

#39.30

5/21/71

Third Supplement to Memorandum 71-32

Subject: Study 39.30 - Attachment, Garnishment, Execution (Earnings Protection Law--Retirement Funds Exemptions)

This memorandum presents for Commission consideration a draft provision (Exhibit II) relating to the exemption from attachment and execution of money held and in the process of distribution by a retirement plan. The proposal provides (1) a complete exemption for money held by a plan and (2) limited protection for money in the process of distribution.

The definition of "retirement plan" has been revised to include all plans which are actually designed and used to provide retirement, death, and disability benefits. Implicit in this definition is a denial of protection to a plan that is designed solely for the purpose of protecting an individual's assets from his creditors. The staff believes that this limitation on the exemption--which we would expect to be enforced by the courts--is adequate protection for creditors. We have accordingly eliminated the pro rata exception for annual contributions in a certain amount which was a feature of earlier drafts. It should be noted that Keogh Act plans are now included under Section 690.18 because they are embraced by both the broad definition and the specific reference to Corporations Code Section 28002 contained in subdivision (a).

Payments made pursuant to a retirement plan are made subject to the general earnings withholding procedure. Further research has disclosed, however, that the Legislature rather consistently has given broad protection to retirement benefits when paid--even to the extent in some cases of providing protection for benefits subsequently deposited or invested by the beneficiary.

See, e.g., Pub. Util. Code § 12337; Code Civ. Proc. § 690.18. See generally Exhibit I. Moreover, even the creditors who have attended our meetings seem to have been lukewarm towards the right to collect from retirement benefits. In view of the past legislative action, and the certain opposition which would be generated by a change, the staff wonders whether the Commission desires to reexamine its decision to limit the protection given to benefits distributed by a qualified plan. If the procedure proposed is approved, we should make conforming changes in these sections which now provide exemptions for a potpourri of retirement plans. See Exhibit I.

Respectfully submitted,

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EXHIBIT I

Corporations Code § 28005 (Retirement systems qualified under IRC § 401)

**§ 28005. Exemptions; taxation; bankruptcy and insolvency laws**

The property of a retirement system, the portion of wages or salary of an employee deducted or to be deducted, the right of a participant or beneficiary to a benefit thereunder, and all his rights in the funds of the system, shall be exempt from taxation, attachment, garnishment, execution, and from the operation of any law relating to bankruptcy or insolvency.

(Added by Stats.1970, c. 1443, p. —, § 4, operative Jan. 1, 1971.)

Education Code § 13808 (State Teachers' Retirement System)

**§ 13808. Rights or benefits not subject to process or attachment**

The right of a person to an annuity, a retirement salary, or a retirement allowance, to the return of contributions, the annuity, retirement salary, or retirement allowance itself, any optional benefit, any other right or benefit accrued or accruing to any person under this chapter, and the moneys in the fund created under this chapter are not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable except as specifically provided in this chapter.

(Added by Stats.1969, c. 896, p. 1738, § 2.)

Government Code § 9359.3 (Legislators' Retirement Law--elected officials)

**§ 9359.3 Exemption from process; nonassignability.** The right of a person to any benefit or other right under this chapter and the money in the Legislators' Retirement Fund are not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable except as specifically provided in this chapter. (Added Stats.1947, c. 879, p. 2063, § 1.)

Government Code § 21201 (State Employees' Retirement Law--includes employees of local government on contract basis)

**§ 21201. Exemption from process, unassignability.** The right of a person to any benefit or other right under this part and the money in the Retirement Fund is not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable except as specifically provided in this part. (Added Stats.1945, c. 123, p. 601, § 1.)

Government Code § 31452 (County Employees' Retirement Law of 1937)

**§ 31452. Retirement allowances exempt from taxation and other process**

The right of a person to a pension, annuity, retirement allowance, return of contributions, the pension, annuity, or retirement allowance, any optional benefit, any other right accrued or accruing to any person under this chapter, the money in the fund created or continued under this chapter, and any property purchased for investment purposes pursuant to this chapter, are exempt from taxation, including any inheritance tax, whether state, county, municipal, or district, and from any law relating to bankruptcy or insolvency. They are not subject to execution, garnishment, attachment, or any other process of court whatsoever, and are unassignable except as specifically provided in this chapter. (Added Stats.1947, c. 424, p. 1263, § 1, as amended Stats. 1949, c. 199, p. 430, § 1; Stats.1955, c. 1503, p. 2745, § 1.)

