

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Judge McMaster discloses that attorneys appearing in cases on today's calendar may have donated to the Committee for Judicial Independence which was formed to oppose the attempted recall of Judge McMaster. A list of donors and amounts donated is under the custody of court executive officer Jody Patel and can be reviewed at room 611, sixth floor, courthouse, 720 Ninth Street.

**Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
LOREN E. MCMASTER, Judge
T. West, Clerk
V. Carroll, Bailiff**

Tuesday, June 13, 2006, 2:00 PM

Item 1 **04AS00681 SARA KATE DICKERSON VS. GARRAHAN ELECTRIC, INC.**

Nature of Proceeding: Motion to Exclude Testimony

Filed By: Wood, Ryan C.

This matter is dropped from calendar.

Item 2 **04AS03743 WILMA HURD-STOVALL VS. REGENTS OF THE UNIVERSITY OF CA, ET
A**

Nature of Proceeding: Summary Judgment

Filed By: Warburg, Anthony S.

This matter is continued to 6/20/2006 at 02:00PM in this department.

Item 3 **04AS04065 MICHAEL REYNOLDS VS. JOHN PISA**

Nature of Proceeding: Motion To Withdraw Atty of Rec

Filed By: Beede, Stephen J.

Motion to Withdraw as Attorney of Record for John Pisa is denied without prejudice. The attorney did not confirm the address within the last 30 days before filing the motion pursuant to CRC 376(c) and therefore is required to serve the court clerk pursuant to CCP 1011(b) and CRC 202.5. (The proof of service must indicate service was accomplished in this manner.)

Moreover, since the trial date is August 1, 2006 and the settlement conference is July 11, 2006 the court would not be inclined to grant the motion unless the trial date is first continued in Department 47.

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 4 **05AS00677 FINANCIAL PACIFIC INS. CO VS. ASSURANCE COMPANY OF AMERICA,**

Nature of Proceeding: Motion For Summary Adjudication (Financial Pacific)

Filed By: White, Glenn M.

Plaintiff Financial Pacific Insurance Co.'s Motion for Summary Judgment, or in the Alternative, for Summary Adjudication of Issues Is denied.

The Court sustains Assurance's Evidentiary Objections to the Paoletti Declaration.

Plaintiff Financial Pacific Insurance Co.'s complaint alleges five causes of action against defendant Assurance: the 1st for declaratory relief, the 2nd for equitable contribution, the 3rd for equitable indemnity the 4th for subrogation and the 5th for equitable subrogation.

Defendant requests summary adjudication of the issue of the method by which the defense fees and costs, incurred by their mutual insured, John Mourier Construction, Inc., in two of three underlying construction defect actions, should be apportioned equally between Financial Pacific, Assurance, and Maryland Casualty.

The Court notes that Maryland Casualty is not a named party to this action, and has not been served or appeared.

It is undisputed that Financial Pacific insured Mourier from June 1, 1992 to June 1, 1995, and again from October 1, 1996 to October 1, 2001. (UMF 1.) Financial Pacific's policies for Oct. 1, 1997 through 2001 contained an exclusion for any appreciable property damage which was apparent prior to the commencement of the policies. (UMF 11.)

Assurance insured Mourier from June 1, 1995 to June 1, 1996. (MF 2) The time in which Maryland Casualty insured Mourier is disputed, but is either June 1, 1996 to June 1, 1997 or to Oct. 1, 1996. (DMF 2.) The post-manifestation exclusion does not appear in the policies of Assurance or Maryland Casualty. (UMF 13.)

In the "Allmendinger" case, more than 50 homeowners sued for damages, for sales which occurred between 1993 and 1997. In the "Alvi" case, more than 30 homeowners sued for damages, for the sales occurred between 1996 and 1998. (UMF 14-15.)

Both Financial Pacific and Assurance agree that the date of close of escrow ("COE") is a fairly reliable benchmark, in the absence of more specific evidence, to determine when the covered damages occurred.

Financial Pacific contends that using the COE dates provided by Assurance, a COE of 1993 for the Allmendinger development and a COE of 1996 for the Alvi development, the later Financial Pacific policies would not have been triggered, as the first "manifestation" of damage, apparent to any person, would have taken place prior to the inception of the policies, and thus been excluded.

