

S.B. 616: CALIFORNIA'S NEW AUTOMATIC EXEMPTION

APPLICABLE TO A DEPOSIT ACCOUNT

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Background. Under California law, a deposit account owner currently enjoys two groups of automatic protections relating to a deposit account maintained with a financial institution when a creditor or other claimant seeks funds in the account. The financial institution is obligated to grant the protections without further actions by the accountholder.

Directly deposited social security and public benefit payments. This first automatic protection is in the form of a statutory exemption. When a garnishment order is served on a financial institution under a writ of execution issued pursuant to California's statutory process for the enforcement of money judgments set forth in the California Code of Civil Procedure ("CCP"),¹ in the event a deposit account having direct deposit of social security benefits or public benefits is subject to the order, the account generally enjoys an automatic, fixed exemption, without the accountholder having affirmatively to seek a stay or release of the order, to the following extent (as updated on April 1, 2019, and every three years thereafter by the California Judicial Council).²

- \$1,750.00 where one depositor is the designated payee of a directly deposited public benefit payments.³
- \$3,500.00 where one depositor is the designated payee of directly deposited social security benefit payments.⁴
- \$2,600.00 where two or more depositors are the designated payees of directly deposited public benefit payments.⁵
- \$5,250.00 where two or more depositors are the designated payees of directly deposited social security benefit payments.⁶

Upon identifying the automatically protected social security or public benefits amount under CCP § 704.080(b) or under the federal garnishment rule ("Final Rule"),⁷ as to social

¹ CCP § 699.510, *et seq.*

² CCP § 703.150(b).

³ CCP § 704.080(b)(1), as updated by the Judicial Council, effective April 1, 2019, under CCP § 703.150(c).

⁴ CCP § 704.080(b)(2), as updated by the Judicial Council, effective April 1, 2019, under CCP § 703.150(c).

⁵ CCP § 704.080(b)(3), as updated by the Judicial Council, effective April 1, 2019, under CCP § 703.150(c).

⁶ CCP § 704.080(b)(4), as updated by the Judicial Council, effective April 1, 2019, under CCP § 703.150(c).

⁷ The federal final garnishment rule originally had been issued as an interim final rule ("Interim Rule") at 76 Fed.Reg. 9939 (February 23, 2011): <http://edocket.access.gpo.gov/2011/pdf/2011-3782.pdf>. The Interim Rule had been adopted 31 C.F.R. Part 212 as a new U.S. Treasury rule. The Social Security Administration adopted the Treasury rule by reference at 20 C.F.R. Parts 404 and 416; the Veterans Administration adopted the Treasury rule by

security benefit payments, whichever amount is greater (as discussed below), if the funds held by the financial institution exceeds the amount subject to levy or otherwise sought to be subjected to the enforcement of a money judgment, it must execute additional steps. The financial institution looks to CCP § 704.080(c)-(f), to afford an accountholder an opportunity to protect public benefits or social security benefits in excess of the amounts under CCP § 704.080(b) or under the Final Rule, whichever amount is greater:

§ 704.080. (a) For the purposes of this section:

(1) "Deposit account" means a deposit account in which payments of public benefits or social security benefits are directly deposited by the government or its agent.

(2) "Social security benefits" means payments authorized by the Social Security Administration for regular retirement and survivors' benefits, supplemental security income benefits, coal miners' health benefits, and disability insurance benefits. "Public benefits" means aid payments authorized pursuant to subdivision (a) of Section 11450 of the Welfare and Institutions Code, payments for supportive services as described in Section 11323.2 of the Welfare and Institutions Code, and general assistance payments made pursuant to Section 17000.5 of the Welfare and Institutions Code.

(b) A deposit account is exempt without making a claim in the following amount:

(1) One thousand two hundred twenty-five dollars (\$1,225) where one depositor is the designated payee of the directly deposited public benefits payments.

(2) Two thousand four hundred twenty-five dollars (\$2,425) where one depositor is the designated payee of directly deposited social security payments.

(3) One thousand eight hundred twenty-five dollars (\$1,825) where two or more depositors are the designated payees of the directly deposited public benefits payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (1) applies.

(4) Three thousand six hundred fifty dollars (\$3,650) where two or more depositors are the designated payees of directly deposited social security payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (2) applies.

(c) The amount of a deposit account that exceeds the exemption provided in subdivision (b) is exempt to the extent that it consists of payments of public benefits or social security benefits.

