NOT FOR GENERAL DISTRIBUTION

#39.30 4/2/73

Memorandum 73-38

Subject: Study 39.30 - Wage Garnishment and Related Matters

Attached as Exhibit I are several letters which express the views of Mr. Alvin O. Wiese, Jr., concerning the Commission's recommendation relating to wage garnishment and related matters.

We plan to set Senate Bills 102 and 103 (the bills introduced to effectuate the wage garnishment recommendation) for hearing soon. We believe that the Commission should consider the suggestions of Mr. Wiese before the bills are set for hearing since the matters he discusses in his letter probably will be brought up at the hearing. The following is an analysis of those suggestions. Unless otherwise indicated, references are to pages in the printed report (attached to Memorandum 73-35).

Section 690.50 (pages 143-147)

Section 690.50, dealing with the manner of claiming an exemption, has been amended to delete all reference to exemption of earnings. The exemption of earnings is claimed under the new statute. Mr. Wiese apparently is concerned that the time limits set out in Section 690.50 (existing law) are not appropriate in case of a wage garnishment. As previously stated, the section is amended so it no longer applies to wage garnishments generally, but the section will apply to claims for exemption for paid earnings (new Section 690.8 on page 140) and payments by pension or retirement plans (new Section 690.23 on page 142). Concerning the objection to the time limits in Section 690.50 as applied to a claim of exemption of property other than earnings, the staff has noted the objection, and it will be considered in connection

with the revision of the execution provisions when the staff prepares a background study on execution.

Section 723.023 (pages 157-158)

Mr. Wiese suggests that Section 723.023, which relates to priority of earnings withholding orders generally, does not adequately protect a creditor who serves an earnings withholding order during the time another order is in effect. He suggests that the statute require that a notice be given the second creditor "that an existing order is operative, whose order it is, or how long it has to run before the order being acted upon would be satisfied." In this connection, it should be noted that Section 723.104 (pages 184-185) requires that the employer complete an "employer's return" and send it to the second creditor within 15 days from the date of service of the second order. The content of the "employer's return" is specified in Section 723.126 (pages 193-194), and this section requires that the second creditor be provided the information suggested by Mr. Wiese (except that Section 723.126 merely requires that the return specify the expiration date of the first order rather than, as Mr. Wiese suggests, "how long it has to run before the order being acted upon would be satisfied."). Since the employer often will not be sure of the precise amount that will be withheld each payday, often he will be unable to specify when the order will be satisfied. Accordingly, the staff believes that Section 723.126 is satisfactory in its present form.

Mr. Wiese also suggests that the employer might be required to hold and honor the second order in the event that the prior order is satisfied or released prior to the expiration of the 125-day period during which the order would be alive as specified in Section 723.022(1). The Commission has discussed this alternative on a number of occasions and has decided not to put this burden on employers. Instead, we have provided a short period

during which the original creditor is precluded from serving a second order, and this gives other creditors an opportunity to serve their orders and an advantage over the first creditor during this period.

Section 723.026 (pages 159-160)

Mr. Wiese believes that Section 723.026, which requires the judgment creditor to send a receipt to the judgment debtor within 10 days after the creditor receives any payment pursuant to an earnings withholding order, places an unnecessary burden upon the creditor. See Exhibit I, page 3 of last letter, attached. There is considerable merit to Mr. Wiese's suggestion. If the Commission desires to adopt this suggestion, Section 723.026 might be revised as follows:

§ 723.026. Judgment creditor to account for payments

723.026. Within ~~10~~ 45 days after ~~he receives any payment pursuant to~~ the end of the withholding period of an earnings withholding order, the judgment creditor shall send the judgment debtor ~~a receipt for such payment~~ an accounting of the payments received pursuant to the order. The accounting shall be sent by first-class mail, postage prepaid. A similar accounting shall be provided within 15 days from receipt of a request for an accounting from the judgment debtor, but the judgment creditor is not required to make such an accounting more frequently than once every 30 days. The ~~receipt~~ accounting shall state the amount of the ~~payment~~ payments received during the period covered by the accounting , the maximum additional amount that may be withheld pursuant to the earnings withholding order, and the total amount received by the creditor during the period the order has been in effect. ~~No receipt is required for payments received pursuant to a withholding order for support.~~

The staff believes that the above provision adequately protects the judgment debtor and will relieve the judgment creditor of a burden that is far out of proportion to the benefit to the judgment debtor.

