include the civil penalty as a practical, usable penalty.

C That is an added protection to the employee to have the civil penalty there.

C I wonder whether it is wise legislation to say that the employer cannot fire the first time--

C That policy is already determined by the federal government. If we do not put that in, we might as well close up the books.

C There might be a policy question whether we want to include the civil penalty.

C Yes, but there is an advantage to both the employer and the employee and the District Attorney in having a civil penalty. Because, if you have a criminal penalty, in 99% of the cases, the DA would never enforce it. But you might get a diligent District Attorney who made a big thing out of this. To do so would be very unfair and undesirable for all concerned. If there is a civil remedy, too, this may act as a safety valve.

C But I think that, in 99% of the cases, there are going to be other factors besides the levy of execution that went into the decision to fire the employee. Unless you have a standard somewhat similar to the criminal one, that is, proof beyond a reasonable doubt, or at least clear and convincing evidence, then I think you set the employer up for a lot of undeserved misery.

C You do not want to write s standard like that in the act.

W Frankly, I have always thought this was a phony provision put in the federal act to play to the crowds. I do not see how you could prove that discharge was based on the garnishment.

C There almost always would be some basis that they can hang their hand on.

W In the first place, I do not think that very often you would have a case where the employer would really want to fire the employee.

C My experience with employers is that they do not. They want to help the guy work the thing out. It is only where it is demonstrated that he is just a bum, and they cannot do any good with him that they want to get rid of him. Not simply because he has been garnished.

W The Uniform Consumer Credit Code takes the position that there should be a complete prohibition against firing anyone for garnishment under any circumstances. I do not honestly think that does much because of the proof problem because you have always some reason to fire the employee other than the garnishment.

C What it does prevent is the rule coming out of the personnel office that, if a second garnishment hits the desk, that employee is going to receive his pink slip automatically. That is what it stops.

C Why shouldn't they be able to do that if they want? I do not say that is good policy--

C It is pretty heartless.

C That is right, but is the government putting heart into all employers?

C In many ways they do.

C But there is a limit.

[BREAK IN TRANSCRIPTION]

Execution versus supplemental proceedings

W Professor Riesenfeld thinks much of this procedure ought to be discretionary. He and I have a basic argument on that. I would rather see a process in which the writ is given to the clerk, and he has no judgment to exercise at all. The clerk automatically issues a garnishment. Professor Riesenfeld thought you could hook this procedure on to supplemental proceedings. That might very well be the ideal way to do it. You would have the debtor before the court, and the court could decide how much he can pay and so forth.

C If the debtor can afford a lawyer to protect himself--

W That is right. I put the reference to supplemental proceedings in here, but I have not attempted to draft a provision using that approach. If Professor Riesenfeld can help us further on that, I am sure he will in December.

C What, basically, would be involved in supplemental proceedings? What kind of a proceeding would you have? What would you do?

C Presently, when the creditor gets a judgment against a debtor and does not know what or where the debtor's assets are or how to best satisfy his judgment, the creditor can obtain an order from the court and summon the debtor before the court to examine him concerning his assets and find out what his sources of income are.

C Does the court try to develop an equitable order or what?

C No, the only order is an order to appear and be examined.

C The way it works is the creditor calls the debtor in, and the judge says, "Well, Mr. Debtor, you go down with the attorney of the creditor to a room down here and, if there is any trouble, come back and see me." They do not even sit there in court.

C If you raise the exemptions high enough, a supplemental proceeding might be a practical thing if both sides have an attorney. But, when you are talking about wage-earner garnishments where the debtor has not gone to court, he has just allowed the default judgment to be entered against him. I am afraid it is somewhat like Professor Riesenfeld's ideas on trying to protect people against attachments by having them go out and having hearings. It is all fine when you have got the money to pay the attorney or the OEO will come in for him. But the guy in the middle that has neither is not going to be helped.

C This might be the way we could handle nonwage execution.

C It is the way nonwage execution practically is handled right now.

C If I understand the sense of this suggestion, it is that, perhaps, before you get any order to execute at all, the debtor has got to have some kind of a hearing. That is surely not done now, and I hope that is not what is suggested. If you know what the assets of your judgment debtor are, you do not have a supplementary proceeding. You simply go out and take them unless you do not want to put him out of business for antitrust reasons or otherwise. If the debtor is big enough, you may have the concern that a creditor, who puts his competitor out of business on a judgment, might be liable for treble damages for violation of the antitrust law.

C Professor Riesenfeld has a point where you have the debtor on a supplemental proceeding, the judge could have authority at this hearing to determine what part, if any, of the earnings should be subject to garnishment and so.

C There is a practical problem. First of all, right now, when you serve the debtor with an order of examination, often he does not show up. Then you serve him with an order to show cause why he should not be found guilty of contempt of the court, and he still does not show up. Then you have him arrested. He finally shows up, and you examine him and find he has nothing anyway. In the meantime, it has cost you about $16 or $17.

C The 75% exemption is already built in anyway. If he wants to be exempt beyond that, he can come in himself and do it.

C I think we can set the problem of supplemental proceedings aside. I cannot believe we want to make these proceedings a condition of being able to levy garnishment because, for one thing, it means that the worker loses a day's pay.

Review of Professor Warren's Proposed Statute

C Logically, doesn't the statute belong in the Code of Civil Procedure?

C Yes, I think it does. Whether the act should be a separate chapter or article is perhaps a question, but, when we get it polished up, then we will try to put it in where in goes.

Section 101. Short Title

W Incidentally, Professor Riesenfeld is very opposed to using the term "earnings execution act." He thinks that using the terms "execution" and "writ of execution" in this act fouls up things and that people may mistake the writ or order for other writs of execution. He also prefers the term "wages" to "earnings." I argued with him on the term "earnings." It seemed to me that the federal statute defines "earnings", and it is more accurate to talk about "earnings." Professor Riesenfeld wants to call it a "wage withholding act."

C No, I think that has got even more problems. The average guy is going to confuse it right off with the federal withholding.

C What was the objection to "execution?"

C That has a gloss that people will apply.

C Call it garnishment if you want to--

W I suggested garnishment. In writing about this, I was always using the word "garnishment." I thought, if I call it that to myself--but, Professor Riesenfeld, it turns out, is also very opposed to using the word "garnishment." He says that it leaves a bad taste in everyone's mouth.

He did not want to use the word "execution," as I understand it, because he does not want a writ of execution on earnings to be confused with other writs of execution. It consists of a somewhat different procedure. He said that only briefly, but he mentioned it in his letter.

C Let us use "The Earnings Protection Act."

C In connection with this, what are you going to call the writ?

C Does it have to be a writ? Are there legal consequences attached to calling it a writ?

C Why don't we just say you get an order for earnings withholding?

Section 102

C Is there anything we would do on Section 102?

C I would just say "in accordance with this chapter" or "article" rather than "the following provisions" but that is just a drafting matter. The entire section would read:

> A judgment creditor may levy upon earnings of a judgment debtor in accordance with the provisions of this chapter.

The title would be "Earnings Levy by Judgment Creditor."

Section 103

C The next section is Section 103. This is the key section.

W This section trys to make this procedure the exclusive way in which you withhold unpaid earnings.

C You have built in the federal ambiguity in the word "earnings," haven't you?

W Right.

C Which we have to do; we cannot avoid that.

W I am afraid, at this point, we still have to. I hope, before any act is enacted in this state, that there will be some federal clarification, but I do not know.

C Couldn't you put in a provision saying that the intent of this act is to satisfy the requirements of the federal act, and that the meaning of "earnings" is the same here as under the federal act? There are a lot of state programs where, if you do not follow the federal requirements in every respect, you do not get the federal money. What they do is incorporate the federal definition and the federal regulations as they change. Maybe we can think about something like that here. I do not think we can define earnings in here.

C Now you say "earnings of an individual." What about the professional corporation? Do you levy on the corporation? That is on the professional corporation and not on the client that may be paying the--

C Why not leave that to case law? Let the courts address that problem. I think a lot would depend on whether it really was a true corporation and all that sort of thing. A close examination of that would probably produce some kind of exception. But I think you run into all kinds of problems.

C Section 105 says: "'Earnings' means compensation paid or payable for personal services . . . ."

C Professional corporations all have a resolution saying how much a doctor or lawyer is going to get.

C The issue is who the employer is.

W I was concerned about the use of the word "individual," but the more I looked at the definition of "earnings," the better I liked the term "individual." Earnings says, "payable for personal services." It seems to me that that leads us to say this is a procedure designed to cover the earnings of an individual. It is his own personal services.

I put Section 103 in because the federal statute provides that you cannot reach earnings by any legal or equitable procedures other than pursuant to this act. Instead of "legal or equitable procedures," it seemed clearer to me to say "judicial procedure."

You might also want to make a clarification here about the wage assignment law. The federal authorities believe that wage assignment in a state like California is not within this act.

C Are we saying that this act does not affect wage assignment by contract from a debtor to a creditor?

C What is wage assignment?

C The debtor goes to the creditor and assigns his wages in advance. There are Labor Code provisions on it.

W The Labor Code allows a very circumscribed assignment of wages. It is a contract between the creditor and the debtor. In some states, the assignment has to be recorded and is given some official effect, but not in California. Therefore, the federals say they do not believe their statute applies to wage assignment in California. That is what they told me informally. In other words, they think the restrictions of Title 3 apply only to withholding of wages of judicial procedure, not where the debtor has consented to it individually.

C Do we need something on that in the act?

W Well, that is the question--whether you should have some clarification in the act. I suggest that wage assignment is not a judicial procedure. However, a lawyer reading this might feel better about it if we had an express statement that the act does not apply to wage assignment. I do not know. It is kind of awkward to draft a statute saying that it does not apply to all kinds of other things because there are all kinds of things that this does not apply to.

C What if the debtor has breached the wage assignment? What if the debtor goes to his employer and says--"Quit paying, I have decided I do not want to honor this contract." Under this act, you could not go into court to enforce contract.

C You would have to get a judgment, and then you would use this act to enforce the judgment.

C Wage assignments in California are very peculiar things. You cannot assign in advance. You can assign only after the indebtedness has been incurred and only for necessaries of life and only when the husband and wife join in it together. Text writers have suggested that wage assignment may be the equivalent of a levy. But would wage assignments come under this provision in the federal act? That is where the problem arises.

W In some states, there is some real reason to believe that that theory is going to be pushed. Under our system, no official recognition is given to a contract assigning wages at all by way of recording it or anything of that sort. You give the assignment to the employer. I do not see how you have any argument here saying that this is a judicial proceeding.

C One thing I should say is that, when we get the act all wrapped, we will have comments for each section, and we will have the legislative committee adopt a report saying that these comments reflect the legislative intent. The comments will be printed under the code sections. Therefore, if something is really obvious, rather than putting it in the statute out of an abundance of caution where it will probably create more confusion and problems, we would put it in the comment. These comments have been really very effective, I think, in getting our acts interpreted properly unless the court really does not like the act at all.

C Is the wage assignment a security interest under the Commercial Code?

C It is excluded.

C Will an attaching creditor of wages argue that he has got a right to 25% even though there has been a wage assignment?

W No. The creditor cannot have anything under the wage assignment act that Section 300 of the Labor Code does not give him. The question would be whether this imposes some further limitation on that. And, in my opinion, it does not because of our terminology --"judicial procedure."

C I am not sure you understand my question. Suppose an employee makes a wage assignment to a creditor and serves a copy on his employer. The employer starts paying that creditor. Now another creditor comes in and serves the employer with a writ and says, "I want 25% of this guy's wages." What happens?

W Labor Code Section 300 says that the wage assignment has priority over the garnishment.

C But the wage assignment would be included in determining the disposable income because it is not required by law to be paid out, so the 25% would be a gross figure before the assignment. Therefore, if he had any money left, you would get 25% down to the base. I guess you still could not go below the base.

C The debtor might come in as hardship case there.

C The attaching creditor has no better rights than the debtor. If the debtor could not get from his employer the part which is already assigned and give it to the attaching creditor, then neither could the attaching creditor. So if the employee makes an assignment to one creditor for necessaries of life which that creditor has furnished to him, and another creditor comes along with a levy on his salary, the latter only gets the part which is not assigned.

C But, if the federal act does not apply, the assigned wages could be disposable earnings. That is, the part assigned is not deducted from determining disposable income.

W That is an interesting point. If income has been previously garnished by another creditor, that is an amount required by law to be withheld. The question is we have Labor Code Section 300 which says that the creditor is entitled, after he takes the wage assignment and notifies the employer, to 25% of those wages before the debtor earns it as a matter of fact. It seems to me that is an amount required by law to be withheld because Labor Code Section 300 gives the wage assignment legal priority over the garnishment act. That is the way I would read it.

C Do you include the wage assignment in determining the 25% of disposable income or not?

W I would [not] [sic] include it in determining disposable income.

C What about the continuing levy problem? Suppose the debtor makes an assignment after the first levy but before the second continuing levy.

