CONSUMER AFFAIRS COMMITTEE
EXEMPT INCOME PROTECTION ACT

A.8527 **M. of A. Weinstein**
S.6203 **Senator Volker**

AN ACT that establishes a procedure for claiming exemption of certain income from levy of execution by judgment debtors.

THIS BILL IS APPROVED

The Consumer Affairs Committee of the Association of the Bar of the City of New York is pleased to submit these comments concerning Assembly Bill A.8527 and Senate Bill S.6203, the "Exempt Income Protection Act." Our committee consists of lawyers with a significant interest in consumer issues, including current and former government regulators, private practitioners and members of firms, and representatives from consumer and business organizations.

This legislation would correct an anomaly in the Civil Practice Law and Rules under which New York residents face the restraint of bank accounts containing monies that are statutorily exempt from garnishment under federal and state law.

Under current federal and state law, numerous types of funds such as Social Security, disability payments, pensions, veterans' benefits, worker's compensation and public assistance are exempt from collection by creditors. These funds are now typically paid to recipients by virtue of direct deposit into their bank accounts. For wage earners who deposit their paychecks in a bank account, 90% of recent (within the last 60 days) wages are also exempt from collection, and such deposits are also often made via direct deposit.

Pursuant to CPLR § 5222, an attorney for a judgment creditor may send a restraining notice to a bank where a judgment debtor holds an account. The restraining notice has the effect of immediately freezing the debtor's funds, including those funds which are exempt from restraint. The debtor receives no notice until after his or her account is frozen and is thus placed in the position of having no funds to pay rent and utilities, purchase food and meet everyday living expenses.

Depending on the nature of the exempt funds, these restraining notices may also have the consequence of allowing a creditor in a private dispute to restrain monies from taxpayer-funded programs – surely an unintended and unfounded result. In addition,

recipients of such monies whose accounts are restrained will then fall back on emergency programs, thus increasing the burden on cities, towns, counties and charities.

Under current law, there is also no clear, established or effective procedure for a debtor to assert a claim that a restrained bank account contains exempt funds and to have the restraint removed. Practitioners who represent consumers report that debtors have significant difficulty in having restraints lifted. A debtor can approach the creditor's attorney seeking the voluntary lifting of the restraint. If the creditor's attorney declines, then the debtor's only recourse is to bring an order to show cause seeking a court order to lift the restraint on exempt funds. Even with the aid of a lawyer, a debtor in this situation may find that it takes weeks if not longer to regain access to funds. For the bulk of consumers who do not have the resources to hire a lawyer or the knowledge or wherewithal to pursue the matter on their own, having a restraint lifted may become an impossible task. When consumers are successful in having a restraint of exempt monies removed, they must pay hefty bank fees. The fee in New York is typically $100 or more.

Changes in the nature of the debt collection industry over the past few years have heightened the odds that a judgment debtor with exempt bank funds will find that his or bank account has been restrained by a creditor. By all accounts, filings in the New York City Civil Court in consumer debt matters – chiefly, credit card cases – have exploded in recent years. The bulk of the increase results from filings by companies that have purchased debt obligations from an original credit card issuer or grantor of credit.[1]

The proposed legislation would amend the CPLR to exempt from restraint the first $2500 in a bank account containing exempt funds which have been directly or electronically deposited within the last 45 days. For this amendment to be operationally effective for banking institutions, one might ask, do banks have the ability to readily identify such direct deposit exempt funds? The answer is that banks *do* have this ability. In fact, a number of banks that operate in New York already have adopted a practice of identifying bank accounts containing direct deposit exempt monies and declining to honor restraining notices against those funds. These include national banks such as Chase, Citibank and Banco Popular, and also smaller, local banks such as Astoria Federal and New York Community Bank.

The legislation would also exempt an amount equal to 240 times the minimum wage (thus, under the present minimum wage, $1716), except for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and dependents. This provision is therefore consistent with existing law which protects recent wages from garnishment. Rather than having banks attempt to determine what monies in a bank account are exempt by virtue of constituting 90% of recent wages, the bill takes a common sense approach of deeming a prescribed yet relatively minimal amount of wages as exempt.

The legislation also adopts a simplified, streamlined approach for resolving questions as to whether funds in an account are exempt. Briefly stated, a creditor will be

[1] *See* "The Consumer Credit Crisis in New York City and Its Impact on the Working Poor," Urban Justice Center, October, 2007, available at www.urbanjustice.org.

required, upon serving a bank with a restraining notice, to provide the bank with an exemption claim form which the bank then sends to the debtor. If the debtor desires to claim more than $2500 in direct deposit statutorily exempt funds, or more than $1716 in exempt wages, he or she may do so by returning the claim form and any appropriate supporting documentation. If the creditor then wants to dispute the debtor's claim, it may do so via an expedited court proceeding. The net effect of the amended procedures, however, is that most disputes will end without resort to an already overburdened court system.

Under the new law, banks would also not be allowed to charge a fee to debtors for bank restraints that creditors attempt to place which have no basis in law. This does not seem to be inequitable, particularly since banks, as noted, can easily determine that direct deposit funds are exempt.

The Consumer Affairs Committee supports the adoption of the Exempt Income Protection Act. This bill will remedy the damaging loophole in the CPLR which allows the restraint of monies which under federal and state law are otherwise exempt from garnishment. In so doing, the legislation will alleviate a hardship to those consumers who deposit their exempt funds into banking institutions, yet face the restraint of those monies. The amendments will also serve the purpose of clarifying the rights of both creditors and debtors and of streamlining the process for determining claims when there is a question as to whether funds are exempt.

It bears reiterating that the proposed amendments to the CPLR are entirely consistent with existing law that exempts social security, disability, pension, veterans, and similar payments, and also 90% of recent wages, from garnishment. The amendments correct an imbalance in the existing scheme which unfairly places a burden on debtors to show that their funds are exempt, at the same time that they are being deprived of access to those funds.

Respectfully submitted,

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