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Proposal to Harmonize New York State Debtor Protections for Savings and Retirement Benefits

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May 6, 2019

Summary of Proposed Legislation to Harmonize New York State Debtor Protections for Savings and Retirement Benefits

Aim: Increase the coherence, clarity, and equity of state law debtor protections for savings and retirement benefits by extending the paradigm that benefits under the terms of specified savings plans, retirement plans or individual retirement arrangements are fully protected from creditors before, during, and after distribution, except for creditors relying on support orders, qualified domestic relations orders (QDROs), or fraudulent transfer rules. The proposal has six major components:

1. Enumeration of protected benefits

Protected benefits would be those under the terms of a tax-qualified trust plan, tax-qualified annuity plan, a 403(b) plan, a 457(b) plan, or an IRA (an individual retirement account or individual retirement annuity). In contrast to current law, the protections would not be affected by the funding vehicle for the IRA or the plan, the form of organization of the plan sponsor, or the extent to which the debtor owns an interest in the plan sponsor. Plan contributions would be limited either by federal tax-qualification rules or by federal tax penalty rules.

2. Consistent definitions and terminology

The basic statutory components would be defined once and cross-referenced throughout the four statutes, rather than appearing in different forms in different provisions, as is now the case.

3. Clearer due process notices

The due process notices for enforcement mechanisms and protections for the funds in a debtor's bank account would be amended to set forth clearer and consistent descriptions of the savings and retirement benefits that are protected from creditor claims.

4. Uniform QDRO rules

Enforceable non-support domestic relations orders would no longer be limited to QDROs, but would include QDRO-like orders if QDROs are not defined for the benefits, such as for IRA benefits. In such cases, enforceable orders would have to satisfy the notice and substantive QDRO requirements.

5. Consistent application of the fraudulent transfer rules

The usual fraudulent transfer rules would govern contributions to all IRAs and the savings and retirement plans governed by the proposal. Benefits funded with trusts would no longer be subject to more stringent rules.

6. Updates and clarifications of statutes being amended

Obsolete provisions and ambiguities would be removed from sections being amended. For example, the proposal would set forth the applicable minimum hourly wage that is used to determine the minimum exemption for each debtor's banking account and weekly disposable earnings. This wage is now undefined because there are four general state minimums.

STATE OF NEW YORK

BILL NUMBER ____

IN ______________

______ __, 2019

Introduced by: ___________________________

AN ACT to amend the civil practice law and rules, the debtor and creditor law, the estates, powers and trusts law, and the insurance law to harmonize the provisions governing how a person's creditor may enforce its claims against the person's benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, an individual retirement account or annuity, or similar plan or arrangement.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 5101 of the Civil Practice Law and Rules, as amended by chapter 59 of the laws of 1993, is amended to read as follows:

§ 5101. Enforcement of money judgment or order.

A money judgment [~~and~~]or an order directing the payment of money[~~, including motion costs,~~] may be enforced as prescribed in article fifty-two. Such enforcement may include the recovery of motion costs. [~~An order of support, alimony or maintenance of any court of competent jurisdiction where arrears/past-due support have not been reduced to judgment, including motion costs, may be enforced as prescribed in article fifty-two upon the default of a debtor as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article.~~]An order directing the payment of money includes an order of support described in subparagraph (i) of paragraph three of subdivision (p) of section fifty-two hundred five of this article.

EXPLANATION—Matter (underscored) is new; matter in brackets [~~–~~] is old law to be omitted

Section 2. Paragraph 2 of Subdivision (c) of Section 5205 of the Civil Practice Law and Rules, as amended by chapter 141 of the laws of 2001, is amended to read as follows:

(c) Exemptions for Trust Property[~~ Exemption~~]. 1. Except as provided in paragraph [~~s four and five~~] three and four of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. This subdivision shall not apply to property considered under paragraph one of subdivision (p) as held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor. The extent of the exemption of such property is described in subdivisions (p) and (q). [~~For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.~~

~~3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy, as amended.~~

~~4.~~] 3. This subdivision shall not impair any rights an individual otherwise has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended on [December 31, 2018], or under any corresponding section of the federal tax law effective as of the date this provision is at issue, or under any order of support, [~~alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment~~]as defined in paragraph one of subdivision (a) of section fifty-two hundred forty-one of this article, upon which a "default," as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article, has been established, subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, whether the default has been reduced to a judgment.

[~~5. Additions to the property described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if~~

1 (i) made after the date that is ninety days before the interposition of the claim on
2 which such judgment was entered, or
3 (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor
4 law.] 4. All additions to property held in trust for a judgment debtor, where the trust has been
5 created by, or the fund so held in trust has proceeded from, a person other than the judgment
6 debtor shall not be exempt from application to the satisfaction of a money judgment if deemed to
7 be fraudulent conveyances under article ten of the debtor and creditor law.
8
9
10 Section 3. Subdivision (d) of Section 5205 of the Civil Practice Law and Rules, as amended
11 by chapter 93 of the laws of 1995, is amended to read as follows:
12 (d) [Income] Exemption for Trust Income and Payments. The following personal property
13 is exempt from application to the satisfaction of a money judgment, except such part as a court
14 determines to be unnecessary for the reasonable requirements of the judgment debtor, and his
15 dependents:

16 1. ninety per cent of the income or payments from [a trust the principal of] property
17 which is exempt under subdivision (c); [provided, however, that with respect to any income or
18 payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or
19 interest established as part of an individual retirement account plan or as part of a Keogh (HR-
20 10), retirement or other plan described in paragraph two of subdivision (c) of this section, the
21 exception in this subdivision for such part as a court determines to be unnecessary for the
22 reasonable requirements of the judgment debtor and his dependents shall not apply, and the
23 ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;]

24 2. ninety per cent of the earnings of the judgment debtor for his personal services
25 rendered within sixty days before, and at any time after, an income execution is delivered to the
26 sheriff or a motion is made to secure the application of the judgment debtor's earnings to the
27 satisfaction of the judgment; and

28 3. payments pursuant to an award in a matrimonial action, for the support of a [wife]
29 spouse, where the [wife] spouse is the judgment debtor, or for the support of a child, where the
30 child is the judgment debtor; where the award was made by a court of the state, determination of
31 the extent to which it is unnecessary shall be made by that court.

32
33
34 Section 4. Subdivisions (l) and (m) of Section 5205 of the Civil Practice Law and Rules, as
35 amended by chapter 62 of the laws of 2011, are hereby amended to read as follows:

36 (l) Exemption of banking institution accounts into which statutorily exempt payments are
37 made electronically or by direct deposit.

38 1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt
39 payments were made to the judgment debtor's account in any banking institution during the
40 forty-five day period preceding the date a restraining notice was served on the banking institution
41 or an execution was served upon the banking institution by a marshal or sheriff, then two
42 thousand five hundred dollars in the judgment debtor's account is exempt from application to the
43 satisfaction of a money judgment if the judgment debtor is a natural person. Nothing in this
44 subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659, [or] 38 U.S.C. §

1 5301, or to enforce a child support, spousal support, alimony, or maintenance obligation.
2 [Nothing in t]

3 This subdivision shall not alter the exempt status of funds that pursuant to this section or
4 under any other provision of state or federal law are otherwise protected from execution, levy,
5 attachment, garnishment or other legal process, [pursuant to this section or under any other
6 provision of state or federal law, or]and shall not affect the right of a judgment debtor to claim
7 such exemption. A judgment debtor may have exemption rights to funds, including, but not
8 limited to, funds attributable to payments of: (1) the debtor's pension and profit-sharing benefits,
9 as set forth in section 5205(q) of the civil practice law and rules, (2) the debtor's public
10 assistance benefits, as set forth in section 137-a of the social services law, (3) the debtor's
11 benefits, as set forth in section 33 of the workers' compensation law, (4) the debtor's
12 unemployment compensation benefits, as set forth in section 595 of the labor law, or (5). 90% of
13 the debtor's earnings, as set forth in section 5205(d) of the civil practice law and rules.

14 2. For purposes of this article, "statutorily exempt payments" means any personal
15 property exempt from application to the satisfaction of a money judgment under any provision of
16 state or federal law. Such term shall include, but shall not be limited to, payments from any of
17 the following sources: social security, including retirement, survivors' and disability benefits,
18 supplemental security income or child support payments; veterans administration benefits; public
19 assistance; workers' compensation; unemployment insurance; public or private pension plans;
20 public or private profit-sharing plans; 401(k) plans, 403(b) plans; 457(b) plans, individual
21 retirement accounts or annuities; railroad retirement plans; and [black lung benefits] the Federal
22 Black Lung Program.

