

April 6, 1972

<u>Time</u>	<u>Place</u>
April 13 - 7:00 p.m. - 10:00 p.m.	STATE BAR BUILDING 601 McAllister Street San Francisco 94102
April 14 - 9:00 a.m. - 5:00 p.m.	BOARD OF BAR EXAMINERS BUILDING 540 Van Ness Ave., 2nd Floor San Francisco 94102
April 15 - 9:00 a.m. - 1:00 p.m.	STATE BAR BUILDING

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

April 13-15, 1972

1. Minutes of March 9-10, 1972, Meeting (sent 3/17/72)

2. Study 39.30 - Employees' Earnings Protection Law

Memorandum 72-22 (to be sent)

Discussion with federal administrator

(Special order of
business for April 14
(morning))

3. Study 39.70 - Prejudgment Attachment

(1) Schedule for Study

Memorandum 72-23 (sent 3/31/72)

(2) Levy Procedure

Memorandum 72-24 (sent 3/31/72)

(3) Ex Parte Attachment in Exceptional Circumstances

Memorandum 72-25 (sent 4/4/72)

(4) Plaintiff's Protective Order (TRO)

Memorandum 72-26 (sent 4/4/72)

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(5) Liability for Wrongful Attachment

Memorandum 72-21 (sent 3/3/72)

4. Administrative Matters

5. Study 63 - Evidence Code

Memorandum 72-29 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 13 AND 14, 1972

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on April 13 and 14, 1972.

Present: Marc W. Sandstrom, Vice Chairman
Noble K. Gregory
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: John W. Miller, Chairman
Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
John J. Balluff
John N. McLaurin
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld-- Commission consultant on attachment, garnishment, and execution--was also present.

Present at the request of the Commission to assist in the development of the Employees' Earnings Protection Law were: William Hoffman, U.S. Department of Labor, Wage and Hour Division, Washington D.C., Betty Bonfils, U.S. Dept. of Labor (SOL office), Washington D.C., and Harriett W. Clark, U.S. Dept. of Labor (SOL office), San Francisco.

The following observers were present for the portions of the meeting indicated:

Thursday, April 13, 1971

Mark W. Jordan, Attorney General, Los Angeles
Edgar A. Kerry, California Rural Legal Assistance and Western Center,
Sacramento
Richard D. Peters, Franchise Tax Board, Sacramento
James T. Philbin, Franchise Tax Board, Sacramento

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Friday, April 14, 1972

Mark W. Jordan, Attorney General, Los Angeles
Richard D. Peters, Franchise Tax Board, Sacramento
James T. Philbin, Franchise Tax Board, Sacramento

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ADMINISTRATIVE MATTERS

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The Minutes of the March 9 and 10, 1972, meeting were approved as submitted.

Cancellation of Meeting Scheduled for April 15

The meeting originally scheduled for April 15 was cancelled because there were insufficient members to constitute a quorum on that date.

Change in Place and Dates of May Meeting

The May meeting, originally scheduled to be held in Sacramento on May 12 and 13, was rescheduled to be held in San Francisco on May 11 (evening), 12, and 13. The meeting was rescheduled because it was concluded that legislators would be generally unavailable on Friday in Sacramento, and various Commissioners expressed the view that San Francisco was much more convenient as a meeting place than Sacramento.

Subject Matter to Be Considered at May Meeting

Because of the need to devote substantially all of the time at the meeting to wage garnishment, civil arrest, and prejudgment attachment, the Commission determined not to consider condemnation at the May meeting. Whether condemnation will be considered at each subsequent meeting will be determined at the May meeting.

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, EXECUTION
(EMPLOYEES' EARNINGS PROTECTION LAW)

The Commission considered Memorandum 72-22 and oral presentations made by various persons at the meeting.

The Commission adopted the substance of amendments to Senate Bill 88 (attached as Exhibit I). The Commission adopted the substance of the revised Comments (attached as Exhibit II).

The Commission discussed Senate Bill 88 with representatives of the federal Wage and Hour Division. The representatives indicated that they were not authorized to give a tentative approval on the bill but but that a decision on whether the bill will be considered to satisfy all federal requirements will be made in due course. The Commission directed the Executive Secretary to write to the federal administrator, expressing the appreciation of the Commission for the cooperation of the federal agency and forwarding an analysis of the support order provisions of the bill.

The Executive Secretary was authorized to have Senate Bill 88 amended to reflect the amendments approved at the meeting (Exhibit I attached) and to attempt to obtain reconsideration of the decision of the Senate Judiciary Committee to refer the bill to interim study.

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STUDY 39.70 - ATTACHMENT, GARNISHMENT, EXECUTION
(PREJUDGMENT ATTACHMENT PROCEDURE)

Schedule for Further Study

The Commission considered Memorandum 72-23. No long-range plans were formulated, but it was decided to devote the entire May meeting to consideration of materials relating to Study 39

Method of Levy

The Commission considered a portion of Memorandum 72-24 and the draft statutory provisions (Exhibit I) attached thereto. The following action was taken.

Section 547.010. The staff was directed to add definitions for (1) bank accounts and (2) motor vehicles required to be registered under the Vehicle Code and to treat these two types of property separately under this article. Bank accounts should be levied upon simply by service of the writ and notice upon the bank. Motor vehicles should be levied upon by the levying officer filing the writ and notice with the Department of Motor Vehicles and seizing the "pink slip." The levying officer should take possession of the vehicle only if he cannot obtain the pink slip. In both of these situations and in all other cases, the defendant should be served with notice of the attachment.

Section 547.020. The staff was directed to make clear that the "Notice of Attachment" or some comparable document will advise the person served with a writ of attachment of the capacity in which he has been served and the property allegedly in his possession or control which is sought to be attached. Separate notices may be required because both the person in

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possession of the property and the defendant must be advised as to their respective rights and duties under the attachment.

The staff was directed to consider revising the provisions relating to service on branch offices to broaden the types of businesses (e.g., stock brokers) included and to make clear that the person in charge of such branch is the person to be served.

Section 547.030. As noted above, the defendant should be served with notice of the attachment in a manner that satisfies due process requirements and conforms to modern practices. In this regard, the requirement of posting should be eliminated if possible. The requirement of service on the occupant should be eliminated in any event.

Section 547.040. Under this section, the third person in whose name the property stands of record must also be served. If there is a failure to make the required service within the prescribed time, the attaching plaintiff shall be subject to liability for slander of title without proof of malice. However, the lien of attachment shall not be affected by a failure to serve.

Section 547.050. The staff was directed to revise this section to permit a third person to retain possession of tangible personal property if he has (or makes a claim to) a right to such possession. If the third person does retain possession, he will be subject to liability to the attaching plaintiff if he releases the property to the defendant. As a matter of drafting, it was suggested that two sections be provided: one dealing with the defendant in possession; the other dealing with a third person in possession.

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Section 547.060. The staff was directed to consider providing an economic test for the issue of whether the property is or is not capable of manual delivery and perhaps to make the method of levy set forth here permissive. Filing should be made with the Office of the Secretary of State and, perhaps, the form of the notice to be filed should be described more specifically. For the time being, no change was made in the suggested procedure of filing first, followed by service.

Section 547.070 and following. Only a few of the remaining sections were considered and no substantive changes were made in these sections. The remaining sections will be reviewed at the next meeting.

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STUDY 63 - EVIDENCE CODE

The Commission considered Memorandum 72-29, relating to Justice Kaus' suggested revisions in the Evidence Code.

The staff was directed to solicit comments from the State Bar, the District Attorneys' Association, and the Conference of California Judges concerning the desirability of the revisions suggested by Justice Kaus. Comments should be requested in time to be considered at the Commission's June meeting.

APPROVED

Date

Chairman

Executive Secretary

AMENDMENTS TO SENATE BILL NO. 88
AS AMENDED IN SENATE MARCH 20, 1972

AMENDMENT 1

On page 1, line 2 of the title of the printed bill, as amended
in Senate March 20, 1972, after "690.18," insert:

690.19,

AMENDMENT 2

On page 1, lines 6 and 7 of title, strike out "to repeal Section
15406 of the Financial Code,".

AMENDMENT 3

On page 5, line 15, strike out "of such earnings".

AMENDMENT 4

On page 5, line 17, strike out "from such earnings".

AMENDMENT 5

On page 5, line 38, strike out "is" and insert:

may be

AMENDMENT 6

On page 5, line 39, strike out "statute of the United States"
and insert:

the Consumer Credit Protection Act of 1968 (15 U.S.C. Secs. 1671-1677)

AMENDMENT 7

On page 6, line 6, after "execution" insert:
unless the debt is incurred for personal services rendered by any employee
or former employee of the debtor

AMENDMENT 8

On page 6, strike out lines 33, 34, and 35.

