#39 10/28/71

Memorandum 71-84

Subject: Study 39 - Attachment, Garnishment, Execution (1971 Enactments and Effect on Commission's 1972 Legislative Program)

SUMMARY

The Commission has determined that its 1972 legislative program will consist only of the Employees' Earnings Protection Law and, if possible, a recommendation to provide a prejudgment attachment procedure that will satisfy constitutional requirements.

There are two bills affecting wage garnishment procedure that most likely will be enacted by the 1971 Legislature. The enactment of these bills will--the staff believes--require consideration by the Commission as to whether a recommendation on wage garnishment procedure should be submitted to the 1972 Legislature at all and, if so, the nature of the recommendation to be submitted. This memorandum outlines possible courses of action available to the Commission.

The experience with the Employees' Earnings Protection Law recommendation is such that the staff again suggests that the Commission give serious consideration whether it is a desirable expenditure of Commission time and resources to attempt to solve the prejudgment attachment procedure problems for the 1972 legislative session.

ANALYSIS

Background

The staff has incorporated the revisions made at the September and October 1971 meetings into the Employees' Earnings Law recommendation that was approved for printing at the September meeting. This recommendation

has been ready to send to the printer for some time. However, for the reasons indicated below, the staff has delayed sending the recommendation to the printer until after the November meeting.

One reason for the delay has been that we have made arrangements to have the proposed legislation printed as a "preprinted bill" for the 1972 session. This means that the proposed legislation has been sent to the printer by the Senate to be printed in bill form and should be available in printed form within the next few days. The printing will be accomplished using the computer method of printing, and we will save a substantial amount of printing funds because we can draw on the material already typed into the computer to print the bill portion of our recommendation. We have delayed sending the copy for the recommendation to the printer until the computer was programed with the text of the bill. A more important reason for the delay is that developments at the 1971 session are so significant that we believe that the Commission will want to consider them before the recommendation is printed.

Should Printing of Approved Recommendation Go Forward or Be Delayed?

Perhaps the most significant changes in wage garnishment procedure that are included in the Commission's recommendation are for (1) a continuing levy for 120 days and (2) a mail service procedure. Bills are close to enactment by the 1971 Legislature that will accomplish the substance of both of these objectives in a way that is inconsistent with the procedure the Commission recommends. These bills are discussed in detail later in this memorandum. Assuming that you will be familiar with the contents of the bills at the November meeting, the initial and basic policy question to be resolved at that meeting is the extent to which these 1971 developments are to be discussed in the recommendation and the effect they will have on the recommendations of the Commission. The following appear to be the possible courses of action that could be taken:

(1) Ignore the 1971 developments. We could date the report as September 1971 when it was approved for publication and publish it in its present form, ignoring the 1971 developments. This would mean that the report would not recognize that a continuing levy procedure and mail service procedure had been enacted by the 1971 Legislature and the thrust of the report would be directed to problems that will not exist when the report is submitted in 1972. Also, the report would ignore the fact that it proposes in effect to make a significant change in the newly adopted procedure for wage garnishment. In other words, the Legislature will be presented with the significant policy question whether a procedure that is put in effect in February 1972 (when 1971 enactments will become effective) should again be changed approximately a year or so later, but the report will not discuss this policy question.

Assuming that the 1971 developments are to be ignored in the published recommendation, the Commission could then either (1) not introduce any legislation to effectuate the recommendation in 1972 and report in its Annual Report for 1972 that no legislation was introduced because of the developments at the 1971 session or (2) work during the next few months on a revised legislative proposal for the 1972 session that takes into account the 1971 developments and amend the proposed legislation contained in the recommendation after introduction in 1972 to reflect the needed revisions. The difficulty with this procedure is that much of the preliminary portion of the printed recommendation would be no longer relevant and the preliminary portion of the printed report would contain no discussion of the reasons why changes in the 1971 adopted procedure are recommended. In addition, it would be necessary to have the legislative committees adopt reports revising many, if not all, of the official Comments to the proposed legislation.

(2) Submit no recommendation to 1972 Legislature. The significant 1971 changes deal with only two aspects of wage garnishment procedure. Matters such as the hardship exemption, withholding table, bank account exemption, wage assignments, tax withholding orders, and the like are not dealt with in the 1971 legislation. Nevertheless, it should be noted that the 1971 legislation had substantial support and no significant opposition. Despite the statement at the last meeting that the bills were introduced only because there was no assurance that the Commission would have a recommendation for the 1972 session, I am advised that the legislative representatives of creditors devoted substantial time and resources to securing enactment of the legislation. Members of the legislative committees that considered the legislation were aware that the Commission has planned to submit a comprehensive statute in 1972 but nevertheless were unwilling to delay enactment of the 1971 bills. Employers took no position on the bills; apparently they take the view the bills would create no serious problems for them. Representatives of debtors were able to obtain amendments which make them satisfied with the legislation. If fact, as I understand the situation, the only opposition to the legislation came from the marshals in Los Angeles.