23 3. (i) Beginning on April first, two thousand twelve, and at each three-year interval
24 ending on April first thereafter, the dollar amount of the exemption provided in this section,
25 subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-
26 two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this article in
27 effect immediately before that date shall be adjusted as provided in subparagraph (ii) of this
28 paragraph.

29 (ii) The superintendent of financial services shall determine the amount of the
30 adjustment based on the change in the Consumer Price Index for All Urban Consumers, New
31 York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. Department of
32 Labor, Bureau of Labor Statistics, for the most recent three-year period ending on December
33 thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-
34 five dollars.

35 (iii) Beginning on April first, two thousand twelve, and at each three-year interval
36 ending on April first thereafter, the superintendent of financial services shall publish the current
37 dollar amount of the exemption provided in this section, subdivision[s (e) and] (h) of section
38 fifty-two hundred twenty-two, subdivision (b) of section fifty-two hundred twenty-two-a,
39 subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two
40 hundred thirty-two of this chapter, together with the date of the next scheduled adjustment. The
41 publication shall be substantially in the form set below:

42 CURRENT DOLLAR AMOUNT OF EXEMPTION FROM ENFORCEMENT OF
43 JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES
44 Sections 5205(l), [5222(e),] 5222(h), 5222-a(b), 5230(a), and 5232(e)

[The following is the current dollar amount of exemption from enforcement of money judgments under CPLR] Pursuant to Subparagraph (iii) of Subdivision (l) of Section 5205 of the New York Civil Practice Law and Rules, the Superintendent of Financial Services is required beginning on April 1, 2012, and at each three year interval thereafter, to update the current dollar amount of exemption from enforcement of judgments under New York Civil Practice Law and Rules Sections 5205(l), [5222(e),] 5222(h), 5222-a(b), 5230(a), and 5232(e)[, as required by CPLR section 5205(l)(3)]. The new dollar amount of exemption from enforcement of money judgments is ($ Amount). This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year).

(iv) Adjustments made under subparagraph (i) of this paragraph shall not apply with respect to restraining notices served or executions effected before the date of the adjustment.

(m) [Nothing in s]Subdivision (l) of this section [limits the judgment debtor's] shall not alter the exemption rights that the judgment debtor otherwise has in this section or under any other law, and shall not affect the right of a judgment debtor to claim such exemption rights. A judgment debtor may have exemption rights to funds, including, but not limited to funds attributable to payments described in the final sentence of paragraph one of section 5205(l) of this article.

Section 5. Section 5205 of the Civil Practice Law and Rules, as amended by chapter 62 of the laws of 2011, is hereby amended by the addition after subdivision (o) of new subdivisions (p) and (q) to read as follows:

(p) Exemption for undistributed benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or a similar plan or arrangement.

1. For purposes of this subdivision, all monies, assets or interests that are part of:

(i) an arrangement that meets the requirements for an individual retirement account under section 408(a) or individual retirement annuity under section 408(b) of the United States Internal Revenue Code of 1986, as amended on [December 31, 2018] or under any corresponding section of the federal tax law effective as of the date this provision is at issue ("IRC"), other than monies, assets or interests treated as excess contributions under IRC sections 4973(b) or 4973(f);

(ii) a pension, profit-sharing or stock bonus plan that meets the requirements under IRC section 401(a), but is not a plan established or maintained for its employees by the government of New York or political subdivision thereof, or by any instrumentality of any of the foregoing ("NY govt. plan");

(iii) a pension or profit-sharing plan that meets the requirements under IRC section 403(a), but is not a NY govt. plan;

(iv) a deferred compensation arrangement that meets the requirements under IRC section 403(b), other than monies, assets or interests treated as excess contributions under IRC section 4973(c), but is not a NY govt. plan; or

(v) a plan that meets the requirements under IRC section 457(b).

shall be considered as held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, and shall be exempt from application to the satisfaction of a money judgment, regardless of whether such judgment debtor or such judgment debtor's employer has contributed to such a plan or arrangement.

2. All property considered in paragraph one of this subdivision as property held in a trust for the judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, shall be conclusively presumed for all purposes to be held in a trust subject to a spendthrift provision under this section and the common law of the state of New York, including, but not limited to, cases arising under or related to sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended on [December 31, 2018], or under any corresponding section of the federal bankruptcy law effective as of the date this provision is at issue.

3. This subdivision shall not impair any rights an individual otherwise has under:

(i) any order of support, as defined in paragraph one of subdivision (a) of section fifty-two hundred forty-one of this article, upon which a "default," as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article, has been established, subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, whether the default has been reduced to a judgment.

(ii) a qualified domestic relations order, as that term is defined in IRC section 414(p), if that section applies to property considered in paragraph one of this subdivision as property held in a trust for the judgment debtor created by a person other than the judgment debtor, or

(iii) any order that meets the requirements of IRC sections 414(p)(1) through (5) and (8) if IRC section 414(p) does not apply to property considered in paragraph one of this subdivision as held in trust for a judgment debtor, where the trust has been created by a person other than the judgment debtor.

4. Additions to the property described in paragraph one of this subdivision shall not be exempt from application to the satisfaction of a money judgment if deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

5. Subdivisions (c) and (d) shall not apply to property considered under paragraph one of this subdivision as held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.

(q) Exemption for distributed benefits by and from a pension plan, profit-sharing plan, stock bonus plan, or a similar plan or arrangement.

1. Payments made from property considered under subdivision (p) as held in a trust created by or proceeded from a person other than the judgment debtor shall be exempt from application to the satisfaction of a money judgment. Property that is traceable to such payments, shall also be exempt from application to the satisfaction of a money judgment. This paragraph shall not impair any rights an individual otherwise has under any order that meets the requirements set forth in paragraph three of subdivision (p).

2. Subdivisions (c) and (d) shall not apply to property considered under paragraph one of subdivision (p) as held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.

Section 6. Subdivision (e) of Section 5222 of the Civil Practice Law and Rules, as amended by chapter 575 of the laws of 2008, is hereby amended to read as follows:

(e) Content of notice. The notice required by subdivision (d) of this section shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or [~~held~~]frozen in order to satisfy a judgment or order which has been entered against you. A money judgment is a court's decision that you owe money to a creditor. A court may also order you to pay another person money. Read this carefully.

[~~You may be able to "vacate" (remove) the judgment. If the judgment is vacated, your bank account will be released. Consult an attorney (including free legal services) or visit the court clerk for more information about how to do this.~~]

YOU MAY BE ABLE TO GET YOUR MONEY OR PROPERTY [~~BACK~~] RETURNED OR RELEASED

You may be able to show that (1) you have satisfied the judgment or complied with the order, or (2) there are circumstances under which the judgment or court order may be vacated, that is set aside. If you can make such a showing, your money or other property will be returned or released. Consult an attorney (including free legal services) or visit the court clerk for more information about how to do or show this.

State and federal laws prevent certain money or property from being taken or frozen to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money or property which may be exempt:

1. Supplemental security income benefits, (SSI);

2. Social security disability benefits (SSD);

[~~2~~]3. Social security benefits;

[~~3~~]4. Public assistance benefits (welfare);

1 5. Income earned while receiving SSI or public assistance;
2 [4]6. Spousal support[,] or maintenance (alimony) payments;
3 7. [or child] Child support payments;
4 [5]8. Unemployment insurance benefits;
5 [6]9. Disability benefits;
6 [7]10. Workers' compensation benefits;
7 [8.]11. Public or private pension plan benefits;
8 [9.]12. Public or private profit-sharing plan benefits;
9 13. Public or private Section 401(k) plan, Section 403(b) plan, or
10 Section 457(b) plan benefits;
11 14. Individual retirement account or individual retirement annuity benefits;
12 15. Railroad retirement benefits;
13 16. Annuity contract benefits
14 17. Black lung benefits
15 [9.] 18. Veterans benefits; and
16 [10.] 19. Ninety percent of your wages or salary earned in the last sixty days;
17 [11. Twenty-five hundred] dollars of any bank account containing [statutorily exempt]
18 payments that were deposited electronically or by direct deposit within the last forty-five days,
19 including, but not limited to, your social security, supplemental security income, veterans
20 benefits, public assistance, workers' compensation, unemployment insurance, public or private
21 pensions, railroad retirement benefits, black lung benefits, or child support payments;
22 12. Railroad retirement; and
23 13. Black lung benefits].
24

25 If you think that any of your money that has been taken or [held] frozen is exempt, you must
26 act promptly because the money may be applied to the judgment or order. If you claim that any
27 of your money that has been taken or [held] frozen is exempt, you may contact the person
28 sending this notice.
29

30 Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING, IF YOU QUALIFY, ANY
31 FREE LEGAL SERVICES ORGANIZATION[IF YOU QUALIFY]. You can also go to court
32 without an attorney to get your money back. Bring this notice with you when you go. You are
33 allowed to try to prove to a judge that your money is exempt from collection under sections
34 5222. 5232, 5239, and 5240 of the New York civil practice law and rules[, sections fifty-two
35 hundred twenty-two-a, fifty-two hundred thirty-nine and fifty-two hundred forty]. If you do not
36 have a lawyer, the clerk of the court may give you forms to help you prove your account contains
37 exempt money that the creditor cannot collect. The law (New York civil practice law and rules,

1 article four and sections [fifty-two hundred thirty-nine] 5239 and [fifty-two hundred forty] 5240)
2 provides a procedure for determination of a claim to an exemption.