AMENDMENT 9

On page 7, line 2, strike out "beneficially owned" and insert:
owned

AMENDMENT 10

On page 7, line 8, strike out "beneficially".

AMENDMENT 11

On page 7, line 12, strike out "beneficially".

AMENDMENT 12

On page 7, line 14, strike out "beneficially".

AMENDMENT 13

On page 7, line 19, strike out "beneficially".

AMENDMENT 14

On page 7, line 26, after "accounts" insert:

owned by or

AMENDMENT 15

On page 7, lines 27 to 29, inclusive, strike out "or in which either was listed as a beneficiary or had a beneficial interest".

AMENDMENT 16

On page 7, line 32, strike out "beneficially".

AMENDMENT 17

On page 8, line 11, after the period insert:

For the purposes of this section, a deposit account is "beneficially owned" by the debtor if the account is one that may be used for the support of the debtor or his family.

AMENDMENT 18

On page 8, line 12, after "account" insert:

beneficially

AMENDMENT 19

On page 9, between lines 11 and 12, insert:

(f) Nothing in this section shall limit the protection afforded debtors under the rules of law relating to spendthrift trusts.

AMENDMENT 20

On page 11, between lines 15 and 16, insert:

(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.

AMENDMENT 21

On page 11, line 34, strike out "statute" and insert:

law

AMENDMENT 22

On page 11, between lines 34 and 35 insert:

Sec. 12.5. Section 690.19 of the Code of Civil Procedure is amended to read:

690.19. All aid given under a public assistance program to a debtor or for his benefit , whether it be in the actual possession of the recipient or deposited by him . However, as against the claim of the county, the real and personal property of a debtor who has received support from public moneys shall be exempt only to the extent provided by and in accordance with the provisions of Section 17409 of the Welfare and Institutions Code. Such aid, prior to payment, shall be exempt without filing a claim of exemption , as provided in Section 690.50.

AMENDMENT 23

On page 15, strike out lines 20 to 40, inclusive, strike out all of page 16, strike out all of page 17, and on page 18, strike out lines 1 to 19, inclusive, and insert:

Sec. 14. 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. Said state department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact of 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, office 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 60 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 Section 690.50 of this code, and the court rendering the judgment shall be considered the levying officer for the purpose of that section.

(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 ~~(1) any wages or salary owing to the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney~~

~~General, or (2) any overpayment of tax, penalty or interest, or interest allowable with respect to such overpayment, under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.~~

(g) 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.~~

~~(h) (1) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are for wages or salary, the judgment creditor shall mail under a separate cover at the time of filing the affidavit with the governmental agency, in an envelope marked "Personal and Confidential", a copy of the affidavit and a Notice to Judgment Debtor as provided in paragraph (2) of this subdivision, addressed to the judgment debtor at his place of employment.~~

(2) The Notice to Judgment Debtor shall be in 10-point bold type, and in substantially the following form:

You may be entitled to file a claim exempting your salary or wages from execution. You may seek the advice of any attorney or may, within 10 days from the date your salary or wages were levied upon, deliver an affidavit to the court rendering the judgment to exempt such salary or wages, as provided in Section 600.80 of the Code of Civil Procedure.

(h) This section does not authorize the withholding of earnings of a public officer or employee.

The earnings of a public officer or employee may be withheld only pursuant to Chapter 2.5 (commencing with Section 723.010).

AMENDMENT 24

On page 19, line 9, after "rendered" insert:

and includes a person from whom the state is seeking to collect a tax liability

AMENDMENT 25

On page 21, line 22, after the period insert:

The receipt shall state the amount of the payment received, the maximum amount that may be withheld pursuant to the earnings withholding order, and the total amount received by the creditor during the period the order has been in effect. No receipt is required for payments received pursuant to a withholding order for support.

AMENDMENT 26

On page 21, strike out lines 26 through 30, inclusive, and insert:
723.022, the judgment creditor, within five days (Saturday, Sunday, and holidays excepted) of such satisfaction, shall:

(a) File a satisfaction of judgment in the court which issued such order; and

(b) Serve a certified copy of such satisfaction on the judgment debtor's employer.

AMENDMENT 27

On page 21, line 31, strike out "723.109" and insert:
723.108

AMENDMENT 28

On page 22, line 10, after the period insert:

The amount to be withheld pursuant to a withholding order for support shall be limited to the amount of the continuing periodic payments ordered by the court in a prior judgment except that, upon motion of the judgment creditor,

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after notice and hearing and upon good cause shown, the court pay order that the amount to be withheld pursuant to a withholding order for support be increased to include payment, in whole or in part, of delinquent amounts owing on the prior judgment. The exemption provided by Section 723.051 applies to a withholding order for support. In no case shall the amount an employer withholds pursuant to a withholding order for support exceed the amount of earnings payable to the judgment debtor by the employer after deducting all amounts required to be withheld by law or by any contract which is not revocable by the employee or at his instance.

AMENDMENT 29

On page 22, between lines 27 and 28, insert:

(5) An employer shall withhold the amount of the periodic payments specified in the withholding order for support. Where the period provided in the order is different from the pay period of the employee, the employer shall prorate the amounts withheld so that the total amount withheld and paid over to the judgment creditor for any given period equals the amount required by the order to be withheld for the same period. The amounts withheld shall be paid to the person specified in the order in accordance with Section 723.025.

AMENDMENT 30

On page 26, line 18, after "chapter" insert:

unless the debt is incurred for personal services rendered by any employee or former employee of the judgment debtor

AMENDMENT 31

On page 26, line 20, after "adequate" insert a comma.

AMENDMENT 32

On page 26, line 21, after "cases" insert:

, to provide the amount essential for the support of the judgment debtor
or his family

AMENDMENT 33

On page 27, strike out lines 3 to 8, inclusive, and insert:

723.071. This chapter shall not limit the state's right to collect a state tax liability except that no levy upon earnings of an employee held by an employer shall be effective unless such levy is made in accordance with the provisions of this chapter and the methods of collection referred to in subdivision (b) of Section 723.070 may not be used to require an employer to withhold earnings of an employee in payment of a state tax liability.

723.072. (a) A "withholding order for taxes" is an earnings withholding order issued pursuant to this article to collect a state tax liability and shall be denoted as a withholding order for taxes on its face.

AMENDMENT 34

On page 27, line 34, strike out "15" and insert:

30

AMENDMENT 35

On page 28, line 1, strike out "15" and insert:

30

AMENDMENT 36

On page 28, line 21, strike out "is to" and insert:

may

AMENDMENT 37

On page 28, line 23, after "if" insert:

(1)

AMENDMENT 38

On page 28, line 26, after "(\$30)" insert:

or (2) the amount of the taxpayer's earnings is sufficient that a portion of his earnings would be withheld pursuant to Section 18806 of the Revenue and Taxation Code if such earnings were subject to withholding under that section but the amount of his earnings is not sufficient to permit withholding under Section 723.050

AMENDMENT 39

On page 28, strike out lines 37 through 40, inclusive.

AMENDMENT 40

On page 29, strike out lines 1 through 3, inclusive, and insert:

(b) Together with the withholding order for taxes, the state shall serve upon the employer an additional copy of the order and a notice informing the taxpayer of the effect of the order and of his right to hearings and remedies provided in this chapter. Within five days from the date of service, the employer shall deliver to the taxpayer a copy of the order and the notice. If the taxpayer is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

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AMENDMENT 41

On page 29, line 4, strike out "may" and insert:

shall

AMENDMENT 42

On page 29, line 13, strike out "apply" and insert:

file a claim of exemption to claim the exemption provided by Section 723.051,

AMENDMENT 43

On page 29, line 14, strike out "to" and insert:

, with

AMENDMENT 44

On page 29, lines 15 and 16, strike out "for a hearing to claim the exemption provided by Section 723.051".

AMENDMENT 45

On page 29, line 17, strike out "application" and insert:

claim of exemption

AMENDMENT 46

On page 29, line 23, strike out "that requires" and insert:

requiring

AMENDMENT 47

On page 30, between lines 10 and 11, insert:

(f) The state may issue a temporary earnings holding order, which shall be denoted as such on its face, in any case where the state intends to apply for withholding order for taxes under this section and has determined that the collection of the state tax liability will be jeopardized in whole or in part if the temporary earnings holding order is not issued. The temporary earnings holding order shall be directed to the taxpayer's employer and shall require him to retain in his possession or under his control all or such portion of the earnings of the taxpayer then or thereafter due as is specified in the order. The temporary earnings holding order expires 15 days from the date it is served on the employer unless it is extended by the court on ex parte application for good cause shown. If a temporary earnings holding order is served on an employer, the state may not thereafter, for a period of six months, serve on the same employer another temporary earnings holding order for the same employee unless the court for good cause shown otherwise orders. Sections 723.153 and 723.154 apply to temporary earnings holding orders issued under this section.