A strong argument can be made that the 1971 legislation should be given a chance to operate for a sufficient time to obtain experience and discover the need for changes. The 1971 legislative scheme is substantially different from that proposed by the Commission, and the staff believes that the 1971 scheme is basically unsound. We do not know what the legislative reaction would be to a proposal to consider enactment of a substantially different scheme upon Commission recommendation in 1972 before the 1971 enactments have even gone into effect.

If this alternative is taken, the Commission would drop the entire recommendation and not publish it. Possibly, sometime in the future--when experience under the 1971 legislation demonstrates its inadequacies--the Commission might submit a recommendation on this subject. This, of course, ignores the need to provide other reforms, the most significant being some sort of reasonable hardship exemption. (It is entirely possible that the existing exception for necessities to the present hardship exemption will be held unconstitutional.)

(3) Revise the recommendation and publish the revised recommendation and submit it to the 1972 Legislature. The staff believes that this is probably the most attractive alternative for several reasons. First, we have no other proposals for the 1972 Legislature and we have a substantial investment in time and resources in this recommendation, together with considerable expert knowledge. Second, it would be possible to consider the 1971 enactments and to incorporate the desirable portions into the proposed legislation. Third, we think that many improvements would be made by the proposed legislation that otherwise never would be made. On the other hand, it is obvious that it will be much more difficult to obtain enactment of a proposal that is fair to all groups concerned since the 1971 enactments are designed to give creditors the improvements they need. If this alternative is the one selected, the staff suggests that the Commission consider the 1971 enactments (discussed below) and determine the substance of the revisions to be made in our previously approved recommendation. We would hope to have a completely revised recommendation available for approval for printing for the December 1971 meeting. This would include not only a revised statute but also a completely revised preliminary portion of the recommendation. We could introduce our recommended legislation probably by February 1972 and would hope to have our printed report by March or April of 1972.

1971 Developments

Continuing levy. Assembly Bill 3057, which has been approved by the Senate Judiciary Committee, provides for a continuing levy for 90 days after service and provides a procedure for exemption hearings. A copy of the bill is attached. (Some technical amendments were made to the bill as attached, but the bill is not yet available in reprinted form.)

The following points are noted with respect to Assembly Bill 3057:

(1) There are several portions of the bill that are inconsistent and ambiguous. We do not know whether these have been corrected by amendment. For example, the bill provides that the judgment debtor may claim a "full" exemption of his earnings "at any time" but goes on to require such claim to be "within 10 days of the date of the levy of execution." The bill requires the levying officer to account for and pay over sums collected "at least every 30 days, and to make a return on collection thereof to the court" but it also provides that the execution upon earnings is returnable "upon the termination of the levy of execution." I assume that such obvious errors as using "judgment debtor" for "judgment creditor" in proposed Section 682.3(a)(1)(a) have been corrected.

(2) The bill is not entirely inconsistent with the procedures we provide in our recommendation. The basic objective of the bill is to provide a continuing levy with a bare minimum of conforming amendments. Whether the withholding period should be 90 days (Assembly Bill 3057) as distinguished from 120 days (our recommendation) seems to us to be a detail. However, the other provisions of the bill cover in an inadequate way only some of the problems covered by our recommended legislation and many problems are not covered at all.

(3) Without increasing the present fee of the levying officer for a one-shot levy on earnings, Assembly Bill 3057 requires not only the present services rendered by the levying officer but also during a 90-day levy on a weekly paid employee the receiving of approximately 12 payments from the employer, the accounting and safekeeping of such payments, and the paying over of such payments at least three times to the creditor. This receipting, accounting for, and paying over of money pursuant to the continuing levy should result in a significant increase in the cost of operation of the levying officer's office. One can expect that, with the pressure on the property tax being what it is, the local agencies will soon seek a substantial increase in fees for these continuing levies if the property tax payers are to be protected. I suspect that this significant cost aspect of Assembly Bill 3057 has not generally been recognized. Our recommendation avoids this cost because there is no public accounting.

In addition, one can expect that there will be substantial uncertainty among employers and levying officers when this bill becomes law and the number of inquiries to levying officers during the 90-day period will be significant. Thus, the net effect of the bill will be to require counties to pay a significantly greater contribution toward the cost of administration of the system. (Our recommendation notes this contribution is significant under existing law. It has been estimated that the county--the property tax payers--pay 30 to 50 percent of the expenses of collection under existing law.)