3

4

5 Section 7. Subdivision (f) of Section 5222 of the Civil Practice Law and Rules, as amended
6 by chapter 59 of the laws of 1993, is hereby amended to read as follows:
7 For the purposes of this section, "order" shall mean an order [issued by a court of competent
8 jurisdiction directing the payment of support, alimony or maintenance] of support described in
9 subparagraph (i) of paragraph three of subdivision (p) of section fifty-two hundred five of this
10 article.[upon which a "default," as defined in paragraph seven of subdivision (a) of section fifty-
11 two hundred forty-one of this article, has been established, subject to the procedures established
12 for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of
13 section fifty-two hundred forty-one of this article, except that, for the purposes of this section
14 only a default shall not be founded upon retroactive child support obligations as defined in
15 paragraph (a) of subdivision one of section four hundred forty of the family court act and
16 subdivision one of section two hundred forty and paragraph b of subdivision nine of section two
17 hundred thirty-six of the domestic relations law.]

18

19

20 Section 8. Subdivision (i) of Section 5222 of the Civil Practice Law and Rules, as amended
21 by chapter 575 of the laws of 2008, is hereby amended to read as follows:
22 (i) Effect of restraint on judgment debtor's banking institution account. If the judgment
23 debtor is a natural person, a [A] restraining notice issued pursuant to this section shall not apply
24 to an amount less than or equal to, [or less than] the product of two hundred forty and the
25 applicable minimum hourly wage, as defined in the penultimate paragraph of this subdivision,
26 [greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair
27 Labor Standards Act of 1938, or and or two hundred forty times the state minimum hourly wage
28 prescribed in section six hundred fifty-two of the labor law, as in effect at the time the earnings
29 are payable (as published on the websites of the United States department of labor and the state
30 department of labor)]except such part thereof as a court determines to be unnecessary for the
31 reasonable requirements of the judgment debtor, and his or her dependents This amount shall
32 [be] equal [to] seventeen hundred sixteen dollars on the effective date of this subdivision, and
33 shall increase [rise] to seventeen hundred forty dollars on July twenty-fourth, two thousand nine,
34 and shall increase [rise] thereafter in tandem with the applicable minimum hourly wage.
35 Nothing in this subdivision shall be construed to limit a banking institution's right or obligation
36 to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. §
37 659, [or] 38 U.S.C. § 5301, or to enforce a child support, spousal support, alimony, or
38 maintenance obligation. [by a court order. Where a judgment debtor's account contains an
39 amount equal to or less than ninety percent of the greater of two hundred forty times the federal
40 minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty
41 times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law
42 as in effect at the time the earnings are payable (as published on the websites of the United States
43 department of labor and the state department of labor), the account shall not be restrained and the
44 restraining notice shall be deemed void, except as to those funds that a court determines to be

1 unnecessary for the reasonable requirements of the judgment debtor and his or her dependents.
2 [Nothing in this subdivision shall alter the exempt status of funds which are exempt from
3 execution, levy, attachment or garnishment, under section fifty-two hundred five of this article or
4 under any other provision of state or federal law, or the right of a judgment debtor to claim such
5 exemption.]
6 For purposes of this article, the "applicable minimum hourly wage" means the federal
7 minimum hourly wage prescribed by paragraph (1) of subsection (a) of section six of the Fair
8 Labor Standards Act of 1938, or the state minimum hourly wage prescribed by subparagraph (i)
9 of paragraph (a) of subdivision 1 of section six hundred fifty-two of the labor law, whichever is,
10 as in effect when the earnings are payable, larger.
11 This subdivision shall not alter the exempt status of payments that, pursuant to section fifty-
12 two hundred five of this article or any other provision of state or federal law, are otherwise
13 protected from execution, levy, attachment, garnishment or other legal process, and shall not
14 affect the right of a judgment debtor to claim such exemption.
15
16
17 Section 9. Part 4 of Subdivision (b) of Section 5222-a of the Civil Practice Law and Rules,
18 as amended by chapter 24 of the laws of 2009, is hereby amended to read as follows:
19 **4.** Content of exemption notice and exemption claim form.
20 **a.** The exemption notice shall be in the following form:
21 "EXEMPTION NOTICE
22 as required by New York Law
23 YOUR BANK ACCOUNT IS RESTRAINED OR "FROZEN"
24 The attached Restraining Notice or [notice]Notice of Levy by Execution has been issued
25 against your bank account. You are receiving this notice because a creditor has obtained a money
26 judgment or order against you, and one or more of your bank accounts has been restrained to pay
27 the judgment. A money judgment is a court's decision that you owe money to a creditor. A court
28 may also order you to pay another person money.
29 You should be aware that FUTURE DEPOSITS into your account(s) might also be restrained
30 if you do not respond to this notice. If a Notice of Levy by Execution is attached, funds may be
31 taken from one or more of your bank accounts to pay the judgment if you do not respond to this
32 notice.
33 [You may be able to "vacate" (remove) the judgment. If the judgment is vacated, your bank
34 account will be released. Consult an attorney (including free legal services) or visit the court
35 clerk for more information about how to do this].
36
37 YOU MAY BE ABLE TO GET YOUR BANK ACCOUNT RELEASED
38
39 You may be able to show that (1) you have satisfied the judgment or complied with the order,
40 or (2) there are circumstances under which a judgment or court order may be vacated, that is set
41 aside. If you can make such a showing, your bank account will be released. Consult an attorney
42 (including free legal services) or visit the court clerk for more information about how to do or
43 show this.

EXPLANATION—Matter (underscored) is new; matter in brackets [–] is old law to be omitted

1

2 Under state and federal law, certain types of funds cannot be frozen or taken from your bank
3 account to pay a judgment. Such money is said to be "exempt."

4 DOES YOUR BANK ACCOUNT CONTAIN ANY OF THE FOLLOWING TYPES OF
5 FUNDS?

6 1. Social security;

7 2. Social security disability (SSD);

8 3. Supplemental security income (SSI);

9 4. Public assistance (welfare);

10 5. Income earned while receiving SSI or public assistance;

11 6. Veterans benefits;

12 7. Unemployment insurance;

13 8. Payments from public or private pension plans [and retirement accounts];

14 9. Payments from public or private profit-sharing plans;

15 10. Payments from public or private 401(k) plans, 403(b) plans or 457(b) plans

16 11. Payments from individual retirement accounts or individual retirement annuities

17 [9.]12. Disability benefits;

18 [10.]13. Income earned in the last 60 days (90% of which is exempt);

19 [11.]14. Workers' compensation benefits;

20 [12.]15. Child support;

21 [13.]16. Spousal support or maintenance (alimony);

22 17. Annuity contract benefits

23 [14.]18. Railroad retirement; [and/or

24 15.]19. Black lung benefits; [.]

25 20. Payments that were deposited electronically or by direct deposit within the last forty-
26 five days that were reasonably identifiable as statutorily exempt. Such payments include, but are
27 not limited to, your social security benefits, including retirement, survivors' and disability
28 benefits, supplemental security income, or child support payments; veterans administration
29 benefits, public assistance, workers' compensation, unemployment insurance, public or private
30 pension plan benefits, public or private profit-sharing plan benefits; 401(k) plan, 403(b) plan or
31 457(b) plan benefits, individual retirement account or individual annuity benefits, railroad
32 retirement benefits, or black lung benefits. If so, [the current dollar amount of exemption from
33 enforcement of judgment under New York Civil Practice Law and Rules section 5205(l)] dollars
34 of the account may be exempt; and

35 21. An amount equal to [the current dollar amount of exemption from restraining notices
36 under New York Civil Practice Law and Rules section 5222(i)] may be exempt.

I[~~f~~]F YES, [~~you can claim that your money is exempt and cannot be taken~~]YOU MAY CLAIM THAT YOUR MONEY IS EXEMPT AND MAY NOT BE TAKEN.

To make the claim, you must

(a) complete the EXEMPTION CLAIM FORM attached;

(b) deliver or mail the form to the bank with the restrained or "frozen" account; and

(c) deliver or mail the form to the creditor or its attorney at the address listed on the form.

