

November 24, 1970

<u>Time</u>	<u>Place</u>
December 3 - 7:00 p.m. - 10:00 p.m.	State Bar Building
December 4 - 9:00 a.m. - 5:00 p.m.	1230 W. Third Street
December 5 - 9:00 a.m. - 1:00 p.m.	Los Angeles 90017

**INTERIM AGENDA**

for meeting of

**CALIFORNIA LAW REVISION COMMISSION**

Los Angeles

December 3-5, 1970

1. Minutes of November 20 Meeting (to be sent)
2. Administrative Matters
3. Study 39 - Attachment, Garnishment, Execution  
Garnishment of Earnings After Judgment
  - ✓ Research Study Prepared by Professor Warren (sent 11/10/70)
  - ✓ Revised Draft of "Earnings Protection Act" (to be distributed at meeting)Pre-Judgment Garnishment and Attachment
  - Research Study Prepared by Professor Riesenfeld (sent 11/5/70)
  - Draft Statute on Earnings Deposited in Bank Account (to be sent)
  - Memorandum 70-118 (to be sent)Schedule and Financing of Study 39
  - Memorandum 70-119 (to be sent)
4. Study 70-115 - Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions
  - Memorandum 70-115 (enclosed)
  - First Supplement to Memorandum 70-115 (enclosed)
5. Study 30 - Custody Jurisdiction
  - Memorandum 70-116 (enclosed)
  - Research Study (attached to Memorandum 70-116)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION

December 3, 4, and 5, 1970

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on December 3, 4, and 5, 1970.

Present: John D. Miller, Vice Chairman  
G. Bruce Gourley (December 4 and 5)  
Noble K. Gregory  
John N. McLaurin  
Marc W. Sandstrom (December 3 and 4)

Absent: Thomas E. Stanton, Jr., Chairman  
Alfred H. Song, Member of Senate  
Carlos J. Moorhead, Member of Assembly  
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, E. Craig Smay, and Nathaniel Sterling, members of the Commission's staff, also were present. Professors Stefan A. Riesenfeld, Boalt Hall School of Law, and William D. Warren, U.C.L.A. School of Law, consultants on the study on attachment, garnishment, and exemptions from execution, were present to discuss their studies, and, sitting with the Commission during a portion of the consideration of these studies, was Ferdinand F. Fernandez, representing the Special State Bar Committee on Attachment and Garnishment.

The following observers also were present during all or a portion of the discussion relating to attachment, garnishment, and exemptions from execution:

Sandor T. Boxer, Coskey & Coskey, Los Angeles Attorney  
Harold F. Bradford, State Bar of California  
Lieutenant Arthur H. Cantero, Los Angeles County Sheriff's Office

Minutes

December 3, 4, and 5, 1970

W. J. Cody, Creditor's Service of Los Angeles  
Paul F. Cohen, Western Center on Law and Poverty  
Loren S. Dahl, Attorney, California Association of Collectors

Paul F. Dauer, Assistant City Attorney, Santa Barbara

Inspector James Gillespie, State Marshal's Association  
J. E. Gugerty, Mutual Collection Bureau  
Emil Markovitz, Creditor's Service of Los Angeles

Eleanor Morrison, Sears & Roebuck Legal Department  
Charles O'Brien, Sears & Roebuck Legal Department

Andrea Ordin, State Attorney General's Office, Los Angeles

David L. Price, Assistant Legislative Representative, State Bar

Lieutenant Howard Traut, Los Angeles County Marshal's Office

Glen Woodmansee, Orange County Legal Aid Society

Minutes  
December 3, 4, and 5, 1970

ADMINISTRATIVE MATTERS

Approval of Minutes of November 20, 1970, Meeting. The Minutes of the November 20, 1970, Meeting were approved as submitted.

Schedule for future meetings. The Commission meeting formerly scheduled for February 12 and 13, 1971, was changed to:

February 19	9:30 a.m. - 5:00 p.m.	State Bar Building
February 20	9:00 a.m. - 4:00 p.m.	1230 W. Third Street Los Angeles 90017

Distribution of background materials on attachment-garnishment study.

The Commission discussed the problem created by having to prepare a substantial number of extra copies of the attachment-garnishment materials for persons interested in this subject. The Commission directed that each person on the distribution list for such materials be notified that he would receive tentative recommendations, and that, if he wished to receive additional materials, he should specifically request that he be sent the additional materials.

Minutes  
December 3, 4, and 5, 1970

STUDY 30 - CUSTODY JURISDICTION

The Commission considered Memorandum 70-116 and the attached Research Study ("The Multiplicity of Child Custody Proceedings--Problems of California Law") by Professor Brigitte M. Bodenheimer. The Commission determined that the specific recommendations set out beginning on page 63 of the research study appeared to be sound and directed the staff, when time permits, to prepare a draft of a statute to carry out those recommendations.

The Commission agreed that it would be better if the Commission itself had an opportunity to discuss the statute to be drafted by the staff before the various persons and organizations interested in custody matters were invited to attend a Commission meeting.

Minutes  
December 3, 4, and 5, 1970

STUDY 39 - ATTACHMENT, GARNISHMENT, EXECUTION

SCHEDULING AND FINANCING OF FURTHER STUDY

The Commission considered Memorandum 70-119 and an oral presentation by the Executive Secretary.

The Commission approved the following tentative schedule for work on Study 39:

(1) A bill relating to garnishment of bank accounts and paid earnings is to be prepared for submission to the 1971 Legislature. Also, if needed, a bill to designate the state official authorized to seek exemption from the federal requirements is to be prepared for submission to the 1971 Legislature.

(2) A bill based on Professor Warren's study relating to earnings execution generally is to be submitted to the 1972 Legislature.

(3) A revised comprehensive statute relating to attachment, garnishment, and exemptions from execution is to be submitted to the 1973 Legislature.

The Commission authorized the use of approximately \$1,200 to finance a pilot factual study concerning the present use of the attachment and execution procedures. The Executive Secretary was to work out the procedure so that law students could be added as intermittent employees to the Commission's payroll to conduct the study under Professor Riesenfeld's supervision if possible. Otherwise the students would be employed by Professor Riesenfeld and he would be reimbursed for the cost of their employment. The Commission deferred consideration of the financing of further studies by Professors Riesenfeld and Warren because Professor Riesenfeld stated he would not be able to undertake anything in addition to the pilot study at this time.

REVIEW OF WRITTEN COMMENTS

The Commission considered Memorandum 70-118 and the attached letters relating to Study 39. No action at this time was required or taken with respect to the letters. They will be considered when the matters to which they relate are considered by the Commission

ATTACHMENT OR EXECUTION ON PAID WAGES AND BANK ACCOUNTS

(PROPOSED AMENDMENT TO CODE OF CIVIL PROCEDURE SECTION 690.6)

The Commission reviewed at some length the revision of Code of Civil Procedure Section 690.6 proposed by Professor Riesenfeld and determined that some changes in the existing section were required by the Sniadach decision and the federal truth-in-lending act.

The Commission directed the staff to draft possible amendments to Section 690.6 which incorporate the following considerations. (These considerations are to serve only as points of reference for further examination and discussion in the preparation of a tentative recommendation.):

(1) The exemption from attachment and execution should apply to wages both payable and paid.

(2) The statute and Comment thereto should make clear that, to be exempt, paid wages should be clearly identifiable as wages by the levying officer. If not so clearly identifiable, the debtor or defendant should bear the burden of having to claim and show that the item taken was in fact wages.

(3) The checking account exemption should protect only wages which are deposited within the thirty days immediately preceding the levy and which represent no more than a one-month earning period.

Minutes  
December 3, 4, and 5, 1970

(4) The following should be exempt from prejudgment levy of attachment:

(a) all earnings due or owing to the debtor which are compensation for personal services. This exemption should be automatic; the debtor should not be required to file a claim for exemption.

(b) all earnings paid to the debtor and still in a form clearly identifiable as earnings. This exemption also should be automatic. The Commission was advised that the automatic nature of the exemptions listed here under (a) and (b) is required by Sniadach inasmuch as there is no provision in California for a hearing prior to the levy of attachment.

