#39.30 1/7/72

Third Supplement to Memorandum 72-2

Subject: Study 39.30 - Attachment, Garnishment, Execution (Employees' Earnings Protection Law)

Attached is an interim report of the State Bar's Ad Hoc Committee on Attachment concerning the recommendation on the Employees' Earnings Protection Law. The recommendations of the State Bar Committee are summarized on pages 15-16 of the committee's report.

Respectfully submitted,

John H. DeMoully
Executive Secretary

3d Supp Memo 72- 2 EXHIBIT I

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

January 6, 1972

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMoully:

The Board of Governors had before it at its December 1971 meeting interim report of the State Bar's Ad Hoc Committee on Attachments dated November 8, 1971. It directed that said report be forwarded to the Law Revision Commission as the recommendations and suggestions of said Committee; copy of the report is enclosed. The Board did not itself take specific action upon the highly technical provisions of said report.

For your information, the Board commended its Committee for its excellent and thorough report.

Very truly yours,

Mary G. Wailes

Mary G. Wailes
Assistant Secretary

MGW:dm

cc: Messrs. David K. Robinson, Kimbrough, Fernandez, Malone and Elmore

INTERIM REPORT OF AD HOC COMMITTEE ON ATTACHMENTS

TO THE BOARD OF GOVERNORS:

INTRODUCTION

This Committee was appointed for the purpose of examining, among other things, the need for revising the current attachment (garnishment) statutes of this state in the light of recent court decisions. Of necessity, this has led the Committee into the area of execution statutes as applied to wages and other related questions, including the need to amend state statutes to conform to the garnishment provisions of the United States Consumer Credit Protection Act (15 U. S. C. §1672 et seq.).

As indicated in the interim report of February 26, 1971, the Law Revision Commission (referred to hereafter as LRC) has been engaged in studying these problems, and the Committee concluded that it was more desirable to work with the LRC than to proceed independently.

As of this date, the LRC is studying, but has not yet published, its tentative recommendations on the subject. In August, 1971, it completed work on a "Tentative Recommendation Relating to Attachment, Garnishment and Execution, Employees' Earnings Protection Law," to the extent that the tentative text and official comments were published, and comments and suggestions were publicly solicited.

This report relates to the latter measure (referred to hereafter as The Recommendation). With such changes as may later be made by the LRC, it will be introduced and presumably pressed for enactment at the 1972 session of the Legislature. This report reflects action

taken by the Committee on October 16, 1971, when it met in Los Angeles for the better part of a day.

It is to be noted that, because of the LRC's time schedule, some suggestions were made by Committee members to the LRC on an informal basis prior to October 16, 1971. This was done, however, without undertaking to bind either the Committee or your Board. The LRC has accepted some of them. It is understood the proposed measure will be placed in pre-print form, and additional changes in the August, 1971, text are exepcted.

Of course, in making this report the Committee is aware of the serious inroads upon California's present attachment statutes as a result of Randone v. Superior Court, 5 Cal. 3d 536 (1971).

THE PROPOSED MEASURE IN GENERAL

The major thrust of The Recommendation is an earnings protection act, that is, an act designed to protect an "employee's" earnings from attachment and to protect a certain portion of those earnings from execution. [An employee is "an individual who performs services subject to the control of an employer as to both what shall be done and how it shall be done." See, §723.11(b) of The Recommendation.]

Exemption of some part of the earnings from attachment and execution is required by Federal law, but The Recommendation will exempt more than the bare minimum. It may be noted, however, that California law now exempts earnings of an employee from attachment. See, present CCP §690.6(a).

In addition to exempting earnings, The Recommendation deals with levies by attachment or execution against bank accounts, and provides for a State Administrator--the Department of Industrial

Relations.

In accomplishing this revision of present statutes relating to levies on wages, the LRC has also modernized the statutes and removed some of the existing expenses of levying on wages by providing for a "continuing levy," which will permit a single levy to remain effective for as much as 120 days. See, proposed CCP §723.22.* The creditor who has caused such a levy to be made will then be required to wait for an additional ten days before he can make another levy upon the same employer. (§723.109).

Additional savings of expense are provided by authorizing and encouraging service of the "order to withhold earnings" by mail, in contrast to the present personal service by the sheriff, marshal or constable (See, §723.101), and by providing for direct payment from the employer to the judgment creditor, in contrast to payment through public officials or the court (See, §723.25).

The Committee finds itself in general agreement with the proposed Act, which appears to bring our state statutes into line with Federal requirements, and to modernize the method of levying on wages. However, there are some specific areas in which the Committee finds itself in disagreement with the text or where it feels that additional attention should be given to particular problems. The remainder of this report will deal with the specifics of The Recommendation and will point out particular problem areas.

EXECUTION UPON EARNINGS IN THE HANDS OF THE DEBTOR

Section 690.5-1/2(e) provides that a debtor's earnings from the

*All code section references made hereafter will refer to the proposed sections of the Code of Civil Procedure unless otherwise noted.

pay period immediately preceding the levy are exempt in his own hands so long as retained "in the form in which paid or as cash" to the same extent as they would have been exempt if unpaid. Amounts actually withheld while the earnings were in the hands of the employer are deducted. Moreover, if the debtor needs a still larger exemption because an amount is "essential for the support of himself or his family" that too will be exempt. [§690.5-1/2(f)]

The Committee considered the fact that this will further insulate certain individuals from payment of their just debts. Nevertheless, the Committee noted that the exemption is limited to funds from the preceding pay period, and as such would only protect money actually being used for day-to-day living expenses. It also noted that this added protection is necessary to carry out the policy of allowing a debtor to have a certain part of his pay check available to him for living expenses. If the debtor should, however, purchase goods with the earnings or deposit them in accounts, they cannot be traced and this exemption will not apply.

The Committee therefore recommends that this protection of earnings be approved.

THE SELF EMPLOYED INDIVIDUAL

Section 690.6 provides that earnings due or owing to a person who is not an employee will be exempt from attachment, and, further, that at least one-half of such earnings due and owing for service performed during the preceding thirty days will be exempt from execution. See, §690.6(b) and (c). Thus, the self-employed person or independent contractor is given less protection than the employee. Prior law is basically continued for these individuals. See, present

CCP. §690.6. The sole change from the prior law is found in part (d), where The Recommendation would exempt amounts "essential for the support" of the person or his family, which the present law will not necessarily do.

These "earnings" will be subject to a levy of execution, whereas employee earnings are only subject to a withholding order. See, §690.5-1/2(b).

The Committee is not convinced that for "exemption," as opposed to "continuous levy," purposes the independent contractor type of worker should be treated in a manner different from the way in which other wage earners are treated. While it may indeed be more difficult to determine what his earnings are, presumably such a determination must be made in any event if any exemptions are to be granted. The Committee notes the fact that the United States Consumer Credit Protection Act does not appear to distinguish between so-called "employees" and others but speaks of "individuals." Also, some individuals might sell a commodity rather than a pure service, and might depend upon that for a livelihood. The Committee feels that consideration should be given to allowing an exemption to such individuals.

It is, therefore, recommended that the LRC give further consideration to the provisions of §690.6 with a view to (1) arriving at a more particular definition of earnings (including a reasonable compensation for an individual's personal labor though such labor may result in sale of a commodity rather than direct sale of a service) and (2) applying the usual exemptions to those earnings.

DEPOSIT ACCOUNTS

Sections 690.7 and 690.7-1/2 provide for deposit account

exemptions from attachment and execution respectively.

The most notable innovation in these sections is their extending the exemption to all accounts rather than limiting them to special types of accounts, such as those at Savings and Loan institutions [present CCP 690.7(a)] or accounts in credit unions (Financial Code §15406). It is believed that this is a very worthwhile change in the law, since under modern conditions there seems to be little justification for treating some deposit accounts different from others. Under this law all accounts in banks, savings and loans or credit unions will be exempt, and the exemption will not be decided by the vicissitudes of where the money is placed.

However, two matters are noted for further attention.

First, the sections provide that a husband and wife will be treated as one individual. See, §690.7(a) and §690.7-1/2(a). While reasonable men may differ on the question of whether an exemption should be lost because of marriage, there appears to be a more fundamental problem. In fact, a husband and wife are not one individual and each may have separate property as well as community property. The sections do not attempt to distinguish between these types of properties; nor do they take account of the fact that earnings of a wife may not be liable for her husband's debts (Civil Code §5117); nor do they consider the possibility that the wife may be a sole trader (present CCP §1811 et seq.). The Committee is concerned about the fact that the wife's separate property account could, for example, cost the husband an exemption for his separate property account, since he must report her account to the court because she and he are "one individual." Neither policy nor logic would seem to

justify this result.

Second, while the Committee does not deem itself competent to determine the proper amount of the exemption, it notes that whereas debtors can now shield up to $2500, and a husband and wife even more, the present proposal will reduce the amount to a total of $500.

The Committee therefore recommends that the principle of extending the deposit account exemption to all types of accounts be approved; and that the LRC be advised of our concern that treating the husband and wife as one individual may cause substantial difficulties and inequities unless the concept is further refined.

CONTINUING LEVY

A. The Levy Itself. - Section 723.22 will provide for a continuing levy procedure. That is, rather than requiring creditors to obtain a new writ for each pay period, the creditor will obtain an earnings withholding order, which will remain in effect for up to 125 days after service upon the employer. Since the employer does not withhold for the first five days after service, the period of withholding will not exceed 120 days.

The Committee believes that this procedure is calculated to eliminate a great deal of economic waste. For example, the judgment creditor will not be forced to incur repeated levy costs which he would, of course, try to pass on to the debtor-employee. Moreover, the creditor does not retain his advantage over other creditors for an inordinate period; and when his order ends he will have to wait ten days before serving another one. See, §723.109. This will give other creditors a sporting chance to collect on their claims. In the interim, if a creditor has served an order he will be notified of the existence of the prior one and given sufficient information to enable

him to re-serve his order at a proper time. See, §723.127.

It is therefore recommended that the continuing levy provision (§723.22) be approved.

B. Compliance with Order.- The employer will comply with the withholding order which has priority (as to priority see §§723.23, 723.30, and 723.31) by remitting the amount withheld directly to the creditor. See §723.25. The employer will also make a return on a form to be provided by the creditor. See, §723.108. This procedure will have the effect of bypassing official collecting authorities entirely. There will be no deposit with the marshall, the sheriff, or any other official. While the Committee notes that requiring payment to and through an official might eliminate some disputes and provide an independent accounting procedure, it believes that, on balance, the proposal will save creditors and debtors difficulties caused by delays and further expenses in the collecting process. The Committee notes that the creditor is required to send the debtor a receipt within 35 days after he receives payment. See, §723.26.

Certainly, this seems like a worthwhile modernization of the law in this area.

It is, therefore, recommended that the provisions requiring direct payment to the creditor be approved.

AMOUNT OF EXEMPT WAGES

The core of the Earnings Protection Act is found in §723.50, where the amount of the wage exemption is outlined.

As heretofore noted, Federal law requires that certain portions of an individual's earnings be exempt from levy. The amount is given by a formula which revolves around the concept of "disposable

earnings," that is, earnings left after deducting any amounts "required by law to be withheld." See, 15 U.S.C.A. §1672. Basically, the greater of 75% of these earnings or thirty times the Federal minimum hourly wage must be protected in any one week. See, 15 U.S.C.A. §1673.

The LRC has drafted provisions that will apparently exempt more earnings than Federal law requires. This has been done for the purpose of giving those in very low earnings brackets a little more to live on. However, it will have the same effect on those in higher earnings brackets, and may, in some instances, exempt rather substantial sums.

