

#39.30

5/5/72

Second Supplement to Memorandum 72-33

Subject: Study 39.30 - Employees' Earnings Protection Law

I have devoted considerable effort to obtaining general support from all interested persons and organizations (except the sheriffs, marshals, and constables) to amended Senate Bill 88. The various groups are still studying the amended bill.

The California Rural Legal Assistance and other poverty lawyers are still greatly concerned about the restrictive hardship exemption. See Exhibit I attached. The Executive Committee of the California Association of Collectors has scheduled a special meeting (during the time when the Commission's May meeting will be held) to determine whether the association will support the amended bill.

The poverty lawyers would like to strike from Section 723.051 the sentence reading: "This standard recognizes that the exemption provided by Section 723.050 should be adequate, except in rare and unusual cases, to provide the amount essential for the support of the judgment debtor or his family." The deletion of this sentence would surely cause the Association of Collectors to oppose the bill and also would appear contrary to the Commission's basic philosophy of providing an automatic exemption in Section 723.050 that will cover the usual case and make hardship hearings unnecessary.

In an effort to resolve the problem, I have suggested to both groups that the following sentence be added to Section 723.051 after the sentence quoted above:

This standard also recognizes that the exemption provided by Section 723.050 may not be adequate, for example, in cases where there are a large number of members of the judgment debtor's family who are dependent upon his earnings for their support.

Both groups are going to study this suggested addition and determine if they could support the bill if this one additional amendment (and the technical amendments suggested in Memorandum 72-33) were made. The understanding would be that the bill would then be pushed for enactment and that no additional amendments would be made. Both groups would state whenever any additional amendment is proposed that they support the bill and do not want to jeopardize its passage by having any additional amendments made. The Commission would agree to consider any suggested additional amendments with a view to proposing for enactment at the 1973 session those changes that it determines are desirable. Either group would be free to support or oppose such additional amendments proposed by the Commission at the 1973 session or to propose any bills they desire at the 1973 session. This appears to be a reasonable basis for proceeding in view of the lateness of the session.

I have discussed with various groups the opposition of the State Bar to the provisions that permit the Franchise Tax Board to take more than an ordinary creditor from the earnings of the taxpayer. If the Franchise Tax Board is unable to support the bill, the concensus seems to be that the tax withholding order provisions should be deleted from the bill, leaving to the courts the question of whether the existing Revenue and Taxation Code and other provisions are constitutional. While the staff believes that it is likely that such provisions will be held unconstitutional, we would leave to the Franchise Tax Board the problem of attempting to secure enactment of constitutional provisions in the event that the existing ones are held unconstitutional. The Franchise Tax Board has the matter under study. If the Franchise Tax Board determines that it will support Senate Bill 88, the staff suggests that the tax withholding order provisions be retained in the

bill in their present form (with the technical changes suggested in Memorandum 72-33) and that the staff attempt to persuade the State Bar that those provisions are an improvement over existing law and that, if the State Bar still believes that they are too extreme, the State Bar should propose its own bill at the 1973 session to further limit the authority of the Franchise Tax Board.

I expect to be able to advise the Commission at the May meeting of the decisions made on the various groups concerning Senate Bill 88.

You will also be interested in the attached extract (Exhibit II) of the Report of the Advisory Committee on the Uniform Consumers Credit Code.

The Board of Governors has directed the legislative representative of the State Bar to support Senate Bill 88 if the amendments suggested by the State Bar Committee are incorporated into the bill. See Exhibit III attached. As indicated in the First Supplement to Memorandum 72-33, these amendments would make it impossible to secure enactment of Senate Bill 88. The suggestion concerning service by ordinary mail merits study and may be something the Commission would want to recommend to the 1973 session if such change would be acceptable to the various groups interested in Senate Bill 88.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

**EXHIBIT I**

**LAW OFFICES OF  
CALIFORNIA RURAL LEGAL ASSISTANCE**

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April 27, 1972

John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California 94305

Re: Senate Bill 88

Dear Mr. DeMouilly:

Reference my letter of April 12, 1972 with attached exhibits, Brian Paddock's letter of April 13, 1972, representing the position of Western Center, my presentation before the Law Revision Commission in San Francisco on April 13, 1972, and your letter of April 21, 1972, with attachments.