AMENDMENT 48

On page 30, strike out line 26 and insert:

723.078. (a) Except as provided in subdivision (b), the employer shall not withhold pursuant to a withholding order for taxes from earnings of the employee payable for any pay period of such employee that ends prior to the fifth day after service of the order.

(b) A "Jeopardy Withholding Order for Taxes," which shall be denoted as such on its face, requires that the employer withhold pursuant to the order from earnings due to the employee at the time of service of the order on the employer and from earnings thereafter due. A Jeopardy Withholding Order for Taxes may be issued only where the state has determined that the collection of a state tax liability will be jeopardized in whole or in part by delaying the time when withholding from earnings commences.

(c) An employer shall continue to withhold

AMENDMENT 49

On page 31, line 19, strike out "article" and insert:

chapter

AMENDMENT 50

On page 31, between lines 19 and 20, insert:

723.083. If the state determines that a withholding order for taxes has been issued in error or that there is no tax liability, the state may refund to the employee any amounts deducted by his employer pursuant to Section 723.024.

723.084. Where a warrant, notice of levy, or notice or order to withhold (referred to in subdivision (b) of Section 723.070) is served on the employer, it shall be deemed to be a withholding order for taxes if the form provides notice on its face that it is to be treated as a withholding order for taxes as to any earnings that are subject to the provisions of this chapter.

AMENDMENT 51

On page 31, line 29, after "chapter" insert:
except for the state's administrative hearings provided by Article 4 (commencing with Section 723.070)

AMENDMENT 52

On page 32, line 25, after the period insert:
Within five days (Saturday, Sunday, and holidays excepted) after the filing of the application, the court clerk shall issue an earnings withholding order in the form prescribed pursuant to Sections 723.120 and 723.125.

AMENDMENT 53

On page 32, strike out lines 26 through 40, inclusive.

AMENDMENT 54

On page 33, strike out lines 1 through 5, inclusive, and insert:

723.103. (a) The judgment creditor shall serve upon the designated employer all of the following:

- (1) Two copies of the earnings withholding order.
- (2) The form for the employer's return.
- (3) Notice to employee of earnings withholding order in the form prescribed pursuant to Sections 723.120 and 723.122.

(b) At the time he makes service pursuant to subdivision (a), the judgment creditor shall provide the employer with a copy of the Employer's Instructions and withholding tables referred to in Section 723.127. The Judicial Council may adopt rules prescribing the circumstances when compliance with this subdivision is not required.

(c) An earnings withholding order served upon the employer more than 45 days after its date of issuance is ineffective.

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723.104. Any employer who is served with an earnings withholding order shall:

(a) Deliver to the judgment debtor a copy of the earnings withholding order and the notice to employee of earnings withholding order within five days from the date of service. If the judgment debtor is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

(b) Complete the employer's return on the form provided by the judgment creditor and mail it by first-class mail, postage prepaid, to the judgment creditor within 15 days from the date of service unless a longer period is specified by the judgment creditor. If the earnings withholding order is ineffective, the employer shall state in his employer's return that he is not complying with the order for this reason and shall return the order to the judgment creditor with the employer's return.

AMENDMENT 55

On page 33, lines 6 and 7, strike out "apply for a hearing to".

AMENDMENT 56

On page 33, strike out lines 13 through 28, inclusive, and insert:

(b) A claim of exemption shall be made by filing with the court clerk an original and one copy of (1) the judgment debtor's claim of exemption and (2) if he claims the exemption provided by Section 723.051, his financial statement.

(c) Forthwith upon the filing of the claim of exemption, the court clerk shall send to the judgment creditor by first-class mail, postage prepaid, all of the following:

- (1) A copy of the claim of exemption.
- (2) A copy of the financial statement if there is one.
- (3) A notice of claim of exemption, stating that the claim of exemption has been filed and that the earnings withholding order will be terminated, or modified to reflect the amount of earnings claimed to be exempt in the claim of exemption, unless a notice of opposition to the claim of exemption is filed with the court clerk by the judgment debtor within five days after the date of the filing of the notice of claim of exemption.
- (d) A judgment creditor who desires to contest a claim of exemption shall, within five days after the date of the mailing of the notice of claim of exemption, file with the court clerk a notice of opposition to the claim of exemption.
- (e) If the court clerk does not receive a notice of opposition within the five-day period, he shall send to the employer by first-class mail, postage prepaid, one of the following:
 - (1) A notice that the earnings withholding order has been terminated if all of the judgment debtor's earnings was claimed to be exempt.
 - (2) A modified earnings withholding order which reflects the amount of earnings claimed to be exempt in the claim of exemption if only a portion of the judgment debtor's earnings was claimed to be exempt.
- (f) If a notice of opposition to the claim of exemption is filed with the court clerk within the five-day period, the court clerk shall set the matter for hearing, which hearing shall be held within 15 days after the date the notice of opposition is filed. The court clerk shall send a notice of the time and place of the hearing to the judgment debtor and judgment creditor by first-class mail, postage prepaid. The notice shall be deposited in the mail at least 10 days before the day set for hearing.

AMENDMENT 57

On page 33, line 29, strike out "(d)" and insert:

(g)

AMENDMENT 58

On page 33, line 39, strike out "(e)" and insert:

(h)

AMENDMENT 59

On page 34, line 8, after "order" insert:

or 60 days after the date of the termination of the order, whichever is later

AMENDMENT 60

On page 34, line 9, strike out "(f)" and insert:

(i)

AMENDMENT 61

On page 34, line 27, after the period insert:

An order may be issued under this section only by a court in the manner prescribed in subdivisions (d), (e), (f), and (g).

AMENDMENT 62

On page 35, lines 23 and 24, strike out "If the court finds" and insert:

Upon determining

AMENDMENT 63

On page 35, strike out lines 39 and 40.

AMENDMENT 64

On page 36, strike out lines 1 through 23, inclusive, and insert:

723.107. No findings shall be required in court proceedings under this chapter.

AMENDMENT 65

On page 36, line 24, strike out "723.109." and insert:

723.108.

AMENDMENT 66

On page 36, line 32, strike out "Instructional Pamphlet" and insert:

Employer's Instructions

AMENDMENT 67

On page 36, line 33, strike out "Table" and insert:

Tables

AMENDMENT 68

On page 36, line 36, after "notices," insert:

claims of exemption,

AMENDMENT 69

On page 37, line 6, before "address" insert:

last known

AMENDMENT 70

On page 37, line 9, strike out "date and place" and insert:

court

AMENDMENT 71

On page 37, line 9, strike out "is" and insert:

was

AMENDMENT 72

On page 37, line 10, after "entered" insert:

and the date the judgment was entered

AMENDMENT 73

On page 37, line 13, after the period insert:

Where a withholding order for support is sought, the application shall state the amount of the periodic payments required by the judgment to be made to the judgment creditor.

AMENDMENT 74

On page 37, line 23, strike out "National" and insert:

federal

AMENDMENT 75

On page 37, line 25, strike out "National" and insert:

federal

AMENDMENT 76

On page 37, strike out lines 26 and 27.

AMENDMENT 77

On page 37, strike out line 30 and insert:

723.122. The "Notice to Employee

AMENDMENT 78

On page 37, line 31, strike out "an".

AMENDMENT 79

On page 37, line 33, strike out "judgment creditor has asked the".

EXHIBIT I

Minutes
April 13 and 14, 1972

AMENDMENT 80

On page 37, lines 33 and 34, strike out "to order" and insert:
has ordered

AMENDMENT 81

On page 37, line 36, after "law" insert:
, or such other amounts as are specified in the order,

AMENDMENT 82

On page 37, line 37, strike out "the application for".

AMENDMENT 83

On page 37, line 38, strike out "application" and insert:
order

AMENDMENT 84

On page 38, line 5, strike out "National" and insert:
federal

AMENDMENT 85

On page 38, line 7, strike out "National" and insert:
federal

AMENDMENT 86

On page 38, strike out line 15 and insert:
of the "Judgment Debtor's Claim of Exemption,"

EXHIBIT I

Minutes
April 13 and 14, 1972

AMENDMENT 87

On page 38, strike out lines 20 through 25, inclusive, and insert:

claim of exemption form and the financial statement form may be obtained at the office of any clerk of a trial court. The clerk of each trial court shall have the forms available at his office.

