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HOW TO PROTECT YOUR CLIENTS' CASH AND ASSETS UNDER NEW MASSACHUSETTS PERSONAL PROPERTY EXEMPTIONS

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On April 7, 2011, new Massachusetts laws which expand personal property exemption go into effect.¹ The new laws redefine the money and personal property a creditor cannot reach to satisfy a debt. People in financial distress will benefit from the changes as the new laws protect their assets more effectively than existing law. But they leave open questions about how the laws will work in practice.

To ensure they receive the full benefit of the new laws, consumers and their lawyers must assert their rights to the new exemptions to the court in supplementary process proceedings, to creditors, to a sheriff or constable who seeks to seize personal property, to employers if their wages are garnished and to banks in the event of trustee process.

The most significant new personal property exemptions are as follows:

- A car necessary for the debtor's personal transportation or to secure or maintain employment up to \$7,500 in value (\$15,000 in value for elderly or disabled; use wholesale resale value)
- Wages equal to 85% of the debtor's **gross** wages or 50 times the hourly minimum wage per week, whichever is greater
- A stove, refrigerator, hot water heater and \$500 per month for heat, water, electricity
- Household furniture up to \$15,000 in value
- Tools used for business up to \$5,000 in value
- A computer and a TV (no dollar limitation on either one)
- Up to \$2500 per month for rent for a family that rents and occupies the home
- Cash of \$2,500 plus certain wages plus money paid as public assistance

¹ The new laws amend:

- MGL Ch. 235 sec. 34 (property exempt from seizure on execution);
- MGL Ch. 224 sec. 16 (dismissal of actions against debtors who are handicapped, age 60 or older and who have no nonexempt property or income);
- MGL Ch. 246 sec. 28 (wage garnishment);
- MGL Ch. 246 sec. 28A (money in a debtor's bank account).

<http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter431>

- The “wild card” exemption in MGL Ch. 235 sec. 34 (17) of \$1,000 - \$6,000 based on certain unused exemptions.²

Special protections for people age 60 or older and for people who are handicapped have been added in supplementary proceedings and in the value of property exempted. A handicapped person is one who has a physical or mental impairment that “substantially limits one or more major life activities” or a person who receives federal or state disability benefits.³ The courts will have to address disputes on when one or more of a debtor’s “major life activities” are impaired.

What is “exempt property”?

“Exempt property” is cash or assets that are beyond the reach of creditors.⁴

The purpose of exemption laws is to allow the person who owes debts to keep the basic necessities of life, such as clothing, food, certain cash and often a car, in order to remain a productive member of society. Exempt property is unreachable regardless of whether the debt is valid and owed. It is unreachable even if the creditor holds a valid state court judgment and execution.

Exempt property is defined by both federal and state laws. Federal laws exempt, for example:

- Social Security income (42 USC sec. 401);
- Supplementary Security Income (SSI) for aged, blind and disabled people (42 USC sec. 1383(d));
- Certain benefits paid to veterans (15 USC sections 1671-1677); and
- 75% of weekly disposable wages (15 USC sections 1671-1677).⁵

In addition, numerous Massachusetts exemption laws protect a debtor’s income. Examples include:

² For the complete list, see MGL Ch. 235 sec. 34 as amended.

³ MGL Ch. 224 sec. 16

⁴ We address only money and personal property exemptions under the new Massachusetts laws here. We do not discuss real property, such as the debtor’s home which may be partially or entirely exempt under the Massachusetts homestead exemption. The new homestead law is effective March 16, 2011. Nor do we address the rights of parties to a security agreement under Article 9 of the Uniform Commercial Code. Thus, for example, if a debtor buys a car and finances the purchase with a lender who takes a security interest in the car, the parties’ rights are governed by the security agreement and Article 9. If the debtor defaults, the lender can repossess its collateral in order to satisfy its indebtedness.

⁵ This list is not exhaustive. Other federal laws give certain debtors other exemptions. But the federal statutes listed are commonly-used exemptions. Moreover, some exemptions apply to most but not all creditors. For example, taxing authorities have special status as creditors in federal wage garnishment.

- Income from public assistance (MGL Ch. 235 sec. 34);
- Unemployment benefits (MGL Ch. 151A sec. 36);
- Workers compensation benefits (MGL Ch. 152 sec. 47); and
- Payments to families with dependent children (MGL Ch. 118 sec. 10)⁶.

Practice note: Nothing in the law prevents a person who owes money from *knowingly and voluntarily* paying over exempt income or turning over exempt personal property to a creditor. But agreeing to do so is often against that person's best interests. A debtor should almost never agree that a creditor can place a lien on exempt property.⁷

Here are some examples of how the new laws can work:

Example 1: how to protect the debtor's car from seizure

Maria owns a 2005 Nissan Altima, which has a wholesale resale value of \$7000. Assume she is younger than age 60 and not handicapped. Bank has a judgment against Maria; it holds an execution and wants to seize and sell her car to satisfy part or all of its debt.

