

10/15/71

Memorandum 71-77

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

At the October meeting, the staff was directed to give further consideration to the basic issue of what wages should be subject to withholding pursuant to an earnings withholding order. The recommendation as presently drafted provides.

723.022. . . . (b) Except as otherwise provided by statute, an employer shall withhold the amounts required by an earnings withholding order from all earnings of the employee payable for any pay period of such employee which ends during the withholding period.

The "withholding period" referred to generally commences on the fifth day after service of the order. The introductory exception clause in subdivision (b) recognizes that "a valid assignment of wages in effect at the time an earnings withholding order is served suspends the operation of the . . . order until after the end of the pay period during which the . . . order is served." See subdivision (c) of Labor Code Section 300. With this exception, an employer is required to withhold from the employee's earnings payable for any pay period which ends during the withholding period. Earnings of that employee for prior pay periods are not, however, subject to withholding pursuant to the current order even though such earnings for some reason are still in the possession of the employer.

These basic rules caused concern among the Commissioners especially as to (1) their application to commissions, bonuses, retroactive pay increases, employer advances, (2) the possibility of acceleration or deferral of payment by the employer to avoid withholding, and (3) the failure to reach earnings for prior pay periods.

(1) "Back pay." Since the October meeting, the staff has revised Section 723.151 (which directs the State Administrator to adopt rules and regulations generally) by adding the following subdivision:

723.151. . . . (b) The State Administrator shall prescribe by regulation the pay period or periods to which various forms of compensation, such as commissions, bonuses, retroactive pay increases, and the like, are to be allocated and the method of computing the amount to be withheld from such forms of compensation under Section 723.050.

The staff is certain that, where compensation is allocated to prior pay periods, federal law requires that the employee's earnings for each pay period be recomputed so that no more is withheld from his earnings than would have been withheld under the normal weekly exemption schedule. We do not think that this would preclude an employer from treating a "Christmas bonus," for example, as earned entirely in one pay period; however, if he chooses to treat it as earned over the entire year then we believe that, if the earnings of an employee who receives such a bonus were subject to an earnings withholding order during the prior year, then the employer will be required to recompute the earnings for the pay periods when the order was in effect and withhold and pay over pursuant to such prior order. See Section 723.032 (service of order creates a lien for a one-year period upon earnings required to be withheld pursuant to such order). Similar treatment would be required for commissions allocated to prior pay periods and retroactive pay increases. It seems obvious that these rules can be burdensome to an employer; however, recomputation is required by federal law; the alternative of not requiring withholding at all from these various types of "back pay" might provide too large a loophole for avoiding these orders.

(2) Deferred or accelerated payment. Since the October meeting, we have added a subdivision to Section 723.155 (remedies of judgment creditor) which provides:

723.155. (a) No employer shall defer or accelerate any payment of earnings to an employee in order to defeat or diminish the satisfaction of a judgment pursuant to the procedures provided by this chapter.

* * * * *

This provision would supplement Labor Code Section 222 which provides:

222. It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon.

These provisions would not preclude an employer from making advance payments prior to service of an earnings withholding order. Where an advance payment has been properly made, such earnings should no longer be treated as "payable" for the pay period but rather are paid, and the employer can therefore "offset" such advances against the earnings otherwise payable. Cf. Prudential Ins. Co. v. Fromberg, 240 Cal. App.2d 185, 49 Cal. Rptr. 475 (1966). However, after service of an order, the employer would make advance payments at his peril; we believe that subdivision (a) of Section 723.155 (set out above) would require the employer to withhold pursuant to the order on the basis of the total earnings of the employee for the given pay period.

(3) Earnings for prior pay periods still held by the employer. The last problem raised at the October meeting was whether earnings for pay periods which do not end within any withholding period and during which no valid assignment of wages was in effect should be subject to a withholding order. The Commission seemed to feel that such earnings should be subject to withholding and directed the staff to attempt to draft a provision which would accomplish this result. We set out below alternative draft provisions which could be

added either as a separate section (which would entail substantial renumbering) or another subdivision to Section 723.022:

In addition to the amounts required to be withheld pursuant to [the provisions of Section 723.022][subdivision (b)] an employer shall withhold the amounts required by an earnings withholding order from all earnings of the employee which are payable [on the date of service of an earnings withholding order][on the fifth day after service of an earnings withholding order] to the employee and which are not otherwise subject to an earnings withholding order and which were not earned during a pay period during any part of which an assignment of wages made pursuant to Section 300 of the Labor Code was in effect.

The staff believes that no additional provision is necessary. The "loop-hole" which exists we think is insignificant in view of the continuing nature of the levy once commenced. Moreover, we suspect that the provision will stimulate employer objections that the provision is too burdensome. However, if any provision is adopted, we believe that the "effective" date of the order should be deferred to the fifth day after service. The provision set out above prohibiting acceleration of payment for the purpose of avoiding withholding should prevent such manipulation and we do think that the employer should have the five-day grace period to do whatever internal office work is necessary to comply with the order. (One consequence of substituting "mail service" for the sheriff serving the writ, is the greater need to provide a 5-day grace period to permit the employer to get the withholding order to the payroll office.) The treatment of wage assignments is consistent with the policy of Labor Code Section 300 which permits an employee to revoke a wage assignment as to unearned wages and to have these unearned wages before he is subject to the impact of an earnings withholding order.

One last comment with respect to the general issue of what wages are subject to levy. The recommendation uses the term "payable" throughout the Employees' Earnings Protection Law. The staff believes that "payable" equals

"due and owing." "Payable" we believe was picked up from the federal law which uses "payable." The Labor Code uses the term "due and payable" in contexts where we use "payable." See, e.g., Labor Code Section 204. The Code of Civil Procedure uses "due and owing." See Code of Civil Procedure Sections 690.5-1/2 and 690.6. We believe that the use of "payable" is entirely adequate but we ask that you consider whether a change in this regard is desirable.

Respectfully submitted,

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STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

ATTACHMENT, GARNISHMENT, AND EXECUTION

Employees' Earnings Protection Law

August 1971

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE: This is a tentative recommendation and is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Employees' Earnings Protection Law

The past several years have witnessed increasingly critical review of the process of wage garnishment¹ leading to significant judicial² and legislative³ activity--both federal and state--in this area. However, both the rapid pace of recent events and the involvement of different branches and levels of government have produced conflict and uncertainty, and the need for further reform remains in a number of areas. This recommendation reviews the area of wage garnishment and related matters, and proposes solutions to the problems revealed.⁴

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1. In California alone, see, e.g., Brunn, Wage Garnishment in California-- A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965); Western Center on Law and Poverty, Impact and Extent of Wage Garnishment in Los Angeles County (1968).
 2. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).
 3. See, e.g., Consumer Credit Protection Act of 1968 (§§ 301-307), 15 U.S.C §§ 1671-1677; Cal. Stats. 1970, Ch. 1523.
 4. The California Law Revision Commission is actively engaged in a general review of the California statutes relating to the entire field of attachment, garnishment, and exemptions from execution with a view to recommending the enactment of a comprehensive revision of this body of law at a future session of the Legislature. This recommendation deals with one aspect of that general subject.

MODERNIZATION OF CALIFORNIA WAGE GARNISHMENT PROCEDURE

Introduction

The primary objective of the measures recently enacted at the state and federal levels has been to secure--through restrictions on the amounts which can be withheld--adequate protection for the wage earner's day-to-day income. However, California's archaic multiple-levy wage garnishment procedure was left basically unchanged, and serious procedural defects have become more apparent when the recently enacted statutes limiting the amounts that can be withheld from wages went into effect.

Present law. California law requires that writs of execution be levied by a sheriff, constable, or marshal⁵ and permits only amounts owing to the debtor at the time of service of the writ to be reached by his creditor through wage garnishment.⁶ A fee is charged for each writ of execution issued⁷ and a writ is good for a maximum of 60 days.⁸ Thus, for example, if a creditor is owed \$250 but is entitled to levy only on \$25 of the debtor's earnings at each weekly pay period, ten separate levies by the sheriff or marshal are required. This entails ten separate trips to the debtor's place of employment by this officer and at least ten bookkeeping computations by

5. Code Civ. Proc. §§ 682, 687.

6. See Code Civ. Proc. § 682.1.

7. See Code Civ. Proc. § 682.1.

8. Code Civ. Proc. § 683.

the employer.⁹ In addition, it requires at least two applications to the court clerk because the period of garnishment will extend for more than 60 days. Moreover, the example assumes that the entire \$25 goes towards satisfying the obligation. In fact, because the fees charged by the sheriff or marshal for service,¹⁰ the fee for issuance of the writ, and interest on the obligation are deducted first from the amount collected,¹¹ less than

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9. It has been estimated that, in 1968, employers in Los Angeles County alone expended nearly two million dollars to process wage garnishments-- or almost \$20 per paycheck garnished. See Western Center on Law and Poverty, supra note 1, at 7. Present law provides virtually no relief to the employer from this burden. See Civil Code § 4701 (employer authorized to deduct the one-dollar service charge for each payment made pursuant to child support order); Code Civ. Proc. § 710 (authorizes public employer to deduct \$2.50 service charge where required to comply with levy made pursuant to that section).
10. See, e.g., Govt. Code §§ 26722 (fee for service of writ of execution is \$5), 26739 (collection fee of not less than \$1), 26746 (mileage--one way at 70 cents a mile).
11. See Code Civ. Proc. §§ 1032.6, 1033.7. See also Code Civ. Proc. § 682.1.

half of this amount can be expected to be applied to reduce the amount owing, and the number of levies will accordingly be doubled.¹² Obviously, this system of multiple levies is both timewasting and expensive for all concerned--public officials, creditors, debtors, employers, and the public generally.¹³

Recommendations

Continuing levy procedure. In New York and other states, a court order to an employer to pay over the debtor's earnings constitutes a continuing levy and is effective until the debt is paid or the debtor is no longer

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12. The following examples were cited to the Commission by Mr. Gordon H. Bishop, representing the California Department of Consumer Affairs:

A typical wage-earner makes \$4.00 per hour, \$160.00 per week. His "disposable income" is \$120.00, of which 25%, or \$30.00 is subject to garnishment. From that \$30.00 is deducted \$1.50 for the writ, \$10.00 sheriff's charges for service, and \$.70 interest, leaving \$17.80 for reduction of the judgment principal. If the debtor were to discharge a \$500 judgment through a series of such executions, he will have paid out in excess of \$800.

So much for the \$4.00 per hour man. Perhaps he can afford the premium. But consider the case of the "poor" to whom the law is designed to give major relief.

A wage-earner makes \$2.00 per hour, \$80.00 per week. If his "disposable income" is \$64.00, the \$16.00 required for the levy would leave just \$3.80 to reduce the judgment principal, assuming the costs in the above example. If the executions were to run for the next 2-1/2 years, the \$500 judgment would be paid off at a cost to the debtor in excess of \$2000.

See Minutes, California Law Revision Commission, Meeting of January 15-16, 1971, on file at the Commission's offices, School of Law, Stanford, California.

13. Despite the fact that the sheriffs and marshals charge a fee for each levy made, it has been estimated that the county--its taxpayers--pays 30 to 50 percent of the expenses of collection. Brunn, supra note 1, at 1222.

employed by the employer.¹⁴ Such a system is clearly more convenient and less expensive than the present California multiple levy system. The major drawback of the continuing levy is that it gives a preferred position to the creditor who first resorts to legal process to enforce his claims. If the initial order is given effect indefinitely, the debt is large, and the debtor's earnings modest, subsequent creditors may be postponed for substantial periods of time. Some compromise between the two extremes is necessary. The Commission accordingly recommends that an order generally¹⁵ be in effect for no longer than 120 days,¹⁶ at the end of which time the creditor who secured such order would be precluded for a short period (10 days) from serving on the same employer another order based on the same debt. This moratorium period would permit another creditor to intervene with an order based on his debt, which would then continue in effect for a 120-day period.

Service by mail. The use of the sheriff or marshal as a high-priced messenger when a creditor is attempting to reach an asset like earnings is an extravagant waste of time and money. The United States Post Office can perform the same task for a few cents. It is in the interests of debtors, creditors, and the public generally that the function of service be performed in a businesslike manner. The Commission accordingly recommends that service by mail of the various applications, notices, and orders required for this process be authorized.

14. See, e.g., N.Y. Pers. Prop. Law, art. 3-A, § 48(a)(McKinney 1950). For a discussion of the experience in Washington that resulted in a continuing levy, see Note, 46 Wash. L.R. 423, 438 (1971).

15. This rule should not apply to orders for support or for the collection of taxes. Such orders should, until satisfied, have a continuing priority over all other obligations. See discussion infra at pp. 15-18.

16. The period of 120 days was selected because the Commission was advised it would be adequate to permit complete satisfaction of the majority of consumer debts.

Employer's service charge. The continuing levy procedure should substantially reduce the collection burdens imposed on employers. To alleviate these burdens further, the Commission recommends that an employer be authorized to deduct a one-dollar service charge from the debtor's earnings each time that the employer is required to withhold on behalf of the creditor pursuant to a withholding order.¹⁷

Ex parte application; judicial review; administrative enforcement. The Commission recommends that the levy procedure continue to be initiated by the creditor upon ex parte application. Provisions for notice and a preliminary judicial hearing in all cases would make the procedure unnecessarily complicated and expensive for all parties. Provision should be made, however, for expeditious judicial review of the issuance and modification of orders requiring the withholding of earnings and for effective notice to the debtor of his right to seek such review. The procedure for invoking judicial review should be made as simple as possible. To aid in the enforcement of the procedures and requirements provided, the power of the court to compel obedience to its orders should be made clear and administrative enforcement--through warnings, cease and desist orders, or injunctive relief--should be provided.

17. Existing law contains no general authorization for such a charge. See footnote 9 supra and accompanying text.

PREJUDGMENT RESTRICTIONS ON WAGE GARNISHMENT

In June 1969, the United States Supreme Court in Sniadach v. Family Finance Corp.¹⁸ held that the prejudgment garnishment of wages under a Wisconsin statute constituted a taking of property in violation of the due process requirements of the Fourteenth Amendment to the United States Constitution. Six months later, the California Supreme Court, relying on Sniadach, held in McCallop v. Carberry¹⁹ that California's then existing prejudgment wage garnishment procedure also constituted a taking of property in violation of procedural due process. In an attempt to conform to the relatively narrow holdings in these cases, Section 690.6 of the California Code of Civil Procedure was amended in 1970 to exempt from levy of attachment "all earnings of the debtor due or owing for his personal services" ²⁰ The Commission recommends that this complete and automatic exemption of wages from garnishment pursuant to prejudgment attachment procedures be preserved.

18. 395 U.S. 337 (1969).

19. 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

20. Cal. Stats. 1970, Ch. 1523, § 19 (emphasis added).

POSTJUDGMENT RESTRICTIONS ON WAGE GARNISHMENT

Introduction

At the same time that prejudgment garnishment of wages received the scrutiny of the courts, wage garnishment generally--including garnishment under postjudgment levy of execution--was the subject of Congressional action. Title III²¹ was incorporated into the federal Consumer Credit Protection Act of 1968 restricting the "garnishment"²² of "earnings"²³ of a debtor to certain limited amounts²⁴ --basically 25 percent of "disposable earnings."²⁵ These restrictions were made applicable nationwide, effective July 1, 1970.²⁶

21. 15 U.S.C. §§ 1671-1677.

22. Subdivision (c) of Section 302 of the Act (15 U.S.C. § 1672(c)) provides:

(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.

23. Subdivision (a) of Section 302 of the Act (15 U.S.C. § 1672(a)) provides:

(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.

24. See Consumer Credit Protection Act of 1968 (§ 303(a), 15 U.S.C. § 1673(a)).

25. Subdivision (b) of Section 302 of the Act (15 U.S.C. § 1672(b)) provides:

(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.

26. The federal act specifically provides that "no court of . . . any State may make, execute or enforce any order or process in violation of this section." 15 U.S.C. § 1673(c). Hence, the conformity of a state law may be challenged in either a state or a federal court if the state enforces a garnishment statute that fails to conform to the federal minimum requirements. To provide some measure of uniformity, the California Legislature amended subdivision (b) of Section 690.6 of the Code of Civil Procedure to exempt from levy of execution such portion of a debtor's earnings "as is allowed by statute of the United States." Cal. Stats. 1970, Ch. 1523, § 19.

Subdivision (a) of Section 303 of the federal act provides, in part:²⁷

(a) . . . [T]he maximum part of the aggregate disposable earnings of an individual for any workweek which his subjected to garnishment may not exceed

(1) 25 per centum 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 [currently \$ 1.60]

whichever is less.

This means that, if an individual's disposable earnings for a workweek are \$48 or less, his earnings may not be garnished in any amount. If his earnings are between \$48 and \$64, the entire amount above \$48 may be garnished. Above \$64, the 25 percent rule applies. Where debtors in low income brackets are concerned, the protection afforded by the federal law seems inadequate to permit even a subsistence level of existence for a debtor and his family faced with the high living costs prevailing in California.

To this deficiency in the federal law must be added the difficulty of determining what constitutes "disposable earnings." The federal law defines "disposable earnings" as those earnings remaining "after the deduction . . . of any amounts required by law to be withheld."²⁸ The latter amounts apparently include amounts withheld for federal and state income taxes, federal social security, and state disability insurance. Less clear is the treatment of wage assignments and contributions to public retirement funds. These ambiguities obviously impose a difficult burden on the employer who must determine what part of his employee's earnings are subject to garnishment.

27. 15 U.S.C. § 1673(a).

28. 15 U.S.C. § 1672(b).

Even where the disposable earnings test can be clearly applied, the results achieved can be disturbing. For example, amounts withheld for federal income tax purposes are clearly deductible in determining "disposable earnings." Presumably, this would permit a debtor who does not choose to claim all his exemptions to shield a certain amount of his earnings from his creditors. On the other hand, a debtor claiming a greater number of exemptions will have less withheld and, therefore, more subject to garnishment. Thus, a debtor with a large family and greater needs may have more earnings garnished than a single debtor with the same gross income but with more limited needs.

Recommendations

To alleviate the problems outlined above,^{28a} the Commission makes the following recommendations.