W I think we ought to spell out here how we think this statute would affect wage assignments.

C Now, can you only assign money that is due and owing and not any future?

C You cannot make a future assignment of wages in California.

C So we are talking about something out of one month only.

C I think you have to take a look at the statute because there are certain things that amount to assignments, such as deductions for Blue Cross and life insurance and union dues and that sort of thing. The law does not require you to dispose of those. So they are disposable income.

C Then you should not exclude wage assignments.

C It depends what the statute says; that is the point. If wage assignments are excluded for the purpose of the federal law, then we have to.

W There is a pretty good argument that it is required by law to be withheld.

C What if I have five children and I do not claim any exceptions, and, therefore, under the law, the employer is required to take a bigger chunk for withholding. I can control my disposable income in that manner, then.

C That is right, and taxpayers in California have larger disposable incomes than taxpayers in New York because of the withholding of state income taxes. In any event, the point is that a debtor, by not claiming all his exemptions, can limit the amount a debtor can reach.

C What about the union dues problem? You have a union security contract which requires you to pay the dues in order to keep your job. Is that disposable income?

C You can have credit union dues, you can have money going into a savings account--there are a lot of things you can have withheld.

W These problems have got to be solved by regulations put out by the federals. What happened was that the federal act went into effect, and now a clamor has gone up about what the act means. The way it is in California right now, the employers have to figure this out from that writ that I showed you. We can give them a little help on that. I guess the biggest help we can give is to get the floor far enough up above $48 that the employer never has to make a determination of what disposable income is except possibly in the case where another creditor has come in.

C Are there any other problems suggested by Section 103?

C Assume an employer has a contract with the union to withhold union dues, but he decides he is not going to do that; would Section 103 prevent the union from enforcing its contract? It is a debt, and Section 103 says you cannot withhold except pursuant to this act.

C The union has more practical means.

C We have talked about the debtor against the employer. What are the remedies of the creditor against the employer?

W The creditor has the right to sue the employer for failing to pay him.

C Anytime we put a quirk into disposable income, we are opening up the employer to suit from either side.

C He is right in the middle.

C I think we ought to have some good faith exemptions for employers in these suits.

C I do not know that you can protect him. I know, under the Truth-in-Lending Act, even if you follow the regulations issued by the Federal Trade Commission and the Federal Reserve Board, if their regulations are incorrect, there may still be a class action against you, and you are still subject to treble damages. Good faith is not a defense even if you were following the regulations. We have been advised to ignore one regulation on the ground that it is wrong--it does not follow the statute. Otherwise, you subject yourself to a treble damage lawsuit.

C What happens if your advice is wrong and the regulation is right?

C Then you have got a malpractice suit against your attorney.

C No, you are leaning in favor of the consumer so there is never going to be any problem.

C There is the same problem in the anti-trust laws. You follow the regulations of the FCC, and then find you are going to be sued by the Department of Justice.

W To repeat, I would think the federal people will have to clarify this question of the disposable income determination. When I talked to those lawyers in the East, that I mentioned earlier, they asked just exactly the same questions you do. In any roomful of people, every man can think of something that is questionable as to whether it is withheld by law. The statute is completely ambiguous.

C Section 201 is the section that creates the problem. It restricts how much of disposable earnings can be taken. One way to alleviate the problem there is to set a high enough exemption based on gross income.

Section 104

W Section 104 is a direct copy from the CCPA.

C What does "an order of a court for the support of any person" mean in California? It undoubtedly means an order in connection with a dissolution proceeding, but what about an order which includes attorneys' fees?

C I do not think that is for the support of a person.

C How does the state collect out-of-earnings? What procedure are they going to use?

C They have procedures under the Taxing Act.

C I had the same basic question under paragraph (1). If this act does not apply and if the execution laws are probably unconstitutional or not in conformity with the federal truth-in-lending act, what do you have left to enforce a child support order?

C Contempt.

C Contempt only?

C Does this exclusion apply only to the restriction on earnings? Here, are we only trying to say that, in one of these cases, you can go below the federal limit on what wages may be taken? I wonder whether, in other words, the protection afforded by this act does not apply, the debtor cannot claim the exemption, but the creditor could still collect under the act.

C No, the whole act does not apply.

C What you will have to do then is keep all the inconsistent acts to collect on support and taxes.

C The only one you have to provide for is support. The state debts are collected under the Revenue and Taxation Code. The federal tax is collected under the Internal Revenue Code. A bankruptcy comes under the chapter of the Bankruptcy Act.

[BREAK IN TRANSCRIPTION]

C Here is the problem. There must be some procedure of getting what you are entitled to get in the cases where we will have an exclusion. If we have an exclusion here, that means we are going to have two bodies of law. We have to have one body of law applying to the cases we have excluded. This other body of law may be more favorable or less favorable to the judgment debtor; it may have a procedure that is more efficient or less efficient. If we are only talking about support orders, and there we think the creditor should be able to get all or 90% of the debtor's income, then we just need to exempt the one section.

C I have another question. As you know, under the bankruptcy laws, you look to the state law for exemptions. I believe that moneys due and owing for wages at the date you file your petition for bankruptcy presently under the law--. Well, I guess under the new federal law, 75% of them are exempt and cannot be taken by the trustee. How is this act going to affect that?

W Presumably, under the federal bankruptcy act, they would look at this act and say the state exemption is so much.

C I do not think it is clear enough, and I will tell you why. Under the present law, there is an exemption from execution of a cause of action; this is under Section 688. This exemption is not set forth in the regular 690 exemption series. The bankruptcy courts in this state do not consider that an exemption because it is not in the 690's which are specifically labeled exemptions even though the section says that a cause of action shall not be subject to levy. It is not within the 690 series, and so they do not consider it an exemption. Apparently, therefore, the courts go a great deal on what is labeled an exemption.

W The only thing that paragraph (2) should apply to is Chapter 13. That is, paragraph (2) says this act does not apply to Chapter 13 at all. Now, that leaves the referee free to decide what an exemption on earnings is in California. Chapter 13 applies to just a wage-earner plan. I can see why they would not want to limit a wage-earner plan on the basis of this act. But a referee in bankruptcy would assume that this act tells what is exempt property in California. I do not see how you can come to any other result.

C You could have one sentence in there to clarify it.

C The problem is paragraph (1). Because, when you talk about spousal support or alimony or the support of a child, there are all kinds of problems with respect to levying and whether there are exemptions or not under the present law. When you eliminate application of this law, I do not know whether you are making matters better or worse.

C But why would we want to apply the regular federal exemption?

C I do not think you would want to give a father immunity for the support of his children. That is what you would be doing if you put in the federal exemption. As it is, the court has discretion and is always open to change the order for support in the event of a change of circumstances. The court has a hearing to determine how much the father earns and fixes the support order accordingly.

C Suppose the court tells him to pay $300 a month for his three children. He does not pay it. Now why shouldn't the wife be able to come in and get this wage withholding order under this act and--

C In a dissolution, she can get an order under the dissolution statute. The problem I have is what would happen in a bastardy case where you do not have dissolution. There are other kinds of support orders than merely in connection with dissolution. There used to be a requirement to support a parent or a child that is not living in the family. That would be another situation.

C There is another one, too, under the Uniform Reciprocal Enforcement of Support Act between states. When the wife is in California, and the husband is in New York, the husband may be brought into court in New York and ordered to pay to the wife in California or vice versa. That is reciprocal. It is a court order of support.

C I think all these are different from a creditor's rights situation. That is all this act says. This act does not deal with the rights of a person to support under a court order.

C But, how do you enforce that court order?

C The debtor either complies with the provisions of the order, or you can take him and put him in contempt.

C Here is what a judge said the other day when I was in court, and he had a fellow in front of him who said, "I cannot pay." The judge said, "You are brought in here for not paying your wife the amounts I ordered you to pay." The debtor said, "Judge, I cannot pay it." The judge looked down and said, "You have got all these debts and all these other creditors. Well, you have got a choice, you either pay the creditors and not pay your wife, or you pay your wife and not pay some of the other creditors. But I advise you that none of those creditors can put you in jail, and I can. Now what is your choice going to be?"

C But, to me, this proposed act would provide a very easy, efficient way of collecting money by withholding it. Why not have that available, too?

C If those acts dealing with persons are not satisfactory, it is very easy to change those acts or adapt this one, but I do not think we ought to study marriage and divorce and bastardy and all

the rest of those things at this time. That is why I think paragraph (1) is an appropriate provision at the moment. Whether or not this procedure is the most desirable method of enforcing support obligations is another question.

C We would not be affecting the right of the court to determine the amount or the conditions under which money would be paid or the use of contempt or anything else. This act would just say to the wife that, if you do not get your $300 a month, you can go down and get an order and tell the employer to withhold and send it to you.

C Aren't there circumstances--say the divorce is 10 years old--where the holder of the divorce judgment would actually undertake to enforce it by execution. Would this act apply?

C Well, we will look into it. The staff will have to look at the dissolution of marriage act to see if there is a collection procedure prescribed. Is it as good as this? Is it sufficient? These questions arise because this is a general exemption appearing in the federal act which was not written with reference to California law. Isn't the answer probably that we need to look at existing law where the exemption applies and determine what will happen if we do not legislate within that field?

Section 105

W Section 105 is copied directly from the federal act. Paragraph (3) is a problem which gave me no end of trouble, and I do not think I have a very happy solution to it. It is convenient to have a term in here defining a person who is a garnishee--

C Won't the federal regulations eventually say something here?

W I hope they will, but they have not yet. We have got to call this person something and, in 999 cases out of 1,000, he is going to be an employer. The question here is whether you can attach an artificial meaning to an employer, knowing that it will be the popular meaning in nearly all the cases. Once is a while, it will not be the popular meaning.

C You have another problem under paragraph (1) which says earnings "includes periodic payments pursuant to a pension or retirement program." Under the existing exemptions, these assets are completely exempt, aren't they?

C Yes, they are exempt and, in some cases, remain exempt where they are traced into bank accounts. I think we have a conflict here with our existing law and, if we adopt this, we are going to have to recommend the change of those 690 exemptions.

C Why should retirement payments be completely exempt? They are like wages. If a guy is getting more than our exemption in retirement funds, why shouldn't the creditor get it?

C You may be right, but you have the exemption now, and you cannot take it away from them. You will have the old people against us, too, and I do not see any reason why we should take on all that battle when we want to get something accomplished.

C What is the logic of saying that, where somebody has earned $100,000 a year and now gets $5,000 a month out of retirement fund, you cannot get any of that, but, where some poor guy makes $450 a month, you can take 25% a month out of his wages?

W Shall we check the exemption statute and see exactly what it is a pension retirement program provides?

C Well, I remember, in looking at the act we had before us last month, that there are at least two separate sections that deal with this in the 690 series. One of them says pension funds are exempt, and there is another one--I think it applies maybe to just the state and public retirement programs--that says pension funds are not only exempt when they come out, but you also have to trace them.

C Are contributions into a retirement fund disposable income? How about the Keogh Act? Is that disposable income?

W Are they required by law to be withheld? No.

C It is not withheld by an employer unless you include a partner or somebody like that as an employer.

C That is not right either. Why shouldn't a self-employed man be able to put it in--

C You might talk to Congressman Keogh and try to get a little better deal for people that are under the Keogh plan. That is the best that they have been able to get out of Congress. It should be comparable. Most people that are under the Keogh plan agree with you that it should be comparable, but the federal government has not agreed with that.

C Would it matter whether you were an independent contractor or an employee? In your definition, it would not matter how you were paid the earnings.

W It is money for personal services; the money I owe my dentist would be compensation under this act.

C I do not think that is what they meant. I think they were thinking only of the employment relationship, but they never said that.

C The clients of a lawyer are all employers under this, literally.

C Wait until they start serving all these withholding orders on all your clients if you do not pay your debts.

C Could you say an employer means "any person, unincorporated association, firm, partnership, or corporation?"

C When we put this act in the code, there will be a definition of person in that code that we will take a look at, but, we were thinking of deleting the language "includes periodic payments pursuant to a pension or retirement program."

C We have either got to delete that or change the 690 exemption.

C At least check to see if there is already an exemption.

W If there is, it seems to me that solves the problem completely.

C I do not think it is a very equitable solution.

C There is another problem here. There are funds which the employers pay hourly rates into which are accumulated over a year period and then paid out to the men. They come out of earnings, and the men are supposed to use this fund for vacations. Would the fund be an "employer"? These are vacation funds, but it is based on earnings. However, the fund is not within this exemption on pensions that has been mentioned. I am curious to see how this thing is going to work as to our fund.

C I wish somebody would solve this problem I am facing. We levy on a bank account, the sheriff picks up the money, pays it to us, and we remit to our customer. Now the debtor comes in and files a claim for exemption. Obviously, the question is moot because the money is paid out. But the claim is based on the fact that the money is a pension so there is now going to be a suit filed against us for conversion of that fund. Can I raise the defense that he has waived the exemption?

C By what?

C By not claiming it before the money was paid over to us.