AMENDMENT 88

On page 38, lines 26 and 27, strike out "The "Application of Judgment Debtor for Hearing" shall" and insert:

The "Judgment Debtor's Claim of Exemption" shall

AMENDMENT 89

On page 38, line 29, strike out "application for a hearing" and insert:

claim of exemption

AMENDMENT 90

On page 39, line 23, strike out "The" and insert:

Except for a withholding order for support, the

AMENDMENT 91

On page 39, after line 40, insert:

(h) An order that the employer deliver to the judgment debtor a copy of the earnings withholding order and the "Notice to Employee of Earnings Withholding Order" within five days after service of the earnings withholding order; but, if the judgment debtor is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

(i) The name and address of the person designated by the judgment creditor to receive notices.

AMENDMENT 92

On page 40, line 40, strike out "an informational".

AMENDMENT 93

On page 41, line 1, strike out "pamphlet" and insert:

"Employer's Instructions"

AMENDMENT 94

On page 41, line 1, strike out "it" and insert:

these instructions

AMENDMENT 95

On page 41, line 4, strike out "The" and insert:

Except to the extent that they are included in the forms required to be provided to the employer by the judgment creditor, the

AMENDMENT 96

On page 41, line 5, strike out "informational pamphlet" and insert:

Employer's Instructions

AMENDMENT 97

On page 41, line 29, strike out "such".

AMENDMENT 98

On page 43, between lines 9 and 10 insert:

723.155. An employer is not subject to any civil liability for failure to comply with subdivision (b) of Section 723.075 or subdivision (a) of Section 723.104.

AMENDMENT 99

On page 43, line 10, strike out "723.155." and insert:

723.156.

AMENDMENT 100

On page 43, strike out lines 14, 15, and 16.

AMENDMENT 101

On page 43, line 17, strike out "17" and insert:

16

AMENDMENT 102

On page 45, line 24, strike out "18" and insert:

17

AMENDMENT 103

On page 46, strike out lines 6 through 12, inclusive, and insert:

(d) An earnings withholding order issued pursuant to Section 723.030 of the Code of Civil Procedure (support order) shall be considered a garnishment for the payment of one judgment for the purposes of this section.

AMENDMENT 104

On page 46, line 15, strike out ", (c), and (d)" and insert:
and (c)

AMENDMENT 105

On page 47, line 8, strike out "19" and insert:
18

AMENDMENT 106

On page 47, line 28, strike out "20" and insert:
19

AMENDMENT 107

On page 51, line 9, strike out "21" and insert:
20

AMENDMENT 108

On page 51, line 28, strike out "22" and insert:
21

AMENDMENT 109

On page 52, strike out lines 2, 3, and 4, and insert:

(b) Except as otherwise prescribed by rules adopted by the Judicial Council, any order made pursuant to Section 4701 of the Civil Code or Section 270h of the Penal Code prior to the operative date of this act shall remain in effect after the operative date of this act and shall be deemed to be a withholding order for support issued pursuant to Section 723.030.

AMENDMENT 110

On page 52, line 5, strike out "23" and insert:

22

AMENDMENT 111

On page 52, line 6, after "Council," insert:

sufficient funds being available to the Judicial Council,

AMENDMENT 112

On page 52, line 9, strike out "th" and insert:

the

AMENDMENT 113

On page 52, line 9, strike out "may" and insert:

shall

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 88

In order to indicate more fully its intent with respect to Senate Bill 88, the Senate Committee on Judiciary makes the following report:

Except for the new or revised comments set out below, the Comments contained under the various sections of Senate Bill 88 as set out in the Recommendation of the California Law Revision Commission Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law (November 1971), reprinted in 10 Cal. L. Revision Comm'n Reports 701 (1971), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill 88.

Civil Code

§ 4701 (amended). Continuing withholding order for support

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 CIV. PROC. § 723.010 *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 CIV. PROC. § 723.030; LABOR CODE § 300. As under prior law, the court may require withholding from the earnings of either or both parents. Authorization for the employer to deduct a one-dollar fee also is continued under Section 723.084. 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. Section 4701 applies to orders directed to both public and private employers. See CODE CIV. PROC. § 723.011(c), (g), and Comment thereto.

Code of Civil
Procedure

Code of Civil Procedure

§ 690.5½ (added). Earnings for personal services of employees

Comment. Section 690.5½ is added to make clear the relationship between new Chapter 2.5 (commencing with Section 723.010) and the remaining 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. Cf. *Randone v. Appellate Department*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). See also *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971).

Section 690.5½ 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 723.010).

Subdivision (a). Subdivision (a) is based on the definition of "earnings" stated in Section 723.011, and Section 690.5½ is applicable therefore only to persons ("employees") protected under the Employees' Earnings Protection Law. Compare Section 690.6. See also Comment to Section 723.011. However, the definition of earnings used here includes earnings "paid or payable"; Section 723.011 refers only to earnings "payable" by an employer. Earnings which are "payable" are those which are referred to as "due or 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), 690.18½ (payments pursuant to a pension or retirement program), 690.19 (public assistance).

Subdivision (b). Subdivision (b) provides an automatic, total exemption from prejudgment levy of attachment of all earnings "due or owing" to any employee. This continues prior law under former subdivision (a) of Section 690.6.

Subdivision (b) 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 723.010).

Subdivision (c). Subdivision (c) exempts from attachment all earnings of the debtor which "are in his possession in a form identified by the levying officer as earnings." It would be inconsistent 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 (c) is consistent with prior law under former subdivision (a) of Section 690.6.

Subdivision (d). Subdivision (d) provides an exemption from attachment for 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 § 1240 (homestead); CODE CIV. PROC. §§ 690.1 (household furnishings and appliances), 690.2 (motor vehicles). Subdivision (d) is consistent with prior law under former subdivision (a) of Section 690.6.

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. Subdivisions (e) and (f), therefore, provide exemptions from execution for paid earnings comparable to the exemptions provided for unpaid earnings by Sections 723.050 and 723.051. It should be emphasized, however, that subdivision (e) protects only earnings from the employee's most recent pay period and, as noted above, does not protect earnings after they have been converted into another form.

690.7,
690.7-1/4,
690.7-1/2
(money deposited in
bank
or sav-
ings and loan
association).

Protection of assets in these other forms must be sought under other exemption provisions. See, e.g., Civil Code § 1240 (homestead); Code Civ. Proc. §§ 690.1 (household furnishings and appliances), 690.2 (motor vehicles), 690.7, 690.7-1/4, 690.7-1/2

(money deposited in bank or savings and loan association). The amount of the exemption under subdivision (e) 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. The exemptions provided under subdivisions (e) and (f) must be claimed by the debtor.

Subdivision (f). Subdivision (f) provides an exemption from execution for amounts essential for support comparable to that provided by subdivision (d) of Section 690.6 and Section 723.051. See the Comment to subdivision (e), *supra*, and the Comments to Sections 690.6 and 723.051.

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

Comment. Section 690.6 is amended to limit its application to those persons and earnings not protected under Section 690.5½ and the Employees' Earnings Protection Law—Chapter 2.5 (commencing with Section 723.010). Section 690.5½ and the Employees' Earnings Protection Law apply only to "employees." See, *e.g.*, Sections 690.5½, 723.011, and 723.106. Section 690.6 does not attempt to define or characterize those persons or earnings that remain. However, they could be categorized generally as independent contractors. See *Le Font v. Rankin*, 167 Cal. App.2d 433, 334 P.2d 608 (1959) (tax consultant). As to these persons, Section 690.6 generally continues prior law. The references to Welfare and Institutions Code Section 11489 and to former Section 682.3 have been deleted because Section 11489 applies only to earnings of employees and Section 682.3 has been repealed. Subdivision (d) has been revised in conformity with Section 723.051 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 "common necessities exception" to the exemption formerly provided in subdivision (c) of Section 690.6 has been eliminated. See Comment to Section 723.051. See also *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701, 725 n.47 (1971)(construction of word "received" used in Section 690.6). A specific reference to the federal Consumer Credit Protection Act of 1968 has been inserted in Section 690.6, but the restrictions on garnishment provided by that act apply to the earnings described in subdivision (a) of Section 690.6 only if that act actually is applicable to such earnings--a matter that is unclear.

§ 690.7 (repealed)

Comment. Section 690.7 is superseded by new Sections 690.7, 690.7-1/4, and 690.7-1/2. See the Comments to those sections.

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

Comment. Section 690.7 provides ~~an~~ exemption from execution for various types of savings and commercial accounts.

a limited (\$100)

Accounts protected. The accounts protected under Section 690.7 include savings and loan association accounts

state and federal

and bank accounts—whether savings or checking accounts. See subdivision (b) (defining "deposit account").

See also Financial Code Sections 5061 (defining "investment certificate") and 5067 (referring to "withdrawable share").

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 was protected. See former Section 690.7.

The exemption under former Section 690.7

for "shares of stock" is not continued, thus limiting the exemption to amounts deposited, investment certificates, and the like.