We have reviewed with great care the Law Revision Commission's reformulation of §723.051, which was proposed on April 13, 1972 and subsequently incorporated into your amendments. We have also taken into consideration the revised comments on this section. Considerable discussion and debate on this particular section has taken place between this office and numerous other legal services offices. Not only have many CRLA attorneys been involved, but numerous attorneys working with and through the Western Center on Law and Poverty have also been consulted. We have also discussed the matter with Jim Reed, who has authorized me to speak for the Consumers Coalition as well.

There is virtual unanimity of opinion that the hardship exemption provision as reformulated by the Law Revision Commission on April 13, 1972, is unacceptable and it remains our position that unless the availability and coverage of the hardship exemption is expanded, we will maintain our opposition to the bill. In reaching this position, we have fully considered the various other provisions of SB 88 which we find attractive. Despite these other provisions, however, we feel that the hardship exemption provision is too significant an issue to permit our support of the bill unless it is reworked.

We hope you appreciate that we have spent a lot of time discussing this particular provision. We simply cannot support language which creates the presumption against an exemption

when earnings are needed for basic needs. In our experience, the present provision, as worded, will result in the denial of claims of exemption for many poor families who, under existing law, are able to totally exempt their earnings. And this will occur, despite the fact that these families clearly need all of their earnings to provide essentials of life - shelter, food, clothing, medical attention - to adequately care for their families. This result is totally unacceptable to us. As we earlier pointed out, we are dealing with families whose standard of living is already austere by any standard. To provide them with the protection necessary, the hardship exemption provision must be worded in such a way that where a family has basic needs, whether because of the size of the family involved, unforeseen medical expenses, extended unemployment, or other essential family needs, and these needs are not met by the exemption provided in the table in §723.050, that the hardship exemption provision is, in fact, available for their use.

While we strenuously object to use of the limiting statement, that "this standard recognizes that the exemption provided by §723.050 should be adequate except in rare and unusual cases", we do not object to the remaining portion of that same hardship exemption provision. We recognize that the hardship exemption provision should not permit a middle income wage earner from exempting all expenses which permit him to maintain an "appropriate station in life".

Poverty attorneys share your hope that few claims will need to be filed. Elimination of unnecessary claims and hearings will not only conserve judicial resources but free poverty attorneys to deal with other pressing problems. As the statutory language of §723.051 suggests, certain cases which read the existing statutory language over generously, ought to be repudiated. As is often done, these cases should be rejected by name in the comments as well as by implication in the statute. We believe that this protects the real interests of creditors as effectively as the "rare and unusual" limitation which we find so objectionable.

We urge that you explore the possibility of rewording the hardship exemption with the collectors. We would be pleased to participate in this exploration if you think it advisable. In any event, we would like to receive their reaction to this proposal.

As confirmed to you earlier, and to the Law Revision Commission, this is the one major issue that yet divides us. If this section of SB 88 can be reworded in a satisfactory manner, we will not only withdraw our opposition to the bill, but actively

support its movement through committee and both Houses of the  
Legislature.

If I can be of any further assistance to you, please  
let me know.

Sincerely,

  
EDGAR A. FERRY  
Attorney at Law

EAK:gb  
cc :Brian Paddock  
Toby Rothschild  
Jim Reed  
Lucy McCabe

EXHIBIT II

SENATE ADVISORY COMMISSION ON THE UNIFORM CONSUMER CREDIT CODE

**5104. NO GARNISHMENT BEFORE JUDGMENT.**

Prior to entry of judgment in an action against the debtor for debt arising from a consumer credit sale, a consumer lease, or a consumer loan, the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings.

CALIFORNIA COMMENTS

**Changes from the Official Text**

This is the Official Text without change.