Basic restrictions; withholding tables. The Commission recommends that the amount of a debtor's earnings subject to withholding by the employer under a wage garnishment be limited by statute. The statute should prescribe a formula under which definite amounts would be deducted for federal and state income taxes, social security, and state disability insurance. Similar deductions are made under federal law; however, these deductions are based on the actual deductions taken from the wages of the particular debtor. The Commission recommends that, in all cases, the deductions for federal and state income taxes be based on the amount that would be withheld from the gross earnings of a single person who claims one tax exemption. Fixing these deductions in this manner permits the preparation of withholding tables which prescribe the maximum amount of earnings which may be withheld from a given amount of gross earnings. An employer would not have to make computations

28a. It should be noted that the enactment of a statute ~~requiring withholding~~ for state income taxes would ~~magnify these problems~~.

but would only have to refer to such tables to determine the amount he is required to withhold under an earnings withholding order. For the employer's further convenience, the Commission recommends that the State Administrator be required to prepare withholding tables for weekly, monthly, and other common pay periods. A creditor serving an earnings withholding order should be required to accompany the order with a copy of these tables.

In addition to the deductions listed above, the Commission recommends that an additional deduction--based on the federal minimum hourly wage--be allowed in determining the amount of a debtor's earnings which are subject to garnishment. This additional deduction for any workweek would equal 30 times the federal minimum hourly wage. After making these deductions, the Commission recommends that 25 percent of the earnings remaining (i.e., the debtor's "nonexempt earnings") be subject to withholding under an earnings withholding order.

As the sample table set out in the footnote²⁹ demonstrates, a major benefit of the Commission's proposals is that they would permit a low income debtor to retain a greater portion of his earnings than is permitted under existing law, thereby virtually eliminating his need to claim an exemption based on hardship for a greater amount of his earnings. This will not only protect an unsophisticated debtor unable to follow the procedures necessary to exempt additional earnings, but it will also avoid burdening the courts with claims of exemption. Because the amount of earnings withheld for the creditor is the same for all debtors with the same gross income, regardless of family size, the debtor who has claimed more than one dependent for tax purposes will have an actual take-home pay greater than that of a single debtor with the same

29. The following table indicates the approximate amounts that would be withheld under the Commission's proposed Employees' Earnings Protection Law as compared to the approximate amounts that would be withheld under existing California law (and the federal Consumer Credit Protection Act (CCPA)).

gross earnings. The recommendation, in this way, recognizes and accommodates the greater need of the debtor with dependents.

Employees' Earnings Protection Law--Withholding Table

Deductions have been made for federal withholding, social security, state disability insurance, and state income tax. The state income tax deduction is based on tax tables for 1970 state taxes. The federal social security tax rate is 5.2% on the first \$7,800 of annual gross earnings. The state disability insurance rate is 1% on the first \$7,400 of annual gross earnings. The amounts shown as disposable earnings in this table are based on a full deduction for social security and disability insurance respectively even though, under present law, in the higher earnings brackets this amount would not be deducted during the entire year. The one-dollar service charge, which an employer would be entitled to make for each payment under the Commission's proposed legislation, is in addition to the amount listed in the table.

GROSS EARNINGS (weekly/annual)	SINGLE PERSON (claiming 1 exemption)		MARRIED + 2 CHILDREN (claiming 4 exemptions)		EMPLOYEES' EARNINGS PRO- TECTION LAW Amount with- held (\$48 ex- empt; 25%)
	Disposable earnings	Amount withheld (CCPA)	Disposable earnings	Amount withheld (CCPA)	
\$60/3,120	\$51.93	\$3.93	\$56.28	\$8.28	-0-
70/3,640	59.25	11.25	65.66	16.42	\$3.00
80/4,160	68.40	17.10	73.64	18.41	5.00
90/4,680	73.55	18.39	81.62	20.41	6.00
100/5,200	80.65	20.16	89.36	22.34	8.00
110/5,720	87.74	21.94	97.04	24.26	10.00
120/6,240	94.94	23.74	104.72	26.18	12.00
135/7,020	105.49	26.37	116.32	29.08	14.00
150/7,800	116.31	29.08	127.80	31.95	17.00
170/8,840	129.91	32.48	142.97	35.74	20.00
200/10,400	149.94	37.49	164.16	41.04	25.00
250/13,000	181.91	45.48	201.53	50.38	33.00
300/15,600	212.29	53.07	236.81	59.20	41.00
400/20,800	272.09	68.02	304.45	76.11	56.00
600/31,200	391.69	97.92	427.07	106.77	86.00

Supplementary relief. In the past, California has theoretically taken a more flexible approach to the protection of earnings than that evidenced by the federal law. Under subdivision (c) of Section 690.6 of the Code of Civil Procedure, a debtor may protect from execution all earnings

necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor, unless the debts are:

- (1) Incurred by the debtor, his wife, or his family for the common necessities of life.
- (2) Incurred for personal services rendered by any employee or former employee of the debtor.

Unfortunately, the exemption provided for earnings necessary for the use of a debtor's family has proved to be of little value. In order to obtain the exemption, the debtor must follow the procedure outlined in Section 690.50. If the creditor alleges that the debt was incurred for "common necessities," there follows a process of affidavit, counteraffidavit, hearing, and possible appeal; all of which takes time, effort, and some sophistication, and still may end with the debtor denied money necessary for his family's support. Comparatively few debtors have availed themselves of the exemption although many more appear to be eligible for it.³⁰ Moreover, where the "common necessities" issue is raised, the claims of competing creditors to garnish earnings are decided on the technical issue of what is a "common necessary of life."³¹ A reputable businessman who has rationed credit prudently to a debtor and has provided a high quality good or service may be

30. See Western Center on Law and Poverty, Impact and Extent of Wage Garnishment in Los Angeles County 6, 122-123 (1968); Brunn, Wage Garnishment in California--A Study and Recommendations, 53 Cal. L. Rev. 1214, 1219 (1965).

31. See, e.g., Los Angeles Finance Co. v. Flores, 110 Cal. App.2d Supp. 850, 243 P.2d 139 (1952).

barred from garnishing the debtor's wages while another creditor whose grant of credit for a "common necessary" was made in reckless disregard of the debtor's ability to pay and who sold the debtor low quality products may be allowed to garnish the same wages.

The Commission recommends that the "common necessary" exception be eliminated,³² that the procedure for claiming an exemption of an additional amount essential for support of the debtor's family be simplified, and that the availability of this right be made clear to the debtor. However, in recognition of the greater liberality provided in the basic exemption, a stricter standard--"essential for support"--should be provided to make clear that the exemption is only intended for use in extraordinary circumstances and is not intended to shield a debtor from his judgment creditors while maintaining other than an austere life style. Only such additional amount as is required for the maintenance of a basic standard of living should be exempt.

32. The Commission also recommends elimination of the exception that permits a creditor who is a former employee of the debtor to take a portion of the debtor's wages even though the debtor can show the money is necessary for the support of his family. This exception is largely irrelevant to the low income debtor, for it is highly unlikely that such a debtor would have obligations to employees.

ORDERS FOR SUPPORT OR FOR THE COLLECTION OF STATE TAXES

Introduction

Subdivision (b) of Section 303 of the federal Consumer Credit Protection Act specifically exempts (1) "any order of any court for the support of any person" and (2) "any debt due for any State or Federal tax" from the restrictions imposed on the amounts permitted to be withheld from earnings in the collection of all other types of debts.³³ The legislation recommended by the Commission recognizes the special nature of these two types of debts.

Orders for Support

Enforcement of orders for support is accomplished in a variety of ways under existing law. Perhaps most commonly compliance is achieved under the threat of the court's exercise of its contempt power; however, execution may be levied for unpaid, accrued amounts.³⁴ In addition, Civil Code Section 4701 authorizes a court to enforce an order for child support by requiring a parent to assign future wages and then directing an order to the employer carrying out such assignment. Such order remains in effect until revoked by the court. Regardless of the enforcement procedure followed, orders for support are not subject to any fixed limitations³⁵ and obligations for support are often accorded some measure of priority over other types of

33. See 15 U.S.C. § 1673(b)(1), (3).

34. See, e.g., Rankins v. Rankins, 52 Cal. App.2d 231, 126 P.2d 125 (1942).

35. See Rankins v. Rankins, supra note 34 (exemption for 50% of person's earnings not available against execution issued upon a judgment for support).

debts.³⁶ The Commission recommends that such treatment be continued. Specifically, it is recommended that the court be authorized to issue an earnings withholding order to enforce a prior order or judgment for the support of any person, including a former spouse of the debtor. The order should continue in effect until terminated by the court; it should be unrestricted in amount (although the debtor should be permitted to have the order reduced by the amount he proves is essential for the support of himself or his present family); and the order should be given priority over all other earnings withholding orders. An order for support should not, however, preclude simultaneous withholding under another order if the debtor's income is sufficiently large to enable withholding under both.

Tax Orders

Under existing law, there are a number of procedures for the collection of unpaid, delinquent state taxes:

(1) The tax liability can be reduced to judgment; and, subject to the various exemptions from execution, the judgment can be collected in the same way any other judgment is collected.

(2) A warrant,³⁷ which has the same effect as a writ of execution, can be issued by the taxing agency. Collection under such a warrant also is subject to the same exemptions as a levy of execution.³⁸

36. See, e.g., Code Civ. Proc. § 690.6 (earnings necessary for support of family exempt from execution).

37. Provisions that authorize issuance of such warrants are: Unemployment Insurance Code Section 1785 (unemployment compensation contributions); Revenue and Taxation Code Sections 6776 (sales and use taxes), 7881 (vehicle fuel license tax), 9001 (use fuel tax), 10111 (motor transportation tax), 16071 (gift tax), 18906 (personal income tax), 26191 (bank and corporation taxes), 30341 (cigarette tax), 32365 (alcoholic beverage tax). See also Revenue and Taxation Code Section 14321 (inheritance tax).

38. See Code Civ. Proc. § 690.51.

(3) A notice or order to withhold³⁹ may be given by mail to any person who has in his possession or control any credit or other personal property or thing of value belonging to the person alleged to be liable for the tax and such person may not dispose of the property without the consent of the taxing agency unless the tax is paid in full. This is an attachment type of procedure. The person notified is required to make a report to the taxing agency of the credit or other personal property being withheld within a few days after receipt of the notice. The personal income tax law and bank and corporation tax law contain a significant additional feature--they require the person holding the property to deliver it to the Franchise Tax Board up to the amount of the delinquent taxes. In contrast with the warrant procedure, there are no exemptions applicable to property required to be withheld and delivered to the Franchise Tax Board pursuant to these two provisions. Accordingly, the board is encouraged to use this third alternative whenever it is available. The Commission has been advised that, in some cases, an employee's entire paycheck has been withheld and paid over to the Franchise Tax Board for delinquent personal income taxes, leaving the employee with nothing from his current earnings to cover the basic needs of his family.

These tax collection procedures should be integrated with the procedures provided generally for levy upon an employee's earnings. While the protection of the public fisc justifies the preferential treatment of tax orders, it does not justify summarily depriving a tax debtor of the means for the

39. Provisions that authorize the giving of a notice to withhold are: Unemployment Insurance Code Section 1755 (unemployment compensation contributions); Revenue and Taxation Code Sections 6702 (sales and use taxes), 7852 (vehicle fuel license tax), 8952 (use fuel tax), 10051 (motor transportation tax), 11451 (private car tax), 16101 (gift tax), 18807 (personal income tax), 26132 (bank and corporation taxes), 30311 (cigarette tax), 32381 (alcoholic beverage tax).

current support of his family. The Commission recommends that taxing agencies which are authorized to issue warrants or notices to withhold be authorized to issue directly without application to the court withholding orders for the collection of state tax liabilities. The amount withheld under such orders should be limited to not more than 50 percent of the tax debtor's non-exempt earnings. In addition, the tax debtor should be permitted to claim an additional amount as "essential for the support of himself or his family." The taxing agency should also be authorized as an alternative to apply to the court for an order requiring the debtor's employer to pay all earnings other than that amount which the taxpayer proves is essential for the support of himself or his family. Orders issued under either procedure should have priority over all other earnings withholding orders except orders for support. However, regardless which procedure is followed, the tax liability should be required either to be shown on the face of the debtor's return or to have been determined in an administrative or judicial proceeding at which the tax debtor had notice and an opportunity to be heard.

STATE EXEMPTION FROM FEDERAL LAW; STATE ADMINISTRATION

The federal Consumer Credit Protection Act invites each state to enact its own restrictions on the garnishment of earnings and to undertake its own enforcement of these provisions.⁴⁰ The advantages of exemption seem apparent. Nothing is gained by having two separate garnishment restriction laws, one state and one federal. An exemption from the federal restrictions would permit California debtors, creditors, and employers to refer to only one body of law to determine the extent to which earnings are subject to garnishment. To gain exemption, a state must enact a law with provisions at least as protective to the individual as the federal law.⁴¹ The Commission

40. Section 305 of the Act (15 U.S.C. § 1675) provides:

305. 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).

41. 29 C.F.R. § 870.51 (1970) provides:

870.51. (a) It is the policy of the Secretary of Labor to permit exemption from section 303(a) of the CCPA garnishments issued under the laws of a State if those laws considered together cover every case of garnishment covered by the Act, and if those laws provide the same or greater protection to individuals. Differences in text between the restrictions of State laws and those in section 303(a) of the Act are not material so long as the State laws provide the same or greater restrictions on the garnishment of individuals' earnings.

(b) In determining whether State-regulated garnishments should be exempted from section 303(a) of the CCPA, or whether such an exemption should be terminated, the laws of the State shall be examined with particular regard to the classes of persons and of transactions to which they may apply; the formulas provided for determining the maximum part of an individual's earnings which may be subject to garnishment; restrictions on the application of the formulas; and with regard to procedural burdens placed on the individual whose earnings are subject to garnishment.

(c) Particular attention is directed to the fact that subsection (a) of section 303, when considered with subsection (c) of that section, is read as not requiring the raising of the subsection (a) restrictions as affirmative defenses in garnishment proceedings.

recommends that an exemption from federal control in this area be sought and believes that the proposals it suggests here would permit an exemption to be obtained. To obtain the exemption, a representative authorized to act on behalf of the state as a liaison with the federal administrator must be designated. The designated official should also be granted the responsibilities of enforcement as well as duties of rule-making and similar administrative tasks. The Commission recommends that the Department of Industrial Relations be selected as the state administrator to administer and enforce these procedures.

To achieve uniformity, the Judicial Council should be authorized to prescribe forms necessary to carry out the prescribed procedures.

RELATED PROBLEMS

Bank Accounts

CAVEAT. There is no procedure under California law permitting the debtor to obtain a hearing prior to a prejudgment levy of attachment on a bank account. Recent decisions of both the United States Supreme Court and the California Supreme Court raise a serious question whether the absence of such a procedure causes such a levy to be unconstitutional. E.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Blair v. Pitchess, Cal.3d ___, ___ P.2d ___, ___ Cal. Rptr. ___ (1971). The California Supreme Court presently has under submission a case in which the procedure for prejudgment attachment of a bank account has been challenged on constitutional grounds. See Blair v. Pitchess, *supra* n.16. If the court holds that such procedure is not constitutional, it will be necessary to make appropriate revisions in the law. This recommendation does not attempt to do that. This recommendation does provide limitations on the amounts which may be attached in circumstances where attachment is constitutionally permitted.

Title III of the Consumer Credit Protection Act leaves unresolved the problem of the proper treatment of bank accounts.⁴² However, in view of the almost universal use of personal checking accounts as at least the

42. In the opinion of the federal administrator, the restrictions on garnishment provided in Title III do not apply to earnings deposited in the debtor's bank account. See Letter From Robert D. Moran, Administrator of the Wage and Hour Division of the Department of Labor, to Mr. Richard Allan Weiss, February 26, 1971, (copy on file at the office of the California Law Revision Commission, School of Law, Stanford, California).

temporary depository of earnings and the increasingly common practice of employers to deposit earnings of an employee directly into the employee's account, the failure of existing statutes to provide any protection from garnishment of such accounts results in the anomalous situation that unpaid earnings are protected but paid earnings deposited in a bank account are not. Yet, the impact upon the wage earner and his family of an interruption of his flow of earnings--whether before or after they are received--is identical. The decisions of the United States and California Supreme Courts both emphasize that wages are a special type of property, that the attachment of wages "may impose tremendous hardship on wage earners with families to support," and that the taking of wages under a prejudgment levy of attachment can give a creditor "enormous leverage."⁴³ Obviously, the very same hardship can occur and leverage be obtained when wages are deposited by or for the wage earner in a checking account and are attached. To limit protection from attachment merely to unpaid wages could simply serve to shift the focus from levies on employers to levies on bank accounts--a change which would only minimally benefit the average wage earner and his family and would not achieve the results contemplated by the courts. Similarly, while there may be no compulsion under the federal statute to protect from execution earnings deposited in a bank account, this in no way

43. See *McCallop v. Carberry*, 1 Cal.3d 903, 906, 464 P.2d 122, 124, 83 Cal. Rptr. 666, 668 (1970), quoting extensively from *Shiada v. Family Finance Corp.*, 395 U.S. 337, 341-342 (1969) ("The result is that prejudgment garnishment . . . may as a practical matter drive a wage earning family to the wall.").

alleviates the obvious need to grant some such protection if any realistic measure of relief is to be provided for a debtor's earnings.

While the foregoing strongly suggests that earnings should be protected in whatever form they may take, there are problems inherent in the exemption of bank accounts that do not arise upon levy against an employer or even against the wage earner himself. Any attempt to exempt all or a specified percentage of earnings deposited in an account would necessarily involve such difficult issues as the tracing and identifying of funds deposited at different times, the allocation of withdrawals to respective deposits, and the claims of third persons to joint accounts. These issues can be minimized by the approach suggested in Section 690.7 of the Code of Civil Procedure and Section 15406 of the Financial Code, which provide fixed exemptions for savings accounts in savings and loan associations (\$1,000) and credit unions (\$1,500). Extension of similar protection to bank accounts would give the wage earner reasonable assurance that garnishment would not leave him destitute and at the same time provide a relatively simple procedure for a levy upon an account or accounts larger than the basic exemption.