Financial Pacific concludes that each of the three insurers, Assurance, Maryland Casualty and Financial Pacific therefore had only one policy triggered (Assurance

6/1/95 - 6/1/96, Maryland Casualty 6/1/96-6/1/97 and Financial Pacific 10/1/96-10/1/97) thus, the burden of the defense costs should be apportioned in equal shares, with each of the three insurers paying 33.33% of the defense costs under the policies, as the most equitable way to apportion the loss.

Assurance disagrees with Financial Pacific's analysis because Financial Pacific accepted Mourier's tender in the underlying actions under all of its the policies, including the 1997-2001 policies, under a reservation of rights. As it accepted the tender, those policies should be included.

Secondly, Financial Pacific has failed to establish that there is no possibility of coverage under the 1997-2001 policies.

Financial Pacific has used the earliest COE dates for each of the two housing projects, not the latest COE for any of the houses. Financial Pacific has provided no evidence to show that some manifestation of damage as to all the houses had occurred and was observable by the earliest close of escrow dates. On the contrary, each of the underlying complaints alleges that the defects were latent, and were not observable at the time of the COE.

Although the complaint alleges three underlying actions, Financial Pacific's motion only addresses two of them, excluding the third, Anderson, action. Anderson is the only one of the underlying actions that has settled, and both Financial Pacific and Assurance contributed to the Anderson settlement based on a time-on-the-risk allocation, including Financial Pacific's 1997-2001 policies. (Assurances' MF 17, 24.)

Code of Civil Procedure section 437c(f)(1) provides that : "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." The claim for damages which may be summarily adjudicated, is limited to punitive damages, as set forth in Section 3294 of the Civil Code.

Here, as both parties have acknowledged their duty to defend and indemnify their mutual insured, and the motions address only the appropriate measure of damages (not punitive damages) which fails to completely dispose of any cause of action or affirmative defense. The motion is therefore denied as inappropriate for summary adjudication

Additionally, the Court finds that Financial Pacific has failed to meet its initial burden of proof on summary adjudication of the 1st cause of action for declaratory relief and the 2nd cause of action for equitable contribution, thus the motion is denied.

The prevailing party defendant is directed to prepare an order for the Court's signature pursuant to C.C.P. section 437c(g) and C.R.C., Rule 391.

0677203

Nature of Proceeding: Summary Judgment (Assurance)

Filed By: Curet, Blaise S.

Defendant Assurance Co. of America's Motion for Summary Judgment, or in the Alternative, for Summary Adjudication of Issues Is denied.

Plaintiff Financial Pacific Insurance Co.'s complaint alleges five causes of action against defendant Assurance: the 1st for declaratory relief, the 2nd for equitable contribution, the 3rd for equitable indemnity the 4th for subrogation and the 5th for equitable subrogation.

On these cross-motions for summary judgment defendant requests summary adjudication of the issue of the method by which the defense fees and costs, incurred by their mutual insured, John Mourier Construction, Inc., in three underlying construction defect actions, should be apportioned.

Assurance contends that this court should find that it is based upon the "time-on-the-risk". Plaintiff Financial Pacific Insurance Co. contends that the defense fees and costs should be apportioned based upon equal shares to each of the three defending insurers.

Both insurers issued commercial general liability policies to the insured. The homes that are the subject of the three underlying actions were built by Mourier. (UMF 5.)

Both Assurance and Financial Pacific accepted their insured's tender of defense. (UMF 16.)

It is undisputed that Financial Pacific insured Mourier from June 1, 1992 to June 1, 1995, and again from October 1, 1996 to October 1, 2001. (MF 21.) Assurance insured Mourier from June 1, 1995 to June 1, 1996. (UMF 18.)

Assurance contends that as Financial Pacific insured Mourier for eight years, while Assurance only insured it for one year, Financial Pacific had a much greater share of the risk than Assurance.

All three underlying actions involve construction defects to single family homes, which were built and sold at various times, before, during and after, Assurance's coverage period.