You must send the forms within 20 DAYS of the postmarked date on the envelope holding this notice. You may be able to get your account released faster if you send to the creditor or its attorney written proof that your money is exempt. Proof can include an award letter from the government, an annual statement from your pension, pay stubs, copies of checks, bank records showing the last two months of account activity, or other papers showing that the money in your bank account is exempt. If you send the creditor's attorney proof that the money in your account is exempt, the attorney must release that money within seven days. You do not need an attorney to make an exemption claim using the form."

b. The exemption claim form shall be in the following form:

NAME OF COURT, NAME OF COUNTY

____________________________________x

PLAINTIFF/PETITIONER/CLAIMANT	INDEX NO.
V.	
DEFENDANT/RESPONDENT	EXEMPTION CLAIM FORM

____________________________________x

NAME AND ADDRESS OF JUDGMENT CREDITOR OR ATTORNEY	NAME AND ADDRESS OF FINANCIAL INSTITUTION
(To be completed by judgment creditor or attorney)	(To be completed by judgment creditor or attorney)
ADDRESS	ADDRESS
A__________________________________	B ____________________________
___________________________________	_____________________________

Directions: To claim that some or all of the funds in your account are exempt, complete both copies of this form, and make one copy for yourself. Mail or deliver one form to ADDRESS A and one form to ADDRESS B within twenty days of the date on the envelope holding this notice. ** If you have any documents, such as an award letter, an annual statement from your pension,

1 paystubs, copies of checks or bank records showing the last two months of account activity,
2 include copies of the documents with this form. Your account may be released more quickly.

3 ____

4 I state that my account contains the following type(s) of funds (check all that apply):

5 ______Social security

6 ______Social security disability (SSD)

7 ______Supplemental security income (SSI)

8 ______Public assistance

9 ______Wages while receiving SSI or public assistance

10 ______Veterans benefits

11 ______Unemployment insurance

12 ______Payments from pensions [and retirement accounts]

13 ______Payments from profit-sharing plans

14 ______Payments from 401(k) plans, 403(b) plans or 457(b) plans

15 ______Payments from individual retirement accounts or individual retirement annuities

16 ______Income earned in the last 60 days (90% of which is exempt)

17 ______Child support

18 ______Spousal support or maintenance (alimony)

19 ______Workers' compensation

20 ______Annuity contract benefits

21 ______Railroad retirement or black lung benefits

22 ______Other (describe exemption):____

23 ____

24 I request that any correspondence to me regarding my claim be sent to the following address:

25 ____

26 (FILL IN YOUR COMPLETE ADDRESS)

27 I certify under penalty of perjury that the statement above is true to the best of my knowledge
28 and belief.

29 ____

30 DATE SIGNATURE OF JUDGMENT DEBTOR
31

32

33

Section 10. Section 5226 of the Civil Practice Law and Rules, as amended by chapter 315 of the laws of 1962, is hereby amended to read as follows:

§ 5226. Installment payment order.

Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving, or will receive, money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the installment payments from the payments being or to be received by the judgment debtor, the court shall take into consideration the reasonable requirements of the judgment debtor, and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received[~~, or, if~~]. If the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, then the installment payments shall be the reasonable value of the services rendered.

This section shall not alter the exempt status of payments that, pursuant to any provision of state or federal law, are otherwise protected from execution, levy, attachment, garnishment or other legal process, and shall not affect the right of a judgment debtor to claim such exemption. Thus, the court shall not fix any installment payments from the payments being or to be received by the judgment debtor that are so exempt, including, but not limited to payments described in the final sentence of paragraph one of section 5205(l) of this article. However, the court shall include the total amount of exempt payments being or to be received by the judgment debtor in determining the amount being or to be received by the judgment creditor when determining the extent to which non-exempt payments will be subject to an installment order.

Section 11. Subdivision (a) of Section 5230 of the Civil Practice Law and Rules, as amended by chapter 24 of the laws of 2009, is hereby amended to read as follows:

(a) Form.

An execution shall specify the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount due thereon and it shall specify the names of the parties in whose favor and against whom the judgment or order was entered. An execution shall direct that only the property in which a named judgment debtor or obligor who is not deceased has an interest, or the debts owed to the named judgment debtor or obligor, be levied upon or sold thereunder and shall specify the last known address of that judgment debtor or obligor. Where the judgment or order was entered in a court other than the supreme, county or a family court, the execution shall also specify the date on which a transcript of the judgment or order was filed with the clerk of the county in which the judgment was entered. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment or order was recovered for all or part of a mortgage debt, the execution shall also

describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

[~~Except in cases when~~] If the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, [~~provided that in those instances~~] the execution must contain[~~s~~] a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."[~~, an~~]

An execution notice with respect to a judgment debtor's account with a banking institution shall state [~~that, pursuant to subdivision (l) of section fifty-two hundred five of this article, two thousand five hundred dollars of an account containing direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article, is exempt from execution and that the garnishee cannot levy upon or restrain two thousand five hundred dollars in such an account~~]

"If you have an account at a banking institution containing direct deposit or electronic payments that are reasonably identifiable as statutorily exempt payments, as such payments are defined in civil practice law and rules section 5205(l)(2), within the last forty-five days, an amount equal to $ [the CURRENT DOLLAR AMOUNT OF THE EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES Section 5205(l)] is exempt from execution and may not be levied upon or restrained." and

"Pursuant to section 5222(i) of this article, an execution shall not apply to an amount less than or equal to, the product of two hundred forty and the greater of, as in effect at the time the earnings are payable, (a) the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938, and (b) the state minimum hourly wage prescribed in subparagraph (i) of paragraph (a) of subdivision 1 of section 652 of the labor law, except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor, and his or her dependents."

[~~Except in cases when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.", an execution notice shall likewise state that pursuant to subdivision (i) of section fifty-two hundred twenty-two of this article, an execution shall not apply to an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law, as in effect at the time the earnings are payable, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents." Where the judgment or order was entered in a court other than the supreme, county or a family court, the execution shall also~~

1 specify the date on which a transcript of the judgment or order was filed with the clerk of the
2 county in which the judgment was entered. Where jurisdiction in the action was based upon a
3 levy upon property or debt pursuant to an order of attachment, the execution shall also state that
4 fact, describe all property and debts levied upon, and direct that only such property and debts be
5 sold thereunder. Where the judgment or order was recovered for all or part of a mortgage debt,
6 the execution shall also describe the mortgaged property, specify the book and page where the
7 mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold
8 thereunder.]
9
10
11 Section 12. Subdivision (e) of Section 5230 of the Civil Practice Law and Rules, as amended
12 by chapter 59 of the laws of 1993, is hereby amended to read as follows:
13 (e) For the purposes of this section "order" shall mean an order [issued by a court of
14 competent jurisdiction directing the payment of support, alimony or maintenance] of support
15 described in subparagraph (i) of paragraph three of subdivision (p) of section fifty-two hundred
16 five of this article. [upon which a "default," as defined in paragraph seven of subdivision (a) of
17 section fifty-two hundred forty-one of this article, has been established, subject to the procedures
18 established for the determination of a "mistake of fact" for income executions pursuant to
19 subdivision (e) of section fifty-two hundred forty-one of this article, except that, for the purposes
20 of this section only, a default shall not be founded upon retroactive child support obligations as
21 defined in paragraph (a) of subdivision one of section four hundred forty of the family court act
22 and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section
23 two hundred thirty-six of the domestic relations law.]
24
25
26 Section 13. Subdivision (b) of Section 5231 of the Civil Practice Law and Rules, as amended
27 by chapter 575 of the laws of 2008, is hereby amended to read as follows:
28 (b) Issuance.
29 Where a judgment debtor is receiving or will receive, money [from any source]that is part of
30 his or her gross income, an income execution for installments therefrom, of not more than ten
31 percent thereof, may be issued and delivered to the sheriff of the county in which the judgment
32 debtor resides, or, where the judgment debtor is a non-resident, the county in which he is
33 employed; provided, however, that if the judgment debtor is a natural person (i) no amount shall
34 be withheld from the judgment debtor's earnings pursuant to an income execution for any week
35 unless the disposable earnings of the judgment debtor for that week exceed the product of thirty
36 and the applicable minimum hourly wage as defined in subdivision (i) of section fifty-two
37 hundred twenty-two of this article [the greater of thirty times the federal minimum hourly wage
38 prescribed in the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly
39 wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the
40 earnings are payable]; (ii) the amount withheld from the judgment debtor's earnings pursuant to
41 an income execution for any week shall not exceed the lesser of twenty-five percent of the
42 disposable earnings of the judgment debtor for that week, or[,] the amount by which the
43 disposable earnings of the judgment debtor for that week exceeds the product of thirty and the
44 applicable minimum hourly wage as defined in subdivision (i) of section fifty-two hundred
45 twenty-two of this article, and [the greater of thirty times the federal minimum hourly wage
46 prescribed by the Fair Labor Standards Act of 1938 [or thirty times the state minimum hourly

~~wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, whichever is less~~]; (iii) if the earnings of the judgment debtor are also subject to deductions for alimony, support, or maintenance for family members, or former spouses, pursuant to section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article, the amount withheld from the judgment debtor's earnings pursuant to this section shall not exceed the amount by which twenty-five percent of the disposable earnings of the judgment debtor for that week exceeds the amount deducted from the judgment debtor's earnings in accordance with section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article. [~~Nothing in this section shall be construed to modify, abrogate, impair, or affect any exemption from the satisfaction of a money judgment otherwise granted by law.~~]

This subdivision shall not alter the exempt status of payments that, pursuant to any provision of state or federal law, are otherwise protected from execution, levy, attachment, garnishment or other legal process, and shall not affect the right of a judgment debtor to claim such exemption.