**Prior California Law**

Prejudgment garnishment of wages without a hearing was ruled unconstitutional by the United States Supreme Court in *Sotadech v Family Finance Corp* (1969), 395 U.S. 337, 89 S. Cl. 1820, 23 L. Ed. 349.

**General Comments**

This section goes beyond the ruling in *Sotadech* by prohibiting prejudgment garnishment of wages regardless of whether there is a hearing.

**5105. LIMITATION OF GARNISHMENT.**

- (a) For the purposes of this article:
  - (1) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld.
  - (2) "Garnishment" means any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of a debt.
- (b) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit sale, consumer lease, or consumer loan may not exceed the lesser of the following:
  - (1) 25 percent of his disposable earnings for that week.
  - (2) The amount by which his disposable earnings for that week exceed forty times the Federal minimum hourly wage prescribed by Section 6(a) (1) of the Fair Labor Standards Act of 1938, U.S.C., Title 29, Section 206 (a) (1), in effect at the time the earnings are payable.
- (c) In the case of earnings for a pay period other than a week, the administrator shall prescribe by rule a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2) of subdivision (b).
- (d) No court may make, execute, or enforce an order or process in violation of this section.

## REMEDIES AND PENALTIES

### CALIFORNIA COMMENTS

#### Changes from the Official Text

Paragraphs 3 of subdivision (b) and subdivision (c) of the Official Text have been redesignated as subdivisions (c) and (d) respectively.

#### Prior California Law

Code of Civil Procedure Section 690.6 exempts one-half of a debtor's earnings unless more is necessary for the use of the debtor's family. The one-half exemption has been superseded by the Federal Consumer Credit Protection Act, upon which this section is based.

#### General Comments

The provisions of Code of Civil Procedure Section 690.6 which permit exemption of a greater portion of a debtor's wages when necessary for the use of his family remains effective to prevent, when applicable, garnishments otherwise permissible under this section.

### OFFICIAL COMMENT

1. This section is derived from CCPA Sections 302 and 303 [15 U.S.C.A. §§ 1672, 1673]. The exemption has been increased from thirty times the minimum hourly wage to forty in the belief that the higher figure was justified in consumer transactions.

2. Section 5104 prohibits all garnishment before judgment for collection of consumer debt. Section 5105 limits the use of garnishment after judgment for collection of consumer debt. It complements rather than displaces local garnishment laws and applies only to garnishment and like proceedings directed toward one other than the consumer debtor, e.g., an employer. The consumer debtor's interests are adequately protected in proceedings supplementary to judgment in which the debtor is personally before the court and the court is therefore able to take his and his dependents' needs into consideration in granting an order against him for payment of a judgment on a consumer debt.

3. This section is designed to assure the consumer debtor that he will retain enough of his earnings to be able to support himself and his dependents by exempting a portion of his earnings from garnishment to enforce judgments for consumer debts. The exemption is based on the concept of "disposable earnings" rather than gross earnings. Disposable earnings are defined to include only those earnings which the debtor can spend after deductions required by law. If the law requires a portion of the debtor's wages to be withheld from him, the debtor has no power of disposition with respect to that portion, and that portion is therefore not included in disposable wages. Thus, amounts required to be withheld for social security or income taxes, amounts withheld pursuant to compulsory retirement, health insurance or similar plans imposed by law and amounts withheld because of a garnishment or levy by another creditor are excluded from "disposable earnings". However, if amounts are withheld from the debtor's earnings by the employer pursuant to a contract made by the employee or on his behalf by a labor union or similar organization, the amounts withheld are included in "disposable earnings" since the deduction is not required by law.

4. This section sets limits on the maximum amount of disposable earnings that a creditor in a consumer credit transaction may reach by garnishment. There is a double test. The creditor may not garnish more than (a) 25 percent of disposable earnings for any workweek or (b) the amount by which disposable earnings exceed 40 times the Federal minimum hourly wage, whichever is less.