(c) An amount deposited in a checking account equal to  $4\frac{1}{3}$  times 30 times the federal minimum hourly wage (presently \$208). This exemption should be automatic.

(d) An amount equal to 75% of all earnings deposited in a checking account (the federal exemption from garnishment) upon the filing of an affidavit by the debtor with the bank which states that the deposit sought to be exempted does in fact represent earnings.

(e) Upon claim and a showing of need at a noticed hearing, all earnings deposited in a checking account could be exempted.

(5) The following should be exempt from post-judgment levy of execution:

(a) An amount determined pursuant to the federal restrictions on garnishment should be automatically exempt from all unpaid earnings and earnings paid but still in a form clearly identifiable as wages.

(b) An amount deposited in a checking account equal to  $4\frac{1}{3}$  times 30 times the federal minimum hourly wage (presently \$208) should be exempt upon

the filing of an affidavit by the debtor with the bank which states that the deposit sought to be exempted does in fact represent earnings and the debtor has claimed no similar exemption on any other account. The form for the affidavit should be furnished to the debtor at the time he is given notice of the levy, and the debtor should be required to file the affidavit within a short period of time.

(c) Upon noticed hearing, the debtor should be able to claim either the federal exemption from garnishment or an up to a complete exemption based on the needs of the debtor's family. However, the staff was directed to consider whether the claimed exemption could not be subject to some maximum limit (e.g., \$1000) in addition to the one-month earning period limitation.

(6) Any procedure provided should protect the banks from any liability and should also be relatively simple for the banks to use.

(7) The staff was directed to determine whether a procedure existed for the levying officer to endorse paychecks and take similar action to reduce earnings to a form capable of disbursement to both the creditor and debtor.

(8) The staff was directed to consider the problems raised by both multiple accounts and accounts in the name of more than one person.

(9) The staff was directed to consider whether the tentative recommendation should designate the California official authorized to seek federal approval of the procedure provided.

(10) The staff was directed to determine what the impact of these procedures will be on wage assignments, as well as welfare payments, unemployment assistance, and pensions and retirement benefits.

Minutes  
December 3, 4, and 5, 1970

EARNINGS PROTECTION ACT

The Commission considered a memorandum concerning the Earnings Protection Act and the attached statute draft, dated November 27, 1970, submitted by Professor William D. Warren, the Commission's consultant.

Whether forms should be included in statute

The Commission discussed whether specimen forms should be included in the statute. After noting Section 415.30 of the Code of Civil Procedure, which provides a form for service by mail and then provides that a form approved by the Judicial Council is deemed to comply with the statute, the Commission determined not to include all the forms in the statute but instead to prescribe the minimum substantive content of the forms, leaving it to the administrator to prescribe the actual form to be used. The omission of the forms from the statute itself would give greater flexibility.

Whether a standard based on gross income can be devised

Professor Warren pointed out that the adoption of a minimum based on gross income--such as \$100 per week--would not eliminate the need to use the "disposable earnings" concept in the statute since the federal act limits garnishments of earnings to 25 percent of "disposable earnings." The staff proposed that a system be established based on gross income, less deductions for social security, and federal income taxes based on the amounts withheld for a single person at various income levels, with a percentage applied to the remainder which is low enough to cover other deductions that might be allowed in reaching federal "disposable earnings" so that the table reflecting the amount of wages to be garnishable would be

Minutes  
December 3, 4, and 5, 1970

approved by the federal authorities. Some of the problems noted in preparing a table based on such a scheme were: (1) allowance should be made for change in the federal income tax law, social security law, and the like; (2) determinations should be made whether payments to private retirement funds, union dues, health plan premiums, and the like, are deductible under the federal statute. It was noted further that, in New York and most other states, state income tax is withheld and considered in determining disposable income while such liability is not considered in California. It was suggested that the only method that would work would be one where a state officer prescribed the table based on a formula set out in the state statute. The official could then consult with the federal authorities and obtain approval of the table in advance so that California employers would know that withholding pursuant to the state-prescribed table would meet federal requirements.

No decision was made whether the staff proposed scheme was possible or practical. The staff was directed to attempt to prepare a table and also to prepare guidelines to the administrator in devising the suggested table.

Minimum exempt gross income

It was suggested that a minimum exemption of \$100 a week should be included in computing the amount of gross income that should be subject to garnishment or a comparable minimum if the disposable earnings concept is used. This would avoid the need for many court hearings that otherwise would result under the hardship provision, and each wage earner would get at least a \$100 exemption.

Minutes  
December 3, 4, and 5, 1970

Definition of disposable income

Another approach suggested was to define disposable income in the statute with a direction to the administrator to also deduct anything else required to be recognized under federal law or regulations. The state administrator would be able to promulgate and to distribute a checklist to employers to enable them to know what should be deducted in determining disposable income. The administrator could also issue rulings on particular questions as to what constitutes disposable income, and the local offices of the administrator could advise employers on questions on the basis of these rulings or checklists.

Time for service of notice

The notice of earnings levy should be permitted to be served by mail together with the notice that default is to be entered. This would be optional with the plaintiff.

The claim of a hardship exemption should be set for hearing within 15 days after the application for a hearing is received by the clerk. See the comparable provisions in existing law.

Written pleadings; requirement of presence at hearing

It was suggested that a form be provided to the judgment debtor who seeks a hearing on necessity which would consist, in effect, of a financial statement. Such form would be completed by any judgment debtor who desires to obtain a hearing to have earnings exempted.

It was suggested both that the debtor be required to appear or, on the other hand, that the judge be permitted to determine the matter on the

Minutes  
December 3, 4, and 5, 1970

basis of written statements provided by the parties, and to draw inferences against the debtor if he fails to appear at the hearing. In any case, the creditor should not be required to appear at the hearing, and the court should make sure that the debtor has proven his case for the exemption even though the creditor does not appear. The staff is to prepare a provision dealing with these problems in the next draft of the statute.

It was suggested that the creditor should be authorized to agree with the debtor to a payment plan without a hearing, and thus the court hearing could be avoided. However, it may be necessary for the court to at least make an order based on the agreement to protect the creditor. (For example, unless the court makes an order, another creditor might levy on the earnings.) It was suggested that the judgment debtor be permitted to suggest a payment plan in his application for a hearing. The court could take the suggested plan into consideration at the hearing. The creditor might indicate that the plan was acceptable, and this would, perhaps, avoid the need for the court making a careful review of the matter.

Section by section review of statute

Section 101. No change.

Section 102. No change.

Section 103. The Comment to Section 103 should be expanded to include a discussion of wage assignments under Labor Code Section 300, the effect of a wage assignment on the concept of "disposable income" (if that concept is retained in the statute), and the effect of a wage assignment on a subsequent wage garnishment. The discussion of wage assignments should also

Minutes  
December 3, 4, and 5, 1970

consider the extent to which a creditor under such an assignment can enforce the assignment against the employer and the employee's right to terminate the assignment.

Section 104. The Comment to Section 104 should be revised to include a discussion of what constitutes "support of any person" and also a reference to the other California statutes that provide the method of obtaining enforcement of support orders. A similar reference should be made to the statutes that provide the means of enforcing a judgment on a debt due the state. The staff was asked to determine whether these other statutes are sufficient.

Section 105. The use of the term "employer" (especially in the forms) is confusing in certain situations. For example, where the client of the lawyer is garnished by a creditor of the lawyer. The staff was directed to consider whether a better term can be devised. Perhaps the form could be revised to include an explanation of what "employer" means. See the form on page 27 of the statute attached to the memorandum.

The problem of a pension or retirement program was discussed. The proposed statute does not make reachable anything that is otherwise exempt by law. Thus, it does not make reachable those retirement or pension funds that are already exempt by statute from execution. With respect to retirement or pension funds that are exempt only if the exemption is claimed, the proposed statute does provide an automatic exemption in the amount provided in the proposed statute (the remainder is exempt if the exemption is claimed).