Nevertheless, the proposed section has a number of virtues: (1) it will -- together with other sections -- offer means of obtaining exemptions from the day-to-day operation of the Federal law; (2) it will simplify the preparation of accurate withholding tables; and (3) because of (1) and (2) it should reduce the cost of procedure to the employer.

The Committee therefore recommends approval of the wage exemption formula.

SPECIAL WITHHOLDING ORDERS

A. Support Orders.- The LRC has proposed that the limitations of §723.50 not apply to a withholding order for support, that is a court order for the "support of any person." See, §723.30. If this sort of order is served it will first be deducted from the employee's earnings and the amount left will then be used in the §723.50 formula to determine what other creditors can take, if anything. See, §723.30 (b)(4).

This variation is permitted by the Federal law. 15 U.S.C.A. §1673(b)(1).

The Committee believes that it is quite reasonable to permit this special variation. The major purpose of the exemption is to protect a family's income so that it can support itself. It would be truly procrustean to then limit support claims by application of this concept. It seems only fair to treat support orders with special consideration.

The Committee recommends approval of the special provisions for support orders.

B. State Tax Orders.- Under §723.31 particular types of state tax orders would be given various kinds of special treatment.

These orders will take priority over other withholding orders, except orders for support. See, §723.31(f)(3). Under this kind of order more than the limited amount provided in §723.50 may be taken by the state. Indeed, the state is even able to take amounts essential for the support of the debtor or his family. In that regard, it should be noted that "essential" is intended to be a strict word. The debtor's accustomed standard of living and his station in life are not the criteria. The amount must actually be vital. See, §723.51.

The Committee agrees that the state should take priority over other creditors. However, it believes that it is not proper for the state to strip a person of those amounts which are essential for his support. There does not seem to be adequate justification for awarding the state special treatment as to the amount it can take. Indeed, it can be argued that if the law is to be humanized the state should set the example by being among the most humane of creditors. It might also be noted that if the debtor is driven to the wall he may become a charge upon the public fisc and the net result could

well be a loss of state income.

Therefore, the Committee recommends that the portions of §723.31 which permit the state to take larger amounts of the debtor's wages than other creditors can take be disapproved.

SERVICE BY MAIL

One of the major money saving devices provided by The Recommendation is contained in §723.101. This section provides for service by means of personal delivery or mail. Postage must be prepaid, but first class mail, air mail, registered mail and certified mail are all satisfactory.

It is realized that many arguments can be made for and against this type of service. For example, some may feel that certified mail is less satisfactory than ordinary mail; and some may take the opposite position. Also, there is always the possibility that the mail will go astray.

At present, after litigation has been commenced, almost all service is done by mail. If the position of the employer is a matter of concern, it is expected that the courts will be reasonably sympathetic toward employers who claim that they have not received a withholding order, and at the same time the creditor can protect himself by using certified or registered mail. It appears that the LRC intends to draft language to permit recovery of costs for personal service in the event that certified or registered mail is refused.

On balance, the Committee recommends that the provisions for mail service be approved.

PROCEDURAL MATTERS

In general, the procedure will be somewhat informal. The creditor will apply for issuance of an earnings withholding order (§723.102)

which will be issued promptly (§723.104). At the same time notice will be served upon the judgment debtor so that he will be in a position to claim his exemptions (§723.103). If he applies for a hearing it must be granted within fifteen days, and the court can then modify or terminate the earnings withholding order (§723.105). A procedure is also provided for the situation where the employee works for more than one employer (§723.106).

The Committee has reviewed these provisions and makes the following observations regarding them:

A. If the debtor wishes a hearing he must file an application form (§723.123) and in most instances a financial statement (§723.124), the form of which will be prescribed by the Judicial Council. The Committee believes that in fairness to the debtor, the creditor ought to be required to deliver these forms in blank when he serves the other documents on the debtor. If this is done the average person will not be left entirely to his own devices, and will have some idea about what he must do to claim his exemptions. It seems that it would be easy enough for the creditor to simply enclose the prescribed forms with the other papers that he must mail in any event. (§723.103)

The Committee recommends that §723.103 be amended to require service of a debtor's application form and financial statement.

B. Under the proposed procedure the earnings withholding order can be issued and served promptly. It may, and probably will, be served before the debtor can apply for and obtain his hearing. After the hearing the court can modify the order, but before that amounts may be withheld and paid over. Thus, even if funds are "essential for support" the creditor will get one free bite at them in all likelihood. If after the court hearing a modification order is issued

the employer will be required to readjust his withholding records to comply with the modified order.

Although the Committee understands that such a proposal has already been considered by the LRC and rejected, it still feels that a period of delay would be desirable, so that there could be an opportunity to make these determinations before the order is served. The Committee has not attempted to work out the exact period, nor has it worked out the exact procedure. It notes that one possibility would be requiring the creditor to refrain from serving the order for a number of days, so that the debtor could notify him (or the court) directly of his desire for a hearing.

Therefore, it is recommended that the LRC give further consideration to allowing a delay in service of an earnings protection order, so that a hearing can be held prior to service on the employer, if the debtor so desires.

ADMINISTRATION AND ENFORCEMENT

Sections 723.150 et seq. provide for administration and enforcement of the provisions of the proposed Earnings Protection Law. As originally drafted the state administrator would have been given the express authority: (a) to adopt rules and regulations (§723.151); (b) to conduct investigations and prosecute actions (§723.152); (c) to act as liaison with the Federal administrator (§723.153); (d) to issue warnings (§723.154), and confer with violators (§723.155); (e) to issue cease and desist orders (§723.156); and (f) to obtain injunctions (§§723.157 and 723.158).

To the extent that the above sections enable the administrator to prepare the tables contemplated by §723.50 and to the extent they provide for liaison with the Federal administrator the Committee is

in agreement with them. Federal regulations require such a liaison functionaire if exemption from direct application of the Federal rules in California is to be obtained. (See, 29 Code of Federal Regulations §870.1 et seq.)

However, the Committee fails to see the need of erecting an administrative procedure which contains the many other functions outlined above. These other functions are not required by Federal law. The courts have traditionally been left the job of assuring proper use and compliance with their own orders and processes. At least until such time as it appears that abuses have arisen under the proposed statutes, which cannot be avoided by slight changes, the Committee believes that the policing function should be left with the courts and should not come under the surveillance of a separate state agency.

The Committee notes that at the October meeting of the LRC the sections providing for these expansive powers were deleted from The Recommendation. However, the Committee is concerned that vesting of the rule making and liaison activities in the Department of Industrial Relations may automatically incorporate the powers generally conferred upon state departments, including powers of investigation and prosecution of actions (see, e,g. Government Code §11180).

It is believed that the statute should make it clear that the functions of the department will be rather ministerial tasks, such as table preparation and liaison, and that possible violations of the law will not be a matter for the department's cognizance.

Therefore, it is recommended that the striking of §§723.150 and 723.154 through 723.158 of The Recommendation be approved; and that §723.151 be amended to make it clear that the state administrator is

not to have authority to conduct investigatory and prosecutorial functions under this Act.

SUMMARY OF RECOMMENDATIONS

The LRC Recommendation discussed in this report is basically sound and the Committee recommends that the LRC be informed that the proposal is generally approved; but that the following important areas of specific approval or disapproval be noted:

A. That specific approval is given to the provisions providing an exemption, limited in time, for earnings in the hands of the debtor, which remain in the form paid or in cash. §690.5-1/2(e).

B. That the provisions for levy on the earnings of a self-employed debtor should be amended to more clearly define "earnings" and for the purpose of applying the usual exemption amount to those earnings. §690.6.

C. That specific approval is given to the principle of extending an exemption to all deposit accounts, but that the "husband and wife" concept should be clarified to account for the fact that they are separate individuals with possibly varying ownership interests. §§690.7 and 690.7-1/2. That it also be noted that the overall exemption has been significantly decreased in amount.

D. That specific approval is given to the provisions for a continuing levy. §723.22..

E. That specific approval is given to the payment of withheld wages directly to the creditor. §723.25.

F. That specific approval is given to the proposed wage exemption formula. §723.50.

G. That specific approval is given to the proposal to give special priority treatment to support orders. §723.30.

H. That the provisions allowing the state to take a larger portion of the debtor's wages for taxes than would be available to other creditors (including amounts essential for the support of the debtor or his family) be disapproved. §723.31.

I. That specific approval is given to the provision for mail service. §723.101.

J. That the debtor's form for hearing application and the debtor's financial statement should be among the documents that the creditor is required to serve upon him when applying for a withholding order. §723.103.

K. That further consideration should be given to providing a delay in service of an earnings withholding order so that a hearing can be conducted prior to service if the debtor so desires. §§723.104 and 723.105.

L. That vesting of broad investigatory and prosecutorial powers in the state administrator be disapproved, and that The Recommendation be amended to make it clear that such powers will not exist. §723.151.

Dated: Nov 2, 1971

Respectfully submitted,

AD HOC COMMITTEE ON ATTACHMENTS

By _____
Ferdinand F. Fernandez, Chairman

Members:

Nathan Frankel
Edward N. Jackson
Ronald N. Hall
Arnold M. Quentner
William W. Vaughn

EAST BAYSHORE NEIGHBORHOOD LEGAL CENTER
LEGAL AID SOCIETY OF SAN MATEO COUNTY
1651 BAY ROAD
EAST PALO ALTO, CALIFORNIA 94303
TELEPHONE: 324-1386

December 7, 1971

John DeMoully, Director
Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

I have just reviewed the paper submitted to you by Mr. Nicholas C. Dreher and Mr. James Fletcher. I believe that they have submitted a very well thoughtout proposal.

As you know from my previous correspondence, I have been quite concerned especially about the level of your automatic exemption. As they pointed out very well in their paper, very drastic effects occur from wage garnishment. I think that it is highly desirable to provide an initial exemption that will really protect people.

If their suggestion of 60 times the minimum wage is not acceptable for the entire range of salaries, may I suggest an alternative. Sixty times the minimum wage could be provided through $120.00 gross earnings per week. At that point a schedule providing for 3/4 of the income could be implemented. Therefore, beginning at $135.00 per week gross income, your schedule beginning at $14.00 per week could be implemented. However, this would take care of those people who have a very low income and would also cover situations where the amount received on the levy is hardly worth the effort. In fact, the only real benefit of the garnishments at the lower end - for example, $3.00 when a person is earning $70.00 per week, $5.00 when a person is earning $80.00 per week - is for harrassment purposes due to the threat of loss of employment.

I would, therefore, strongly urge that you would consider giving greater protections at the lower end of the wage scale. Either that suggested by Mr. Dreher and Mr. Fletcher or the compromise version which I have suggested would provide greater protections.

I would also strongly urge that you consider implementing the protections suggested by Mr. Dreher and Mr. Fletcher concerning loss of employment. The social costs of such loss of employment is simply too great to bear. It hurts both the creditor and the debtor and ultimately society in general. I think that such a provision is fully justified and in the package of legislation such as you are suggesting would have a very good chance of passage.

I do not think that failure of Assemblyman McAllister's Bill should preclude you from introducing it as part of your suggested package.

I also think that you should give careful considerations to the suggestions concerning protections to welfare recipients and those freed from prison. However, if greater protections are given at the lower end of the wage scale, I believe that this protection would be somewhat less necessary. Therefore, I would urge again that you consider carefully the protections afforded to the very low income wage earner.

Thank you again for your consideration of my views.

Yours very truly,

Eric W Wright

ERIC W. WRIGHT
Assistant Professor of Law
University of Santa Clara
Law School

EWW:lar

January 7, 1972

To: California Law Revision Commission

Since the December meeting, we have been engaged in some additional research in an attempt to answer questions concerning our proposals that were raised at the meeting. What follows are our reply to these questions and also some additional comments on the Commission's work with wage garnishment. that we were unable to bring up at the meeting.