Example: An unmarried consumer debtor earns \$3.10 an hour. Wages are paid on a

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weekly pay period running from Wednesday through Tuesday. During that period the debtor worked 38 hours. Gross wages were \$117.80. The employer withholds Federal income taxes of \$21.70, social security taxes of \$5.18, union dues of \$1.25 pursuant to a contract with the union, and \$5.00 for a Christmas savings plan of which the employee is a member. New wages paid to the employee are \$84.67. "Disposable earnings" are \$90.92; 25% of disposable earnings is \$22.73; 40 x minimum hourly wage of \$1.60 is \$64.00; the excess of disposable earnings over \$64.00 is \$26.92.

Under Section 5105 the creditor may garnish no more than \$22.73, the lesser of \$22.73 and \$26.92.

5. This section is not meant to displace other provisions of state law which may provide additional protection to the debtor. For examples: (1) if state law provides that a debtor may defeat a garnishment by a showing that the wages subject to garnishment are necessary for the support of himself and his dependents, the debtor may take full advantage of that law; and (2) if state law exempts 90 percent of earnings, only \$11.78 or 10 percent of earnings of \$117.80 may be collected under the garnishment in the example above.

**5106. NO DISCHARGE FROM EMPLOYMENT FOR GARNISHMENT.**

No employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a consumer credit sale, consumer lease, or consumer loan.

CALIFORNIA COMMENTS

Changes from the Official Text

This is the Official Text without change.

OFFICIAL COMMENT

1. The penalty for violation of this section is found in Section 5202 (f).
2. This Section is derived from CCPA Section 304 [15 U.S.C.A. § 1674], but it prohibits an employer from discharging an employee by reason of any garnishment (whether one or more) under a judgment arising from a consumer credit sale, consumer lease, or consumer loan.

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ARTICLE 2

DEBTORS' REMEDIES

**5202. EFFECT OF VIOLATIONS ON RIGHTS OF PARTIES.**

(a) If a creditor has violated the provisions of this division applying to waiver of rights or benefits (subdivision (a) of Section 1107), collection of excess charges or enforcement of rights (subdivision (c) of Section 1201), receipts, statements of account and evidence of payment (Sections 2315 and 3314), certain negotiable instruments prohibited (Section 2403), balloon payments (Sections 2405 and 3402), security in sales or leases (Section

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2407), assignments of earnings (Section 2410 and 3403), attorney's fees (Sections 2413 and 3404), limitations on default charges (Sections 2414 and 3405), authorizations to confess judgment or taking powers of attorney (Sections 2415 and 3407), restoration of property (subdivision (e) of Section 2504), restrictions on interests in land as security (Section 3510), or limitations on the schedule of payments or loan term for supervised loans (Section 3511), the debtor has a right in an action other than a class action to recover from the person violating this division a penalty in an amount determined by the court not less than one hundred dollars (\$100 nor more than one thousand dollars (\$1,000). With respect to violations arising from sales made pursuant to revolving charge accounts or from loans made pursuant to revolving loan accounts, no action pursuant to this subdivision may be brought more than two years after the violations occurred. With respect to violations arising from other consumer credit sales and consumer loans and from consumer leases, no action pursuant to this subdivision may be brought more than one year after the due date of the last scheduled payment of the agreement with respect to which the violation occurred.

(b) If a creditor has violated the provisions of this division applying to authority to make supervised loans (Section 3502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge. If he has paid any part of the principal or of the loan finance charge, he has a right to recover the payment from the person violating this division or from an assignee of that person's rights arising from the debt. With respect to violations arising from loans made pursuant to revolving loan accounts, no action pursuant to this subdivision may be brought more than two years after the violation occurred. With respect to violations arising from other loans, no action pursuant to this subdivision may be brought more than one year after the due date if the last scheduled payment of the agreement pursuant to which the charge was paid.

(c) A debtor is not obligated to pay a charge in excess of that allowed by this division, and if he has paid an excess charge he has a right to a refund. A refund may be made by reducing the debtor's obligation by the amount of the excess charge. If the debtor has paid an amount in excess of the lawful obligation under the agreement, the debtor may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against debtors arising from the debt.