Minutes  
December 3, 4, and 5, 1970

The problems created by inclusion of a "spendthrift clause" in a retirement fund should also be considered by the staff. See Thomas v. Thomas, 192 Cal. App.2d 771, 13 Cal. Rptr. 872 (1961)(pension fund payments not subject to garnishment for overdue alimony where fund contained a spendthrift clause).

The Commission determined that the statute should be redrafted to make clear that protected earnings include periodic payments pursuant to a pension or retirement program and that this exemption of retirement or pension funds should be automatic. The reasons for this should be stated. Payments received from pension and retirement funds should, however, be considered in determining the total exemption available under the proposed statute for earnings where a person receives payments both from a pension or retirement fund and other sources. A lack of enthusiasm for limiting the amount of the exemption for pension and retirement fund payments was apparent, but the staff indicated that it might attempt to draft a statute that would make uniform rules applicable to all pension and retirement funds, both public and private, with an appropriate limitation on the total amount of the exemption.

Section 201. In redrafting this section, the phrase "the lesser of the following" should be inserted after "may not exceed."

Subdivision (2) was revised to substitute "essential for the support of the judgment debtor's family" for "necessary for the use of the judgment debtor's family."

Section 202. No change.

Minutes  
December 3, 4, and 5, 1970

Section 301. The Commission discussed the problems that may arise under a continuing levy. The continuing levy procedure set out in the proposed statute would permit one creditor to get priority over all other creditors. It was recognized that the first creditor to levy on a \$5,000 parcel of property will get priority over other creditors. However, it was suggested that wages are distinguishable because they are periodic and come due in the future.

One problem suggested was that, if a debtor confessed to judgment in the amount of \$5,000 to a friend, the debtor might be able to avoid garnishment of his wages by all other creditors for an extended period of time while payment on the \$5,000 judgment was being withheld and paid to his friend. The solution to this problem seems to be to set the judgment aside on the ground of fraud in attempting to defeat the rights of the other creditors. The law on fraud was considered to be adequate to take care of this problem, and it did not appear that anything additional was needed on this point in the proposed statute.

A representative of creditors reported that he has discussed the New York continuing levy procedure with creditors in that state. Two objections to the New York procedure are made. First, in the case of a bona fide large judgment, it could tie up the wages subject to garnishment for five or ten years or even for the lifetime of the judgment debtor. Secondly, these creditors also mention that there are numerous situations where a friend gets a judgment, but it is difficult to prove that it is a fraudulent judgment. He reported further, however, that representatives of

Minutes  
December 3, 4, and 5, 1970

creditors take various positions--some support the concept of a continuing levy; others oppose it. It seems a reasonable compromise would be to put a time limit on the continuing levy. This would appear to be more workable and equitable to all concerned than the existing California procedure or the New York procedure. From the standpoint of the debtor, the suggested procedure would help to minimize court costs, and, because of the liberal exemptions, would give him enough money to live on. From the standpoint of the creditor, the impact of garnishment on the debtor is not so drastic, and the debtor will, accordingly, have a better chance of paying his creditors and avoiding bankruptcy. Moreover, the suggested procedure avoids the present, constant need to pay out the costs of levying each time a levy is made. While the creditor can now add such costs to his judgment, he has no assurance that he will ever actually recover these costs from the debtor, who may go into bankruptcy, quit his job, be fired, and the like. It is actually better for everyone--the debtor, the creditor, and the employer--for the debtor to come in and sit down and voluntarily work out a payment plan, even though payments are small.

The six-month period for the continuing levy would help to avoid the problems in New York. For example, there would be much less incentive to obtain a fraudulent judgment because it would only defer other creditors for six months at the most.

The Commission discussed the problem of subsequent attempts to garnish wages after an order withholding wages has been directed to the

Minutes  
December 3, 4, and 5, 1970

employer and the issue of what priority, if any, is to be given to subsequent creditors who attempt to levy on wages when a prior garnishment is in effect.

The Commission tentatively determined that the employer should merely notify subsequent garnishers that he is presently withholding wages pursuant to an order and should tell them the court from which that order issued and the date when that order expires. (His return, for example, would state that the levy then in effect expires on July 5, 1971. Then, on July 6, 1971, the creditors could all attempt to obtain a new wage withholding order.) No priority would be given and, in effect, the present attempt of all creditors to obtain a wage levy each pay day would take place every six months rather than each pay day. The Commission directed the staff to prepare a revised statute with a six-month continuing levy and notice by the employer to subsequent creditors that the levy is in effect until the specified date.

Consideration should also be given to the creditor's remedy if the employer does not honor the wage withholding order. See Code of Civil Procedure Section 717.

Section 302. A provision should be added to this section that the administrator can promulgate a form in lieu of the statutory form provided. If such a form contains the substance of the statutory form, it should be deemed to comply with the statute. The staff should consider whether the form should be in the form of a declaration under penalty of perjury, recognizing that an out-of-state declarant would have to make the declaration under oath. If the statute refers merely to an affidavit, the administrator could promulgate a form providing a declaration under penalty of perjury.

Section 303. The application for a hearing should be by affidavit or declaration under penalty of perjury. Consideration should be given to requiring the application to be accompanied by a detailed financial statement. The Comment (and the illustrative form) should contain a statement to the effect that the judgment debtor is not limited to the reasons stated in his application for a hearing, but the court may consider that the application was incomplete in ruling on the request for relief by the judgment debtor. Perhaps the application for hearing could be by postcard.

Section 304. The introductory portion of Section 304 should read:  
"If the judgment debtor sends the application for a hearing by mail or otherwise within the time specified in Section 303. . . ."

There should be a provision providing that the matter be set for hearing within 15 days from the date the application for hearing is received.

If there is no hearing, the order to the employer will state in effect that the employer is to withhold and pay to the judgment creditor the maximum amount provided by law. The order would contain information on how that

Minutes

December 3, 4, and 5, 1970

amount is to be determined, depending on what system is devised for determining that amount. If there is a hearing, the court can specify the amount withheld. However, the statute should provide for a flexible order, that is, the court should be authorized to make any of the following orders: (1) that the employer is to withhold the maximum amount provided by law; (2) that nothing is to be withheld; (3) that the employer is to withhold a specified amount or a percentage of the amount in excess of a specified amount; or (4) that nothing is to be withheld for a designated period and then a designated amount is to be withheld. Problems would arise where the employee is sick for two days and does not get paid if the order is not made flexible. To deal with these types of problems, the statute should give the judge a flexible authority, with perhaps guidelines in the statute, to devise an appropriate order to the employer.

The Commission discussed whether there should be any procedure at all to cover hardship cases. One scheme suggested would prescribe a gross exemption but would eliminate any right to an exemption in a greater amount. This would eliminate the need for a court hearing. On the other hand, Professor Warren pointed out that garnishment is under attack throughout the country, that there is great support throughout the country for abolishing garnishment entirely, that the failure to provide a hardship provision to allow a judgment debtor to obtain some relief in clear hardship cases will result in abuses that could cause the entire procedure to be abolished. The hearing requirement proposed in the statute is not likely to result in any more hearings than now result under the present procedure which requires two determinations: (1) whether an exemption is necessary for the support

Minutes

December 3, 4, and 5, 1970

of the debtor's family and (2) whether the debt was incurred for "common necessities." It was noted that the debtor would be advised that he could obtain a court hearing under the proposed procedure, but it was also noted that, under present procedures, he also is advised that he can come into court to claim his exemptions. A high basic exemption would eliminate the need for most of the claims for a hardship exemption. Professor Warren expressed the view that he did not believe there would be any more hearings under the proposed statute than are now held under the existing procedure. All the factors that go to discouraging persons from claiming their exemptions now will operate to discourage persons from requesting a hearing under the new procedure. Moreover, if hearings are requested, and the debtor does not appear at the hearing, there will be no burden on the courts merely because the hearing is requested. In addition, if the request for the hearing operates to deprive the debtor of later requesting a hearing during the six-month period, it would be even more unlikely that hearings would be requested. Nevertheless, the order must be suspended if a hearing is requested, because otherwise the employer will be burdened with orders that are later changed. There is a real advantage to not bothering the employer until the amount to be taken is decided upon.