Unfortunately, neither of us will be able to attend the January meeting in Los Angeles. We would be happy, though, to answer any questions the Commission has concerning our comments.

Respectfully submitted,

Nicholas C. Dreher

Nicholas C. Dreher

James A. Fletcher

James A. Fletcher
Stanford, California

I. WELFARE

At the December meeting, several members of the Commission, particularly Mr. Stanton, indicated some interest in an amendment to the Commission's proposal granting immunity from garnishment to debtors recently off welfare or out of prison. We mentioned at the meeting that at least two states already have enacted similar provisions. Minnesota provides 6 months of immunity to debtors just off welfare and just out of prison (Minn. Stats. Ann. - 550.37 (4)); Rhode Island provides 1 year of immunity only for welfare recipients (Gen. Laws. R.I. - 9-26-4 (12)(b)). The theory behind such an immunity provision is obvious. Certain classes of debtors are in such precarious financial condition that instead of forcing each member of the class to claim a hardship exemption, it is more efficient to grant a blanket exemption to the whole class. It is a virtual certainty that debtors recently off welfare or out of prison will find themselves in an extraordinarily unstable financial position. The fact that someone has been on welfare is prima facie evidence that he has great difficulty supporting himself. In addition, people recently off welfare or out of prison have necessarily been unemployed for some time. This means they will have no seniority when they return to work, and probably very little job security. Because the debts owed by welfare recipients and prison inmates are difficult to collect, especially while they are on welfare, creditors will be understandably eager to collect from debtors recently back to work. In all likelihood, this means that many debtors will have their wages garnished shortly after returning to work.

A 1965 study in Wisconsin revealed that, of a random sample of families leaving the welfare roles, approximately 25% were garnished within a year after returning to work; half of this number being garnished within 90 days[1].

A debtor garnished on more than one debt may be discharged under the present law. Given the minimal job security of someone recently off welfare or out of prison, it is probable that many employers would discharge these debtors after the second garnishment. It should be clear that discharge means disaster to someone recently out of prison or off welfare; it might conceivably force him back onto welfare or into a life of crime. Society has a very large stake in helping former prison inmates and former welfare recipients to become self-supporting; rising crime rates and welfare costs attest to this fact.

If these debtors are granted a brief period of immunity from garnishment, it is possible that they may be able to establish some measure of financial stability and perhaps make voluntary payment agreements with creditors, before their job is jeopardized and their precarious financial situation aggravated by garnishment.

At the December meeting, Mr. Gregory expressed some concern that an immunity provision might have the effect of discouraging employers from hiring former welfare recipients and prison inmates. In fact, such a provision will have just the opposite effect. An immunity provision is a guarantee to the employer that no withholding orders will have to be processed while the employee is immune. This guarantee surely makes the immune debtor a more appealing job applicant than he would otherwise be.

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[1]Hearings on HR 11601 before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency: 90th Congress, 1st Session (1967), pp.1033-34.

Mr. DeMoully pointed out, at the December meeting, that if the automatic exemption is sufficiently high, most former welfare recipients and prison inmates will be exempt from garnishment anyway. This point is well taken. We feel, however, that those individuals who do leave prison or welfare for a high-salaried job are in need of some extra protection.

A brief period of immunity is not unduly prejudicial to creditors. The fact that creditors' claims may have been uncollectable for a substantial period already, indicates that a slightly longer wait will not increase the burden unduly. On balance, we feel that the potential benefit, to all concerned, of a brief period of immunity for former prison inmates and welfare recipients outweighs the minor inconvenience to creditors of a slightly longer waiting period before they can employ garnishment as a collection device.

Specifically, we would propose an immunity period of 125 days, the same length of time for which a debtor is immune under the Commission's hardship exemption (723.105 (e)). This amount of time would seem to be long enough to give the former prison inmate or welfare recipient a fair chance of achieving some financial and job stability, and not so long that the interests of creditors are unduly prejudiced. To prevent the possibility of abuse of such an immunity provision, it should be available to a single debtor only once every three years. Procedurally, the immunity system would be very easy to administer. It would be a simple matter for those leaving prison or welfare to be issued a certificate of immunity by the Welfare Department or the Adult Authority. Such certificate could then be presented by the debtor to his new employer; the

employer then refusing to honor withholding orders until the expiration of the immunity period.

If it is a policy of this state to help welfare recipients and prison inmates to become self-supporting and responsible members of the society, we feel that the adoption of an immunity provision of the kind we have proposed, is indispensable.

II. EXEMPTION SCHEDULE

Problem of Withholding Small Amounts

At the December meeting, the Commission members adopted the view that the withholding of small amounts from the debtor's paycheck was not worth the trouble. The feeling seemed to be that the costs of the paperwork and processing of the withholding order made it terribly inefficient to have small payments. We agree with this view, but we would go even further than the Commission did, i.e., prohibiting withholding of less than $5. We suggest that it is too costly and not worth the effort involved to withhold amounts less than $10. From Mr. Bessey's proposed exemption schedule and from his comments at the meeting, we feel that the creditors probably agree with us. Therefore, we would recommend to the Commission that 723.050(b) be further amended to prohibit the withholding of less than $10.

Exemption Levels

As we stated in our last memorandum to the Commission, one of the primary purposes of the exemption provisions in the garnishment law is to allow the debtor and his family to maintain at least a minimum standard of living so that he can remain a productive member

of the community[2]. Part of our study of the garnishment area has been to look at the actual statistics and figures to try to see what amounts of income a debtor and his family need. Previously we recommended that the Commision adopt an exemption schedule of 60 x the minimum wage + 75% of the excess in order to allow the debtor to provide an adequate standard of living for his family. We realize now that perhaps this recommendation was unrealistic and unfair to the creditor.

Nevertheless, we do believe that the Commission should take a close look at the actual figures as to what amounts of income a debtor and his family need to maintain a basic standard of living. Unfortunately, at the December meeting we did not have a chance to present tha materials we have been able to gather on this subject. Consequently, we have included with this memorandum as Appendix A a table that presents a comprehensive breakdown of the amounts of income a debtor with a family of four needs in various areas of the state to live on a "lower budget." The "lower budget" figures are a compilation of the Bureau of Labor Statistics and represent what is needed in order to maintain a "modest but adequate" standard of living.

In light of these figures, we do not believe that the Commision's exemption schedule allows the debtor to keep enough income in order to provide his family with an adequate standard of living. (This is especially true since the average judgment

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[2]Perfection Paint Products v. Johnson, (1958), 164 Cal App 2d 739, 330 P2d 829.

debtor usually has several dependents to support[3]). As mentioned above, although we feel our previous recommendation would allow most debtors to provide such a standard of living for their families, the exemption schedule was unrealistically high. Consequently, we now propose a compromise exemption schedule of 40 x the minimum wage + 75% of the excess. Coupled with the above proposed amendment prohibiting the withholding of less than $10, such an exemption schedule should give adequate protection to the debtor with a low income while allowing the creditor a meaningful remedy. (See Appendix B).

III. AVAILABILITY OF CREDIT

The only major objection that seemed to be raised to our suggestion of increasing the amount of the automatic exemption at the last meeting was Professor Riesenfeld's assertion that if the exemption is put at too high a level, the creditor will begin to demand a security interest in the borrower's personal property before extending credit or will in some other way restrict the granting of credit to low income, high risk wage earners. We have several comments in reply to this argument.

Our first response is that the class of debtors with which this argument is concerned, those whose earnings would be completely exempt or almost completely exempt under an increased exemption schedule, are earning so little that they do not own personal property of any sufficient value to serve as a security interest

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[3]In a 1967 study of garnishment in Los Angeles County, it was found that the average debtor supports an average of 3.6 dependents and that 19% of the debtors interviewed had 6 or more dependents. The Noumeyer Foundation. Western Center on Law and Poverty. Wage Garnishment: Impact and Extent in Los Angeles County (1968), p. 38. (Hereafter cited as Western Center Study).

on debts of any substantial amount. What Professor Riesenfeld's argument comes down to is that if the garnishment remedy is restricted by increasing the exemption levels, then creditors will respond by seeking secured interests in debtors' personal property. If debtors do not have sufficient property, though, then creditors will just refuse to extend credit to these low income debtors. In short, the real basis of Professor Riesenfeld's argument is that if the garnishment remedy is restricted, then creditors will be much more reluctant to extend credit, especially to low income wage earners. This is an argument that has often been made before, and while the argument is theoretically very plausible and while such a consequence would be very undesireable for the low income wage earner, we do not believe the argument is valid.

No one would doubt that credit is readily available for almost anyone who wants it. The proposition is as true for low income people as for any other[4]. The main reason credit is so easily obtained is <u>not</u> because collection remedies are easily available to the creditor. Credit is so readily extended primarily because the vast majority of debtors repay the credit without having to be coerced. This is so because in our credit-oriented economy, most people feel that it is absolutely essential to

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[4]An FTC study in Washington, D.C. found that 70% of retailers who dealt with low income wage earners required no credit references. FTC, Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (1968), p. 7.

In a survey of debtors who had been recently garnished in New York, it was found that 40% of those interviewed had not been asked when acquiring the debt on which they were garnished whether they had outstanding debts although 66% were making payments on other debts at the time. Consumers in Trouble, a study conducted by David Caplovitz at the Bureau of Applied Research, Columbia University (New York: February, 1968), p. 32.

maintain a good credit rating[5].

Moreover, some more specific proof that the availability of credit does not depend on the existence of wage garnishment as a remedy for creditors may be obtained by looking at the case of welfare recipients. Although the welfare payments to recipients are immune from garnishment, it has been well established that credit is readily extended to welfare recipients. Thus, a 1965 study of families formerly on welfare in Milwaukee found that more than 20% had been offered credit by merchants even though the merchants were fully aware of the families welfare status. In addition, fully 50% of the families surveyed actually increased the amount of debt owed while they were on welfare[6]. Several commentators have reported similar findings[7]. Hence, the fact that creditors do extend credit to welfare recipients, a class of people against whom garnishment may not be used, provides some proof that restriction on the use of garnishment will not cause creditors to restrict the granting of credit.

Finally, it might be worthwhile to point out parenthetically that this same argument--that restriction on the use of garnishment will make credit more difficult to obtain--was made to the court in Randone v. Appellate Dept. of the Superior Court of Sacramento[8].

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[5]It has been estimated that the national delinquency rate on installment credit is between 1 and 2%. In general see, C. Grosse and C. Lean, Wage Garnishment in Washington--An Empirical Study, 43 Wash L Rev. 743 (1968), p. 750.

[6]Western Center Study, pp. 103-104.

[7]e.g. David Caplovitz, The Poor Pay More (1963).

[8](1971) 5 Cal 3d 536, 96 Cal Rptr 709

Justice Tobriner's response was skeptical:

> We cannot accept the creditors' argument for several reasons. First, although the agency maintains quite steadfastly that the withdrawal of a general remedy of attachment will contract the credit market, this contention rests on nothing more solid than the agency's own assertion. While this allegation may contain some surface plausibility, several legal commentators have concluded that there is no reason to believe that attachment has any necessary effect on the availability of credit: (citations omitted). On the present record, we are in no position to accept plaintiff's unproven assertion. 5 Cal 3d at 555, 96 Cal Rptr at 722

IV. HARDSHIP EXEMPTION PROCEDURE

At the December meeting, several members of the Commission expressed the belief that it should be one of the purposes of this reform of the garnishment laws to reduce the burden on the courts resulting from too many claims of exemption. We agree wholeheartedly. It is clear, however, that this objective should be accomplished by (1) raising the automatic exemption high enough to eradicate the need for most hardship exemptions, and (2) toughening the standards for the grant of a hardship exemption. It certainly cannot be the intent of the Commission to reduce the number of claims of exemption by retaining a procedure so complicated that many of those debtors actually entitled to the exemption fail to claim it simply because they don't know how. It has been very clearly established that under the present law, a large majority of those who would qualify for hardship exemptions fail to claim them for this very reason[9].