The exemption provided by Section 690.7 is in no way dependent upon a showing by the debtor that the amount claimed as exempt represents his earnings. On the

other hand, the debtor may be able to exempt a greater amount in certain accounts containing earnings. See Section 690.7-1/2. And, the debtor is provided an additional exemption in Section 690.7-1/4 that permits him to protect an amount in excess of the \$100 exemption if he is able to show such amount is essential for the support of himself or his family.

The exemption provided in this section applies only to amounts "owned" by the debtor, i.e., subject to withdrawal by him for his own use. The requirement that the debtor must give notice to the financial institution a reasonable time prior to withdrawal does not make the account one that is not "owned" by him.

Persons protected. Only an individual may take advantage of the exemption provided by Section 690.7. See subdivision (a). An account owned by joint debtors is exempt in the total amount that each debtor would be able to exempt following application of the exemption formula. A husband and wife, however, are entitled to only one exemption between them even if they are joint debtors; and accounts standing in the name of either or both of them--whether they consist of separate, community, or quasi-community property--must be listed in the claim of exemption even though only one of them is the judgment debtor. See subdivisions (e) and (f). It should be noted, however, that, although the separate property of a nondebtor spouse may be considered in computing the exemption provided in Section 690.7, nothing in the section authorizes the satisfaction of the judgment out of such property. See discussion infra.

Exemption must be claimed. The exemption provided by Section 690.7 must be claimed pursuant to Section 690.50. See Section 690(a). 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, the release of funds pursuant to the exemption provided by Section 690.7 should be expeditiously accomplished. It will be easy to compute the exempt amount and there should

or his spouse.

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.

Computation of exemption. As much as \$100 owned by the debtor in an account is exempt under Section 690.7(e). This exemption is an aggregate one, however. Hence, a debtor may claim as exempt only that portion of an account levied upon which he owns and which, when added to all other amounts owned by the debtor or his spouse in other accounts in the manner described below, equals \$100. 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 or his spouse held in all other accounts on the date of the first levy even though the other accounts have not been levied upon. See subdivision (f). In computing the amount exempt in any account, the exemption is applied first to amounts in accounts that have not been levied upon and then to amounts in any accounts that have been levied upon until the full exemption has been consumed. Further, all amounts in such accounts, 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 Evid. Code §§ 605, 606.

Some or all of an account levied upon may in fact not be subject to 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). Section 690.7 does not affect this immunity; a nondebtor may make his third-party claim pursuant to Section 689.

The following examples illustrate the operation of the \$100 exemption.

Example 1. Debtor has a \$500 account that is levied upon and a \$50 account that is not levied upon. The exemption is applied first to the account not levied upon--\$50. The exemption is applied next to \$50 in the account levied upon, leaving \$450 that the creditor can reach in that account.

Example 2. Debtor has a \$200 account that is levied upon and a \$1,000 joint account with his spouse that is not levied upon. The exemption is applied first to the account not levied upon--\$100. The creditor can reach all \$200 in the account levied upon. Note: This result applies regardless whether the character of the property in the joint account is separate, community, or quasi-community.

or unemployment

Orders for support; state tax liabilities. Subdivision (g) eliminates the exemption otherwise provided by this section where execution is sought to enforce a court order for support

or to collect a state tax liability or to recover overpayments of unemployment or disability benefits. The special consideration for support and tax liability is consistent with the special treatment accorded these obligations under Title III of the federal Consumer Credit Protection Act. See 15 U.S.C. § 1673(b)(1), (3). Although the effect of subdivision (g) of Section 690.7 is to give a debtor's first family priority over the debtor's second family, this preference is balanced by the protection afforded the second family under Section 723.051 (exemption from earnings withholding of amount essential for support). See the Comments to Sections 723.030 and 723.051.

Banker's lien. The exemption provided by Section 690.7 is a limitation on garnishment procedures only; it does not in any way affect the exercise of rights pursuant to Civil Code Section 3054 (banker's lien). See subdivision (h).

§ 690.7-1/4 (added). Deposit account; hardship exemption

Comment. Section 690.7 1/4 provides an exemption for deposit accounts comparable to that provided for earnings under Section 723.051. To obtain the exemption, the debtor must prove that his current earnings and other income are not adequate to provide the amount essential for the support of the debtor and his family. Section 690.7 1/4 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 an unsatisfied judgment.

Subdivision (c) is comparable to Section 723.124 which prescribes the content of the judgment debtor's financial statement which is required when earnings are sought to be exempt from withholding on the ground that they are essential for the support of the judgment debtor or his family.

Subdivision (d) is similar to, and subdivision (e) is the same as, provisions found in Section 690.7. See the Comment to that section.

Subdivision (f) makes clear that the exemption provided in Section 690.7 1/4 does not affect any greater exemption that may be provided to certain deposit accounts by the law relating to spendthrift trusts. For a discussion of the extent to which a creditor may reach funds in a spendthrift trust, see 4 B. Witkin, Summary of California Law Trusts §§ 66-67 (1960).

§ 690.7-1/2 (added). Deposit account; exemption where financial institution acts as employer's payroll agent

Comment. Section 690.7-1/2 provides an exemption for the earnings of an employee where a financial institution acting as his employer's payroll agent has computed the net amount payable to the employee (by deducting from the employee's gross earnings all required and authorized deductions) and

credited that amount to his deposit account. The exemption provided by this section is automatic; the employee need not claim it under Section 690.50.

An exemption of the type provided by Section 690.7-1/2 is needed to satisfy the requirements of Title III of the federal Consumer Credit Protection Act. That act has been interpreted by the federal administrator to cover earnings in an account of the type covered by Section 690.7-1/2. It should be noted that Section 690.7-1/2 does not authorize the use of an employer's payroll agent where such use is otherwise prohibited by law. See subdivision (d). Cf. Labor Code § 212.

Where a financial institution acts as an employer's payroll agent, the employee may not be able to obtain his funds out of the deposit account before the account is garnished by a creditor. The purpose of Section 690.7-1/2 is to protect the employee's earnings in this situation so that the creditor cannot defeat the protection given earnings under the Employees' Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010), by levying on the account before the employee can obtain his earnings out of the deposit account.

In applying the exemption provided by this section, the financial institution first determines the amount of the earnings of the employee that were credited to the deposit account for the last pay period prior to the levy. From this amount, the financial institution subtracts all amounts debited to the account after the net earnings for the pay period were credited to the account. The remainder is the amount of the account that is exempt from levy of execution.

The following examples illustrate the method of computation.

Example 1

Assume the following facts and transactions:

	<u>Balance</u>
Balance in account as of March 31.	\$ 0
April 1. Gross earnings for weekly pay period ending March 31 are \$260. Financial institution computes deductions and credits net of \$200 to employee's deposit account.	\$200
April 2. Creditor levies on account.	

Computation of amount of deposit account exempt:

Earnings credited to account for last pay period prior to levy.	\$200
Less amount debited to account after earnings for last pay period credited.	<u>\$ 0</u>
	\$200

Amount of account balance that is exempt is \$200.

Example 2

Assume the following facts and transactions:

	<u>Balance</u>
* Balance in account as of March 31.	\$ 20
April 1. Gross earnings for weekly pay period ending March 31 are \$260. Financial institution computes deductions and credits net of \$200 to employee's deposit account.	\$220
April 3. Employee deposits \$20 to account.	\$240
April 4 and 5. Checks totaling \$65 are debited to account.	\$175
April 6. Creditor levies on account.	

Computations of amount of deposit account exempt:

Earnings credited to account for last pay period prior to levy.	\$200
Less amount debited to account after earnings for last pay period credited.	<u>\$ 65</u>
	\$135

Amount of account balance (\$175) that is exempt is \$135.

The remaining \$40 is not exempt under Section 690.7-1/2. (The debtor may, however, be eligible for an exemption under Section 690.7-1/4.)

A debtor who qualifies for an automatic exemption under this section may also claim the deposit account exemption provided by Section 690.7. However, the debtor may not cumulate these exemptions; in case of a claimed exemption under Section 690.7, the court may allow an exemption only under the section that will exempt the greater amount. See subdivision (c).

A debtor who qualifies for an automatic exemption under this section may also claim the deposit account exemption provided by Section 690.7-1/4 (exemption of amount essential for support).

It should be noted that the exemption provided in this section does not insulate an employee's earnings from garnishment pursuant to an earnings withholding order directed to the employer. An employer cannot avoid his duty to withhold earnings as required by the Employee's Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010) of this title, by designating a financial institution to act as his payroll agent.

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

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.

§ 690.18-1/2 (added). Exemptions; periodic payments payable or paid by pension or retirement plans

Comment. Section 690.18-1/2 has been added to satisfy 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. §§ 1572, 1673. Subdivision (c) makes clear that Section 690.18-1/2 is not the exclusive source of exemptions for payments from retirement funds. See, e.g., Code Civ. Proc. § 690.18 (public employees), Corp. Code § 28005 (plans complying with federal Internal Revenue Code requirements); Educ. Code § 13808 (State Teachers' Retirement System); Govt. Code §§ 21201 (State Employees' Retirement Law), 31452 (County Employees' Retirement Law of 1937).