The Commission accordingly recommends that Sections 690.7 and 15406 referred to above be repealed and that a 1,500-dollar aggregate exemption from attachment and a 500-dollar aggregate exemption from execution be provided for deposits or accounts of a debtor in any financial institution. These basic exemptions should prove adequate in the majority of cases. However, additional protection seems justified and a debtor should be permitted to claim a greater exemption where he can show that the amount claimed is essential for the support of himself or his family. Finally, where there has been a prejudgment attachment of the bank account of a business, the debtor should be permitted to claim exemption for such greater amount that he can show is essential for the maintenance and continuation of his business. It should be emphasized, however, that both these further exemptions would apply only where the debtor can prove that the basic exemption is inadequate to provide for the contingencies referred to.

Paid Earnings

As noted above, in 1970, Code of Civil Procedure Section 690.6 was amended in an attempt to conform that section to the recently announced judicial constitutional rulings and the new federal statutory restrictions. However, the section as amended was restricted to earnings "due and owing." This amendment constituted a change from the former California law which

protected earnings "received" by the debtor.⁴⁴ Moreover, to exempt earnings payable ("due and owing") by an employer but to permit these same earnings to be subject to levy as soon as they pass into the hands of the employee-debtor seems inconsistent with, if not contrary to, the rationale of Sniadach and McCallop and the purpose of the federal legislation. To avoid this inconsistency and to restore this aspect of prior law, the Commission recommends that earnings in the possession of the debtor be afforded statutory protection comparable to that given wages earned but unpaid. The exemption may be granted automatically where the earnings are readily identifiable as such. Where this is not the case, the debtor should be required to claim and show that he is entitled to an exemption.

Retirement Funds

The federal restrictions on garnishment imposed by Title III also apply to "periodic payments pursuant to a pension or retirement program."⁴⁵ California law regarding such payments is less clear. As for payments held or

44. Between 1937 and 1970, California granted a wage exemption to earnings "received." Cal. Stats. 1937, Ch. 578, § 1, p. 1623. Prior to 1937, the exemption was accorded to earnings without reference to their status as "owing" or paid over. The word "received" was construed early as including accrued but unpaid wages. See *Medical Finance Ass'n v. Rambo*, 33 Cal. App.2d Supp. 756, 757, 86 P.2d 159, 160 (Sup. Ct. L.A., App. Dep't 1938) ("We are not to be understood as saying that the exemption would not also attach to the proceeds of his earnings in the judgment debtor's hands, so long as they could be identified as such. That question is not before us and we express no opinion on it."). In subsequent cases, the California courts have at least sub silentio applied the wage exemption to a paycheck in the hands of the employee or deposited by him in a bank account. See *Medical Finance Ass'n v. Short*, 36 Cal. App.2d Supp. 745, 92 P.2d 961 (Sup. Ct. L.A., App. Dep't 1939) (W.P.A. worker's paycheck); *Le Font v. Rankin*, 167 Cal. App.2d 433, 334 P.2d 608 (1959) (bank account); *Carter v. Carter*, 55 Cal. App.2d 13, 130 P.2d 186 (1942) (bank account).

45. 15 U.S.C. § 1672(a), quoted in note 23 supra.

in the process of distribution from public pension and retirement plans, subdivision (b) of Section 690.18 of the Code of Civil Procedure provides a complete and automatic exemption. As for similar payments held or in the process of distribution from certain private plans, subdivision (c) of that section seems to provide an exemption only from garnishment "in any bankruptcy proceeding." Moreover, the exemption must be claimed, and subdivision (c) purports to deny an exemption to moneys held under a Keogh Act plan. This denial conflicts, however, with the exemption provided such plans under Sections 28002 and 28005 of the Corporations Code.

The Commission recommends that Section 690.18 be revised to delete the reference to Keogh Act plans contained therein, thus resolving the conflict with the exemption provided in the Corporations Code. The Commission further recommends that a provision be added exempting periodic payments payable by a pension or retirement plan that are not otherwise exempt to the same extent that wages are exempt. Such provision would satisfy the federal restrictions imposed by Title III.

Finally, a provision should be added which makes clear that the exemptions provided in Section 690.18 are not exclusive and in no way limit similar, or overlapping, exemptions provided in other codes.

Wage Assignments

Section 300 of the Labor Code presently grants a valid prior voluntary wage assignment preference over subsequent assignments and levies of execution. Continuation of such a preference would permit a judgment debtor to give preference to one creditor and to defeat the claims of other creditors who seek to collect on their judgments under the proposed earnings withholding procedure. To integrate wage assignments with the operation of the latter

procedure, the Commission recommends that a prior wage assignment be granted priority only until the end of the pay period during which an earnings withholding order is served. The operation of the earnings withholding order should be suspended during this period, thus permitting the debtor an opportunity to put his affairs in order. Such action may include revocation of the prior assignment. In this regard, wage assignments should be made revocable at will as to unearned wages. Thus, where an assignment becomes too onerous--for example, after service of an earnings withholding order--, such an assignment may be revoked.

OPERATIVE DATE

In order to allow sufficient time for state and local public officials and the public to become familiar with the new law and to develop the necessary forms and procedures, the Commission recommends that the new statute become operative on July 1, 1973.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 4701 of the Civil Code, to amend Sections 688, 690.6, 690.18, 690.50, and 710 of, to add Sections 690.5-1/2, 690.7, and 690.7-1/2 to, to add Chapter 2.5 (commencing with Section 723.10) to Title 9 of Part 2 of, and to repeal Section 690.7 of, the Code of Civil Procedure, to repeal Section 15406 of the Financial Code, and to amend Section 300 of the Labor Code, relating to attachment, garnishment, and exemptions from execution.

The people of the State of California do enact as follows:

CIVIL CODE

§ 4701 (amended). Continuing withholding order for support

Sec. 1. Section 4701 of the Civil Code is amended to read:

~~4701. In any proceeding where the court has ordered either or both parents to pay any amount for the support of a minor child, the court may order either parent or both parents to assign to the county clerk, probation officer, or other officer of the court or county officer designated by the court to receive such payment, that portion of salary or wages of either parent due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support, maintenance and education of the minor child. Such order shall be binding upon an employer upon the service of a copy of such order upon such employer and until further order of the court. The employer may deduct the sum of one dollar (\$1) for each payment made pursuant to such order. Any such order may be modified or revoked at any time by the court. Any such assignment made pursuant to court order shall have priority as against any attachment, execution, or other assignment, unless otherwise ordered by the court.~~ In any proceeding where the court has ordered a parent to pay any amount for the support, maintenance, or education of a minor child, the court may issue an earnings withholding order under Section 723.30 of the Code of Civil Procedure for the amount so ordered. The withholding order may require the parent's employer to pay the withheld earnings to the county clerk, probation officer, or other officer of the court, to a county officer, to the person having custody of the child, or to such other person as is specified in the order to receive such payment.

Comment. Section 4701 is amended to reflect the enactment of the comprehensive procedure for earnings withholding set forth in the Employees' Earnings Protection Law. See Code of Civil Procedure Section 723.10 et seq.

While the wage assignment procedure formerly used under Section 4701 is not continued, the substantive effect of the prior law is continued. Thus, the order for support continues to have priority over other withholding orders and assignments and is binding until modified or terminated by the court. See Code of Civil Procedure Section 723.30; Labor Code Section 300. As under prior law, the court may issue earnings withholding orders to withhold from the earnings of either or both parents. Authorization for the employer to deduct a one-dollar fee also is continued under Section 723.24. Under prior law, withheld earnings were required to be paid to a court officer or county officer specified by the court; this authority is continued in the amended section and expanded to permit the court to order the employer to pay the withheld earnings directly to the person having custody of the child or to such other person as the court specifies in the order.

CODE OF CIVIL PROCEDURE

§ 688 (technical amendment)

Sec. 2. Section 688 of the Code of Civil Procedure is amended to read:

688. Except as provided in Chapter 2.5 (commencing with Section 723.10):

(a) All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, ~~except-as-provided-for-in-Section-690.6,~~ and all property and rights of property seized and held under attachment in the action, are liable to execution.

(b) Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment, except that a copy of the complaint in the action from which the writ issued need not accompany the writ; provided, that no cause of action nor judgment as such, nor license issued by this state to engage in any business, profession, or activity shall be subject to levy or sale on execution. ~~Sold-aust-must-be-retuned-by-the-officer-as-so much-money-sellested-at-its-current-value,-without-exposing-the-same to-sale.~~

(c) Until a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution, except a levy on the interests or claims of heirs, devisees, or legatees in or to assets of

deceased persons remaining in the hands of executors or administrators, thereof prior to distribution and payment. However, an alias execution may be issued on said judgment and levied on any property not exempt from execution.

Comment. Section 688 is amended to make clear that, although earnings of an employee-debtor are "not exempt by law" from all collection procedures, they are exempt from levy of execution and are subject to levy only under the Employees' Earnings Protection Law. See subdivision (b) of Section 690.5-1/2. See generally Chapter 2.5 (commencing with Section 723.10). The phrase "except as provided for in Section 690.6" is deleted as unnecessary. The sentence relating to gold dust is deleted as obsolete.

§ 690.5-1/2 (added). Earnings for personal services of employees

Sec. 3. Section 690.5-1/2 is added to the Code of Civil Procedure, to read:

690.5-1/2. (a) As used in this section, "earnings" means compensation paid or payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise.

(b) All earnings of the debtor which are due or owing to him are exempt from levy of attachment and execution without filing a claim for exemption as provided in Section 690.50 and are subject to levy only in the manner and to the extent provided in Chapter 2.5 (commencing with Section 723.10).

(c) All earnings of the debtor which have been paid to him and are in his possession in a form identified by the levying officer as earnings are exempt from levy of attachment without filing a claim for exemption as provided in Section 690.50.

(d) All earnings of the debtor which have been paid to him and are retained in the form in which paid or as cash but which are not identified by the levying officer as earnings are exempt from levy of attachment.

(e) Earnings of the debtor which have been paid to him and are retained in the form in which paid or as cash are subject to levy of execution only in an amount not to exceed the maximum amount of the earnings of the debtor for his pay period immediately preceding the levy that could be withheld by his employer under Section 723.50 less any amounts withheld from such earnings by the debtor's employer pursuant to any earnings withholding order.

(f) Such additional portion of the earnings described in subdivision (e) which a debtor proves is essential for the support of himself or his family is exempt from levy of execution.

(g) A levying officer is not liable for any injury resulting from any identification or misidentification of assets made pursuant to this section, whether or not such identification or misidentification be negligent, unless he is guilty of actual fraud, corruption, or actual malice.

Comment. Section 690.5-1/2 is added to make clear the relationship between new Chapter 2.5 (commencing with Section 723.10) and the existing attachment and execution procedures and to satisfy the restrictions upon the attachment of and execution upon earnings imposed by recent judicial decisions and federal legislation. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Consumer Credit Protection Act of 1968 (§§ 301-307), 15 U.S.C. §§ 1671-1677. See also Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971).

Section 690.5-1/2 states the exemptions from prejudgment levy of attachment for all earnings of an employee, both paid and payable. This section is also the source of exemption from postjudgment levy of execution for paid earnings of an employee. The exemptions for unpaid earnings, i.e., earnings "due and owing," are provided in Chapter 2.5 (commencing with Section 723.10).

Subdivision (a). Subdivision (a) is based on the definition of "earnings" stated in Section 723.11, and Section 690.5-1/2 is applicable therefore

only to persons ("employees") protected under the Employees' Earnings Protection Law. Compare Section 690.6. See also Comment to Section 723.11. However, the definition of earnings used here includes earnings both "paid and payable"; Section 723.11 refers only to earnings payable by an employer. Earnings which are "payable" are those which are referred to as "due and owing" under this section. "Paid" earnings are covered here by reference to earnings which have been paid to the debtor--whether or not they are still in a form identifiable as "earnings." It should be noted that certain analogous types of periodic payments--for example, retirement payments, welfare assistance, and unemployment benefits--are not covered here but by other provisions of the 690 series. See, e.g., Sections 690.175 (unemployment compensation), 690.18 (payments pursuant to a pension or retirement program), 690.19 (public assistance).

Subdivision (b). Former subdivision (a) of Section 690.6 provided an automatic, total exemption from prejudgment levy of attachment of all earnings "due and owing" to any debtor; this aspect of the former law is carried forward without change in subdivision (b) of Section 690.6 and subdivision (b) of this section. Compare Cal. Stats. 1970, Ch. 1523, § 19.

Subdivision (b) of Section 690.5-1/2 also makes clear that the levy of execution may no longer be used to garnish the wages of an employee while they are still in the hands of his employer. A judgment creditor now may only reach this asset of a debtor pursuant to Chapter 2.5 (commencing with Section 723.10).

Subdivision (c). Subdivision (c) exempts from attachment all earnings of the debtor which "are in his possession in a form identifiable by the levying officer as earnings." It would be inconsistent with the rationale of Sniadach and McCallop to exempt earnings payable by an employer but to

make these same earnings subject to attachment as soon as they pass into the hands of the employee-debtor. (The term "debtor" is used here to include a defendant or cross-defendant subject to attachment. See Section 690(c).) Accordingly, to avoid such an anomaly, subdivision (c) provides the same total exemption from attachment for all paid earnings still in a form identified as earnings. Included in the latter category would, for example, be an uncashed paycheck. The identification is done by the levying officer--sheriff, constable, or marshal. Where the levying officer mistakenly attaches earnings, the debtor may still claim an exemption under subdivision (d). Under subdivision (c), however, the exemption is automatic; no claim pursuant to Section 690.50 is required.

Subdivision (d). Subdivision (d) covers earnings paid but not in a form identifiable as earnings or, at least, not in fact so identified by the levying officer. Subdivision (d) is intended to cover the relatively rare case where the officer cannot or does not properly identify earnings as earnings. This can happen, for example, where cash in the possession of the debtor is attached. Circumstances may clearly indicate that the money is "earnings"--for example, cash in a pay envelope attached shortly after the debtor leaves his place of employment upon a payday. Nevertheless, in other circumstances, subdivision (d) affords the debtor an opportunity at least to claim an exemption pursuant to Section 690.50 by showing that "earnings" have been attached. Subdivision (d) does not, however, protect earnings after they have been converted into another form. Protection of assets in these other forms must be sought under other exemption provisions. See, e.g., Civil Code Section 1240 (homestead); Code of Civil Procedure Sections 690.1 (household furnishings and appliances), 690.2 (motor vehicles), 690.7 (money deposited in bank, credit union, or savings and loan association).

Subdivision (e). As noted above, subdivision (b) makes clear that the levy of execution may no longer be used to garnish the wages of an employee while they are still in the hands of his employer. A judgment creditor now may only reach this asset under Chapter 2.5. However, Chapter 2.5 deals primarily with unpaid earnings, i.e., earnings which are "due and owing." For a very limited exception to this rule with regard to tips, see Section 723.106 and Comment thereto. Earnings, once paid, are subject to levy of execution. Subdivision (e), therefore, provides an exemption for paid earnings comparable to the exemptions provided for unpaid earnings by Sections 723.50 and 723.51. It should be emphasized, however, that, as noted above, this subdivision does not protect earnings after they have been converted into another form. Compare Section 690.7-1/2 (money deposited in bank, credit union, or savings and loan association). The exemption provided under subdivision (e) must be claimed by the debtor and the amount of such exemption is based upon the total amount of the nonexempt earnings of the debtor from his last paycheck--not upon the amount of earnings in his possession at the time of levy.

Subdivision (f). Subdivision (f) provides an exemption for amounts essential for support comparable to that provided by subdivision (d) of Section 690.6 and Section 723.51. See Comments to Sections 690.6 and 723.51.

Subdivision (g). Subdivision (g) provides an immunity from liability comparable to that provided by Government Code Section 822.2 (misrepresentation by public employee).

§ 690.6 (amended). Earnings for personal services of persons other than employees

Sec. 4. Section 690.6 of the Code of Civil Procedure is amended to read:

690.6. (a) As used in this section, "earnings" do not include compensation payable by an employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus, or otherwise.

(a) (b) All the earnings of the debtor due or owing for his personal services shall be exempt from levy of attachment without filing a claim for exemption as provided in Section 690.50.

(b) (c) One-half, or such greater portion as is allowed by statute of the United States, of the earnings of the debtor due or owing for his personal services rendered at any time within 30 days next preceding the levy of execution shall be exempt from execution without filing a claim for exemption as provided in Section 690.50.

(c) (d) Such additional portion of his earnings which a debtor proves is essential for the support of himself or his family shall be exempt from levy of execution. All of such earnings, if necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor, unless the debts are:

(1) ~~--Incurred by the debtor, his wife, or his family for the common necessities of life.~~

(2) ~~--Incurred for personal services rendered by any employee or former employee of the debtor.~~

(d) (e) The court shall determine the priority and division of payment among all of the creditors of a debtor who have levied an execution upon nonexempt earnings upon such basis as is just and equitable.

~~(e)~~ (f) Any creditor, upon motion, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the priority and division of payment among all the creditors of the debtor who have levied an execution upon nonexempt earnings pursuant to this section.

Comment. Section 690.6 is amended to limit its application to those persons and earnings not protected under the Employees' Earnings Protection Law--Chapter 2.5 (commencing with Section 723.10)(applicable only to "employees"). See, e.g., Sections 723.11, 723.106. Section 690.6 accordingly applies to persons who can be categorized generally as independent contractors. As to these persons, Section 690.6 continues prior law with one exception. Subdivision (d) has been revised in conformity with Section 723.51 to provide an exemption for those earnings which the debtor proves are essential for support. The standard provided is stricter than the standard under former law; however, the former exceptions to the exemption have been eliminated. See Comment to Section 723.51. See also Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971).

§ 690.7 (repealed)

Sec. 5. Section 690.7 of the Code of Civil Procedure is repealed.

~~690.7.--(a)--To-the-maximum-aggregate-value-of-one-thousand dollars-(\$1,000),-any-combination-of-the-following:--savings-deposits in,-shares-or-other-accounts-in,-or-shares-of-stock-of,-any-state-or federal-savings-and-loan-association;- "savings-deposits"-shall-in-clude-"investment-certificates"-and-"withdrawable-shares"-as-defined in-Section-5061-and-5067-of-the-Financial-Code,-respectively.~~

~~(b)--Such-exemption-set-forth-in-subdivision-(a)-shall-be-a-maxi-mum-of-one-thousand-dollars-(\$1,000)-per-person,-whether-the-character of-the-property-be-separate-or-community.~~

Comment. Section 690.7 is superseded by new Sections 690.7 and 690.7-1/2.