C Are retirement funds under that act completely exempt?

C They are if they are claimed.

C We should probably try to avoid the requirement of claims and consider making them exempt for the purposes of this act without a claim.

C Are you going to have them put that on the postcard?

C Yes, we might put that in.

C What becomes of the compliance under the federal act then?

C We have got a broader exemption than the federal act so we are alright there.

W The only kick would be that it is not automatic. But maybe they will give a little on something like this.

C The best thing would be to have a procedure where the creditor files his order with the retirement fund and, if the debtor gets more than $400 a month, he has to pay the debt. This would be a mixed blessing. There is an automatic exemption; you do not have to claim it, but the exemption would be limited in amount.

C You must talk to the Legislature on this thing. Maybe they will have some ideas on how vigorously they would pursue this. But, if it were just passed by the Legislature last time over the opposition of the creditor's attorneys, what are we going to--

C You would have to change the municipal and state employee exemption, too, if you are doing this. Then the state employees would probably impeach us.

C It is a hot potato, believe me.

C That is the trouble; there is so much in the law that is this kind of special interest stuff that--

C For exemple, we tried to limit the life insurance exemptions. You know that all proceeds from a life insurance policy are exempt, and the only limitation is based on the premium paid of $500. We put in a one-year limitation, that is, if the proceeds of a policy are held in a bank account or savings account for over a year, then they become exposed on the theory that, if the debtor does not need them within a year, they are not badly needed, and they should be used to pay his debts. Life insurance companies came down on all fours, and it was finally eliminated.

C What about the cash value that is in the policy; can you touch this?

C If it is over $500, you get pro rata of the cash value of the policy. If the premiums are more than $500 a year, you can get the proportion of the premiums to the face value of the policy.

C That is when it is paid. What about the cash value?

C Let us take a specific example. If you have a $500 premium on a $10,000 life insurance policy, the entire policy is exempt. If you have a $10,000 policy and a $1,000 premium, then only half of the policy is exempt whether it is the face value of the policy or the loan value or the cash value. You can levy on the cash value of the policy--one-half of the cash value.

C I think we cannot really come up with a completely sensible act here. It is obvious.

C Can we be helpful in any other way concerning Section 105?

C We are going to say "but does not include periodic payments pursuant to a pension or retirement program" if we find that those are otherwise exempt. Then the question we will have is whether the fact that you have to claim the exemption jeopardizes your getting federal approval for this act. And, if it would, then we would have to think about doing something about that.

C How would it jeopardize it?

C Because they would say that their act automatically excludes a portion of the pension fund payments, and our act does not provide an equivalent exemption for those. Because you have to claim the exemption; it is not automatic.

C We can talk about making those procedures simpler.

C It might be that we should look at that pension exemption and make a certain amount exempt automatically, and then we would have it cleaned up.

C How are you going to make an automatic exemption from a bank account?

C If we give an automatic exemption to bank accounts up to a certain sum, that would take care of that problem. Isn't that the best way to handle it? To make it automatic to the same extent as wages, and then to the balance, this act has no application.

W In other words, you would just leave it in the definition of earnings, and then it would be automatic to the extent of the act?

C Yes, and then the other exemption would not be wiped out. You could say in the Comment this provision does not wipe out the exemption that is already in the law. I think that is a better way of doing it. You would give the exemption to the extent it is claimed under the present Code of Civil Procedure, but to the extent it is not claimed, at least the amount that would be given for wages would automatically be exempt. That would satisfy the federal people.

Section 201

W Section 201, paragraph (1), is the federal provision. Paragraph (2) is a copy of our present California restriction without the common necessaries and without the employee restrictions.

C Are we going to consider a paragraph (3) here, providing the blanket exemption? What amount do you think we want to put in for the purpose of getting comment?

C Paragraph (2) says the debtor's family has to reside in the state. If the debtor is, in fact, supporting his family, it seems to me that it should make no difference whether his family lives here or elsewhere.

C That is right. He might be under a court order in California to support his family in New York, and, if he does not, he can go to jail in California.

C We should take out "residing in this State."

C I thought we were going to consider getting rid of paragraph (1) by making a broad enough flat exemption based on gross wages.

C No, I think we were going to leave the federal one in and then put our own in there that was enough higher so that we would never use the federal limit. But we would provide these limits as alternatives --whichever was most favorable to the debtor. If the federal limit ever exceeded ours so we had to add another one, in the meantime, we would still comply with the federal standard.

C We would provide that "only the aggregate gross earnings of the judgment debtor for any workweek which exceed $100 are subject to earnings execution." That would mean you get more than a $400 a month exemption out of the act.

C If payment is on a monthly basis, we would have to put some formula in there. But that would be the kind of provision we would have. Then you do not have to worry about the concept of disposable income.

C What does the federal provision amount to on a monthly basis? What is the lower limit?

W $48.00. 30 times $1.60 for one week.

C That would be a little over $200 a month. But we would have to have the 25% limit in there also.

C I would like to see this written on the basis of $400 a month or more, myself.

C Well, we could start with that and get comments from both sides. If you have a figure, then there is something to focus on, and we will get some evidence one way or another on what really is necessary.

W This would be a step in the right direction for everybody.

C I think the creditors would like it. They would not have to argue about what disposable earnings is and all that.

C It depends on how high you put the limit. If you put it too high, you cut out all recovery.

C May I ask a question about paragraph (2)? What is the definition of "family," and what does "for use of" mean?

W I am trying to hook in there to the interpretation of our old law.

C I think you should say "necessary for the support."

C Yes, "use" is pretty broad. I do not think you should use "use"; it could mean anything.

C The word "family" has problems, too. They are having great difficulty, I understand, in some counties in determining what a family is. Some people now claim the family does not require anything except an agreement to live together.

C I am not sure "support" is the right word either. It is really the "necessities of the family."

C If you just leave "use" as it is, you are using the language which is in the present statute, and that has been interpreted to mean the necessaries of life.

W I think that I would favor that.

C In the Comment, then, you could indicate what you mean--

W You could write a very detailed provision here, and I think the judge is still going to do pretty much what he wants and what he has done before.

C Do you have to come in and claim the exemption under paragraph (2)? It does not say that now. Paragraph (2) should say that "no earnings which the debtor can show are necessary for the use of his family shall be subject"--

W The statute has a section on that that says the debtor has the burden here.

C The two other limits we talked about--the $400 base plus 25% and the federal scheme--you do not claim. This exemption you have to claim and prove.

C Yes, we are going to draft it that way.

C Perhaps the term "family" could be limited to persons whom the debtor is obligated by law to support.

C Why don't you say it means persons for whom the debtor would be entitled to take a deduction under the Federal Income Tax Law?

C You know there could be cases where the debtor is supporting somebody who really is not strictly family, but the person would go on welfare if the debtor quits supporting him, and that is not a desirable result.

C It is a problem, and I do not know if we can solve the thing. The term "family" has become very broad; and, if you use "obligated to support," the exemption might be too limited.

C It does not seem to me it is a sufficiently significant problem to warrant changing the law.

[BREAK IN TRANSCRIPTION]

Section 301

C We really have to be careful to protect the employer.

C The best way to protect him is to have the order tell the employer exactly what to do, and there will be no interpretation--

C Are the limits specified in the order?

W We have two cases. In one case, there is a hearing, and I would assume we would want a specific figure stated by the court in its order. If there is no hearing, if the debtor does not ask for a hearing, the creditor and the court have no information available to them. You can only tell the employer not to collect more than the federal formula. You have to give the employer a writ or an order with a little chart like the one I showed you.

C The rule would be in the order though. The employer can read the order and comply with that and not have a duty to try to find out what some regulation says.

W That is right.

C The amount would have to be computed almost every week. If the guy is working on overtime or gets compensation on some commission basis, it varies and--

C Section 301 would then provide:

> Receipt of an earnings withholding order imposes upon an employer a continuing duty to withhold from the judgment debtor's earnings those amounts provided by the order or computed in accordance with the order. . . .

W Let me raise this point. Professor Riesenfeld thinks that I have erred here in that I have not specifically said that, not only does the order constitute a continuing duty to withhold, but also constitutes a lien upon unpaid earnings and upon future earnings when earned.

C That goes to priorities, I take it?

C That is right. Professor Riesenfeld says that such a writ, when served, in effect constitutes a lien on unpaid earnings of the judgment debtor and upon future earnings of the judgment debtor when earned.

C I think that makes sense because, in addition to bankruptcy, an employee can enter into agreements with his employer on commissions and extra compensation so that he will be paid later. If the creditor does not get a lien, he will miss this money.

C I have a question. The statute provides for the payments to be made to the judgment creditor--what about the creditor's attorney or other representative?

C The statute could say "pay to . . . the judgment creditor or the person designated by him. . . ." Then the employer could pay it to a bank or anybody. The person would be designated in the order.

C We need to say something in the Comment about this lien applying. The Comment should point out that there is this lien; then at least we will smoke out responses to these proposals.

C Shouldn't there be a provision that the writ is terminated by a release from the attachment creditor?

C There is a duty in here on the creditor to advise the employer that the judgment is satisfied.

C Yes, but suppose the writ is released before the judgment is fully paid. Paragraph (2) of Section 301 says:

> A writ of earnings execution is terminated by either the employer's payment in full . . . or the termination of the judgment debtor's employment. . . .

Suppose the attaching creditor wants to release before that. The debtor may come in and say, "Hey! I do not want that on my salary. Release it, and I will pay you voluntarily."

W I would certainly have no objection to that.

C Should the word "employer" be in there? Shouldn't the execution be terminated whenever there is payment in full of the amount owing?

C Yes, but that is the point where the debtor can get a release. The employer would pay in full the amount specified in the order. If he does not know what other arrangements are made, then he can go ahead until he is notified. You have to have that.

C Suppose the employee notifies the employer that he has found other ways to pay his judgment. It is paid, but the employer has not paid it in full, and the creditor has not said a peep.

C Then the employer tells the employee to get a release from the creditor. If the creditor does not give him a release, there will be a penalty and a sanction. Otherwise, you are going to find people who will just go to their employers the next day and say, "I have paid this."

C Instead of having the release go from the attorney to the employer, why not have the release go from the attorney to the clerk who issued the order? Let the clerk tell the employer he does not have to pay anymore. Similar to the sheriff releasing an attachment.

C That might put some extra steps in it. If the order shows who the creditor is and if there is a release from the creditor, why bother with the clerk? Let the creditor give the notice. He is the one that has been paid; he is the one who is going to know. The clerk is not going to know. What would happen if the employer got the wrong information from the clerk's office?

W I have a requirement back here that, when the judgment is satisfied, the judgment creditor must notify the employer. I take it that here, you want something further saying that, if he has released the levy prior to full satisfaction, he also notify the employer.

C How do you pick 90 days after termination as a limit on the order? What is the rationale for that?

W Well, in the first place, you do no want to have a situation where the writ is served and the employee quits, and, then, two years later, the employee starts working again, and there is a burden on the employer to keep on paying to the creditor. So, that is for the benefit of the employer. On the other hand, I presume you would not want a case where the employee is laid off for a short period and, then, when he comes back, he avoids the writ. It seems to me that there is a chance for collusion there. The 90-day period is the New York provision.

C In other words, a break in employment for more than 90 days terminates the order.

C If you went on vacation for 90 days, that would not be a termination?

C No, that would not terminate the employment.

Section 302

C Section 302 says the withholding order is obtained "from the court which enters the judgment."

W There is a policy problem here that has really got me baffled. If you look at the statute now, you find very little said about venue and what court issues a writ. I decided to say that the writ may be obtained from the court which entered the judgment on the theory that that court is the one that would have jurisdiction over the parties, and so forth. But our problem is in hearings. Suppose a creditor in Beverly Hills makes a deal with a debtor in Modesto in which he says, "When your contract is received, it is accepted." The contract is made in Beverly Hills, and the creditor would have the right to sue the debtor in Beverly Hills. If he gets a judgment in Beverly Hills by default and issues a notice to the debtor, the debtor has to come down from central California to the hearing in Beverly Hills. But it seems to me the hearing ought to be where the job is. This may be of some benefit to the employer eventually.

C There is a recent statute on venue that is analogous to this. We might get some help from the language used there.

C What about the present supplemental procedure? Where is that supposed to be brought?

C In the court where the judgment is granted if the judgment debtor is within 150 miles from that court.

C If he is not within 150 miles, then you go to the Superior Court nearest to the debtor.

C How do you establish the fact that you have a judgment in another court?

C By recording the abstract of judgment.

C We will have to work something out along those lines here.

C Let us say you get a judgment in San Francisco, and the judgment debtor goes down and gets a job in Los Angeles. Now, you are going to try to levy on his earnings. It seems to me it should be a Los Angeles court that does all of this.

C Who are you considering here?

C Well, the employer and the judgment debtor, too.

C Principally, the employer.

C The creditor will turn this over to a collection agency that is going to be working down there anyway.