§ 690.19 (amended). Public assistance benefits

Comment. Section 690.19 is amended to make clear that the exemption provided by Section 690.19 continues even though the public assistance benefits are deposited in a checking or savings account. This is consistent with the treatment given public retirement benefits under subdivision (a) of Section 690.18.

§ 690.50 (technical amendment)

Comment. Section 690.50 is revised to include appropriate references to Sections 690.54, 690.7, 690.7-1/4, and 690.18-1/2.

§ 710 (technical amendment)

Comment. Section 710 is amended to eliminate the use of the abstract of judgment procedure as a means of garnishing the wages or salary of a public employee. The earnings of public officer or employees may be withheld pursuant to the Employees' Earnings Protection Law only. See Chapter 2.5 (commencing with Section 723.010).

§ 723.011. Definitions

Comment. Section 723.011 states definitions used in applying this chapter. This chapter deals only with the garnishment or withholding of earnings for services rendered in an employer-employee relationship. See Section 723.020. 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 as 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 subdivisions (b), (c), and (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 Judicial Council,

will be required in some circumstances to provide by rule; consistent with the statutory definition, whether certain items are an employee's earnings and, if so, the earnings period to which such earnings are attributable. See Section 723.15Q. 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 690.18-1/2.

Article 2. General Provisions

§ 723.020. Exclusive procedure for withholding earnings

Comment. Section 723.020 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 690.5½. 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 723.030, Civil Code Section 4701, and Welfare and Institutions Code Section 11489. 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, 690.7-1/4 (checking and savings accounts) and Section 690.18 (retirement funds). See also Sections 690.5½ (paid earnings). As to garnishment of earnings

Penal Code Section 270h,

, 690.7-1/2 (deposit account exemption where employer uses financial institution as payroll agent), 690.18-1/2 (payments from retirement plan).

of a person who is not an employee, see Section 690.6. 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 limitations on the state's ability to garnish wages for tax delinquencies pursuant to its warrant and notice procedures. See Article 4 (commencing with Section 723.070).

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 XIII of the 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. Finally, this chapter does not affect the procedures for the examination of a debtor of the judgment debtor provided in Chapter 2 (Sections 717-723) of this part. See Comment to Section 723.154.

§ 723.022. Employer's duty to withhold; withholding period

Comment. Section 723.022 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." See Section 723.150 (Judicial Council authorized to adopt rules regarding the pay period to which commissions, bonuses, and the like are attributable). The "withholding period" is described in subdivision (a). It should be noted that *only* earnings for a pay period ending during the withholding period are subject to levy. Earnings for prior periods, even though still in the possession of the employer, are not subject to the order. An employer may not, however, defer or accelerate any payment of earnings to an employee with the intent to defeat or diminish the satisfaction of a judgment pursuant to this chapter. See Section 723.153.

The withholding period generally commences five calendar days (not working or business days) after service of an earnings withholding order is completed. Subdivision (e) makes clear that, for the purposes of this section, service is completed when the particular paper is actually received at the proper office. Compare Section 723.101. For example, if an order is served on Friday, the withholding period would commence on the following Wednesday. See CODE CIV. PROC. § 12. The five-day delay affords the employer time to process the order within his

organization, *i.e.*, deliver the order to the employer's bookkeeper, 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 723.023 (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. However, this delay does not affect the date the withholding period terminates under subdivision (a) (1). See LABOR CODE § 300 and Comment thereto.

The withholding period does not end until the first of the events described in paragraphs (1) through (3) of subdivision (a) occurs; thus, the employer has a *continuing* duty to withhold.

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. See Section 723.101 (manner of service). The judgment creditor has an affirmative duty to so inform the employer of the satisfaction. See Section 723.027. Service of an order for the collection of state taxes suspends the duty of an employer to withhold pursuant to a prior order (other than an order for support). See Section 723.077 (tax orders). However, this is only a suspension. After the tax order is satisfied, if the withholding period for the prior order has not ended and the duty to withhold has not ended under subdivision (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 723.030 (support orders); 723.078 (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 look to the creditor for the recovery of amounts previously paid out. See Section 723.154

Cf. Section
723.078 (tax
orders).

(employer entitled to rely on documents actually served). See also Section 723.105 (recovery from creditor of amounts received after order terminated).

An earnings withholding order may also be affected by federal bankruptcy proceedings.

§ 723.023. Priority of orders generally

Comment. Section 723.023 establishes the general rules governing priority of earnings withholding orders. Generally speaking, the first order served is given priority. Occasionally, two or more orders will be served 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 served 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 723.030 (support orders) and 723.077 (state taxes) and the Comments thereto. Unless the subsequent earnings withholding order is for state taxes or for support, an order is ineffective if the employer receives the order while he is

required to comply with another. In such a case, the employer does not hold such an order and give it effect when the prior order expires but returns it. See Section 723.104. However, the creditor may serve the same order within 45 days after its issuance. See Section 723.103(c).

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 723.077 (tax order suspends operation of prior order); Labor Code Section 300 (suspension where prior assignment in effect). See also Comment to Section 723.022. 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 is suspended or not given effect of the reason for the employer's action. See Sections 723.077 and 723.104.

An employer is generally entitled to rely upon what is served upon him. See Section 723.154 and Comment thereto. He is not required to inquire as to whether or not a creditor has either obtained or served an order improperly.

An earnings withholding order may be served either personally or by certified or registered mail. See Section 723.101. In the latter case, should the employer refuse service (thus forcing the creditor to serve personally), Section 723.101 makes clear that this action does not cause the creditor to lose his priority and outlines the rights of the various parties in such circumstances.

§ 723.025. Payment to judgment creditor

Comment. Section 723.025 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, but the employer may elect to make monthly remittances.

Regardless of when, or if, payment is required, the employer is required to send an employer's return to the judgment creditor. See Sections 723.104 and 723.126.

§ 723.028. Withholding order for costs and interest

Comment. Section 723.028 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 723.108.

§ 723.030. Orders for support

Comment. Section 723.030 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 Sections 723.077 and 723.050 and the Comments 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 43, 37, 39 P.2d 953, 957 (1936) (dictum); *Rankins v. Rankins*, 52 Cal. App.2d 231, 126 P.2d 125 (1942). Compare WELF. & INST. CODE § 11489 as enacted by Cal. Stats. 1971, Ch. 578. 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 723.050 inapplicable. However, the exemption provided by Section 723.051 is applicable to an earnings withholding order for support. Paragraph (1) thus continues the substance of the prior case law. A determination that the exemption provided by Section 723.051 applies has no effect on the support order upon which the earnings withholding order is based; application for modification of the original order for support must be made separately. See CIVIL CODE § 4301. See also *Thomas v. Thomas*, 14 Cal.2d 388, 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.

Article 3. Restrictions on Earnings Withholding

§ 723.050. Maximum amount of earnings that may be withheld

Comment. Section 723.050 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 723.030 (support); 723.074 and 723.076 (taxes); 723.106 (multiple sources of earnings). See also Section 723.051 (exemption obtained by special hardship showing).

Section 723.050 reflects policies similar to those underlying Sections 302 and 303 of the federal Consumer Credit Protection Act. Thus, 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. However, 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 723.050 specifies the amounts to be deducted in determining the portion of the debtor's earnings which are subject to garnishment ("nonexempt earnings"). 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 Judicial Council to prepare tables which will be distributed to employers required to withhold earnings. See Section 723.103(b). An employer therefore generally 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 723.050 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 30 times the federal minimum wage. As the federal minimum wage is increased, this floor is increased accordingly. (Under the federal law in effect on January 1, 1972, if a debtor's disposable earnings are less than \$48 per week, no garnishment is permitted; if his disposable earnings are between \$48 and \$64, all his disposable earnings above \$48 are subject to garnishment; if his disposable earnings are more than \$64 a week, 25 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. Moreover, subdivision (b) provides a formula that precludes withholding of less than \$10, thus providing additional protection to low income wage earners and saving employers the expense of withholding an amount less than \$10. Cf. Section 723.074 (state taxes).

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 Sections 723.030 and 723.077 and Comments thereto. Suppose, for example, that an employee's earnings are \$200 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 \$160 of earnings. The employer should refer to the appropriate withholding table and determine how much is to be withheld from \$160 of earnings and withhold that amount under the ordinary withholding order.