Government Code § 32210 (County Fire Service Retirement Law)

**§ 32210. Title to property; exemption from taxation, bankruptcy or other process; assignment prohibited**

The title to all property acquired pursuant to this chapter shall be taken in the name of the county. The title to any money which becomes due to any member shall not pass from the county or county fire protection district to him until he is entitled thereto under this chapter. That portion of the wages of any member deducted or to be deducted under this chapter, the right of a member or other person to an annuity or pension, and all of his rights in the fund are exempt from taxation and from the operation of any law relating to bankruptcy or insolvency and shall not be attached or taken upon execution or other process of any court. An assignment of any right in or to the funds, or to any pension or annuity is void. (Added Stats.1947, c. 424, p. 1297, § 1.)

Insurance Code § 11045 (Fraternal Benefit Societies)

**§ 11045. Exemption from creditors' claims.** Money or other aid paid or rendered by any such society shall not be liable, either before or after payment, to attachment, or to be applied by any legal or equitable process or operation of law to pay any liability of a member or any person having a right thereto. (Added Stats.1951, c. 1193, p. 3016, § 2.)

Public Utilities Code § 12337 (Municipal Utility District Act)

**§ 12337. Exemption of benefits from claims of creditors**

All money received by any person as an annuity, pension, retirement allowance, disability payment, or death benefit from the retirement system, and all contributions and interest thereon returned to any member of the retirement system, whether in the actual possession of such person or deposited, loaned, or invested by him, is unassignable, and is exempt from execution \* \* \* and attachment \* \* \* as provided in Section 69018 of the Code of Civil Procedure. (Amended by Stats.1970, c. 1523, p. —, § 62.)

Public Utilities Code § 25337 (Transit District Law--Counties of Alameda  
or Contra Costa)

§ 25337. Received benefits not subject to legal process; nonassignability

All money received by any person as an annuity, pension, retirement allowance, disability payment, or death benefit from the retirement system, and all contributions and interest thereon returned to any member of the retirement system, whether in the actual possession of such person or deposited, loaned, or invested by him, is unassignable, and is exempt from execution \* \* \* and attachment \* \* \* pursuant to Section 690.18 of the Code of Civil Procedure.

(Amended by Stats.1970, c. 1523, p. —, § 63.)

Unemployment Insurance Code § 988 (Basic unemployment and disability insurance)

§ 988. Exemption from garnishment, attachment or execution

Contributions by workers, payable as provided in this article, shall be exempt from \* \* \* attachment \* \* \* and execution pursuant to Section 690.16 of the Code of Civil Procedure, and from garnishment or any other remedy for the collections of debts, and in the event of the insolvency or bankruptcy of an employer shall not be considered any part of his assets and shall be paid to the director prior to the payment of any other claim against the employer.

(Amended by Stats.1970, c. 1523, p. —, § 64.)

Unemployment Insurance Code § 1342 (Supplemental employer plans)

§ 1342. Invalidity of waiver of benefit rights; assignment, release or commutation of benefits; exemption of benefits; invalidity of agreement by employee to pay contributions required of employer

Any waiver by any person of any benefit or right under this \* \* \* code is invalid. Benefits \* \* \* under this code, incentive payments provided by Section 5401, payments to an individual under a plan or system established by an employer which makes provisions for his employees generally, or for a class or group of his employees, for the purpose of supplementing unemployment compensation benefits, are not subject to assignment, release, or commutation, and are exempt from \* \* \* attachment and execution pursuant to Sections 690.175 and 690.18 of the Code of Civil Procedure. Any agreement by any individual in the employ of any person or concern to pay all or any portion of the contributions required of his employer under this division is void.

(Amended by Stats.1961, c. 1336, p. 3114, § 1; Stats.1970, c. 1523, p. —, § 65.)

Code of Civil Procedure § 690.18

**§ 690.18 Exemptions; public pension, retirement, disability or death benefits; vacation credits**

(a) All money received by any person, a resident of the state, as a pension, or as an annuity or retirement or disability or death or other benefit, or as a return of contributions and interest thereon, from the United States government, or from the state, or any county, city, or city and county, or other political subdivision of the state, or any public trust, or public corporation, or from the governing body of any of them, or from any public board or boards, or from any retirement, disability, or annuity system established by any of them pursuant to statute, whether the same shall be in the actual possession of such pensioner or beneficiary, or deposited by him.