(d) Notwithstanding Article 5 (commencing with Section 701.010) of Chapter 3, when a deposit account is levied upon or otherwise sought to be subjected to the enforcement of a money judgment, the financial institution that holds the deposit account shall either place the amount that exceeds the exemption provided in subdivision (b) in a suspense account or otherwise prohibit withdrawal of that amount pending notification of the failure of the judgment creditor to file the affidavit required by this section or the judicial determination of the exempt status of the amount. Within 10 business days after the levy,

reference at 38 C.F.R. Part 1; the Railroad Retirement Board adopted the Treasury rule by reference at 20 C.F.R. Parts 350, 404, and 416; and the Office of Personnel Management adopted the Treasury rule by reference at 5 C.F.R. Parts 831 and 841. The Interim Rule became a final rule at 78 Fed.Reg. 32099 (May 29, 2013): <http://www.gpo.gov/fdsys/pkg/FR-2013-05-29/pdf/2013-12567.pdf>.

the financial institution shall provide the levying officer with a written notice stating (1) that the deposit account is one in which payments of public benefits or social security benefits are directly deposited by the government or its agent and (2) the balance of the deposit account that exceeds the exemption provided by subdivision (b). Promptly upon receipt of the notice, the levying officer shall serve the notice on the judgment creditor. Service shall be made personally or by mail.

(e) Notwithstanding the procedure prescribed in Article 2 (commencing with Section 703.510), whether there is an amount exempt under subdivision (c) shall be determined as follows:

(1) Within five days after the levying officer serves the notice on the judgment creditor under subdivision (d), a judgment creditor who desires to claim that the amount is not exempt shall file with the court an affidavit alleging that the amount is not exempt and file a copy with the levying officer. The affidavit shall be in the form of the notice of opposition provided by Section 703.560, and a hearing shall be set and held, and notice given, as provided by Sections 703.570 and 703.580. For the purpose of this subdivision, the "notice of opposition to the claim of exemption" in Sections 703.570 and 703.580 means the affidavit under this subdivision.

(2) If the judgment creditor does not file the affidavit with the levying officer and give notice of hearing pursuant to Section 703.570 within the time provided in paragraph (1), the levying officer shall release the deposit account and shall notify the financial institution.

(3) The affidavit constitutes the pleading of the judgment creditor, subject to the power of the court to permit amendments in the interest of justice. The affidavit is deemed controverted and no counteraffidavit is required.

(4) At a hearing under this subdivision, the judgment debtor has the burden of proving that the excess amount is exempt.

(5) At the conclusion of the hearing, the court by order shall determine whether or not the amount of the deposit account is exempt pursuant to subdivision (c) in whole or in part and shall make an appropriate order for its prompt disposition. No findings are required in a proceeding under this subdivision.

(6) Upon determining the exemption claim for the deposit account under subdivision (c), the court shall immediately transmit a certified copy of the order of the court to the financial institution and to the levying officer. If the order determines that all or part of the excess is exempt under subdivision (c), with respect to the amount of the excess which is exempt, the financial institution shall transfer the exempt excess from the suspense account or otherwise release any restrictions on its withdrawal by the judgment debtor. The transfer or release shall be effected within three business days of the receipt of the certified copy of the court order by the financial institution.

(f) If the judgment debtor claims that a portion of the amount is exempt other than pursuant to subdivision (c), the claim of exemption shall be made pursuant to Article 2 (commencing with Section 703.510). If the judgment debtor also opposes the judgment creditor's affidavit regarding an amount exempt pursuant to subdivision (c), both exemptions shall be determined at the same hearing, provided the judgment debtor has complied with Article 2 (commencing with Section 703.510).

In sum, in the event the financial institution holds such excess funds beyond the protected amount under CCP § 704.080(b) or under the Final Rule, as to social security benefit payments, whichever amount is greater, it is under an obligation to suspense such funds or block access thereto “pending notification of the failure of the judgment creditor to file the affidavit required by this section [704.080(e)(1)] or the judicial determination of the exempt status of the amount.” Upon holding the funds in suspense or blocking access thereto, the financial institution within 10 business days shall provide a written notice to the levying officer under CCP § 704.080(d), providing in part:

Within 10 business days after the levy, the financial institution shall provide the levying officer with a written notice stating (1) that the deposit account is one in which payments of public benefits or social security benefits are directly deposited by the government or its agent and (2) the balance of the deposit account that exceeds the exemption provided by subdivision (b).