Section 14. Subdivision (c) of Section 5231 of the Civil Practice Law and Rules, as amended by chapter 829 of the laws of 1987, is hereby amended to read as follows:

(c) Definition of Earnings, [~~and~~] Disposable Earnings, and Gross Income.

(i) As used herein earnings means compensation paid or payable for an individual's personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to the terms of a pension, profit-sharing, or retirement [~~program~~]plan, including but not limited to, a plan that meets the requirements under sections 401(k), 403(a), 403(b), or 457(b) of the United States Internal Revenue Code of 1986 as amended on [December 31, 2018], or under any corresponding section of the federal tax law effective as of the date this provision is at issue.

(ii) As used herein disposable earnings means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(iii) As used herein a judgment debtor's gross income means the judgement debtor's earnings, income from a trust, or any other income before any deductions are made from such income.

Section 15. Subdivision (g) of Section 5231 of the Civil Practice Law and Rules, as amended by chapter 178 of the laws of 1990, is hereby amended to read as follows:

(g) Statement on Income Execution.

Any income execution delivered to the sheriff on or after the effective date of this act shall contain the following statement:

NOTICE TO JUDGMENT DEBTOR RECEIVING AN INCOME EXECUTION
AS REQUIRED BY NEW YORK LAW

This is part of an Income Execution being issued against you. This execution is being issued because a creditor has obtained a money judgment order against you, and is compelling you to pay the creditor a portion of the payments you will receive from the person specified above. If

1 you don't pay the creditor such portion of those the payments within the specified period, such
2 person will be notified of your debt and directed to pay your creditor such portion of the person's
3 payments to you.

4 A money judgment is a court's decision that you owe money to a creditor. You may be able
5 to show that (1) you have satisfied the judgment or complied with the order, or (2) there are
6 circumstances under which a judgment or court order may be vacated, that is set aside. If you
7 can make such a showing, your bank account or other property will be released. Consult an
8 attorney (including free legal services) or visit the court clerk for more information about how to
9 do or show this.

10

11 THIS INCOME EXECUTION DIRECTS THE WITHHOLDING OF UP TO TEN
12 PERCENT OF THE JUDGMENT DEBTOR'S GROSS INCOME PAYMENTS. IN CERTAIN
13 CASES, HOWEVER, STATE OR FEDERAL LAW DOES NOT PERMIT THE
14 WITHHOLDING OF THAT MUCH OF THE JUDGMENT DEBTOR'S GROSS INCOME
15 PAYMENTS. THE JUDGMENT DEBTOR IS REFERRED TO NEW YORK CIVIL
16 PRACTICE LAW AND RULES § 5231 and 15 UNITED STATES CODE § 1671 ET SEQ.

17

18 I. LIMITATIONS ON THE AMOUNT THAT [CAN]MAY BE WITHHELD.
19 A. AN INCOME EXECUTION FOR INSTALLMENTS FROM A JUDGMENT
20 DEBTOR'S GROSS INCOME [CANNOT]MAY NOT EXCEED TEN PERCENT (10%) OF
21 THE JUDGMENT DEBTOR'S GROSS INCOME.
22 B. IF A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS ARE LESS
23 THAN THIRTY (30) TIMES THE GREATER OF (THE CURRENT FEDERAL MINIMUM
24 WAGE (, PER HOUR), [OR]THAT IS ( ), OR, THE CURRENT NEW YORK STATE
25 MINIMUM WAGE (, PER HOUR), THAT IS ( ), NO [DEDUCTION
26 CAN]WITHHOLDINGS MAY BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS
27 UNDER THIS INCOME EXECUTION.
28 C. A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS
29 [CANNOT]MAY NOT BE REDUCED BELOW [THE AMOUNT ARRIVED AT BY
30 MULTIPLYING THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER
31 HOUR), OR ( ), UNDER THIS INCOME EXECUTION.] THIRTY (30) TIMES THE
32 GREATER OF (THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), THAT IS (
33), OR, THE CURRENT NEW YORK STATE MINIMUM WAGE (, PER HOUR), THAT IS (
34)
35 D. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S
36 EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT, OR MAINTENANCE
37 FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS EQUAL
38 OR EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S
39 DISPOSABLE EARNINGS, NO DEDUCTION [CAN]MAY BE MADE FROM THE
40 JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.
41 E. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S
42 EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT, OR MAINTENANCE
43 FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS ARE
44 LESS THAN TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S
45 DISPOSABLE EARNINGS, DEDUCTIONS MAY BE MADE FROM THE JUDGMENT
46 DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION. HOWEVER, THE AMOUNT

1 ARRIVED AT BY ADDING THE DEDUCTIONS FROM EARNINGS MADE UNDER THIS
2 EXECUTION TO THE DEDUCTIONS MADE FROM EARNINGS UNDER ANY ORDERS
3 FOR ALIMONY, SUPPORT, OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER
4 SPOUSES [CANNOT]MAY NOT EXCEED TWENTY-FIVE PERCENT (25%) OF THE
5 JUDGMENT DEBTOR'S DISPOSABLE EARNINGS.
6
7 [NOTE: NOTHING IN] THIS NOTICE DOES NOT LIMIT[LIMITS] THE PROPORTION
8 OR AMOUNT WHICH MAY BE DEDUCTED FROM A JUDGMENT DEBTOR'S
9 EARNINGS UNDER ANY ORDER FOR ALIMONY, SUPPORT, OR MAINTENANCE FOR
10 FAMILY MEMBERS OR FORMER SPOUSES PURSUANT TO CPLR § 5241.
11
12 II. EXPLANATION OF LIMITATIONS.
13 DEFINITIONS:
14
15 "DISPOSABLE EARNINGS" [DISPOSABLE EARNINGS]-ARE THAT PART OF AN
16 INDIVIDUAL'S EARNINGS LEFT AFTER DEDUCTING THOSE AMOUNTS THAT ARE
17 REQUIRED BY LAW TO BE WITHHELD (FOR EXAMPLE, TAXES, SOCIAL SECURITY,
18 AND UNEMPLOYMENT INSURANCE, BUT NOT DEDUCTIONS FOR UNION DUES,
19 INSURANCE PLANS, ETC.).
20
21 "EARNINGS" ARE THE COMPENSATION PAID OR PAYABLE FOR AN
22 INDIVIDUAL'S PERSONAL SERVICES, WHETHER DENOMINATED AS WAGES,
23 SALARY, COMMISSION, BONUS, OR OTHERWISE, AND INCLUDES PERIODIC
24 PAYMENTS PURSUANT TO THE TERMS OF A PENSION, PROFIT-SHARING OR
25 RETIREMENT PLAN, INCLUDING, BUT NOT LIMITED TO A 401(K) PLAN, 403(A)
26 PLAN, 403(B) PLAN, OR A 457(B) PLAN.
27
28 "GROSS INCOME" IS [SALARY, WAGES OR OTHER INCOME, INCLUDING ANY
29 AND ALL OVERTIME EARNINGS, COMMISSIONS, AND INCOME FROM TRUSTS,
30 BEFORE ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.] THE JUDGEMENT
31 DEBTOR'S EARNINGS, INCOME FROM A TRUST, OR ANY OTHER INCOME BEFORE
32 ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.
33
34 ILLUSTRATIONS REGARDING EARNINGS:
35

