Attachment and Garnishment In California—In Need Of Reform

I. INTRODUCTION

The law of attachment and garnishment[1] is in a state of flux throughout the United States following two recent events which have forced most states to significantly alter their attachment and garnishment procedures. The first was a 1969 United States Supreme Court ruling in *Sniadach v. Family Finance Corp.*[2] which invalidated the pre-judgment attachment of wages. The second was the enactment of the Federal Consumer Credit Protection Act of 1968 which took effect on July 1, 1970, and which imposed federal restrictions on the amount creditors may take from debtors earnings and prohibited discharge from employment because of garnishment for any one indebtedness.[3] As a result, state legislatures and courts have been rethinking the question of what may be seized from the debtor, when it may be seized, and who should seize it.

This article will examine the problems created by the *Sniadach* decision and the Federal garnishment law, the judicial and legislative

[1]Attachment and garnishment both refer to the seizure of a debtor's property by legal process. Attachment refers to prejudgment seizure (*see* CAL. CODE CIV. PROC. § 537 (West Supp. 1971)) and execution refers to seizure after judgment (*see* CAL. CODE CIV. PROC. § 681 (West Supp. 1971)). "Garnishment" refers to either attachment or execution of property belonging or owing to the debtor, for services performed, and in the hands of a third person. Garnishment will be referred to hereinafter as the seizure of wages due the debtor from his employees both before or after judgment.

[2]395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969).

[3]The Consumer Credit Protection Act, Title III, 15 U.S.C. §§ 1671-1677 (Supp. V, 1965).

response to those problems in California, the weakness of those responses, and the gaps and irregularities which remain in the California law of attachment and garnishment.

The California Supreme Court responded to *Sniadach* in *McCallop v. Carberry*[4] by declaring that California's pre-judgment wage attachment procedure was invalid.[5] The California legislature responded by enacting an amendment to the California Code of Civil Procedure in 1970 which changes the type of property and amount of property which is exempt from attachment and execution.[6]

Analysis will reveal how these responses have been inadequate to solve the many difficulties which the *Sniadach* decision and the Federal Consumer Credit Protection Act created. Specifically, five problems areas will be considered:

1) It is unclear from the *Sniadach* opinion whether its rationale should be applied to the attachment of goods as well as the attachment of wages, and courts throughout California and the nation are split on this issue.

2) The lack of coordination between the Federal Consumer Credit Protection Act and the California State procedure under which wages are seized provides a cumbersome and ineffective administrative and enforcement mechanism.

3) The specific language of the federal statute has provided some difficulties in interpretation.

4) The federal statute provides criminal penalties only for unlawful discharge from employment because of garnishment and fails to provide civil relief for any violation.

5) The California attachment and execution procedural scheme as amended does not guarantee the debtor a warning that his wages will be garnished prior to actual garnishment, makes it difficult for him to assert his rights to statutory exemptions, and is inefficient and expensive for all the parties involved.

These five problems will be treated in depth in an attempt to pinpoint specific deficiencies in the present law and focus on a broad legislative solution. It should be the goal of the legislative solution to clarify and simplify the substance, procedure, and enforcement of attachment and garnishment laws in such a way that the creditor's

---

[4]1 Cal. 3d 902, 83 Cal. Rptr. 666, 464 P.2d 122 (1970).

[5]CAL. CODE CIV. PROC. §§ 537 and 538 (West 1954) at the time of the McCallop decision provided that a writ of attachment could be issued upon wages to the limit of the exemption provided for in CAL. CODE CIV. PROC. § 690.11 (West 1954) without a judgment or judicial hearing.

[6]CAL. A. B. 2240, § 19, 1970 Reg. Now CAL. CODE CIV. PROC. § 690.6 (West Supp. 1971).

remedy is substantially preserved without unnecessarily "driving a wage earning family to the wall."[7]

II. SNIADACH, ATTACHMENT OF GOODS, AND DUE PROCESS

A. THE *SNIADACH* DECISION

The *Sniadach* decision technically holds that the garnishment of an employee's wages prior to a hearing on the merits to determine whether the employee in fact owes the money, is a violation of due process, except in certain extraordinary situations. Much has been written on the constitutional aspects of the decision in an attempt either to restrict it to the garnishment of wages or extend it to other forms of property.[8] In absence of determinative constitutional criteria in *Sniadach,* the decision will here be examined with an eye toward a legislative policy solution rather than a judicial one.

The *Sniadach* case arose when Mrs. Sniadach moved to dismiss garnishment proceedings against her under the Wisconsin garnishment and attachment statute, on the grounds that she was not given an opportunity to be heard prior to the garnishment.[9]

The Wisconsin statutory scheme provided that the clerk of the court would issue the summons at the request of the creditor's lawyer, and the creditor's lawyer would serve the employer, who would freeze the wages which were not exempt from attachment.[10] The wage earner was allowed a $25.00 subsistence exemption if he were single or a $40.00 subsistence exemption if he had dependents, but never was the exemption to exceed 50 percent of the wages owing.[11] The creditor was required to notify the wage earner of the garnishment within ten days after it took place.[12]

The United States Supreme Court found several deficiencies in the

[7]The words used by Justice Douglas in Sniadach, 395 U.S. 337 at 341-342, 89 S. Ct. 1820 at 1822, 23 L. Ed. 2d 349 at 353, to describe the plight of wage earners whose wages are being garnished.

[8]Note, *Attachment and Garnishment,* 68 MICH. L. REV., 986 1970; Note, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp,* 17 U.C.L.A. REV. 837 1970; Note, *Validity of Prejudgment Wage Garnishment,* WIS. L. REV., 1969: 335.

[9]395 U.S. 340, 89 S. Ct 1822, 23 L.Ed.2d 353 (1969).

[10]WIS. STAT. ANN. § 267.04(1) (Supp. 1969).

[11]WIS. STAT. ANN. § 267.18(2) (A) (Supp. 1969).

[12]WIS. STAT. ANN. § 267.07(1) (Supp. 1969).

Wisconsin statute as it applied to Mrs. Sniadach's motion, which deficiencies rendered the statute invalid. Specifically the opinion presented eight reasons why the Wisconsin statute violated due process: (1) The statute provided for no hearing prior to garnishment;[13] (2) the levy deprived the debtor of his enjoyment of assets;[14] (3) there is no provision for release of the assets prior to a trial on the merits;[15] (4) the assets consisted of wages which are a special form of property in our economy;[16] (5) the exemption statute was weak;[17] (6) the creditor's claim, satisfied by garnishment, included collection fees;[18] (7) the debtor was a resident of the forum and thus subject to in personam jurisdiction, thus not requiring the attachment of his property to secure *quasi in rem* jurisdiction;[19] (8) no evidence of need for immediate creditor protection was presented.[20]

Therefore, Justice Douglas considered the statute invalid because it deprived the wage earner of the enjoyment of assets which were special because they are necessary to his support, without determining first whether he in fact owed the debt, and without a showing that the creditor needed immediate protection. Should the holding of the Court in articulating these deficiencies be construed as invalidating only the attachment of wages, or can the decision be applied to invalidate the attachment of other forms of property?

Justice Douglas's majority opinion in *Sniadach* spoke exclusively of the pre-judgment attachment of wages. The Douglas opinion states:

> "We deal here with wages, a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of the property and the problems of procedural due process."[21]

Although Justice Douglas considered wages "special," that characterization should not be determinative of the question of whether the attachment of other types of property is similarly invalid. Many other types of property are similarly necessary to the life or livelihood of debtors: Automobiles are necessary to transport workers to their

[13] 395 U.S. 340, 89 S.Ct. 1822, 23 L.Ed. 2d 351, (1969).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 340, 89 S.Ct. at 1822, 23 L.Ed. 2d at 353.

[17] *Id.* at 341, 89 S.Ct. at 1822, 23 L.Ed. 2d at 353.

[18] *Id.*

[19] *Id.* at 339, 89 S.Ct. at 1821, 23 L.Ed. 2d at 353.

[20] *Id; see* S. Riesenfeld, *Background Study Relating to Attachment and Garnishment* 19, Oct. 22, 1970 (background study prepared for the California Law Revision Commission). On file at the Commission's offices, School of Law, Stanford, California.

[21] *Id.* at 340, 89 S.Ct. at 1822, 23 L.Ed. 2d at 353.

place of employment; tools are often necessary to the debtor to enable him to pursue his livelihood; and bank accounts often contain all the wages paid to a debtor and represent his only resource for the payment of large expenses. The criteria as to whether the attachment violates due process would therefore appear to be whether the property to be seized is necessary to the life or livelihood of the debtor—and not whether it is wages or some other form of property.