In a word, the financial institution does not merely tender the excess funds to the levying officer. Additional obligations attach under CCP § 704.080, except in cases where a garnishment order is served by a levying party not subject to CCP § 688.030(a)(1), such as the Franchise Tax Board or the Employment Development Department, due to the ruling in *Hepner v. Franchise Tax Bd.*, 61 Cal. Rptr. 2d 341 (Ct. App. 1997), but subject to the Final Rule, as discussed below.

Department of Child Support Services. This second automatic protection afforded a support payment obligor’s deposit account with a financial institution is not set forth in the CCP. The California Department of Child Support Services (“DCSS”) collects delinquent child support debt from a support obligor pursuant to California Family Code §§ 17453⁸ and 17522.5⁹ by issuing an order to withhold (“Order”). Two populations of Orders are employed by DCSS: a “Child Support Collections Order to Withhold”¹⁰ and “Child Support Collections Order to Withhold-\$3,500 Exemption.”¹¹ Family Code § 17453(j)(2)¹² provides that the assets of an

⁸ Family Code § 17453 authorizes the Financial Institution Data Match Program to match delinquent support obligors with a financial institution’s account holders to identify delinquent support obligor account holders.

⁹ Family Code § 17522.5 provides a means to levy against a financial asset and its proceeds through liquidation. We perhaps also could include a reference to Family Code § 17522(a), the general provision in the Family Code dealing with DCSS’s levy rights to claim past due child support payments from an obligor:

(a) Notwithstanding any other law, if any support obligor is delinquent in the payment of support for at least 30 days and the local child support agency is enforcing the support obligation pursuant to Section 17400, the local child support agency may collect the delinquency or enforce any lien by levy served on all persons having in their possession, or who will have in their possession or under their control, any credits or personal property belonging to the delinquent support obligor, or who owe any debt to the obligor at the time they receive the notice of levy.

¹⁰ DCSS form number 0653 (01/13/09).

¹¹ DCSS form number 0654 (01/13/09).

¹² Family Code § 17453(j) provides, with emphasis:

(j) (1) Each county shall notify the department upon the occurrence of the circumstances described in the following subparagraphs with respect to an obligor of past-due support: (A) A court has ordered an obligor to make scheduled payments on a child support arrearages obligation and the obligor is in compliance with that order. (B) An earnings assignment order or an order/notice to withhold income that includes an amount

obligor owing child support arrearage, even though in compliance with scheduled payments on the arrearage, is subject to levy under an Order, but the first \$3,500.00 of the obligor's assets are exempt.¹³ In the event an obligor is not in compliance with scheduled payments on the arrearage, the obligor is not afforded this \$3,500.00 exemption under the Order.

“Stacking” of automatic exemptions. In the event a financial institution is served with an Order granting the \$3,500.00 exemption, if the obligor thereunder also is the recipient of directly deposited social security or public benefit payments covered under CCP § 704.080, or covered under the Final Rule as to a directly deposited social security payment, a question could remain whether the obligor is entitled in the aggregate to *both* the \$3,500.00 exemption and the additional protection automatically afforded under § 704.080(b) as to public benefits or the Final Rule as to a directly deposited social security payment, whichever is greater.¹⁴

for past-due support has been served on the obligated parent's employer and earnings are being withheld pursuant to the earnings assignment order or an order/notice to withhold income. (C) At least 50 percent of the obligated parent's earnings are being withheld for support.

(2) Notwithstanding Section 704.070 of the Code of Civil Procedure, if any of the conditions set forth in paragraph (1) exist, the assets of an obligor held by a financial institution are subject to levy as provided by paragraph (2) of subdivision (d). However, the first three thousand five hundred dollars (\$3,500) of an obligor's assets are exempt from collection under this subdivision without the obligor having to file a claim of exemption. (3) If any of the conditions set forth in paragraph (1) exist, an obligor may apply for a claim of exemption pursuant to Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure for an amount that is less than or equal to the total amount levied. The sole basis for a claim of exemption under this subdivision shall be the financial hardship for the obligor and the obligor's dependents. (4) For the purposes of a claim of exemption made pursuant to paragraph (3), Section 688.030 of the Code of Civil Procedure shall not apply. (5) For claims of exemption made pursuant to paragraph (3), the local child support agency responsible for enforcement of the obligor's child support order shall be the levying officer for the purpose of compliance with the provisions set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure except for the release of property required by subdivision (e) of Section 703.580 of the Code of Civil Procedure. (6) The local child support agency shall notify the department within two business days of the receipt of a claim of exemption from an obligor. The department shall direct the financial institution subject to the order to withhold to hold any funds subject to the order pending notification by the department to remit or release the amounts held. (7) The superior court in the county in which the local child support agency enforcing the support obligation is located shall have jurisdiction to determine the amount of exemption to be allowed. The court shall consider the needs of the obligor, the obligee, and all persons the obligor is required to support, and all other relevant circumstances in determining whether to allow any exemption pursuant to this subdivision. The court shall give effect to its determination by an order specifying the extent to which the amount levied is exempt. (8) Within two business days of receipt of an endorsed copy of a court order issued pursuant to subdivision (e) of Section 703.580 of the Code of Civil Procedure, the local child support agency shall provide the department with a copy of the order. The department shall instruct the financial institution to remit or release the obligor's funds in accordance with the court's order.