(d) If a debtor is entitled to a refund and a person liable to the debtor refuses to make a refund within a reasonable time after demand, the debtor may recover from that person a penalty in an amount determined by a court not exceeding the greater of either the amount of the credit service or loan finance charge or 10 times the amount of the excess charge. If the creditor has made an excess charge in deliberate violation of or in reckless disregard for this division, the penalty may be recovered even though the creditor has refunded the excess charge. No penalty pursuant to this subdivision may be recovered if a court has ordered a similar penalty assessed against the same person in a civil action by the administrator (Section 6113). With respect to excess charges arising from sales made pursuant to revolving charge accounts or from loans made pursuant to revolving loan accounts, no action pursuant to this subdivision may be brought more than two years after the time the excess charge was made. With respect to excess charges arising from other consumer credit sales or consumer loans, no action pursuant to this subdivision may be brought more than one year after the due date of the last scheduled payment of the agreement pursuant to which the charge was made.

(e) Except as otherwise provided, no violation of this division impairs rights on a debt.

(f) If an employer discharges an employee in violation of the provisions prohibiting discharge (Section 5106), the employee may within one year bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for six

## REMEDIES AND PENALTIES

weeks. In any case in which it is found that an employer has violated Section 5106, the court may award reasonable attorney's fees incurred by the employee.

(g) If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bonafide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subdivisions (a), (b), and (c), the validity of the transaction is not affected, and no liability is imposed under subdivision (d) except for refusal to make a refund.

(h) In an action other than a class action in which it is found that a creditor has violated this division, the court may award the debtor the costs of the action together with reasonable attorney's fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the debtor. For the purposes of this subdivision, assertion by a creditor of an agreement or any clause of an agreement made unenforceable by this division is a violation of this division.

(i) A creditor has no liability for a penalty under subdivisions (a) or (d) if within 15 days after discovering an error, and prior to the institution of an action under this division or the receipt of written notice of the error, the creditor notifies the person concerned of the error and corrects the error. If the violation consists of a prohibited agreement, giving the debtor a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

## CALIFORNIA COMMENTS

### Changes from the Official Text

1. Subdivision (a) of the Official Text has been amended as follows:

(a) If a creditor has violated the provisions of this division applying to *waiver of rights or benefits (subdivision (a) of Section 1107), collection of excess charges or enforcement of rights (subdivision (e) of Section 1201, receipts, statements of account and evidence of payment (Sections 2315 and 3314), certain negotiable instruments prohibited (Section 2403), balloon payments (Sections 2403 and 3402), security in sales or leases (Section 2407), assignments of earnings (Sections 2410 and 3403), attorney's fees (Sections 2413 and 3404), limitations on default charges (Sections 2414 and 3405), authorizations to confess judgment or taking powers of attorney (Sections 2415 and 3407), restoration of property (subdivision (e) of Section 2504), restrictions on interests in land as security (Section 3510), or limitations on the schedule of payments or loan term for regulated supervised loans (Section 3511), the debtor is not obligated to pay the credit service charge or loan finance charge, and has a right in an action other than a class action to recover from the person violating this division or from an assignee of that person's rights who undertakes direct collection of payments or enforcement of rights arising from the debt a penalty in an amount determined by the court not in excess of three times the amount of the credit service charge or loan finance charge. No not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000). With respect to violations arising from sales made pursuant to revolving charge accounts or from loans made pursuant to revolving loan accounts, no action pursuant to this subdivision may be brought more than two years after the violations occurred. With respect to violations arising from other consumer credit sales and consumer loans and from consumer leases, no action pursuant to this subdivision may be brought more than one year after the due date of the last scheduled payment of the agreement with respect to which the violation occurred.*

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This is adapted from an NCLC amendment, the comments to which follow, and includes a conformity amendment (see comments to Section 3501) substituting "supervised" for "regulated":

Rights that do not provide for adequate remedies or for any remedy at all, and prohibitions on practices that do not provide for sufficient penalties or for any penalty at all are generally ineffective to accomplish the desired result. They become little more than exhortatory, easily ignored, and meaningless proclamations. In order to deter practices that society has proscribed by legislation, a sufficient penalty must be imposed. Since an aggrieved party is the one best able to enforce violations of prohibitions, he should have an adequate remedy to do so. This proposed amendment takes a step in this direction.