Can a constable, acting on Bank's behalf, seize Maria's car to satisfy the debt?⁸ Is she entitled to a hearing prior to seizure? Prior to sale of the car?

Answer: Maria's car is entirely exempt, leaving the question of how the exemption is honored.⁹ The law is silent on whether the creditor or constable must give notice to Maria prior to seizure. She is entitled to notice prior to sale. MGL Ch. 235 sections 37, 38.

Maria should assert her right to the exemption. She must show that the value of her car (\$7000) is less than her \$7500 exemption. The law does not clearly prohibit seizure unless Maria asserts her exemption right to the creditor and constable.¹⁰

To determine the value of the debtor's car, the law looks to "wholesale resale value". MGL Ch. 235 sec. 34 (par. 16). Wholesale value is lower than retail value. It often means the price an auto dealer

⁶ This list of Massachusetts exempt income is also not exhaustive. It does not include all Massachusetts exemption laws. And exemption rules may not apply to all creditors. For example child and spousal support obligations often have special status.

⁷ Doing so would deprive the debtor of the exemption the law provides. In addition, if the debtor were to file a bankruptcy case later, the lien could not be "stripped off" under 11 U.S.C. sec. 522(f).

⁸ For sake of brevity, I use "constable" to include sheriffs and constables.

⁹ If the creditor brings supplementary process proceedings, Maria should assert her right to exemption and provide evidence of the value of the car in that proceeding.

¹⁰ As a matter of "best practices", the creditor or constable is well-advised to give notice prior to seizing an asset which may be entirely exempt. Doing so will avoid liability issues later. But some creditors and their agents do not give notice prior to levying on property. See generally 48 Mass.Practice Collection Law sec. 9:18 and 9:71 (Third Ed.) J. Shapiro, M. Perlin, J. Connors. Constitutional due process problems arise if a debtor is not afforded notice and an opportunity to be heard on the existence and scope of the exemption. Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985), invalidating a Rhode Island statute for failure to provide debtor with notice of exemption and procedure for claiming the exemption.

would pay a consumer on trade-in. See <http://www.consumerreports.org/cro/cars/car-buying-advice/guide-to-used-car-buying/pricing/how-much-is-the-car-worth/index.htm>

The NADA and Kelley Blue Book values for a 2005 Nissan are \$6500 and \$6900 respectively, according to an internet search. They are only “ballpark” figures. They are subject to adjustment up or down depending on the mileage and condition of the car. Maria’s lawyer can argue that the Bank and constable are on notice that Maria’s car is entirely exempt because the value of the Nissan is less than her \$7500 exemption. Bank would receive nothing on seizure and sale. If the constable levies on a car he knows or should know is worth less than the exempt amount, the debtor’s lawyer may argue that the constable (and possibly the Bank) are liable in tort for wrongful seizure of exempt property.

Example 2: how to protect the debtor’s car from seizure where the car is subject to a valid security interest

Jenny owns a 2009 Subaru Forester with a wholesale value of \$19,000. Jenny financed the purchase and now owes \$14,000 to Finance Company, which has a perfected security interest in the car. X holds a judgment and execution against Jenny for an unsecured loan. Can X levy on Jenny’s Subaru?

Answer: Probably yes. Jenny should assert her exemption and demonstrate to X that seizure and sale would be futile. If X seizes and sells Jenny’s Subaru, it is first obligated to pay Finance Company’s secured debt of \$14,000 out of the \$19,000 sale proceeds. It must then pay Jenny the entire balance of \$5,000 (\$19,000 minus \$14,000) because it is less than her \$7500 exemption. X gets nothing.

See Jessamey v. Norfolk Financial Corp., 2006 Mass.App.Div. 82 (Car valued at \$6,000 was subject to seizure even though it was subject to purchase money lien of \$12,500).

Practice note: Does the debtor bear the burden of demonstrating that Finance Company’s secured debt is \$14,000? The burden probably falls on the debtor since she knows what the unpaid balance is. The creditor and constable do not. A lien search will reveal the existence of the lien but not the current balance due. And often, secured creditors are unwilling to disclose to third parties what the balance due is, absent prior consent of the debtor.

The statute does not expressly prohibit the seizure of the car in this situation. Jenny or her counsel should provide evidence of the amount of secured debt and evidence of the value of the car to the court and to the creditor and constable prior to the seizure.

Example 3: how to protect the car of a person who is handicapped or older than 60

Assume the same facts as in Example 1 except that Maria is 65 years old. The result is the same as above, except that Maria enjoys a \$15,000 exemption in the car. Moreover, the supplementary process action in state court must be dismissed without prejudice because she has no property or income that is “not exempt from being taken on execution”. MGL Ch.224 sec. 16 as amended.

Practice note: Who bears the burden of demonstrating that Maria is older than 60 or handicapped and therefore entitled to a \$15,000 exemption? Maria should assert her rights in supplementary process proceedings. Does the constable have a duty to ask Maria how old she is?