C I would think the venue would be controlled by the residence of the debtor because he is the one that has to have a hearing. It is not the employer who has to have a hearing. All he has to do is make a telephone call or make a--

C Well, the place of employment and the place of residence of the debtor are not normally going to be a great distance apart. But, there could be a problem if you have an employee who is out on the road all the time.

C You have the home office problem, too. If you just go to the residence, at least you have some hope of tying it down to one location.

C You have to know where that is to mail the notice anyway.

C That raises a question that probably will come up later. But you say you need to know the debtor's address to mail a notice to him. Sometimes the creditor will know where the debtor is employed and not

know where he lives. It would seem to me, when we get to that point, that we make it an either/or provision. Provide some way to give him notice where you do not know where he lives.

C The creditor had to have some place to serve him in order to get the default judgment; this is going to be shortly after the default judgment is entered. So you are going to know the debtor's address.

C You would be surprised how fast they can move.

C Send it to the last known address.

C That would be alright.

C At some point here, you had better put in the social security account number of the employee, also.

Section 303

C Here, again, we can have this notice mailed by the creditor who can then file an affidavit that he has mailed it with the clerk instead of having the clerk mail it. That will stop some of the objections by the clerk's office, I think.

C I mentioned earlier the situation where the debtor might have an automatic stay. It would not be very often, but he may have appealed, and this would be a separate reason for creating an exclusion. I guess we are going to have some kind of procedure to appear both for this and if the debtor wants to try to overcome the presumption that he got the notice.

C What about the idea of having the request for hearing on postcards? The debtor would just have to fill it out.

W Before we come to that, I have these paragraphs (1), (2), and (3), in which I try to describe in narrative form what the federal formula is. I am inclined to think the Los Angeles marshal has done a much better job of this by putting it in a chart. That is what I

showed you a while ago. The marshal has covered, in a rather precise chart, four cases. These are: one-week pay period, two-week pay period, semi-monthly pay period, and monthly pay period. The employer can call up if it does not fit one of those. It is very brief.

C You have to add your other section here. That is, the other limitation or floor on earnings that can be taken.

C Then you do not need to put the rest of this stuff in unless and until the disposable earnings limitation has to be used. But the administrator can put a provision in the regulations to cover the type of form to be used for that period.

C Is it better to legislate this form or can we provide in the statute that the administrator, or whoever the official is who administers this, will issue rules and regulations providing for the forms?

C I think, actually, the latter is the better practice. The debtors are going to insist that this form be kept simple and readable. This is where the notice is, and it could certainly be done by the administrator.

C If we did adopt the $100-a-week limitation, the form would be fairly simple, and you could put it in the statute, as I suggested, and then require the administrator to make other rules, if necessary.

C When you get down to the very end of this application for a hearing, why do you not just put a little line asking the debtor to state his social security account number? The judgment debtor is going to have no objection to that. However, there are funds and large employers who keep their records with social security account numbers now. IBM machines may be tied into the system, and it could be very helpful.

C In paragraph (4), you explain to the debtor that wages "necessary for the use of" his family are exempt, but then, later in the paragraph, you use the phrase "in order to support your family." To me, those are not necessarily the same. I think you should use the same language, and it should be "necessary for the use of" in both places.

C I am not so sure that the notice should not try to state the substance of what "use" means. If I am a debtor and I get this notice, I will say, "Well, I need this furniture; I need all these things." He is going to give that word "use" in the notice an entirely different meaning. It should say "absolute necessities" or something similar.

C We need a better explanation here of what is exempt. I do not understand the phrase. If so much of it is case law, how will the debtor know what the case law is?

C Yes, but you might mislead him. If you do not tell him what the broadest sense of "use" means in your notice, you are misleading him.

W If you want to use the administrator route, what you can do here, instead of telling the administrator exactly what to put in the form, you can tell him the form has to contain the substance of the law and whatever else is appropriate. In that way, you can avoid the problem we are having with language. The point to be made under paragraph (4) is that we must invite the debtor and indicate to him how to claim an exemption by sending back the application for hearing. If you do that, then you put it all on the administrator.

C But, if the administrator finds there are bugs in it, at least he can change it a lot quicker than going up to Sacramento to change the statute.

C Can I make a couple of comments on this? Technically speaking, under the current law, when you file a decree of exemption, you are not required to be present in court; you can prevail just by submission of the claim itself. One of the reasons for this is the burden on people to take off, particularly where the amount in issue is not that great. The procedure here, as I read it, requires the person to appear.

C Only if he claims the exemption because he has unusual expenses.

C Yes, I am talking about your individual who has unusual expenses.

C Well, he should come into court on that--

C I am saying that, under current law, he is not required to.

C Yes, but now he cannot get anything like a $400 exemption. If we were to give him a substantial exemption, and he wanted more--

C I just wanted to raise the point. There are two other problems, and these primarily relate to the lower economic brackets. First, not knowing that counsel is available to assist you in case you do not understand even this simple form of notice. A simple reference to the fact of availability of help would be desirable. Second, a large group of people in the state do not understand notices in English. I am not saying that notices should be all in Spanish, but a simple notification in Spanish that there are Spanish-speaking lawyers who are available to them would be desirable. This has already been done by a number of other agencies. The Department of Motor Vehicles and a number of other agencies recognize the problem. I think it would not add to the length to have a single line or a couple of lines relating to those two points.

C Why limit it to Spanish?

C Well, you can say there are Chinese-speaking, and so forth, but, statistically speaking, the largest group of non-English speaking people in this state are Spanish speaking, and this is already recognized in a number of other forms.

C Yes, but that is an argument you make to the administrator specifying the forms. We have decided to leave this for regulation. We are just going to say that you have to have the minimum things in the notice rather than trying to say whether you use Spanish and so on. But, as to your point about being able to get an exemption of more than $400 without appearing in court and without the judge being able to question you, I do not see how a judge can grant an exemption for more than the base without some evidence. If you have the burden of proof on it, how can you get an order with nobody there?

C Well, under current law, you have met that burden when you put the statement in. It is under penalty of perjury. You do not have a strong case to put on. You cannot elaborate if he is not there, but it does serve a function. Sure you are taking a chance.

C If we make the basic exemption big enough, we are not going to catch too many people who do not have the knowledge or the sophistication to protect their rights.

C I would agree that, if the sume was high enough, our concern would be eliminated.

C $100 a week should be high enough, I would think.

C If it is not, we would like to know. You have got to stop someplace.

C What is the creditor going to do? He has a debtor making $700 a month who puts in some kind of an affidavit. The creditor goes to court to resist it, and the guy is not there. There are a lot of statements in there, but he has no opportunity to ask questions or cross-examine.

C It works both ways. A number of creditors have a form that goes automatically to counteract the affidavit, and they do not show up, either.

C Most of the affidavits that are filed itemize those expenses. If you are going to give a flat exemption and then leave it to a court to decide what the overage should be, it seems to me there should be a hearing rather than affidavits.

C We are saying that the creditor only gets 25% over the $400. The debtor still has a 75% exemption on all earnings over $400. Surely, you cannot be too worried at that point.

C I think $400 gross income is rather high. Under federal law, if the debtor makes $65 a week, you can get $15; now, add taxes, deductions, social security, and you still have less that $400 a month in gross. I think that $400 is being too generous.

C Yes, but it has to be generous before the federal fellow is going to say, "Well, that is better than what we have."

C You can make it just as good as theirs.

C If you are using gross income, how are you going to make the state exemption just as good unless you are high enough above the federal exemption that there is no question about it?

W What you want to do, as I see it, is to have an exemption that we are sure is higher than federal law. Then, have the federal exemption to fall back on when the minimum wage goes up and before the Legislature acts.

C And also have the right of the employee to come in and show that he needs more than the $400. For instance, if he has 10 children, and three of them are in the hospital, four of them are in corrective institutions, and all that sort of thing, certainly he can get more in that case, but he must take the day, or send his wife out, to do so.

THE END

October 26, 1970

Memorandum

To: California Law Revision Commission

Re: Wage Garnishments

California's wage garnishment laws are criticized on many different fronts. Debtors believe the exemptions are inadequate and difficult to assert; moreover, they see garnishment proceedings as interfering with their employment relationship and endangering their jobs. Creditors find it difficult and expensive to collect money through the archaic wage garnishment machinery in California and concede that the greatest importance of garnishment to them is its in terrorem effect on debtors. Employers see themselves as innocent third parties who have to bear much of the burden of the present system. Everyone is confused by the fact that since July, 1970, California citizens are subject to two somewhat incompatible garnishment laws, one state and one federal. Legal commentators contend that harsh garnishment laws (and California is generally considered to have one of the "harsh" laws) push debtors into bankruptcy to the ultimate detriment of creditors in general. Other complaints could be added to this list.

The question arises how a consultant can be of the most assistance to the Commission on a broad problem like garnishment reform when only a limited amount of time is

available to formulate preliminary recommendations. Certainly a comprehensive analysis of the whole area of wage garnishments is ruled out by time considerations. As I indicated to the Commission in May, my objective is to present to the Commission some proposals for legislative action with only a brief report justifying these proposals. In this memorandum I state what I conceive to be the major policy decisions the Commission must make in the garnishment area. I have attempted to show how the policy recommendations that I make can be implemented by sketching out in rough draft form a fairly comprehensive wage garnishment statute which I have called, for purposes of discussion, the "Earnings Execution Act." I offer this statute to the Commission as a basis for discussion of possible reforms in wage garnishment law. If the Commission believes that some of the reforms recommended are worthy of further study, future drafts may either incorporate these changes into the existing provisions on garnishment in the Code of Civil Procedure or continue the approach employed in the Earnings Execution Act of having a separate statute on the subject of wage garnishments.

My assessment of the major policy decisions to be made in the garnishment area follows:

1. Desirability of continuing levy procedure. In New York and other important states a court order to an employer to pay over the debtor's earnings constitutes a continuing levy and is effective until the debt is paid or the debtor is no longer employed by the employer. In California the creditor must make additional levies if the

first does not yield enough money to pay the debt. Clearly a continuing levy system is more convenient and less expensive than the present multiple levy system. There is no convincing reason why such a system would be unfavorable to debtors for it in no way increases the exposure of a debtor's earnings to seizure, rather it makes seizure of earnings less expensive for creditors, employers, the court system, and for debtors themselves.

2. Abolition of common necessaries exception to CCP Section 690.6. The policy decision proposed by the Earnings Execution Act is that if a debtor can sustain the burden of showing at a hearing that he must have all or part of the 25% of his disposable earnings otherwise available for execution in order to support his family, the creditor must be postponed to the extent of the debtor's demonstrated needs. This is not a radical debtor-protection measure, but is merely legislative recognition that courts should be able to postpone the rights of creditors in certain collection situations in which debtors desperately need their wages to feed, clothe and shelter their families. The common necessaries rule, in focusing on the source of debts already incurred instead of on the debtor's present and future needs, is hopelessly irrelevant to the issue of what earnings should be exempt, as is explained in the accompanying report.

3. Incorporation of Title III of the CCPA into California law. Nothing is gained by having two separate garnishment restriction laws, one state and one federal.

The Earnings Execution Act illustrates how the two laws can be combined, and presumably qualifies for exemption from federal enforcement. Matters as local as garnishments seem to be particularly suitable for state enforcement. The Wages and Hours Division of the Department of Labor is a remote and inaccessible source of enforcement and information regarding wage garnishments. "Creative federalism" starts at home, and California's interest in her citizens who are debtors or creditors should be great enough to lead the State to seek exemption from federal control in this area.

4. Improvement in manner in which debtors may assert their rights to exemptions. Debtor and consumer protection laws are marked by examples of statutes that give debtors rights they don't know about and would have difficulty in asserting even if they did. Debtors have long complained about the procedure they must follow in claiming their wage exemptions under CCP Section 690.6. The Earnings Execution Act is drafted on the basis that whenever a notice is given to a debtor requiring a reply from the debtor to claim rights (in this case the right to show the court at a hearing that he needs all of his earnings to support his family), the notice must be accompanied by a relatively simple form that may be filled in and returned. A similar procedure is adopted with respect to communications with employers.

5. Granting debtors private remedies for enforcement of garnishment restrictions. If creditors or employers violate garnishment restriction laws, the results to debtors can be catastrophic. Modern debtor protection laws like

Truth-in-Lending and the Uniform Consumer Credit Code give debtors specific remedies for violations. Private remedies are effective not only in affording the injured debtor recompense but also in providing an incentive to employers and creditors to comply.

6. Giving administrative enforcement powers to state officials. The Earnings Execution Act gives powers of administrative enforcement to a watch-dog state official. This official is not only given injunctive powers but is also given the right to bring civil actions on the part of injured debtors. It is likely that the Department of Labor will not grant exemption from federal enforcement unless the state seeking exemption has given adequate administrative powers to a state official with respect to wage garnishments.