In the "Anderson" case, the close of escrow (COE) on sales occurred between 1994 and 2001. In the "Alvi" case, the COE occurred between 1996 and 1998. In the "Allmendinger" case, the COE occurred between 1993 and 1997. (UMF 11-13.)

If the home was built after the expiration of the Assurance policy period, June 1, 1996, the damage could not have occurred during the policy period.

Assurance does not request that the Court determine the applicability of the property damage exclusion, or whether the property damage occurred before, during or after Assurance's policy period. Nor is the Court requested to determine the number of homes that would not be covered by Assurance's policy. (Memo Points & Authorities,

9:14-10:3.) The motions address only the appropriate measure of allocation of defense attorneys' fees and costs (damages) to be imposed as between the two insurers.

However, Code of Civil Procedure section 437c(f)(1) provides that : "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." The claim for damages which may be summarily adjudicated, is limited to punitive damages, as set forth in Section 3294 of the Civil Code.

Here, as both parties have acknowledged their duty to defend and indemnify their mutual insured, and the motions address only the appropriate measure of damages (not punitive damages) which fails to dispose of any cause of action or affirmative defense. The motion is therefore denied as inappropriate for summary adjudication.

The prevailing party plaintiff is directed to prepare an order for the Court's signature pursuant to C.C.P. section 437c(g) and C.R.C., Rule 391.

0677203

Item 6 **05AS01861 GERARD ROBERT VS. SANDIE JOHNSON, ETAL**
Nature of Proceeding: Motion To Withdraw Atty of Rec (Joseph Tena)
Filed By: Pongratz, Stephen G.

Motion to Withdraw as Attorney of Record for Joseph Tena is unopposed but is denied without prejudice. The declaration is contradictory since it states counsel has confirmed the address within the last 30 days but also states he has been unable to confirm the current address. If the client cannot be located after a diligent search, the court clerk must be served pursuant to CCP 1005(b) and CRC 202.5.

In addition, counsel must serve the proposed order with the motion. CRC 376(e). The Declaration and Order must state the trial date since the declaration submitted with this motion states that the trial setting conference took place on May 15, 2006. Counsel must also include the notice of the tentative ruling system in the notice of motion. Local Rule 3.04(B).

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 7 **05AS01861 GERARD ROBERT VS. SANDIE JOHNSON, ETAL**
Nature of Proceeding: Motion To Withdraw Atty of Rec (Sandie Johnson)
Filed By: Pongratz, Stephen G.

Motion to Withdraw as Attorney of Record for Sandie Johnson is unopposed but is denied without prejudice. Counsel's declaration is contradictory since it states he

has confirmed the address within the last 30 days but also states he has been unable to confirm the current address. If the client cannot be located after a diligent search, the court clerk must be served pursuant to CCP 1011(b) and CRC 202.5 (and the proof of service should so state).

In addition, counsel must serve the proposed order with the motion. CRC 376(e). The Declaration and Order must set forth the trial date since the declaration submitted with this motion states that the trial setting conference took place on May 15, 2006. Counsel must also include the notice of the tentative ruling system in the notice of motion. Local Rule 3.04(B).

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 8 **05AS04239 BETTYE J. HICKERSON VS. BILL COLEMAN ET AL**

Nature of Proceeding: Motion to Set Aside Dismissal

Filed By: Esquina, Leonard

Plaintiff's Motion to Set Aside Dismissal entered May 11, 2006 is granted. However, the court grants the alternative monetary sanction in the amount of \$2,160 (\$200 hourly rate for 10 hours, \$160 filing fee) to compensate defendant for the cost of the May 11 motion and opposing this motion. The monetary sanction, payable by plaintiff and her counsel jointly and severally, must be paid on or before July 14, 2006, and if not paid by then, defendant may submit a formal order for the sanctions and enforce it as a separate judgment.

On May 11, 2006 the defendant brought a motion for terminating sanctions or alternatively issue, evidence and monetary sanctions, based on plaintiff's failure to obey a court order requiring responses to form interrogatories on or before March 27, 2006. On May 11, 2006 plaintiff also brought a motion to compel responses to Special Interrogatories and Requests for Production.