Justice Douglas admitted that a "summary procedure such as that held invalid by the court may meet the requirements of due process in extraordinary situations...[which require] special protection of a state or creditor interest...[and where the statute is] narrowly drawn to meet only such unusual conditions."[22]

Justice Douglas cited several cases as examples of such "extraordinary situations." None of the cases he cited as examples of extraordinary situations involved the garnishment of wages. This lends credence to the argument that the opinion invalidates the attachment of property other than wages because it suggests that attachment may only be used in extraordinary situations—not merely that the attachment of wages may be used only in extraordinary situations. Two factors characterize the factual settings of the four cases cited by Douglas: (1) There was a strong public need for immediate seizure; and (2) the property seized was not necessary to the life or livelihood of the debtor.[23] For example, in *Ewing v. Mytinger and Casselberry, Inc.*[24] the Supreme Court recognized the need for the Administrator of the Federal Food and Drug and Cosmetic Act to quickly seize drugs which the administrator has probable cause to believe are misbranded; in *Fahey v. Mallonece*[25] the Supreme Court recognized the need for the Federal Home Loan Bank to take over operations of a failing savings and loan association in an effort to maintain the public confidence in savings and loan institutions generally; in *Coffin Brothers and Co. v. Bennett*[26] the Supreme Court recognized the need for quick attachment by a commissioner in order to satisfy stockholder liability assessments due a failed bank, in an effort to uphold public confidence in the banking system; and in *Ownby v. Morgan*[27] the Supreme Court recognized the need for the pre-hearing seizure of property of a non-resident defendant by a resident creditor to obtain

[22]*Id.* at 339, 87 S.Ct. at 1821, 23 L.Ed. 2d at 352.

[23]Note, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A. L. REV. 837, 841 (1970).

[24]339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 2d 1088 (1950).

[25]332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1941).

[26]277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928).

[27]256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921).

quasi in rem jurisdiction, where he cannot secure *in-personam* jurisdiction under a long arm statute. These four examples indeed represent extraordinary situations in which there was a demonstrated need to seize property prior to a hearing in order to protect a public interest which would not be protected if the seizure were made subject to a hearing on the merits to determine the validity of the claim. None of the cases involved property which was necessary to the day-to-day existence of the debtor. Therefore, the exceptions to the Court's prohibition of attachment does not restrict the reasoning of the ruling to the attachment of wages.

While some question may remain as to the coverage of Justice Douglas' opinion, Justice Harlan's concurring opinion in *Sniadach* is clearly not limited to the attachment of wages. He would only allow the attachment prior to a hearing on the merits if the deprivation of the use of the property could be characterized as *de minimis* or in special situations in which the need for an immediate seizure is demonstrated.

Justice Harlan stated:

> Since this deprivation [of the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit] cannot be regarded as *de minimis*, she must be accorded the usual requisites of procedural due process; notice and a prior hearing . . .
>
> Apart from special situations, some of which are referred to in this court's opinions, (cited above) I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property.[28]

In contrast to the majority opinion Justice Harlan's test clearly does not depend upon whether the property seized is wages, but whether the seizure has a significant effect upon the debtor, and whether the creditor can demonstrate a special need for seizing property prior to a hearing on the merits.

Thus, while it is unclear from the *Sniadach* opinion whether the court intended to apply its rationale to the attachment of property other than wages, two broad themes pervade the opinion: (1) there was no compelling need to attach wages prior to a hearing; and (2) the attachment deprived the debtor of property crucial to her day-to-day existence.

---

[28]395 U.S. at 343, 89 S.Ct. at 1823, 23 L.Ed. 2d at 354-355 (1969).

B. AFTERMATH OF *SNIADACH*

The California Supreme Court held in *McCallop v. Carberry*[29] that *Sniadach* did invalidate California's garnishment statute. However, the inconclusive nature of the *Sniadach* opinion with regard to whether its rationale should be applied to the pre-judgment attachment of property other than wages has plagued the courts since the decision was handed down. There has been much litigation on the issue and the result has been mixed.

In California, The Second District Court of Appeals has held that *Sniadach* did not apply to invalidate a levy of attachment on residential property, and personalty in a business facility.[30] The court stated: "The cited case [*Sniadach*] is limited to wages . . . If there is to be any change in the law, it should be implemented by the legislature."[31] The California Supreme Court refused to grant a hearing on the case. There is a chance, however, that the case was refused a hearing because it was not an appropriate case for the California Supreme Court to decide the issue, because it involved the seizure of residential property, the use of which is not prevented under a lien of attachment prior to hearing.

In *Mihaus v. Municipal Court,*[32] the First District Court of Appeals held, however, that *Sniadach* did apply to invalidate California Code of Civil Procedure 1166(a) which allowed a landlord to obtain a writ of immediate possession of the leased property for unlawful detainer upon a showing that the tenant was insolvent or had property subject to execution prior to any hearing on the substantive issues bearing on his right to possession. Citing *Sniadach,* the court held ". . . due process is not provided for in 1166(a) because these procedures are not aimed at establishing the validity, or at least the probable validity of the underlying claim against the tenant, that is, the landlord's claim to the right of possession based on facts establishing that the tenant is guilty of unlawful detainer."[33]

Lower courts in California have applied *Sniadach* to other forms of property such as corporate bank accounts.[34] California courts, therefore, have failed to read *Sniadach* in a consistent fashion and the

---

[29]1 Cal. 3d 902, 83 Cal. Rptr. 666, 464 P.2d 122 (1970).

[30]Western Board of Adjusters Inc. v. Covina, 9 Cal. App. 3d 659, 88 Cal. Rptr. 293 (1970).

[31]*Id.* at 674, 88 Cal. Rptr. at 302.

[32]7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).

[33]*Id.* at 488, Cal. Rptr. at 23.

[34]2 POV. L. RPTR. 11, 199; and Sacramento Superior Court Civ. No. 203519, August 18, 1970.

result is continued uncertainty.[35]

The United States District Court, Northern District of California, has ruled[36] that *Sniadach* applied to invalidate the California Innkeepers Lien.[37] The Innkeepers Lien provides that hotel, motel, inn, boardinghouse, furnished apartment house and lodginghouse keepers "may seize the property of a tenant who has not paid charges due, prior to any judicial hearing and if such charges are not paid within 60 days, may sell such property."[38] The apartment-hotel involved in the case had locked all the boarder's possessions in his room for failure to pay his weekly rent. His possessions locked in the room included his paint brushes and other tools which he used in his trade, and his bank book which he needed to withdraw money from his bank account.[39] The court stated:

> Focusing on the evils peculiar to wage garnishment discussed by Justice Douglas in *Sniadach,* this court . . . finds [the Innkeepers Lien] infirm for the deleterious effect it has on the lives of those to whom it applies . . . the lien procedure of Section 1861 strikes with a greater impact than the analogous procedures under the Wisconsin statute invalidated by *Sniadach* . . .[40]

The court cited five reasons for this conclusion: (1) the statute has its primary impact on people who are "either financially embarrassed or of extremely limited means;[41] (2) the seizure may well include all of the boarder's worldly goods; (3) the seizure may well result in the loss of the boarder's job because it may include the tools of his trade; (4) the lien procedure gives leverage to the creditor which may result in "dubious or fraudulent claims;"[42] (5) there are "virtually no exemptions from its coverage."[43]

Therefore, the District Court examined the effect which the seizure had upon the debtor and invalidated the statute because its effect was substantial.

Different states have applied *Sniadach* differently. The Arizona

[35]At the time of printing, the question of whether Sniadach should be applied in California to invalidate the prejudgement attachment of personal checking accounts is before the California Supreme court in the case of Randone v. Superior Court of Sacramento County (Civ. No. 65553 August May 3, 1970).

[36]Klim v. Jones, 315 F.Supp. 109 (N.D. Cal. 1970).

[37]CAL. CIV. CODE § 1861 (West, 1954).

[38]*Id.*

[39]315 F. Supp. 109 (N.D. Cal. 1970).

[40]*Id.* at 122.

[41]*Id.*

[42]*Id.* at 123.

[43]*Id.* CAL. CIV. CODE § 1861 (West 1954) exempts only "(1) any musical instrument . . . used by the owners . . . to earn all or part of his living. (2) Any prosthetic or orthopedic appliance personally used by a guest, boarder, tenant, or lodger."