7. Abolition of levy of writs by marshals. My judgment is that the use of marshals as high-priced messengers when a creditor is attempting to reach a static and highly visible asset like earnings is a waste of time and money. The United States Post Office will do the same work for a few cents. We should recognize that one function of courts in this country is the collection of debts. It is to the interest of debtors, creditors, and taxpayers that this function is performed in a businesslike manner. A court clerk's staff should make collections using modern methods, e.g., telephones, mails, computers, etc. The clerk's staff should become expert in garnishment restriction law so that debtors, creditors, and employers can obtain accurate information at the local level.

8. Requiring employers to make payments directly to judgment creditors rather than to public officials. Communications are probably good enough in this State to justify a system in which the employer can send a check directly to a creditor without the use of the government as an escrow agent. Here again the United States mails can do the job.

9. Discharge from employment. The federal prohibition is copied in the Earnings Execution Act, but the debtor is given a civil penalty in the Act for violation of the prohibition. Under the federal law only a criminal penalty is provided and this is generally thought to be ineffective in such cases. Some thought might be given to a stronger provision than the federal prohibition against discharging an employee for garnishment on one indebtedness.

10. Execution versus supplemental proceedings. Professor Riesenfeld has suggested that many of the reforms offered by the Earnings Execution Act could be as well achieved by the supplemental proceedings route. In the interest of getting this material in the hands of the Commission at this time, I am not attempting to draft provisions using this alternative approach at this time. I hope to give the matter further consideration before the November meeting.

Respectfully submitted,

William D. Warren

William D. Warren

WDW:K

Summary of Proposed Earnings Execution Act

On July 1, 1970, Title III of the Consumer Credit Protection Act of 1968 (hereafter referred to as the CCPA) went into effect throughout the United States imposing restrictions on the amounts creditors may take from debtor's earnings and prohibiting discharge from employment under certain circumstances. In 1969, the United States Supreme Court in Sniadach v. Family Finance Corp., 395 U.S. 349, handed down a decision which led the California Supreme Court in McCallop v. Carberry, 1 Cal. 3d 903 (1970), to rule that California's pre-judgment wage attachment procedure is invalid. The proposed Earnings Execution Act is an attempt to adjust the California law of wage garnishments in the light of these events, as well as to modernize it in other respects.

The CCPA invites each state to enact its own restrictions on earnings garnishments and to undertake their own enforcement of these provisions.

1. State exemption

Section 305 of the CCPA states: "The Secretary of Labor may by regulation exempt from the provisions of section 303(a) garnishments issued under the laws of any state if he determines that the laws of that state provide restrictions on garnishment which are substantially similar to those provided in section 303(a)." Further directions regarding state exemptions are set out by the Secretary of Labor in 29 Code of Federal Regulations Sections 870.50-870.56 (May 1970). It is clear that for a state to gain exemption it must enact a law with provisions as strong as or stronger than those of the Federal law and that it must make adequate provisions for enforcing its law.

The proposed Earnings Execution Act would appear to qualify for exemption on the basis of these criteria set forth by the Secretary of Labor to this date. Its restrictions are stronger than those in the Federal law, and its enforcement mechanism is far better. The effect of state exemption would be that California would enforce its own restrictions on the amounts creditors can have withheld from the pay of debtors. The Department of Labor would relinquish the field to California enforcement authorities except in one instance. On July 2, 1970, the Administrator of the Wage and Hour Division of the United States Department of Labor provided in 29 Code of Federal Regulations Section 531.39(b) that the amount of an individual's earnings withheld in excess of the amounts allowed by Title III of the CCPA will not be considered to be the equivalent to payment of wages to the employee for the purpose of the Fair Labor Standard's Act. Presumably, then, even in a state that has been exempted by the Secretary of Labor, an employer withholding too much from the debtor's pay could find himself in violation of the FLSA and subject to Federal prosecution.

2. Abolition of pre-judgment earnings attachments

The proposed Earnings Execution Act prohibits pre-judgment attachment of earnings. Sniadach indicates that pre-judgment earnings attachments are permissible only if a pre-seizure hearing is granted or some overriding public interest justifies summary procedure. It is difficult to find a compelling justification for summary procedures in the wage garnishment area. The usual bases for summary procedures -- likelihood that the asset will be concealed or removed from the jurisdiction -- do not apply to an asset like unpaid earnings, and the vital importance to the workingman of

receiving his take-home pay in full and on time so that he can support his family militates against summary procedures. While a pre-seizure hearing could be allowed in the case of earnings, such a process would be only slightly less burdensome to creditors than obtaining the judgment itself and would impose an additional and unnecessary burden on the courts. Hence, the present practice of many creditors of going to judgment before seizing earnings is adopted as the standard under this Act. See CCP Section 690.6, as amended in 1970.

3. Restrictions on withholdings from debtor's earnings

The Earnings Execution Act incorporates the Federal restrictions on amounts a creditor can take from a debtor's earnings:

(a) if the debtor's disposable earnings are $48 or less for a workweek, the creditor can take nothing;

(b) if the debtor's disposable earnings are between $48 and $64 for a work week, the creditor can take only the amount in excess of $48; and

(c) if the debtor's disposable earnings are $64 or more for a work week, the creditor can take 25% of the disposable earnings.

California has traditionally taken a more flexible approach on the question of debtor protection in the wage garnishment area than that evidenced by the CCPA. Doubtless this flexible approach was motivated by the realization that the debt collection process is more fair, efficient, and economical from the standpoint of the public, the creditor and the debtor if the debtor is allowed to retain his employment, to remain a productive member of the community, and is not forced into bankruptcy or onto the ever-lengthening welfare roles. Under CCP Section 690.6, a debtor can gain exemption for all earnings which he can prove to be "necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) incurred by such debtor, his wife or family, for the common necessaries of life; or, (b) incurred for the personal services rendered by an employee, or former employee, of such debtor".

The Earnings Execution Act has retained California's flexible policy that a demonstrated family need for the debtors' earnings must come before the rights of creditors, but has dropped both of the exceptions in CCP Section 690.6. The "common necessaries" exception, found only in a handful of states, was apparently conceived as a means of insuring debtors that they would be able to obtain credit for whatever courts decided were the common necessaries of life.

Los Angeles Finance Co. v. Flores, 110 Cal. App.2d Supp. 850, 243 P.2d 139 (Super. Ct. App. Dept. 1952), is still the leading case on the subject. The issue in Flores was whether "common necessaries" implied that the debt in question was incurred by the debtor for an item necessary to that particular debtor for his own peculiar circumstances (e.g., a watch to a timekeeper or a tuxedo to a waiter) or, alternatively, for an item "necessary to sustain life", (e.g., food or clothing). Flores took the latter view and held that "If the item is regarded essentially or substantially as necessary to sustain life," then it is a common necessary; consequently a debt incurred for the purchase of such an item may be collected by execution on one half of the debtor's wages which otherwise would be exempt from execution if the debtor could show his need for all of his wages to sustain his family. Other appellate decisions on "common necessaries" add little to the Flores view. See Lentfoehr v. Lentfoehr, 134 Cal. App. Supp. 905, 286 P.2d 1019 (App. Div. Super. Ct. 1955); White v. Gobey, 130 Cal. App. Supp. 789, 19 P.2d 876(1933); Evans v. Noonan, 20 Cal. App. 288, 128 Pac. 794 (1912). There is no appellate guidance on how the provision applies to loan credit as distinguished from sales credit.

It is fair to say that there is no evidence whatsoever, after all of the years this rule has been in effect, that the common necessaries rule has had any effect on credit granting patterns in California. There is not the slightest reason to believe that credit grantors in California act any differently from those in the great majority of states that do not have the common necessaries rule. In truth, the result of the common necessaries rule in California has been to decide the question whether competing creditors can reach a debtor's earnings neither from the debtor's point of view (the needs of the debtor's dependents) nor from the creditor's viewpoint (whether the creditor was careful to advance credit to the debtor only after ascertaining that his credit-worthiness showed an ability to pay, or whether the creditor provided the debtor with quality goods or services). Rather, the claims of competing creditors for earnings may be decided in California on the often techincal, and usually irrelevant, issue of what is a "common necessary of life." Hence, a reputable creditor who has rationed credit prudently to a debtor and has provided high quality goods and services to him may be barred from reaching wages while another creditor whose credit grant was made in reckless disregard of the debtor's ability to pay and who sold the debtor low quality products may be allowed to garnish wages.

A second reason for abandoning the common necessaries rule is that in actual operation the effect of this rule has been to eliminate the exemption of earnings necessary to support the debtor's family in all but a small number of cases. If a creditor alleges that his debt is for common necessaries, the debtor must in order to obtain an exemption pursuant to CCP Section 690.6 go through the complicated process outlined in CCP Section 690.50 (affidavit, counteraffidavit, hearing, etc.), all of which takes time, effort, and some sohistication. Indications are that few debtors even apply for the exemption (as few as 1 in 25), though presumably many more are eligible for it. See Western Center on Law & Poverty, Wage Garnishment, Impact and Extent in L.A. County at 6, 122-23(1968); Brunn, "Wage Garnishment in California, A Study and Recommendations," 53 Calif. L. Rev. 1214, 1219(1965). Hence, in the usual wage garnishment case, the debtor finds himself with only half of his wages available for support of his family. It is no coincidence that California has one of the highest rates of consumer bankruptcy in the nation.

Old Section 690. 11 (now Section 690.6(c)(2)) provides that a creditor who is a former employee of the debtor can take the nonexempt portion of the debtor's wages even though the debtor can show the money was necessary for the support of his family. This provision has not been carried into the Earnings Execution Act. It is largely irrelevant to the case of the low income debtor, for such a debtor has no employees, and information is difficult to find on whether this provision is ever actually invoked by creditors. Further study is called for to determine whether this provision meets any real problems in the area of debtor-creditor relations.

The approach taken by the Earnings Execution Act is to allow the creditor 25% of the debtor's disposable earnings (subject to the $48 floor) unless the debtor can sustain the burden of proving to a judge his need for part or all of the remaining 25% of his earnings to support his family. Judges have demonstrated their ability to adjust the competing interests of creditors and debtors

on the basis of a need-for-support test. The debtor with a good job, manageable family expenses, and a disinclination to pay his rightful debts will find little judicial sympathy and will lose 25% of his earnings. On the other hand a poverty debtor, hit by illness or other misfortune, may have his future as a functioning, income producing citizen saved by a judge willing to delay his creditors until the debtor can get back on his feet. This delay may mean that the debtor will not have to resort to bankruptcy and that the creditor will ultimately be able to collect his debt.

4. Discharge from employment

In 1969 California added to Labor Code Sections 2922 and 2924 language which states, inter alia, "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for one indebtedness, prior to a final order or judgment of a court." This provision was copied from CCPA Section 304(a) except for the underlined phrase. The original federal provision is copied by Earnings Execution Act Section 401. Two problems arise with the 1969 California amendments. First, the underlined language could be construed to mean that the prohibition against discharge applies only to prejudgment attachment of earnings. If true, first McCallop v. Carberry, 83 Cal. Rptr. 666 (1970), and then CCP Section 690.6 render the provision meaningless for they bar prejudgment attachment of earnings in California. Second, under present California law there may be multiple levies for a single debt. If the debtor's earnings have been levied on several times for the collection of a single debt, the employer who discharges him may have vidated the statute in that he has discharged him for garnishments with respect to "one indebtedness." In adopting the continuing levy procedure in Earnings Execution Act Section 301, California would bring its law into accord with what Congress probably intended in CCPA Section 304(a).

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4. The mechanics of collecting from earnings.

The Earnings Execution Act makes a fundamental departure from California's archaic system of wage garnishment which has proved to be unsatisfactory both for creditors and debtors. California law requires that writs of attachment and execution be levied by a sheriff, constable, or marshal. Only debts owing to the debtor at the time of service of the writ can be reached by his creditor through wage garnishment. Hence, a creditor must have a new levy for each payment period of a debtor until the debt is fully paid. For example, if a creditor has a debt of $500 and is entitled to levy on $50 of the debtor's earnings at each pay period, ten separate levies by the sheriff or marshal would be required. This would entail ten separate trips to the debtor's place of employment by this officer and ten bookkeeping computations by the employer. In 1968 employers in Los Angeles County alone expended nearly $2 million to process wage garnishments, or almost $20 per paycheck garnished. [Western Center on Law & Poverty, Wage Garnishment, Impact and Extent in L.A. County at [redacted] (1968).

Multiple levies -- a creditor can have levies as often as he wishes -- are both time-wasting and expensive for public officials, creditors, and debtors. Despite the fact that the sheriffs and marshals charge a fee for each levy made, a fee which the creditor passes along to the debtor as costs, the county pays 30% to 50% of the expenses of collection. Braun, supra, at p. 1122.

Court clerks charge a fee for each writ of execution issued; the writ is good for a maximum of sixty days; hence, multiple writs may also be necessary under the present law, again adding to costs. By simplifying collection procedures, the Act reduces costs that are passed on to the debtor. This directly benefits the debtor and proportionately increases the likelihood that the creditor's judgment will be satisfied.