On May 8 plaintiff filed a non-opposition only to the motion to compel, in which she stated that responses to the special interrogatories and the requests for production had been served, and that "On May 5, 2006, all requested discovery responses were mailed to defense counsel" (Declaration of Esquina). The Declaration did not state that responses to the form interrogatories, which were the subject of the court order, had also been served on May 5. (However, it appears that a proof of service of the form interrogatory responses was attached to the Declaration filed May 8, 2006.) Thus, at the time the tentative ruling was prepared the Court was not aware that the plaintiff had complied with the court order. Moreover, the Court was not given any explanation in the declaration as to why the court order was not complied with in a timely manner. The Court had no evidence in the opposition upon which to base any finding that the failure to comply with discovery or the court order was not willfull. Since there was no opposition to the motion for terminating sanctions, and no clear explanation in the attorneys declaration that the court-ordered discovery had been provided before the hearing, the Court granted the motion for terminating sanctions.

The failure of plaintiff's attorney to file an opposition to the motion for terminating sanctions was not excusable neglect. He has still failed to explain why the court order

was not obeyed in a timely manner and thus has not established that the failure to obey was not willfull. At oral argument on the 11th he indicated that he was trying to save money by filing an opposition to only one motion, which indicates that a conscious decision was made not to oppose and the failure to oppose was not the result of any neglect. .

However, now that the Court is fully aware the responses to the discovery in dispute were received by defendant on May 8, the Court determines that the terminating sanction granted May 11 is overly harsh, even if the failure to timely obey the court order was willfull and even if plaintiff has not met the "excusable neglect" or "mandatory relief" provisions of CCP 473.

The Court exercises its inherent power to reconsider its prior ruling and reconsiders on its own motion the imposition of the terminating samction. *Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304; *Darling, Hall & Rae v Kritt* (1999) 75 Cal.App.4th 1148.

A discovery sanction cannot put a party in a better position than it would be if it received the discovery. Here, the defendant had already received the discovery responses at the time the terminating sanction was imposed. The terminating sanction is therefore overly punitive for the discovery abuse, and is therefore being vacated and the above monetary sanctions are being imposed instead. See *Puritan Insurance v Superior Court* (1985) 171 Cal.App.3d 877.

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 9 **05AS04385 LEWIS, MILLER & COMPANY, INC. VS. DANA BERRY ET AL**

Nature of Proceeding: Motion For Attorney's Fees

Filed By: Stolman, Marc D.

Plaintiff's Motion for Attorneys' Fees is unopposed and is granted in the requested amount of \$2,500 based on 10 hours of attorney time.

The proposed order sets the attorneys fees at only \$1,750. Plaintiff may submit an amended proposed order pursuant to CRC 391 containing the correct amount of fees.

Since Plaintiff failed to comply with Local Rule 3.04(B) by not including notice of the tentative ruling system in the notice of motion, counsel shall be available in person or by court call at the time of the hearing in the event the defendants appear for oral argument without having requested an appearance.

The minute order is effective immediately . No formal order is required except plaintiff is ordered to send a copy of the minute order to defendant.

Item 10 **05AS05173 BRIAN WERTZER ET AL VS. HENRY WILLMS ET AL**

Nature of Proceeding: Demurrer

Filed By: Stoker, Steven R.

Defendants' demurrer and motion to strike re the 1st amended complaint is ruled on as follows:

Plaintiffs allege that in 1999 they purchased a home in Rancho Murieta from defendants and that within the last three years the tile in the lower level of the residence began to crack. Defendants demurred to the original complaint and plaintiffs conceded there was no contract claim because it was barred by the statute of limitations. The court sustained the demurrer to the contract claim without leave to amend. The demurrer to the fraud cause of action was sustained with leave to amend.

Plaintiffs' first amended complaint now alleges that at the time of the purchase defendants knew the home had been exposed to the elements. Plaintiffs also allege that they discovered in April of 2004 that the defective tile was due to a poor subfloor, and that in April of 2004 defendants wrote them a letter stating they would fix the tile. Plaintiffs allege that defendant's brother installed the subfloor and that defendant's knew that the subfloor was defective but concealed this fact from plaintiff.