Supreme Court for example has overruled the Arizona Court of Appeals[44] and limited the *Sniadach* rationale to an individual's wages, reasoning that the pre-judgment attachment of property other than wages "went beyond the scope of the *Sniadach* opinion."[45] However, the Wisconsin Supreme Court arrived at the opposite result and found that *Sniadach* should be applied to the attachment of bank deposits.[46] The court reasoned:

> Although the majority opinion in *Sniadach* makes considerable reference to the hardship of the unconstitutional procedure on the wage earner, we think that no valid distinction can be made between garnishment of wages and that of other property. Clearly, a due process violation should not depend upon the type of property being subjected to the procedure. Under the respondent's contention, wages in the hand of the employer would be exempt from pre-judgment garnishment, but wages deposited in a bank or other financial institution would be subject to pre-judgment garnishment.[47]

C. PROPOSAL

In the light of this judicial confusion, the *Sniadach* opinion should be used in conjunction with empirical evidence as a basis for reaching a legislative determination as to what type of property should be subject to attachment and what property should be exempt from attachment as a matter of social policy.

In view of the two broad considerations in *Sniadach,* that there was no compelling need to attach the wages prior to hearing, and that the attachment would have deprived the debtor of property crucial to her day to day existence, and given the distinction between commercial and consumer debtors in terms of their legal expertise and ability to manipulate assets, one possible approach would be to distinguish between commercial and consumer debtors for the purpose of attachment law. The law could distinguish between the attachment of property to satisfy a debt incurred to finance a commercial enterprise and the attachment of property to satisfy a debt incurred to purchase personal, family, or household goods or services. This distinction has precedent in our law of commercial transactions. The recently enacted California Consumer Credit Reporting Act,[48]

[44]Arnold v. Knettle, 10 Ariz. App. 590, 460 P.2d 45 (1969).

[45]Templan Inc. v. Superior Court of Maricopa County, 105 Ariz. 270, 463 P.2d 68 (1969).

[46]Larson v. Fetherstone, 44 Wisc. 2d 712, 172 N.W.2d 20 (1969).

[47]*Id.* at 715, 172 N.W. 2d 23.

[48]CAL. CIV. CODE Title 1.5 (West Supp. 1971) distinguishes between a commercial creditor and a consumer creditor.

Article 9 of the UCC,[49] the Rees-Levering Automobile Sales Finance Act,[50] and the Unruh Act[51] all distinguish between the financing of consumer goods and the financing of commercial goods and treat the two types of financing differently. There is such a fundamental difference between consumer and commercial debtors that the merits of extending the *Sniadach* rationale to each should be separately considered. This paper will consider only the issue of extending *Sniadach* to consumer debtors.

There are a number of reasons for treating consumer debtors separately. Whereas the business debtor may be hurt by attachment as significantly as the consumer debtor, a consumer debtor is likely to be less informed about financial transactions and less informed about

---

CAL. CIV. CODE §§ 1751 (c) (West Supp. 1971) states:

> "Commercial creditor means a person or entity which extends credit for purposes other than personal, family or household purposes."

CAL. CIV. CODE § 1751 (d) (West Supp. 1971 states:

> "Creditor means a person or entity which extends credit for personal, family, or household purposes."

[49]CAL. COMM. CODE § 9109 (1) (West Supp. 1964) which is the same as U.C.C. § 9-109(1), defines "consumer goods" as "goods used or bought for use primarily of personal or household purposes."

CAL. COMM. CODE § 9109(2) (West 1954) which is the same as U.C.C. § 9-109 (2), defines "equipment" as "goods used or bought for use primarily in business."

CAL. COMM. CODE § 9302(d) (West 1954) which is the same as U.C.C. 9-302(d), provides that a financing statement need not be filed to obtain a purchase money interest in most consumer goods.

CAL. COMM. CODE § 9401 (West 1954), which is the same as U.C.C. § 9-401, provides for different places of filing the financing statement for different types of goods.

[50]CAL. CIV. CODE § 2981-2984.4 (West Supp. 1970). The Act regulates the financing of motor vehicles. CAL. CIV. CODE § 2981.(3) (j) (West Supp. 1971) defines "motor vehicle" as follows:

> (j) "Motor Vehicle" means any vehicle required to be registered under the vehicle Code which is bought for use primarily for personal or family purposes, and does not mean any vehicle which is bought for use primarily for business or commercial purposes."

[51]CAL. CIV. CODE Title II Ch. 1 §§ 1801-1812.1 (West 1954). The act regulates consumer retail credit. It applies only to retail sales of goods and services to consumers and does not embrace commercial transactions. James Talcott, Inc. v. Gee, 266 Cal.App. 2d 386, 72 Cal.Rptr. 178, (1968). CAL. CIV. CODE § 1802.1 (West 1954) states:

> "Goods" means tangible chattels bought for use primarily for personal, family or household purposes, including certificates or coupons exchangeable for goods . . . but does not exclude any motor vehicle request to be registered . . . .

CAL. CIV. CODE § 1802.2 (West, 1954) states:

> "Services" means work, labor and services, for other than commercial or business use, including services furnished in connection with the sale or repair of goods as defined in Section 1802.1 . . . .

his legal rights. He is also less likely to present his legal defense in court because he lacks the knowledge necessary to start an action, or answer a complaint, he cannot afford or will not pay the amount necessary to start a legal action, and he very often cannot spare the time off from work to pursue a legal action.[52] Therefore, the consumer debtor is more likely to be victimized by pre-judgment attachment than the business debtor because he is less likely to pursue his defenses necessary to quash the attachment. Moreover, there is less likely to be any "situation requiring special protection of a public or creditor interest"[53] where a consumer debtor is involved because his knowledge of the law and economic condition render it difficult for him to hide his assets, change them into exempt categories, or otherwise avoid a levy of execution after a judgment has been secured against him. Therefore, with the exception of pre-judgment attachment for the purpose of obtaining *quasi in rem* jurisdiction the consumer debtor should be protected from all pre-judgment attachment of his property under the rationale of *Sniadach.*

Collection agency interests have two clear objections to the abolishment of pre-judgment attachment of all types of property.[54] First, waiting to attach until after a hearing on the merits is held to be slow and expensive, and second, it affords the debtor a chance to flee with his assets, or to convert nonexempt assets into exempt assets. These interests warn in addition, that the abolition of general creditor attachment will result in credit restriction, which will inhibit the ability of consumers to borrow. The reasoning which supports these objections is premised on the assumption that virtually all defaulting debtors have no defense to the payment of the debt on the merits. From this, the creditor interests conclude that a judicial hearing would serve no purpose except to apprise the debtor of the impending attachment of his property thus enabling him to change its location, or ownership, or to convert it into exempt property so as to prevent its attachment by the judgment creditor.[55] This argument may be viable with reference to commercial debtors who have access to legal representation and possess a degree of business expertise,[56] but it lacks substantial credibility with reference to the consumer debtor,

[52]*See* note 57, *infra.*

[53]395 U.S. at 339, 89 S.Ct. at 1821, 23 L.Ed. 2d at 354-355 (1969).

[54]Personal interview with Mr. Gary Ott, Sacramento Offiice, Retail Credit Assn., Jan. 15, 1971.

[55]Minutes, California Law Revision Commission Meeting of October 22 23, 1970, p. 52, paragraph 1, on file at the Commission's offices, School of Law, Stanford, California. Statement of John D. Bessey, Attorney, representing creditor interests before the Commission.

[56]*Id.* at 50, paragraph 7, statement of John D. Bessey.

who has no access to legal advice, who is not aware of his legal rights to exemptions, and who cannot easily hide his assets.

A study by David Caplovitz of 1,315 debtors whose wages were being garnished or who were facing court action because of their debts in Chicago, Detroit, New York, and Philadelphia reveals the type of consumers who find themselves in legal trouble because of bad debts.[57] Only seven percent of the group studied were on welfare at the time the debt was contracted.[58] In 83 percent of the families, the chief earner was male.[59] Seven percent of those men held two jobs and in 35 percent of those families the wife also worked.[60] Only eleven percent of the families were broken and headed by a female.[61] More than half of the families had lived in the same city for more than twenty years.[62] Therefore, the families studied were relatively stable. They were, however, less well educated than the general population. Of the heads of the household, 21 percent had elementary school or less, 37 percent had some high school, 30 percent were high school graduates, nine percent had some college, and two percent were college graduates.[63] The families studied, therefore, were for the most part relatively stable working or lower-middle class people. The men and many of their wives are employed. However, they are less well educated than the general population and were apparently less sophisticated as consumers than their incomes would indicate.[64]

The Caplovitz study also concluded that consumer debtors whose wages are garnished or who are sued for their debts are woefully incompetent to protect their rights through the legal process.[65]

This study tended to show therefore that consumer debtors whose property is likely to be attached or who are likely to be sued are not the type of people who are likely to move or be sophisticated enough to hide assets or convert nonexempt assets into exempt assets. They are not likely to be able to defeat a levy of execution after judgment any more than they are able to defeat the attachment of their property before judgment. *Sniadach* deals with the problem of creditors

---

[57]1. Caplovitz, DEBTORS IN DEFAULT 1-15, (study conducted through the Bureau of Applied Social Research, Columbia University, New York, Jan. 1970) [hereinafter referred to and cited as Caplovitz].