From the debtor's point of view, the present procedures make it bewilderingly difficult for him to assert his rights. Judge Brunn describes his plight in the following excerpt:

> The half of the wages that is not automatically exempt can be attached by a routine allegation in the affidavit for attachment that the action is brought to collect a debt incurred for the common necessaries of life; for a writ of execution not even an affidavit is needed. If the debtor wants to get that half of his earnings exempted, his road begins by his filing an exemption affidavit. He first has to obtain the forms from the sheriff; they are not given to him at the time his wages are garnished. He completes them in duplicate, "specifying the section or sections of this code on which he relies for his claim to exemption, and all facts necessary to support his claim . . ." and returns the affidavit to the levying officer. Does he then get his wages? No. Then he waits at least five days. During that time the creditor may file a counteraffidavit. If the creditor doesn't, the wages are released. But if he does, they remain tied up for at least five more days. During that time either party may move to have the exemption claim heard in court. If no one makes such a motion the wages are then released. If a motion is made, the levy stays in effect pending the hearing and the money remains in the hands of the sheriff. The hearing is to be within fifteen days after the making of the motion. Thus, as much as twenty-five days may elapse between the garnishment and the hearing.
>
> Brunn, "Wage Garnishments in California: A Study and Recommendations," 53 California Law Review 1214, 1218-1219 (1965).

The Earnings Execution Act adopts modern business methods to simplify execution against earnings and to reduce the cost of the process.

If private creditors can collect their bills almost exclusively by the use of the mails, telephone, and computers, the public bill collectors -- the courts -- can do so as well. In fact, with the power of the law behind them, they can do it better. The Earnings Execution Act's approach to the mechanics of earnings collection is based on a few simple premises: (1) courts (through their staffs: clerks, sheriffs, marshals, etc.) can communicate effectively with debtors and employers through the mails; (2) a single order by a court to an employer to withhold and pay over earnings is all that is needed to impose a continuing duty on the employer to comply until the debt is paid or the debtor's employment is terminated; (3) debtors can be told their rights in simple language and can be given effective methods of asserting them; (4) payments of withheld earnings can be made directly from the employer to the creditor without the intervention of the court as an escrow agent; and (5) the interest of creditors in having their debts collected can make them useful participants in the earnings execution process.

The sequence of events prescribed by the Act for the earnings execution process follows:

1. The judgment creditor delivers an affidavit to the clerk seeking issuance of a writ of earnings execution.

2. The clerk mails a "notice of earnings execution"

to the judgment debtor informing him that part of his pay will be taken unless he can come into court and prove that he must have it to support his family or that he has been discharged in bankruptcy with respect to the debt on which the judgment is based.

c 7. If the debtor believes that he can prove a case for a reduction in the amount of his earnings subject to execution and is willing to take time off from his job to go to court, he tears off the "application for hearing" form attached to the notice of earnings execution, fills it out, and mails it back to the clerk. If debtor wants no hearing, he does not return the application for hearing.

Q 7. If the clerk fails to receive the application for hearing from the debtor within the prescribed time, he promptly issues the writ of earnings execution which he mails to the employer described in the affidavit applying for the writ. The writ gives the employer the formula for calculating the amount to withhold from the judgment debtor's pay and orders him to mail a check for that amount to the judgment creditor each time the judgment debtor is paid. If the employer has questions, he is directed to telephone the clerk's office where expert information will be available concerning the withholding formula and other matters about which the employer may be uncertain. If the employer does his payroll by computer (or if he has a bank or other agency do it for him), will be programmed the computer to deduct the proper amount from the debtor's pay each time he is paid.

e→f. If the debtor returns the form applying for a hearing to the clerk, a time is set for hearing. The clerk notifies each party of the hearing by mail, sends the creditor a Xerox copy of debtor's application, and cautions the debtor to bring with him to the hearing any records that will help him prove his case. At the hearing the court decides how much of the judgment debtor's pay can properly be withheld (subject, of course, to the 25% limit and the $48 floor) and enters an order stating the specific amount, if any, to be withheld for each pay period. The clerk then issues the writ of earnings execution to the employer without the withholding formula set forth but with the exact figure to be withheld clearly indicated.

f→g. When the employer receives the writ he must not only make arrangements to make the withholding but he must also fill in the "earnings execution return" and mail it back to the clerk. The clerk Xeroxes a copy of the return and sends it to the judgment creditor, who now knows whether to expect payment from the employer.

g←h. The $48 floor required by the Federal restrictions raises one operational problem which is dealt with in Section 305. If the debtor has multiple jobs, a creditor may be entitled to take amounts from one employer in excess of the amounts the creditor would be entitled to were that employer the debtor's only employer. In such a case, the position of the Earnings Execution Act is that each employer should be allowed to assume that he is the debtor's only employer until the creditor has proved at

a hearing that there are other employers and has obtained a court order designating the amount to be withheld.

h 7. A determination by the court that a portion of the debtor's earnings should be exempt from execution as necessary for the use of his family should not be a final determination on this issue because the debtor's resources and needs will change. However, the judgment creditor should not be able to seek a new hearing on the issue immediately after suffering an adverse holding in a hearing. Section 309(2) suggests that there should be a period of six months or 90 days after a hearing before the creditor can raise the issue again. On the other hand, if the court finds that some portion of the debtor's earnings is not necessary for the support of his family, conditions may change to the extent that the debtor may be able to persuade a court that he now needs more or all of his earnings to support his family. Thus Section 309(3) gives the debtor the right to a new hearing at any time six months or 90 days after a hearing.

The California official designated to administer the Act will doubtless wish to issue rules to make the entire earnings collection process as efficient as possible. Management study techniques could profitably be employed in working out the bugs. For instance, the official might wish to prescribe by rule that all forms (affidavits, notices, applications, writs, returns, etc.) used in connection with the earnings execution process should be standardized business forms so that employers, clerks, and others dealing with them may do so with maximum efficiency. The official might wish to provide a grace period of a few days after receipt of a writ by an employer before he is obliged to start making payments so that the necessary arrangements for withholding can be made.

6. Operational difficulties under the Earnings Execution Act

Adoption by the Earnings Execution Act of pre-seizure hearings, continuing levies, and the federal exemption formula raises some important operational difficulties.

a. pre-seizure hearings

The Act expands the traditional California policy that where the debtor must have his earnings to sustain his family, the creditor's claim to the earnings must be at least temporarily postponed. The severity of the debtor's need for his earnings can only be determined by a hearing, and a major policy decision of the Act is that this hearing should be held before the debtor's earnings are withheld rather than after the fact. The question arises whether this will occasion unwarranted delays in reaching earnings. Under the time schedule tentatively proposed by the Act, in cases in which the debtor demands a hearing, 15 days might pass between the time the creditor asks for a writ (Section 302) and the debtor communicates his application for a hearing (Section 303). When the hearing is set, the judgment creditor receives 10 days' notice. Thus if court time is available so that hearings may be set promptly, a period of no more than one month should pass from the date of the creditor's request for a writ and the date of issuance of the writ. This delay is no greater than that under present law when a debtor asserts his Section 690.11 exemption and a hearing on the issues of family need and common necessaries is held. **See CCP Section 690.[illegible] for the time schedule with respect to affidavits, counteraffidavits, and hearings.**

b. continuing levies

The Act dispenses with multiple levies and adopts the concept of the continuing levy. In effect the employer is ordered to withhold an amount from the debtor's paycheck at each pay period until the judgment debt is paid. An employer accustomed to earnings executions should have little difficulty in determining when to stop making payments to the judgment creditor. Nevertheless it is desirable to require the judgment creditor to notify the employer when the debt has been paid (Section 310). In cases in which the judgment creditor receives some payment from a source

other than the debtor's earnings from the employer in question, the requirement of notice of satisfaction is necessary to prevent the employer from overpaying.

Another problem inherent in a continuing levy scheme is how to deal with costs and interest accruing after issuance of the writ of earnings execution. See CCP Section 682.2 for the present law on the subject. The Act provides in Section 309 that when the sum in the original writ has been paid the judgment creditor may obtain another writ for the costs and interest. This is much easier than requiring the employer to attempt to calculate the 7% rate of interest on the declining balance of the debt.

c. federal formula ($48/25%)

Congressional action in imposing a $48 "floor" on weekly earnings exempt from garnishment raises serious operational problems. Unless there has been a hearing at which the debtor and the creditor are before the court, neither the court issuing a writ nor the creditor has reason to know the actual amount of the debtor's disposable earnings; hence, neither knows whether the $48 floor applies to reduce the amount of earnings normally available under the 25% limit. Only the employer has the full information, and the effect of the CCPA is to impose on the employer the burden of determining the correct amount of earnings subject to levy. Under the CCPA, the employer must make determinations on three factual issues: (a) the amount of the employee's disposable earnings; (b) the applicability of the $48 floor; and (c) the applicability of the 25% limit.

This is a heavy burden to place on the employer, but it must be emphasized that California employers are now bearing this burden have have done so since Title III took effect in July, 1970. By incorporating the provisions of Title III into California law and gaining exemption from the federal law, the Earnings Execution Act gives the employer some much needed assistance in this area.

Under the Earnings Execution Act, if the debtor requests a hearing pursuant to Section 304, he will of necessity have to present information relative to his earnings which will allow the court to determine how much the $48/25% formula allows to be taken from his earnings. Section 304 requires the court to enter an order stating the amount to be withheld and that this amount be entered on the writ of execution.

In cases in which no hearing is requested, the employer will have only the directions given him in the writ to dalculate the amount to be withheld. This is the situation employers have found themselves in since July, 1970, and the only official advice or assistance available to them comes from the Wages and Hours Division of the Department of Labor. The difficulty in obtaining quick advice from this federal agency is one of the practical reasons the Earnings Execution Act is based on the premise of state exemption from the federal act and state enforcement of all garnishment restrictions. If the Earnings Execution Act were enacted and federal authorities granted California exemption from Title III of the CCPA, there would be two levels of official assistance accessible to California employers, creditors and debtors. These are the state-wide enforcement agency (called in the Act the "Designated Official") and, more important, the court clerks. If Title III becomes California law, the court clerks will become expert in the practical operations of restrictions on earnings executions and their officies will become vital sources of advice and information to employers and other interested parties. Section 307 requires that the writ sent to the employer must contain the clerk's telephone number and that the writ must invite employers to obtain information from the clerk about amounts to be withheld.

Another operational problem under the $48 floor occurs with respect to the multiple employment case discussed above. Without exemption from Title III of the CCPA, California employers are uncertain whether they are paying out correct

amounts in cases in which employers have more than one job. The Earnings Execution Act allows employers to assume that they are the only employer until the judgment creditor complies with Section 305 and proves that the debtor has other sources of income.

7. Enforcement

An effort has been made in the Earnings Execution Act to encourage compliance with the law on two levels: informal or self-enforced compliance and formal or coerced compliance. Voluntary compliance is encouraged when a law is reasonably easy to comply with and when some of the participants have a strong self-interest in seeing that the law is complied with.

a. voluntary compliance

The prime self-interested party in the earnings execution process is, of course, the judgment creditor. If the process does not work, he is not paid. His first

function is to find the debtor's employer or employers from whom he hopes to obtain earnings; he must identify them on the affidavit seeking issuance of the writ. The fiction that debts could be collected by arming the sheriff with a writ and having him poke around for assets of the debtor is nothing more than a fiction today. The creditor must locate the assets. If nothing happens after he applies to the clerk for issuance of the writ, the judgment creditor will begin to inquire of the clerk and employer what the situation is. If he receives money from the employer but in an amount he believes to be less than the law allows, we can expect him to use the telephone to find out why. On the other hand, if the debtor believes too much is being deducted from his pay, he will take the matter up with his employer. If payment to the judgment creditor stops before the debt is paid, he will call the employer and ask the reason -- whether the debtor's employment has terminated, the employer's payroll clerk has erred, or whatever. If withholdings continue after the judgment creditor has been fully paid, the debtor will raise the question with the employer. This is how most business affairs are conducted, and the natural tensions and pressures based on the self-interest of the creditor and debtor should operate in the earnings execution process just as they do in private business transactions.

b. debtor's remedies

An alarming omission from Title III of the CCPA is

any provision for arming the debtor with civil remedies to protect his interests under that statute. The Earnings Execution Act supplies the debtor with adequate remedies and charges a public official with over-all supervision of the area of earnings executions.

For wrongful discharge, CCPA Section 304 makes provision only for criminal penalties. Criminal prosecution is such a ponderous way of enforcing a provision against wrongful discharge that it may be virtually disregarded as effective debtor protection. Section 801 incorporates the criminal penalty provision from the Federal Act merely as a necessary condition to gaining state exemption. Earnings Execution Act Section 502 gives the aggrieved debtor a civil remedy for wrongful discharge in the amount of six weeks lost earnings.

