

FOR ELDER AND DISABLED CLIENTS: NEW LAWS TO PROTECT THEIR MONEY AND ASSETS

March 18, 2011

**By Robert J. Hobbs, Deputy Director, National Consumer Law Center and
Hon. Carol J. Kenner (U.S. Bankruptcy Court, retired), NCLC**

New laws to protect money and property of the elderly and the disabled go into effect shortly. Here are the highlights:

Special protection under homestead law

As of March 16, 2011, homeowners who are disabled or age 62 or older have three choices in connection with the new homestead law:

1. They can do nothing. If the homeowner already has a valid homestead on record, it remains valid. If the homeowner has not recorded a homestead, the new law provides an “automatic” homestead. It protects up to \$125,000 in equity in the home in which the homeowner resides and uses as a principal residence.
2. They can record a homestead under Section 3 of the new law, which protects up to \$500,000 in equity.
3. They can record a homestead under Section 2 of the new law. A Section 2 homestead is available only to homeowners who are disabled or age 62 or older. It protects the principal residence from “attachment, seizure or execution of judgment.”¹ It provides better protection than a Section 3 homestead. **If possible, all disabled or elderly homeowners should record a new Section 2 homestead, regardless of whether they recorded a homestead under the old statute and regardless of whether they have equity in their home now.**

Recording a new homestead protects people who have refinanced their mortgage in recent years, as many refinancing mortgages contained a waiver of homestead rights. Section 2 homesteads (unlike section 3 homesteads) can be “stacked” such that multiple owners gain increased protection.² Recording a homestead as soon as possible is worthwhile since it will “trump” any later-recorded liens.³

¹ Section 2 of M.G. Ch. 188.

² For example, if two co-tenants each record a valid Section 2 homestead, together they can protect up to \$1,000,000 in equity. If, instead, they record a Section 3 homestead, they could protect only a total of \$500,000 in equity.

³ All homesteads are subject to mortgages. But a homestead under the new law is only subject to non-consensual liens (such as a lien of a debt collector who has obtained a judgment) if such liens are recorded prior to the date the homestead is recorded. A homestead recorded under the old statute was subject to pre-existing debts, regardless of whether the debt was secured by an interest in real estate. This rule did not apply in bankruptcy cases.

A disabled person is defined as one who has a medically-determinable permanent physical or mental impairment which would meet the disability requirements under Supplemental Social Security as of the date of recordation of the homestead. To comply with the recordation requirements for a valid elder or disabled person's homestead, the homeowner must also record a certified copy of the disability award letter or a Massachusetts physician's statement attesting that the homeowner meets the criteria.⁴

Special protection under new personal property exemptions for disabled and people age 60 or older

On April 7, 2011, new personal property exemptions protect people from creditors who hold a judgment and seek to levy on execution.⁵ Special protections are created for those who are disabled or age 60 or older. They can protect up to \$15,000 in value of a car they use for personal transportation or to find or get to work.⁶ A disabled person is one who "(i) has a physical or mental impairment which substantially limits one or more major life activities; or (ii) is regarded as having such impairment as evidenced by the receipt of state or federal disability benefits." G.L. Ch. 224 sec.16.⁷

The new statute does not set forth a procedure by which the elder or disabled people can assert the enhanced exemption.⁸ Advocates must inform the court, the judgment creditor and the constable or sheriff who seeks to seize personal property that the debtor enjoys the protection \$15,000 exemption. They must also assert their client's right to dismissal of the supplementary process action if the client has no property or income that is "not exempt from being taken on execution." MGL Ch. 224 sec. 16 as amended.

Interim Treasury regulation protects recipients of Social Security, SSI and other federal benefits

On May 1, 2011, a new interim Treasury regulation will protect people who receive Social Security, SSI, veterans and certain other federal benefits. It requires banks to treat as exempt all such deposits made within 60 days of service of the trustee summons, regardless of whether the bank

⁴ See Section 5 of Ch. 188 for specific requirements.

⁵ See <http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter431> On this topic generally, see our recent article on MLRI website. Property that is exempt is beyond the reach of most creditors, even those holding valid judgments. Some debts, such as those for taxes or child support, have enhanced status however.

⁶ See Massachusetts G.L. Ch. 235 sec. 34 (property exempt from seizure on execution) and Ch. 224 sec. 16 (dismissal of actions against people who are handicapped, age 60 or older and who have no nonexempt personal property or income).

⁷ If the client has not been declared eligible for state or federal benefits, the advocate is faced with a challenging evidentiary problem: how does one prove the client is disabled because he or she is limited in one of more major life activities? What is a major life activity? The Massachusetts legislature appears to have chosen to define a disability very broadly.

⁸ A judgment creditor can chose to seek supplementary process or an execution. In the supplementary process proceeding, the debtor will have an opportunity to explain the basis for his or her exemption. But if the judgment creditor obtains an execution and instructs a constable or sheriff to levy on the debtor's personal property, there is often no proceeding in which assert the objection. Thus, whenever a client receives notice of a default judgment, he or she should immediately notify a lawyer and assert the right to the exemption.

account contains commingled funds. <http://www.regulations.gov/#!documentDetail;D=RRB-2011-0006-0001>

Banks can no longer freeze such funds or pay them over to creditors. Funds which are not electronically deposited may be vulnerable, despite the exemption. And money moved to a bank account other than the one in which funds are electronically deposited may also be vulnerable. Advocates may want to advise their clients to have their federal benefit checks deposited electronically and, if possible, to refrain from moving that money to another account.