[58]*Id.* at 2-10.

[59]*Id.* at 2-7.

[60]*Id.*

[61]*Id.*

[62]*Id.* at 2-1 — 2-54.

[63]*Id.* at 2-16.

[64]WESTERN CENTER ON LAW AND POVERTY, WAGE GARNISHMENT, IMPACT AND EXTENT IN LOS ANGELES COUNTY, 17 [hereinafter cited as L.A. STUDY].

[65]Caplovitz, *supra* note 57, at 9-37.

which require "special protection," because the person whose property the creditor is seeking to attach is likely to hide his assets, leave the jurisdiction, or in any way defeat the post-judgment execution. Therefore, the law should provide a mechanism to distinguish between those cases which require special protection and those cases which do not.

Given the fact that consumer debtors as a group are highly unlikely to have the sophistication required to defeat a levy of execution and given the fact that consumer debtors who are sued for their debts are poorer—and therefore more likely to have need of the property sought to be attached to continue their day-to-day existence—it should be the policy of the much needed legislation in this field to prevent the attachment of any property for the purpose of satisfying a debt incurred to purchase personal, family, or household goods or services. The consumer debtor should always be given the benefit of notice and trial on the merits to determine his liability prior to any seizure of his property.

III. THE FEDERAL GARNISHMENT STATUTE

Title III of the Consumer Credit Protection Act, which was enacted in 1968, and took effect July 1, 1970, sought to remedy many of the burdens which garnishment imposed upon the wage-earner by restricting the percentage of each pay check which could be garnished, providing a fixed minimum subsistance exemption below which no pay could be garnished, and making it illegal to discharge an employee because of garnishment for the satisfaction of one debt. It was a bold step by the federal government to protect debtors from many overly harsh state statutory garnishment schemes and reduce the number of consumer bankruptcies caused by garnishment. While it is difficult to assess its effect in reducing consumer bankruptcies or in reducing the rate of discharge from employment due to bankruptcy, it is possible to examine some deficiencies in the law and question whether the federal government is in fact the level of government which should administer and enforce garnishment laws.

The federal statute provides limitation on the state mechanism for the garnishment[66] of the disposable earnings[67] of a worker for

[66]Subdivision C of Section 302 of the Act (15 U.S.C. § 1672(c)) (Supp. V, 1965)), provides:

> (c) The term "garnishment" means compensation paid or payable for personal services, whether denominated as wages, salary, commission,

any one work week, and prohibits the discharge of an employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."[68] The Act provides that with the exceptions of a court order for the support of "any person," a court order of bankruptcy under Chapter XIII of the Bankruptcy Act, and a debt due for any State or Federal tax,[69] only 25 percent of an individual's "disposable earnings"[70] for any one workweek may be subjected to garnishment. The Act further provides a minimum subsistance exemption of weekly disposable earnings below which nothing may be garnished.[71] The level of this subsistance exemption is 30 times the federal minimum hourly wage. Thus with the minimum wage at the current level of $1.60 hour, the minimum subsistance exemption is $48.00 per week. For example, if a worker has weekly "disposable earnings" of $48 or less, nothing may be garnished. If a worker has a weekly disposable income of between $48 and $64, the amount garnished must not exceed that amount which would leave the worker $48 of disposable income for the week.

Other sections provide that the Act is to be enforced by the Secretary of Labor acting through the Wage and Hour Division of the Labor Department,[72] and that individual states may secure an exemption from the maximum allowable garnishment provisions of the Act[73] by the Secretary of Labor, "if he determines that the laws of that state provide restrictions on garnishment which are substantially similar to those provided. . . ."[74]

The federal statute presents several practical problems which in-

---

business or otherwise, and includes periodic payments to a pension or retirement program.

[67]Subdivision (a) of Section 302 of the Act (15 U.S.C. § 1672 (a) (Supp. V, 1965)) provides:

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

Subdivision (b) of Section 302 of the Act (15 U.S.C. § 1672 (b) (Supp. V, 1965)) provides:

> (b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

[68]Consumer Credit Protection Act, Title III § 304 [hereinafter cited as C.C.P.A.], 15 U.S.C. § 1674 (Supp. V, 1965).

[69]C.C.P.A. § 303(b), 15 U.S.C. § 1673(b) (Supp. V, 1965).

[70]C.C.P.A. § 303(a)(1), 15 U.S.C. § 1673 (a) (1) (Supp. V, 1965).

[71]C.C.P.A. § 303(a)(2), 15 U.S.C. § 1673(a) (2) (Supp. V, 1965).

[72]C.C.P.A. § 306, 15 U.S.C. § 1676 (Supp. V, 1965).

[73]C.C.P.A. § 305, 15 U.S.C. § 1675 (Supp. V, 1965).

[74]*Id.*

hibit its effectiveness and will be discussed:

(1) Some of the language of the statute is difficult to interpret, and difficult for the parties involved to use.

(2) The act provides the Wage and Hour Division with little enforcement power, and provides aggrieved workers no civil remedies to recoup overpayment to creditors or loss of pay as a result of illegal dismissal.

(3) The Wage and Hour Division is far removed from the state procedures used in garnishing wages and is therefore unable to effectively inform wage-earners of their rights under the law.

A. INTERPRETATION OF THE ACT

The Act contains two basic ambiguities which render it difficult for the employer to comply with and difficult for the Wage and Hour Division to enforce.

(1) The act defines wages as "compensation paid or payable."[75] This presumably includes wages which have been paid and are in the employee's possession as well as that amount which he is owed for services rendered. If this definition is interpreted literally, wages which have been paid and deposited in the employee's bank account by either the debtor or the employer are also subject to the federal exemption requirement. This presents a dilemma because money deposited in an employee's bank account is very difficult to identify as wages paid. The practical problems presented in the administration of such a statutory limitation are such as to make it nearly impossible to use. Consequently, bank accounts, whether they contain wages or not, have not been held to the federal exemption standard.[76] If a percentage of wages paid to an employee and deposited in a bank account are to be exempt from execution, the only reasonable and practical way to administer such a restriction is to declare a specific amount in bank accounts totally exempt from execution. This would not strictly conform to the federal statute since it would protect savings consisting of money other than wages paid. It would, however, have the effect apparently desired by the federal statute, namely to exempt an amount from execution which represents 75 percent of the amount paid to the debtor, but which is unenforcible under the federal statute, because of the impossibility of determining what portion

[75]C.C.P.A. § 302(a), 15 U.S.C. § 1672(a) (Supp. V, 1965).

[76]"The marshal (in Los Angeles County) has decided on his own that C.C.P.A. does not cover bank accounts. He is not going to apply it to bank accounts until somebody orders him to." Minutes, California Law Revision Commission, Meeting of October 22, 23, 1970, p. 59, para. 6, Comment of Professor William D. Warren.

of a bank account is wages and what portion is not wages.

(2) The federal statute expresses the minimum subsistance exemption, below which no wages may be garnished, and the amount from which 25 percent may be garnished in terms of "disposable earnings." "Disposable earnings" is defined as that portion of the wages "remaining after the deduction from those earnings of any amounts required by law to be withheld."[77] This definition of disposable earnings presents two problems to employers. First, it is difficult to determine which deduction should be included as required by law and which should not be included, and, second, it is expensive to figure the different deductions separately.

Many public employers have mandatory retirement plans which may replace social security deductions and which are required by the law of the public agency or government to be deducted from the public employee's pay. The federal garnishment statute does not explain what is meant by the term "required by law to be withheld," and the question of whether mandatory retirement deductions by public employees is "required by law" is not answered by the federal statute.

This problem is exemplified by an apparent contradiction between the interpretation of the section by the State of California's Department of Human Resources and the Wage and Hour Division interpretation. The State of California, through the Department of Human Resources has included all employee retirement contribution deductions in its figuring of disposable earnings under the federal statute.[78] The Wage and Hour Division's interpretation of the act however would appear to exclude such deductions.[79] It gives examples of "deductions" required by law as: "(1) federal income tax deductions, (2) federal social security tax deductions, (3) state and city tax withholding deductions, (4) state unemployment insurance taxes,"[80] which are all required deductions for all private and public employees. It also specifically excludes deductions for retirement programs,[81] but it fails to distinguish voluntary retirement contributions from those which are mandatory. Therefore, "disposable earnings" as it has been defined in the federal act is a term which is difficult to use and its application has resulted in conflicting interpretations.

[77]C.C.P.A. § 302 b, 15 U.S.C. 1672(b) (Supp. V, 1965).