Section 723.027 (page 160)

Mr. Wiese suggests that five days within which to file a satisfaction of judgment with the court when the judgment is satisfied is commercially too short a time. See his letter at the bottom of page 4 and the top of page 5. He suggests lengthening the time to 10 days at a minimum if the debtor requests or 30 days if no request is made.

Section 723.027 applies only if the judgment is satisfied by some means other than payments pursuant to the order. See Section 723.022 (defining "withholding period"). It does not apply if the employer has withheld the full amount specified in the earnings withholding order. In that case, no notice is necessary. Accordingly, the problem presented by the comment will not arise in every case; it will arise only in those cases where the employee makes extra payments or the creditor successfully levies on property other than earnings. Considering that the employer may withhold earnings that should not be withheld since the judgment has been satisfied, the staff would not like to increase the time period beyond the five days (Saturday, Sunday, and holidays excepted). At the same time, we believe that there is merit in not requiring that a "certified" copy of the satisfaction of judgment be served on the judgment debtor's employer. Accordingly, we would delete the word "certified" from Section 723.027(b) and subdivision (d) of Section 723.022.

Section 723.077 (pages 177-178)

Mr. Wiese does not like to have tax and support orders preclude withholding pursuant to orders of ordinary creditors. Actually, the bill does

not necessarily have this effect. If there is an amount that may be withheld under the formula after the withholding for taxes or support has been made, there can be withholding on the ordinary order. See Section 723.030(b)(4). Recall also that the federal administrator has advised the Commission that the amount withheld pursuant to a tax or support order must be included in considering the amount that may be withheld in applying the limitations on withholding.

Section 723.105 (pages 185-188)

Mr. Wiese is concerned that the time limits in Section 723.105 are too short. In substance, he suggests that the five-day period in subdivision (c)(3) and subdivisions (d), (e), and (f) be made 10 days. (It would seem the remainder of the section is satisfactory.) The justification for this change is that the time limits are too short to be practical and that the increase in the amount exempt automatically avoids the need that a hearing on a claim of exemption be held so promptly. See the discussion of Section 690.50 on page 2 of Mr. Wiese's letter.

Section 723.122 (pages 190-191)

Section 723.121 provides that the creditor must include in his application for an earnings withholding order a statement that the applicant has no information or belief that the indebtedness for which the order is sought has been discharged by a discharge granted to the judgment debtor under the federal Bankruptcy Act or that prosecution of the proceeding has been stayed in a proceeding under the federal Bankruptcy Act. Section 723.122 requires that the notice to the employee indicate that amounts cannot be withheld if the employee proves that he has been granted a discharge under the Bankruptcy Act or that proceedings for the collection of the debt have been

stayed under that act. Mr. Wiese suggests this provision creates uncertainty and that the matter should be left to the bankruptcy referee and the bankruptcy laws. See his letter on pages 4 and 5.

Section 723.124 (page 192)

Mr. Wiese objects to asking the debtor to list "extraordinary prospective expenses." See his letter on page 5.

Sections 723.152 and 723.154 (pages 196-197)

Mr. Wiese believes that the remedies against employers are impractical and have no "teeth." See his letter on page 5. Perhaps a provision should be added to the statute to read:

> 723.157. Nothing in this chapter affects any power a court may have to imprison or fine a person who violates a court order.

This seems to be consistent with Sections 723.153 and 723.154 which provide that the remedies provided by those sections are not exclusive. Also, a comparable provision was included in the civil arrest statute.

Labor Code Section 300 (pages 199-203)

Mr. Wiese is concerned that the amendments of Section 300, which make wage assignments revocable at will, will make a wage assignment less security and less enforceable than it presently is when not served on the employer. The amendments will have this effect. A wage assignment will be revocable at will by the employee. This prevents the employee giving one creditor priority and also permits him to avoid the obligation to pay from wages pursuant to a wage assignment at a time when amounts are being withheld pursuant to an earnings withholding order.