For excessive withholding from his earnings, the judgment debtor may sue either (or both) the employer or the judgment creditor to recover the excess amount (Section 501). If he can show that the judgment creditor received the money knowing it to be in excess of the amount allowed by law, he can recover a penalty from the judgment creditor (Section 501). The judgment creditor can escape this penalty only by making prompt restitution to the debtor after receiving the money. The imposition of penalties against the judgment creditor clearly makes it imperative that he familiarize himself with the restrictions of the Earnings Execution Act before deciding to use the courts to collect his bills. This burden

of knowing the law seems appropriately placed on the judgment creditor in this case. No penalty is recoverable against the employer. His is the responsibility of complying as best he can with the writ of earnings execution. If he errs in favor of the creditor, the debtor may sue him (Section 501); if he errs in favor of the debtor, the creditor may sue him (Section 601). These remedies, together with the administrator's powers over him, should be enough to make the employer comply without punitive sanctions.

c. administrative supervision

Title III of the CCPA is enforced by the Secretary of Labor. It is clear that to obtain exemption a state must give an administrator some effective powers over the participants in earnings garnishments. The Earnings Execution Act empowers an administrator to issue rules implementing the Act, investigate violations, sue to halt violations, and bring actions on the part of the debtor to recover excess payments and penalties.

Earnings Execution Act

~~Draft of 8/7/70~~
~~W. D. Warren~~

Part 1. Short Title, General Provisions, and Definitions.

Section 101. Short Title.

This Act shall be known and may be cited as the Earnings Execution Act.

Section 102. Earnings Execution by Judgment Creditor.

A judgment creditor may have execution upon earnings of a judgment debtor in accordance with the following provisions.

Section 103. Earnings Execution Exclusive Legal Procedure for Withholding.

Except as provided in Section 104, the earnings of an individual shall not be required to be withheld for payment of a debt by means of any judicial procedure other than pursuant to the provisions of this Act.

Comment

Attachment of earnings before judgment is abolished, and the procedure of earnings execution is the exclusive judicial method of compelling an employer to withhold

earnings. Nothing in this Act affects wage assignments by contract between creditor and debtor.

Section 104. Exclusions.

The provisions of this Act do not apply in the case of

(1) an order of a court for the support of any person;

(2) an order of a court of bankruptcy under chapter XIII of the Bankruptcy Act; or

(3) a debt due for any State or Federal Tax.

Comment

This section is taken from CCPA Section 303(b).

Section 105. Definitions.

For the purposes of this Act:

(1) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(2) "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(3) "Employer" means any person who owes earnings to another.

Comment

Subsections (1) and (2) are taken from CCPA Section 302.

Subsection (3) defines "employer" broadly as including anyone owing earnings to another. Since the person who owes earnings for personal services to another will almost invariably be an employer in the popular sense of that word in cases in which a creditor is seeking to reach these earnings, the term "employer" is chosen to be the term used in this Act, to describe the person who is ordered to withhold earnings, even though in some cases it would apply to persons who are not employers in the popular sense.

Part 2. Restrictions on Earnings Executions.

Section 201. Restrictions on Earnings Executions.

(1) The maximum part of the aggregate disposable earnings of a judgment debtor for any workweek which is subject to earnings execution may not exceed

(a) 25 per centum of his disposable earnings for that week, or

(b) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the [Designated Official] shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (b).

(2) No earnings of a judgment debtor are subject to earnings execution which are necessary for the use of the judgment debtor's family, residing in this State, and supported in whole or in part by the judgment debtor.

Comment

Subsection (1) is the limitation found in CCPA Section 303(a). Subsection (2) is based on the exemption in CCP Section 690.11, but omits the provision on the "common necessaries of life." Thus under this section, the debtor making more than $64 per week in disposable earnings is subject to having 25% of his disposable earnings taken unless he can show that part or all of that 25% is necessary to support his family. The "Designated Official" is the administrator charged with enforcement of the Act. No attempt at this time is made to indicate what public official this should be.

Section 202. Violation of Restrictions.

(1) No court may make, execute, or enforce an order or process in violation of the restrictions in Section 201.

(2) No employer may withhold earnings of a judgment debtor and no judgment creditor may receive earnings of a judgment debtor pursuant to earnings execution in violation of the restrictions in Section 201.

Comment

Subsection (1) is CCPA Section 303(c).

Part 3. Procedure for Executing on Earnings.

Section 301. Continuing Duty to Withhold Earnings.

(1) Receipt of a writ of earnings execution imposes upon an employer a continuing duty to withhold from the judgment debtor's disposable earnings those amounts allowed by law and to pay these amounts over to the judgment creditor until the writ is terminated.

(2) A writ of earnings execution is terminated by either

(a) the employer's payment in full of the amount owing pursuant to the judgment; or

(b) the termination of the judgment debtor's employment with the employer for 90 days or more.

Section 302. Application for Issuance of Writ.

The judgment creditor may apply for issuance of a writ of earnings execution from the court which entered the judgment pursuant to which earnings execution is sought. When applying for the writ, the judgment creditor shall deliver an affidavit to the clerk which shall be in substantially the following form:

1. On (date) a judgment was entered by (description of court) in favor of (name and address of judgment creditor) and against (name and address of judgment debtor) and said judgment was duly entered in (where entered). There is now owing on

this judgment a net balance of $_____, which includes any further sums which may have accrued since entry of the judgment by way of interest, costs, or fees. Of this amount $_____ was due on the judgment as entered and bears interest at 7% per annum inthe amount of $_____ per day from the issuance of this writ.

2. The affiant requests the issuance of a writ of earnings execution ordering (name and address of employer) _____ to withhold from the judgment debtor's disposable earnings those amounts allowed by law and to pay these amounts to the affiant until the amount owing pursuant to the judgment is fully paid.

3. The affiant states that he has no information or belief that the judgment debtor has been adjudicated a bankrupt with reference to the indebtedness for which the writ is sought or that the judgment debtor is, at the time of the request for the writ, under a wage earner's plan approved by a United States Court.

Comment: The court which entered the judgment presumably met jurisdictional and venue requirements and is the appropriate one to conduct pre-execution hearings requested by either the creditor or the debtor under Sections 304 and 305.

Section 303. Notice of Earnings Execution.

After receipt of the judgment creditor's affidavit, the clerk shall mail to the judgment debtor at the address set out in the affidavit a copy of the judgment creditor's affidavit and a notice of earnings execution. If the judgment debtor returns the application for hearing, properly completed, within the proper time, the clerk shall

send a copy of the application to the judgment creditor at the time he is notified of the hearing. The notice of earnings execution shall be in substantially the following form:

(name of j.c.) has asked the (description of court) to order (name of employer) to withhold a portion of your earnings and to pay this money to him in payment of the judgment described in the enclosed affidavit. The law allows the following amounts of money to be withheld from your earnings to pay judgments.

(1) If your disposable earnings (those earnings left after deduction of any amounts required by law to be withheld by your employer) for a workweek are $48 or less, no money can be withheld.

(2) If your disposable earnings for a workweek are more than $48 but less than $64, only the amount in excess of $48 can be withheld.

(3) If your disposable earnings for a workweek are $64 or more, 25% of your disposable earnings may be withheld.

(4) However, no money can be taken from your earnings which you can prove to the court to be necessary for the use of your family, residing in California and supported in whole or in part by you, or for a debt which has been discharged in bankruptcy.

Fill out the form on the bottom of this page entitled "Application for Hearing" if you claim either (a) that in order to support your family you must have more of your earnings than you would have left under paragraphs (2) or (3) above, or (b) that you have received a discharge in bankruptcy for the indebtedness for which the judgment was obtained. Cut off the form and mail it to the clerk no later than 15 days after the date on the notice. You will shortly receive a notice from the clerk telling you where and when to appear in court and what evidence to bring with you to the hearing.

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Application for Hearing

Directions: If you desire a hearing, cut off this form at the dotted line and mail it to: Clerk of ______________________ Court, at (address of clerk) . You must mail it no later than 15 days after the date on the notice of earnings execution. [Clerk fills in these blanks before notice is sent to judgment debtor.]

I wish to apply for a hearing on the question of how much money can be withheld from my earnings because (check the appropriate box):

1. ☐ In order to support my family I must have more of my earnings than I would have left under paragraphs (2) or (3) of the notice of earnings execution.

2. ☐ I have received a discharge in bankruptcy for the indebtedness for which the judgment was obtained.

State briefly the facts which you can prove in court showing, in case you checked box 1, why you need more of your earnings for family support, or, if you checked box 2, when and where you were discharged in bankruptcy.

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____________________ (date)	____________________ (name of judgment debtor)
	____________________ (address)

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Section 304. Hearing on Amount to be Withheld.

(1) If the judgment debtor requests a hearing by returning the application for hearing, properly completed, within the proper time, to the clerk, the court shall grant a hearing on the question of the amount to be withheld from the judgment debtor's disposable earnings. The judgment debtor has the burden of proof on the issues of his need for earnings for the use of his family and discharge in

At the time the clerk sends notice of hearing to the judgment creditor, he shall include a copy of the judgment debtor's application for hearing.

bankruptcy. The judgment creditor shall receive 10 days' notice of the hearing and may appear at the hearing.

(2) If the court finds that the judgment creditor is entitled to have an amount withheld from the judgment debtor's disposable earnings and paid over to him, then the court shall enter an order stating the amount to be withheld from the judgment debtor's disposable earnings for each pay period. The amount stated in the order shall be entered on the writ of earnings execution when issued.

(3) If the court finds that the judgment creditor is not entitled to have an amount withheld from the judgment debtor's disposable earnings and paid over to him, then the court shall so order and no writ of earnings execution shall be issued.

Section 305. Multiple Employment.

(1) Owing to the multiple employment of the judgment debtor, the judgment creditor may be entitled to have an employer withhold a greater amount from the judgment debtor's disposable earnings than the employer would have had to withhold were he the judgment debtor's only employer.

(2) The court which entered the judgment pursuant to which the earnings execution is sought shall grant a hearing on the question of the amount to be withheld from the judgment debtor's disposable earnings after receiving a written request

from the judgment creditor setting out the facts on which the judgment creditor's claim is based. The judgment creditor has the burden of proof on the issue of his claim to have a greater amount withheld from an employer. The judgment debtor shall receive 10 days' notice of the hearing and may appear at the hearing. The clerk shall send the judgment debtor a copy of the judgment creditor's request at the time he is notified of the hearing.

(3) If the court finds that owing to the multiple employment of the judgment debtor, the judgment creditor is entitled to have an employer withhold a greater amount from the judgment debtor's disposable earnings than the employer would have had to withhold were he the judgment debtor's only employer, then the court shall enter an order stating the amount to be withheld from the judgment debtor's disposable earnings for each pay period. The amount stated in the order shall be entered on the writ of earnings execution when issued.

Comment

Suppose the judgment debtor has three jobs, each paying disposable earnings of $50 per week. Each employer would believe that he could withhold no more than $2 per week, but the judgment creditor is entitled to $37.50 (25% of $150). The employers should be permitted to rely on the assumption that they need only withhold $2 per week until the judgment creditor can persuade the court otherwise. The court may order that the writ of earnings execution shall direct one employer to withhold $37.50 per week. The fact that one employer may have

knowledge of the multiple employment of the judgment debtor is not determinative. He may pay out the $2 per week until he is directed by the writ of earnings execution to do otherwise.

Section 306. Issuance of Writ.

The clerk shall promptly issue a writ of earnings execution if

(1) after hearing, the court has found that a portion of the judgment debtor's disposable earnings is subject to execution, or

(2) the judgment debtor has failed to mail the completed "Application for Hearing" form to the clerk within the proper time.

Comment

If neither the judgment debtor nor the judgment creditor requests a hearing, none will be held before issuance of the writ. If requested, two kinds of hearings may precede issuance of the writ. First, the hearing on application of the judgment debtor (Section 303) at which the judgment debtor may seek to reduce the amount of earnings subject to execution by proving that he needs the earnings to support his family or that the debt was discharged in bankruptcy. Second, the hearing on application of the judgment creditor (Section 305) at which the judgment creditor may increase the amount of earnings

subject to execution from any one employer by showing multiple employment on the part of the debtor. In either case, the parties are before the court, and if the court finds that the judgment creditor is entitled to any part of the judgment debtor's disposable earnings, it must state that amount in its order as required by Section 304(2).

Section 307. Writ of Earnings Execution.

(1) The writ of earnings execution shall be issued in the name of the people, sealed with the seal of the court, subscribed by the clerk or judge, dated, and directed to the employer. When the employer sends back the earnings execution return, the clerk shall send a copy of the peturn to the judgment creditor.

(2) The writ of earnings execution shall be in substantially the following form:

(Title of Court)

(Number and abbreviated title of action)

THE PEOPLE OF THE STATE OF CALIFORNIA

To (name of employer)

On (date) a judgment was entered by the above entitled court in the above-entitled action in favor

of (name of judgment creditor) and against (name of judgment debtor) and said judgment was duly entered in (where entered). There is now owing on the judgment a net balance of $_____, which includes any further sums which may have accrued since entry of the judgment by way of interest, costs, or fees. Of this amount $_____ was due on the judgment as entered and bears interest at 7% per annum in the amount of $_____ per day from the issuance of this writ. This judgment is not paid until the judgment creditor has received both the net balance owing at the time of this writ and the amount of interest that has accrued to the date of final payment.

