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**PROCESSING RESTRAINING NOTICES AND LEVIES:
AN UPDATE ON THE 2008 AMENDMENTS**

I. INTRODUCTION

- A. The Exempt Income Protection Act was signed into law on September 25, 2008 and takes effect on January 1, 2009.
- B. The Act amends New York's Civil Practice Law and Rules (CPLR) with respect to the restraint and seizure of exempt funds (such as social security) in bank accounts.
- C. Under current law, a bank served with a restraining notice or levy is under no obligation to determine whether any funds in the customer's account are exempt from the reach of creditors. Some banks have voluntarily reviewed accounts and not imposed a restraint if it is clear the account only contains social security funds. Other banks have complied with all restraining notices and levies even if it appeared that the account only held exempt funds.
- D. The amendments impose significant new requirements on the way banks handle restraining notices and levies, including the following:
 - Banks are prohibited from restraining (or paying out on a levy) \$2,500 in an account that has received direct deposit or electronic payments of exempt funds (such as social security) within the prior 45-day period; this amount will change every three years;
 - Banks are prohibited from restraining (or paying out on a levy) \$1,716 in an account, as such amount is deemed to represent exempt wages; this amount will increase as the minimum wage increases;
 - Banks are prohibited from charging a fee to a depositor who is the subject of a restraining notice or levy if the restraining notice or levy is not effective against the account; and
 - Banks must provide a notice and two copies of an exemption claim form (along with a copy of the restraining notice or levy) to a depositor who is the subject of a restraint or levy, and to follow specific procedures if a customer claims that funds are exempt.

II. PROTECTION OF \$2,500 IN ACCOUNTS RECEIVING EXEMPT FUNDS ELECTRONICALLY OR BY DIRECT DEPOSIT

- A. A bank cannot restrain or pay out on a levy \$2,500 in an account if the account has received the direct deposit or electronic payment of amounts “reasonably identifiable as statutorily exempt” funds during the 45-day period preceding the service of the restraining notice or levy.
- B. If the account has more than \$2,500, the amount over \$2,500 is subject to restraint/levy. If the account has \$2,500 or less, the restraint/levy is deemed void and the bank is not required to hold and monitor the account for one year.
- C. What do to: When served with a restraining notice or levy, a bank should check the account to see if there was a direct deposit or electronic payment of statutorily exempt funds within the preceding 45 days of receipt of the restraining notice/levy; if there was such a deposit, and the account has more than \$2,500, only hold the amount over \$2,500; if \$2,500 or less is in the account, do not hold anything and consider the restraint/levy to be void.
- D. If the restraining notice is deemed void, then any further deposits into the account are not subject to the restraint and no fee may be imposed (see Section IV below).
- E. If the customer has more than one account that has received the direct deposit or electronic payment of amounts “reasonably identifiable as statutorily exempt” funds during the 45-day period preceding the service of the restraining notice or levy, then each such account gets the \$2,500 protection.
- F. Statutorily exempt funds include any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law, such as social security benefits, SSI, child support payments processed and received through the Social Security Act, VA benefits, public assistance, workers’ compensation payments, unemployment insurance, public or private pensions, railroad retirement funds and black lung benefits.
- G. The amendments do not provide any guidance on when funds are deemed “reasonably identifiable as statutorily exempt.” A rule of reason should apply. If the source of the funds indicates that the funds are exempt (such as a social security code), a bank will likely be deemed on notice. However, if there is no such code or other indication that the funds are exempt, a bank should not have to do extensive research to determine if an exemption applies.
- H. The \$2,500 exemption amount is scheduled to change on April 1, 2012 (and every three years thereafter) based on changes in the consumer price index. The new amount will be published every three years by the New York State Banking Department.

III. PROTECTION OF WAGES

- A. A bank cannot restrain or pay out on a levy a certain amount that is deemed to be protected wages. The law sets forth a formula for calculating the exempt wage amount based on the minimum wage under both state and federal law, but for convenience purposes the law sets forth a specific amount that banks can rely on: \$1,716 (up until July 23, 2009).
- B. This is an automatic exemption; a bank does not have to identify the source of the funds or check to see if it was received by direct deposit or electronic payment.
- C. The exempt amount will change when the minimum wage changes. The next scheduled change is July 24, 2009 when the exempt amount goes to \$1,740.
- D. If the customer has more than \$1,716, the amount over \$1,716 is subject to restraint/levy. If the customer has \$1,716 or less, the restraint/levy is deemed void. If the restraint is deemed void, any further deposits into the bank are not subject to the restraint and no fee may be imposed (see Section IV below).
- E. If the account has received the direct deposit or electronic payment of amounts “reasonably identifiable as statutorily exempt” funds during the 45-day period preceding the service of the restraining notice or levy, then the bank should follow the rules for the \$2,500 exemption discussed in Section II above. There is no “double” exemption for the \$2,500 and the \$1,716.
- F. A customer is only entitled to the protection of a total of \$1,716 even if the customer has multiple accounts. Accordingly, if the customer has two accounts with each account containing a balance of \$2,000, the total protection under the wage provision is \$1,716 (not \$1,716 for each account).