¹³ This protection afforded an obligor is an asset protection. The source of funds underlying this \$3,500 need not be, e.g., federal benefit payments protected under the Final Rule.

¹⁴ Furthermore, an obligor enjoys under Family Code § 17450(c)(2) an exemption from levy upon an obligor's proof of receipt of social security disability insurance (“SSDI”) benefits. *In re Marriage of Danny C. and Shannon Hopkins* (2009) 173 Cal.App.4th 281. This right is likely reflected regardless in CCP § 704.080, as SSDI benefit payments may be covered under CCP § 704.080 through its reference to “disability insurance benefits” at § 704.080(a)(2) and may enjoy an automatic exemption thereunder.

This question of the availability of both protections under California law is rendered more complex due to the potential applicability of the Final Rule, with the Final Rule preempting CCP § 704.080 as to directly deposited social security payments. The Final Rule does not preempt state law that may be more protective of social security benefit payments.¹⁵ Therefore, under the Final Rule (provided a Notice of Right to Garnish Federal Benefits does not accompany an Order) a financial institution would be required to identify a protected amount as to an obligor's deposit account thereunder. Upon identification of that protected amount, the financial institution would determine if CCP § 704.080 affords greater protection to an obligor's account. That greater amount would be protected. Then, again, the financial institution must determine if a stacking of federal and state protections, including the \$3,500.00 exemption, would govern.

DCSS does not agree with the practice of stacking multiple protections available under both federal and state law as to an Order. DCSS contends that against an Order granting a \$3,500.00 protection a financial institution must automatically grant the following to a support obligor:

- The greater of the protected amount under the Final Rule *or* the exemption under CCP § 704.080 as to social security benefit payments and
- The \$3,500.00 exemption, *but in no event greater than \$3,500.00 in total, unless the protected amount under the Final Rule or CCP § 704.080 exceeds this \$3,500.00.*

In terms of a risk analysis, on the one hand, if a financial institution were to conform to DCSS's position by not stacking multiple protections, the funds subject to an Order may be increased, as a support obligor would have a cap on the total available protections of \$3,500.00, unless the protected amount under CCP § 704.080 as to social security benefit payments or the Final Rule, whichever amount is greater, exceeds this \$3,500.00. However, the support obligor may press a claim against the financial institution for failing to stack protections in the event the total protections, upon stacking, exceeds \$3,500.00 (except as to a protected amount under CCP § 704.080 as to social security benefit payments or the Final Rule, whichever amount is greater). Further, in the event the financial institution dishonors checks and other items by virtue of the reduction in an account's balance resulting from honoring the Order, the support obligor may have a claim against the financial institution for wrongful dishonor.¹⁶ The financial institution could defend this claim, contending, among other defenses, that the support obligor did not suffer an injury, as the financial institution arguably discharged a support obligation of the obligor.

On the other hand, in terms of a risk analysis, if a financial institution were not to conform to DCSS's position by stacking multiple protections, the funds subject to an Order may

¹⁵ 31 C.F.R. § 212.9(b).

¹⁶ California Uniform Commercial Code § 4402.

be decreased as a support obligor may have multiple protections available, exceeding the \$3,500.00 cap. While the support obligor may be pleased with this result, DCSS may press a claim against the financial institution for failing to subject all available funds to the Order. If DCSS's position is correct as a matter of law, the financial institution may have direct liability to DCSS. While the financial institution may cross claim against the support obligor in this action, seeking to be indemnified, the support obligor may be unable to respond in damages.