It was noted that, under AB 2240, the debtor is advised that he has the right to claim his exemptions.

The Commission discussed the problems that are presented by a hearing on hardship exemptions. For the time being, the hardship exemption hearing was retained. However, a decision on whether a hardship hearing is to be provided will be made after the standard exemption table to be prepared by the staff is available. The Commission discussed an exemption based on \$100 per week.

Minutes  
December 3, 4, and 5, 1970

Section 305. Under existing law, the employee who has several employers is treated as if each employer were the only employer. Section 305 would change this so the creditor could obtain a hearing and the judge could order payments based on the income from all employers. This would cause problems if the debtor lost one of his employments; hence the court needs a continuing power to modify the order. The Comment to Section 305 should point out that the section will also apply where the person has exempt retirement funds (which would have to be considered in determining the amount that can be withheld out of his nonexempt earnings.

Section 306. No comments.

Section 307. The form should not have the words "by the above entitled court in the above entitled action;" instead, it should state that the judgment was entered in the records of [specified court--indicating precise court], and should refer to the docket number and contain any other needed information. A certified copy of the judgment will be filed in ~~the~~ court issuing the earnings withholding order. The employer's notice goes to the court that issues the withholding order and will need a filing number. A fee should be prescribed to be paid to the court issuing the withholding order. (See the new Judicial Council Form in connection with Section 307.) The problem of a traveling salesman with no fixed residence was discussed and the possibility of using either the county of residence or the county of employment at the time the proceeding is commenced was considered.

On page 13, paragraph (b) at the top of the page was revised to read:

(b) The judgment debtor's employment has been terminated for 90 days or more after receipt of this order.

Minutes  
December 3, 4, and 5, 1970

In paragraph (c), "released from liability" was changed to "released from levy." This paragraph should also make clear from whom the notice is to come. The problem of a release resulting from a bankruptcy proceeding should also be considered. (Under the new discharge bill, the entry of the bankruptcy order affects the discharge so that will simplify the procedure.)

Section 308. There should be included in the form the employee's social security number, if known.

Section 309. This section should be revised to reflect the change to the six-month order.

Section 310. This section should be revised to reflect the decision that all creditors compete to be first upon expiration of the prior order.

Section 311. This section should be revised to refer to the release of the levy or earnings withholding order by the judgment creditor. It was suggested that the statute should specify the manner in which the judgment creditor releases the withholding order. A form should be provided as a part of the form package.

Section 401. The restriction against discharge should be explained better in the Comment. Labor Code Sections 2922 and 2924 (see background study) should be repealed or revised.

Section 501. In connection with this section, the issues were raised: (1) whether the existing law relating to employers is adequate to cover excess withholding by an employer and (2) why is "after demand" included in subdivisions (1) and (2)?

Minutes  
December 3, 4, and 5, 1970

In subdivision (4), the period should be changed to 30 days. Actual knowledge is to be required, and the word "actual" should be inserted in subdivision (4). The Comment should indicate what is meant by actual knowledge. There would be no liability merely for a computer error with no other knowledge. To be liable, the creditor should also know beyond any doubt that there has been an actual excess withheld; however, he should have a duty to investigate when he is given notice of an excessive withholding. Nevertheless, almost the only case where liability would exist is where the creditor has been fully paid and continues to receive payments. It was noted that, if garnishment is based on gross income, the test would be fairly simple. Then, after a demand, the creditor could check and see if the amount withheld was properly withheld according to the table. Moreover, the judgment creditor should be able to rely on the withholding order in determining whether he is subject to possible liability under subdivision (4). The statute should make clear that the administrator can bring the action on behalf of the employee under this section.

If any sanction is included against the employer, it should apply only if the employer is not in compliance with the wage withholding order.

The Comment should point out that the statutory remedies are not exclusive. Liability for abuse of process should be the remedy for "sewer service."

The Commission discussed whether the creditor should be provided a remedy in the statute if the employer withholds money from the employee but never pays it over to the creditor. Section 503 was revised to permit the creditor to recover his attorney fees in such a case. Putting the money in his pocket would subject the employer to a possible criminal action. Also, even under

Minutes  
December 3, 4, and 5, 1970

present procedures, a creditor may examine the garnishee (employer) and have a contempt order issued for the employer's failure to comply with the court's order. See Code of Civil Procedure Sections 719-721. It was recognized that practical problems exist, but they were not considered ones that could be solved in the proposed statute.

Section 502. The existing Labor Code provisions (which have a standard somewhat similar to that proposed here) should be examined and their substance inserted here.

There should be a reference to the requirement of mitigation of damages in the Comment to Section 502. See Green v. Smith, 261 Cal. App.2d 392, 67 Cal. Rptr. 796 (1968).

Section 503. This section was revised (3 to 2 vote) to read in substance as follows:

In any action brought under the provisions of this Part, the court may, in its discretion, award costs and reasonable attorney's fees incurred by the prevailing party. This section does not apply to any hearing on the issue of whether a portion of the earnings of the employee are essential for the support of his family.

The primary reasons for this provision are to encourage employers to pay over as required by the order and also to provide judgment debtors with a practical remedy.

Section 601. Subdivision (1) of Section 601 was deleted. However, the Comment should state that nothing in the act precludes an employer from bringing an action for indemnity against creditor where the employer is sued by the employee for excessive withholding. There should be no requirement for supplementary proceedings to collect under subdivision (2). See Code of Civil Procedure Sections 719-721.

Minutes  
December 3, 4, and 5, 1970

Administrative enforcement--Section 701 et seq. The staff is to prepare a memorandum on the possible administrative agencies that might be selected to enforce the statute. One of the existing California agencies will be selected.

Section 701. No change.

Section 702. Subdivision (2) should be made broader in case the federal law is changed. That is, the subdivision should be phrased in terms of providing such information as is needed by the federal administrator in order to obtain a state exemption from federal statute and regulations.

Section 703. An effort should be made to find a comparable California statute dealing with investigations to enforce an act and Section 703 should be based on such a California statute. It was suggested that perhaps the Labor Code has such a provision applicable to investigations by the Labor Commissioner. However, the policy of the section appeared to be sound. Further consideration should be given to whether the subpoena power referred to should be statewide or more limited.

Section 704. This section, too, should be based on an existing California statute if a model can be found. Rules would be promulgated under the Administrative Procedure Act. The normal procedure to enforce these rules would be to obtain a court injunction. See Section 705. The action of the administrator should be reviewed de novo by the court.

Section 705. Under subdivision (2), there ordinarily will be a simple cease and desist order issued by the administrator with a court request by

Minutes  
December 3, 4, and 5, 1970

the administrator for its enforcement. There should be a trial de novo on review of such an order, but the problem of exhaustion of administrative remedies must be considered. The staff was directed to prepare a memorandum concerning what can be done in this area within the limitations of the California Constitution.

Section 706. This section should be shortened, if possible, to provide that the designated official may bring actions on behalf of employees under Section 501. This would avoid unnecessary detail in this section. In this connection, the staff was directed to check the provisions of the Labor Code which authorize the Labor Commissioner to bring actions for wages on behalf of an employee. The time specified in subdivision (4) should be conformed to the previously determined 30-day period if subdivision (4) is retained. The need for subdivision (6) was questioned.

Section 801. This section should be revised to make the penalty for wrongful discharge a misdemeanor. To do so, it will be necessary to provide for confinement in a county jail and appropriate language to this effect should be adopted from an existing statute.

Forms. On page 25, the form should be in the form of a declaration or affidavit.

An additional form might be provided for the debtor to set forth relevant financial information.

A form for the notice of setting for hearing might also be provided. Such a notice should indicate that failure to appear at the hearing may preclude the debtor's right to a later hearing if such a rule is established. The notice also might state that failure to appear may result in the court drawing inferences against the debtor.