§ 690.7 (added). Deposit account; exemption from attachment

Sec. 6. Section 690.7 is added to the Code of Civil Procedure, to read:

690.7. (a) As used in this section, "debtor" includes an individual, corporation, partnership, and unincorporated association. For the purposes of this section, a husband and wife shall be treated as one individual.

(b) As used in this section, "deposit account" means:

(1) A deposit or account in any "bank" described in Section 102 of the Financial Code.

(2) A savings deposit in, share or other account in, or share of stock of any state or federal savings and loan association. As used in this paragraph, "savings deposit" includes "investment certificate" and "withdrawable share" as defined in Sections 5061 and 5067 of the Financial Code.

(3) A share or certificate for funds received of the member of a credit union and all the accumulation on such share or certificate.

(c) A deposit account owned by a debtor is exempt from attachment to the extent of the lesser of:

(1) Fifteen hundred dollars (\$1,500).

(2) The amount by which fifteen hundred dollars (\$1,500) exceeds the amounts in all other deposit accounts owned by the debtor on the date of levy.

(d) A deposit account owned by a debtor is exempt from attachment in the amount essential for the support of the debtor or his family or essential for the maintenance and continuance of his business.

(e) Any debtor claiming an exemption under this section must list in his claim for exemption under Section 690.50 all deposit accounts standing in his name whether alone or with others and all amounts held in such accounts on the date of the levy.

(f) For the purposes of this section, it shall be presumed that all amounts in all deposit accounts standing in the name of the debtor either alone or with others are owned by the debtor. The presumption established by this subdivision is a presumption affecting the burden of proof.

(g) The exemptions provided by this section are not applicable where the attachment is sought to enforce a court order for the support of any person or to collect a state tax liability as that term is defined in paragraph (2) of subdivision (a) of Section 723.31.

(h) Nothing in this section affects the rights of a banker under Section 3054 of the Civil Code.

Caveat. There is no procedure under California law permitting the debtor to obtain a hearing prior to a prejudgment levy of attachment. Recent decisions of both the United States Supreme Court and the California Supreme Court raise a serious question whether the absence of such a procedure causes such a levy to be unconstitutional. E.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Blair v. Pitchess, Cal.3d , P.2d , Cal. Rptr. (1971). The California Supreme Court presently has under submission a case in which the procedure for prejudgment attachment of a bank account has been challenged on constitutional grounds. See Blair v. Pitchess, supra n.16. If the court holds that such procedure is not constitutional, it will be necessary to make appropriate revisions in the law. This recommendation does not attempt to do that. This recommendation does provide limitations on the amounts which may be attached in circumstances where attachment is constitutionally permitted.

Comment. Section 690.7 provides exemptions from attachment of various types of savings and commercial accounts. For similar, but more limited, exemptions of such accounts from execution, see Section 690.7-1/2.

Accounts protected. The accounts protected under Sections 690.7 and 690.7-1/2 include savings and loan association accounts, credit union accounts, and bank accounts--whether savings or checking accounts. See subdivision (b) (defining "deposit account"). Under prior law, the amount exempt depended on the type and holder of the account: Checking accounts and bank accounts generally were not protected; \$1,000 in a savings and loan association account and \$1,500 in a credit union account was exempt. See former Section 690.7 and former Financial Code Section 15406. These exemptions were cumulative so that a single debtor could exempt a total of \$2,500 by proper allocation of his money. Sections 690.7 and 690.7-1/2, on the other hand, provide a single aggregate exemption applicable to all types of accounts, including bank savings and checking accounts.

The failure of prior law to provide any exemption for personal checking accounts--the usual depository for current earnings--violated the spirit if not the letter of both recent federal legislation and judicial decisions. See 15 U.S.C. §§ 1671-1677; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Blair v. Pitchess, Cal.3d , P.2d , Cal. Rptr. (1971). See also Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971), reprinted

in 10 Cal. L. Revision Comm'n Reports _____ (1971). It should be noted, however, that the exemptions provided by Sections 690.7 and 690.7-1/2 are exclusive. They are in no way dependent upon a showing by the debtor that the amount claimed as exempt represents his earnings. Nor may the debtor claim a greater amount as exempt by showing that amounts deposited were derived from his earnings.

Persons protected. A business as well as an individual may take advantage of the exemptions from attachment provided by Section 690.7. See Section 690.7(a). A business is not provided an analogous exemption from execution under Section 690.7-1/2. See Section 690.7-1/2(a).

A husband and wife are treated as one person for the purposes of Sections 690.7 and 690.7-1/2. See subdivision (a). Accordingly, they are entitled to only one exemption and accounts standing in the name of either or both of them must be listed in the claim of exemption even though only one of them is sued or is the judgment debtor.

Although subdivision (a) gives "debtor" a special meaning for the purposes of Sections 690.7 and 690.7-1/2, it is clear that there is no adjudicated debt in the case of attachment. The general definition of "debtor" contained in Section 690(c)(debtor included defendant and judgment debtor) is fully applicable to both sections.

Exemption must be claimed. The exemptions provided by Sections 690.7 and 690.7-1/2 must be claimed pursuant to Section 690.50. See Section 690(a).

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This requirement makes it possible to limit the amount to be exempted by taking into consideration all other accounts owned by the debtor. Nevertheless, in the ordinary case, it is anticipated that the release of funds pursuant to the exemption provided by Section 690.7 or 690.7-1/2 will be expeditiously accomplished. Where only the basic exemption is claimed, it will be easy to compute the exempt amount and there should be little occasion for the filing of counteraffidavits by a creditor; the attaching officer will be able to make the necessary distributions on the basis of the debtor's affidavit alone.

Basic exemption. As much as \$1,500 in the debtor's account is exempted from attachment by Section 690.7(c). A similar \$500 exemption from execution is provided by Section 690.7-1/2(c). This basic exemption is an aggregate one, however. Hence, a debtor may claim as exempt from attachment only that portion of an account levied upon which, when added to all other amounts held by the debtor in other accounts on the date of the levy, equals \$1,500. The exemption must be claimed and the burden of proof is on the debtor to show that he is in fact entitled to exempt the amount claimed. See subdivision (f). See also Section 690.50.

In claiming the exemption, the debtor must list in his claim for exemption the amount he holds in all other accounts on the date of the levy even though the other accounts are not levied on. See subdivision (e). In computing the amount of the debtor's exemption, any account standing in the debtor's name, including all joint accounts, are presumed to be the debtor's. This presumption is one affecting the burden of proof. See subdivision (f). See also Evidence Code Sections 605, 606. Some or all of such accounts may in fact not be subject to attachment or execution to ~~satisfy the debtor's obligation~~

because of the nature of the account or the character of the funds in the account. See Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954); Spear v. Farwell, 5 Cal. App.2d 111, 42 P.2d 391 (1935). Sections 690.7 and 690.7-1/2 do not affect this immunity; a nondebtor may make his third-party claim pursuant to Section 690.

Additional exemption for support or continuation of business. The debtor is given two additional exemptions from attachment that permit him to protect an amount in excess of the basic \$1,500 exemption if he is able to show such amount is essential for the support of himself or his family (compare Section 723.51) or essential for the maintenance and continuation of his business. See subdivision (d). The latter protection should be particularly helpful to the small business man in avoiding the tremendous impact of an attachment of the operating funds of his business. It should be noted, however, that it applies only against a levy of attachment and is limited to amounts essential for the needs of the business.

Exclusion of attachments to enforce orders for support and to collect state tax liabilities. Subdivision (g) eliminates the exemptions otherwise provided by this section where the attachment is sought to enforce a court order for support or to collect a state tax liability. This special consideration for such creditors is consistent with the special treatment accorded them under the Employees' Earnings Protection Law (Chapter 2.5 of this title) as well as under Title III of the federal Consumer Credit Protection Act. See 15 U.S.C. § 1673(b)(1), (3).

Banker's lien. The exemptions provided by Sections 690.7 and 690.7-1/2 are limitations on garnishment procedures only; they do not in any way affect the exercise of rights pursuant to Civil Code Section 3054 (banker's lien). See subdivision (h).

§ 690.7-1/2 (added). Deposit account; exemption from execution

Sec. 7. Section 690.7-1/2 is added to the Code of Civil Procedure, to read:

690.7-1/2. (a) As used in this section, "debtor" means an individual and does not include a corporation, partnership, or unincorporated association. For the purposes of this section, a husband and wife shall be treated as one individual.

(b) As used in this section, "deposit account" means:

(1) A deposit or account in any "bank" described in Section 102 of the Financial Code.

(2) A savings deposit in, share or other account in, or share of stock of any state or federal savings and loan association. As used in this paragraph, "savings deposit" includes "investment certificate" and "withdrawable share" as defined in Sections 5061 and 5067 of the Financial Code.

(3) A share or certificate for funds received of the member of a credit union and all the accumulation on such share or certificate.

(c) A deposit account owned by a debtor is exempt from execution to the extent of the lesser of:

(1) Five hundred dollars (\$500).

(2) The amount by which five hundred dollars (\$500) exceeds the amounts in all other deposit accounts owned by the debtor on the date of levy.

(d) A deposit account owned by a debtor is exempt from execution in the amount essential for the support of the debtor or his family.

(e) Any debtor claiming an exemption under this section must list in his claim for exemption under Section 690.50 all deposit

accounts standing in his name whether alone or with others and all amounts held in such accounts on the date of the levy.

(f) For the purposes of this section, it shall be presumed that all amounts in all deposit accounts standing in the name of the debtor either alone or with others are owned by the debtor. The presumption established by this subdivision is a presumption affecting the burden of proof.

(g) The exemptions provided by this section are not applicable where the execution is sought to enforce a court order for the support of any person or to collect a state tax liability as that term is defined in paragraph (2) of subdivision (a) of Section 723.31.

(h) Nothing in this section affects the rights of a banker under Section 305⁴ of the Civil Code.

Comment. Section 690.7-1/2 is added to provide protection from execution similar to that provided by Section 690.7 from attachment. See Section 690.7 and Comment thereto. However, the exemptions provided by Section 690.7-1/2 are available only to individuals, and no exemption is provided for amounts necessary to maintain or continue the operation of a business. Compare subdivisions (a) and (d) of Section 690.7 with subdivisions (a) and (d) of this section.

§ 690.18 (amended). Exemptions; public and private pension, retirement, disability or death benefits; vacation credits

Sec. 8. Section 690.18 of the Code of Civil Procedure is amended to read:

§ 690.18.

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

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

(c) All money held, controlled, or in process of distribution by any private retirement plan, including, but not limited to, union retirement plans, or any profit-sharing plan designed and used for retirement purposes, or the payment of benefits as an annuity, pension, retirement allowance, disability payment or death benefit from such retirement or profit-sharing plans, and all contributions and interest thereon returned to any member of any such retirement or profit-sharing plan, are exempt from execution, attachment, or garnishment in any bankruptcy proceeding. ~~This subdivision shall not apply to any moneys held in any retirement program established pursuant to the federal "Self-Employed Individuals Tax Retirement Act of 1962" (P.L. 87-702, 76 Stat. 809), nor to any moneys received in any manner by persons from any such retirement program so established.~~

(d) All periodic payments payable by a pension or retirement plan that are not otherwise exempt by law are exempt from levy of execution in the amount that is exempted by Section 723.50 without filing a claim for exemption as provided in Section 690.50.

(e) Nothing in this section limits the applicability of any exemption otherwise provided by statute.

Comment. Subdivision (c) of Section 690.18 formerly excluded Keogh Act plans from the exemption provided by this section. Such exclusion conflicted with the exemption provided such plans under Sections 28002 and 28005 of the Corporations Code. The conflict has been resolved by deletion of the reference to Keogh Act plans from Section 690.18.

Subdivision (d) has been added to Section 690.18 to satisfy the federal restrictions on garnishment of "periodic payments pursuant to a pension or retirement program" provided by Title III of the Consumer Credit Protection Act of 1968. See 15 U.S.C. §§ 1672, 1673.

Subdivision (e) has been added to make clear that this section is not the exclusive source of exemptions for retirement funds. See, e.g., Corp. Code § 28005; Educ. Code § 13808 (State Teachers' Retirement System); Govt. Code §§ 21201 (State Employees' Retirement Law) and 31452 (County Employees' Retirement Law of 1937).

Note: The Commission is actively engaged in a general review of the California statutes relating to the entire field of attachment, garnishment, and execution with a view to recommending the enactment of a comprehensive

revision of this body of law at a future session of the Legislature. The revisions made in Section 690.18 are designed to cure obvious defects in the law and to enable the State of California to secure federal approval of the Employees' Earnings Protection Law. See Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971). The Commission plans to reconsider this section in connection with the general review mentioned above.

§ 690.50 (amended)

Sec. 9. Section 690.50 of the Code of Civil Procedure is amended to read:

¶ 690.50.

(a) If the property mentioned in Sections 690.1 to 690.29, inclusive, shall be levied upon under writ of attachment or execution, the defendant or judgment debtor (herein referred to as "the debtor"), in order to avail himself of his exemption rights as to such property, shall within 10 days from the date such property was levied upon deliver to the levying officer an affidavit of himself or his agent, together with a copy thereof, alleging that the property levied upon, identifying it, is exempt, specifying the section or sections of this code on which he relies for his claim to exemption, and all facts necessary to support his claim, and also stating therein his address within this state for the purpose of permitting service by mail upon him of the counteraffidavit and any notice of the motion herein provided.

(b) Forthwith upon receiving the affidavit of exemption, the levying officer shall serve upon the plaintiff or the person in whose favor the writ runs (herein referred to as "the creditor"), either personally or by mail, a copy of the affidavit of exemption, together with a writing, signed by the levying officer, stating that the claim to exemption has been received and that the officer will release the property unless he receives from the creditor a counteraffidavit within five days after service of such writing.

(c) If the creditor desires to contest the claim to exemption, he shall, within such period of five days, file with the levying officer a counteraffidavit alleging that the property is not exempt within the meaning of the section or sections of this code relied upon, or if the claim to exemption be based on Sections 690.2, 690.3, 690.4, 690.6, alleging that the value of the property claimed to be exempt is in excess of the value stated in the applicable section or sections, together with proof of service of a copy of such counteraffidavit upon the debtor.

(d) If no such counteraffidavit, with such proof of service, is so filed with the levying officer within the time allowed, the officer shall forthwith release the property.

(e) If such counteraffidavit, with such proof of service, is so filed, either the creditor or the debtor shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the claim to exemption, the priority or division of payment between one or more creditors from nonexempt earnings under the provisions of Section 690.8 or the value of the property claimed to be exempt. Such hearing shall be granted by the court upon motion of either party made within five days after the counteraffidavit is filed with the levying officer, and such hearing must be had within 15 days from the date of the making of such motion unless continued by the court for good cause. The party making the motion for hearing shall give not less than five days' notice in writing of such hearing to the levying officer and to the other party, and specify therein that the hearing is for the purpose of determining the claim to exemption. The notice may be of motion or of hearing and upon the filing of the notice with the clerk of court, the motion is deemed made.

(f) If neither party makes such motion within the time allowed, or if the levying officer shall not have been served with a copy of the notice of hearing within 10 days after the filing of the counteraffidavit, the levying officer shall forthwith release the property to the debtor.

(g) At any time while the proceedings are pending, upon motion of either party or upon its own motion, the court may (1) order the sale of any perishable property held by such officer and direct disposition of the proceeds of such sale, and (2) make such other orders as may be proper under the particular circumstances of the case. Any orders so made may be modified or vacated by the court or judge granting the same, or by the court in which the proceedings are pending, at any time during the pendency of the proceedings, upon such terms as may be just.

(h) The levying officer in all cases shall retain physical possession of the property levied upon if it is capable of physical possession, or in the case of property not capable of physical possession, the levy shall remain in full force and effect, pending the final determination of the claim to exemption. However, no sale under execution shall be had prior to such final determination unless an order of the court hearing the claim for exemption shall so provide.

690.7,
690.7-1/2,
690.18.

690.5-1/2,

Code Civ. Proc. § 690.50

(i) At such hearing, the party claiming the exemption shall have the burden of proof. The affidavits and counteraffidavits shall be filed by the levying officer with the court and shall constitute the pleadings, subject to the power of the court to permit an amendment in the interests of justice. The affidavit of exemption shall be deemed controverted by the counteraffidavit and both shall be received in evidence. Nothing herein shall be construed to deprive anyone of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial may be waived in any such case in like manner as in the trial of an action. No findings shall be required in a proceeding under this section. When the hearing is before the court sitting without a jury, and no evidence other than the affidavit and counteraffidavit is offered, the court, if satisfied that sufficient facts are shown thereby, may make its determination thereon. Otherwise, it shall order the hearing continued for the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits. At the conclusion of the hearing, the court shall give judgment determining whether the claim to exemption shall be allowed or not, in whole or in part, and may give judgment determining the priority or division of payment between one or more creditors from nonexempt earnings under the provisions of Section 690.6, which judgment shall be determinative as to the right of the creditor to have the property taken and held by the officer or to subject the property to payment or other satisfaction of his judgment. In such judgment the court shall make all proper orders for the disposition of such property or the proceeds thereof.

(j) A copy of any judgment entered in the trial court shall be forthwith transmitted by the clerk to the levying officer in order to permit such officer to either release the property attached or to continue to hold it to sell it, in accordance with the provisions of the writ previously delivered to him. Such officer, unless an appeal from the judgment is waived, or the judgment has otherwise become final, shall continue to hold such property under attachment or execution, continuing the sale of any property held under execution until such judgment becomes final. However, if a claim to exemption under Section 690.6 is allowed by such judgment, the debtor shall be entitled to a release of the earnings so exempted at the expiration of three days, unless otherwise ordered by the court, or unless the levying officer shall have been served with a copy of a notice of appeal from the judgment.

690.5-1/2 or

(k) When any documents required hereunder are served by mail, the provisions of this code relating to service by mail shall be applicable thereto.