We would encourage financial institutions to confer with their legal counsel as to (i) whether the \$3,500.00 protection is available in addition to the greater of the protected amount under the Final Rule or the exemption granted under CCP § 704.080 as to social security benefit payments; or (ii) whether the total protections granted under the Final Rule or CCP § 704.080 as to social security benefit payments, whichever amount is greater, and Family Code § 17453(j) may not exceed the total amount of \$3,500.00, unless the protected amount under CCP § 704.080 or the Final Rule exceeds this sum. If a financial institution is uncertain of the path to pursue, it may elect to interplead the funds at issue as between the support obligor and DCSS.¹⁷ Based on the analysis above, it would appear that complying with DCSS's position might present less risk to a financial institution than stacking protections. Nevertheless, because each Order may turn on unique and specific facts, we would urge financial institutions to confer immediately with counsel upon service of these Orders involving a \$3,500.00 protection.¹⁸

S.B. 616: the new CCP automatic exemption. Effective September 1, 2020, California has enacted a third automatic protection afforded a judgment debtor to a deposit

¹⁷ CCP § 386, *et seq.*

¹⁸ DCSS submitted a request to the California Attorney General, seeking her opinion on this matter. California Attorney General Assigned Pending Opinion Request No. 12-402. On December 20, 2013, the Attorney General issued Opinion No. 12-402 regarding the interplay among the Final Rule, CCP § 704.080, and Family Code § 17453(j), ruling that an obligor is merely entitled to the largest of the three individual exemptions. In responding to a DCSS order to withhold, a financial institution under this ruling should (1) calculate the amount that would be protected under each of these three exemptions and (2) accord protection to the obligor's funds only up to the largest of those amounts. Protecting funds in that amount would satisfy the largest exemption while providing the obligor with greater protection than would be required under the remaining exemptions. In citing the protected amounts in CCP § 704.080, the opinion fails to note the updated amounts by the Judicial Council, effective April 1, 2013, under CCP § 703.150(b). As of April 1, 2019, the adjusted amounts under CCP § 704.080:

Public benefits, one depositor is designated payee	\$ 1,750
Social security benefits, one depositor is designated payee	\$ 3,500
Public benefits, two or more depositors are designated payees ²	\$ 2,600
Social security benefits, two or more depositors are designated payees ²	\$ 5,250

account under Senate Bill 616,¹⁹ exempting an amount up to the minimum basic standard of adequate care for a family of four for Region 1, subject to annual adjustment effective July 1 of each year. Under CCP § 704.220(a), the following new automatic exemption is available:

(a) Money in the judgment debtor’s deposit account in an amount equal to or less than the minimum basic standard of adequate care for a family of four for Region 1, established by Section 11452 of the Welfare and Institutions Code and as annually adjusted by the State Department of Social Services pursuant to Section 11453 of the Welfare and Institutions Code, is exempt without making a claim.²⁰

Unlike the question regarding the stacking of protections potentially afforded a debtor under CCP § 704.080, the Final Rule, and an Order granting the \$3,500.00 exemption, CCP § 704.220(b) could provide the following definitive guidance as to the stacking of available exemptions to a debtor, albeit the employment of the term “exemption” may raise a question regarding the protection afforded an obligor under Family Code § 17453(j):

(b) (1) Subdivision (a) does not preclude or reduce a judgment debtor’s right to any other exemption provided by state or federal law.

(2) If the financial institution holding the judgment debtor’s deposit account has actual knowledge that the judgment debtor is entitled to one or more exemptions that the financial institution is required to apply pursuant to federal law or state law other than that set forth in subdivision (a), the following shall apply:

(A) If the sum of the amount of money in the deposit account that would be exempt from levy under the additional exemptions is less than or equal to the amount set forth in subdivision (a), the additional exemptions described in this paragraph shall be considered encompassed within the exemption set forth in subdivision (a) and subdivision (a) shall apply.

(B) If the sum of the amount of money in the deposit account that would be exempt from levy under the additional exemptions is greater than the amount set forth in subdivision (a), subdivision (a) shall not apply and instead money in the deposit account equal to or less than the sum of the additional exemptions is exempt without making a claim.

¹⁹ As enacted S.B. 616 is available as Chapter 552. A copy of this bill is available at the following link: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB616

²⁰ The Region 1 amount was \$1724.00 prior to July 1, 2020; effective July 1, 2020, it became \$1788.

The communication announcing the increase, effective July 1, 2020, can also be found at:

<https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-60.pdf>; past year communications are available (and future year letters will be available) by going to <https://www.cdss.ca.gov/inforesources/letters-regulations/letters-and-notices/all-county-letters>, as organized by year.

Further, the automatic exemption within CCP § 704.220(a) does not apply to money levied upon to satisfy a child support or spousal support payment under § 704.220(c).²¹ Of course, a debtor obligor would continue to enjoy the \$3,500.00 exemption under a “Child Support Collections Order to Withhold-\$3,500 Exemption” issued pursuant to Family Code § 17453(j).