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[9]Western Center Study, pp. 122-23.
Another study conducted in Santa Clara County arrived at substantially the same results: only 18% of those eligible for hardship exemptions ever filed a claim. Garnishees' Knowledge of Claim of Exemption Rights-A Survey, an unpublished paper by four Stanford University undergraduates.

It is the expressed intention of the Commission to simplify the procedure for claiming a hardship exemption. We feel, however, that the Commission proposal represents only modest improvements over the present law in this area. Under the present law, the debtor is entitled to be informed of his right to file a claim of exemption. The Commission proposal merely requires a slightly more explicit version of such notice. It has been demonstrated, we think, that notice alone does not result in those eligible debtors claiming the exemption. We would recommend, therefore, that 723.103(a) be amended to require the garnishing creditor to include, with the other documents sent to the debtor, two copies of the "Application of Judgment Debtor for Hearing" and two copies of the "Judgment Debtor's Financial Statement" with explicit instructions for completing and filing such forms. The Commission should recognize that debtors compose a class that is probably less knowledgeable in the legal area than the rest of the populace; and that any legislation should reflect this fact.

V. CONCLUSION

At the December meeting, several members of the Commission, particularly Mr. Miller, suggested that our view of the problems of garnishment was too narrow, and that we failed to give sufficient weight to competing claims of creditors and employers in our proposed changes in the garnishment laws. Although we have adopted a somewhat pro-debtor position, we regret conveying the impression

that our concern is only with debtors. We attempted to propose changes which take into account the competing interests of creditors, debtors, employers and all others affected by garnishment. For example, we urged a much tougher anti-discharge law not because we feel that the interests of employers are any less deserving of protection than the interests of debtors. We simply recognized that allowing employers to avoid the cost of processing withholding orders by discharging garnished employees, results in the imposition of much greater costs on other groups; e.g., taxpayers who must support discharged debtors forced onto welfare and creditors whose claims are lost throught bankruptcy. We have sincerely attempted to base our other suggestions on a similarly broad view of all the interest groups affected by the garnishment laws.

APPENDIX A

Annual Costs of a Lower Budget for a 4-Person Family,

Spring 1970 for Selected Areas of California

Area	Food	Housing	Trans-portation	Clothing+ Personal Care	Medical Care	Other Family Consump-tion	Total Consump-tion	Other Costs	Total
Bakersfield	$1,878	1,335	505	830	649	323	5,520	342	5,862
LA-Long Beach	1,890	1,617	512	881	708	349	5,957	356	6,313
San Diego	1,847	1,502	494	857	662	341	5,703	348	6,051
SF-Oakland	1,948	1,729	519	892	635	361	6,084	359	6,443
Non-Metro.*	1,828	1,436	622	836	513	278	5,513	342	5,855

Source: U.S. Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, (1970), p. 290, table 126.

*Included in the average were some other non-metropolitan areas of other states.

APPENDIX B

Amount Withheld Under New Schedule
At Various Income Levels
And Net Take Home Pay

(New Schedule: 40 x minimum wage + 75%)

Gross Earnings per year/week	Amount Withheld Under New Schedule per week	Disposable Earnings Single Person per week	Net Take Home Pay Single Person per year/week	Disposable Earnings Married + Two Children per week	Net Take Home Pay Married + Two Children per year/week
$3,120/60	0	51.93	2,700/51.93	56.28	2,927/56.28
3,640/70	0	59.25	3,081/59.25	65.66	3,414/65.66
4,160/80	1.00	68.40	*3,557/68.40	73.64	*3,829/73.64
4,680/90	2.00	73.55	*3,825/73.55	81.62	*4,244/81.62
5,200/100	4.00	80.65	*4,194/80.65	89.36	*4,646/89.36
5,720/110	6.00	87.74	*4,562/87.74	97.04	*4,993/97.04
6,240	8.00	94.94	*4,937/94.94	104.72	*5,392/104.72
7,020	10.00	105.49	4,965/95.49	116.32	5,529/106.32
7,800/150	13.00	116.31	5,372/103.31	127.80	5,970/114.80
8,840/170	16.00	129.91	5,923/113.91	142.97	6,602/126.97
10,400/200	21.00	149.94	6,705/128.94	164.16	7,444/143.16

*Figure takes account of amendment eliminating withholdings of less than $10.

WAGE GARNISHMENT SHOULD BE PROHIBITED

*William T. Kerr**

I. Introduction

Historically, the statutory treatment of wage garnishment[1] among the states has been characterized primarily by its diversity. Although most states exempt a specified amount of a man's wage from the reach of his creditors, the dollar levels of these exemptions are as various as the methods chosen to compute the amount to be exempted.[2] In addition, legislators, some union spokesmen and some legal commentators have become increasingly aware of the role of wage garnishment in the "debt-or-spiral" of easy credit, discharge from employment, backruptcy[3] and welfare. Inevitably this spiral involves a disproportionate impact on the poor.[4] Impelled by these concerned groups, Congress enacted the Federal Consumer Credit Protection Act of 1968,[5] effective July 1, 1970.

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*Member of the Michigan Bar.

[1] Garnishment of wages is a statutory procedure which has roots going back as far as medieval times. *See* Riesenfeld, *Collection of Money Judgments in American Law*, 42 IOWA L. REV. 155 (1957); and RESTATEMENT OF JUDGMENTS §§35, 36 (1942). A "special note" to section 36 states:

> A proceeding by which the plaintiff is enabled to reach and to apply to the satisfaction of his claim a debt owing to the principal defendant is ordinarily called garnishment, and the principal defendant's debtor is called the garnishee. The word 'garnish' means 'warn'; the garnishee is warned that he is not to pay his debt to the defendant, his creditor, but to the plaintiff. In some of the New England states, the proceeding is called 'trustee process' and the defendant's debtor is called the trustee.

[2] A current list of the amounts of earnings exempted from garnishment under state laws was published by the U.S. Department of Labor, Bureau of Labor Standards, May 1967.

[3] *See* E. DOLPHIN, AN ANALYSIS OF ECONOMIC & PERSONAL FACTORS LEADING TO CONSUMER BANKRUPTCY 18 (Bureau of Business and Economic Research, Michigan State University Graduate School of Business Administration, Occasional Paper No. 15, 1965); STABLER, THE EXPERIENCE OF BANKRUPTCY 7 (1966).

[4] *See Hearings on H. R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., at 661-67 (1967) [hereinafter cited as *Hearings*]. Statement of Dr. David Coplovitz, New York City, N.Y., Author of THE POOR PAY MORE; Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1965).

[5] Pub. L. 90-321, §301 (May 29, 1968).

> §301. Findings and purpose
>
> (a) The Congress finds:
>
> (1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extension of credit. Such extensions of credit divert money into excessive

Yet this law is only one step in ameliorating the impact of wage garnishment and, if it diverts our attention from an eventual prohibition of this device, it is an unfortunate compromise.[6] Bill H.R. 11601,[7] introduced in the House, would have placed an unqualified prohibition upon wage garnishment.[8] The final Act merely raises the level of wage exemption to

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credit payments and thereby hinder the production and flow of goods in interstate commerce.

(2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this title are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws.

[6] Representatives of the United States Treasury were unable to decide whether the abolition of wage garnishment would be desirable. The Internal Revenue Service is one of the most frequent users of wage garnishment. *Hearings* 103-04.

President Johnson in his March 15, 1967, Message on Urban and Rural Poverty directed the Attorney General, in consultation with the Secretary of Labor and the Director of the Office of Economic Opportunity, to make a comprehensive study of the problems of wage garnishment. This contributed as much as anything to the evolution of a compromise on the wage garnishment issue. As a result of this proposal, many, including Sargent Shriver, at that time Director of OEO, argued that legislation dealing with wage garnishment should not be enacted until these studies were completed. *See* the statement of Mr. DeShazor, appearing on behalf of the American Retail Federation, *Hearings* 231, and the statement of Mr. Walker, Executive Vice President, American Bankers Association, *Hearings* 351-52. Referee Clive Bare, who testified with three other experienced bankruptcy referees, *see* note 24 *infra*, responded accordingly:

> We have been studying this problem for—at least I have for some 10 years, and Referee Snedecor for 30 years, Referee Whitehurst for 10 years and Referee Moriarty for 6 to 8 years. Certainly I do not believe that any bill should be enacted without adequate study but we have studied this problem for many, many years.

Each of the aforementioned referees advocated a prohibition on wage garnishment.

[7] H. R. 11601, 90th Cong., 1st Sess. (1967).

[8] *Id.* §201:

> The Congress finds that garnishment of wages is frequently an essential element in predatory extensions of credit and that the resulting disruption of employment, production, and consumption constitutes a substantial burden upon interstate commerce.
>
> Sec. 202(a): No person may attach or garnish wages or salary due an employee, or pursue in any court any similar legal or equitable remedy which has the effect of

a uniform minimum[9] and restricts to a certain extent the right of an employer to discharge an employee whose wages have been garnished.[10] This is not enough; wage garnishment should be prohibited. In the legislature of at least one state, Michigan, the lawmakers are presently

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stopping or diverting the payment of wages or salary due an employee.

(b): Whoever violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

[9] Pub. L. 90-321, §302-03 (May 29, 1968).

§302. Definitions

For the purposes of this title:

(a) The term '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.

(b) The term '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.

(c) The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

§303. Restriction on garnishment

(a) Except as provided in subsection (b) and in section 305, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 percentum of his disposable earnings for that week or

(2) 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 Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) The restrictions of subsection (a) do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

(c) No court of the United States or any State may make, execute, or enforce any order or process in violation of this section.

[10] *Id.* §§304-07.

§304. Restriction on discharge from employment by reason of garnishment

faced with such a proposal and have an opportunity to reconsider the federal compromise.[11]

II. Impact of Wage Garnishment

A. Impact on the Employee

Of the effects felt by the employee, the most immediate is, of course, disciplinary action. It is common knowledge that wage garnishment is

> (a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.
> (b) Whoever wilfully violates subsection (2) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.
> Significant procedural sections include the following:
> §305. Exemption for State-regulated garnishments
> 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).
> §306. Enforcement by Secretary of Labor
> The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this title.
> §307. Effect on State laws
> This title does not annul, alter, or affect, or exempt any persons from complying with, the laws of any State
>
> (1) prohibiting garnishments or providing for more limited garnishments than are allowed under this title, or
> (2) prohibiting the discharge of any employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness."

[11] Two separate bills were introduced in the Michigan legislature in February 1969. At the time of this publication, no numbers had yet been assigned. Both bills were sponsored by the Detroit Neighborhood Legal Services with the support of the U.A.W.-C.I.O. The first, taken from the Texas constitutional prohibition on garnishment (*see* note 75 *infra*), provides:

> Exemption of wages from garnishment.
> No current wages for personal service shall be subject to garnishment; and where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness.

The second, modeled after the Federal Consumer Credit Protection Act, provides:

> 1. The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in intra-state commerce.

considered by many employers an adequate ground for such action and even for discharge. There are no available statistics on the frequency with which employees are discharged by employers for this reason.[12] Some indication of the impact on employees, however, is reflected in the policies adopted by employers when wages are garnished.

In 1966 this writer surveyed one hundred large companies located in states where wage garnishment is permitted. Forty companies responded to the lengthy and detailed questionnaire in this sampling, which is

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2. The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on intra-state commerce.

For the purposes of this Act:

1. The term '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. The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amount required by law to be withheld.