IF DISPOSABLE EARNINGS [IS]ARE	AMOUNT TO PAY OR DEDUCT FROM EARNINGS UNDER THIS INCOME EXECUTION IS
(A) LESS THAN OR EQUAL TO, 30 TIMES THE GREATER OF THE (FEDERAL MINIMUM WAGE ( ), NEW YORK STATE MINIMUM WAGE), THAT IS ( ) [OR LESS]	NO PAYMENT OR DEDUCTION ALLOWED
(B) MORE THAN 30 TIMES THE	THE LESSER OF: THE EXCESS OF

GREATER OF (FEDERAL MINIMUM WAGE ( ), NEW YORK STATE MINIMUM WAGE ( )), THAT IS ( ), BUT [AND] LESS THAN 40 TIMES [FEDERAL MINIMUM WAGE ( )] THE GREATER OF (FEDERAL MINIMUM WAGE ( ), NEW YORK STATE MINIMUM WAGE ( )), THAT IS ( )	DISPOSABLE EARNINGS OVER 30 TIMES THE GREATER OF (FEDERAL MINIMUM WAGE ( ), NEW YORK STATE MINIMUM WAGE ( )) [IN DISPOSABLE EARNINGS], OR 10% OF [GROSS] EARNINGS
(C) MORE THAN 40 TIMES THE GREATER OF (FEDERAL MINIMUM WAGE ( ) NEW YORK STATE MINIMUM WAGE ( )), THAT IS ( ) [OR MORE]	THE LESSER OF: 25% OF DISPOSABLE EARNINGS, OR 10% OF [GROSS] EARNINGS

III. NOTICE: YOU MAY BE ABLE TO CHALLENGE THIS INCOME EXECUTION THROUGH THE PROCEDURES PROVIDED IN CPLR § 5231 (i) AND CPLR § 5240

IF YOU THINK THAT THE AMOUNT [OF YOUR INCOME] BEING DEDUCTED OR THAT WOULD BE DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD ACT PROMPTLY BECAUSE THE MONEY WILL BE APPLIED TO THE JUDGMENT. [IF YOU CLAIM THAT THE AMOUNTOF YOUR INCOME BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW,] IN SUCH CASE YOU SHOULD CONTACT YOUR EMPLOYER OR OTHER PERSON [PAYING YOUR INCOME]MAKING OR WHO WOULD MAKE SUCH DEDUCTIONS. FURTHER, YOU MAY CONSULT AN ATTORNEY, INCLUDING, IF YOU QUALIFY, LEGAL AID[IF YOU QUALIFY]. NEW YORK STATE LAW PROVIDES TWO PROCEDURES THROUGH WHICH AN INCOME EXECUTION [CAN]MAY BE CHALLENGED:

CPLR § 5231(i) MODIFICATION. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER MODIFYING AN INCOME EXECUTION.

CPLR § 5240 MODIFICATION OR PROTECTIVE ORDER: SUPERVISION OF ENFORCEMENT. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER DENYING, LIMITING, CONDITIONING, REGULATING, EXTENDING OR MODIFYING THE USE OF ANY POST-JUDGMENT ENFORCEMENT PROCEDURE, INCLUDING THE USE OF INCOME EXECUTIONS.

Section 16. Subdivision (d) of Section 5232 of the Civil Practice Law and Rules, as amended by chapter 59 of the laws of 1993, is hereby amended to read as follows:

(d) For the purposes of this section "obligor" shall mean an individual other than a judgment debtor obligated to [~~pay support, alimony or maintenance pursuant to an order of a court of competent jurisdiction who has been found to be in "default" of such order as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article and the establishment of such default has been subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (c) of subdivision one of section four hundred forty and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.~~] satisfy an order of support described in subparagraph (i) of paragraph three of subdivision (p) of section fifty-two hundred five of this article.

Section 17. Subdivision (e) of Section 5232 of the Civil Practice Law and Rules, as amended by chapter 24 of the laws of 2009, is hereby amended to read as follows:

(e) Notwithstanding the provisions of subdivision (a) of this section, if the judgment debtor is a natural person and [~~if~~] direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (l) of section [~~fifty-two hundred five~~]5205 of this article, were made to the judgment debtor's account during the forty-five day period preceding the date that the execution notice was served on the garnishee banking institution, then a garnishee banking institution shall not execute, levy, attach, garnish, or otherwise restrain or encumber, [~~two thousand five hundred~~][the CURRENT DOLLAR AMOUNT OF THE EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES Section 5205(l)] dollars in the judgment debtor's account. Notwithstanding the provisions of subdivision (a) of this section, if the judgment debtor is a natural person, then an execution shall not apply to an amount less than or equal to [~~or less than~~], the product of two hundred forty and the applicable minimum hourly wage as defined in subdivision (i) of section fifty-two hundred twenty-two of this article [~~the greater of two hundred forty times the federal minimum hourly wage prescribed in the Labor Standards Act of 1938, or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law, as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor)~~] except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor, and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall increase [~~rise~~] to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall increase [~~rise~~] thereafter in tandem with the applicable minimum hourly wage as defined in subdivision (i) of section fifty-two hundred twenty-two of this article [~~minimum wage~~]. Nothing in this subsection shall be construed to limit a banking institution's right or obligation to restrain, remove or execute upon such funds from the judgment debtor's account if required by 42 U.S.C. § 659, [~~or~~] 38 U.S.C. § 5301, or to enforce a child support, spousal support, alimony, or maintenance obligation [~~or by a court order~~].

[~~Nothing in t~~]This subdivision shall not alter the exempt status of funds that, pursuant to section fifty-two hundred five of this article or any other provision of state or federal law, are otherwise protected from execution, levy, attachment, garnishment or other legal process, [~~under~~

1 section fifty-two hundred five of this article or under any other provision of state or federal law,
2 or]and shall not affect the right of a judgment debtor to claim such exemption.
3
4
5 Section 18. Subdivision (a) of Section 5241 of the Civil Practice Law and Rules, as amended
6 by chapter 270 of the laws of 2013, is hereby amended to read as follows:

7 (a) Definitions. As used in this section and in section fifty-two hundred forty-two of this
8 chapter, the following terms shall have the following meanings:

9 1. "Order of support" means any temporary or final order, judgment, agreement or
10 stipulation incorporated by reference in such judgment or decree in a matrimonial action or
11 family court proceeding, or any foreign support order, judgment or decree, registered pursuant to
12 article five-B of the family court act which directs the payment of alimony, maintenance, support
13 or child support.

14 2. "Debtor" means any person directed to make payments by an order of support.

15 3. "Creditor" means any person entitled to enforce an order of support, including a
16 support collection unit.

17 4. "Employer" means any employer, future employer, former employer, union or
18 employees' organization.

19 5. "Income payor" includes:

20 (i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit
21 program, policy of insurance or annuity;

22 (ii) the state of New York or any political subdivision thereof, or the United States;
23 and

24 (iii) any person, corporation, trustee, unincorporated business or association,
25 partnership, financial institution, bank, savings and loan association, credit union, stock purchase
26 plan, stock option plan, pension plan, retirement plan, profit-sharing plan, 401(k) plan, 403(a)
27 plan, 403(b) plan, 457(b) plan, individual retirement account, individual retirement annuity,
28 stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or
29 institution.

30 6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or
31 periodic or lump sum payment due to an individual, regardless of source, including wages,
32 salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment
33 insurance benefits, payments pursuant to the terms of a public or private pension or retirement
34 [program] plan, profit-sharing plan, 401(k) plan, 403(a) plan, 403(b) plan, 457(b) plan,
35 individual retirement account, or an individual retirement annuity, federal social security
36 benefits, as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance
37 benefits paid pursuant to the social services law and federal supplemental security income.

38 7. "Default" means the failure of a debtor to remit to a creditor three payments on the date
39 due in the full amount directed by the order of support, or the accumulation of arrears equal to or
40 greater than the amount directed to be paid for one month, whichever first occurs.

1 8. "Mistake of fact" means an error in the amount of current support or arrears or in the
2 identity of the debtor or that the order of support does not exist or has been vacated.

3 9. "Support collection unit" means any support collection unit established by a social
4 services district pursuant to the provisions of section one hundred eleven-h of the social services
5 law

6 10. "Date of withholding" means the date on which the income would otherwise have
7 been paid or made available to the debtor were it not withheld by the employer or income payor.

8 11. "Health insurance benefits" means any medical, dental, optical and prescription drugs
9 and health care services or other health care benefits which may be provided for dependents
10 through an employer or organization, including such employers or organizations which are self-
11 insured.

12 12. "Business day" means a day on which state offices are open for regular business

13 13. "Issuer" means a support collection unit, sheriff, the clerk of court, or the attorney for
14 the creditor.
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17 Section 19. Paragraph (1) of subdivision (b) of Section 5241 of the Civil Practice Law and
18 Rules, as amended by chapter 270 of the laws of 2013, is hereby amended to read as follows:

19 (b) Issuance.