Under subdivision (a) of the 1968 Official Text of the UCCC, penalties are imposed only for violations of two sections of the Code, Section 2403 prohibiting the use of certain negotiable instruments and Section 3511 limiting the inequality of payments and the length of the loan period for certain regulated loans. The penalty imposed is merely avoiding of an obligation to pay a credit service charge or loan finance charge and recovery of no more than three times the amount of such charge. In very few instances would this penalty be adequate either as a deterrent or to compensate the aggrieved party.

Subdivision (a) of this proposed amendment would add ten prohibitions to the existing two for which penalties could be imposed. In addition, the penalty itself would be increased to provide a significant deterrent to potential violators. The formula used here is derived from the Federal Consumer Credit Protection Act (Truth-in-Lending), with a minimum and a maximum recovery. Within this range a court may apportion penalties according to the seriousness of the offense and the overall circumstances of each violation. Alternate minimum penalties of \$250 and \$100 are suggested, but it is strongly urged that the larger minimum penalty be adopted as the best means to accomplish the purposes of this section. The suggested minimum of \$100 is the least that is needed to achieve the desired results. Penalties may not be recovered in a class action.

2. Subdivision (f) of the Official Text has been amended by inserting a one year statute of limitations in place of a "[ ] day" statute, and by adding the last sentence.

3. Subdivision (g) of the Official Text has been amended as follows:

(g) If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subdivisions (a), (b), and (d)(c), and the validity of the transaction is not affected, and no liability is imposed under subdivision (d) except for refusal to make a refund.

This is an NCLC amendment, the comments to which read:

The 1968 Official Text of subdivision (g) of this section provides that a creditor is not subject to penalty if he establishes by a preponderance of the evidence that a violation is unintentional or the result of bona fide error. Subdivision (g) of this proposed amendment retains this provision and adds to it the requirement adapted from Section 130(c) of the Federal Consumer Credit Protection Act (Truth-in-Lending) and Section 5203(c) of the 1968 Official Text of the UCCC that a creditor may be so excused only if he maintains procedures reasonably calculated to avoid such violations.

4. Subdivision (h) of the Official Text has been amended as follows:

(h) In any case an action other than a class action in which it is found that a creditor has violated this division, the court may award the debtor the costs of the action together with reasonable attorney's fees incurred by the debtor. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the debtor. For the purposes of this subdivision,

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*assertion by a creditor of an agreement or any clause of an agreement made unenforceable by this division is a violation of this division.*

This amendment is an NCLC amendment, the comments to which follow, except for exclusion of class actions, retention of "may award" instead of "shall award", and addition of the last sentence:

Subdivision (h) of the 1968 Official Text of this section permits a court in its discretion to award reasonable attorneys fees incurred by the debtor in cases where a creditor has violated the Act. Courts have frequently been reluctant to award attorneys fees and when they do so the amount is usually based on the amount of the recovery. As the amount of recovery in these cases is generally low, it is difficult to find attorneys to prosecute the case as they cannot be adequately compensated. A deterrent penalty is of little effect if lawyers are not available to prosecute the cases. The debtors' rights provided by this section are rendered meaningless if a remedy is lacking because of inability to retain a lawyer.

Subdivision (h) of this proposed amendment seeks to correct this situation by providing that the court must award reasonable attorney's fees in any action where it is found that a creditor has violated the Act. Moreover it sets as the standard by which the fees are measured not the amount of the recovery, but the actual time that an attorney reasonably spent on the case. This has the incidental effect of preventing an unearned windfall in those few cases where large recoveries are obtained. It should also encourage settlement as any time spent on a case after a reasonable offer of settlement may not have been reasonably expended.