(l) Whenever the time allowed for an act to be done hereunder is extended by the court, written notice thereof shall be given promptly to the opposing party, unless such notice be waived, and to the levying officer.

(m) An appeal lies from any judgment under this section. Such appeal to be taken in the manner provided for appeals in the court in which the proceeding is had.

Comment. Section 690.50 is revised to include appropriate references to Sections 690.5-1/2, 690.7, 690.7-1/2, and 690.18.

§ 710 (amended)

Sec. 10. Section 710 of the Code of Civil Procedure is amended to read:

710.

(a) Whenever a judgment for the payment of money is rendered by any court of this state against a defendant to whom money is owing and unpaid by this state or by any county, city and county, city or municipality, quasi-municipality, district or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

1. If such money, ~~wages or salary~~ is owing and unpaid by this state to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money, ~~wages or salary~~ to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller ~~or to the State Personnel Board~~. Said state department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact that the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, officer or commission for any amounts advanced to said judgment debtor or by him owed to the State of California, and ~~after deducting therefrom an amount equal to one-half or such greater portion as is allowed by statute of the United States, of the earnings owing to the judgment debtor for his personal services to the state rendered at any time within 30 days next preceding the filing of such abstract or transcript~~, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

2. If such money, ~~wages or salary~~ is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality, district or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality, district or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, ~~less an amount equal to one-half or such~~

~~greater portion as is allowed by statute of the United States, of the earnings of the debtor owing by the county, city and county, city, municipality, quasi-municipality, district or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.~~

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor. The procedure for determining the claim of exemption shall be governed by the procedure set forth in ~~636-26 of this code.~~ Section 690.50.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

~~(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General.~~

H (e) (f)

Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. ~~For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund.~~

(g) This section does not authorize the withholding of earnings of a public employee. The earnings of a public employee may be withheld only pursuant to Chapter 2.5 (commencing with Section 723.10).

Comment. Section 710 is amended to eliminate the use of the abstract procedure as a means of garnishing the wages or salary of a public employee. The earnings of such employees may be withheld pursuant to the Employees' Earnings Protection Law only. See Chapter 2.5 (commencing with Section 723.10).

Sec. 11. Chapter 2.5 (commencing with Section 723.10) is added to Title 9 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2.5. EMPLOYEES' EARNINGS PROTECTION LAW

Article 1. Short Title; Definitions

§ 723.10. Short title

723.10. This chapter shall be known and may be cited as the "Employees' Earnings Protection Law."

§ 723.11. Definitions

723.11. As used in this chapter:

(a) "Earnings" means compensation payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise.

(b) "Employee" means 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.

(c) "Employer" means a person for whom an individual performs services as an employee.

(d) "Judgment" includes a support order.

(e) "Judgment creditor" means the person in favor of whom a judgment is rendered and includes his representative. As applied to the state, "judgment creditor" means the specific state agency seeking to collect a judgment or tax liability.

(f) "Judgment debtor" means the person against whom a judgment is rendered.

(g) "Person" includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.

(h) "State Administrator" means the Department of Industrial Relations.

Comment. Section 723.11 states definitions used in applying this chapter. Subdivisions (a), (b), and (c) make clear that this chapter deals only with the garnishment or withholding of earnings for services rendered in an employer-employee relationship. Subdivisions (b) and (c) are based on the common law requirements for such relationship. It should be noted that an employee may be given considerable discretion and still be an employee so long as his employer has the legal right to control both method and result. However, no attempt is made here to incorporate specific case law arising

out of situations involving problems and issues unrelated to the purposes and procedures relevant in applying this chapter. "Employee" includes both private and public employees. (See subdivision (g).) See also Section 710.

"Earnings" embraces all remuneration "whether denominated as wages, salary, commission, bonus, or otherwise." The infinite variety of forms which such compensation can take precludes a more precise statutory definition. Accordingly, the State Administrator, who is authorized and directed to adopt "such rules and regulations as are reasonably necessary for the purpose of administering . . . this chapter," will be required in some circumstances to provide rulings consistent with the statutory definition as to whether certain items are an employee's earnings. See Section 723.151. One such item will probably be vacation credits or pay. Different employers will treat this form of compensation differently. Generally speaking, however, vacation pay should be subject to withholding only when paid, i.e., when the employee goes on vacation or terminates his employment in circumstances where he has the right to be paid his accrued benefits.

Unlike the definition of "earnings" used in Title III of the federal Consumer Credit Protection Act of 1968, the term used here does not include "periodic payments pursuant to a pension or retirement program." Separate treatment is accorded such payments under Section 690.18.

Article 2. General

§ 723.20. Chapter exclusive procedure for withholding earnings

723.20. The earnings of an employee shall not be required to be withheld for payment of a debt by means of any judicial procedure other than pursuant to the provisions of this chapter.

Comment. Section 723.20 makes the Employees' Earnings Protection Law the exclusive judicial method of compelling an employer to withhold earnings. Attachment of earnings before judgment is abolished by subdivisions (b) and (c) of Section 690.5-1/2. For provisions relating to voluntary wage assignments, see Labor Code Section 300. For issuance of an earnings withholding order to enforce an order for support, see Section 723.30 and Civil Code Section 4701. This chapter has no effect on judgment collection procedures that do not involve the withholding of an employee's earnings. See, e.g., Sections 690.7, 690.7-1/2 (bank accounts), and Section 690.18 (retirement funds). However, where an employee's earnings are sought to be garnished, the creditor must comply with the provisions of this chapter. This rule applies to public entities as well as private persons. This chapter, for example, imposes significant limitations on the state's ability to garnish wages for tax delinquencies pursuant to its warrant and notice procedures. See Section 723.31.

Of course, the Employees' Earnings Protection Law has no effect on matters that are preempted by the federal law, such as federal bankruptcy proceedings--including proceedings under Chapter 13 of the National Bankruptcy Act--and federal tax collection procedures. E.g., Int. Rev. Code of 1954, § 6334(c). Nor does this chapter apply to deductions which an employer is authorized by statute to make for such items as insurance, premiums and payments to health, welfare, or pension plans. See, e.g., Govt. Code §§ 1158, 12420; Labor Code §§ 224, 300.

§ 723.21. Levy made by earnings withholding order

723.21. A levy upon the earnings of a judgment debtor shall be made by an earnings withholding order, directed to his employer, in accordance with this chapter.

§ 723.22. Term of withholding period; employer's duty to withhold

723.22. (a) As used in this section, "withholding period" means the period which commences five (5) calendar days after service of an earnings withholding order upon the employer and which continues until the first of the following dates:

(1) The one hundred and twenty-fifth day after the order was served.

(2) The date of termination requested by the creditor or ordered by the court.

(3) The date the employer has withheld the full amount specified in the order.

(b) Except as otherwise provided by statute, an employer shall withhold the amounts required by an earnings withholding order from all earnings of the employee payable for any pay period of such employee which ends during the withholding period.

(c) Notwithstanding subdivision (b), an employer shall cease withholding pursuant to an earnings withholding order whenever he is served with a certified copy of a satisfaction of the judgment upon which the order is based.

(d) An employer is not liable for any amounts withheld and paid over to a judgment creditor pursuant to an earnings withholding order prior to service upon the employer of a written notice of termination of such order or a certified copy of a satisfaction of the judgment upon which the order is based.

(e) For the purposes of this section, service shall be deemed complete on the date the document served is actually first received

at either the branch or office where the employee works or the office from which he is paid.

Comment. Section 723.22 states the basic rules governing the employer's duty to withhold pursuant to an earnings withholding order. Subdivision (b) requires the employer to withhold from all earnings of an employee payable for any pay period of such employee which ends during the "withholding period." This latter period is described in subdivision (a).

The withholding period generally commences five calendar days after service of an earnings withholding order. The five-day delay affords the employer time to process the order within his organization, i.e., deliver the order to the proper department, make bookkeeping adjustments, and so on. The introductory clause to subdivision (b) recognizes certain exceptions to this general rule. An employer is not generally required to withhold pursuant to two orders at the same time; thus, a subsequent order will not be given effect. See Section 723.23 (priority of orders) and Comment thereto. Moreover, withholding may be delayed beyond the normal five-day period where a prior assignment of wages is in effect. See Labor Code Section 300 and Comment thereto.

The withholding period does not end until the first of the events described in paragraphs (1) through (3) of subdivision (b) occurs; thus, the employer has a continuing duty to withhold. The "one shot" effect of service of a writ of execution does not apply here. See Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971).

Paragraph (1) provides a general expiration date 125 days after the date of service--thus, the employer will usually be required to withhold for 120 days.

Paragraph (2) reflects the fact that a creditor may voluntarily terminate an order or the court may order termination. See Section 723.105. Of course, in some situations, the court will only modify the prior order, and the employer then must comply with the order as modified.

Paragraph (3) requires the employer to stop withholding when he has withheld the full amount specified in the order.

Again, it should be noted that there are certain exceptions to these rules. One of these is stated in subdivision (c) which requires the employer to stop withholding after he has been served with a certified copy of a satisfaction of the judgment upon which the order is based. The judgment creditor has an affirmative duty to so inform the employer of the satisfaction. See Section 723.27. Service of an order for the collection of state taxes suspends the duty of an employer to withhold pursuant to a prior order. See Section 723.31 (tax orders). However, this is only a suspension. After the tax order is satisfied, if the duty to withhold pursuant to the prior order has not ended under subdivision (b) or (c), the employer must again withhold pursuant to the prior order. Similarly, the duty to withhold is not terminated by the discharge or suspension of an employee and, if the employee is rehired or returns to work during the withholding period, the employer must resume withholding pursuant to the order. Finally, the termination of certain types of orders--orders for the collection of state taxes and support orders--are governed by separate rules. See Sections 723.30 (support orders); 723.31 (tax orders).

Sometimes an order will be terminated or the judgment upon which it is based will be satisfied without the employer's prior knowledge. Subdivision (d) makes clear that an employer will not be subject to liability for having withheld and paid over amounts pursuant to an order prior to service of a written termination of the order or a certified copy of a satisfaction of judgment. The employee must recover amounts previously paid out from the creditor. See Section 723.105. See also Section 723.29 (employer entitled to rely on documents actually received).

An earnings withholding order may also be affected by federal bankruptcy proceedings. The state procedure provided here is, of course, subordinate to the federal law governing bankruptcy proceedings.

§ 723.23. Priority of orders generally

723.23. (a) Except as otherwise provided in this chapter:

(1) An employer shall comply with the first withholding order which he receives.

(2) If the employer receives two or more orders on the same day, he shall comply with the order issued pursuant to the judgment first entered. If two or more orders received on the same day are also based on judgments entered upon the same day, the employer shall comply with whichever one of such orders he selects.

(3) If an earnings withholding order is received during the period that an employer is required to comply with another earnings withholding order for the same judgment debtor, the employer shall not withhold earnings pursuant to the subsequent order.

(b) For the purposes of this section, an earnings withholding order is received on the date it is actually received at either the branch or office where the employee works or the office from which he is paid.

Comment. Section 723.23 establishes the general rules governing priority of earnings withholding orders. Generally speaking, the first order received is given priority. Occasionally, two or more orders will be received on the same day. In this situation, the employer must comply with the order which was issued pursuant to the judgment first entered. The date of entry of judgment will be indicated on the face of the order. See Section 723.125. In rare instances, orders received the same day will also be based on judgments entered the same day. In this situation, the

employer has complete discretion to choose the order with which he will comply. He must, of course, comply with one of these orders. For exceptions to these basic priority rules, see Sections 723.30 (support orders) and 723.31 (state taxes) and the Comments thereto.

Unless the subsequent earnings withholding order is for state taxes or for support, an order is void which is received while the employer is required to comply with another. Hence, with the exceptions noted, an order to withhold for a second indebtedness received while the first order is in effect does not offer a basis for discharge of the employee. See Labor Code Section 2929 and Comment thereto.

It should be noted that, in some circumstances, the operation of an order may be suspended, but the duty to withhold is not terminated. See, e.g., Section 723.31 (tax order suspends operation of prior order); Labor Code Section 300 (suspension where prior assignment in effect). See also Comment to Section 723.22. In such cases, as well as in cases where the subsequent order is not given effect, the employer is required to advise the creditor who has served the order that it is suspended or not given effect of the reason for the employer's action. See Sections 723.31(b)(5), 723.109, 723.127.

An employer is generally entitled to rely simply upon what is served upon him. See Section 723.29 and Comment thereto. He is not required to determine whether or not a creditor has either obtained or served an order improperly.

§ 723.24. Employer's service charge for withholding

723.24. Each time an employer makes a deduction from an employee's earnings pursuant to an earnings withholding order, he may make an additional deduction of one dollar (\$1) and retain it as a charge for his services in complying with the earnings withholding order.

Comment. Section 723.24 authorizes, but does not require, an employer to deduct an additional dollar as a service charge each time he is required to withhold a portion of his employee's earnings pursuant to an earnings withholding order. For example, if the employee is paid weekly and an amount is withheld each week pursuant to the earnings withholding order, the employer may deduct an additional service charge of one dollar each week. A similar one-dollar charge was formerly authorized under Civil Code Section 4701. A charge of \$2.50 was authorized under Code of Civil Procedure Section 710 when earnings of a public employee were levied on under that section. However, there was no provision authorizing an employer to make a service charge in connection with wage garnishments generally.

§ 723.25. Payment to judgment creditor

723.25. (a) The amount required to be withheld pursuant to an earnings withholding order shall be paid to the person specified in the order within 15 days after each payment of earnings is made to the employee unless the employer elects to pay in regular monthly payments made not later than the fifteenth day of each month. In the latter case, the initial monthly payment shall include all amounts required to be withheld from the earnings of the employee during the preceding calendar month up to the close of the employee's pay period ending closest to the last day of that month, and thereafter each monthly payment shall include amounts withheld from the employee's earnings for services rendered in the interim up to the close of the employee's pay period ending closest to the last day of the preceding calendar month.

(b) Notwithstanding subdivision (a), an employer is not required to pay over an amount withheld until the accumulated amount that has been withheld and not paid over reaches ten dollars (\$10). This subdivision does not apply where it appears that no additional money will be withheld from the employee's earnings pursuant to the particular earnings withholding order.

Comment. Section 723.25 specifies when the amounts withheld pursuant to an order must be paid over to the creditor. Generally this must be done within 15 days after the employee is paid the amount remaining after withholding. See subdivision (a). Subdivision (a), however, permits the employer to elect to make monthly remittances and subdivision (b) permits him to forward payments even less frequently where only small amounts are being withheld.

§ 723.26. Judgment creditor to furnish receipt for payment

723.26. Within 35 days after he receives any payment pursuant to an earnings withholding order, the judgment creditor shall send the judgment debtor a receipt for such payment by first class mail.

Comment. The receipt required by Section 723.26 not only provides the judgment debtor with a record of payments made on the judgment but also enables the judgment debtor to determine whether his employer has paid the amount withheld from his earnings to the judgment creditor.

§ 723.27. Creditor required to notify employer when judgment satisfied

723.27. If the judgment pursuant to which the earnings withholding order is issued is satisfied prior to the end of the withholding period provided in Section 723.22, the judgment creditor shall promptly file a satisfaction of judgment in the court which issued such order and shall send a certified copy of such satisfaction to the judgment debtor's employer.

Comment. Section 723.27 insures that an employer withholding earnings pursuant to an order will be promptly notified when the judgment pursuant to which the order was issued is satisfied. In some cases, the employer will be aware of the satisfaction by virtue of having himself withheld the amount necessary to satisfy the judgment. See Section 723.22(a)(3). However, often the judgment will be satisfied by additional payments from the debtor or through other debt collection procedures instituted by the creditor. In the latter situation, the creditor has the duty to promptly notify the employer of the satisfaction by sending him a certified copy of such satisfaction.

Section 723.27 merely requires the creditor to file a satisfaction of judgment with the court which issued an earnings withholding order. This will not always be the court which rendered the original judgment. As to the general duty of a creditor to furnish a debtor a satisfaction of judgment, including filing in the court which rendered such judgment, see Section 675.

§ 723.28. Withholding order for costs and interest

723.28. Subject to Section 723.109, after the amount stated as owing in the earnings withholding order is paid, the judgment creditor may apply for issuance of another earnings withholding order covering costs and interest that may have accrued since application for the prior order.

Comment. Section 723.28 makes clear that a judgment creditor must apply for another earnings withholding order to recover costs and interest that accrue following the application for a prior order. To illustrate: A creditor obtains a judgment which his debtor does not pay. The creditor applies for and secures an earnings withholding order directed to the debtor's employer. The application and order require payment of only those amounts owing at the time of the application for this order. See Sections 723.121 (application for issuance of earnings withholding order) and 723.125 (content of earnings withholding order). After the application for this order, further costs may, and interest on the judgment will, accrue. If the creditor wishes to recover these amounts by wage garnishment, he must apply for another earnings withholding order, following the same procedure as before. This application and order is subject to the same general requirements as any other withholding order. It is not entitled to any priority over the orders of other creditors, and the creditor is required to comply with the waiting period prescribed by Section 723.109.

§ 723.29. Employer may rely on orders and notices proper on their face

723.29. Notwithstanding any other provisions of this chapter, an employer who complies with any written order or written notice which purports to be given or served in accordance with the provisions of this chapter is not subject to any civil or criminal liability for such compliance unless he is actively participating in a fraud.

Comment. Section 723.29 makes clear that an employer is protected from liability where he complies with an order or written notice which appears proper on its face. Occasionally, through mistake, inadvertence, or even deliberate misconduct, an employer may be sent an order or notice which appears valid but which has been improperly obtained or served. For example, a creditor may violate the 10-day moratorium on service of a second earnings withholding order. See Section 723.109 and Comment thereto. The employer is not required in such circumstances to go beyond the document itself and is not subject to liability where he complies with its directions and is not actively participating in a fraud. The remedy of the injured party in such a case is to proceed against the person who sent the improperly obtained or falsified document.

§ 723.30. Orders for support

723.30. (a) A "withholding order for support" is an earnings withholding order to enforce a court order for the support of any person. A withholding order for support shall be denoted as such on its face.