3. The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed:

1. 10 per centum of his disposable earnings for that week; or

2. the amount by which his disposable earnings for that week exceed forty 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 exemption shall be forty, a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in this Act.

The restrictions of this Act do not apply in the case of:

1. any order of any Court for the support of any person;

2. any order of any Court of Bankruptcy under Chapter XIII of the Bankruptcy Act;

3. any debt due for any State or Federal Tax.

No Court of this State may make, execute, or enforce any order or process in violation of this Act.

No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

Whoever willfully violates this Act shall be fined not more than $1,000, or imprisoned not more than one year, or both.

[12] W. Willard Wirtz, Secretary of Labor, estimated the number of wage garnishment-precipitated discharges to be between 100,000 and 300,000 annually. *Hearings* 739.

hereafter referred to as the *Survey*.[13] Twenty-seven of the responding companies indicated that they have a practice of discharging employees whose wages are garnished an excessive number of times. Fourteen of these indicated that the practice had been reduced to a fixed corporate policy, while the rest treated each case individually. One New York department store discharges an employee after a single garnishment is received. Five companies discharge after the second, six after the third and two after the fourth garnishment within a calendar year. One of the thirteen companies indicating that they do not discharge an employee because of wage garnishments commented:

> We do not discharge for garnishment even though we would like to release the bad offenders (10 to 15 a year). These people in a lot of cases don't seem to try to do better even with counseling, help, advice and threats. These people use very poor judgment. Make the same mistakes over and over.

A study conducted in 1958 among 133 companies in and near New Haven, Connecticut, indicated that only nineteen considered garnishment as sufficient grounds for dismissal.[14] Over one-half said that each case was given special consideration, which indicates that an indeterminate number would dismiss an employee for excessive wage garnishments, but have not reduced the practice to a fixed policy. Two of the companies commented that in their organization dismissal was appropriate if the employee's salary was garnished four times, but they added that the policy was not strictly enforced. On the other hand, one company remarked that, "Usually repeaters are not the type suited for our work and leave or are dismissed for other reasons."

In state committee proceedings on attachments in 1964 remarks made by California Assemblyman Johnson revealed a similar experience:

> I know that there are companies that have inflexible rules if they have so many attachments. They are discharged regardless of whether they are valuable employees or not .... Now this is my own experience so I

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[13] Considering the lengthy nature of these questionnaires inquiring about corporate policies toward garnishment of employee wages, a forty per cent response was probably not unusual. It was felt that a lesser number of detailed answers would reveal more of analytical value than a greater number of simple, general answers. The results of the survey justified this opinion. The form of the questionnaire and the responses it brought forth are included in Appendix A, *infra* at 397.

[14] *Garnishment of Employees' Wages; Survey by N.O.M.A.'s New Haven Chapter*, 33 Office Exec. 42 (Feb. 1958).

> know what I am talking about in this respect, and you may be right that it is only a small percentage, but it is very important to these people who lose their jobs because of attachments.[15]

He added that, "... most of the companies have a rule, sometimes only one and a maximum of three garnishments and they lose their job."[16] A study examining garnishment cases in the Wisconsin cities of Green Bay, Kenosha, Racine and Madison revealed that eleven per cent of the garnished employees were fired forthwith; forty-one per cent were warned of dismissal. In fifteen per cent of the cases the employer tried to help the employee.[17] There was no indication in cases involving warning or discharge whether the employee had been garnished previously. Another survey was made in San Diego, California.[18] Seventy-one of seventy-two firms having a policy on wage garnishment gave a *warning* on the first attachment. Twelve firms, or seventeen per cent, fired the employee on the second attachment. Thirty-five more fired the employee after the third. Cumulatively, two-thirds fired an employee with as many as three garnishments. In addition, another ten firms fired an employee on the fourth attachment, and another on the fifth. Of the seventy-two companies reporting, only thirteen, or eighteen per cent, did *not* fire for wage attachment. Of these, nine reported that wage attachments were not a problem.

Business periodicals have encouraged employers to adopt a dismissal policy as a means of warding off what was felt to be a growing problem.

> What can you do? First, clamp down with a reasonable rule as the Crane Company [Chicago] did. The rule: Two of these documents served on the company within a twelve month period and the employee can be fired.[19]

Recent studies, according to the National Association of Manufacturers, indicate that a majority of companies dismiss employees whose wages are garnished a third time.[20]

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[15] *California Assembly Interim Comm. on the Judiciary, Proceedings on Attachments* 44 (1964), [hereinafter cited as *Proceedings*] cited in Brunn, *Wage Garnishments in California; A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965).

[16] *Proceedings* 59. *See also* Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 754-59 (1968).

[17] Comment, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759, 766 n. 29.

[18] *Hearings* 1020-21.

[19] King, *When a Worker Goes Too Far in the Hole, You Pay*, 119 FACTORY 178 (August 1961).

[20] *Id.* at 179.

It is not clear whether employers always limit such a rule to production employees. One company in the *Survey*, a large manufacturer in Kansas City, Missouri, so indicated. On the other hand, a large department store chain apparently applies its policy to supervisory personnel as well, because garnishment is taken as an indicator that the employee is poor management potential.

A second effect of wage garnishment is felt by the employee who seeks other employment after being discharged from his former position because of wage garnishment. Such a discharge diminishes his chance of securing other employment.[21] Twenty-five of the thirty-five responding companies in the *Survey* indicated that knowledge of such a fact would have an adverse effect on an applicant's chances of securing employment. The others did not consider prior garnishment as relevant in their hiring process. None of the thirty-five felt that previous wage garnishments would operate as an absolute bar to employment. Moreover, a company is not necessarily made aware of such prior garnishments, as one company indicated: "This item is not a question on the application; however it normally is discussed during the interview."

The ultimate impact not only of wage garnishment and discharge, but also of the threat of discharge is personal bankruptcy. While threatened loss of job on grounds of garnishment is certainly not the sole cause of bankruptcy, most commentators seem to agree that the threat often triggers a bankruptcy which may be based essentially on other underlying financial difficulties.[22] Another California Assemblyman testified at the state's 1964 hearings on attachments:

> I am connected with an office that handled a few bankruptcies and I'd say 95% are for the purpose of saving their jobs; and the employers I think have a rule of two or possibly three attachments within twelve months and then they lose their jobs.[23]

A panel of experienced bankruptcy referees testified before a congressional subcommittee on H.R. 11601, the original House version of the Consumer Credit Protection Act. They agreed that the number of individual bankruptcies in a state is significantly affected by the leniency or

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[21] Statement of David Coplovitz, author of THE POOR PAY MORE, *Hearings* 662:

> Studies have shown that some of the hard-core unemployed are, in fact, unemployable because they have garnishment records.

See also statement of W. Willard Wirtz, Secretary of Labor, *Hearings* 735.

It has been pointed out that the re-employment problem prompts an undetermined number of employees to quit employment voluntarily to avoid garnishment. *Wage Garnishment in Washington—An Empirical Study*, *supra* note 16.

[22] *See* E. DOLPHIN, *supra* note 3.

[23] *Proceedings* 71.

harshness of its garnishment laws.[24] The following table[25] supplements their observations:

States Having the Highest and Lowest Per Capita Bankruptcy Rates, 1962

High-rate States	Number of Filings Per 100,000 Population
Alabama	279
Oregon	200
Tennessee	184
Maine	153
Georgia	149
Arizona	147
California	145
Illinois	134
Ohio	132
Colorado	131

Low-rate States	Number of Filings Per 100,000 Population
N. Carolina	1
Texas	2
S. Carolina	3
Pennsylvania	4
Maryland	5
Florida	7
Delaware	10
S. Dakota	11
New Jersey	12
Alaska & D.C.	13

United States as a whole: 72 Filings Per 100,000 Population

When we add the dimension of wage exemptions from garnishments, the table reveals a remarkable correlation. Only one of the states in the top half of the table, Illinois, has a wage exemption as high as 85 per cent. The lowest wage exemption in the lower half is 90 per cent.[26] In an excellent article[27] George Brunn discusses two specific instances which lend further support to the relationship between tough garnishment laws

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[24] *Hearings* 417-48. Referees Whitehurst (Dallas, Texas), Snedecor (Portland, Oregon), Bare (Tennessee) and Moriarity (California) appeared.

[25] Myers, *Non-Business Bankruptcies*, in PROCEEDINGS OF TENTH ANNUAL CONFERENCE, COUNCIL ON CONSUMER INFORMATION 2.

[26] It should be noted that it is impossible to tell from these statistics to what extent employers' discharge policies affect personal bankruptcy rates.

[27] *See* Brunn, *supra* note 15, at 1237.

and high personal bankruptcy rates. In 1961, Illinois raised its exemption from a flat $45 a week to a more permissive 85 per cent of take-home pay.[28] From 1961 to 1964 non-business bankruptcies filed in Illinois declined nine per cent, while in the same period nationally they rose eighteen per cent. An even more striking example occurred in Iowa, where in 1957 the 100 per cent exemption was abolished and an unrealistic $35 per week plus $3 per dependent was substituted.[29] From 1957 to 1963 the bankruptcy rates in Iowa quadrupled, almost double the national rate.[30]

While the increased exemption rates in Illinois resulted in a nine per cent decrease in personal bankruptcies, the reduction in the *absolute number is not really very striking*.[31] There is reason to believe that employer policies do not take into consideration the size of the exemption. It is the number of times that an employee's wages are garnished that is most important to the employer and not whether each garnishment secures ten per cent or fifty per cent of the employee's wage. Thus, one might reasonably conclude that the *threat of discharge* for wage garnishment has reduced the potential mollifying effect of increased exemptions on the rate of personal bankruptcy filings. The Federal Consumer Credit Protection Act apparently counters this tendency by combining a restriction on discharge with the increased exemption. However, the restrictions on the employer's right to discharge contained in Section 304(a) of the Act[32] are ambiguous. The protective language could be limited to situations in which an employee's wages are garnished for a single debt; alternatively, the language could be construed to protect the employee from discharge regardless of how many creditors subject the employee to garnishment, as long as each limits himself to a single garnishment. The latter interpretation will give the employee considerably more protection, since it is unlikely that the

[28] ILL. REV. STAT. ch. 62 §73 (1965).

[29] IOWA CODE ANN. §627.10 (1968).

[30] *See* Note, *State Wage Exemption Laws & the New Iowa Statute—A Comparative Analysis*, 43 IOWA L. REV. 555, 560 (1958).

[31] The year-by-year figures, as compiled from Tables F-3 of the Annual Reports of the Director of Administrative Offices of the United States Courts for the years 1961-1964, are:

Year	Illinois	U.S.	Ill./U.S.
1961	16,356	131,397	12.1
1962	13,705	132,118	10.4
1963	14,057	139,176	10.1
1964	14,900	155,193	9.6

[32] Pub. L. 90-321, §304 (May 29, 1968). Restriction on discharge from employment by reason of garnishment.

(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment *for any one indebtedness*. [Emphasis added].

employee having financial difficulties will be pursued only by one creditor.[33]

Finally, it may be admitted that wage garnishment, together with the threat of discharge which it induces, collects a significant amount of the repayments due from debtors. However, the vast majority of debts are voluntarily repaid.[34] The extent to which these are repaid as a result of the fear of wage garnishment cannot be measured, but it should not be overstated. Most voluntary payments are likely induced by the desire to maintain a strong credit rating.