[78]*See* STATE OF CALIFORNIA PAYROLL PROCEDURES MANUAL - Revision No. 628 39.6 (c). (State of California, 1970).

[79]United States Department of Labor, Workplace Standards Administration, WAGE AND HOUR DIVISION PUBLICATION NO. 1309, Oct. 1970.

[80]*Id.* at 2.

[81]*Id.*

Even if an employer has no difficulty interpreting the term "disposable earnings," he may find it difficult to use because he has to figure the garnishment from the total wage reduced by the amount of the deductions which are "required by law"[82] (*e.g.* taxes and social security) before he figures in other regular deductions for health insurance, voluntary retirement plans, and the like. The employer must first determine which deductions are "required by law" and deduct them from the gross earnings. If the resulting pay to the employee is below $48 per week, nothing may be garnished from his wages. If the resulting pay is between $48 and $64 per week, the amount garnished must not exceed the amount which would reduce the pay below $48. If the resulting pay exceeds $64, the employee must deduct 25 percent of it for garnishment. Then he may deduct amounts not "required by law" from the gross pay reduced by the "mandatory" deductions and the garnishment. This procedure is terribly burdensome on the employer because he must disrupt his normal payroll procedure and use three separate steps to determine how much of the wage earner's check may be garnished.

The procedure could be significantly simplified by expressing the minimum subsistance exemption amount and the amount from which the garnishment is figured in terms of gross earnings rather than disposable earnings. This would avoid much of the figuring which the employer must now do. He would only have to determine if the gross pay is above the minimum subsistance exemption, and deduct the garnishment accordingly, then make the other deductions in accordance with his ordinary practice.

B. ENFORCEMENT AND ADMINISTRATION

The enforcement of the act is hindered in two significant ways. First, the act provides a criminal penalty only for unlawful discharge. It does not provide a criminal penalty for excessive garnishment and it provides no civil remedy for either violation. Second, the Wage and Hour Division, the sole enforcer of the act, is not a party to the state and local procedure which carries out the garnishment law and is thus not exposed to many violations.

(1) The statute provides inadequate remedies even if the employee is apprised of his rights under the statute and informs the Wage and Hour Division of the violation.

If the employee is unlawfully discharged in violation of § 305 of the Act for example, he is provided with no civil remedy to force the

[82]C.C.P.A. § 303 (a) (1),15 U.S.C. 1673 (a) (1) (Supp. V, 1965).

employer to rehire him or to render any back pay which he was denied because of the illegal discharge. Nor is the employee provided with a remedy to secure an amount withheld from his earnings which exceeds the amount allowed in the statute. The Act provides for a criminal penalty for unlawful discharge[83] but provides the Wage and Hour Division with no enforcement power over the percentage exemption provision. Therefore, the Wage and Hour Division is able to exert little pressure to prohibit excessive garnishment and the employee is not provided a statutory remedy to recover the money which was illegally seized.

(2) The federal statute also lacks effectiveness because the Wage and Hour Division of the United States Department of Labor which enforces the Act is not in a position to discover most violations and it is not in a position to inform employees and employers whom the Act seeks to protect of their rights and obligations under the Act. The Wage and Hour Division does not participate in any of the state procedures for garnishing wages and does not come into contact with the people whom the statute seeks to protect and is, therefore, not readily available to protect them. Although the Wage and Hour Division is actually engaged in informing the public regarding the protection offered by the statute, in the form of pamphlets to employers, and television commercials for debtors, it is feared by people in the Division itself that many people in need of protection are unaware of the statute.[84]

Moreover, even if people in need of help were aware of the Act they must call the Wage and Hour Division for help and there are a limited number of Wage and Hour Division offices where this help may be obtained. For example, the Wage and Hour Division only has four offices to cover an area which extends from Vallejo, California to the Oregon border and the entire state of Nevada with the exception of Las Vegas. There is a large office in Sacramento, California and there are one man offices in Reno, Nevada, Eureka, California and Redding, California.[85]

The Wage and Hours Division must wait for complaints because it has no mechanism with which to discover infractions on its own. Therefore, the enforcement of the Act is dependent upon knowledge of the Act by those it seeks to protect, who inform the Wage and

---

[83]C.C.P.A. § 304(b), 15 U.S.C. 1674(b) (Supp. V, 1965) provides:

> (b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

[84]Interview with Mr. William Buhl, Area Director, Wage and Hour, and Public Contracts Division, U.S. Dept. of Labor, Sacramento, California, on Jan. 15, 1971.

[85]*Id.*

Hour Division of violations. The enforcers are absent from any proceedings in which the judgment is secured, the writ of execution is sought, or served on the employer, or any other state regulated procedure in which information could be made available to the interested parties.

The lack of coordination of effort[86] and availability of information is most important to the debtor. If the employer has a question regarding the interpretation of the instructions he receives on how much to deduct from an employee's paycheck, he is aware of the fact that the marshal's office who served the writ has expertise on the field and can either answer his question or refer him to someone who can. The debtor, on the other hand, may well be unaware of any rights or protection offered by the statute and is likely to have little knowledge about where to go for help.

The abuses of employee discharge from employment by reason of the garnishment of his wages and small state exemptions from wage garnishment which the federal law seeks to relieve could be more effectively relieved by a law written, enforced and administered by the state and coordinated with the state's procedural schemes for the execution of debtors' wages. This could be accomplished under § 305 of the Act which provides for exemption to be granted the state from the exemption from garnishment provision of the Act if the state passes laws as strong or stronger than the federal law, and provides for adequate enforcement.[87]

The state should, therefore, enact legislation which complies with the federal act to the extent that it provides a 75 percent exemption from garnishment. The minimum subsistance exemption and the amount from which only 25 percent may be garnished should be expressed in terms of gross income rather than disposable income so as to relieve the burdens which the definition of disposable income has caused. The minimum subsistance exemption expressed in terms of gross income should be high enough so that virtually all wage-earners are assured a take home pay of at least the amount of the federal minimum subsistance exemption.

The state should also exempt a certain amount of all bank and savings and loan accounts[88] in an effort to prevent all wages paid into

---

[86]*Id.* An example of the lack of coordination and information between the Wage and Hour Division and the local governments is that both the city and county of Sacramento deducted garnishments in excess of the percentage allowed for three months after the law took effect. The mistake affected 163 employees and involved in excess of $4,000.00

[87]*See* 29 CODE OF FEDERAL REGULATIONS §§ 870.50-870.56 (May 1970), which sets out the Secretary of Labor's directions concerning state exemptions.

[88]CAL. CODE CIV. PROC. § 690.7 (West Supp. 1971) exempts from attachment:

a bank account from being subjected to attachment. This would not strictly comply with the federal garnishment statute but would be an enforceable solution whereas the federal statute is completely unenforcable as it applies to the garnishment of wages paid into a bank account. Civil remedies should be written into the law giving the wage earner the right to compensatory damages in the amount of any pay he loses as a result of an illegal discharge from employment because of garnishment, and any pay of which he is deprived because of garnishment in excess of that permitted in the statute.

This statutory provision could then be coordinated with the state garnishment procedural scheme so that all the parties involved in the garnishment process could be apprised of the statutory protection by the public bodies which administer the process rather than by an outside agency.

IV. THE PROCEDURAL SCHEME IN CALIFORNIA[89]

The enactment of Assembly Bill 2240 in California in 1970 amending the law of attachment and execution, made few meaningful changes with respect to the garnishment of wages. As it pertains to garnishment, the law abolished the pre-judgment attachment of wages,[90] which merely brought the statute into conformity with the requirements previously articulated by both the United States[91] and the California Supreme Courts.[92] The amendment also abolished the requirement in the pre-amendment garnishment law that the creditor must notify the employee of an impending attachment of wages.[93] The new law provides instead that notice of the post-judgement execution of wages must be sent to the judgment debtor on the

---

(a) To a maximum aggregate value of one thousand dollars ($1,000), any combination of the following: savings deposits in, shares or other accounts in, or shares of stock of, any state or federal savings and loan association;

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

[89]For a comprehensive review of the pre-amendment garnishment statute in California *see* G. Brunn, *Wage Garnishment in California: A Study and Recommendation*, 53 CAL. L. REV. 1214 (1965) [hereinafter cited as Brunn].

[90]CAL. CODE CIV. PROC. § 690.6 (a) (West Supp. 1971).

[91]Sniadach v. Family Finance Corp, 395 US 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).

[92]McCallop v. Carberry, 1 Cal 3d 902, 83 Cal. Rptr. 666, 464 P.2d 122 (1970).