(b) Notwithstanding any other provision of this chapter:

(1) The restrictions on earnings withholding contained in Section 723.50 do not apply to a withholding order for support.

(2) An employer shall continue to withhold pursuant to a withholding order for support until it expires by its terms or the court orders its termination.

(3) An employer who receives a withholding order for support shall withhold and pay over earnings of the employee pursuant to such order even though he is already required to comply with another earnings withholding order.

(4) An employer shall withhold earnings of an employee pursuant to both a withholding order for support and another earnings withholding order simultaneously, but the amount to be withheld under the other order shall be based on the earnings of the employee remaining after the amount withheld pursuant to the withholding order for support has first been deducted.

Comment. Section 723.30 provides special rules for an earnings withholding order to enforce a court order for the support of any person, including a former spouse of the judgment debtor. An earnings withholding order for support is given a different effect than other withholding orders: It is effective until terminated by the issuing court (it may, of course, be modified); it is unrestricted in amount; even when in effect, it does not necessarily preclude withholding on either a prior or subsequent order.

The amount specified in the earnings withholding order for support is always withheld first from the support obligor's earnings and paid over to the person specified in that order. However, a prior order remains in effect, and a judgment creditor may still obtain an earnings withholding order even where there is already in effect a prior earnings withholding order for support. Thus, where there are two orders in effect--one for support and one for another obligation--the amount withheld for support is deducted from the employee's earnings first. The amount to be withheld pursuant to the other order is then computed based on the earnings remaining after this deduction. See Section 723.50 and the Comment thereto.

Paragraph (1) of subdivision (b) is consistent with prior law. Under prior law, the exemption for 50 percent of a person's earnings did not apply to a judgment based on a support obligation. E.g., Bruton v. Tearle, 7 Cal.2d 48, 57, 59 P.2d 953, (1936)(dictum); Rankins v. Rankins, 52 Cal. App.2d 231, 126 P.2d 125 (1942). Also, under prior law the court had the power to make an equitable division of the debtor's earnings between, for example, his first wife and children and himself and his second family. See Rankins v. Rankins, supra. Paragraph (1) makes the exemption provided by Section 723.50 not applicable and the exemption provided by Section 723.51 applicable to an earnings withholding order for support, thus continuing the substance of the prior case law. A determination that the exemption provided by Section 723.51 applies has no effect on the support order upon which the earnings withholding order is based; only the court that made the original order for support may modify that order. See Civil Code Section 4801. See also Thomas v. Thomas, 14 Cal.2d 355, 94 P.2d 810 (1939). Accordingly, the obligation imposed by the original support order will continue and amounts required to be paid under that order will accumulate until such amounts are paid or the order is modified.

§ 723.31. Orders for state taxes

723.31. (a) As used in this section:

(1) "State" means the State of California and includes any officer, department, board, or agency thereof.

(2) "State tax liability" means a liability, including any penalties and accrued interest and costs, for which the state would be authorized to issue (i) a warrant pursuant to Section 1785 of the Unemployment Insurance Code, or Section 6776, 7881, 9001, 10111, 16071, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code or (ii) a notice or order to withhold pursuant to Section 1755 of the Unemployment Insurance Code, or Section 6702, 7851, 8952, 10051, 11451, 16101, 18807, 26132, 30311, or 32381 of the Revenue and Taxation Code.

(b) A "withholding order for taxes" is one issued pursuant to this section and shall be denoted as such on its face.

(c) A withholding order for taxes may be issued whether or not the state tax liability has been reduced to judgment.

(d) A withholding order for taxes may only be issued where the existence of the state tax liability either appears on the face of the taxpayer's return or has been determined in either an administrative or judicial proceeding in which the taxpayer had notice and an opportunity to be heard. No review of the taxpayer's tax liability shall be permitted in proceedings under this section.

(e) Except as otherwise provided in this section, the provisions of this chapter shall apply to a withholding order for taxes and shall govern the procedures and proceedings concerning such order.

(f) Notwithstanding any other provision of this chapter:

(1) The state may itself issue a withholding order for taxes to collect a state tax liability. The amount required to be withheld pursuant to an order issued under this paragraph shall be specified in the order and shall be not more than fifty percent (50%) of the taxpayer's nonexempt earnings as that term is defined in subdivision (a) of Section 723.50. At the time of issuance, the state shall serve upon the taxpayer (i) a copy of the order and (ii) a notice informing the taxpayer of the effect of the order and his right to review and modification of such order. The taxpayer may apply in the manner provided in Section 723.105 to a court of record in his county of residence for a hearing to claim the exemption provided by Section 723.51. No fee shall be charged for such application. After hearing, the court may modify the withholding order for taxes previously issued, but in no event shall the amount required to be withheld be less than that permitted to be withheld under Section 723.50.

(2) The state may, at any time, apply to a court of record in the county where the taxpayer was last known to reside for the issuance of a withholding order for taxes to collect a state tax liability. Such application shall include an affidavit stating that the state has served upon the taxpayer (i) a copy of the application and (ii) a notice informing the taxpayer of the purpose of the application and his right to appear with regard to such application. The court shall immediately set the matter for hearing and the court clerk shall notify the state

and the taxpayer at least 10 days before the hearing of its time and place. After hearing, the court shall issue a withholding order for taxes which shall require the taxpayer's employer to withhold and pay over all earnings of the taxpayer other than that amount which the taxpayer proves is exempt under Section 723.51, but in no event shall the amount required to be withheld be less than that permitted to be withheld under Section 723.50.

(3) Subject to paragraph (4), an employer who receives a withholding order for taxes shall withhold and pay over earnings of the employee pursuant to such order and shall cease to withhold earnings pursuant to any prior order except a withholding order for support. If an employer ceases to withhold earnings pursuant to a prior order, he shall notify the judgment creditor who obtained the prior order that a supervening withholding order for taxes is in effect.

(4) An employer shall not withhold earnings of an employee pursuant to a withholding order for taxes if a prior withholding order for taxes is in effect.

(5) An employer shall continue to withhold pursuant to a withholding order for taxes until the amount specified in the order has been paid in full.

(g) No method of collection of an unpaid tax liability from the earnings of an employee may be used by the state, except as provided in this chapter.

Code Civ. Proc. § 723.31

Comment. Section 723.31 provides special rules governing earnings withholding orders for the collection of certain state taxes. As to taxes not within the scope of Section 723.31, the tax obligation must be reduced to judgment, and the taxing authority may then obtain an earnings withholding order like any other creditor and such order is treated the same as any other earnings withholding order.

Tax liabilities within scope of Section 723.31. Section 723.31 applies to those tax liabilities for which a warrant may be issued pursuant to Section 1785 of the Unemployment Insurance Code (unemployment compensation contribution) or Section 6776 (sales and use taxes), 7881 (vehicle fuel license tax), 9001 (use fuel tax), 10111 (motor transportation tax), 16071 (gift tax), 18906 (personal income tax), 26191 (bank and corporation taxes), 30341 (cigarette tax), or 32365 (alcoholic beverage tax) of the Revenue and Taxation Code or for which a notice or order to withhold may be given pursuant to Section 1755 of the Unemployment Insurance Code (unemployment compensation contributions) or Section 6702 (sales and use tax), 7852 (vehicle fuel license tax), 8952 (use fuel tax), 10051 (motor transportation tax), 11451 (private car tax), 16101 (gift tax), 18807 (personal income tax), 26132 (bank and corporation taxes), 30311 (cigarette tax), or 32381 (alcoholic beverage tax) of the Revenue and Taxation Code.

Procedure for issuance of order. Special procedures for issuing withholding orders for taxes are provided in Section 723.31. The state taxing

authority may either issue a withholding order for taxes directly without application to the court or may apply to the proper court for a withholding order. Under the first procedure, the order may require the employer to withhold not more than 50% of the taxpayer's nonexempt earnings. However, the taxpayer may apply to the appropriate court and secure a reduction of the amount required to be withheld upon proof that these earnings are essential for support. Under the second procedure, the taxing authority can obtain an order, after court hearing, that requires the employer to withhold all of the employee's earnings in excess of the amount essential for the support of the taxpayer and his family. This latter grant of authority is not intended as a directive that such authority be used generally. This extreme remedy could be harsh in its application and should be used sparingly. Regardless of which procedure is followed, a withholding order for taxes may require an employer to withhold not less than 25% of the taxpayer's nonexempt earnings.

Subdivision (d) makes clear that, regardless of which procedure is followed, no withholding order for taxes may be issued unless the state tax liability either appears on the face of the taxpayer's return or has been determined in either an administrative or judicial proceeding in which the taxpayer had notice and an opportunity to be heard concerning such liability. However, no review of the taxpayer's tax liability shall be permitted in proceedings under this section.

Few state tax liabilities are reduced to judgment. Subdivision (c) recognizes this and permits continuation of the present practice.

Form of order. The withholding order for taxes must be denoted as such on its face. The form of the order must comply with rules of the Judicial Council. See Section 723.126.

Priority. A withholding order for taxes takes priority over any prior order except one for support or another withholding order for taxes. As indicated in the Comment to Section 723.30, a support order always takes priority over any other order. Thus, where a support order is in effect and a subsequent tax order is received, the employer will continue to withhold for support, and the amount withheld pursuant to the tax order will be dependent upon the amount of earnings left after subtracting the amount withheld pursuant to the support order. See the Comments to Sections 723.30 and 723.50. However, where the prior order is for the collection of a debt other than for taxes or support, the tax order displaces the prior order, and the employer must withhold pursuant to the tax order until the tax debt is completely paid. If the earnings withholding order for taxes is satisfied during the withholding period of the prior order (Section 732.22), the employer must then again withhold pursuant to the prior order. Where there is a prior tax order in effect, the second tax order is void; the employer may not withhold pursuant to the second order and must properly notify the agency which issued or obtained the second order of the reason for his action.

Procedure provided exclusive. The procedure for withholding earnings for the collection of state tax liability provided in the Employees' Earnings Protection Law is exclusive. The authorization, for example, to direct orders to third persons who owe the taxpayer money found in Section 18807 (personal income tax) and Section 26132 (bank and corporation tax) of the Revenue and Taxation Code is limited by Section 723.31. Subdivision (g) of Section 723.31 makes this clear. Section 723.31 deals, however, only with orders for the collection of certain state taxes. The collection of federal taxes is accomplished pursuant to federal law and cannot be limited by state law. See Int. Rev. Code of 1954, § 7334(c). As to state and local taxes not within the scope of Section 723.31, the tax liability is treated the same as any other obligation. See discussion supra.

§ 723.32. Lien created by service of earnings withholding order

723.32. Service of an earnings withholding order creates a lien upon the earnings required to be withheld pursuant to such order. Such lien shall continue for a period of one year from the date such earnings became payable.

Article 3. Restrictions on Earnings Withholding

§ 723.50. Maximum amount of earnings that may be withheld

723.50. (a) As used in this section, "nonexempt earnings" for any workweek means the earnings of the judgment debtor for that workweek less the sum of the following:

(1) An amount equal to the amount that would be withheld for federal income tax purposes from the same amount of earnings of a single person who claims one exemption.

(2) An amount determined by the State Administrator which is representative of the amount that would be withheld for federal social security tax purposes from such amount of earnings.

(3) An amount determined by the State Administrator which is representative of the amount that would be withheld for state disability insurance taxes from such amount of earnings.

(4) An amount equal to the amount that would be withheld for state income tax purposes* from the same amount of earnings of a single person who claims one exemption.

(5) An amount equal to thirty (30) 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.

(b) Except as otherwise provided in Sections 723.30, 723.31, and 723.106, the maximum amount of the earnings of a judgment debtor in any workweek which can be withheld pursuant to this chapter is twenty-five percent (25%) of his nonexempt earnings. If the amount computed

*This is drafted in anticipation of the adoption of a state system for withholding of personal income taxes.

under this subdivision is not a multiple of one dollar (\$1), fractional amounts less than one-half dollar shall be disregarded and fractional amounts of one-half dollar or more shall be rounded upward to the next higher whole dollar. If the total amount withheld is not more than one dollar (\$1), nothing shall be withheld.

(c) The State Administrator shall prescribe by regulation the method of computing the amount to be withheld in the case of earnings for any pay period other than a week, which method shall be substantially equivalent in effect to that prescribed in subdivision (b).

(d) The State Administrator shall prepare withholding tables for determining the amount to be withheld from the earnings of employees for representative pay periods. The tables may prescribe the amounts to be withheld according to reasonable earnings brackets. The tables prepared by the State Administrator pursuant to this subdivision shall be used to determine the amount to be withheld in all cases where the tables permit computation of the amount to be withheld.

Comment. Section 723.50 provides the standard exemption applicable to all earnings withholding orders other than orders for support, certain orders for taxes, and orders based on multiple sources of earnings. See Sections 723.30 (support); 723.31 (taxes); 723.106 (multiple sources of earnings). See also Section 723.51 (exemption obtained by special hardship showing).

Section 723.50 reflects policies similar to those underlying Sections 302 and 303 of the federal Consumer Credit Protection Act. In determining the amount of the debtor's earnings subject to garnishment, under both this section and the federal law, certain basic amounts withheld pursuant to law

are first deducted. Federal law requires the deduction of all amounts actually "required by law to be withheld." For example, the amount actually withheld for federal income tax purposes from the debtor's earnings is deducted in determining his earnings subject to garnishment ("disposable earnings"). Thus, a debtor claiming a greater number of exemptions will have less withheld and therefore more subject to garnishment. This produces the anomalous situation that a debtor with a large family and greater needs may have more earnings garnished than a single debtor with the same gross income and with more limited needs. Moreover, the federal statute does not elaborate upon what are considered to be "amounts required by law to be withheld." To alleviate these problems, Section 723.50 either specifies precisely the amounts to be deducted in determining the portion of the debtor's earnings which are subject to garnishment ("nonexempt earnings") or directs the State Administrator to fix such specific deductions. These items are related to the types of deductions made under federal law; i.e., they are based on the amounts withheld for federal and state income taxes, social security, and state disability insurance. See paragraphs (1)-(4) of subdivision (a). However, the amount deducted to determine nonexempt earnings is fixed according to a formula and is not necessarily the amount actually deducted from the debtor's earnings. One of the major benefits of this scheme is that it permits tables to be prepared which indicate the exact amount to be withheld from any given amount of earnings. Subdivision (d) directs the State Administrator to prepare tables which will be distributed to every employer required to withhold earnings. See Section 723.107. An employer therefore need not make any computations but will simply withhold pursuant to an earnings withholding order the amount listed in the tables provided him.

Both the federal scheme and Section 723.50 make some provisions for the effect of inflation. The federal statute, however, merely provides a floor based on the federal minimum wage. That is, the federal statute does not permit the creditor to reduce the debtor's weekly disposable earnings below an amount equal to thirty times the federal minimum wage. As the federal minimum wage is increased, this floor is increased accordingly. (Under the current federal law, if a debtor's disposable earnings are less than forty-eight dollars per week, no garnishment is permitted; if his disposable earnings are between forty-eight and sixty-four dollars, all his disposable earnings above forty-eight dollars are subject to garnishment; if his disposable earnings are more than sixty-four dollars a week, twenty-five percent of his disposable earnings are subject to garnishment.) This floor is not an exemption excluded from every debtor's earnings. In contrast, paragraph (5) of subdivision (a) provides a basic minimum exemption that is always deducted in determining nonexempt earnings.

Where an earnings withholding order for support is in effect, the amount withheld pursuant to such order is deducted from the earnings of the employee before computing the amount to be withheld pursuant to any other order. See Section 723.30 and Comment thereto. Suppose, for example, that an employee's nonexempt earnings are \$100 and a withholding order for support is in effect which requires \$40 to be withheld. In determining the maximum amount which may be withheld pursuant to another earnings withholding order, the debtor is treated as having \$60 of nonexempt earnings. Thus, under an ordinary earnings withholding order, \$15 may be withheld ($25\% \times \60); under a withholding order for taxes issued directly by the state, \$30 may be withheld ($50\% \times \60). See Section 723.31.

§ 723.51. Amounts essential for family support exempt

723.51. The portion of his earnings which a judgment debtor proves is essential for the support of himself or his family is exempt from levy under this chapter. The judgment debtor's accustomed standard of living or a standard of living "appropriate to his station in life" are not the criteria for measuring the debtor's claim for exemption under this section.

Comment. Section 723.51 is based on the exemption formerly provided by subdivision (c) of Section 690.6. However, the standard for the exemption provided here is more restrictive than former subdivision (c) of Section 690.6 ("essential for support" as compared to "necessary for the use"). This strict standard recognizes that the liberal exemption provided by Section 723.50 should be adequate except in extremely rare and unusual cases. This section is not intended to be used for the maintenance of a life style appropriate to the debtor's station in life or an accustomed standard while the debtor owes money on unsatisfied judgments against him.

Former subdivision (c) of Section 690.6 prevented the debtor from claiming the support exemption if the debt sought to be collected was:

(1) Incurred by the debtor, his wife, or his family for the common necessities of life.

(2) Incurred for personal services rendered by any employee or former employee of the debtor.

In actual operation, the effect of the "common necessities" rule in California was to decide the question whether competing creditors could reach a debtor's earnings neither from the debtor's point of view (the needs of the debtor's dependents were ignored) nor from the creditor's viewpoint (no consideration was given to whether the creditor was careful to advance credit

to the debtor only after ascertaining that his credit worthiness showed an ability to pay or whether the creditor provided the debtor with quality goods or services. Rather, the claims of competing creditors for earnings could be decided on the technical, and usually irrelevant, issue of what was a "common necessary of life." See, e.g., Los Angeles Finance Co. v. Flores, 110 Cal. App.2d Supp. 850, 243 P.2d 139 (1952). The "common necessary" exception has accordingly been eliminated.

The exception which permitted a creditor who was a former employee of the debtor to take a portion of the debtor's wages even though the debtor could show the money was necessary for the support of his family has also been eliminated. This exception was largely irrelevant to the low income debtor, for such a debtor has no employees, and there is no indication that this provision was actually used by creditors. See generally Recommendation Relating to Attachment, Garnishment, Exemptions From Execution: Employees' Earnings Protection Law (1971).