B. Impact on Employers

It is not difficult to understand why employers have adopted reasonably strict attitudes toward employees whose wages have been garnished. Garnishment of an employee's wage is costly, inconvenient and indicative of a degree of financial irresponsibility that may both reflect upon the reputation of the company and suggest that the employee involved will be less productive or less capable than he was before garnishment. Estimates of cost per garnishment vary rather widely. The Cook County Credit Bureau in Chicago surveyed 1,100 employers in 1964 and found that processing a single garnishment costs from $15 to $35. The estimated costs of garnishment to the surveyed employers totaled $12 million annually.[35] A study by the Long Island Railroad Company revealed that for every $100 of employee indebtedness management spends $20 to process the collection.[36] The Crane Company of Chicago figures that each garnishment costs the company $50, each wage assignment $20.[37] The writer's *Survey* indicated a greater variation in estimated costs, ranging from $25 to "minimal" and "very little." Twenty-one of the thirty-five responding companies could not estimate the cost; this included eighteen of the twenty-seven who indicated that they do discharge an employee whose wages are garnished excessively.

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[33] Pub. L. 90-321, §§301-7 (May 29, 1968). The revised final draft of the Uniform Consumer Credit Code (November 1968), governing situations arising out of a consumer credit sale, consumer lease or consumer loan, would prohibit garnishment before judgment against the debtor (§5.104). The Code would limit garnishment by the same measures as the 1968 Act, except that the maximum amount subject to garnishment may not exceed "the amount by which his disposable earnings for that week exceed *forty* times the Federal minimum hourly wage . . ." [Emphasis added], §5.105), rather than the multiple of "thirty" in the 1968 Act. Section 5.106 contains an unqualified prohibition on discharge regardless of the number of times an employee's wages are garnished.

[34] The delinquency rate on installment credit has been estimated at between one and two per cent.' *Proceedings App. A* (letter from Robert Kopriva, Associated Credit Bureaus of California).

[35] Wall St. J. Mar. 15, 1966 at 14, col. 3-4.

[36] Stessin, *Managing Your Manpower*, 77 DUNS R. & MOD. IND. 67-68 (Jan. 1961).

[37] Trueman, *Head Off Employee Garnishment*, 25 ADM. MGT. 10 (April 1964).

This fluctuation in cost estimates can be attributed to the cost factors considered relevant by each employer. The cost of a wage garnishment varies among employers according to their labor costs, the difficulty in computing the employee's exemptions, the necessity of court appearances and resulting loss of job time by the employee, the necessity of utilizing outside counsel, and the extent to which the employer's payroll system has been computerized. It is impossible to determine whether identical cost elements were used when two companies computed their costs. Most employers have not undertaken to make precise cost estimates, but no computation would accurately reflect differences among employers unless a uniform system of accounting and identification of cost elements were in effect.

The *Survey* confirms the opinion of George Brunn[38] that cost is not the sole reason motivating employers to discharge an employee whose wages have been garnished. Of the twenty-seven companies in the *Survey* that indicated a policy of discharging employees, only eight cited cost as the sole factor behind their policy. Nine others combined cost with the fact that garnishment indicated that the employee was a non-productive individual. Three companies cited the latter as the sole reason. Other factors cited as the sole reason for discharging the employee included the inconvenience and time-consuming nature of garnishment and its reflection on the management potential of the employee.

Wage garnishment, which typically serves to inform the employer of the financial plight of an employee, has precipitated employer action beyond the formulation of discharge policies.[39] It appears that very few employers rely on discharge as their sole means of protection. Thirty-one of the thirty-five companies responding to the *Survey* indicated that some form of assistance is provided to employees whose financial problems have been brought to the attention of the employer. A typical reply was as follows:

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[38] *See* Brunn, *supra* note 15.

[39] *See* Statement of I. W. Abel, President, United Steelworkers of America, *Hearings* 754-71, and particularly the following exchange:

> *Mrs. Sullivan.* Do you know whether any of these companies have debt counsellors who help employees who get themselves into financial trouble?
>
> *Mr. Abel.* There is some of that in the personnel departments, but it isn't a large practice.
>
> Again, the companies take the position that this is a cost and something they can't afford. It is bad enough the burden is placed upon them to make the collections and do the paperwork and take care of the creditors. So, there isn't too much of that. *Id.* at 772.

A notable exception is Inland Steel Corp. *Hearings* 74.

> Nothing formal, but the advice and counsel of the supervisor or perhaps a staff person is available. We prefer that employees make a request for help in their personal financial matters. In a few meritorious cases, we have loans to help employees in need – for example where they are saddled with the debts of relatives.

A few companies appear to be less helpful. One large manufacturer said:

> The company does not counsel employees as such about financial difficulties. When a garnishment is received, the company attitude toward employees satisfying their individual financial responsibilities is explained in detail. It is also indicated at that time that repeated occurrences may lead to disciplinary layoffs or discharge.

One business periodical[40] noted the apparent fact that employers "do little until they receive a garnishment notice." The *Survey* lends support to this observation. Twenty-five of the thirty-four responding companies said they have no formalized policy of credit education designed to avoid a first garnishment. Two of the nine which said they did have such a policy indicated that they engaged in credit education either informally and on an individual basis or "very little." A Michigan department store chain said that "before garnishment proceedings, a company will usually contact us in an effort to start their collection again." This provides a signal for active efforts in aid of the employee, which were felt by that responding company to be the reason it had never had an employee's wages garnished. The situation recounted in one business periodical must be considered an exception:

> At Consolidated Laundries, Inc. in New York City, there is a stringent policy which forbids vendors from entering the plant or operating on its property. Security guards are alerted to shoo away sidewalk merchants, and a campaign has been launched to warn employees against shoddy selling practices.[41]

The most effective aspect of such a policy is the credit education effort. No estimate has ever been made of the cost of such preventive measures to the affected employers.

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[40] *See* note 19 *supra*.

[41] Stessin, *Managing your Manpower*, 77 DUNS R. & MOD. IND. 67, 68 (Jan. 1961).

C. Impact on Society

Society underwrites a considerable portion of the cost of wage garnishment. Data obtained by George Brunn from the San Francisco Sheriff's Office revealed that fees for 1963-1964 totaled $113,554, while estimated costs of running that office exceeded $250,000.[42] It is probably fair to assume that this experience is not atypical. Fees are usually set at a dollar amount or on a mileage basis and are often in need of revision. Since they are inadequate to cover actual costs of operation, the difference must be made up out of tax revenue and society in effect provides a substantial subsidy to the creditor.

To the extent wage garnishment ends in bankruptcy, discharge from employment, or both, society absorbs the cost of supporting individuals on welfare as well. The Cook County Department of Public Aid noted that nine per cent of the persons on its relief rolls had been fired from their jobs after an encounter with wage garnishment.[43] No statistics are yet available on the extent to which this experience has been repeated throughout the country.

III. The Role of The Labor Unions

In light of the direct impact of wage garnishment on the employer-employee relationship, it is somewhat surprising that labor unions have not played a more active role in attempting to restrict the discretion of employers to discharge employees for that reason.[44] In the *Survey*, only three of the twenty-three companies responding to the question indicated that there had been any efforts by the union in this respect. Only one was partially successful. One unaccountable reply of a national tire manufacturer noted: "Have never had the provision in the contract

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[42] It should be noted that these figures refer to civil litigation in general and are not restricted to garnishment situations. *See* Brunn, *supra* note 15; Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, n. 6 (1968).

[43] Wall St. J. Mar. 15, 1966 at 14, col. 3-4. The syndrome of wage garnishment, discharge, bankruptcy and relief is believed by some to have played in the past and to be still playing today a significant role in generating the resentment which underlies the disturbances which have prevailed in major cities throughout the country. *E.g.*, Letter of Mr. John Houston, Neighborhood Legal Services Center, Detroit, Michigan. *Hearings* 888-89; article by Mr. Milton J. Huber, Associate Professor, Center for Consumer Affairs, University Extension, Milwaukee, Wisconsin. *Hearings* 1026-31; Statement of Senator Robert F. Kennedy, *Hearings* 1175-80.

[44] Congressman Frank Annunzio, one of the leading proponents of abolishing wage garnishment, commented: "I am disappointed that the national AFL-CIO could not take a position at this time on this legislation." *Hearings* 197. He later said they might "need a little prodding". *Id.* at 540. *But see* note 11 *supra* regarding the role of the UAW-CIO in Michigan in 1969.

and cannot get an agreement from the union to put one in." The ostensible justification for union diffidence on this subject lies in the precedents set by certain arbitration awards rendered in the late 1950's. Discharges of employees whose wages had been garnished an excessive number of times were upheld on the ground that a company rule setting a limit of two or three garnishments was reasonable.[45] The only instances in which an arbitrator reinstated a discharged employee involved situations where the company rule had not been adequately publicized[46] or had been arbitrarily and discriminatorily enforced.[47] These cases, however, involved submission of an "all disputes" clause for interpretation by the arbitrator. Thus, these decisions would not preclude the inclusion of a provision specifically dealing with wage garnishment in the collective bargaining agreement. In fairness to the unions it should be acknowledged that unless the subject matter is a "mandatory" subject of collective bargaining within the terms of the National Labor Relations Act[48] the union has no right to enforce its demand by means of a strike. If a subject falls outside the mandatory area, the union can seek to bargain with the employer about the particular subject, but may not carry its demands to the point of impasse. The subjects as to which employers have an obligation to bargain are vaguely defined in section 8(d) of the National Labor Relations Act as "wages, hours, and other terms and conditions of employment."[49] Whether discharge for wage garnishment comes within these terms has never been litigated. The question involves both an element which is unrelated (the garnishment) and an element which is related to the job (the discharge). The mixed nature of the subject matter has contributed to uncertainty and a resulting loss of bargaining power by the unions. Other subjects also involving

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[45] Ideal Cement Co., 30 Lab. Arb. 690 (1958); International Harvester Co., 21 Lab. Arb. 709 (1953). In Kroger Co., 28 Lab. Arb. 421 (1957), the union and the employer agreed to a rule permitting the discharge of an employee after two garnishments. After discharge and at the arbitration hearing, the employee argued that the service of the garnishment notice was erroneous because the federal bankruptcy court, approving a plan to satisfy all creditors, had exercised its power of preemption. The arbitrator ruled that although the state court may have erred by issuing the garnishment order, the notice served on the employer was voidable rather than void and the employee had not attempted to set aside the order.

In Lockheed Aircraft Corporation, 28 Lab. Arb. 411 (1957), an employee was discharged pursuant to a plant rule after his employer was served with three garnishments. Two of the garnishment notices were pursuant to the same judgment and the employee argued that this was the equivalent of one violation. The arbitrator ruled against the employee, noting that each garnishment was individually served. *See* Kovarsky, *Discharges for Events Occurring Away From Work*, 13 LAB. L. J. 344 (1962); Fisher, *How Garnisheed Workers Fare Under Arbitration*, 90 MONTHLY LAB. REV. 1 (1967).

[46] American Bakeries Co., 30 Lab. Arb. 1058 (1958).

[47] Trailmobiles, Inc., 27 Lab. Arb. 160 (1956).

[48] 29 U.S.C. §§141-197 (1964).

[49] *Id.* at §158(d).

mixed elements have been declared mandatory subjects of collective bargaining, however: for example, the preservation of an employee's rights after induction into the armed services.[50] Still, unions have elected not to press the issue of wage garnishments to the point of impasse. This decision is probably attributable to the strength of employer reluctance to bargain on the issue,[51] but it is nevertheless unfortunate. If union resources were applied in negotiating contracts, litigating cases or even lobbying for legislation resulting in the abolition of discharge on grounds of wage garnishment, the impact would be very definitely felt in the law of garnishment.

IV. Legislative Reaction – A Criticism

Recognizing these varying aspects of the impact of wage garnishment, legislators introduced in the New York Legislative Assembly in 1965[52] several bills aimed at eliminating the most tangible and direct effect of wage garnishment, discharge from employment. This legislative effort resulted in the enactment of section 5252 of the Civil Practice Act. It provides:

> (1) No employer shall discharge or lay off an employee because an income execution has been served upon such employer against the employees' wages; provided, however, that this provision shall not apply if more than one income execution against such employee is served upon the employer within any period of twelve consecutive months after January first, nineteen hundred sixty-seven.[53]

With some modification, this was the "model" for the provision restricting discharge in the Federal Consumer Credit Protection Act.[54] This solution to the wage garnishment syndrome is simplistic and inequitable; more importantly, it is incapable of achieving the desired degree of protection for the debtor-employee.