[93]CAL. CODE CIV. PROC. § 690.11 (West 1954).

same day as the execution of his wages is authorized and must inform him that he may be entitled to an exemption from that execution. The notice must also instruct him that he may seek the advice of an attorney and/or deliver an affidavit to the levying officer as provided in the code.[94]

The law otherwise remains unchanged. It retains the 100 percent exemption in cases where all the earnings are necessary for the use of the debtor's family[95] and its condition that the exemption is not allowed if the debt sought to be satisfied by the execution was incurred for the "common necessaries of life."[96] It retains the very difficult and lengthy procedure for filing a claim for the 100 percent exemption,[97] and the system of multiple levies served by marshals.[98]

These statutory provisions, which comprise the law of garnishment in California, will be discussed in depth and viewed in the light of empirical evidence which reflects on their effect upon credit extension and garnishment of wages in California.

A. THE RIGHT TO EXEMPTION AND THE "COMMON NECESSARIES" RULE

California's exemption provision makes it possible for a judgment debtor to avoid any garnishment, if all his earnings are necessary for the support of his family and if the debt was not incurred in the purchase of the common necessaries of life for his family. Specifically the California Code of Civil Procedure §690.6 (c) provides:

> All of such earnings [may be exempt] if necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor unless the debts are:
> (1) Incurred by the debtor, his wife, or his family for the common necessaries of life;
> (2) Incurred for personal services rendered by any employee or former employee of the debtor.

Thus an employee who needs all of his income to support his family may not exempt his wages from garnishment if the debt for which the wages are being garnished was incurred to purchase something which the court considers to be a "common necessary." The "common necessaries" exception has been a difficult and obstructive provision

[94]CAL. CODE CIV. PROC. § 682.1 (West Supp. 1971).

[95]CAL. CODE CIV. PROC. § 690.6 (c) (West Supp. 1971).

[96]CAL. CODE CIV. PROC. § 690.6 (c) (1) (West Supp. 1971).

[97]CAL. CODE CIV. PROC. § 690.50 (West Supp. 1971).

[98]There is no statutory provision enabling the creditor to secure one writ of execution to satisfy the entire judgment.

of the California law for many years. As interpreted in *Los Angeles Finance Co. v. Flores,*[99] which ruled that a gold watch purchased as a birthday gift was not a common necessary, it has come to include only those items purchased which are "necessary to sustain life, such as food, heat and shelter, etc. (common to all)."[100] The standard, "common necessaries," is difficult to interpret in specific cases because what is necessary to sustain life in the eyes of one judge may be a luxury in the eyes of another. Even if the effect of the "common necessaries" provision could be of benefit in certain limited situations, the difficulties in interpretation reduce its effectiveness.

The purpose of the provision was apparently to enable the creditors providing necessaries to execute on wages at least to the extent provided by the standard exemption and thus encourage them to be more liberal in extending credit, so that marginal credit risks may have the opportunity to purchase necessary products. While this may appear to be a worthy goal, it results in rather paradoxical inequities. It puts a family which imprudently purchased a luxury item in a more advantageous position than a family confronted with a large emergency medical bill. Thus the "common necessaries of life" provision is of doubtful merit even if it produced the desired effect.

There is no evidence, however, that the common necessaries provision has produced any change in credit policy. Because it is so difficult for debtors to exercise their rights to an exemption (a problem to be discussed later) very few debtors exercise their right to claim an exemption although many are presumably entitled to the relief.[101] As a result, creditors are unlikely to distinguish between the extension of credit for the purchase of a "common necessary" and the extension of credit for the purchase of a luxury. Obviously creditors are not motivated to so distinguish unless it is beneficial to them to do so, and when so few debtors file for an exemption the distinction becomes immaterial. In fact, it has been shown in several studies that many retailers in low income areas throughout the country "advertise widely in media appealing to the low-income, high risk con-

---

[99]110 Cal. App. 2d Supp. 850, 243 P.2d 139 (1952).

[100]*Id.* at 856, 243 P.2d at 144.

[101]L.A.STUDY, *supra* note 64, at 37. Less than five percent of those persons whose wages were garnished did in fact file claims for exemption, although of those who did not file, the claim was allowed in 86 percent of the cases. *Id* at 37. The average worker in the study had take home pay of less than $300 per month and supported an average of 3.6 dependents. *Id* at 38. Therefore, it is probable that in any of the cases studied, the worker would have been entitled to an exemption but failed to file a claim.

sumer, and extend credit with little if any credit investigation."[102]

The "common necessaries" limitation has merely served to prevent deserving low income families from seeking and/or securing a 100 percent exemption. It has not enabled creditors to liberalize credit extension for the sale of necessaries as opposed to other retail products. The "common necessaries" limitation draws a vague and unreasonable distinction between goods which are "necessary to sustain life" and those which are not, and thereby benefits one class of creditor over another, to the detriment of low income families, without altering the process of credit extension in any way and should therefore be abolished.

B. THE STATUTORY PROCEDURE FOR CLAIMING AN EXEMPTION

No exemption is effective if it cannot be used by the people it purports to protect. In a comprehensive study of wage garnishment in Los Angeles County in 1968[103] it was reported that in 8.5 percent of the cases the money garnished was returned to the debtor, the money being held for an average of 66 days.[104] The study showed that less than five percent of those whose wages were garnished filed claims for exemptions, yet the average worker in the study had disposable income of "less than $300 a month and supports an average of 3.6 dependents although 19 percent had six or more dependents."[105] Presumably, therefore, many of the persons who were eligible for exemptions because they needed their entire income to support their

---

[102]*Id.* at 11. *See also* FTC ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES, PRACTICES OF DISTRICT OF COLUMBIA 7 (1968), in which it is reported that out of 486 contracts subjected to analysis, 70 percent of the retailers catering to low income clientele indicated that they used no credit references or references only with other low income retailers. *See also* Caplovitz, *supra* note 57, at 3-14. Where it was found that 41 percent of those families in court action as a result of their bad debts, who were interviewed in Chicago, Detroit and New York, said that they had not been asked whether they had other debts at the time they borrowed the money or made the purchase, although 66 percent were making payments on other debts at the time of purchase.

[103]L.A. STUDY, *supra* note 64. The study was done on all wage garnishments in Los Angeles County in 1968. Because it was a pre-Sniadach study this included prejudgement garnishment as well as the execution of wages. The exemption procedure however has not been altered as a result of the Sniadach decision because it has always applied to both attachment and execution.

[104]*Id.* at 36.

[105]*Id.* at 38. Compare findings of Brunn, *supra* note 89, at 1217, where it was found that out of 178 attachments and executions levied in San Francisco County in February 1965, there were only 52 claims for exemption, a ratio that the sheriff in San Francisco considered "typical".

families did not claim an exemption. The report also found that in 86 percent of the cases, people who filed a claim for exemption and appeared in court were granted either the entire claim or part of it.[106]

Why do so few persons subject to garnishment who qualify for an exemption actually claim an exemption? The answer can best be seen by inspecting the method under which a claim for exemption must be filed under California State law. California Code of Civil Procedure § 690.50(a)[107] provides that after the wages have been levied upon, the judgment debtor:

> In order to avail himself of his exemption rights as to such property, shall within 10 days from the date such property was levied upon, deliver to the levying officer an affidavit of himself or his agent together with a copy thereof, alleging that the property levied upon identifying it, is exempt, specifying the section or sections of this code in which he relies for his claim to exemption, and all facts necessary to support his claim. . . .

The judgment debtor must thus be aware of his right to claim the exemption, know the code section in which his right is defined, and be able to present the reasons for his claim.[108]

The law then provides that the creditor has five days to return a counteraffidavit and that if none is forthcoming, the money will be released to the judgment debtor.[109] If the creditor files a counteraffidavit there is a subsequent 5 day period for either party to file a motion with the levying officer for a hearing.[110] If no motion is made the property will be released to the judgment debtor.[111] If the motion is filed the hearing must be held within 15 days from the date of the filing.[112] When the claim for exemption finally gets to court the judgment debtor has the burden of proof.[113] Thus even if the judgment debtor is successful in proving his right to the exemption he could be deprived of his wages for 25 days in the interim.

This is a difficult procedure to pursue, and it is highly unlikely that most debtors who find their wages garnished and have a low

---

[106]*Id* at 37.

[107]Former CAL. CODE CIV. PROC. § 690.26 (West 1954) renumbered and amended CAL. CODE CIV. PROC. § 690.50 (West Supp. 1971). by Ch. 1280, § 55 [1970] Cal. Stats.

[108]CAL. CODE CIV. PROC. § 690.6 (c) (West Supp. 1971) provides that the debtor must allege facts showing that all of his earnings are necessary for the use of his family and that the debt was not incurred for the "common necessaries of life".

[109]CAL. CODE CIV. PROC. § 690.50 (c) (West Supp. 1971).

[110]CAL. CODE CIV. PROC. § 690.50 (e) (West Supp. 1971).