Plaintiffs 1st amended complaint now alleges four causes of action. The causes of action are not labeled, in violation of CRC 312(g). Plaintiffs now allege a 1st cause of action for Breach of Contract, 2nd cause of action for Breach of Promise, 3rd cause of action for Negligence, and 4th cause of action for Fraud.

The motion to strike the 1st, 2nd and 3rd causes of action is granted, without leave to amend. These causes of action are improper and go beyond the scope of the court's ruling allowing amendment of only the Fraud cause of action. *Weil & Brown, Civil Procedure Before Trial*, section 6:635.5; *People v Clausen* (1967) 248 Cal.App.2d 770, 785. This ruling is without prejudice to plaintiffs bringing a properly noticed motion to amend. The demurrer to these claims is dropped as moot.

The demurrer to the 4th cause of action Fraud is overruled. The only ground for demurrer is uncertainty. Plaintiffs have alternatively pleaded that the nondisclosure was negligent or intentional. This is permissible alternative pleading and does not render the claim uncertain. The cases relied on by defendant are not on point and do not stand for the proposition that a plaintiff cannot alternatively plead that conduct was intentional or negligent. In any event, the 3rd cause of action was stricken and the only claim remaining is for intentional misrepresentation.

Answer to remaining cause of action for Fraud (intentional misrepresentation) to be filed and served on or before June 23, 2006.

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 11 **05AS05173 BRIAN WERTZER ET AL VS. HENRY WILLMS ET AL**

Nature of Proceeding: Motion To Strike

Filed By: Stoker, Steven R.

See ruling in Item 10.

Item 12 **05AS05531** **PATELCO CREDIT UNION VS. EUGENE Y. TAYLOR ET AL**

Nature of Proceeding: Writ of Possession Hearing

Filed By: Caudill, Thomas

Application for Writ of Possession is denied.

On July 21, 2004 Auburn Imports assigned a motor vehicle installment sale contract to Plaintiff Patelco. Plaintiff is record lienholder of the vehicle. The contract with the first buyer grants Patelco a security interest in the vehicle. The first purchaser of the BMW was Chikonka Silumbe, who bought the car on July 21, 2004 for \$42,465. Silumbe did not make payments and Patelco seeks possession of the car.

Silumbe apparently left the car on the lot to be resold again. (Intervenor believes Silumbe may have been an employee of Auburn Imports involved in the fraudulent scheme) On August 20, 2004 Auburn Imports, unbeknownst to Patelco, sold the same car to the Taylors (defendants) for \$50,182 (the contract actually reflects that Auburn Imports accepted a cashiers check for \$53,588.53, and a trade-in BMW worth \$17,900, bringing the price they paid closer to more than \$60,000.) On the record before the court, defendants are bona fide purchasers. They had no notice that Patelco was the lienholder or that Silumbe was the registered owner since the DMV did not *issue* the Certificate of Title until September 24, 2004, after the Taylors bought the car. The Taylors obtained a loan for the car from intervenor Kaiperm and are still making payments on the car. Kaiperm cannot obtain title to the car and Defendants are unable to register the car in their name because the lienholder is Patelco.

The writ of possession is denied since the complaint does not state a cause of action for claim and delivery against the defendants and plaintiff's have not established their legal right to possess the car. The contract attached to the Declaration of Bell gives Patelco the right to repossess the vehicle from Silumbe, not from the Taylors. The court cannot determine at this time whether the "Full Title Doctrine" applies, but even if it does not, the plaintiff has not established a statutory right to repossess the car from defendants.

It appears that both plaintiff and defendants were defrauded by Auburn Imports, who fraudulently sold the first contract to Patelco and then, before the DMV issued the certificate of title, again sold it to the Taylors. Not suprisingly, Auburn Imports is no longer in business.

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 13 **06AS00519** **KARA REILLY, ET AL VS. CA ST AUTO ASSN INTER-INS BUREAU**

Nature of Proceeding: Demurrer

Filed By: Rhodes, Elizabeth D.