§ 723.051. Amounts essential for family support exempt

Comment. Section 723.051 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 723.050 should be adequate except in a small percentage of cases such as, for example, where the debtor has five or six children who are dependent on his earnings for their support or has large medical expenses. See also Section 723.124 (content of Judgment Debtor's Financial Statement). Section 723.051 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 incurred,

"by the debtor, his wife, or his family for the common necessities of life."

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 (Sup. Ct. L.A., App. Dep't. 1952). The "common necessary" exception has accordingly been eliminated.

Article 4. Earnings Withholding Orders for Taxes

§ 723.070. Definitions

Comment. Section 723.070 provides definitions for terms used in this article.

"State" means the state or any agency thereof. Where the term "state" is used in this article, it refers to the particular state agency that administers the particular tax law under which recovery of the delinquent tax is sought. See Section 723.011(e).

The definition of "state tax liability" makes this article apply 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 licence 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 of levy may be given pursuant to Section 1755 of the Unemployment Insurance Code (unemployment compensation contributions) or for which a notice or order to withhold may be given pursuant to Section 6702 (sales and use tax), 7851 (vehicle fuel license tax), 8952 (use fuel tax), 10051 (motor transportation tax), 11451 (private car tax), 16101 (gift tax), 18817 (personal income tax), 26132 (bank and corporation taxes), 30311 (cigarette tax), or 32381 (alcoholic beverage tax) of the Revenue and Taxation Code.

§ 723.071. Exclusive procedure for withholding earnings for state tax liability

Comment. Section 723.071 makes clear that the levy procedure for withholding earnings of an employee 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 18817 (personal income tax) and Section 26132 (bank and corporation tax) of the Revenue and Taxation Code is limited by Section 723.071. This article deals, however, only with levy on earnings to collect 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, § 6334(c). As to other taxes not within the scope of this article, 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 and this article does not apply.

§ 723.072. Withholding order for taxes; notice and opportunity for review of liability before order issued

Comment. Section 723.072 provides that no withholding order for taxes may be issued unless the state tax liability either appears on the face of the taxpayer's tax return or has been determined in an administrative proceeding in which the taxpayer had notice and an opportunity for administrative review. However, no review of the taxpayer's tax liability is permitted in court proceedings under this chapter. See Section 723.082.

Few state tax liabilities are reduced to judgment. Subdivision (d) recognizes this . . .

§ 723.073. Provisions governing tax withholding orders

Comment. Section 723.073 makes clear that the provisions of this chapter governing earnings withholding orders are applicable to withholding orders for taxes except to the extent that this article contains special provisions applicable to such orders.

§ 723.074. Agency issued withholding order for taxes

Comment. Section 723.074 specifies the procedure to be followed when the state taxing agency itself issues the withholding order for taxes. In such case, no application to a court for the order is required. Under an order issued pursuant to Section 723.074, the employer may be required to withhold not more than twice the amount permitted to be withheld pursuant to Section 723.050 (except that \$10 is required to be withheld in certain instances where the amount of earnings would not be sufficient to require withholding under Section 723.050). The state taxing agency provides the employer with withholding tables prescribing the amount to be withheld pursuant to orders issued under this section. The amount determined according to the applicable table must be withheld by the employer unless the order itself specifies a lesser amount or the amount to be withheld is reduced pursuant to subdivision (c) or (d) of Section 723.075.

§ 723.075. Notice to taxpayer; reduction in amount withheld

Comment. Section 723.075 applies only to an order issued under Section 723.074.

Section 723.075 requires service of a copy of the order and a notice informing the employee of the effect of the order and his right to review and modification of the amount to be withheld pursuant to the order. These papers are served on the employer who is required to deliver them to the employee. Cf. Section 723.104 (ordinary withholding orders). Section 723.075 requires that the taxpayer first seek administrative relief before he can claim the exemption provided by Section 723.051 (hardship exemption) in a court proceeding. Notwithstanding the hardship exemption provided by Section 723.051, the state taxing agency is entitled to a withholding order in an amount not less than the amount permitted to be withheld under Section

723.050 even though there is a court hearing on the employee's claim that his earnings are essential for support.

§ 723.076. Court issued withholding order for taxes

Comment. Section 723.076 provides a procedure whereby the taxing agency 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. An order may be obtained under Section 723.076 that requires the withholding of more than the amount that the state taxing agency could require the employer to withhold pursuant to an order issued by the agency itself under Section 723.074. This 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. The state taxing agency is always entitled to a withholding order in an amount not less than the amount permitted to be withheld under Section 723.050 even though there is a court hearing on the employee's claim that all of his earnings are essential for the support of the taxpayer and his family. Provision is made in subdivision (f) of Section 723.076 for a temporary order directing the employer to hold any earnings of the employee then or thereafter due. Such orders should be used only in rare and unusual cases.

§ 723.077. Priority of orders

Comment. Section 723.077 deals with the priority a tax withholding order is to be given with respect to other earnings withholding orders. 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 723.030, 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. Similarly, where a tax order is in effect and a support order is served, the support order again takes priority. The employer will withhold pursuant to the support order first, 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 723.030 and 723.050. 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 only 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 723.022), 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 ineffective; the employer may not withhold pursuant to the second order and must promptly notify the agency which issued or obtained the second order of the reason for his action. See Section 723.104(b).

§ 723.078. Withholding period; notice terminating order

Comment. Subdivision (a) of Section 723.078 requires the employer to withhold commencing at the same time as with any other order. Cf. Section 723.022. Subdivision (b) provides for a jeopardy withholding order that requires immediate withholding. Such an order should be used only in rare and

unusual cases. Subdivision (c) requires the employer to withhold earnings pursuant to a withholding order for taxes until the amount specified in the order has been paid in full and provides for a notice if the tax liability is satisfied before the full amount specified in the order has been withheld. The notice required by Section 723.078 is in lieu of the notice provided by Section 723.027.

§ 723.079. When receipt required

Comment. Section 723.079 provides an exception to the requirement of Section 723.026.

§ 723.080. Service

Comment. Section 723.080 provides special provisions for service of notices, documents, and orders under this article. This special service provision is in lieu of the one prescribed by Section 723.101.

§ 723.081. Forms

Comment. Section 723.081 requires that forms used in connection with this article be prescribed by the state taxing agency administering the particular tax law except that the Judicial Council prescribes the forms used in connection with court issued orders under Section 723.076.

§ 723.082. Review of tax liability

Comment. Section 723.082 makes clear that the court, in a proceeding to determine whether a withholding order for taxes should be modified or terminated because of hardship, may not review the taxpayers's tax liability.

§ 723.083. Refund of employer's service charge

Comment. Section 723.083 authorizes the state to refund the employer's service charge to the employee if the withholding order for taxes is issued in error or there is no tax liability.

§ 723.084. Warrant or notice deemed withholding order for taxes

Comment. Section 723.084 deals with the situation where it is not clear whether an employer-employee relationship exists. The warrant, notice of levy, or notice or order to withhold may be issued on the assumption the taxpayer is an independent contractor. However, if the warrant, notice, or order indicates that it is to be treated as an earnings withholding order if the taxpayer is an employee, it cannot be defeated by a claim that the taxpayer is an employee.

§ 723.100. Judicial Council authorized to prescribe practice and procedure

Comment. Article 5 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 the practice and procedure in proceedings under this chapter. The state tax agency prescribes the rules of procedure for administrative hearings under Article 4 (withholding orders for taxes).

§ 723.101. Service; recovery of costs

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, subdivisions (b) and (c) make clear that, regardless of which means is actually used, the recovery of the costs of service is limited to the cost of service by certified mail with return receipt requested unless this form of service is first refused by the person being served. Only in such circumstances may the cost of personal delivery be recovered. See subdivision (c).

Subdivision (d) provides certain special rules for problems which can arise where mail service has been refused. For example, suppose creditor A mails an earnings withholding order to his debtor's employer and the employer refuses to accept such mail. Creditor A then serves his order by personal delivery but, in the meantime, creditor B has served an order requiring the withholding of the wages of the same debtor and B's order has gone into effect. It would be unfair to A to deny him his priority because of the employer's refusal. Accordingly, subdivision (d) permits A to apply to the court which issued A's original earnings withholding order for an order to the employer directing him to stop withholding pursuant to B's order and to give effect to A's earnings withholding order. So that A may have the benefit of a full 120-day withholding A's

earnings withholding order is deemed to have been served on the date of service of the special court order made pursuant to subdivision (d). It should be noted that subdivision (d) only preserves the priority which A would have had if the employer had accepted the mail service. Thus, where the intervening order is a withholding order for taxes, A is not entitled to displace the taxing agency. See Section 723.077. The remedy provided by subdivision (d) is exclusive. A is not entitled to recover amounts previously paid to B from either B or the employer, and A's order is not given retroactive effect.

Special provisions as to when service is complete for particular purposes are found in Sections 723.022(e) (withholding period) and 723.023(b) (priority of orders). As to service of withholding orders for taxes, see Section 723.080.