[111]CAL. CODE CIV. PROC. § 690.50 (f) (West Supp. 1971).

[112]CAL. CODE CIV. PROC. § 690.50 (e) (West Supp. 1971).

[113]CAL. CODE CIV. PROC. § 690.50 (i) (West Supp. 1971).

enough income to qualify for the exemption have the knowledge and time to engage in such a struggle.[114] It is a convincing explanation for the great number of people in the Los Angeles study who apparently qualified for the exemption yet failed to file a claim.

C. THE COST OF GARNISHMENT TO THE DEBTOR AND THE EMPLOYER

(1.) MULTIPLE LEVIES

Under present California law, the marshal, who works in the civil division of most county sheriffs' offices and whose job it is to serve the levies of execution on wages, serves a separate writ of execution for each separate garnishment of wages and there is no restriction on the number of execution levies which a creditor may use. There is no statutory provision enabling a creditor to secure one writ of execution to satisfy the judgment he has received and require the employer in the absence of separate levies, to garnish the amount permitted by law from each paycheck until the judgment is satisfied.

The present system is very costly and serves no useful purpose. For example, if a creditor seeks to collect a $100 debt by garnishing the debtor's wages, and the debtor has disposable income of $100 per week, the debt will take four weeks to collect because only 25 percent of this disposable income is able to be garnished under the federal garnishment statute, and the marshal will have to be employed four separate times to serve the writ. The marshal's fees for serving the writ are initially paid by the creditor but become part of the costs chargeable to the debtor. The sheriff's fees for each levy are $5[115] plus $.75 per mile from his office to the point of service one way.[116] There is also a clerk's fee of $4 for issuing the writ of execution.[117]

Therefore in the example suggested above the fees for issuing the writ of execution and serving each levy will be at least $24 ($5 for each of the four levies plus $4 for issuing the writ of execution) plus $.75 per mile from the marshal's office to the employee's place of business. This is a burdensome amount to be added to a debt which

---

[114]L.A. STUDY, *supra* note 64, at 20. The study concluded that debtors who are eventually sued for their debts, and thus become subject to execution of wages, are less well educated than the general population and fall into income categories under $5,000 annually. *Also see* Caplovitz, *supra* note 57, at 2-16.

[115]CAL. GOV. CODE § 26734 (West Supp. 1971).

[116]CAL. GOV. CODE §26746 (West 1954).

[117]CAL. GOV. CODE § 26828 (West 1954) CAL. CODE CIV. PROC. § 683 (West 1954) provides that there may be several levies under a single writ and that the writ remains in effect for 60 days.

the debtor is already having difficulty paying. In the example above it amounts to at least 20 percent of the debt owed.

There are two defects in this procedure. First, the physical delivery of the writ by the marshal serves on the debtor's employer no useful purpose. The marshal does not physically force the employer to do anything, he does not actually receive the money at the time of service, and he does not benefit the employer with any information that the employer could not obtain just as easily by calling an informed source. Second, even in the absence of service by the marshal there is no reason for separate service or mailing for each levy. Such a system forces the employer to disrupt his payroll procedure for each separate levy rather than enabling him to plan his payroll procedure to account for future levies as would be possible if employers were served with a single levy authorizing enough separate garnishments to satisfy the judgment. As a result the money spent for the marshal's service on the employer is wasted because it benefits none of the parties involved, and its impact is multiplied because of the provision for a separate service for each levy.

(2.) COST TO EMPLOYER

The cost to employers, which is not passed on to the debtor, is an important factor in the state procedure. In the Los Angeles area in 1968, it was reported that the average cost of each garnishment to employers was burdensome. Among industrial employers contacted in the Los Angeles study,[118] it cost small employers an average of $5.40 per garnishment, medium sized employers paid an average of $32.00 per garnishment, and large employers paid an average of $15.40 per garnishment.[119] This fact obviously causes employers to be dissatisfied with the present garnishment system. When this cost to the employee is added to the fees paid to the marshal for service of the levy, it is evident that the total cost of collecting a small debt may well equal the amount of the debt itself.

The employer is often adversely affected in a less obvious way as a result of the garnishment of his employees' wages. Many employers in the Los Angeles study felt that the pressure of garnishment on the employees caused them to perform less capably than they were able. Fifty-four percent of the employers felt that garnishment of this employee's wages "caused the employee to perform at less than maximum efficiency."[120]

[118] L.A. STUDY, *supra* note 64, at 48. Data was gathered from manufacturers who employed 30,839 out of the 616,400 manufacturing employees in Los Angeles County.

[119] *Id.*

[120] *Id.* at 51.

Therefore, the employer is forced to become involved both directly and indirectly to his detriment in the debt collection process through garnishment. More than two-thirds of the employers called for reforms in the garnishment law.[121] Most of them called for the abolition of the pre-judgment attachment of wages which was subsequently accomplished by the *Sniadach* decision.[122] This reform, although it was important in giving the debtor his day in court, probably had little effect upon the employers because even the Los Angeles study in 1968 dealt with only 42,103 attachments of wages out of the 148,773 total garnishments it studied (the remainder being executions)[123] and of the executions the creditors secured default judgments in 87 percent of the cases.[124]

Garnishment also resulted in the termination[125] of debtors from their employment at the rate of 300 per 10,000 in small industries, 43 per 10,000 in medium sized industries and 4 per 10,000 in large industries.[126] The termination rate was proportioned to the expense of retraining the employee and not the cost to the employer per garnishment. The small industries hired mostly unskilled workers at close to the minimum wage who were easily replaceable,[127] which accounted for the higher termination rate in small industries. The average case of wage garnishment studied had 2.4 wage garnishments and the average employer discharged the employees after an average of 2.6 garnishments. Therefore, nearly 40 percent of the employees studied ran the risk of being discharged as a result of garnishment.[128]

The employer should be spared as much expense, confusion, and harassment as possible in the collection of debts through the garnishment of employee's wages. The law should be streamlined by abolishing the system of multiple levies, thus enabling the employer to easily apply the levies to his individual payroll and deduction mechanism even to the point of enabling the employer who does his payroll by computer to program the impending levy into the program of employee deductions. This would significantly reduce the cost to the employer and mitigate some employer bitterness with the current procedure, thus reducing the economic incentive to discharge employees whose wages are subject to garnishment.

---

[121] *Id.*

[122] *Id.*

[123] *Id.* at 6.

[124] *Id.* at 38.

[125] Termination included both discharge and voluntary termination from employment due to garnishment. *Id.* at 45, Table III.

[126] *Id.* at 49.

[127] *Id.* at 46-47.

[128] *Id.* at 35.

D. NOTICE AND SUMMONS

Prior to 1970, the California law provided that in order to receive a writ of attachment on wages, the credit collector must file an affidavit stating, among other things, that the defendant has been given notice that a "writ of attachment will issue after 8 days from the date of such notice."[129] Such notice was only required in the case of attachments of wages and the provision was abolished in the 1970 act which did away with pre-judgment garnishment. The notice provision, however, did not prove to be of benefit to the debtor. There was no form which it had to take, and it did not have to inform the debtor that he may be eligible to claim an exemption. It was used by many credit collectors as a threat.[130] Fifty percent of the credit collection agencies responded in the Los Angeles study and reported a 50 percent success rate in collection as a result of sending the eight day notice and it was established by the study that many more eight day notices were sent than writs of attachment sought.[131] Therefore, the eight day notice under the old attachment of wages law was used as an instrument of coercion.

Under the new law, creditors must secure a judgment and a writ of execution before wages can be garnished, the debtor being served with a summons and complaint, and if the judgment is secured, a copy of the writ of execution.[132] The fact that creditors are forced to secure a judgment is likely to make little difference in terms of the total number of garnishments, because of the high percentage of judgments which are secured by default.[133]

Why is there such a high rate of default among consumer debtors and what type of notice provision should be instituted to more adequately apprise the debtor of the impending threat to his wages?

The Caplovitz study, mentioned earlier,[134] asked the interviewees who had been sued as debtors whether they had received a summons telling them that they were being sued and that they should go to court on a certain day. Forty-one percent responded that they had received no such notice.[135] Of the 59 percent who admitted to receiv-

---

[129]Former CAL. CODE CIV. PROC. § 690.11 (West 1954) repealed by Ch. 1523, § 27, [1970] Cal. Stats.

[130]L.A. STUDY, *supra* note 64, at 111.

[131]*Id.* at 112.

[132]CAL. CODE CIV. PROC.§ 682.1 (West Supp. 1971).

[133]L.A. STUDY, *supra* note 64, at 7, found that 87 percent of the judgements were obtained by default and 75 percent of the cases studied were executions rather than attachments, even though it was a pre-Sniadach study.