The exemption granted under S.B. 616 is per debtor, not per account. Thus, in the event a debtor has deposit accounts with two or more financial institutions, the process of granting and securing the exemption becomes more complex. We turn to CCP § 704.220(d)(3):

(e) (1) The exemption applies per debtor, not per account.

(2) If a judgment debtor holds an interest in multiple accounts at a single financial institution, the judgment creditor or judgment debtor may file an ex parte application in the superior court in which the judgment was entered for a hearing to establish how and to which account the exemption should be applied. Subject to a service of an order issued in that hearing, if any, the financial institution may determine how and to which account the exemption should be applied. This paragraph does not create a cause of action against a judgment creditor who executes a levy or against a financial institution that complies with a levy pursuant to the court’s determination.

(3) If a judgment debtor holds an interest in multiple accounts at two or more financial institutions, the judgment creditor shall, and the judgment debtor may, file an ex parte application in the superior court in which the judgment was entered for a hearing to establish how and to which account the exemption should be applied. Subject to a service of an order issued in that hearing, if any, the financial institutions shall comply with the levy subject to the exemption. This paragraph does not create a cause of action against a judgment creditor who executes a levy or against a financial institution which complies with a levy pursuant to the court’s determination.

Thus, in a word in the event the judgment creditor becomes aware of a judgment debtor having multiple accounts at two or more financial institutions enabling the debtor to enjoy an exemption potentially in excess of the statutorily granted amount under CCP § 704.220(a), the creditor is under an obligation affirmatively to preclude such an unfavorable result through filing an ex parte application. Absent the filing of an ex parte application for relief, serendipitously the debtor could enjoy an exemption windfall amount in excess of the amount under § 704.220(a). The debtor is not statutorily obligated to file an ex parte application under such circumstances under § 704.220(e)(3).

²¹ (c) Subdivision (a) does not apply to money levied upon to satisfy any of the following:

- (1) A levy to satisfy a judgment for wages owed, child support, or spousal support. For purposes of this paragraph, “wages owed” includes damages and penalties.
- (2) A provision of the Public Resources Code, Revenue and Taxation Code, or Unemployment Insurance Code.
- (3) A warrant or notice of levy issued by the state, or any department or agency thereof, for the collection of a liability.

California Financial Code § 1411. Financial Code § 1411 limits a bank’s setoff right against a customer to recover certain debts covered by that section. Not later than the day following the exercise of a setoff with respect to a deposit account for any debt claimed by the bank from the customer, the bank is required to deliver personally or send by first class mail postage prepaid to the address of each customer a written notice.²² Among other things, this notice specifically must provide in at least 10-point type a response the debtor could submit to the bank enabling the debtor to assert certain exemptions available to the debtor under CCP §

²² (1) A statement that the bank has set off a debt or a portion thereof against the customer's deposit account, identifying the account, and giving the respective balances before and after the setoff.
 (2) A statement identifying the debt set off against the account and giving the respective balances due before and after the setoff.
 (3) A statement that if the customer claims that the debt has been paid or is not now owing, or that the funds in the deposit account consist of moneys expressly exempt pursuant to Chapter 4 (commencing with Section 703.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure, and listed in the notice, the customer may execute and return the notice to the bank by mail at the address shown or personally to the bank branch where the customer's account is maintained not later than 20 days after the date of mailing or personal delivery.
 (4) A statement that if the notice is executed and returned, the bank may file an action in court to collect the debt; that if a lawsuit is filed, the customer will be notified and have an opportunity to appear and defend; and that if the bank is successful, the customer will be liable for court costs, and attorney's fees, if the debt so provides.
 (5) A response form in at least 10-point type containing substantially the following:
 “The debt described in the Notice of Setoff received from the bank is ____ is not ____ my debt or the debt of another person in whose name the account is maintained.
 “I claim that the debt:
 ____ has been paid.
 ____ is not now owing.
 ____ is not subject to setoff because the money in the account is:
 ____ Paid earnings (CCP 704.070)
 ____ Proceeds from execution sale of or insurance for loss of a motor vehicle (CCP 704.010)
 ____ Proceeds from execution sale of household furnishings or other personal effects (CCP 704.020)
 ____ Relocation benefits (CCP 704.180)
 ____ Life insurance proceeds (CCP 704.100)
 ____ Disability and health insurance benefits (CCP 704.130)
 ____ Workers' compensation benefits (CCP 704.160)
 ____ Unemployment or strike benefits (CCP 704.120)
 ____ Retirement benefits including, but not limited to, social security benefits (CCP 704.080, 704.110, 704.115)
 ____ Public assistance benefits including welfare payments and supplemental security income (SSI) or charitable aid (CCP 704.170)
 ____ Proceeds from sale of or insurance for damage or destruction of a dwelling (CCP 704.720, CCP 704.960)
 ____ Proceeds from execution sale of or insurance for loss of tools of a trade (CCP 704.060)
 ____ Award of damages for personal injury (CCP 704.140) or wrongful death (CCP 704.150)
 ____ Financial aid paid by an institution of higher education to a student for expenses while attending school (CCP 704.190)
 “I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
 Date:
 Signed: ”.....