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[50] NLRB v. Knoxville Pub. Co., 124 F.2d 875 (6th Cir. 1942). *See generally* McManemin, *Subject Matter of Collective Bargaining*, 13 LAB. L.J. 985 (1962); Annot., 12 ALR 2d 265 (1950).

[51] *See* Brunn, *supra* note 15, at 1234 n. 113.

[52] Bills introduced into New York were the following: Senate Intro. 2168 (1965); Senate Intro. 2299 (1965); Senate Intro. 3061, Assembly Intro. 4920, vetoed July 19, 1965; Senate Intro. 4164 (1965); Senate Intro. 4146 (1965); Assembly Intro. 3267 (1965); Assembly Intro. 3577 (1965). Legislative activity has also taken place in New Jersey. Wall St. J. Mar. 15, 1966 at 14 col. 3, 4.

[53] N.Y. CIV. PRAC. §5252 (McKinney 1966).

[54] Pub. L. 90-321 (May 29, 1968).

A. Equitable Considerations

The immediate result of a prohibition on an employer's right to discharge an employee for wage garnishment is to force the employer to act as a collection agency for creditors. These same creditors have sometimes contributed to the financial plight of the debtor through unrealistically relaxed credit standards combined with other active inducements to buy. The employer and society continue to bear much of the total cost of garnishment, while it is the creditor in a private transaction who benefits from the device. Where the right to discharge is the only aspect of the garnishment process which is eliminated, employers will be forced to underwrite the system to an even greater extent, because garnishment will continue to operate against employees who might formerly have been discharged. Creditors will be more eager to use the device when they can be assured that in so doing they cannot cut off the source of their security. An employer's reaction to this situation was reflected in the following statement by the president of a Pennsylvania corporation:

> Is there any excuse for a merchant to take on a poor credit risk? Shouldn't the merchant, whose whole sales strategy seems to be to stress the ease with which payments can be met, have to take some of the risk for over-selling? Why should a company management have to bail out the loan shark who plays upon the gullible?[55]

It has been argued that a ban on the right to discharge, such as in New York, will force employers to take a more active part in the credit education of their employees. One employer responding to the *Survey* did indicate that if such a law were enacted it would "be necessary. . . to install a program of providing information and credit education to employees." As indicated earlier, however, many employers already take some steps to prevent a *second* garnishment by providing various forms of aid or information to the employee in trouble. It is questionable whether an employer would see in a prohibition on his right to discharge any necessity to expand this program and attempt to avoid the *first* garnishment also. It might even prove more economical to allow the first garnishment to serve as an indicator as to which individuals need such credit education. If so, it is doubtful that present employer policies will be changed to any great extent. With so doubtful an improvement, one must certainly question whether it justifies coercing an innocent third-party employer to bear the costs of making a creditor whole, especially where creditors themselves go to great lengths to induce the creation of the debtor-creditor relation.

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[55] Stessin, *Managing Your Manpower*, 77 DUNS. R. & MOD. IND. 67, 68 (Jan. 1961).

B. Practical Considerations

A prohibition on discharge cannot be effectively enforced. The *Survey* indicated that many employees whose wages are garnished will be discharged for real or fictitious reasons relating to their conduct on the job. Of the twenty-seven employers in the *Survey* who acknowledged a policy of discharging employees for wage garnishment, twenty-one indicated that they would comply with an outright ban and four said they would evade the law by fabricating some other reason. Of the twenty-one that indicated they would comply, however, nine added "hedges" that indicate the possibility of significant interpretative and enforcement difficulties. For example, a large food producer said:

> Certainly if there were legal requirements the company would comply with the law. If . . . irregular attendance were also involved, this would be given *special* attention. [Emphasis added].

Other similar responses included the following:

> We would comply. If the relative cost became too burdensome, we would support legislation to make things more equitable.
>
> While we would not evade the law by discharging such an employee by finding or manufacturing another dischargeable offense, we would take a critical look at his conduct on the job.
>
> If the employee continued to get garnished, usually his attendance would not be good, if this was the case the employee may be discharged for excessive absences.

One major manufacturer merely said that such a law "would not stand up." The correlation between an excessive number of wage garnishments and ancillary deficiencies in the employee's performance of his job is also supported by the comments of employers in the New Haven study mentioned earlier.[56] This correlation clearly provides employers with an alternative ground for discharge. Any statutory scheme which forces them to use an alternative by simply prohibiting discharge for garnishment reasons will face serious enforcement problems.

At least three general approaches to the *enforcement* of a prohibition on discharge have found specific expression in proposed or enacted

[56] *See* note 14 *supra*.

legislation. A bill which passed the New York Assembly and Senate, but was vetoed by Governor Rockefeller on July 19, 1965, would have made discharge in violation of the prohibition an unfair labor practice.[57] This would have required an amendment to the local labor law and therefore would not be available to other states having no labor board. A second approach, which became a part of section 5252 of the New York Civil Practices Act, would give the discharged employee a civil action for damages for lost wages as a result of the discharge.[58] The New York statute also authorized the court to reinstate the discharged employee. Except for its value as a deterrent, however, such a measure has questionable utility considering the personal problems which could be created by forced reinstatement after discharge. Finally, the approach in the Federal Consumer Credit Protection Act would make violation of the act a criminal offense punishable by fine or imprisonment.[59]

Regardless of the enforcement method adopted, a violation of the prohibition would occur if and when an employee was discharged "because of" a wage garnishment. In light of the statements of employers in the *Survey* indicating scrutiny of alternative grounds for discharge, we have already seen the significant interpretive difficulties and consequent enforcement problems that are likely to result. It cannot, however, be contended that the courts and arbitrators are not competent to deal with this difficult factual issue. An appropriate analogy has been drawn to the demonstrated ability of the National Labor Relations Board to litigate the question of whether an employee has been disciplined because of his union activity or his job performance. Nevertheless, it is doubtful that an employee who has been dismissed because of wage garnishment will be able to afford the legal services necessary to bring a complex factual issue to trial or to sustain protracted litigation.

In considering enforcement by criminal sanctions we must face the serious question of whether such sanctions will be utilized. It is arguable that politically motivated district attorneys, who have enough to do without prosecuting what is essentially a labor dispute, will not be willing to pursue a complaint against a well-regarded local company. This is, of course, less true of the federal enforcement machinery under the Consumer Credit Protection Act.

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[57] Senate Intro. 3061, Assembly Intro 4920, vetoed July 19, 1965. No veto message was given.

[58] N.Y. CIV. PRAC. §5252 (2) (McKinney 1966) provides:

> An employee may institute a civil action for damages for wages lost as a result of a violation of this section within ninety days after such violation. Damages recoverable shall not exceed lost wages for six weeks and in such action the court also may order the reinstatement of such discharged employee. Not more than ten per centum of the damages recovered in such action shall be subject to any claims, attachments or executions by any creditors, judgment creditors or assignees of such employee.

[59] *See* note 5 *supra*.

C. Cost-Shifting Devices

Some form of cost-shifting device would make a ban on discharge more equitable for the employer. A study conducted by Michigan State University in 1959[60] recommended, in part, that the costs of garnishment be shifted to the creditor. Such an approach might increase the percentage of employers who would voluntarily comply with the legislation and thus reduce enforcement problems. However, it would not diminish the interpretive difficulties arising where employers choose alternative grounds for discharge.[61] Of the twenty-seven responding companies that acknowledged adherence to a policy of discharging employees for wage garnishment, eighteen said that a cost shift would have no effect upon that policy, and only three replied that it would change policy.

A cost-shifting device would be extremely difficult to implement. As mentioned earlier, employers' costs vary widely and often they are not computed at all. Such a law would have to establish a uniform system of accounting, since the cost of garnishment for different employers varies with the cost elements included in the calculation by each. The ultimate effect of this device would probably be an increase in the cost of credit to debtors generally, as the cost shifted to the creditor would be passed on to the consumer.

The criticisms of these attempts to alleviate the impact of wage garnishment would carry substantially less weight if the attempts embodied the only solution. However, there is an alternative method: equally direct, easier to enforce and more likely to eradicate the ills of wage garnishment without burdening innocent third parties. We should prohibit wage garnishment through federal legislation; and short of this goal, individual states should abolish the device.

V. Prohibition of Wage Garnishment?

Anyone who advocates a prohibition on wage garnishment grows accustomed to the incredulous stares of credit-oriented interests who regard garnishment as the bulwark of consumer debt collection. When one examines a proposal to eliminate wage garnishment superficially, it appears potentially harmful. However, a closer examination of its practical ramifications leads to an opposite conclusion.[62]

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[60] Stessin, *supra* note 55, at 68.

[61] *See* text accompanying note 38, *supra*.

[62] Our attitude toward the necessity of wage garnishment is not universal. Since 1870, when the Wages Attachment Act was enacted, England has immunized the wages of "any servant, labourer, or workman" from attachment by creditors before or after judgment. This Act by its terms applies only to lower classes of wage earners. The concept of the "security of the wage packet", however, has not been exported to the United States to any great extent. *See* Wood, *Attachment of Wages*, 26 MOD. L. REV. 51 (1963).

A. Effect on Employees, Employers, and Society

A prohibition on wage garnishment would immediately benefit the debtor-employee and his family. By assuring the availability of a wage-earner's weekly wage for living expenses, it would permit him to break the frequently-observed cycle of garnishment, discharge, bankruptcy and welfare. It would also eliminate the cost and inconvenience which are ancillary to wage garnishment and are, in effect, subsidies now given to the creditor by society as others, chiefly employers and sheriff's department civil divisions, bear so much of the cost burden.

Creditor groups argue that the elimination of wages as a source for the collection of debts will drive up credit standards and decrease the availability of credit.[63] This, it is said, will be harmful to debtors because it will be impossible for them to raise their living standards by using future wages as collateral. In addition, it will be disastrous to our totally credit-oriented economy.[64] There are no statistics which substantiate

Ratio of Installment Credit to Retail Sales[65]

State	Installment Credit Extended in 1963	Retail Sales in 1963	Ratio of Installment Credit to Personal Income
	(in billions of dollars)		
Alabama	0.794	3.253	24.4
California	6.621	26.889	24.6
Colorado	0.665	2.649	25.1
Florida	1.905	7.610	25.0
New York	6.124	23.977	25.5
N. Carolina	1.212	4.975	24.4
Texas	3.222	12.715	25.3

[63] *See Hearings* 1207, and the statement of Fred Noz, Association of Commercial and Professional Attorneys, *Id.* at 1209.

> Without the device of wage garnishment, the various businesses mentioned in this paragraph would have no means of enforcing collection of their accounts receivable and would no longer possess any basis for extending credit to anyone.

[64] *Id.* at 1208:

> Any change in wage garnishments, which are a part of this, (our credit-oriented economy) will do harm to our economy as it is today. If wage garnishments are abolished altogether—80 percent of all debts are collectable through garnishments. If they are not collectable, this will deal a severe blow to our economy.

[65] Data compiled by Brunn, *supra* note 15, at 1241 n. 146-150.

these dire predictions. On the contrary, the following data compiled by George Brunn tend to disprove the extravagant claims made by creditors.