Withholding on Earnings of State Employees

The Department of Public Works has indicated that the five-day period provided before a withholding order goes into effect is not adequate in the case of state employees. State employees are treated differently than other employees generally for the purpose of wage payment. For example, they are paid monthly. It has been suggested that a 10-day period would be more administratively convenient and would not hurt the creditor since he will pick up a whole month's earnings merely be serving the notice more than 10 days prior to the end of the monthly pay period. Accordingly, to avoid controversy on this matter, the staff urges that the Commission make an amendment to provide a 10-day delay in case of state employees.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 73-38

EXHIBIT I

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L. J. STYSKAL (OF COUNSEL)

March 20, 1973

Professor William Warren
Stanford Law School
Stanford, California 94305

Re: AB 101 (Wage Garnishment Bill)

Dear Bill:

I had the opportunity to review the Minutes of the March 1, 2, and 3, 1973 meeting of the Law Revision Commission concerning wage garnishment, and particularly the position of the Attorney General that a hearing is not required before a "withholding order for taxes". I thought you might be interested to know that on March 5, 1973 Judge Charles Church of the Los Angeles Superior Court in a case entitled Walter Heller Company vs. The County Tax Collector impliedly found that Section 2914 of the Revenue and Taxation Code authorizing seizure and sale for unpaid taxes by the County Tax Collector was unconstitutional for lack of an opportunity for hearing. Similarly, although the findings have not yet been settled, in the case of Chrysler Credit Corporation against Harold Ostley decided March 16, 1973 in which we represented plaintiff, Judge Wong in Department 55 ordered judgment for the plaintiff as prayed which will carry with it a finding that said statute is unconstitutional. I am cautious in this latter conclusion since the findings have not been settled.

I enclose a photostatic copy of a letter dated March 7, 1973 which I wrote to the Chairman of the Executive Committee of the California Loan and Finance Association, Mr. Kull. I express my viewpoint on AB 101. Because the letter was written on a personal basis, I do not wish to have it published, but because of your deep interest in the Wage Garnishment Bill and all of the efforts that you have expended on it, I thought the comments which I made to Mr. Kull might be of interest to you. I am sure they will be raised once

the bill reaches Committee.

Sincerely,

STYSKAL, WIESE & MELCHIONE

Alvin O. Wiese, Jr.

AOW/jc
Enclosure

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March 26, 1973

William D. Warren
Professor of Law
Stanford Law School
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Dear Bill:

I acknowledge your March 22nd letter concerning AB 101 (wage garnishment). I have no objection to your furnishing the Commission with a copy of my letter. I simply did not want it reproduced and distributed generally throughout the state.

In a meeting last Friday, the membership of the law committee of the California Loan and Finance Association agreed substantially with my view points, and I believe that the Commission would receive support from the California Loan and Finance Association for the bill if amendments, as outlined in my letter, were made.

Sincerely,

STYSKAL, WIESE & MELCHIONE

Alvin O. Wiese, Jr.

AOW/dd

March 7, 1973

Not for Publication

Mr. Olen Kull
Household Finance Corporation
628 South Grand Avenue, Suite 803
Los Angeles, California 90017

Re: AB 101 (Wage Garnishment Bill)

Dear Olen:

Because of the number of garnishments for the purpose of collection run through this office, I suppose I am the principal member of the Law Committee from whom Bill Robinson solicited comments in the third paragraph of his March 6th letter.

I am sure you are acquainted with the several years of work that the California Law Revision Commission has done to come up with an acceptable wage garnishment bill in California. Like some of the other lawyers on the Committee, I have been receiving their weekly revisions and staff studies, many of which have been so voluminous that they are impossible to keep up with.

I am compelled to the conclusion that Bill Robinson reached--simply, that we are going to have a revision of wage garnishment law in California in one form or another, and therefore, outright opposition to AB 101 is not appropriate to serve the best interests of the members of the Association and preserve what rights to collection still exist. I would prefer to see some amendments to AB 101 to make it a little bit more palatable to the creditor's interests even though some of the suggestions I may make hereafter will at best be unpopular if not impossible to achieve.