5. Subdivision (i) has been added. It is an NCLC amendment, the comments to which are:

Violations may occur for a variety of reasons, not all of them necessarily pernicious. If the creditor within a reasonable time of discovering the violation voluntarily corrects the error, he need not pay a penalty. Subdivision (i) of this proposed amendment so provides, and it presumes that voluntariness ceases either upon the commencement of an action against the creditor or upon his receipt of written notification of the error. The 1968 Official Text of the UCCC has no comparable provision. This provision is adapted from Section 130 (b) of the Federal Consumer Credit Protection Act (Truth-In-Lending).

### **Prior California Law**

1. Civil Code Section 1812.7 (Unruh Act) provided that recovery of any finance, delinquency, extension, deferral or refinance charge is barred when the seller failed to comply with any provisions of the Act. Section 1812.8 provided a procedure for correcting any noncompliance, thereby avoiding any penalty. Section 1812.9 provided for recovery of three times the finance charge plus any delinquency, collection, extension, deferral or refinance charges for willful violation in connection with the imposition, computation or disclosure of or in conjunction with the finance charge on a consolidated contract. Recovery included all enumerated charges on the underlying contracts.

2. Civil Code Section 2983 (Rees-Levering Act) provided that a contract is unenforceable and the buyer may recover the total amount paid for violation of the provisions on contract contents or maximum finance charges. Section 2983.1 provided for recovery of three times the finance charge for violation of the rebate upon prepayment provision.

### **General Comments**

1. This section and Section 5203 are not intended to provide specific remedies for every violation, though most violations have been provided for including all of the more serious ones. For the remainder the commission has relied on the tort in essence doctrine of *Laczko v. Jules Meyers, Inc* (1969), 276 Cal App 2d 293, 80 Cal Rptr 798, in which it was held that violation of a statutory duty to another may be a tort and violation of a statute embodying a public policy, as does this code, it is generally actionable even

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though no specific civil remedy is provided in the statute itself. This doctrine, combined with the prevailing debtor's right to attorney's fees and the possibility of recovering punitive damages when the creditor's conduct was malicious or oppressive, is intended to give the wronged debtor a broad arsenal of weapons for seeking redress.

2. The short statute of limitations in subdivision (f) envisaged by the Official Text has been replaced in the California Text by the normal statute for tort actions.

3. Subdivision (h) is not intended to change existing law with respect to attorney's fees in class actions. The exclusion of class actions was inserted for this reason.

4. Many actions under the code are likely to be brought in cases where the creditor has not actually violated the code, but has attempted to enforce an unenforceable right, for example, an unconscionable clause in the agreement. Addition of the last sentence to subdivision (h) ensures that there is no loophole through which a creditor could escape liability for attorney's fees in such a situation.

OFFICIAL COMMENT

1. This Section sets forth certain remedies of the debtor in the event of violation of the Act by the creditor, subdivision (a) describes the rights of the debtor in the event of violation of Section 2403 with respect to the taking of a negotiable instrument in a consumer credit transaction, or of Section 3511 with respect to the schedule of payments or maximum loan term of regulated loans. Subdivision (b) describes the remedies available to the borrower when a loan at a rate of loan finance charge exceeding 18 percent is made by a person not authorized to make such a loan. Subdivisions (c) and (d) set forth the rights of the debtor with respect to excess charges by the creditor. Subdivision (f) describes the rights of an employee who has been discharged in violation of Section 5106.

2. The Act provides for other remedies in addition to those set forth in this division. The debtor has a defense to the enforcement of a transaction which violates Section 5107 on extortionate extensions of credit. Section 5108 gives the debtor a remedy in certain cases of unconscionability. Section 5203 sets forth the rights of the debtor with respect to transactions in which the creditor has violated the provisions on disclosure. Articles 3 of Chapters 2 and 3. Section 5204, which is derived from CCPA Section 125 [15 U.S.C.A. § 1635], allows to the debtor a right of rescission with respect to transactions in which the creditor takes a security interest in the residence of the debtor. The debtor also has a right to cancel a home solicitation sale. Article 5 of Chapter 2 [Section 2501 et seq.].