Article 4. Procedure for Issuance of
Earnings Withholding Orders

§ 723.100. Judicial Council authorized to prescribe practice and procedure

723.100. The Judicial Council may provide by rule, not inconsistent with this chapter, for practices and procedures in proceedings under this article.

Comment. Article 4 outlines generally the procedure for issuance and review of an earnings withholding order; however, Section 723.100 authorizes the Judicial Council to provide by rule for such special practices and procedures which it believes necessary or desirable for proceedings under this article.

§ 723.101. Service; recovery of costs

723.101. (a) Service under this article shall be by personal delivery or by first-class mail, airmail, registered mail, or certified mail, postage prepaid.

(b) Notwithstanding Section 1032.6, a judgment creditor is not entitled to the costs of service under this chapter which exceed one dollar (\$.1).

Comment. Subdivision (a) of Section 723.101 specifies the means by which service must be accomplished under this chapter. Although personal service is authorized, it is anticipated that the convenience and economy of service by mail will result in the overwhelming use of this method. In any event, subdivision (b) makes clear that, regardless of which means is actually used, the recovery of the costs of service is limited to one dollar.

§ 723.102. Application for issuance of earnings withholding order

723.102. (a) A judgment creditor may apply for the issuance of an earnings withholding order by filing with the clerk of the court from which the order is sought an application in the form prescribed by the Judicial Council.

(b) The application for an earnings withholding order shall be made to the court which entered the judgment pursuant to which the earnings withholding order is sought if the address of the judgment debtor's last known residence is within 150 miles of the city where that court is located.

(c) In cases not covered by subdivision (b), the application shall be made to a court of record in the county where the judgment debtor was last known to reside. An application filed under this subdivision shall be accompanied by an abstract of the judgment in the form prescribed by Section 674.

Comment. Subdivisions (b) and (c) of Section 723.102 are based on Section 722 (proceedings supplemental to execution). For the required content of the application, see Section 723.121. For special provisions regarding the issuance of a withholding order for taxes, see Section 723.31.

§ 723.103. Notice and forms to be sent to judgment debtor

723.103. (a) At the time of filing an application for issuance of an earnings withholding order, the judgment creditor shall serve the following upon the judgment debtor:

(1) A copy of the application for the earnings withholding order.

(2) A notice of the application.

(b) Service upon the judgment debtor shall be made at his last known residence address or, if no such address is known to the judgment creditor, the documents may be mailed to the judgment debtor in an envelope marked "Personal--Important Documents" addressed to him at his place of employment.

(c) The failure of the judgment debtor to receive the documents does not affect the validity of a properly issued earnings withholding order.

Comment. Section 723.103 is designed to give the judgment debtor notice of the imminence of an earnings withholding order so that he will be able to assert any facts which may affect the issuance or the amount of the order as soon as conveniently possible. For requirements for the application for an order and the notice of application, see Sections 723.121 and 723.122. For methods of service, see Section 723.101.

If the judgment creditor fails to comply with this section, he may be subject to the ordinary sanctions for abuse of process and contempt, and any order issued may be subject to attack on grounds of intrinsic fraud. However, subdivision (c) makes clear that, even though the judgment debtor fails to receive the notice and forms, the validity of the earnings withholding order is not affected.

§ 723.104. Issuance of earnings withholding order

723.104. Upon application of a judgment creditor, the court clerk shall promptly issue an earnings withholding order in the form prescribed by Section 723.125.

Comment. Section 723.104 makes clear that an earnings withholding order shall be promptly issued on the ex parte application of a judgment creditor. The debtor may request a hearing pursuant to Section 723.105, have such order modified or terminated, and even recover from the creditor amounts withheld and paid over pursuant to such order, but this does not affect the initial issuance of the order.

§ 723.105. Hearing on application of judgment debtor; court order after hearing; recovery of amounts already withheld and paid over

723.105. (a) A judgment debtor may, at any time, apply for a hearing to claim an exemption under this chapter if:

(1) No prior hearing has been held with respect to the earnings withholding order; or

(2) There has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order.

(b) Application for a hearing shall be made by filing an original and one copy of the judgment debtor's application for hearing and, if he claims the exemption provided by Section 723.51, his financial statement.

(c) The hearing shall be held within 15 days after the date the application is filed. The court clerk shall notify the judgment debtor and the judgment creditor at least 10 days before the hearing of its time and place and shall include with the notice to the judgment creditor a copy of the application for hearing and the financial statement, if any.

(d) If, after hearing, the court orders that the earnings withholding order be modified or terminated, the clerk shall promptly send a copy of the modified earnings withholding order to the employer of the judgment debtor or notify the employer in writing that the earnings withholding order has been terminated. The court may order that the earnings withholding order be terminated as of a date which precedes the date of hearing.

(e) Except as provided in Section 723.106, if the earnings withholding order is terminated by the court, unless the court otherwise orders, the judgment creditor may not apply for another earnings withholding order directed to the same employer with respect to the same judgment debtor for a period of 125 days following the date of the earnings withholding order.

(f) If an employer has withheld and paid over amounts pursuant to an earnings withholding order after the date of termination of such order, the judgment debtor may recover such amounts only from the judgment creditor. If the employer has withheld amounts pursuant to an earnings withholding order but has not paid over such amounts to the judgment creditor, after termination of the order, the judgment debtor may recover such amounts from his employer.

Comment. Section 723.105 outlines generally the procedure for the hearing of a debtor's claims in opposition to the issuance of an earnings withholding order. Section 690.50 is not applicable.

A debtor is not limited as to when he may apply for a hearing; however, unless there has been a material change in either his income or his needs, he may apply only once during the period the order is in effect. See subdivision (a). A similar limitation applies to a judgment creditor who may not apply for the issuance of an earnings withholding order directed to the same employer for the same debtor for 125 days following the judicial termination of a prior order except in connection with a multiple employment or unless the court orders otherwise. See subdivision (e).

An application is made by the debtor by filing an original and one copy of his application and, if necessary, his financial statement. Subdivision (b). For the form of these documents, see Sections 723.123 and 723.124. Upon receipt of these documents, the matter is set for a prompt hearing

and the clerk is required to send the copies of the application and financial statement to the creditor and notice of the hearing to both parties. See subdivision (c).

After hearing, the court may order that the earnings withholding order be modified or even terminated. The date fixed for termination of the order may precede the date of the hearing. See subdivision (d). Where the date of termination is made retroactive, an employer may have already withheld and paid over pursuant to the earnings withholding order prior to receipt of notice of termination. Subdivision (d) of Section 723.22 makes clear that the employer is not liable to the debtor for such amounts and subdivision (f) of this section authorizes the debtor to recover such amounts from his creditor. Of course, where amounts have been withheld but not yet paid over to the creditor, the debtor can recover these amounts from the employer. See subdivision (f).

§ 723.106. Multiple sources of earnings

723.106. (a) As used in this section, the term "earnings" includes all compensation, including tips, for personal services performed by an employee, whether such compensation is received from an employer or from others.

(b) Where a judgment debtor has earnings from more than one source, an earnings withholding order may be issued based on the debtor's total earnings but directed to one employer.

(c) An employer shall not be required to withhold pursuant to this section, an amount in excess of the lesser of the following:

(1) The amount of earnings otherwise payable by that employer to the judgment debtor.

(2) An amount equal to that which would be permitted to be withheld if the total earnings of the debtor were used in computing non-exempt earnings under Section 723.50.

(d) A judgment creditor may, at any time, request a hearing to prove that the judgment debtor receives earnings from more than one source and that the judgment creditor should be granted an order requiring one employer to withhold a greater amount from the earnings payable by that employer than he would have to withhold were he the judgment debtor's only source of earnings. The request shall set out the facts on which the judgment creditor's claim is based. The request shall be made to the court to which application is made for the earnings withholding order.

(e) The court shall set the matter for hearing after receiving the written request together with an affidavit stating that the judgment

creditor has served a copy of the request for hearing in the manner provided in Section 723.101. The court clerk shall notify the judgment debtor and the judgment creditor at least 10 days before the hearing of its time and place.

(f) The judgment creditor has the burden of proof on the issue of his right to have a greater amount withheld by one employer pursuant to this section. If the court finds that the judgment creditor is entitled to an order requiring an employer to withhold a greater amount from the judgment debtor's earnings than the employer would have had to withhold were he the judgment debtor's only source of earnings, the court shall make an appropriate order.

(g) The hearing provided by this section may be combined with a hearing under Section 723.105. If an earnings withholding order has previously been issued under this section, the court, after hearing held at the request of either the judgment debtor or the judgment creditor, may modify the prior order, and the clerk shall promptly send a copy of the revised order to the employer of the judgment debtor.

Comment. Section 723.106 affords a creditor an opportunity to require an employer to withhold more than he would otherwise withhold by a showing that the debtor has a greater source of earnings than that one employer. This can occur both where the debtor has two or more employers and where he is receiving "earnings," such as tips which are included here as earnings for the purpose of computing the amount of earnings which may be garnished. It should be noted that the term "earnings" used here is still limited to compensation for services rendered by an employee, i.e., an employee-employer relationship

is involved, even though the compensation for the work performed may not come directly from the employer. Where there are two employers, the creditor may, of course, apply for separate withholding orders directed to each; however, there may be advantages for both the creditor and debtor in having only one of these two employers withhold the total amount garnishable from the debtor's combined earnings from both employers.

Although subdivision (d) permits a creditor to request a hearing under this section "at any time," after the matter has been heard once, a second hearing should not be required unless and until there has been a change in circumstances that warrants reconsideration of the issues.

Occasionally, in the multiple employment situation, only one employer will be withholding pursuant to an order based on the combined earnings of a debtor and a second employer will be served with an earnings withholding order by a second creditor--both of the latter being unaware of the prior order. In such circumstances, it is up to the debtor to claim relief from the second order pursuant to Section 723.105. It should be noted in this regard that Section 723.105 authorizes the court to terminate the second order retroactively, and the debtor may recover amounts already paid over to the second creditor.

§ 723.107. Transmittal of order and information to employer

723.107. (a) The earnings withholding order, together with the form for an employer's return and the informational pamphlet and withholding tables published by the State Administrator, shall be served upon the designated employer by the judgment creditor.

(b) The State Administrator may promulgate rules and regulations permitting waiver of or variances from the requirements of subdivision (a).

(c) An order not served upon the employer within 45 days after its date of issuance is void.

Comment. Section 723.107 prescribes what must be served upon the employer by the judgment creditor and when such service must be accomplished to be effective. The form for the employer's return is prescribed in Section 723.127.

Service under this section will generally be accomplished by mail. Failure of the employer to accept such service can be dealt with by both the court (see Section 723.159) and the State Administrator. See Sections 723.154-723.158.

§ 723.108. Employer's return

723.108. Any employer who receives an earnings withholding order shall complete the employer's return on the form provided by the judgment creditor and shall mail it to the judgment creditor within 15 days from the date he receives the earnings withholding order.

Comment. Section 723.108 directs every employer to fill out and mail an Employer's Return to every judgment creditor who serves an earnings withholding order. Such a return must be made even though the order is not given effect. See Comment to Section 723.23. For the form of the return, see Section 723.127.

§ 723.109. Limitation on obtaining additional earnings withholding orders

723.109. If an employer withholds earnings pursuant to an earnings withholding order, the judgment creditor who obtained such withholding order may not serve another withholding order on the same employer requiring him to withhold earnings of the same employee during the 10 days following the expiration of the prior earnings withholding order.

Comment. Section 723.109 precludes a creditor who has obtained an earnings withholding order which has gone into effect from serving another order during the 10-day period following the expiration of his prior order. The purpose of this limitation is to give other creditors a 10-day period during which they can serve their earnings withholding orders while the original creditor is precluded from competing with them. The original creditor may apply for the second earnings withholding order either before or after his prior order expires. But service of the second order while the original order is in effect will be ineffective under Section 723.23, and service during the 10-day period following expiration of the original order is prohibited by Section 723.109. Even though a creditor violates the 10-day moratorium period, the employer may act pursuant to what he has received. See Section 723.29. Of course, after the expiration of the 10-day period, the original creditor is treated like any other creditor.

It should be noted that each agency of the state is considered a separate entity for the purposes of this chapter. See Section 723.11(e). Hence, even though one agency has been making collection, a second agency may serve an earnings withholding order within the 10-day period provided in this section.

Article 5. Forms; Instructional Pamphlet; Withholding Table

§ 723.120. Judicial Council to prescribe forms

723.120. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this chapter and only such forms may be used to implement this chapter.

Comment. Section 723.120 requires the Judicial Council to prescribe the forms necessary for the purposes of this chapter. Various sections prescribe information to be contained in the forms; but, subject to these requirements, the Judicial Council has complete authority to adopt and revise the forms as necessary.

§ 723.121. Application for earnings withholding order

723.121. The "Application for Issuance of Earnings Withholding Order" shall be executed under oath and shall include all of the following:

- (a) The name and address of the judgment creditor.
- (b) The date and place where the judgment is entered.
- (c) The amount sought to be collected, indicating the amount of the judgment, plus additional accrued items, less partial satisfactions, if any.
- (d) The name and address of the employer to whom the order will be directed.
- (e) The name and address of the person to whom the withheld money is to be paid.
- (f) The name and address of the person designated by the judgment creditor to receive notices.
- (g) A statement that the applicant has no information or belief that the indebtedness for which the order is sought has been discharged by a discharge granted to the judgment debtor under the National Bankruptcy Act or that the prosecution of the proceeding has been stayed in a proceeding under the National Bankruptcy Act.
- (h) A statement that the applicant has complied with the requirements of Section 723.103.

Comment. Although Section 723.121 requires the application to be executed "under oath," this may generally be done by a statement signed under penalty of perjury. See Section 2015.5. The actual form for the application is prescribed by the Judicial Council. See Section 723.120.

§ 723.122. Notice of application

723.122. In addition to other information required by the rules and regulations of the State Administrator, the "Notice of the Application for Issuance of an Earnings Withholding Order" shall inform the judgment debtor of all of the following:

(a) The judgment creditor has asked the court to order the named employer to withhold from the earnings of the judgment debtor the maximum amounts allowed by law and to pay these amounts over to the person specified in the application for the order in payment of the judgment described in the application.

(b) The maximum amounts allowed by law to be withheld pursuant to Section 723.50.

(c) No amount can be withheld from the earnings of a judgment debtor (1) for a debt which he can prove has been discharged by a discharge granted to him under the National Bankruptcy Act or (2) where he can prove that further proceedings for the collection of such debt have been stayed in a proceeding under the National Bankruptcy Act.

(d) No amount can be withheld from the earnings of a judgment debtor which he can prove is essential for the support of himself or his family.

(e) If a judgment debtor wishes a court hearing to prove that amounts should not be withheld from his earnings, he must file with the clerk of court two copies of the "Application of Judgment Debtor for Hearing," and, in addition, if he claims the exemption referred to in paragraph (d), he must also file with the clerk two copies of the "Judgment Debtor's Financial Statement."

Comment. The actual form for the notice of application is prescribed by the Judicial Council. See Section 723.120.

§ 723.123. Form for application of judgment debtor for hearing

723.123. The "Application of Judgment Debtor for Hearing" shall be executed under oath. In addition to other matters required by the Judicial Council, where the judgment debtor claims the exemption provided by Section 723.51, unless the judgment debtor claims that all his earnings are essential for the support of himself or his family, the application for a hearing shall indicate how much the judgment debtor believes should be withheld from his earnings each pay period by his employer pursuant to the earnings withholding order.

Comment. Although Section 723.123 requires the application to be executed "under oath," this may generally be done by a statement signed under penalty of perjury. See Section 2015.5. The actual form for the application is prescribed by the Judicial Council. See Section 723.120.

§ 723.124. Judgment debtor's financial statement

723.124. The "Judgment Debtor's Financial Statement" shall be executed under oath and, in addition to other information which may be required by the Judicial Council, shall include all of the following information:

(a) Name, age, and relationship of all persons dependent upon judgment debtor's income.

(b) All sources of the judgment debtor's earnings and other income and the amounts of such earnings and other income.

(c) All sources and the amounts of earnings and other income of the persons listed in subdivision (a).

(d) A listing of all assets of the judgment debtor and of the persons listed in subdivision (a) and the value of such assets.

(e) All outstanding obligations of the judgment debtor.

(f) Any extraordinary prospective expenses that would justify a reduction in the amount of earnings that would otherwise be withheld pursuant to Section 723.50.

(g) Whether any earnings withholding orders are in effect for the judgment debtor or the persons listed in subdivision (a).

Comment. Although Section 723.124 requires the Financial Statement to be executed "under oath," this may generally be done by a statement signed under penalty of perjury. See Section 2015.5. The actual form for the Financial Statement is prescribed by the Judicial Council. See Section 723.120.

§ 723.125. Earnings withholding order

723.125. In addition to other matters required by the Judicial Council, the "Earnings Withholding Order" shall include all of the following:

(a) The name and address of the employer to whom the order is directed.

(b) The date and place where the judgment was entered and the name of the judgment creditor and judgment debtor.

(c) The net balance owing on the judgment.

(d) A description of the withholding period and an order to the employer to withhold from the earnings of the judgment debtor the amount required by law to be withheld or the amount specified in the order, as the case may be, during such period.

(e) An order to the employer to pay over to the judgment creditor or his representative at a specified address the amount required to be withheld pursuant to the order in the manner and within the times provided by law.

(f) An order that the employer fill out the "Employer's Return" and return it by first-class mail to the judgment creditor or his representative at a specified address within 15 days after the employer receives the earnings withholding order.

Comment. Section 723.125 specifies the information to be included in the Earnings Withholding Order. The form of the order is prescribed by the Judicial Council. See Section 723.120. Special forms are prescribed for earnings withholding orders for support or taxes. See Section 723.126.

§ 723.126. Earnings withholding orders for support or taxes

723.126. The requirements of Section 723.125 do not apply to an earnings withholding order for taxes or for support. The Judicial Council shall prescribe the form and contents of withholding orders for taxes or for support.

Comment. Although the information listed in Section 723.125 will be necessary in an earnings withholding order for support or taxes, such orders have special rules concerning priority, duration, and amounts that may be withheld. See Sections 723.30 and 723.31. Accordingly, the form and content of these special orders is left to determination by the Judicial Council.