Minutes  
December 3, 4, and 5, 1970

STUDY 71 - COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER  
OF CAUSES OF ACTION, AND RELATED MATTERS

The Commission considered Memorandum 70-115 and the First Supplement to Memorandum 70-115. The Commission, at its November 20, 1970, meeting, had determined that Section 428.30 and the Comment thereto should be revised as set out on page 7 of the Memorandum. The following actions were taken:

(1) The suggested addition to the Comment to Section 428.10 was approved.

(2) The suggested addition to the Comment to Section 428.70 was approved.

(3) The other matters presented for consideration by Memorandum 70-115 were discussed, but no revisions were made in the recommendation or proposed legislation.

November 27, 1970

Memorandum to: Members of Law Revision Commission and Staff

Re: Earnings Protection Act

From: Bill Warren

1. We agreed at the last meeting that perhaps it would be better to have the administrator prepare some of the forms and that the statute should only tell him generally what the contents of the forms should be. This draft adopts that view. However, for debtor and creditor groups to understand what this statute is all about, it would be very helpful for them to have some indication of what we have in mind with respect to these forms. Hence, I have prepared four illustrative forms in the manner that I hope an administrator would approach the task. I have labeled these "Sample Forms."

2. Note on Section 201. At the meeting on November 20, we theorized that we could make the lot of the employer easier with respect to his determination of disposable earnings if we substituted a figure of \$100 for the  $30 \times \$1.60$  formula. On reflection, it seems to me that we were wrong, for the employer still must determine what is disposable earnings for purposes of applying the 25% test; hence, increasing \$48 of disposable earnings to \$100 of gross earnings helps the employer only in the cases in which the debtor's gross earnings fail to exceed \$100. The reason New York was able to use the method that we wanted to use is that their law now restricts a creditor from taking more than 10% of a debtor's earnings, and this makes it unnecessary for them to determine 25% of disposable earnings, for it would presumably always be in excess of 10% of gross earnings. Pending further instructions, I will leave Section 201 unchanged.

Earnings Protection Act

Part 1. Short Title, General Provisions, and Definitions

Section 101. Short Title.

This Act shall be known and may be cited as the Earnings Protection Act.

Section 102. Earnings Levy by Judgment Creditor.

A judgment creditor may levy upon earnings of a judgment debtor in accordance with the following provisions.

Section 103. Earnings Levy Exclusive Judicial Procedure for Withholding.

Except as provided in Section 104, the earnings of an individual shall not be required to be withheld for payment of a debt by means of any judicial procedure other than pursuant to the provisions of this Act.

Comment

Attachment of earnings before judgment is abolished, and the procedure of earnings levy is the exclusive judicial method of compelling an employer to withhold earnings. Nothing in this Act affects wage assignments by contract between creditor and debtor.

Section 104. Exclusions.

The provisions of this Act do not apply in the case of

- (1) an order of a court for the support of any person;
- (2) an order of a court of bankruptcy under chapter XIII of the Bankruptcy Act; or
- (3) a debt due for any State or Federal Tax.

Comment

This section is taken from CCPA Section 303(b).

Section 105. Definitions.

For the purposes of this Act:

(1) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(2) "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(3) "Employer" means any person who owes earnings to another.

Comment

Subsections (1) and (2) are taken from CCPA Section 302. Proceeds of pension and retirement funds (except for Keough Act plans) are exempt under CCP Section 690.18, but exemption must be claimed under CCP Section 690.50. The effect of leaving reference to pension and retirement funds within the definition of earnings is to afford the debtor an automatic exemption for such proceeds to the extent provided by EPA Section 201. Subsection (3) defines "employer" broadly as including anyone owing earnings to another. Since the person who owes earnings for personal services to another will almost invariably be an employer in the popular sense of that word in cases in which a creditor is seeking to reach these earnings, the term "employer" is chosen to be the term used in this Act to describe the person who is ordered to withhold earnings, even though in some cases it would apply to persons who are not employers in the popular sense.

Part 2. Restrictions on Earnings Levy

Section 201. Restrictions on Earnings Levy.

(1) The maximum part of the aggregate disposable earnings of a judgment debtor for any workweek which is subject to earnings levy may not exceed

(a) 25 per centum of his disposable earnings for that week, or  
(b) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable,  
whichever is less. In the case of earnings for any pay period other than a week, the [Designated Official] shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (b).

(2) No earnings of a judgment debtor are subject to earnings levy which are necessary for the use of the judgment debtor's family supported in whole or in part by the judgment debtor.

#### Comment

Subsection (1) is the limitation found in CCPA Section 303(a). Subsection (2) is based on the exemption in CCP Section 690.11, but omits the provision on the "common necessities of life." Thus under this section, the debtor making more than \$64 per week in disposable earnings is subject to having 25% of his disposable earnings taken unless he can show that part or all of that 25% is necessary to support his family. The "Designated Official" is the administrator charged with enforcement of the Act. No attempt at this time is made to indicate what public official this should be.

#### Section 202. Violation of Restrictions.

No court may make, execute, or enforce an order or process in violation of the restrictions in Section 201.

#### Comment

This is CCPA Section 303(c).

Part 3. Procedure for Levy on Earnings

Section 301. Continuing Levy on Earnings.

(1) Receipt by an employer of an earnings withholding order constitutes a lien on unpaid earnings of the judgment debtor and upon future earnings when earned and imposes on the employer a continuing duty to withhold from the judgment debtor's earnings amounts in accordance with the earnings withholding order and to pay these amounts over to the person specified in the order until the writ is terminated.

(2) An earnings withholding order is terminated by either

(a) the employer's payment in full of the amount specified in the earnings withholding order;

(b) the termination of the judgment debtor's employment with the employer for 90 days or more; or

(c) receipt by the employer of notice pursuant to Section 311.

Section 302. Application for Issuance of Order.

The judgment creditor may apply for issuance of an earnings withholding order from the court which entered the judgment pursuant to which earnings execution is sought if the address of the judgment debtor's last known residence is within 150 miles of the city where the court is located. Otherwise the judgment creditor may apply for issuance of the order only in the county where the debtor was last known to reside. When applying for the order, the judgment creditor shall file an affidavit with the clerk which shall be in substantially the following form:

1. On \_\_\_\_\_ (date) \_\_\_\_\_ a judgment was entered by \_\_\_\_\_ (description of court) \_\_\_\_\_ in favor of \_\_\_\_\_ (name and address of judgment creditor) \_\_\_\_\_ and against

(name and address of judgment debtor) and said judgment was duly entered in (where entered). There is now owing on this judgment a net balance of \$\_\_\_\_\_, which includes any further sums which may have accrued since entry of the judgment by way of interest, costs, or fees. Of this amount, \$\_\_\_\_\_ was due on the judgment as entered and bears interest at 7% per annum from the date of entry.

2. The affiant requests the issuance of an earnings withholding order requiring (name and address of employer) to withhold from the judgment debtor's earnings the amounts allowed by law and to pay these amounts to (name and address of person to receive money).

3. The affiant states that he has no information or belief that the judgment debtor has been adjudicated a bankrupt with reference to the indebtedness for which the order is sought or that the judgment debtor is, at the time of the request for the order, under a wage earner's plan approved by a United States court.

Section 303. Notice of Earnings Levy; Application for Hearing.

(1) After filing an affidavit applying for issuance of an earnings withholding order, the judgment creditor or his representative shall send by mail or otherwise to the judgment debtor at his last known address a copy of the affidavit and a notice of earnings levy. After the affidavit and notice have been sent to the judgment debtor, the judgment creditor or his representative shall file an affidavit stating that fact.

(2) The [Designated Official] shall prescribe by rule the form of the notice of earnings levy. In addition to other matters deemed appropriate by the [Designated Official], the notice shall inform the judgment debtor that:

(a) the judgment creditor has asked the court to order a named employer to withhold a certain indicated amount of the judgment debtor's earnings

and to pay this over to the person specified in the order in payment of the judgment described in the accompanying affidavit;

(b) no amount can be withheld from the judgment debtor's earnings which he can prove in court either to be necessary for the use of his family supported in whole or in part by the debtor or to be for a debt which has been discharged in bankruptcy; and

(c) if the judgment debtor wishes a hearing to prove that amounts should not be withheld from his earnings pursuant to paragraph (b), he should fill in the accompanying form entitled "Application for Hearing" and send it by mail or otherwise to the clerk no later than 15 days after the date of the notice.