704.010, *et seq.* This § 1411(c)(5) should be updated to refer to CCP § 704.220 as adopted under S.B. 616.

Absent a legislative amendment to this statutorily mandated notice in § 1411(c)(5), a bank could consider unilaterally adding new language, affording a debtor an opportunity to contend that the debt is not subject to setoff because the money in the account is “An amount equal to or less than the minimum basic standard of adequate care for a family of four in Region 1 (CCP 704.220).” In electing this option, one question could remain: May a bank change the statutorily mandated notice consistent with § 1411?

Certain government agency levies. One open question under CCP § 688.030(a)(1) is whether the automatic exemption granted under S.B. 616 could also apply to certain government agency levies pursuant to any provision of the Public Resources Code, Revenue and Taxation Code (excluding Sections 3201 to 3204, inclusive), or Unemployment Insurance Code. The Employment Development Department (“EDD”) may levy against an account under a notice of levy.²³ The Franchise Tax Board could levy to seize funds of a delinquent taxpayer. Finally, a county could issue a seizure for taxes under Revenue and Taxation Code §§ 2902, 2903, 2921.5, 2922, and 2951 through 2963.

In addressing an exemption granted under CCP § 703.010, *et seq.*, CCP § 688.030 provides, with emphasis supplied:

- (a) If pursuant to any provision of the Public Resources Code, Revenue and Taxation Code (excluding Sections 3201 to 3204, inclusive), or Unemployment Insurance Code, property is levied upon pursuant to a warrant or notice of levy issued by the state or by a department or agency of the state for the collection of a liability:
- (1) If the debtor is a natural person, the debtor is entitled to the same exemptions to which a judgment debtor is entitled. Except as provided in subdivisions (b) and (c), the claim of exemption shall be made, heard, and determined as provided in Chapter 4 (commencing with Section 703.010) of Division 2 in the same manner as if the property were levied upon under a writ of execution.
- (2) A third person may claim ownership or the right to possession of the property or a security interest in or lien on the property. Except as provided in subdivisions (b) and (c) or as otherwise provided by statute, the third-party claim shall be made, heard, and determined as provided in Division 4 (commencing with Section 720.010) in the same manner as if the property were levied upon under a writ of execution.
- (b) In the case of a levy pursuant to a notice of levy:
- (1) The claim of exemption or the third-party claim shall be filed with the state department or agency that issued the notice of levy.
- (2) The state department or agency that issued the notice of levy shall perform the duties of the levying officer, except that the state department or agency need not give itself the notices that the levying officer is required to serve on a judgment creditor or creditor or the notices that a judgment creditor or creditor is required to give to the levying officer.

²³ California Unemployment Insurance Code § 1755.

The state department or agency in performing the duties of the levying officer under this paragraph has no obligation to search public records or otherwise seek to determine whether any lien or encumbrance exists on property sold or collected.

(c) A claim of exemption or a third-party claim pursuant to this section shall be heard and determined in the superior court in the county where the property levied upon is located.

(d) This section shall become operative on January 1, 2014.

At least as to the Franchise Tax Board (“FTB”) under a “notice”²⁴ to withhold, in *Hepner v. Franchise Tax Bd.*, 61 Cal. Rptr. 2d 341 (Ct. App. 1997), the California Court of Appeal ruled that notwithstanding CCP § 688.030(a)(1) a taxpayer did not have right to claim exemptions from collection of back income taxes when enforcement was pursued by notice to withhold issued by the FTB. The court concluded that the legislative history of CCP § 688.030 clearly demonstrated that the legislature deliberately chose not to extend the exemption to a tax debtor when enforcement is pursued directly by way of a FTB notice to withhold. If a sheriff, constable, or marshal serves the levy through a “warrant” on behalf of a state agency, CCP § 688.030 could apply granting the debtor the exemptions to which the debtor is entitled, as such levy is similar to a writ of execution.