20 (1) When a debtor is in default, an income execution for support enforcement may be
21 issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the
22 creditor as an officer of the court. Where a debtor is receiving or will receive income, an income
23 execution for deductions therefrom in amounts not to exceed the limits set forth in subdivision
24 (g) of this section may be served upon an employer or income payor after notice to the debtor.
25 The amount of the deductions to be withheld shall be sufficient to ensure compliance with the
26 direction in the order of support, and shall include an additional amount to be applied to the
27 reduction of arrears. The issuer may amend the income execution before or after service upon the
28 employer or income payor to reflect additional arrears or payments made by the debtor after
29 notice pursuant to subdivision (d) of this section, or to conform the income execution to the facts
30 found upon a determination made pursuant to subdivision (e) of this section.

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33 Section 20. Section 282 of the Debtor and Creditor Law, as amended by chapter 568 of the
34 laws of 2010, is hereby amended to read as follows:

35 Under section five hundred twenty-two of title eleven of the United States, entitled
36 "Bankruptcy", an individual debtor domiciled in this state may exempt from the property of the
37 estate, to the extent permitted by subsection (b) thereof, only (i) personal and real property
38 exempt from application to the satisfaction of money judgments under sections 5205 and 5206
39 [~~fifty-two hundred five and fifty-two hundred six~~]of the civil practice law and rules, (ii)
40 insurance policies and annuity contracts and the proceeds and avails thereof as provided in
41 section 3212 [~~three thousand two hundred twelve~~] of the insurance law and (iii) the following
42 property:

1. Bankruptcy exemption of a motor vehicle. One motor vehicle not exceeding four thousand dollars in value above liens and encumbrances of the debtor; provided, however, if such vehicle has been equipped for use by a disabled debtor, then ten thousand dollars in value above liens and encumbrances of the debtor.

2. Bankruptcy exemption for right to receive and keep benefits. The debtor's right to receive, or [~~the debtor's interest in~~] property that is traceable to: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans' benefit; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) all payments under: [~~a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified under section 401, 408 or 408A of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one (a), four hundred three (a), four hundred three (b), four hundred eight, four hundred eight A, four hundred nine or four hundred fifty-seven of the Internal Revenue Code of nineteen hundred eighty-six, as amended~~]

(i) a pension, or profit-sharing plan that meets the requirements under section 401(a) of the United States Internal Revenue Code of 1986, as amended [on December 31, 2018], or under the corresponding section of any federal tax law effective as of the date this provision is at issue (“IRC”), and is a plan established or maintained for its employees by the government of New York or political subdivision thereof, or by any instrumentality of any of the foregoing;

(ii) a pension or profit-sharing plan that meets the requirements under IRC section 403(a), and is a plan established or maintained for its employees by the government of New York or political subdivision thereof, or by any instrumentality of any of the foregoing;

(iii) a deferred compensation arrangement that meets the requirements of IRC section 403(b), other than monies, assets or interests treated as excess contributions under IRC section 4973(c), and is a plan established or maintained for its employees by the government of New York or political subdivision thereof, or by any instrumentality of any of the foregoing.

3. Bankruptcy exemption for right to receive and keep certain property. The debtor's right to receive, or property that is traceable to: (i) an award under a crime victim's reparation law; (ii) a payment on account of the wrongful death of an individual of whom the debtor was a dependent to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; (iii) a payment, not to exceed seventy-five hundred dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; and (iv) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Section 21. Subdivision one of Section 283 of the Debtor and Creditor Law, as amended by chapter 568 of the laws of 2010, is hereby amended to read as follows:

1. General application. [~~The aggregate amount the debtor may exempt from the property of the estate for personal property exempt from application to the satisfaction of a money judgment under subdivision (a) of section fifty-two hundred five of the civil practice law and rules and for benefits, rights, privileges, and options of annuity contracts described in the following sentence shall not exceed ten thousand dollars.~~] A debtor may not exempt from the estate items of property with an aggregate value exceeding ten thousand dollars that are either (1) benefits, rights, privileges, and options of an annuity contract described in the following sentence or (2) personal property exempt from application to the satisfaction of a money judgment only under subdivision (a) of section 5205 of the civil practice law and rules. Annuity contracts subject to the foregoing limitation are those that are: (a) initially purchased by the debtor within six months of the debtor's filing a petition in bankruptcy, (b) not described in any paragraph of section [~~eight hundred five (d)~~] 805(d) of the Internal Revenue Code of nineteen hundred fifty-four, (c) not otherwise exempt from section 3212 of the insurance law under subdivision (g) of that section, and [~~(c)~~](d) not purchased by application of proceeds under settlement options of annuity contracts purchased more than six months before the debtor's filing a petition in bankruptcy or under settlement options of life insurance policies.

Section 22. Section 7-3.1 of the Estates, Powers and Trusts Law, as amended by chapter 76 of the laws of 2005, is hereby amended to read as follows:

§ 7-3.1. [~~Disposition in trust for creator void as against creditors~~] Creditor's Claims To Property Contributed to a Trust by a Trust Beneficiary.

(a) [~~A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.~~] To the extent that a beneficiary's trust interest is attributable to property contributed by a beneficiary, whether or not the beneficiary's interest is subject to a spendthrift provision, the interest is subject to the claims of the beneficiary's existing or subsequent creditors.

(b) [~~(1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.~~] Paragraph (a) does not apply to property considered under paragraph one of subdivision (p) of Section 5205 of the Civil Practice Law and Rules as held in trust for a judgment debtor, where the trust has been created by a person other than the judgment debtor.

[~~(2) All property described in subparagraph one of this paragraph shall be conclusively presumed to be in a trust with spendthrift provisions under this section and the~~

~~common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.~~

~~(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.~~

~~(4) Additions to the property described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.~~]

(c) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(d) [~~A disposition in trust shall not be considered to be for the use of the creator under paragraph (a)~~] Paragraph (a) does not apply by reason of the trustee's authority to pay trust principal to the trust contributor as reimbursement for income taxes pursuant to section 7-1.11 of this article. [~~Nor shall a disposition in trust be considered to be for the use of the creator under paragraph (a) of this section~~] Paragraph (a) does not apply where the trustee is authorized under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust creator shall be entitled to reach any trust property based on the discretionary powers described in this paragraph.

(e) Cross-reference. See subdivision (p) of section 5205 of the civil practice law and rules, (providing protections for a debtor's benefits under the terms of a specified pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or a similar plan or arrangement.).

Section 23. Section 3212 of the Insurance Law, as amended by chapter 58 of the laws of 2009, is hereby amended by the addition after subsection (f) of new subsection (g) to read as follows:

(g) (1) This section shall not otherwise apply to any of the benefits, rights, powers, privileges and options which, under any annuity or other contract, are due, are prospectively due, or have been paid to the annuitant, the annuitant's beneficiary or assignee under the terms of

1 (A) any arrangement that was established, in whole or in part, to meet the
2 requirements for an individual retirement annuity under Section 408 of the United States Internal
3 Revenue Code of 1986, as amended on [December 31, 2018], or under the corresponding section
4 of any federal tax law effective as of the date this provision is at issue ("IRC");

5 (B) a pension, profit-sharing or stock bonus plan that was established, in whole or in
6 part, to meet the requirements under IRC section 401(a), but is not a plan established or
7 maintained for its employees by the government of New York or political subdivision thereof, or
8 by any instrumentality of any of the foregoing ("NY govt. plan");

9 (C) a pension or profit-sharing plan that was established, in whole or in part, to meet
10 the requirements under IRC section 403(a), but is not a NY govt. plan;

11 (D) a deferred compensation arrangement that was established, in whole or in part, to
12 meet the requirements of IRC section 403(b), but is not a NY govt. plan; or

13 (E) a plan that was established, in whole or in part, to meet the requirements of IRC
14 section 457(b).

15 (2) Section 7-3.1 of the estates, powers and trusts law and section 5205 of the civil
16 practice law and rules shall apply to the benefits, rights, powers, privileges and options which,
17 under any annuity or other contract, are due, are prospectively due, or have been paid to the
18 annuitant, the annuitant's beneficiary or assignee under the terms of any of the plans or
19 arrangements set forth in subsection (1). Those sections shall, however, apply as though all
20 monies, assets or interests that are part of the plan or arrangement are held in trust for a judgment
21 debtor,

22 (A) where the trust has been created by, or the fund so held in trust has proceeded
23 from, a person other than the judgment debtor under the provisions of subdivision (p) of section
24 5205 of the civil practice law and rules, if the plan or arrangement satisfies the requirements set
25 forth in subsection (1); and

26 (B) where the trust has been created by the judgment debtor, if the plan or
27 arrangement does not satisfy the requirements set forth in subsection (1).