(3) the [Designated Official] shall prescribe by rule the form of the application for hearing. In addition to other matters deemed appropriate by the [Designated Official], the notice shall inform the debtor that, if he desires a hearing to prove that amounts should not be withheld from his earnings pursuant to paragraph (b) of subsection (2), he should briefly state the facts he intends to prove at the hearing and should return the completed form to the clerk no later than 15 days after the date of the notice.

#### Comment

See attached illustrative forms "Notice of Earnings Levy" and "Application for Hearing."

#### Section 304. Hearing on Amount to be Withheld.

(1) If the judgment debtor sends the application requesting a hearing to the clerk by mail or otherwise within 15 days after the date of the notice of earnings levy, a copy of the application shall be made available by the clerk to the judgment creditor or his representative and the court shall set

the matter of the amount to be withheld from the judgment debtor's earnings for a hearing. The judgment debtor and the judgment creditor or his representative shall be notified at least 10 days before the hearing of its time and place. The judgment debtor shall have the burden of proof on the issues of his need for earnings for the use of his family and discharge in bankruptcy.

(2) If the judgment debtor appears at the hearing and the court finds that the judgment creditor is entitled to have an amount withheld from the judgment debtor's earnings and paid over to him, the court shall enter an order stating the amount to be withheld from the judgment debtor's earnings for each pay period. The amount stated in the order shall be entered on the earnings withholding order when issued. If the judgment debtor appears at the hearing and the court finds that the judgment creditor is not entitled to have an amount withheld from the judgment debtor's earnings and paid over to him, the court shall so order and no earnings withholding order shall be issued.

(3) If the judgment debtor does not appear at the hearing, the court shall issue an order stating that the judgment creditor is entitled to have the maximum amount allowed by law withheld from the judgment debtor's earnings. This fact shall be stated in the earnings withholding order when issued.

(4) If the judgment debtor fails to request a hearing pursuant to subsection (1), he may subsequently request a hearing by sending an application for hearing to the clerk by mail or otherwise. The clerk shall notify the judgment creditor or his representative that the application has been received and shall make a copy of it available to the judgment creditor or his representative. The court shall then set the matter for hearing.

(5) If the judgment debtor requests a hearing pursuant to subsection (1) but fails to appear, the court may in its discretion grant another hearing

after the judgment debtor files an affidavit with the clerk requesting another hearing and explaining his failure to appear at the previous hearing.

(6) At a hearing held pursuant to subsection (1), the judgment creditor may be heard on the matter of the multiple employment of the judgment debtor (Section 305), and the judgment creditor shall have the burden of proof on the issue of his right to have a greater amount withheld from an employer because of the judgment debtor's multiple employment.

Section 305. Multiple Employment.

(1) The judgment creditor may request a hearing to show that, owing to the multiple employment of the judgment debtor, the judgment creditor is entitled to have an employer withhold a greater amount from the judgment debtor's earnings than the employer would have had to withhold were he the judgment debtor's only employer. The request for hearing shall be made to the court to which application was made for the earnings withholding order. The court shall set the matter for hearing after receiving a written request setting out the facts on which the judgment creditor's claim is based together with an affidavit stating that the judgment creditor or his representative has mailed a copy of the request for hearing to the debtor's last known address. The judgment debtor and the judgment creditor or his representative shall be notified at least 10 days before the hearing of its time and place. The judgment creditor shall have the burden of proof on the issue of his right to have a greater amount withheld from an employer because of the judgment debtor's multiple employment.

(2) If the court finds that, owing to the multiple employment of the judgment debtor, the judgment creditor is entitled to have an employer withhold a greater amount from the judgment debtor's earnings than the employer would have had to withhold were he the judgment debtor's only employer, then

the court shall enter an order stating the amount to be withheld from the judgment debtor's earnings for each pay period. The amount stated in the order shall be entered on the earnings withholding order when issued.

(3) At a hearing held pursuant to this section, the judgment debtor may be heard on the matter of the amount to be withheld from his earnings, and he shall have the burden of proof on the issues of his need for earnings for the use of his family and discharge in bankruptcy.

#### Comment

Suppose the judgment debtor has three jobs, each paying disposable earnings of \$50 per week. Each employer would believe that he could withhold no more than \$2 per week, but the judgment creditor is entitled to \$37.50 (25% of \$150). The employers should be permitted to rely on the assumption that they need only withhold \$2 per week until the judgment creditor can persuade the court otherwise. The court may order that the earnings withholding order shall direct one employer to withhold \$37.50 per week. The fact that one employer may have knowledge of the multiple employment of the judgment debtor is not determinative. He may pay out the \$2 per week until he is directed by the earnings withholding order to do otherwise.

#### Section 306. Issuance of Earnings Withholding Order.

The clerk shall promptly issue an earnings withholding order if

(1) after hearing, the court has found that a portion of the judgment debtor's earnings is subject to levy, or

(2) the judgment debtor has failed either to send the application requesting a hearing to the clerk within the proper time or to appear at a scheduled hearing.

#### Comment

If neither the judgment debtor nor the judgment creditor requests a hearing, none will be held before issuance of the earnings withholding order. If requested, two kinds of hearings are possible. First, the hearing on application of the judgment debtor (Section 303) at which the judgment debtor may seek to reduce the amount of earnings subject to levy by proving that he needs the earnings to support his family or that the debt was discharged in bankruptcy. Second, the hearing on application of the judgment creditor (Section 305) at which the judgment creditor may increase the amount of earnings subject to levy from any one employer by showing multiple employment on the part of the debtor. In either case, the parties are before the court, and if the court finds that the judgment creditor is entitled to any part of the judgment debtor's earnings, it must state that amount in its order pursuant to Section 304(2). The two kinds of hearings may be consolidated pursuant to Sections 304(6) and 305(3).

Section 307. Earnings Withholding Order.

(1) An earnings withholding order shall be issued in the name of the people, sealed with the seal of the court, subscribed by the clerk or judge, dated, and directed to the employer. The judgment creditor or his representative shall send the order to the employer by mail or otherwise and shall file an affidavit with the clerk stating this fact. The clerk shall make a copy of the employer's return available to the judgment creditor or his representative.

(2) The earnings withholding order shall be in substantially the following form:

(Title of Court)

(Number and abbreviated title of action)

THE PEOPLE OF THE STATE OF CALIFORNIA

To (name and address of employer)

On (date) a judgment was entered by the above entitled court in the above entitled action in favor of (name of judgment creditor) and against (name of judgment debtor) and said judgment was duly entered in (where entered). There was owing on the judgment at the date of application for the earnings withholding order a net balance of \$                    , which includes any further sums which may have accrued since entry of the judgment until the date of the application by way of interest, costs, or fees. Of this amount, \$                     was due on the judgment as entered and bears interest at 7% per annum from the date of entry.

You are ordered to pay the amounts indicated below out of the earnings of the judgment debtor by withholding appropriate amounts from his periodic earnings and paying these amounts over to the person specified below after each periodic payment of earnings to the judgment debtor. You are ordered

to continue to make payments out of the judgment debtor's earnings until the happening of the first of the following three events:

(a) you have paid the judgment creditor the full amount specified in this order;

(b) you have terminated the judgment debtor's employment for 90 days or more after receipt of this order; or

(c) you have received notice from the judgment creditor that the judgment has been satisfied or that the judgment debtor has otherwise been released from liability on the judgment.

[If there is no court order specifying the amount to be withheld, the following shall appear on the order:]

The appropriate amount to be withheld from the judgment debtor's periodic earnings is that amount indicated by the accompanying form entitled "Computation of Amounts to be Withheld from Earnings."