(4) Assembly Bill 3057 retains the substance of the existing "hardship" exemption--including the denial of an exemption where the creditor has furnished "common necessaries of life." The procedure for claiming the exemption is also unchanged. The way the hearing system is set up under the bill, we suspect a

knowledgeable lawyer can cause the creditor considerable difficulty with the affidavit, counter-affidavit procedure. The procedure provided in Section 690.50 is based on a one-shot levy; we do not know how it will work on a continuing levy and we do not know whether Assembly Bill 3057 is intended to limit the number of hearings a judgment debtor can request during the 90-day period. Also, it is unclear just what effect a levy under the bill has on a subsequent levy during the 90-day period; apparently the second creditor is entitled to a hearing under Section 690.6(d) and (e) to obtain a priority or division among the creditors who have levied on the earnings. There does not appear to be any priority or protection given the first creditor who levies. The standard for determining priority and division (apparently two levies can be in effect at the same time) is "such basis as is just and equitable." This could cause difficulty. The cost to judicial administration of these hearing procedures--on the exemption and on priorities and division among creditors--could be significant. The continuing levy makes the priority and division provisions much more significant than they now are.

(5) As indicated above, we believe Assembly Bill 3057 deals unsatisfactorily with priorities between creditors who each use a levy of execution. Moreover, the bill does not deal at all with priorities where a wage assignment is in effect (Labor Code Section 300 now gives a wage assignment a priority over a levy of execution), where a support order has been issued (Civil Code Section 4701 gives a support order a priority over a levy of execution), or where some form of tax withholding order is in effect.

This failure to deal with problems is illustrated repeatedly. There is no provision for an employer's service charge. The employer may not accumulate amounts withheld no matter how small. The employer is given no grace period within which he can process the levy. The employer must withhold from all "earnings then or thereafter due to the judgment debtor" during the

90-day period. The term used is not "due and owing" or "payable" or "due and payable" but would seem to require withholding from all earnings attributable to the 90-day period, including commissions and bonuses, as well as all earnings "due" for any prior period. "Earnings" is undefined and accordingly items such as vacation pay are simply left in limbo. These seem to us to be problems inherent in a continuing levy procedure which should be covered.

Needless to say, the bill does not attempt to go beyond its narrow objective; it does not deal with bank accounts, retirement funds, notice to the debtor of his right to claim an exemption, the inequity of the hardship exemption, notice by the creditor of his satisfaction of the judgment, exemption from the federal wage garnishment law, limitations on tax withholding, exemptions for paid as well as unpaid earnings, and so on.

By way of summary, we believe Assembly Bill 3057 makes only one significant change in the law--it provides a 90-day withholding period. The bill does not, however, adequately resolve the many problems raised by such a change and we believe these problems are dealt with in a more rational and clearer manner in our recommendation. As to the withholding period, we believe the 120-day period is better since we believe that it will increase significantly the chance of the creditor to obtain complete satisfaction of the judgment on one levy.

Mail service. Assembly Bill 1725 has been approved by a subcommittee of the Senate Judiciary Committee (a quorum of the committee not being present when the bill was considered), and we assume that the bill will be enacted. A copy of the latest version of the bill is attached. We assume that technical defects have been corrected by later amendments.

Assembly Bill 1725 basically provides for an abstract of judgment procedure similar to that used for a levy against the earnings of a public employee and for mail service by the levying officer. The procedure it provides supplements the continuing levy procedure provided by Assembly Bill 3057. The representative of the employers did not object to these bills, but we suspect employers will not be particularly delighted when they are required to become familiar with a number of different procedures for withholding from wages: (1) the continuing levy procedure under Assembly Bill 3057 which appears to require personal service, (2) the abstract of judgment procedure under Assembly Bill 1725, which is a one-shot levy and permits either personal service or mail service, (3) the continuing wage assignments for support pursuant to court order, a procedure that also is the subject of a bill introduced in 1971, (4) tax withholding orders, and (5) wage assignments. We suspect that the employer will have to have on his payroll staff an expert in the various types of wage garnishment procedures and the requirements the employer must follow for each type.

Assembly Bill 3057 amends Section 690.6 in a way where it will not work in connection with Assembly Bill 1725, for Assembly Bill 1725 assumes no amendment in Section 690.6. Also, if both Assembly Bills 1725 and 3057 are approved, we are concerned that there will be considerable confusion as to the hearing procedures when an exemption is claimed.

Assembly Bill 1725 provides that the employer gets a $2.50 fee for complying with the one-shot levy. Assembly Bill 3057, on the other hand, which requires the employer to comply with a continuing order for 90 days (12 or 13 withholdings for a weekly employee and computations of the amount to be withheld each time) provides no fee for the employer. Our recommendation is more favorable to the employer than either of the bills. In place of the $1.00 for

the wage assignment for support under present law, the $2.50 proposed by Assembly Bill 1725 for a one-shot levy, and the $2.50 for the one-shot levy on a public entity, the bill would permit a fee that could total about $17 for one levy ($1 per each withholding during 120-day levy) and this $17 is not advanced by the creditor.