IV. PROHIBITION ON FEES

- A. A bank cannot charge a fee to a customer if a restraining notice or levy is served on the bank and the bank cannot legally restrain the account or pay on the levy. This overrides any provision in the bank’s account agreement or fee schedule that may reserve the right to impose such a fee. (Federally chartered banks and thrifts may not be subject to this prohibition under preemption principles.)
- B. For instance, if a bank receives a restraining notice against an account that received direct deposit of social security in the prior 45-day period and has a balance of \$2,500 or less, the account cannot be restrained, and the bank will not be allowed to charge the customer a legal process fee. If the account had more than \$2,500 on deposit, the bank will be allowed to charge a fee because the restraint will apply to the amount over \$2,500.

V. NO MORE THAN TWO RESTRAINING NOTICES A YEAR

- A. The new law prohibits a creditor from serving more than two restraining notices per year on a natural person's bank account.
- B. This could come into play if the judgment creditor serves a restraining notice on the bank, but the restraining notice is deemed void because the account does not have more than the protected amount (\$1,716 or \$2,500), and the creditor sends subsequent restraining notices in the hope the debtor has added more funds to the account.
- C. Under existing law, a judgment creditor cannot serve more than one restraining notice upon the same person with respect to the same judgment or order without obtaining a court's permission.

VI. BANKS MUST PROVIDE NOTICE OF EXEMPTION AND CLAIM FORM

- A. The amendments impose new obligations on banks to provide notices to their customers (natural persons only) who are the subject of a restraint or levy, and then to follow specific procedures and time frames that vary based on whether a customer claims an exemption.
- B. Judgment creditors serving a restraining notice or levy on a bank with respect to a natural person are required to serve the bank with two copies of the restraining notice or levy (as applicable), an exemption notice, and two exemption claim forms. Within **2 business days** of receipt of the restraining notice or levy, the bank must then serve the judgment debtor with a copy of the restraining notice or levy, the exemption notice and the two exemption claim forms. The required papers must be sent by first class mail to the judgment debtor's last known address.
- C. If the judgment creditor does not provide the bank with the exemption notice and exemption claim forms along with the restraining notice or levy, the restraining notice or levy is void and the bank cannot restrain the account or pay out on the levy.
- D. The judgment debtor is allowed **20 days** to complete and return the exemption claim forms to the bank and judgment creditor. If the bank receives an exemption claim form from a judgment debtor, it must notify the judgment creditor "forthwith" of the date on which the funds will be released. The bank is required to release all funds in the judgment debtor's account **8 days** after the date postmarked on the envelope containing the executed exemption claim form mailed to the bank or the date of personal delivery, unless the judgment creditor submits an objection within that time frame.

- E. In order to object to the judgment debtor's claim of exemption, the judgment creditor is required to serve motion papers on the bank and judgment debtor within **8 days** of the date on the postmarked envelope containing the exemption forms. Upon receipt of an objection from the judgment creditor, the bank is required to retain the funds claimed to be exempted for **21 days** unless otherwise ordered by the court. Upon completion of the hearing on the motion, the court will issue a decision within **5 business days**, and the judgment creditor must serve the court's order on the bank and judgment debtor. If **21 days** expire and the bank has not otherwise been ordered by the court to take certain action, the bank must release the funds to the judgment debtor.
- F. At any point during the procedure to determine whether or not the funds are exempt, the judgment creditor or judgment debtor may in writing direct the bank to release the funds to the other party.
- G. With respect to a restraining notice, if no claim of exemption is received by the bank from the judgment debtor within **25 days** after the exemption notice and claim forms are mailed to the judgment debtor by the bank, the funds in the account remain subject to the restraining notice. With respect to a levy, if no claim of exemption is received by the bank from the judgment debtor within **30 days** after the exemption notice and claim forms are mailed to the judgment debtor by the bank, the funds in the account may be paid out on the levy.

VII. TRANSITIONAL ISSUES

- A. The new law takes effect on January 1, 2009. Any restraining notices or levies received after that date will be subject to the new rules.
- B. What about restraining notices served on the bank in late 2008 but not processed by the bank until 2009? The law does not specifically address this issue, but it would seem to be reasonable for banks to not apply the new provisions to those restraints and levies.

VIII. ISSUES RELATING TO NONCOMPLIANCE

- A. The amendments do not set forth any specific penalties for failure to comply with the requirements; however, there are significant consequences under existing law for noncompliance with the rules on restraining notices and levies.
- B. If a bank is served with a proper restraining notice that is effective against an account and the bank does not properly restrain the account and the customer withdraws the funds, the judgment creditor can seek to hold the bank liable for damages.

- C. If a bank is served with a restraining notice that is not effective against an account (if, for instance, the account does not have funds above the protected amount or the judgment creditor did not provide the proper exemption notice or claim form), and the bank restrains the account in error, then the customer could try to hold the bank liable for any damages incurred as a result of the bank's actions. The determination of whether the bank would be liable may depend on a number of factors, including whether the customer suffered any loss as a result of the restraint.

December, 2008

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