AB 101 takes a new and fresh procedural approach to the method of running a wage garnishment after judgment, which in my opinion, is most advantageous to the creditor. The creditor obtains the withholding order from the clerk of the court just as he obtains the writ of execution under present procedures. The advantage is that he may serve this upon the employer without use of the Marshal thereby greatly reducing the cost of the wage garnishment execution. As you know, these costs have been increasing each

year so that in many cases the costs are commensurate with the dollar amount of return on the execution taking into consideration the disposable earnings available for execution under the Consumer Credit Protection Act. The foregoing is the greatest advantage to creditors.

It does not concern me that the amount of wages automatically exempt from levy is increased over those exempt under Federal Law. Our experience has been that it is not the amount recoverable upon a levy on wages that is important, but simply that something is recoverable since in 90% of the cases the first levy results in a voluntary agreement by the debtor to pay on the account. The features of AB 101 to which I have objection, not necessarily in the order of their importance, are the following:

1. Section 690.50 C.C.P. has to do with the procedure by which the debtor may file a claim of exemption and sets forth the time limits within which the creditor may file an affidavit to contest the exemption, and thereafter notice a motion before the court to have it heard and determined. These time limits are unrealistically short, particularly in a metropolitan area such as Los Angeles and with the delay in mail as we now know it to exist. Section 690.5(b) provides that upon receipt of a claim of exemption, it shall be served upon the judgment creditor by mail and the judgment creditor has 5 days from the date that the exemption is sent to file a counteraffidavit to contest it. In many cases it takes 3 to 4 days before the creditor receives the exemption allowing 2 or less days to prepare and file a counteraffidavit. Subdivision (f) of the same section allows the creditor only 10 days to establish a date of hearing and make a notice of motion to have the exemption determined by the court. Many Municipal courts permit a law and motion calendar or hearing on exemptions on only one day each week. It is frequently impossible under these circumstances to calendar the hearing on a claim of exemption on the one available law and motion calendar during the 10 day period. Before the protection afforded by the Consumer Credit Protection Act whereby only a small portion of the earnings can now be withheld, a hardship to the debtor could result if the hearing did not take place at the earliest possible date. Today, with restricted court calendars on civil matters, a lack of hardship on the debtor, this time limitation should be extended within which to make a motion to determine the validity of the debtor's claim for exemption. My recommendation is that the 5 and 10 day limitations be doubled to 10 and 20 days.

2. Section 723.023 (Employees' Earnings Protection Law--Civil Code) establishes the general priority where two or more orders to withhold wages are served upon the employer. Subsection 3 provides that during the period when an existing order is being complied with by the employer, any subsequent order is "ineffective". It does not provide that the employer must notify the creditor that an existing order is operative, whose order it is, or how long it has to run before the order being acted upon would be satisfied. The creditor is thereby left without requisite knowledge as to when a subsequent order might appropriately be sought. A preferable solution to this problem would be to amend the section to require notification by the employer to the creditor running the second or subsequent order of the existence of a prior order and requiring the employer to honor the second order in the event the prior order is satisfied or released prior to the expiration of the 125 day period for which the order would be alive as specified in Section 723.022(1).

3. Section 723.026 places an unnecessary burden upon the creditor which probably could not be complied with in the time limit specified. It requires the creditor within 10 days after receiving a payment to send the judgment debtor a receipt; the receipt must state the amount of the payment; it must state the maximum amount that may be withheld pursuant to the earnings withholding order; and the total amount received by the creditor during the period the order has been in effect. I think we should recognize that debtors are well aware of the amount withheld from their wages. Elsewhere in the Act, the creditor is required to serve upon the employer a table showing the maximum amount which can be withheld so that this information is available to the debtor in advance of any levy. Similarly, the total amount received by the creditor is readily calculable and well known to the debtor. This added burden and expense to the creditor is unnecessary, and if the Legislature is concerned that a debtor may wish an accounting from the creditor as to the application of funds, the Section could simply be amended to provide that the creditor shall furnish the debtor an accounting upon the debtor's request in writing.