§ 723.102. Application for issuance of earnings withholding order

Comment. Section 723.102 requires a judgment creditor to apply for an earnings withholding order to the court which granted him the judgment. For the required content of the application, see Section 723.181. For special provisions regarding the issuance of a withholding order for taxes, see Article 4 (commencing with Section 723.070). The last sentence of Section 723.102 makes clear that an earnings withholding order shall be promptly issued on the ex parte application of a judgment creditor. The debtor may claim an exemption 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.

§ 723.103. Transmittal of order and information to employer

Comment. Section 723.103 prescribes what must be served upon the employer by the judgment creditor and when such service must be accomplished to be effective (order must be

served within 45 days of its issuance). Section 723.103 requires that the creditor serve on the employer an extra copy of the order and a notice advising the employee of the effect of the order and his rights with respect to the order. The employer is required to deliver these papers to the employee within five days of service. See Section 723.104.

§ 723.104. Delivery of papers to employee; employer's return

Comment. Section 723.104 requires the employer to deliver to the employee a copy of the order and a notice advising the employee of his rights.

Section 723.104 also requires the 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 723.023. For the form of the return, see Section 723.126.

If the order is not given effect, the employer must indicate the reason and return the order.

§ 723.105. Judgment debtor's claim of exemption

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

A debtor is not limited as to the time within which he must claim an exemption. However, unless there has been a material change in either his income or his needs, he may claim an exemption 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 date of

service of a prior terminated order or 60 days after the date of termination, whichever is later, except in connection with a multiple employment or unless the court orders otherwise or there is a material change in circumstances. See subdivision (h).

A claim of exemption is made by the debtor by filing an original and one copy of his claim of exemption 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 clerk is required to send the copies of the application and financial statement to the creditor, together with a notice of the claim of exemption which advises the creditor of the effect of the claim. See subdivision (c).

The judgment creditor who contests the claim of exemption must file a notice of opposition within five days. Subdivision (d). If no notice of opposition is filed, the court clerk sends the employer a notice terminating the order or, if the claim of exemption lists an amount the judgment debtor believes should be withheld pursuant to the order (see Section 723.123); a modified order in the amount indicated in the claim of exemption. Subdivision (e). If a notice of opposition is filed, the court clerk sets the matter for hearing and notifies both parties. Subdivision (f).

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 (g). 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 723.022 makes clear that the employer is not liable to the debtor for such amounts, and subdivision (i) of this section authorizes the debtor to recover such amounts from his creditor. Where amounts have been withheld but not yet paid over to the creditor, the employer is required to pay those amounts to the employee-judgment debtor. See subdivision (i).

§ 723.107. Findings not required

Comment. Section 723.107 is comparable to a provision found in subdivision (i) of Section 690.50 (claims for exemption).

§ 723.108. Limitation on obtaining additional earnings withholding orders

Comment. Section 723.108 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 723.023, and service during the 10-day period following expiration of the original order is prohibited by Section 723.108. Even though a creditor violates the 10-day moratorium period, the employer may act pursuant to what has been served upon him. See Section 723.154. Of course, after the expiration of the 10-day period, the original creditor is treated like any other creditor.

on the same
employer

It should be noted that each agency of the state is considered a separate entity for the purposes of this chapter. See Section 723.011(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.

§ 723.120. Judicial Council to prescribe forms

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 the Judicial Council has complete authority to adopt and revise the forms as necessary and may require additional information in the forms, or may omit information from the forms that it determines is unnecessary.

§ 723.123. Form of claim of exemption

Comment. Although Section 723.123 requires that the claim of exemption 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 claim of exemption is prescribed by the Judicial Council. See Section 723.120.

§ 723.125. 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 taxes. See Section 723.081. The Judicial Council may determine to adopt special forms for support orders, pursuant to its authority granted by Section 723.120, since these orders have special rules concerning priority, duration, and amounts that may be withheld. See Section 723.030.

§ 723.126. Employer's return

Comment. Section 723.126 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. Although Section 723.126 requires the employer's return to be executed "under oath," this may generally be done by a statement signed under penalty of perjury. See Section 2015.5.

§ 723.127. Employer's Instructions and withholding tables

Comment. Subdivision (a) of Section 723.127 requires the preparation of Employer's Instructions that provide the employer with the information he needs to comply with the law. The creditor provides the employer with a copy of the Employer's Instructions with the earnings withholding order. See Section 723.103.

Subdivision (b) authorizes, but does not require, the Judicial Council to recover the cost of printing the Employer's Instructions and withholding tables from persons required or desiring to obtain such materials.

§ 723.150. Rules

Comment. Section 723.150 requires that rules be adopted for the administration of this chapter. Such rules include specific requirements regarding the treatment of various forms of prepaid and deferred earnings such as, but not limited to, commissions, bonuses, retroactive pay increases, vacation benefits, prepaid earnings, advances, and draw account payments.

§ 723.151. Liaison with federal administrator

Comment. Section 723.151 authorizes the Judicial Council 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 723.151 is found in Government Code Section 25210 (county participation in Economic Opportunity Act of 1984). 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.

§ 723.152. Fraudulent withholding by employer

Comment. Section 723.152 is based on Labor Code Section 227 (failure to make agreed payments to health, welfare, or similar fund).

§ 723.153. Employer not to defer or accelerate payment of earnings

Comment. Section 723.153 makes clear that an employer may neither defer nor accelerate payment of earnings to an employee in an attempt to avoid compliance with an earnings withholding order and specifies the measure of damages in case of a violation.

§ 723.154. Remedies of judgment creditor

Comment. Section 723.154 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 723.154 makes clear that supplemental proceedings under Chapter 2 are not a prerequisite to suit by the creditor against the employer. Whether or not the court can order the employer to withhold and pay over in a Chapter 2 proceeding is a matter not dealt with in the Employees' Earnings Protection Law.

Subdivision (b) 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 723.108 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.

This section also makes clear that, where an employer is complying with a prior order, he is not liable for failing to comply with a subsequent valid order—even though the prior order is in fact invalid—unless he is actively participating in a fraud.

§ 723.155. Failure of employer to give notice to employee

Comment. Section 723.155 makes clear that an employer is not liable for civil damages if he fails to give the employee the notice advising the employee of his rights. The section does not preclude the Labor Commissioner from taking action under the Labor Code if an employer consistently fails to give his employees the notice he is required to deliver under Section 723.075(b) or Section 723.104(a).

Labor Code

§ 300 (amended). Wage assignments

Comment. Section 300 is amended to make the section consistent with the Employees' Earnings Protection Law (CODE CIV. PROC. § 723.010 *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 generally without substantive change provisions formerly contained in Section 300. A sentence has been added to paragraph (2) to provide a limited exception from the requirement of spousal consent. Paragraph (7) 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 Employees' Earnings Protection Law, and the former reference to priority of wage assignments has been superseded by paragraph (7) and subdivision (c).

Subdivision (c). Subdivision (c) clarifies the relationship between a valid 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 (f). 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 Employees' Earnings Protection Law.

Subdivision (d). See the Comment to subdivision (f).

Subdivision (e). Subdivision (e) continues the substance of a provision formerly found in Section 300 and extends the scope of the former provision to cover the statement provided for in paragraph (2) of subdivision (b).

Subdivision (f). The first sentence of subdivision (f), 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. The former provision also restricted the amount of unearned wages or salary that could be assigned. The former 50-percent limitation on the amount of wages or salary that can be assigned has been continued in subdivision (d). The former 25-percent "hardship" limitation has not been continued because subdivision (f) permits 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 onerous, especially after service of an earnings withholding order, the 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 Employees' Earnings Protection Law—rather than Section 300—to enforce their judgments; but it avoids conflict between wage assignments and orders issued pursuant to the Employees' Earnings Protection Law.

Subdivisions (g) and (h). Subdivisions (g) and (h) continue without substantive change provisions formerly contained in Section 300.

It should be noted that the inapplicability of Section 300 to the deductions referred to in subdivision (h) means not only that compliance with the formalities and limitations provided in Section 300 is not required but also that Section 300 provides no special preferences for such deductions.

§ 2929 (amended). Discharge from employment because of wage garnishment

Comment. The second sentence is added to subdivision (a)(1) of Section 2929 to make clear that an employee is given the protection afforded by the section when a withholding order for taxes is issued even though such an order may not involve a judicial procedure and even though the tax liability may not have been reduced to judgment. Subdivision (d) is added to Section 2929 to

make clear that a continuing garnishment of wages pursuant to an earnings withholding order for support is considered as a "garnishment for the payment of one judgment" for the purposes of this section.

Operative Date

Comment. The operative date of this act is delayed until January 1, 1974, 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.