You are ordered to pay these amounts out of the earnings of the judgment debtor by withholding appropriate amounts from his periodic earnings and paying these amounts over to the judgment creditor after each periodic payment of earnings to the judgment debtor. You must continue to make payments out of the judgment debtor's earnings until the judgment is fully paid or the judgment debtor's employment is terminated for 90 days or more.

[If there is no court order regarding the amount to be withheld, the following shall appear on the writ]:

The appropriate amount to be withheld and paid over to the judgment creditor is the following:

(1) For payment periods which are weekly or lesser periods:

(a) If the judgment debtor's disposable earnings (those earnings left after deduction of any amounts required

by law to be withheld) are $48 or less, no money shall be withheld.

(b) If the judgment debtor's disposable earnings are more than $48 but less than $64, that amount in excess of $48 shall be withheld.

(c) If the judgment debtor's disposable earnings are $64 or more, 25 percent of his disposable earnings shall be withheld.

(2) For payment periods longer than one week, you must transform the statutory exemption amounts for one week set out in paragraph (1) above into equivalent amounts for a longer period. The formula to be used to find the equivalent of $48 is: Z (the number of workweeks and fractions thereof) x 30 x the applicable Federal minimum wage ($1.60). For the purpose of this formula, a calendar month is considered to consist of 4 and 1/3 workweeks. Thus, so long as the Federal minimum hourly wage is $1.60 an hour, the equivalent amount applicable to the disposable earnings for a 2-week period is $96 (2 x 30 x $1.60); for a monthly period, $208 (4 and 1/3 x 30 x $1.60); and for a semi-monthly period, $104 (2 and 1/6 x 30 x $1.60).

[If there is a court order regarding the amount to be withheld, the following shall appear on the writ]:

The appropriate amount to be withheld and paid over to the judgment creditor is the following: $_____, per _(payment period)_.

[If both of the above paragraphs are printed on the writ, the clerk shall cross out the inapplicable paragraph.]

You will pay over to the (name of judgment creditor) at (his address) the appropriate amount by check mailed promptly after each payment of earnings is made to the judgment debtor.

You will fill out the form entitled "Earnings Execution Return" [at the bottom of] [attached to] this writ and return it to the clerk at the indicated time.

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(Important: Cut off this form at the dotted line and mail it to the clerk.)

Earnings Execution Return Form

Directions: Fill this form out and mail it to: Clerk of _____ Court, at (clerk's address). If you have questions about the writ or this form, you may obtain information by calling or writing the clerk's office. His telephone number is: (XXX) XXX-XXXX. You must mail this form to the clerk no later than 15 days after the date on the writ. [Clerk shall fill in blanks before writ is sent to employer.]

Execution on earnings of (name of judgment debtor, (address of judgment debtor) _____. [Clerk shall fill in blanks before writ is sent to employer.]

1. ☐ If the judgment debtor is not now employed by you and you do not otherwise owe him earnings,* check this box.

2. ☐ If the judgment debtor is now employed by you or you otherwise owe him earnings,* check this box and fill in the amount of his disposable earnings (those earnings left after deduction of any amounts required by law to be withheld) $________ and his pay period (weekly, monthly, etc.).

3. ☐ If the judgment debtor is now employed by you or you otherwise owe him earnings,* and all of his disposable earnings allowed by law to be withheld are now being withheld pursuant to a prior writ of earnings execution, check this box in addition to box 2.

______________________ (date)   ______________________ (signature of employer)

*"Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

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Section 308. Priority of Writs.

If more than one writ of earnings execution is issued to an employer with respect to the same judgment debtor, the writ which is first received shall be the first paid. Succeeding writs shall be held by the employer and paid in order of their receipt.

Section 309. Additional Writs; Additional Hearings.

(1) After the amount stated as owing in the writ of earnings execution is satisfied, the judgment creditor is entitled to issuance of another writ of earnings execution covering costs and interest that may have accrued since entry of the prior writ. A writ for costs and interest requested within 30 days of payment of the amounts stated in a prior writ shall have the same priority as the prior writ.

(2) [Six months] [Ninety days] after a determination at a hearing pursuant to Section 304 that some part of the judgment debtor's earnings to which the judgment creditor would otherwise have been entitled is not subject to execution because the earnings are shown to be necessary for the use of the judgment debtor's family, the judgment creditor is entitled to another hearing on this issue.

(3) [Six months] [Ninety days] after a determination at a hearing pursuant to Section 304 that some part of the judgment debtor's earnings is subject to execution, the judgment debtor is entitled to another hearing on the issue whether the earnings are necessary for the use of his family. If the judgment debtor did not apply for a hearing after receipt of notice of earnings execution pursuant to Section 303, he may apply for a hearing no sooner than [six months] [ninety days] after the date of the notice of earnings execution.

Comment

This Act provides for a continuing levy upon earnings (Section 301(1)). In such a case the requirement of CCP Section 682.2 to the effect that the levying officer shall compute the interest accrued at the date of levy is inappropriate. The simplest way for the creditor to get his additional costs and interest accruing until time of payment is to apply for another writ for these amounts. The needs of the debtor's family for his earnings may change and subsections (2) and (3) allow both the creditor and the debtor to seek new hearings after a lapse of time. Alternative periods are [redacted] suggested for consideration.

Section 309. Satisfaction of Judgment.

When the judgment pursuant to which the writ of earnings execution was issued is satisfied, the judgment creditor shall promptly notify the employer of the satisfaction.

Comment

The judgment creditor would also have to comply with CCP Section 675 on satisfaction of judgments.

Part 4. Discharge from Employment.

Section 401. Restriction on Discharge from Employment.

No employer may discharge an employee by reason of the fact that his earnings have been subjected to execution for any one indebtedness.

Comment

This is CCPA Section 304(a).

Part 5. Remedies of Judgment Debtor.

Section 501. Civil Action by Judgment Debtor.

(1) If an employer withholds pursuant to earnings execution an amount from the judgment debtor's earnings in excess of that allowed by this Act, the judgment debtor may bring a civil action against the employer to recover the excess amount.

(2) If a judgment creditor receives pursuant to earnings execution an amount from the judgment debtor's earnings in excess of that allowed by this Act, the judgment debtor may bring a civil action against the judgment creditor to recover the excess amount.

(3) The judgment debtor is entitled to only one recovery for the excess amount withheld by the employer or received by the judgment creditor.

(4) If the judgment creditor receives pursuant to earnings execution an amount from the judgment debtor's earnings with knowledge that it is in excess of that allowed by this Act, and does not return the excess amount to the judgment debtor within 10 days of its receipt, the judgment debtor may bring a civil action to have a civil penalty of $100 assessed against the judgment creditor for each such violation of this Act. The amount assessed shall be paid to the judgment debtor.

Comment

The judgment debtor can recover an excess amount from either the employer or the judgment creditor. If the judgment creditor receives money which he knows to be an excessive amount, he must return it to the judgment debtor or face a civil penalty. Unfortunately Title III of the CCPA neglects to give the debtor a remedy for violation of the statute, and this section corrects this omission.

Section 502. Remedy for Wrongful Discharge.

If an employer discharges an employee in violation of Section 401, the employee may bring a civil action for recovery of earnings lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed six times the weekly earnings of the employee.

Comment

Title III of the CCPA provides no civil remedy for wrongful discharge. This section corrects that omission.

Section 503. Costs and Attorney's Fees.

In any action brought by the debtor pursuant to the provisions of this Part in which he is the prevailing party, the court may award costs and reasonable attorney's fees incurred by the debtor.

Part 6. Remedy of Judgment Creditor

Section 601. Civil Action by Judgment Creditor.

If an employer fails to withhold or pay over to the judgment creditor amounts from earnings of the judgment debtor in accordance with a writ of earnings execution, the judgment creditor may bring a civil action against the employer to recover the amount which the employer should have withheld and paid over pursuant to the writ.

Part 7. Administrative Enforcement.

Section 701. Powers of [Designated Official].

The [Designated Official] within the limitations provided by law may

(1) receive and act on complaints, take action designed to obtain voluntary compliance with this Act, or commence proceedings on his own initiative;

(2) counsel persons and groups on their rights and duties under this Act;

(3) establish programs for the education of debtors with respect to credit practices and problems;

(4) make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public; and

(5) adopt, amend, and repeal rules to carry out the provisions of this Act. The [Designated Official] shall adopt rules not inconsistent with the regulations prescribed from time to time pursuant to Title III of the Consumer Credit Protection Act of 1968 by the Secretary of Labor.

Comment

The [Designated Official] must adopt rules consistent with those of the Secretary of Labor to obtain and maintain the state exemption.

Section 702. Liaison with Federal Administrator.

The [Designated Official] shall have the power and the duty

(1) to represent and act on behalf of the State of California in relation to the Administrator of the Wage and Hour Division of the United States Department of Labor (hereinafter referred to as the Administrator) and his representatives with regard to any matter relating to or arising out of the application, interpretation, and enforcement of California laws regulating proceedings to withhold earnings of debtors for payment of their debts;

(2) to submit to the Administrator in duplicate and on a current basis a certified copy of every enactment of the California legislature affecting any of those laws, and a certified copy of any decision in any case involving any of those laws, made by the highest court of California which has jurisdiction to decide or review cases of its kind, if properly presented to the court; and

(3) to submit to the Administrator any information relating to the enforcement of those laws which the Administrator may request.

Comment

In 29 Code of Federal Regulations Section 870.55(a), issued on May 26, 1970, the Secretary of Labor requires as a condition of exemption of any state that the official designated to enforce the law in that state be given the powers and duties set out above.

Section 703. Investigatory Powers.

If the [Designated Official] has reasonable cause to believe that a person has violated this Act, he may make an investigation to determine if the violation has occurred, and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which

is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence. Upon failure without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the [Designated Official] may apply to a court for an order compelling compliance.

Section 704. Application of Administrative Procedure Act.

The Administrative Procedure Act (Chapter 4, Chapter 4.5, and Chapter 5 of the Government Code) applies to and governs all administrative action taken by the [Designated Official] pursuant to this Act.

Section 705. Injunction; Administrative Enforcement Order.

(1) The [Designated Official] may bring a civil action to restrain a person from engaging in violations of this Act and for other appropriate relief.

(2) After notice and hearing, the [Designated Official] may order a person to cease and desist from engaging in violations of this Act. A respondent aggrieved by an order of the [Designated Official] may obtain judicial review of the order and the [Designated Official] may obtain an order of the court

for enforcement of its order in the [_____] court. The proceeding for review or enforcement is initiated by filing a petition in the court. Copies of the petition shall be served upon all parties of record.

Comment

The [Designated Official] may elect either to go to court and obtain an injunction or to enter its own cease and desist order.

Section 706. Civil Action by [Designated Official].

(1) If an employer withholds pursuant to earnings execution an amount from the judgment debtor's earnings in excess of that allowed by this Act, the [Designated Official] may bring a civil action against the employer to recover the excess amount. The amount of earnings recovered shall be paid over to the judgment debtor.

(2) If a judgment creditor receives pursuant to earnings execution an amount from the judgment debtor's earnings in excess of that allowed by this Act, the [Designated Official] may bring a civil action against the judgment creditor to recover the excess amount. The amount of earnings recovered shall be paid over to the judgment debtor.

(3) The [Designated Official] is entitled to only one recovery for the excess amount withheld by the employer or received by the judgment creditor.

(4) If the judgment creditor receives pursuant to earnings execution an amount from the judgment debtor's earnings with knowledge that it is in excess of that allowed by this Act, and does not return the excess amount to the judgment debtor within 10 days of its receipt, the [Designated Official] may bring a civil action against the judgment creditor to have a civil penalty of $100 assessed against the judgment creditor for each such violation of this Act. The amount assessed shall be paid over to the judgment debtor.

(5) An action brought by the [Designated Official] may relate to violations of this Act by an employer or judgment creditor with respect to more than one judgment debtor.

(6) If a judgment debtor brings an action against an employer or judgment creditor to recover an excess amount or a civil penalty, an action by the [Designated Official] to recover for the same excess amount or civil penalty shall be stayed while the judgment debtor's action is pending and shall be dismissed if the judgment debtor's action is dismissed with prejudice or results in a final judgment granting or denying the judgment debtor's claim.

Comment

The [Designated Official] may bring actions on behalf of judgment debtors for recovery of excessive amounts or assessment of penalties. Under subsection (5) he may bring a class action. If the [Designated Official] has filed suit and the judgment debtor also files suit to recover the same amounts, the judgment debtor's suit takes precedence.

Part 8. Criminal Penalty

Section 801. Criminal Penalty for Wrongful Discharge.

Whoever willfully violates Section 401 (Restrictions on Discharge from Employment) shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Comment

This is the penalty prescribed by CCPA Section 304(b).