Defendant's Demurrer and Motion to Strike are sustained/granted with leave to amend. Plaintiff has requested leave to amend and has submitted a proposed 1st amended complaint. The court does not address the adequacy of the 1st amended complaint. The 1st amended complaint shall be filed and served on or before June 20, 2006.

Defendant shall respond to the 1st amended complaint within 10 days of service (15 days if served by mail.)

The minute order is effective immediately. No formal order pursuant to CRC Rule 391 or further notice is required.

Item 14 **06AS00519 KARA REILLY, ET AL VS. CA ST AUTO ASSN INTER-INS BUREAU**

Nature of Proceeding: Motion To Strike

Filed By: Rhodes, Elizabeth D.

See ruling in Item 13.

Item 15 **06AS00803 RAMON GONZALES, ET AL VS. NLCS ESCROW SERVICES, INC., ET AL**

Nature of Proceeding: Demurrer

Filed By: Wright, Robin P.

This matter is dropped from calendar.

Item 16 **05AM00247 TERISA E YONEMURA VS. DANIEL J. FRANKLIN, SR., ET AL.**

Nature of Proceeding: Motion To Withdraw Atty of Rec

Filed By: Beede, Stephen J.

Motion to Withdraw as Attorney of Record for plaintiff is unopposed and is granted. The court will sign the proposed formal order.

Item 17 **05AM02161 RONALD JIMINEZ VS. JILL NMI OSTROWSKI, ET AL.**

Nature of Proceeding: Motion To Compel to Form Interrogatories/Special Interrogatories/Produc

Filed By: Kruse, Robert G.

This matter is dropped from calendar.

Item 18 **05AM03443 CHAY M. VANG, ET AL VS. BRUCE TILLOTSON**

Nature of Proceeding: Motion to Set Aside Default

Filed By: Bell, Tina Ann

This matter is dropped from calendar.

Item 19 **05AM09035 FIRST NATIONAL BANK OF OMAHA VS. TERRI DOSS**

Nature of Proceeding: Motion to Amend Judgement

Filed By: Dunning, Donald T.

Judgment Creditor's Motion to Amend Judgment to include an AKA of judgment debtor is unopposed and is granted.

The court will sign the proposed formal order.

Since judgment creditor failed to comply with Local Rule 3.04(B) by not including

notice of the tentative ruling system in the notice of motion, counsel shall be available in person or by court call at the time of the hearing in the event the defendants appear for oral argument without having requested an appearance.

Item 20 **06CS00641** **IN RE: KHAMPHANH PACKDY**

Nature of Proceeding: Petition For Change Of Name

Filed By:

Petition for name change is granted.

Item 21 **06CS00643** **IN RE: SUSAN PATRICIA SLAVICH**

Nature of Proceeding: Petition For Change Of Name

Filed By:

Petition for Name Change is granted on condition proof of publication is filed in Department 53 before the time set for hearing.

Item 22 **05ED12799** **STATE OF CALIFORNIA, ET AL VS. SHAKINA T. CAMPBELL**

Nature of Proceeding: Notice of Hearing on Claim of Exemption

Filed By: Flanary-Crabb, R.

Claim of exemption is denied to the extent the judgment creditor is entitled to \$105 per pay period, up to \$210 per month. Any amounts retained in excess thereof are to be returned to the judgment debtor.

There is no exemption for the necessities of life if the underlying judgment is for the necessities of life. CCP 706.051(c)(1). However, judgment creditor has agreed to accept less than the maximum garnishable amount.

Item 23 **05ED14947** **STATE OF CALIFORNIA, ET AL VS. MARCO A. HERNANDEZ**

Nature of Proceeding: Notice of Hearing on Claim of Exemption

Filed By: McLaughlin, L.

Claim of exemption is denied to the extent judgment creditor is entitled to \$75 per week, up to \$300 per month. Any amounts retained in excess thereof are to be returned to the judgment debtor.

There is no exemption for the necessities of life if the underlying judgment is for the necessities of life. CCP 706.051(c)(1). However, judgment creditor has agreed to accept less than the maximum garnishable amount.