Consider, too, how difficult it may be in certain circumstances to demonstrate that a debtor is disabled, especially when the debtor does not receive federal or state disability benefits.

Example 4: how to protect the debtor's wages

Creditor sues John, gets a judgment for \$3000 and seeks to seize John's wages. John's gross weekly pay is \$500. Assume his net pay (after federal and state taxes and FICA) is \$400. How much money must John's employer freeze for the benefit of the creditor?

Answer: Probably none. The analysis is more complex than may first appear because several statutes are involved:

- Massachusetts hourly minimum wage is currently \$8.00. Since the Massachusetts hourly minimum wage is greater than the federal hourly minimum wage (\$7.25), we use the Massachusetts hourly wage in the calculation. 50 times \$8.00 = \$400 is exempt.
- Under the federal wage exemption law, 15 USC sec. 1671-1677, 75% of the debtor's "weekly disposable income" (gross wages minus federal and state income taxes and FICA) is exempt. In this example, John's weekly disposable income is \$400. 75% of \$400 = \$300, thus \$300 is exempt under this statute.
- 85% of John's gross wages (MGL 246 sec. 28) is \$425. (85% X \$500 = \$425)

Answer: John's weekly wages up to \$425 are exempt, since that amount is greater than 50 times the Massachusetts minimum wage (\$400) and greater than the amount under the federal wage exemption law (\$300). Since John's net pay (\$400) is less than \$425, his net pay is entirely exempt. John's employer should pay him \$400. Creditor gets nothing.

Practice note: Obviously there are no court decisions yet on this section. Some may argue that Bank is entitled to \$75 (15% of John's gross wages) and John is entitled to \$500 minus \$75 minus income taxes and FICA. We reject that reading. The legislature could have said "all but 15% of an employee's wages are exempt". But it chose not to do so. Instead, it said that 85% of a debtor's wages are exempt. We believe our reading is consistent with the clear language of the statute and faithful to the legislature's intent.

Example 5: how to protect money in the debtor's bank account

ABC has a judgment against Nick in the amount of \$3,000. Nick has \$2,000 in his personal savings account at Savings Bank. ABC serves its judgment and trustee summons on Savings Bank. How much of Nick's money must Savings Bank set aside for ABC?

Answer: None. Under the new section 28A of MGL Ch. 246, Savings Bank cannot freeze or set aside any money for the creditor since the balance in Nick's account (\$2000) is less than the exempt amount of \$2500.¹¹

What if Nick's account contains \$4,000?

Answer: Savings Bank should set aside \$1,500 (\$4000 minus \$2,500), unless another federal or state law exempts that balance.

For example, if all deposits in the account are Social Security or SSI benefits, the entire balance is exempt under federal law. A new interim Treasury regulation, which goes in to effect May 1, 2011, addresses this issue. It will protect people, especially the disabled and the elderly, who receive certain exempt federal benefits more effectively.¹²

Example 6: how does the new "wild card" exemption section work?

Paula, who is neither handicapped nor age 60 or older, owns a car worth \$10,000. There are no liens on the car. Paula owns no furniture and thus has an unused exemption of \$15,000 under paragraph 2 of MGL Ch.235 sec. 34. Can Paula use the "wild card" exemption to protect the full \$10,000 value from seizure and sale by a judgment creditor?

Answer: Yes, but she must assert and prove her right to the exemption. MGL Ch. 235 sec. 34, par. 17 as amended (the new "wild card" exemption) exempts the debtor's interest in

"any personal property, not to exceed \$1,000 in value, plus up to \$5,000 of any unused dollar amount of the aggregate exemptions provided under clauses Second, Fifth and Sixteenth".

Paula has a \$7,500 car exemption plus \$5,000 in her unused "wild card" exemption, for a total of \$12,500. Since her car is worth only \$10,000, the full value is protected.

Practice note: Paula will have to assert and prove her exemption with the court, the creditor and the constable since there is no real mechanism for her to show that she is entitled to a "wild card" exemption - nor how much that exemption is worth.

Many questions on burden of proof, valuation, notice, due process, and trustee process of wages and bank accounts will arise under the new exemptions. Lawyers representing debtors will have an opportunity to make new law in this area.

¹¹ MGL Ch.246 sec. 28 as amended. See also MGL Ch.235 sec. 34 par. 15 which provides an exemption for an amount equal to \$2,500 in cash or savings or other deposits *plus* certain wages *plus* the full amount paid as public assistance.

¹² The new interim Treasury regulation protects people who receive Social Security, SSI, veterans and certain other federal benefits that are directly-deposited in their bank accounts. <http://www.regulations.gov/#!documentDetail;D=RRB-2011-0006-0001> The regulation requires banks to treat as exempt all such deposits made within 60 days of service of the trustee summons, regardless of whether the account contains commingled funds. Banks can no longer freeze such funds or pay them over to creditors. Federal benefit checks which are not electronically deposited remain vulnerable, despite the exemption.