As to the automatic exemptions granted in the future under S.B. 616, notwithstanding the inapplicability of CCP § 688.030 as to certain government levies under the ruling of *Hepner*, a bank could elect to apply exemptions affirmatively as a matter of business judgement. If the bank so elects, a further question of stacking of exemptions could surface: If an exemption is granted by the bank as a matter of courtesy to a taxpayer notwithstanding the inapplicability of CCP § 688.030, should it regardless elect not to stack exemptions or should it stack exemptions as the terms of S.B. 616 precluding the stacking of exemptions would not apply?

Further, as to certain garnishment orders issued by a state or other government authority, e.g., the FTB and the EDD, effective June 28, 2013,²⁵ the Final Rule became applicable to such authority. Thus, as to certain automatic exemptions granted an account holder under CCP § 704.080 to a social security payment, notwithstanding the holding in *Hepner*, a financial institution would be obligated to grant protection to such payment under the Final Rule.

One final point. The California Department of Tax and Fee Administration (“CDTFA,” formerly known as the State Board of Equalization) administers California’s sales and use, fuel, tobacco, alcohol, and cannabis taxes, as well as a variety of other taxes and fees that fund specific state programs. CDTFA may levy against a bank account.²⁶ As to a levy issued by the CDTFA, notwithstanding the ruling in *Hepner*, the automatic exemptions in CCP § 704.080(b)

²⁴ A curious point regarding *Hepner* is that the FTB does not issue a notice to withhold to collect delinquent tax obligations; it issues an “order” to withhold. The court uses both the terms (notice to withhold and order to withhold) throughout the opinion. A distinction between the two terms is unclear.

²⁵ 78 Fed.Reg. 32099 (May 29, 2013).

²⁶ California Revenue and Taxation Code § 6702.

as to public benefits and social security payments, could apply against a CDFTA levy by virtue of the terms in California Revenue and Taxation Code § 6703(a), with emphasis supplied:

(a) Subject to the limitations in subdivisions (b) and (c), the board may by notice of levy, served personally or by first-class mail, require all persons having in their possession, or under their control, any credits or other personal property belonging to a retailer or other person liable for any amount under this part to withhold from such credits or other personal property the amount of any tax, interest, or penalties due from such retailer or other person, or the amount of any liability incurred by them under this part, and to transmit the amount withheld to the board at such times as it may designate. The notice of levy shall have the same effect as a levy pursuant to a writ of execution.

Therefore, when the CDFTA serves a levy against a financial institution, it may prudently apply the terms of CCP § 704.080, granting to the accountholder the automatic exemption as to public benefits and social security payments and complying with the terms of that section as to excess funds in an account, if any.

Further, effective June 28, 2013, because the CDFTA, as a state government agency, became subject to the Final Rule, a financial institution would protect the greater amount of the social security payment covered under CCP § 704.080(b) or the Final Rule and thereafter apply § 704.080 as to excess amounts, if any.

Conclusion. When a financial institution responds to a garnishment served under California law, effective September 1, 2020, the universe of automatic protections afforded a deposit account owner expands. Effective that date the amount of the minimum basic standard of adequate care for a family of four for Region 1, established through the California Disability Benefits website, becomes available to a judgment debtor. The banking industry is well advised to prepare for this development particularly due to the complexity of this new exemption. For example, because the amount of the exemption could change as of July 1 of each year, bankers must remain vigilant to update annually the amount of this exemption, as necessary.

Financial Code § 1411 may present additional compliance challenges as well with regard to the content of the mandated notice a bank is required to deliver or mail to a debtor upon exercising a right of setoff against a debt covered by that section. As noted above, a bank could unilaterally update the notice by referencing CCP § 704.220 therein.

Finally, as to a levy originated by certain state government agency, some ambiguity could surface when determining the applicability of this new automatic exemption under S.B. 616 to such levies notwithstanding the terms of CCP § 688.030. If a law enforcement official serves the levy through a warrant on behalf of a state agency, CCP § 688.030 could apply granting the debtor the exemptions to which the debtor is entitled, as such levy is similar to a writ of execution. However, if the agency itself serves the levy through a notice or order to withhold, the holding in *Hepner* could govern precluding the availability of the automatic exemption,

except to the extent the funds in a deposit account are protected under the Final Rule. This observation does not apply to a levy served by the CDFTA; it is not subject to the rule announced in *Hepner* as that agency is subject to Revenue and Taxation Code § 6703; nevertheless, that agency is subject to the Final Rule, effective June 28, 2013.