§ 723.127. Employer's return

723.127. (a) The "Employer's Return" shall be executed under oath and, in addition to other matters required by rules and regulations of the State Administrator, the form for the return provided to the employer shall state all of the following information:

(1) The name and address of the person to whom the form is to be returned.

(2) A direction that the form be mailed to such person no later than 15 days after the date the employer receives the earnings withholding order.

(3) The name and address of the judgment debtor and, if known, his social security number.

(b) In addition, the employer's return form shall require the employer to supply all of the following information:

(1) Whether the judgment debtor is now employed by the employer or whether the employer otherwise owes him earnings.

(2) If the judgment debtor is employed by the employer or the employer otherwise owes him earnings, the amount of his earnings for the last pay period and the length of this pay period.

(3) Whether the employer is presently required to comply with a prior earnings withholding order and, if so, the court which issued such order, the date it was issued, and the expiration date of such order.

Comment. Section 723.127 specifies the information to be included in the Employer's Return. The form for the return is prescribed by the Judicial Council. See Section 723.120. The return may be executed under penalty of perjury. See Section 2015.5.

§ 723.128. Informational pamphlet and withholding tables

723.128. (a) The State Administrator shall prepare an informational pamphlet for employers and revise or supplement it to reflect changes in the law or rules regulating the withholding of earnings.

(b) The State Administrator shall publish the informational pamphlet and the withholding tables adopted by him pursuant to Section 723.50. He may impose a charge for copies sufficient to recover the cost of printing.

Comment. Subdivision (a) of Section 723.128 requires the preparation of an informational pamphlet that contains the information necessary so that an employer may comply with the law. The creditor mails the employer a copy of the pamphlet with the earnings withholding order. See Section 723.107.

Subdivision (b) permits the State Administrator to recover the cost of printing informational pamphlets and withholding tables.

Article 6. Administration and Enforcement

§ 723.150. State Administrator

723.150. Except for those duties required of the Judicial Council, the State Administrator shall administer and enforce this chapter.

Comment. The State Administrator is the Department of Industrial Relations. See Section 723.11 (defining "State Administrator").

§ 723.151. Rules and regulations

723.151. The State Administrator, in accordance with the provisions of Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code, shall adopt, amend, and repeal such rules and regulations as are reasonably necessary for the purpose of administering and enforcing this chapter and as are not inconsistent with this chapter.

Comment. Section 723.151 requires that rules and regulations be adopted, amended, and repealed in accord with the Administrative Procedure Act.

§ 723.152. Investigations and enforcement powers generally

723.152. For the performance of his duties, the State Administrator has the powers conferred by Article 2 (commencing with Section 11180) of Chapter 2, Part 1, Division 3, Title 2 of the Government Code.

Comment. Section 723.152 makes clear that the State Administrator, in performing his duties under this chapter, has the general authority given the head of each state department to make investigations and prosecute actions.

§ 723.153. Liaison with federal administrator

723.153. The State Administrator may perform all acts required by the Administrator of the Wage and Hour Division of the United States Department of Labor as conditions to exemption of this state from the earnings garnishment provisions of the Consumer Credit Protection Act of 1968, including, but not limited to:

(a) Representing and acting on behalf of the state in relation to the Administrator of the Wage and Hour Division and his representatives with regard to any matter relating to, or arising out of, the application, interpretation, and enforcement of the laws of this state regulating withholding of earnings.

(b) Submitting to the Administrator of the Wage and Hour Division in duplicate and on a current basis, a certified copy of every statute of this state affecting earnings withholding, and a certified copy of any decision in any case involving any of those statutes, made by the Supreme Court of this state.

(c) Submitting to the Administrator of the Wage and Hour Division any information relating to the enforcement of earnings withholding laws of this state which he may request.

Comment. Section 723.153 authorizes the State Administrator to do whatever is required by the federal administrator to obtain and maintain a state exemption from the earnings garnishment provisions of the Consumer Credit Protection Act. A similarly broad grant of power as that contained in the first paragraph of Section 723.153 is found in Government Code

Code Civ. Proc. § 723.153

Section 25210 (county participation in Economic Opportunity Act of 1964).
Subdivisions (a), (b), and (c) are based on the language of 29 Code of
Federal Regulations Section 870.55(a), requiring the State Administrator
to act as liaison with the federal administrator.

§ 723.154. Warning to violator

723.154. If the State Administrator determines that the public interest will be adequately served by such action, he may give a person who violates this chapter a suitable written notice or warning.

Comment. Section 723.154 is based on Health and Safety Code Sections 26332 and 26555.

§ 723.155. Conference with suspected violator

723.155. If the State Administrator has reason to believe that any violation of this chapter has occurred or is threatened, he may hold an informal conference with the suspected violator or his representative for the purpose of ascertaining the facts relating to the suspected violation and, if it appears that a violation has occurred or is threatened, arriving at an adequate and effective means of correcting or preventing the violation.

Comment. Section 723.155 is based on Section 12533 of the Government Code, which relates to the powers of the Attorney General in connection with health care service plans.

§ 723.156. Cease and desist order

723.156. (a) The State Administrator, acting in the name of the people of the State of California, may issue an order directing any person to show cause why an order should not be issued directing such person to cease and desist from engaging in any act or practice in violation of any provision of this chapter.

(b) Within 15 days after service of the order to show cause, the respondent may request a hearing on the question of whether acts or practices in violation of this chapter have occurred. The hearing shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and judicial review shall be available as provided by Section 11523 of the Government Code.

(c) If the person fails to show cause why the cease and desist order should not be issued, the State Administrator may issue the order.

Comment. Section 723.156 is based in part on Section 12534 of the Government Code, which relates to powers of the Attorney General in connection with health care service plans.

§ 723.157. Injunctive relief; failure to comply with cease and desist order

723.157. In case of any violation of this chapter, if the violator does not comply with a cease and desist order issued pursuant to Section 723.156, the State Administrator, acting in the name of the people of the State of California, may institute a proceeding to obtain injunctive relief or other appropriate relief in the superior court in and for the county in which the violation occurs or in which the principal place of business of the violator is located. Any proceeding under this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the State Administrator shall not be required to allege facts tending to show the lack of an adequate remedy at law or tending to show irreparable damage or loss.

Comment. Section 723.157 is based on Section 12535 of the Government Code, which relates to powers of the Attorney General in connection with health care service plans.

§ 723.158. Injunctive relief pending administrative adjudication

723.158. Whenever the State Administrator has reasonable cause to believe that there has been any violation of this chapter and that substantial and irreparable injury will be unavoidable if injunctive relief is not obtained pending final adjudication pursuant to Section 723.15⁶, the State Administrator, acting in the name of the people of the State of California, may institute a proceeding to obtain such injunctive relief or other appropriate relief in the superior court in and for the county in which the violation occurs or in which the principal place of business of the violator is located. Any proceeding under this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the State Administrator shall not be required to allege facts tending to show the lack of an adequate remedy at law.

Comment. Section 723.158 is based in part on Section 12535 of the Government Code, which relates to powers of the Attorney General in connection with health care service plans. This section makes clear the power of the State Administrator to obtain judicial injunctive relief in emergency circumstances where normal administrative procedures would be inadequate.

§ 723.159. Enforcement of orders

723.159. Any order of the court made pursuant to this chapter may be enforced by the court by contempt or other appropriate order.

Comment. Section 723.159 makes clear the power of the court to compel obedience to its orders. See Sections 128 and 1209(5). See generally Part 3, Title 5 (Sections 1209-1222).

§ 723.160. Fraudulent withholding by employer

723.160. If an employer withholds earnings pursuant to this chapter and, with the intent to defraud either the judgment creditor or the judgment debtor, fails to pay such withheld earnings over to the judgment creditor, the employer is guilty of a misdemeanor.

Comment. Section 723.160 is based on Labor Code Section 227 (failure to make agreed payments to health, welfare, or similar fund).

§ 723.161. Remedies of judgment creditor

723.161. If an employer fails to withhold or to pay over the amount he is required to withhold and pay over pursuant to this chapter, the judgment creditor may bring a civil action against such employer to recover such amount.

Comment. Section 723.161 authorizes suit by a creditor against an employer both where the employer fails to withhold properly and where he fails to pay over amounts withheld. This remedy is independent of the procedure provided in Chapter 2 (Sections 717-723) of this Part and Section 723.161 makes clear that supplemental proceedings under Chapter 2 are not a prerequisite to suit by the creditor against the employer. Whether or not Chapter 2 is applicable in this situation is a matter not dealt with here.

Of course, in addition to the remedy Section 723.161 provides to the judgment creditor, the court has the power to compel obedience to its orders through exercise of the contempt power. See Section 723.159 and Comment thereto.

§ 723.162. Fees of clerk

723.162. (a) The fee for filing an application for an earnings withholding order under subdivision (a) of Section 723.101 is two dollars (\$2).

(b) The fee for filing an application and abstract under subdivision (b) of Section 723.101 is two dollars (\$2) when filed in a justice court and four dollars (\$4) when filed in a superior or municipal court.

(c) Except as provided in Section 723.24, no other fees may be charged under this chapter.

FINANCIAL CODE

Financial Code Section 15406 (repealed)

Sec. 12. Section 15406 of the Financial Code is repealed.

~~15406.--The-shares-and-certificates-for-funds-received-of
members-of-any-credit-union-and-all-the-accumulation-on-such
shares-and-certificates-are-exempt-from-sale-on-execution-and
proceedings-supplementary-thereto,-to-the-amount-of-one-thousand
five-hundred-dollars-(\$1,500)+~~

Comment. Section 15406 is superseded by the provisions of Sections 690.7 and 690.7-1/2 of the Code of Civil Procedure. See Section 690.7, and Comment thereto.

LABOR CODE

Labor Code § 300 (amended)

Sec. 13. Section 300 of the Labor Code is amended to read:

300. (a) As used in this section the phrase "assignment of wages" includes the sale or assignment of, or giving of an order for wages or salary.

(b) No assignment of ~~,-or-order-for~~ wages ~~or~~ salary, earned or to be earned, ~~shall-be~~ is valid unless all of the following conditions are satisfied :

(1) ~~Such~~ The assignment is contained in a separate written instrument, signed by the person by whom the ~~said~~ wages ~~or~~ salary have been earned or are to be earned, and identifying specifically the transaction to which the assignment relates ~~;-and~~ .

~~(b)~~ (2) Where ~~such~~ the assignment ~~of,-or-order-for-wages-or-salary~~ is made by a married person, the written consent of the husband or wife of the person making ~~such~~ the assignment ~~or-order~~ is attached to ~~such~~ the assignment ~~or-order;-and~~ .

~~(c)~~ (3) Where ~~such~~ the assignment ~~or-order-for-wages-or-salary~~ is made by a minor, the written consent of a parent or guardian of ~~such~~ the minor is attached to ~~such-order-or~~ the assignment ~~;-and~~ .

~~(d)~~ (4) Where ~~such~~ the assignment ~~of-or-order-for-wages-or-salary~~ is made by a person who is unmarried or who is an adult or who is both unmarried and adult, a written statement by the person making ~~such~~ the assignment ~~or-order~~ , setting forth such facts, is attached to or included in ~~such~~ the assignment ~~or-order;-and~~ .

~~(e)~~ (5) No other assignment ~~or-order~~ exists in connection with the same transaction or series of transactions and a written statement by the person making ~~such~~ the assignment ~~or-order~~ to that effect , is attached ~~thereto~~ to or included ~~therein;-and~~ in the assignment.

~~{#}~~ (6) A copy of ~~such-an~~ the assignment ~~or-order~~ and of the written statement provided for in ~~subdivision-(d)-hereof~~ paragraph (4) , authenticated by a notary public, ~~shall-have-been~~ is filed with the employer, accompanied by an itemized statement of the amount then due to the assignee ; .

(7) provided,--that-at-such-time At the time the assignment is filed with the employer, no other assignment ~~or-order~~ for the payment of any wages ~~or-salary~~ of the employee is subject to payment ; and no ~~attachment or-levy-on-execution~~ earnings withholding order against ~~said~~ his wages ~~or-salary~~ is in force.

~~Any-valid-assignment,--when-filed-in-accordance-with-the-provisions contained-herein,--shall-have-priority-with-respect-to-any-subsequently filed-assignment-or-order-or-subsequent-attachment-or-levy-on-execution. Any-power-of-attorney-to-assign-or-collect-wages-or-salary-shall-be revocable-at-any-time-by-the-maker-thereof.~~

(c) A valid assignment of wages in effect at the time an earnings withholding order is served suspends the operation of the earnings withholding order until after the end of the pay period during which the earnings withholding order is served. Thereafter the earnings withholding order has priority over the assignment.

~~No-assignment-of,--or-order-for-wages-or-salary-shall-be-valid-unless at-the-time-of-the-making-thereof,--such-wages-or-salary-have-been-earned, except-for-the-necessities-of-life-and-then-only-to-the-person-or-persons furnishing-such--necessities-of-life-directly-and-then-only-for-the-amount needed-to-furnish-such-necessities,--Under-any-assignment-of,--or-order for-wages-or-salary-to-be-earned,--a-sum-not-to-exceed-50-per-centum-of the-assignor's-wages-or-salary,--and-not-to-exceed-25-per-centum-of-the assignor's-wages-or-salary,--upon-the-showing-that-such-wages-or-salary~~

~~are necessary for the support of his mother, father, spouse, children or other members of his family, residing in this State and supported in whole or in part by his labor, shall be collectible from the assignor's employer at the time of each payment of such wages or salary.~~

(d) The employer ~~shall be~~ is entitled to rely upon the statements of fact in the written statement provided for in ~~subdivisions (d) and (e) hereof~~ paragraphs (4) and (5) of subdivision (b) , without the necessity of inquiring into the truth thereof, and the employer shall incur no liability whatsoever by reason of any payments made by him to an assignee under any assignment ~~or order~~, in reliance upon the facts so stated.

(e) An assignment of wages to be earned is revocable at any time by the maker thereof. Any power of attorney to assign or collect wages or salary is revocable at any time by the maker thereof. No revocation of such an assignment or power of attorney is effective as to the employer until he receives written notice of revocation from the maker.

(f) No assignment of ~~or order for~~ wages ~~or salary~~ , earned or to be earned , ~~shall be~~ is valid under any circumstances , if the wages or salary earned or to be earned are paid under a plan for payment at a central place or places established under the provisions of Section 204a ~~of this code~~ .

(g) This section ~~shall~~ does not apply to deductions which the employer may be requested by the employee to make for the payment of life, retirement, disability or unemployment insurance premiums, for the payment of taxes owing from the employee, for contribution to funds,

plans or systems providing for death, retirement, disability, unemployment, or other benefits, for the payment for goods or services furnished by the employer to the employee or his family at the request of the employee, or for charitable, educational, patriotic or similar purposes.

Comment. Section 300 is amended to make the section consistent with the Earnings Protection Law (Code Civ. Proc. §§ 723.10 et seq.).

Subdivision (a). Subdivision (a) simply makes clear that the shortened phrase "assignment of wages" continues prior law as to the kind of instrument dealt with in this section.

Subdivision (b). Paragraphs (1) through (6) of subdivision (b) continue without substantive change provisions formerly contained in Section 300. Paragraph (7) of subdivision (b) continues without substantive change a provision formerly contained in Section 300 except that the former reference to the attachment or levy on execution against wages or salary is replaced by a reference to an earnings withholding order to conform to the procedure provided by the Earnings Protection Law.

Subdivision (c). Subdivision (c) clarifies the relationship between a valid prior wage assignment and a subsequently served earnings withholding order. Where a wage assignment is in effect and an earnings withholding order is served, the employer shall not withhold pursuant to the order until after the end of the pay period during which the order was served. Thus the wage assignment is in effect given an exclusive preference for that pay period and the debtor is given an opportunity to put his affairs in order. Such action may include revoking the wage assignment as to unearned

wages pursuant to subdivision (e). Even where the debtor revokes the wage assignment prior to the end of the pay period (but after receipt of an earnings withholding order), the operation of the order is suspended until after the current pay period. Hence, the debtor is afforded an opportunity to retain his unearned wages for the current pay period only. After such moratorium, the earnings withholding order has a priority over the assignment if the latter remains in effect. The unlimited preference formerly given to an assignment of unearned wages or salary is not continued because this preference would permit a judgment debtor to give preference to one creditor and to defeat the claims of other creditors who seek to collect on their judgments under the Earnings Protection Law.

Subdivision (d). Subdivision (d) continues without substantive change a provision formerly found in Section 300.

Subdivision (e). The first sentence of subdivision (e) which makes an assignment of unearned wages or salary revocable at any time by the maker thereof, replaces the former provision of Section 300 which invalidated an assignment of wages or salary unless such wages were earned or the assignment was for necessities or for support. This provision also restricted the amount of unearned wages or salary that could be assigned. Although there are no limits on the amount of wages or salary that now can be assigned, subdivision (e) will permit the person making the assignment of wages or salary to be earned to revoke the assignment at any time. Thus, where an assignment becomes too

Labor Code § 300

onerous, especially after service of an earnings withholding order, such assignment may be revoked. The delayed preference given the earnings withholding order under subdivision (c) will generally require persons having judgments, including support orders, to use the procedure provided in the Earnings Protection Law--rather than Section 300--to enforce their judgments, but it avoids conflict between wage assignments and orders issued pursuant to the Earnings Protection Law.

Subdivisions (f) and (g). Subdivisions (f) and (g) continue without substantive change provisions formerly contained in Section 300. Other statutes may authorize deductions from employees' wages or salary without compliance with this section. E.g., Govt. Code §§ 1158, 12420, 13922, 20135. It should be noted that the inapplicability of Section 300 to the deductions referred to in subdivision (g) means not only that compliance with the formalities provided in Section 300 is not required but also that Section 300 provides no special preferences for such deductions.

OPERATIVE DATE

Sec. 14. This act becomes operative on July 1, 1973, but the Department of Industrial Relations and the Judicial Council may, prior to that date, do whatever is necessary so that this act may go into effect on July 1, 1973. The Department of Industrial Relations shall publish the earnings withholding tables and informational pamphlets referred to in Section 723.128 before July 1, 1973. The Judicial Council shall prescribe by rule the necessary forms as required by Section 723.120 before July 1, 1973.