Ratio of Installment Credit to Total Personal Income[66]

State	Total Personal Income	Ratio of Installment Credit to Personal Income
	(in billions of dollars)	
Alabama	5.542	14.3
California	52.419	12.6
Colorado	4.678	14.2
Florida	11.933	16.0
New York	53.120	11.5
N. Carolina	8.630	14.0
Texas	21.118	15.3

Florida, North Carolina and Texas have 100 per cent exemptions, while Alabama, California and Colorado have exemptions below 85 per cent.[67] Thus, it appears that neither the ratio of credit sales to retail sales nor the ratio of credit sales to total disposable personal income vary significantly between those states with a high exemption and those with a lower exemption level. In addition, the claim that the abolition or restriction of wage garnishment would adversely affect the economic condition of the community cannot be sustained by any available evidence.[68] One claim of the credit groups, however, can be supported by statistical data. The ratio of debt collections to credit extensions would decrease if wage garnishment were not allowed.[69] However, the significant point is that this decreased ratio had no apparent effect upon the volume of credit extended in those states already having a 100 per cent exemption. A partial explanation for this surprising lack of effect is that the "club"

[66] *Id.*

[67] See Table in text at 379, *supra*.

[68] BUREAU OF THE CENSUS, CENSUS OF BUSINESS, 1963 RETAIL TRADE 13 (1965). For example, all the southeastern states have per capita incomes below the national average regardless of the nature of their garnishment laws. Among them Florida, which does not allow wage garnishment, had the highest per capita income, while Mississippi, which not only allowed garnishment but had a low exemption, had the lowest. FLA. STAT. ANN. §222.11 (1968); MISS. CODE ANN. §307 (1965); Mississippi has since raised its exemption to seventy-five per cent. MISS CODE ANN. §307 (1966). Obviously, per capita income is affected by many factors. While the foregoing does not prove conclusively that the abolition of wage garnishment has no impact upon the level of economic activity, it certainly supplies no evidence for the contrary proposition.

[69] *See* Brunn, *supra* note 15, at 1242 n. 153.

of wage garnishment is not the only payment-inducing device available to creditors. Nearly all people pay their debts voluntarily. Many do so to maintain their credit standing.[70] They would continue to do so if wage garnishment were eliminated. Yet if it were eliminated, it is reasonable to anticipate that creditors will be forced to raise their credit standards by insisting on a demonstrated history of debt-responsibility. This will mean that the consumer will have to maintain a strong credit standing by voluntary debt repayment and demonstrated responsibility. The Federal Consumer Credit Protection Act is perhaps the first concrete indication that society is now demanding that the creditor participate responsibly in the education of the consumer. This consumer education will force those people presently unwilling or unable to comprehend the extent to which they are committing themselves beyond their ability to repay to evaluate more critically their standing before assuming debt responsibility. At present, credit is freely made available even to those with a history of financial difficulties, and the desires of every consumer are heightened by sophisticated appeals made through mass media to his acquisitive appetite: buy an article of merchandise on credit, use it, have it repossessed and buy another from the merchant down the street.[71] Our economy's well-developed techniques of merchandising, advertising and promotion will undoubtedly maintain or intensify existing acquisitive desires of consumers at all economic levels. The future, then, must see the responsible creditor participate in re-educating the consumer toward a realization that debt repayment is an essential prerequisite to future credit extension. Even the poor consumer is more likely to increase voluntary repayment of debts if his capability and opportunity for critically evaluating his commitments is increased. The result of this re-education would modify considerably the need for credit-tightening that has been predicted by those opposed to the abolition of wage garnishment. It would not be surprising if the elimination of wage garnishment would compel creditors to exchange and pool information on debtor responsibility to a greater extent than in the past. While potentially costly, this and any increased costs attributable to bad debt losses would probably be passed on to debtors as higher credit cost rather than decreased availability of credit. Such a spreading of costs among debtors and creditors is far more equitable, however, than burdening middlemen

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[70] *See* Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 750 (1968).

[71] The appeal to acquisitive appetites is made to all consumers, regardless of their economic level. To those without economic means to satisfy their desires this creates a frustration often satisfied by credit purchases. This predictable reaction was undoubtedly in the collective mind of Congress when it labelled one of the effects of the availability of wage garnishment as "predatory" extension of credit. See §301 *supra* note 5; *See also Hearings* 264.

employers or society generally with the task of remedying the breakdown in the private debtor-creditor relationship.[72]

B. Potential Problems in Eliminating Wage Garnishment

Prohibitions of wage garnishment by individual states are subject to potential frustration. Conflict of law rules permit a creditor's extraterritorial assignment of his claim against a debtor to defeat the policies of the state in which the claim originated.[73] This is not an insurmountable difficulty, however. Pennsylvania, which already has a 100 per cent exemption, and Ohio have statutes making it a criminal offense for a resident creditor to assign a claim to a nonresident for the purpose of evading the exemption laws of the state in which the debt originated. Such a provision is necessary to make effective a prohibition on wage garnishment enacted by an individual state.

The *Survey* revealed another potential weakness of a prohibition on wage garnishment. Of the twenty-seven companies that acknowledged a policy of discharging employees whose wages were garnished, twelve indicated that they would not change their policies if wage garnishment were prohibited. It is difficult to evaluate this reaction since the phrasing of the question was awkward.[74] Some representative responses included the following:

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[72] Admittedly, the justification for the abolition of wage garnishment discussed in this section is not applicable to all classes of creditors. "Predatory" extensions of credit are not characteristic of the positions of judgment creditors in personal injury or property damage suits in which a judgment debtor was at fault. Nor is there a "predatory" extension of credit in the case of the usual creditor who has rendered personal services to the debtor, such as a doctor or a dentist. To permit certain creditors to garnish wages while excluding others from using the device is a difficult task, however. If the creditor who has rendered personal services is to be permitted use of wage garnishment, what of the creditor who both renders a service and sells a product, such as a home improvement company whose high pressure sales techniques precipitate extensions of credit without regard to the debtor's ability to repay? Aside from definitional problems, constitutional questions under the equal protection clause of the fourteenth amendment may arise unless the categorization of classes of creditors has a sound practical basis. Such permissive categories may, however, make a ban on wage garnishment more palatable to some and therefore more feasible politically. Any such permissive category should, however, still be subject to provisions for prohibiting discharge as a result of any garnishment. While the text of this article discourages reliance upon a ban on discharge to solve the problems of wage garnishment, it may be the next best protection for the debtor in a compromise solution such as that mentioned above.

[73] *See* La Grone, *Recovery of a Florida Judgment by Garnishing the Wages of the Head of a Family*, 17 FLA. L. REV. 196 (1964).

[74] *See* Appendix A, question number 8.

> The Company policy would, no doubt, be the same since we expect all employees to satisfy their obligations.
>
> The Company's attitude toward financial irresponsibility would be unchanged.
>
> An irresponsible attitude toward financial obligations will in most cases be combined with a poor attitude toward the job and low productivity. If an individual does not measure up to Company standards, his employment may be terminated.

In essence, these responses indicate that many employers feel that they have a legitimate interest in the financial responsibility or irresponsibility of their employees. Would the elimination of wage garnishment protect the employee against discharge in the event he gets into financial difficulty? The attitudes of employers toward the financial responsibility of their employees is shaped by a recognition that the individual cannot prevent his relationships at home from influencing his performance on the job. The elimination of wage garnishment and threats incident to it should minimize the psychological problems of employees having financial difficulties since their livelihood would be secure. This, in turn, should reduce the attendance and productivity problems which are the specific symptoms on the job. As long as there are employers with archaic notions about debt who discharge employees simply because of financial irresponsibility unrelated to job performance, there remains the possibility that creditors will retain a coercive and destructive debt-collecting device. The creditor can merely threaten to communicate the fact of the employee's financial plight to the employer in such a manner that the employer would discharge the employee.

The presence of this potential problem has led to some imaginative counter-measures in Texas, where the prohibition against wage garnishment has been elevated to the constitutional level.[75] To protect the integrity of this constitutional prohibition, Texas courts have found it necessary to police employer-creditor contracts by expanding traditional concepts of tort liability.[76] Anticipating this potential circumvention of state policy against wage garnishment, an alternative to such civil litigation as a means of control would be a measure similar to the following, enacted to supplement a 100 per cent wage exemption:

> It shall be a misdemeanor punishable by a fine of not more than five hundred dollars or

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[75] TEX. CONST. Art. 16 §28.

[76] *See* Holman, *Soliciting Collection Assistance From the Debtor's Employer*, 27 TEX. B.J. 787 (1964).

by imprisonment for not more than six months or both, for a creditor to enlist the aid of a debtor's employer in the collection of a debt owed to the creditor by the debtor.

VI. Conclusion

Wage garnishment has extracted a heavy toll from employers, employees and society. The enactment of the Federal Consumer Credit Protection Act, although symbolic of a growing concern for those affected by wage garnishment, will not modify its effects significantly. Those employees residing in states now having exemption levels below those established in the Act will derive an obvious and immediate financial advantage when their wages are garnished. It is unlikely, however, that the employee in financial difficulty will find much comfort in the Act's restriction on discharge, for it is indeed modest, whether interpreted to protect him in the event of only one garnishment or even in the event of single garnishments by every creditor. Most employees discharged today could be discharged for the same or substituted reasons without a violation of the Act by an employer who, perhaps with justification, is likely to react strongly when forced to bear the costs of a breakdown in a relationship he did not create. Where wage garnishment has been prohibited, eliminating these destructive features, the alternative which common sense indicates that creditors will substitute has proved a lesser evil. Creditors, although collecting a lesser percentage of their claims, continue to make credit available, but they choose to pass a new cost, bad debt losses, on to the debtor class in the form of higher credit costs. After weighing the equities and practicalities of this alternative cost allocation, wage garnishment clearly appears to be more troublesome and inequitable than it is really worth. Wage garnishment should be prohibited. The wage garnishment provisions of the Consumer Credit Protection Act will then become unnecessary, representing what in fact they are: only a beginning step toward a *final* solution.

APPENDIX A

The Questionnaire and Summary of Responses

1. Does your company have a policy of discharging employees whose wages are garnished?

Responses 40

Yes	27	
No	13	
		Discharge after 1 - 1
		2 - 5
		3 - 6
		4 - 2
		Treat each case individually 13

2. If you discharge employees whose wages are garnished, what is/are the reason/reasons?

Responses 27

Cost	8
Cost plus garnishment is indicative of a non-productive employee	9
Garnishment is indicative of a non-productive employee	3
Other	7

3. What is your estimate of the cost of each garnishment?

21 of the 35 responding companies did not know the cost

18 of the 27 responding companies who discharged employees did not know the cost.

4. Does the company take into consideration whether an applicant for employment has had his wages garnished in the past?

Yes	25
No	10

If yes, does this bar 0 or make less likely 25 the applicant's chances of securing employment?

10 companies did not consider this fact in their hiring process.

5. Has the union attempted through collective bargaining to restrict the company's right to discharge an employee for wage garnishment?

Responses 23

Yes	3
No	20

Have they succeeded?

No	2
Partially	1

6. Do you provide counseling or other forms of aid to an employee who has financial difficulty?

Responses 35

Yes	31
No	4

7. Does the company attempt to prevent wage garnishment by providing information or credit education to the employees?

Responses 34

Yes	9
No	25

8. If wage garnishment were prohibited, would this in your opinion change the company's policy?
Responses of the companies who do discharge:

Yes 8
No 12

9. If wage garnishment were allowed, but the cost burden was shifted to the garnishing creditor, would this change the company policy?
Responses of the companies who do discharge:

Yes 3
No 18

10. If the company were prohibited from discharging an employee whose wages were garnished, and the company continued to bear the cost burden, would the company, in your opinion, comply 21; evade the restriction by finding some other reason to discharge an employee whose wages were continually garnished? 4

The responses to the questionnaire, as well as a tabulation of results, are on file at the University of Michigan Law Library.