[If there is a court order regarding the amount to be withheld, the following shall appear on the order:]

The appropriate amount to be withheld from the judgment debtor's earnings is the following:

\$ \_\_\_\_\_, per (payment period) \_\_\_\_\_.

[If both the above paragraphs are printed on the order, the clerk shall cross out the inapplicable paragraph.]

You are ordered to pay over to (name of judgment creditor or his representative) at (his address)

the appropriate amount by check mailed promptly after each payment of earnings is made to the judgment debtor.

You are ordered to fill out the accompanying form entitled "Employer's Return" and to return it to the clerk at the indicated time.

Section 308. Forms.

(1) The [Designated Official] shall prescribe by rule the form of the computation of amounts to be withheld from earnings. In addition to other matters deemed appropriate by the [Designated Official], the form shall contain information enabling the employer to compute the amount of the judgment debtor's disposable earnings available for earnings levy by the creditor.

(2) The [Designated Official] shall prescribe by rule the form of the employer's return. In addition to other matters deemed appropriate by the [Designated Official], the form shall state the following:

- (a) identification and address of clerk;
- (b) direction that form be sent to clerk by mail or otherwise no later than 15 days after date on the earnings withholding order; and
- (c) name and address of the judgment debtor.

In addition the form shall require the employer to supply the following information:

- (a) whether the judgment debtor is now employed by the employer or the employer otherwise owes him earnings;
- (b) if the judgment debtor is employed by the employer or the employer otherwise owes him earnings, the amount of his disposable earnings and the length of his pay period; and
- (c) whether the judgment debtor's earnings are now being withheld pursuant to a prior earnings withholding order.

Comment

See attached illustrative forms "Amounts to be Withheld from Earnings" and "Employer's Return."

Section 309. Additional Writs; Additional Hearings.

(1) After the amount stated as owing in the earnings withholding order is paid, the judgment creditor is entitled to issuance of another earnings withholding order covering costs and interest that may have accrued since application for the prior order. An order for costs and interest requested within 30 days of payment of the amounts stated in a prior order shall have the same priority as the prior order.

(2) [Six months] [Ninety days] after a determination at a hearing pursuant to Section 304 that some part of the judgment debtor's earnings to which the judgment creditor would otherwise have been entitled is not subject to levy because the earnings are shown to be necessary for the use of the judgment debtor's family, the judgment creditor is entitled to another hearing on this issue.

(3) [Six months][Ninety days] after a determination at a hearing pursuant to Section 304 that some part of the judgment debtor's earnings is subject to levy, the judgment debtor is entitled to another hearing on the issue whether the earnings are necessary for the use of his family.

Comment

This Act provides for a continuing levy upon earnings (Section 301(1)). In such a case the requirement of CCP Section 682.2 to the effect that the levying officer shall compute the interest accrued at the date of each levy is inappropriate. The simplest way for the creditor to get his additional costs and interest accruing until time of payment is to apply for another order for these amounts. The needs of the debtor's family for his earnings may change and subsections (2) and (3) allow both the creditor and the debtor to seek new hearings after a lapse of time. Alternative periods are suggested for consideration.

Section 310. Priority of Orders.

If more than one earnings withholding order is issued to an employer with respect to the same judgment debtor, the order which is first received shall be first paid. Succeeding orders shall be held by the employer and paid in order of their receipt.

Section 311. Satisfaction of Judgment.

When the judgment pursuant to which the earnings withholding order was issued is satisfied or when the judgment debtor has otherwise been released from liability on the judgment, the judgment creditor shall promptly notify the employer of this fact.

Part 4. Discharge from Employment

Section 401. Restriction on Discharge from Employment.

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

Comment

This is CCPA Section 304(a).

Part 5. Remedies of Judgment Debtor

Section 501. Civil Action by Judgment Debtor.

(1) If an employer withholds pursuant to earnings levy an amount from the judgment debtor's earnings in excess of that specified in the earnings withholding order, the judgment debtor may, after demand, bring a civil action against the employer to recover the excess amount.

(2) If a judgment creditor receives pursuant to earnings levy an amount

from the judgment debtor's earnings in excess of that allowed by this Act, the judgment debtor may, after demand, bring a civil action against the judgment creditor to recover the excess amount.

(3) The judgment debtor may bring action against the employer and the judgment creditor separately or he may join them but he is entitled only to one recovery for the excess amount withheld by the employer or received by the judgment creditor.

(4) If the judgment creditor receives pursuant to earnings levy an amount from the judgment debtor's earnings with knowledge that it is in excess of that allowed by this Act, and does not return the excess amount to the judgment debtor within 10 days of its receipt, the judgment debtor may bring a civil action to have a civil penalty of \$100 assessed against the judgment creditor for each such violation of this Act. The amount assessed shall be paid to the judgment debtor.

#### Comment

The judgment debtor can recover an excess amount from either the employer or the judgment creditor. If the judgment creditor receives money which he knows to be an excessive amount, he must return it to the judgment debtor or face a civil penalty. Unfortunately Title III of the CCPA neglects to give the debtor a remedy for violation of the statute, and this section corrects this omission.

#### Section 502. Remedy for Wrongful Discharge.

If an employer discharges an employee in violation of Section 401, the employee may bring a civil action for recovery of earnings lost as a result

of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed six times the weekly earnings of the employee.

Comment

Title III of the CCPA provides no civil remedy for wrongful discharge. This section corrects that omission.

Section 503. Costs and Attorney's Fees.

In any action brought by the judgment debtor pursuant to the provisions of this Part in which he is the prevailing party, the court may award costs and reasonable attorney's fees incurred by the judgment debtor.

Part 6. Remedies of Employer and Judgment Creditor

Section 601. Remedies of Employer and Judgment Creditor.

(1) If the judgment creditor receives pursuant to earnings levy an amount from the earnings of the judgment debtor in excess of that allowed by this Act, the employer may, after demand, bring a civil action against the judgment creditor to recover the excess amount.

(2) If an employer fails to pay over to the judgment creditor an amount from earnings of the judgment debtor in accordance with an earnings withholding order, the judgment creditor may, after demand, bring a civil action against the employer to recover the amount which the employer should have paid over pursuant to the order.

Part 7. Administrative Enforcement

Section 701. Powers of [Designated Official].

The [Designated Official] within the limitations provided by law may

- (1) receive and act on complaints, take action designed to obtain voluntary compliance with this Act, or commence proceedings on his own initiative;
- (2) counsel persons and groups on their rights and duties under this Act;
- (3) establish programs for the education of debtors with respect to credit practices and problems;
- (4) make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public; and
- (5) adopt, amend, and repeal rules to carry out the provisions of this Act. The [Designated Official] shall adopt rules not inconsistent with the regulations prescribed from time to time pursuant to Title III of the Consumer Credit Protection Act of 1968 by the Secretary of Labor.

Comment

The [Designated Official] must adopt rules consistent with those of the Secretary of Labor to obtain and maintain the state exemption.

Section 702. Liaison with Federal Administrator.

The [Designated Official] shall have the power and the duty

- (1) to represent and act on behalf of the State of California in relation to the Administrator of the Wage and Hour Division of the United States Department of Labor (hereinafter referred to as the Administrator) and his representatives with regard to any matter relating to or arising

out of the application, interpretation, and enforcement of California laws regulating proceedings to withhold earnings of debtors for payment of their debts;

(2) to submit to the Administrator in duplicate and on a current basis a certified copy of every enactment of the California legislature affecting any of those laws, and a certified copy of any decision in any case involving any of those laws, made by the highest court of California which has jurisdiction to decide or review cases of this kind, if properly presented to the court; and

(3) to submit to the Administrator any information relating to the enforcement of those laws which the Administrator may request.

#### Comment

In 29 Code of Federal Regulations Section 870.55(a), issued on May 26, 1970, the Secretary of Labor requires as a condition of exemption of any state that the official designated to enforce the law in that state be given the powers and duties set out above.