[134]Caplovitz, Vol. II, *supra* note 57, at 1-54.

[135]*Id.* at 1-53.

ing a summons, 73 percent neither responded themselves nor sent a representative to court.[136] Of those who did not go to court there were many reasons given for their absence. Only eleven percent said they had no defense. Twelve percent said they were unable to go because of sickness, or unwillingness to lose a day's pay. Twenty-seven percent said they tried to work out a deal and thought that court action had been discontinued. Twelve percent forgot about it, and eight percent said they didn't know they were supposed to go.[137] Yet, of those interviewed, 35 percent said that they were dissatisfied with their purchase because they had been misinformed about some aspect of the purchase. Of this group 27 percent said they were misinformed about the price, 44 percent about the quality, 18 percent said they were sold the wrong merchandise, and 17 percent said they were misinformed about financial arrangements.[138] Sixty-four percent had tried to do something about their dissatisfaction, of which 80 percent had complained to the store.[139] These facts indicate that although the summons is served and conforms to constitutional standards, it is ineffective in alerting people to impending litigation and more importantly to the rights such a judgment against them will confer on the plaintiffs, even when they feel they have a legitimate complaint about the service or product they received. The summons merely states that a judgment may be secured against the defendant. It does not warn him of the consequences following from that judgment. For example, legal aid attorneys often speak of person after person who enters their offices with a complaint in one hand and a default judgment against them in the other.[140] They are not actually apprised of the seriousness of the action until the creditor attempts to secure a remedy by using the judgment he has secured.

Another factor which renders the summons meaningless to many debtors is the location of the court in which they are told to appear. Much of the debt collection is done in the large cities. People in the surrounding outlying areas are summoned to appear in court many many miles from their homes. For example, collection on oil company credit card debts for northern California has been done in San Francisco, and people from as far away as Sacramento, 100 miles away, are summoned to appear in San Francisco for what may be a

---

[136] *Id.*

[137] *Id.*

[138] *Id.* at 1-13.

[139] *Id.* at 1-14.

[140] Interview with Sean McCarthy, Attorney, Sacramento Legal Aid Society, Jan. 10, 1971.

rather small debt.[141] This type of inconvenience discourages people who might otherwise appear to present a defense to the complaint against them.

The California law now provides that the judgment debtor must be sent a copy of the writ of execution either at the time of the levy or after it has been made. The notice must state the amount of the judgment including interest, costs, and attorney's fees. The notice must also include information stated substantially as follows:

> Notice to the Judgment Debtor: You may be entitled to file a claim exempting your property from execution. You may seek the advice of an attorney or may, within 10 days from the date your property was levied upon, deliver an affidavit to the levying officer seeking to exempt such property, as provided in Section 690.50 of the Code of Civil Procedure.[142]

Though this notice does provide the judgment debtor with an indication that he may be entitled to an exemption, it is not sent to him until the writ has been secured and in most cases has been served on his employer. Usually, therefore, the judgment debtor's wages will already have been garnished when he receives the warning and he will be faced with the long process for claiming his exemption while being deprived of the portion of his wages already garnished. Indeed, if this notice is to be effective, it should serve as a warning that wages will be executed, and it should provide a description of the exemption to which he may be entitled. The notice should encourage the judgment debtor to pay the debt if he owes it and is able. This notice does noth-

---

[141] *Id.* CAL. CODE CIV. PROC. § 395 (West 1954) provides:

> . . . When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or any such defendant resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary . . .

However the same section provides that venue is not jurisdictional and that any court with subject matter jurisdiction may hear a cause of action. Therefore venue may be changed only upon complaint by defendant. If a defendant does not respond, his venue objection is waived. The Unruh Act in CAL. CIV. CODE § 1812.10 (West Supp. 1971) as amended in 1970, provides that in all actions on contracts under its provisions (*see* footnote 51) "The plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county or judicial district described . . . as a proper place for the trial of the action." If the plaintiff fails to so state ". . . the court shall upon its own action . . . dismiss any such action without prejudice." 51 Cal. Opps. Atty. Gen. 183 contends that CAL. CIV. CODE § 1812.10 (West 1954) prior to amendment is jurisdictional and thus subject to judicial scrutiny absent an objection by the defendant.

[142] CAL. CODE CIV. PROC. § 682.1 (West Supp. 1971).

ing to encourage him to pay on his own and it may in fact be his first warning that the creditor is actively collecting the debt. This procedure surely does not serve to carry out the goal provided for in the 100 percent exemption. If a man needs his entire salary to support his family, surely he should be given the chance to prove that need prior to any seizure of his wages. To take the wages prior to a warning and notice of a possible right to the exemption renders the exemption of very limited value.

E. A GENERAL PROPOSAL[143]

The system of multiple levies served on the employer should be abolished and replaced by a system which utilizes the mail. This reform should be administered by a county administrative office, perhaps the county clerk's office. It should be accompanied by a change in the type of notice sent to the judgment debtor informing him of the impending garnishment.

Before the writ of execution is mailed to the employer a copy of it should be mailed to the judgment debtor. This notice should clearly inform the judgment debtor that his wages may be garnished. The notice should also clearly state that the judgment debtor may claim an exemption from garnishment which would exempt all of his wages if he needs all of his wages for the support of his family. The judgment debtor should then be given the chance to mail a form to the office which mailed him the notice, claiming an exemption and briefly stating the reasons why he feels he qualifies for the exemption and requesting that the matter be set for hearing. If the clerk receives the claim of exemption, the matter would be set for hearing and both the debtor and creditor would be notified of the date. If the clerk received no claim of exemption, the clerk's office would mail the writ of execution to the employer.

It could be argued that this procedure would merely delay the execution and would increase the burden imposed on the creditor. It does not however give the debtor any rights he does not now possess under California law; it merely informs him of those rights and makes it possible for him to claim his rights in a way that is within the understanding and competence of ordinary citizens. The notice is also useful as in informational device which will notify the judg-

[143]For a specific proposal being recommended by the California Law Revision Commission, *see:* CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION RELATING TO ATTACHMENT, GARNISHMENT AND EXECUTION FROM EXECUTION; EARNINGS PROTECTION LAW (State of California, April 1971) on file at the Commission Offices, School of Law, Stanford, California.

ment debtor in an official and formal manner that his wages will be garnished, rather than in the form of a threat which many debtors have learned to disregard. If the judgment debtor fails to make a claim or if he makes a claim, has a hearing and is not granted an exemption, the writ of execution in the amount of the judgment should be mailed to the employer and should contain instructions which would enable the employer to garnish the proper amount from the employee's wages for whatever number of pay periods it takes to satisfy the judgment or until such time as the judgment is satisfied by the debtor himself. This would eliminate the cost of delivery of each levy by the marshal. The office which was given the job of handling the mailing of the notice to the judgment debtor and the writs of execution to the employer should be provided with a small fee for its work but the fee would be much smaller than that paid to the marshal because it would only involve the mailing of the writ of execution to the employer—rather than each individual levy—and it would not involve the cost of travel to the employer's place of business. This procedure would also reduce the cost of each garnishment to the employer because he would be able to figure the deductions for garnishment in advance and figure them into the employee's regular payroll deduction rather than having to disrupt his procedure for each individual garnishment.

This procedure would, therefore, eliminate the excessive cost imposed on both the creditor and the employer as a result of the system of multiple levies delivered by the marshal's office and it would give the judgment debtor the benefit of official notice that his wages will be garnished before they are actually garnished thus giving him a chance to pay the debt before garnishment occurs. It would also inform him of his rights to an exemption and give him a chance to claim the exemption without involving him in a technical and complicated legal procedure, and it would give him a chance to have his claim adjudicated before the garnishment takes place—so that if he does require all his wages for the support of his family he will not be denied the use of those wages while he is adjudicating his claim.

V. CONCLUSION

In light of the *Sniadach* decision, and the judicial indecision on the question of whether the rationale of the decision applies to the attachment of property other than wages, and the distinctions between commercial and consumer debtors, legislation should be enacted abolishing all attachment of property to satisfy debts incurred in the purchase of personal, family, and household goods or services.

This legislation should be combined with other legislation which would enable county governments in California to administer and enforce an act which embodies the strength of the federal garnishment statute but includes changes making the act easier for the parties involved to use and offering civil remedies to debtors who are hurt by the violation.

The legislation should also be accompanied by provisions abolishing the "common necessaries" exception to the 100 percent exemption from garnishment and abolishing personal service of multiple levies on the employer. Service on the employer should be accomplished by mail, should be accomplished by one mailing rather than multiple service, and should be permitted only after notice of garnishment is provided to the judgment debtor, which includes information as to his rights to a 100 percent exemption and provides him with a method of claiming that exemption.

Charles Michael Cowett