3. In addition to the foregoing individual debtors' remedies the Act provides for actions by the administrator for the benefit of debtors. The administrator may issue cease and desist orders with respect to violations of the Act. Sections 6108 and 6110. The administrator may also bring a civil action against a creditor for making or collecting charges in excess of those permitted by the Act; the court may order the respondent to refund to the overcharged debtors the amount of the excess charge and in some cases to pay to the debtors a civil penalty. Section 6113. In addition, Section 6111 provides for civil actions by the administrator for injunctions against a course of making unconscionable agreements or of fraudulent or unconscionable conduct.

4. In addition to the individual debtors' remedies and remedies of the administrator described above, the debtor may have other remedies based on general principles of law or equity, or based on the provisions of other applicable law. See Sections 1103 and 6115.

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May 1, 1972

## TO THE MEMBERS OF THE AD HOC COMMITTEE RE ATTACHMENTS

Gentlemen:

This is to advise you that the Board of Governors at its March 1972 meeting took the following action concerning your committee:

"RESOLVED, upon consideration of request submitted on behalf of Law Revision Commission under date of February 14, 1972 that the Board hereby authorizes the Ad Hoc Committee on Attachments to expand the scope of its studies to cover attachment, garnishment and execution and to transmit its comments on various tentative proposals of said Commission directly to the Commission, it being understood that said comments are those of the committee only and not necessarily those of the Board of Governors or of the State Bar."

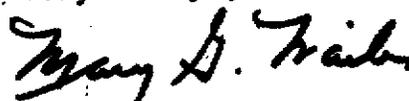
The Board at its April meeting adopted the following two resolutions concerning two reports of your committee:

"RESOLVED, upon consideration of Interim Report, Ad Hoc Committee on Attachments dated March 15, 1972 and report of Board Committee on Legislation thereon, that the Board hereby approves the provisions of S.B. 88 - Employee's Earnings Protection Law - with the amendments recommended by said Ad Hoc Committee, as so amended instructs the Legislative Representative to support the same and approves the balance of said report."

Members of the Ad Hoc  
Committee re Attachments  
May 1, 1972  
Page 2

"RESOLVED, upon consideration of Special Report, Ad Hoc Committee on Attachments dated March 7, 1972 and report of Board Committee on Legislation thereon, that the Board hereby disapproves S.B. 1048 re prejudgment attachment procedures for the reasons stated by the committee and instructs the Legislative Representative to oppose the same."

Very truly yours,



Mary G. Wailes  
Assistant Secretary

MGW:jls

cc: Messrs. D. Robinson, DeMouilly, Janofsky,  
Malone, Bradford and Eades

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95867



May 11, 1972

In reply refer to:  
L:JTP:cc

John H. DeMouilly  
Executive Secretary  
California Law Review Commission  
School of Law, Stanford University  
Stanford, CA 94305

Senate Bill 88

Dear Mr. DeMouilly:

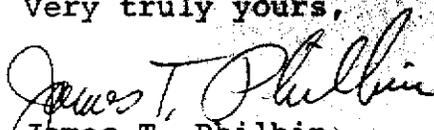
It appears to me that in Section 723.074 we have created a problem in preparing tables to show the amount to be withheld. The problem arises because of a general reference to Section 18806 of the Revenue and Taxation Code. Under that section, general withholding tables will be prepared showing different amounts to be withheld depending upon the number of dependents. I believe that, if we had to reproduce these same tables on our tax withholding orders, it would be too burdensome.

I recommend that in determining whether an amount shall be withheld under subdivision (c) (2) that the reference should be to withholding tables issued under Section 18806 of the Revenue and Taxation Code that are applicable to single persons or married persons without allowances for additional exemptions. I do not believe this will be a frequently used provision and, therefore, I do not see any real hardship being imposed by this change. If a taxpayer has many dependents, I cannot imagine that there would be any withholding by us in this situation.

I suggest that a sentence be added after the sentence that ends subdivision (c) (2) as follows:

In determining whether the earnings are sufficient so that a portion of earnings would be withheld pursuant to Section 18806 of the Revenue and Taxation Code, the tables issued under that section applicable to single persons or married persons without allowances for additional exemptions shall be used.

Very truly yours,

  
James T. Philbin  
Counsel