#### Section 703. Investigatory Powers.

If the [Designated Official] has reasonable cause to believe that a person has violated this Act, he may make an investigation to determine if the violation has occurred, and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity

and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence. Upon failure without lawful excuse to obey a subpoena or to give testimony and upon reasonable notice to all persons affected thereby, the [Designated Official] may apply to a court for an order compelling compliance.

Section 704. Application of Administrative Procedure Act.

The Administrative Procedure Act (Chapter 4, Chapter 4.5, and Chapter 5 of the Government Code) applies to and governs all administrative action taken by the [Designated Official] pursuant to this Act.

Section 705. Injunction; Administrative Enforcement Order.

(1) The [Designated Official] may bring a civil action to restrain a person from engaging in violations of this Act and for other appropriate relief.

(2) After notice and hearing, the [Designated Official] may order a person to cease and desist from engaging in violations of this Act. A respondent aggrieved by an order of the [Designated Official] may obtain judicial review of the order and the [Designated Official] may obtain an order of the court for enforcement of its order in the [\_\_\_\_\_] court. The proceeding for review or enforcement is initiated by filing a petition in the court. Copies of the petition shall be served upon all parties of record.

Comment

The [Designated Official] may elect either to go to court and obtain an injunction or to enter its own cease and desist order.

Section 706. Civil Action by [Designated Official].

(1) If an employer withholds pursuant to earnings levy an amount from the judgment debtor's earnings in excess of that specified in the earnings withholding order, the [Designated Official] may bring a civil action against the employer to recover the excess amount. The amount of earnings recovered shall be paid over to the judgment debtor.

(2) If a judgment creditor receives pursuant to earnings execution an amount from the judgment debtor's earnings in excess of that allowed by this Act, the [Designated Official] may bring a civil action against the judgment creditor to recover the excess amount. The amount of earnings recovered shall be paid over to the judgment debtor.

(3) The [Designated Official] may bring action against the employer and the judgment creditor separately or he may join them but he is entitled to only one recovery for the excess amount withheld by the employer or received by the judgment creditor.

(4) If the judgment creditor receives pursuant to earnings levy an amount from the judgment debtor's earnings with knowledge that it is in excess of that allowed by this Act, and does not return the excess amount to the judgment debtor within 10 days of its receipt, the [Designated Official] may bring a civil action against the judgment creditor to have a civil penalty of \$100 assessed against the judgment creditor for each such violation of this Act. The amount assessed shall be paid over to the judgment debtor.

(5) An action brought by the [Designated Official] may relate to violations of this Act by an employer or judgment creditor with respect to more than one judgment debtor.

(6) If a judgment debtor brings an action against an employer or judgment creditor to recover an excess amount or a civil penalty, an action by the [Designated Official] to recover for the same excess amount or civil penalty shall be stayed while the judgment debtor's action is pending and shall be dismissed if the judgment debtor's action is dismissed with prejudice or results in a final judgment granting or denying the judgment debtor's claim.

Comment

The [Designated Official] may bring actions on behalf of judgment debtors for recovery of excessive amounts or assessment of penalties. If the [Designated Official] has filed suit and the judgment debtor also files suit to recover the same amounts, the judgment debtor's suit takes precedence.

Part 8. Criminal Penalty

Section 801. Criminal Penalty for Wrongful Discharge.

Whoever willfully violates Section 401 (Restrictions on Discharge from Employment) shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

Comment

This is the penalty prescribed by CCPA Section 304(b).



5. However, no money can be withheld from your earnings which you can prove to the court to be necessary for the use of your family supported in whole or in part by you, or for a debt which has been discharged in bankruptcy.

Fill out the accompanying form entitled "Application for Hearing" if you claim either (a) that it is necessary for the use of your family, supported in whole or in part by you, that you must have more of your earnings than you would have left under paragraphs (1) through (4) above, or (b) that you have received a discharge in bankruptcy for the indebtedness for which the judgment was obtained. In order to have a hearing, you must send the application for a hearing by mail or otherwise to the clerk no later than 15 days after the date of the notice. You will shortly receive a notice from the clerk telling you where and when to appear in court for your hearing.

\* Disposable earnings means those earnings left after deduction of any amounts required by law to be withheld by the employer.

Application for Hearing

Directions: If you desire a hearing, send this form by mail or otherwise to: Clerk of \_\_\_\_\_ Court, at (address of clerk) . You must send it no later than 15 days after the date on the notice of earnings levy. [These blanks must be filled in before notice is sent to judgment debtor.]

I wish to apply for a hearing on the question of how much money can be withheld from my earnings because (check the appropriate box):

1.  In order to support my family I must have more of my earnings than I would have left under paragraphs (1) through (4) of the notice of earnings levy.

2.  I have received a discharge in bankruptcy for the indebtedness for which the judgment was obtained.

3.  Other reasons.

State briefly the facts which you believe you can prove in court showing, in case you checked box 1, why you need more of your earnings for family support, or, if you checked box 2, when and where you were discharged in bankruptcy, or, if you checked box 3, your reasons.

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\_\_\_\_\_ (date)

\_\_\_\_\_ (name of judgment debtor)

\_\_\_\_\_ (address)

\_\_\_\_\_ (social security number)

SAMPLE FORM

Employer's Return Form

Directions: Fill this form out and mail it to: Clerk of \_\_\_\_\_ Court, at (clerk's address). If you have questions about the earnings withholding order or this form, you may obtain information by calling or writing the clerk's office. His telephone number is: (XXX) XXX-XXXX. You must mail this form to the clerk no later than 15 days after the date on the order. [These blanks must be filled in before order is sent to employer.]

Levy on earnings of (name of judgment debtor), (address of judgment debtor). [These blanks must be filled in before order is sent to employer.]

1.  If the judgment debtor is not now employed by you and you do not otherwise owe him earnings,\* check this box.
2.  If the judgment debtor is now employed by you or you otherwise owe him earnings,\* check this box and fill in the amount of his disposable earnings (those earnings left after deduction of any amounts required by law to be withheld): \$ \_\_\_\_\_; and his pay period: (weekly, monthly, etc.).
3.  If the judgment debtor is now employed by you or you otherwise owe him earnings,\* but all of his earnings allowed by law to be withheld are now being withheld pursuant to a prior earnings withholding order, check this box in addition to box 2.

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(signature of employer)

\* "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

SAMPLE FORM

Computation of Amounts to be Withheld from Earnings

The amounts you are required to withhold from the judgment debtor's pay for each pay period are the following:

1. For one-week pay period

If your disposable earnings* are:	This amount can be withheld:
\$ 1.00 to \$48.00	Nothing
\$48.01 to \$64.00	All over \$48.00
\$64.01 and over	25% of total disposable earnings*

2. For two-week pay period

If your disposable earnings* are:	This amount can be withheld:
\$ 1.00 to \$ 96.00	Nothing
\$ 96.01 to \$128.00	All over \$96.00
\$128.01 and over	25% of total disposable earnings*

3. For semi-monthly pay period

If your disposable earnings* are:	This amount can be withheld:
\$ 1.00 to \$104.00	Nothing
\$104.01 to \$138.67	All over \$104.00
\$138.68 and over	25% of total disposable earnings*

4. For monthly pay period

If your disposable earnings* are:	This amount can be withheld:
\$ 1.00 to \$208.00	Nothing
\$208.01 to \$277.33	All over \$208.00
\$277.34 and over	25% of total disposable earnings*

For payment periods other than the ones set out, you must change the statutory exemption amounts for one week in paragraph (1) above into equivalent amounts for a different period. The formula to be used to find the equivalent of \$48 is: Z (the number of workweeks and fractions thereof) x 30 x \$1.60 (present Federal minimum wage). For this formula, a calendar month is considered to consist of 4 and 1/3 workweeks.

\* The law defines "disposable earnings" as meaning "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." Hence, you would not include in an employee's disposable earnings amounts withheld for: (list of examples, e.g., federal income tax, social security tax, etc.). On the other hand, you would include in an employee's disposable earnings amounts withheld for: (list of examples, e.g., company retirement plans, group health or life insurance premiums, savings bonds, charitable contributions, etc.).