(b) All money held, controlled, or in process of distribution by the state, or a city, city and county, county, or other political subdivision of the state, or any public trust or public corporation, or the governing body of any of them, or by any public board or boards, derived from the contributions by the state or such city, county, city and county, or other political subdivision, or such public trust, public corporation, governing body, or public board or boards, or by any officer or employee thereof, for retirement or pension purposes or the payment of disability, death, or other benefits, or the payment of benefits payable to, or the reimbursement of benefits paid to, employees thereof under the provisions of the Unemployment Insurance Code, and all rights and benefits accrued or accruing to any person under any system established pursuant to statute by the state, city, city and county, county, or other political subdivision of the state, or any public trust or public corporation for retirement, annuity, or pension purposes or payment of disability or death benefits, and all vacation credits accumulated by a state employee pursuant to the provisions of Section 18050 of the Government Code, or any other public employee pursuant to any law for the accumulation of vacation credits applicable to such employee. Such moneys, benefits, and credits shall be exempt without filing a claim of exemption as provided in Section 690.50.

(c) All money held, controlled, or in process of distribution by any private retirement plan, including, but not limited to, union retirement plans, or any profit-sharing plan designed and used for retirement purposes, or the payment of benefits as an annuity, pension, retirement allowance, disability payment or death benefit from such retirement or profit-sharing plans, and all contributions and interest thereon returned to any member of any such retirement or profit-sharing plan, are exempt from execution, attachment, or garnishment in any bankruptcy proceeding. This subdivision shall not apply to any moneys held in any retirement program established pursuant to the federal "Self-Employed Individuals Tax Retirement Act of 1962" (P.L. 87-792; 76 Stat. 809),<sup>1</sup> nor to any moneys received in any manner by persons from any such retirement program so established.

EXHIBIT II

§ 690.18 (added). Retirement plan; exemption from attachment and execution

690.18. (a) As used in this section, "retirement plan" means a plan or system designed and used for the payment of retirement, disability, or death benefits, including, but not limited to, any retirement system as defined in Section 28002 of the Corporations Code, any union or joint employer-employee retirement or disability plan, any profit-sharing plan designed and used for retirement or disability purposes, and any public retirement or disability plan established by the state, or any county, city, or city and county, or other political subdivision of the state, or any public trust, public corporation, or public board.

(b) Except as provided in subdivision (c), there shall be exempt from attachment or execution all money, assets, and benefits held, controlled, or in the process of distribution by any retirement plan.

(c) All money in the process of distribution by any retirement plan, or currently payable pursuant to such plan, is exempt from attachment and execution in the amounts and manner specified in Section 690.6a. For the purpose of applying Section 690.6a to this subdivision:

(1) The beneficiary of the retirement plan shall be deemed an "employee" of the plan.

(2) The retirement plan shall be deemed an "employer."

(3) The money being distributed or currently payable by such plan to a person shall be deemed his "earnings."

(4) The interval at which the money is being distributed or is payable shall be deemed a "pay period."

Comment. Section 690.18 is substantially revised to provide exemptions for retirement benefits consistent with the purpose of providing adequate relief for retired persons generally as well as providing procedures for collection which are integrated with the Earnings Protection Law (Chapter 2.5 of this Title) <sup>and</sup> / the exemption of earnings generally. These provisions apply equally to both public and private retirement plans. See subdivision (a).

Money (and other assets) held or controlled by or under any retirement or disability plan and not in the process of distribution are completely exempt from levy. See subdivision (b). This continues former law as to public plans and as to many private plans. See former Code of Civil Procedure Section 690.18, Cal. Stats. 1970, Ch. 1523, § 44.5; former Corporations Code Section 28005, Cal. Stats. 1970, Ch. 1443, § 4. New Section 690.18 provides the same protection for all bona fide retirement plans designed and used for the payment of retirement, death, and disability benefits.

When money is being or has been distributed to a retired or disabled person (or such person has the right to require them to be paid pursuant to the plan), such money is treated as "earnings" under Section 690.6a. Hence, it is subject to garnishment by the person's creditors in accordance with Chapter 2.5. See subdivision (c). Chapter 2.5 provides not only a procedure for collection (through service of a withholding order upon a person authorized to act on behalf of the retirement plan) but also substantial limitations on the amounts which can be withheld. See Sections 723.50 and 723.51.

Subdivision (b) of former Section 690.18 also protected certain benefits provided public employees under the Unemployment Insurance Code and vacation credits of such employees. The protection of unemployment benefits was duplicated and is continued under Section 690.175. Vacation credits are properly treated as earnings under the Earnings Protection Law. That is, they are subject to garnishment as earnings when paid. See Section 723.11.