4. Section 723.027 has some serious mechanical problems. 5 days within which to file a satisfaction of the judgment with the court when the judgment is satisfied is commercially too short a time. Satisfactions are customarily prepared by the law office representing the creditor, and frequently, certainly by mail, the

lawyer for the creditor cannot communicate with the creditor to determine if the account has been satisfied. In the first place, when does the time limit start to run--from the time the employer mails the final payment? From the time it is received by the creditor? How about the period of time necessary for the check to clear if the final payment is made by check? I agree that a satisfaction should be filed, but the requirement to be commercially reasonable would better be stated by requiring it 10 days after receipt of written request by the debtor or within 30 days whichever is sooner.

Subdivision (b) is totally impractical. In our Los Angeles court system, it is presently taking 15 to 25 days after request to obtain the certification of a document from the clerk of the court. Furthermore, there is no need to incur the expense of certification for notice to the employer when a simple copy would suffice.

5. Section 723.077 establishes two categories of priority over the general withholding order available to a creditor. They include orders for support and taxes. Socialogically, I have recognition for the fact that the state would like to see spousal and child support orders enforceable in order to cut down on the welfare roles. I also appreciate their desire to collect taxes. On the other hand, I cannot subscribe to the total and absolute priority of both of these types of orders over the claims of all other creditors, even those who have furnished necessities of life to a debtor. I believe that the section on priorities of orders could equitably accomplish the desired objective if support and tax orders were allowed to run concurrently with orders for payment of general creditors on a formula or percentage basis.

6. Section 723.105 having to do with the debtor's claim of exemption is subject to the same time limitation exemption commented upon in paragraph 1 hereof having to do with C.C.P. 690.50.

7. Section 723.122 specifies the form of notice to be served upon the employee of an earnings withholding order. Subdivision (c) states that the notice provide that nothing can be withheld for a debt which the employee can prove was discharged in bankruptcy or the enforcement of which has been stayed by a

bankruptcy court. Where do you prove this? At what time? What is the procedure? The laws of the bankruptcy court have adequately dealt with the problem, particularly in the field of nondischargeable debts, and it seems to me that this section only causes confusion. Suppose an employee presents a bankruptcy discharge to his employer in opposition to a withholding order when in fact the bankruptcy court has determined the debt to be nondischargeable. It would be much better to leave this subject matter to the jurisdiction of the bankruptcy referee and bankruptcy laws where it properly belongs.

8. Section 723.124 provides for the information to be included in the debtor's financial statement. Subsection (f) asks the debtor to list "extraordinary prospective expenses". In my opinion, this is inappropriate to determine the need for total exemption from garnishment on the date the claim is to be determined, and should not be the proper subject matter for consideration of the debtor's right to exemption.

9. Section 723.152 and 723.154 have to do with the creditor's remedy against a fraudulent or concealing employer. These sections are impractical and have no "teeth". It would seem to me impossible to prove intent to defraud on the part of the employer, and it is totally impractical for a creditor to bring a separate civil action against an employer to recover wages he failed to withhold when the amounts involved are customarily nominal at best. In my opinion, these sections should be consolidated to simply make the employer strictly liable for failure to, or improper compliance with the earnings withholding order, and subject to contempt citation by the court on the verified application of any creditor vesting power in the court in the same collection action to order the employer to pay sums to the creditor which he improperly fails to withhold.

10. The wage assignment as security for a personal property broker loan is a delicate subject. The amendments propose to tamper with Section 300 of the Labor Code. Repeated readings of the amendment leave me confused as to whether the amendments make a wage assignment any less security or less enforceable than it presently is when it is not served upon the employer.

The one specific section with which I am concerned is Subdivision (f) which provides that a wage assignment is revocable at any time by the maker. I am fearful that this could do violence to the concept of wage assignment as security, and I see no useful purpose for this amendment to the section.

I shall be interested in the observations of others on the comments I have made in this letter, and as the Bill progresses to Committee, perhaps I can be of further assistance to you in considering the foregoing proposals.

Sincerely,

STISKAL, WIESE & MELCHIONE

AOW:lb

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CC Bill Robinson
Al Fink
George Richter
James Werson
Larry Chandler