The staff fears that, when employers are faced with the variety of complex procedures that would be added to the law by Assembly Bills 1725 and 3057, the pressure to discharge an employee whose wages have been garnished will greatly increase. It is not only the variety of procedures for levy that concerns us but also the ambiguities in the law as to how to compute the amount to be withheld and the "earnings" upon which withholding is required.

We have not attempted to find all the defects in Assembly Bill 1725. There are, however, many problems. For example, subdivision (a)(1) of Section 710.5 refers to "money, wages, salary or commissions" which are "owing and unpaid" while subdivision (c) refers to "wages, salary or commissions," omitting reference to "money." We do not find any requirement that the "money" that is "owing and unpaid" be "due and payable" and we wonder what effect the bill will have on accrued vacation, and the like. (Public employees have the benefit of a specific provision dealing with this, a provision that is not made applicable to the employees covered by Assembly Bill 1725.)

The state law will not satisfy federal requirements (for example, Section 690.6 retains the 30-day provision which is contrary to federal requirements) and the employers will be faced with potential violation of federal requirements if they comply with the literal provisions of the state law.

Assembly Bill 1725 retains the sheriff, marshal, or constable as the levying officer but permits service by mail. The levying officer gets $3.00 for his duties under the statute. Here again we have the public expense of

receiving, accounting, and paying over funds. Certainly the fee provided will not cover the cost to the county of providing these services, and the prospects that the counties will request higher fees may be anticipated in future sessions.

There is little in Assembly Bill 1725 that would be an improvement over the scheme provided in the Commission's tentative recommendation. The bill retains the sheriff, constable, or marshal as the levying officer but permits mail service and provides for a flat fee to cover service and handling and accounting for money received by the levying officer. The staff believes that the Commission's recommendation is preferable.

Assembly Bill 1725 provides for payment of a $2.50 fee to the employer when service is made (the continuing levy bill--Assembly Bill 3057--does not provide a fee for the employer). The fee must be advanced by the creditor. Our proposal permits the employer to deduct a $1.00 fee each time a deduction is made. Under our proposal, the creditor advances nothing, the employer is permitted to obtain a significantly larger amount for his services, and the burden on the employee is not unreasonable since the cost is spread over the entire period of the order. The staff believes that the Commission's recommendation is preferable.

Assembly Bill 1725 provides for a notice to the judgment debtor--a notice that is not very informative (we have not seen the later amendments to the bill, but we would hope that the form of the notice has been improved). Assembly Bill 1725 provides its own special hearing procedure on a claim for exemption. The staff believes all these matters are covered in a better manner in the Commission's recommendation.

Conclusions Concerning Employees' Earnings Protection Law Recommendation

We believe that the enactment of Assembly Bill 1725 and Assembly Bill 3057 will add further confusion and uncertainty to an already confused area of law. We think that the bills will create serious problems for employers.

We see nothing in either bill that would be an improvement on what is contained in the Commission's recommendation. The bills contain many technical defects (unless these have been corrected in later versions of the bills). They provide overlapping, inconsistent procedures. They are inconsistent with federal requirements.

The Commission's recommendation would substitute a well drafted, consistent procedure for the mess that will exist when Assembly Bills 1725 and 3057 become law. The staff believes that the recommendation should be revised to reflect the enactment of the 1971 bills but that there is nothing in those bills that should be incorporated into the recommendation.

It is a policy question whether a recommendation should be submitted in 1972 or whether it would be better to wait until 1973 or 1974 when the mess created by the enactment of the 1971 bills should have become apparent to all.

Suggestions Concerning Approach to Study of Attachment

At the 1971 session, a number of bills were introduced to deal with the problem of repossession of personal property. These bills are designed to provide a hearing procedure in repossession cases that will meet constitutional requirements. No doubt bills to take care of the prejudgment attachment procedure problems are now being drafted. The staff believes that the experience with wage garnishment procedure indicates that it is not profitable to work in an area where developements are so rapid as they are in the creditor remedies field unless the Legislature is willing to defer action until our recommendations are available. And this the Legislature has not been willing to do.

The staff believes that the attachment study should not be conducted on a crash basis. We will not have our recommendation available until late in the 1972 session and may not even be able to accomplish that. By that time, other groups will have legislation well along.

Our legislative program for 1972 is a meager one. Its significance is greatly reduced by the 1971 enactments. A similar failure to produce a meaningful program during the next year would cause me great concern.

For these reasons, the staff suggests that condemnation be given a top priority and that the overall study of attachment, garnishment, and exemptions be conducted on a continuing basis with the same degree of depth and consideration as other major studies. No attempt should be made to deal with portions of this study on a crash basis; the various interest groups have demonstrated their ability to deal with the problems of immediate concern much more expeditiously than the Commission can.

Respectfully submitted,

John H. DeMoully
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