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30 Section 24. The provisions of this act shall be severable, and if any clause, sentence,
31 paragraph, subdivision, section or part of this act shall be adjudged by any court of competent
32 jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder
33 thereof but shall be confined in its operation to the clause, sentence, paragraph, subdivision,
34 section or part thereof directly involved in the controversy in which such judgment shall have
35 been rendered.

36

37

38 Section 25. This act shall take effect on [the effective date], the Effective Date. This act shall
39 apply only to (a) executions, levies, attachments, restraining orders, turnover orders, installment
40 payment orders, income deduction orders, garnishments, or other legal process that are issued or

1 entered on or after the Effective Date to enforce a judgment or an order directing the payment of
2 money, and (b) bankruptcy petitions filed on or after the Effective Date.
3
4

NEW YORK STATE ___________________

MEMORANDUM IN SUPPORT OF LEGISLATION

Submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: _________________

SPONSOR: __________________

TITLE OF BILL: **AN ACT** to amend the civil practice law and rules, the debtor and creditor law, the estates, powers and trusts law, and the insurance law to harmonize the provisions governing how a person's creditor may enforce its claims against the person's benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, an individual retirement account or annuity, or similar plan or arrangement.

These amendments were proposed by the New York State Bar Association ("NYSBA"). The amendment is intended to harmonize in an equitable and unambiguous fashion the debtor protections for benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or under the terms of a similar plan or arrangement in CPLR §§ 5101, 5205, 5222, 5222-a; 5226, 5230, 5231, 5232, and 5241; Dr. & Cr. L. §§ 282 and 283; EPTL § 7-3.1; and Ins. L. § 3212. A NYSBA report describing the amendment in detail, the history of the sections being amended, and the tax characteristics of tax-qualified pension, profit-sharing, stock bonus plans, individual retirement arrangements, and similar plans and arrangements, is available at ______________________nysba.org. The amendments provide that:

- A person's protected benefits would be any benefit to which such person is entitled under the terms of (a) a tax-qualified pension plan, profit-sharing plan, or stock bonus plan, (b) an individual retirement account or annuity or (c) a specified plan or arrangement receiving similar favorable treatment under the federal tax law. The same protections would apply to an individual who is a participant in such a plan or arrangement, and to a beneficiary of such individual. The funding vehicle for the plan or arrangement is irrelevant. However, there is no protection for any benefit derived from contributions treated as excess contributions for purposes of the federal income tax. Benefits from New York government plans, other than 457(b) plans, would be protected under sections addressing those plans and the Dr. & Cr. L.

- A person's creditors, other than the person's exception creditors, would not be able to enforce their claims against any of the person's protected benefits before their distribution, upon their distribution, or after their distribution.
- A person's exception creditors would be those that either are enforcing specified orders of support or domestic relations orders, or are adversely affected in a specified manner by the creditor's contributions to a plan or arrangement described above.
- The due process notice and the substantive provisions for restraining notices, income executions, non-income executions and levies against the bank account or other personal property of a judgment debtor, insofar as the notice and provisions pertain to benefits under the terms of a tax-qualified pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or under the terms of a similar plan or arrangement, would be clarified and be made consistent with each other, and with the exemption provisions governing those benefits.

Accordingly, this measure would make the following statutory changes:

CPLR § 5101

This Section currently sets forth how Article 52 may be used to enforce judgments and orders directing the payment of money. The measure clarifies that motion costs may be recovered when either a judgment or order is enforced under Article 52. The measure also revises the reference to support orders that may be enforced under Article 52 to reference the orders of support described in CPLR § 5205(p). That new section addresses the extent to which benefits from pension/profit sharing plans, individual retirement arrangements, and similar plans and arrangements are exempt from creditor claims.

CPLR § 5205(c)

This subdivision of the Section currently protects from creditor claims undistributed benefits and benefit payments from Roth or traditional individual retirement accounts, Keogh plans, 457 plans, or corporate retirement or other plans that meet the requirements of IRC 401(a). The measure deletes all those benefit protections in favor of broader protections contained in a new subdivision 5205(p), and changes the subdivision title from "Trust Exemptions," to the more accurate "Exemptions for Trust Property." The measure, however, continues to treat those enforcing support orders of support or QDROs as exception creditors. The measure adds fraudulent conveyance exception creditors, who are restricted to those described in Article 10 of the Debtor and Creditor Law.

CPLR § 5205(d)

The subdivision of the Section currently protects from creditor claims any benefit payments from Roth or traditional individual retirement accounts, or from Keogh plans, retirement or other plans described in CPLR § 5205(c). No exception creditors are set forth in the Section. The measure deletes all those benefit protections in favor of broader protections contained in a new subdivision 5205(p), and changes the subdivision title from "Income Exemptions," to the more accurate "Exemptions for Trust Income and Payments."

CPLR § 5205(l)

The subdivision of the Section currently protects from creditor claims $2,850 of funds in a bank account if any payments reasonably identifiable as statutorily exempt payments are deposited electronically or by direct deposit into such account 45 days before the service of a restraining notice. The New York State Superintendent of Financial Services shall make cost-of-living updates of the protected amount. The amount was updated as of April 1, 2018 to $2,850 and will be again updated as of April 1, 2021. The sample list currently includes "pension" payments. The measure limits the exemption to natural persons in order to be consistent with CPLR §§ 5222, 5222-a, and 5232, that apply the exemption only to natural persons. The measure also adds to the sample list payments from profit-sharing plans, 401(k) plans, 403(b) plans, 457(b) plans, individual retirement accounts, and individual retirement annuities. The measure clarifies that the provision does not affect exemptions for pension or profit-sharing benefits, public assistance benefits, workers' compensation benefits, or unemployment compensation benefits.

CPLR § 5205(m)

The subdivision of the Section currently seeks to assure that CPLR § 5205(l) does not limit the exemption rights that the judgment debtor otherwise has. The measure amends the Section to be more consistent with the similar sentence currently in CPLR § 5205(l). The measure clarifies that the provision does not affect exemptions for pension or profit-sharing benefits, public assistance benefits, workers' compensation benefits, or unemployment compensation benefits by referencing the description of those benefit payments in CPLR § 5205(l).

CPLR § 5205(p)

There is currently no such subdivision of the Section. The measure adds this new subdivision to protect from creditor claims the debtor's undistributed benefits under the terms of a tax-qualified pension, profit-sharing, or stock bonus plan, an individual retirement account or annuity, a 403(b) plan, or a Section 457(b) plan. Plan beneficiaries receive the same protections as plan participants. The section does not address benefits from New York government plans other than 457(b) plans. However, there are no protections to the extent that benefits are subject to the IRC excise tax for excess contribution. There are four kinds of exception creditors: (1) those overturning fraudulent conveyances, (2) those enforcing family support orders (3) those enforcing a qualified domestic relations order, as defined under the IRC ("QDRO"); (4) those enforcing domestic relations orders that meet the substantive and notice requirements of a QDRO, for arrangements, such as individual retirement accounts, to which the IRC definition of a QDRO is not applicable. The family support orders are described using the definitions set forth in CPLR § 5241, which addresses income executions to enforce support obligations.

CPLR § 5205(q)

There is currently no such subdivision of the Section. The measure adds this new subdivision to protect from creditor claims during and after their distribution the debtor's benefits that are protected before their distribution in CPLR § 5205(p). Plan beneficiaries receive the same protections as plan participants. Post-distribution protections apply to property traceable to the distribution. There are the same four exception creditors as in CPLR § 5205(p). In particular, domestic relations orders pertaining to benefits under the terms of a plan or arrangement described in subdivision (p) are enforceable against a benefit distributions even if the order arises after the distribution.

CPLR § 5222(e)

The subdivision of the Section currently sets forth the form of the required due-process notice of possible exemptions that creditors must provide in concert with the service of any notices restraining the debtor or a party with the debtor's property from selling, assigning or transferring the debtor's property. The notice also must be provided in concert with levies by execution. CPLR § 5232(c). The measure revises the sample list of exemptions to keep the similar ones together, and explicitly includes profit-sharing plan benefits, 401(k) plan benefits, 403(b) plan benefits, Section 457(b) plan benefits, individual retirement account benefits, and individual retirement annuity benefits, annuity contract benefits, as well as pension plan benefits. The measure also adds to the notice an explicit statement that the restrained/levied assets may be released or returned if the debtor can show that he or she has satisfied the judgment or complied with the order. Lay people are more likely to understand that restrained property is described as frozen rather than being held by an unspecified person.

CPLR § 5222(f)

The subdivision of the Section currently defines the orders of support that may be enforced with restraining notices. The measure revises the definition of such orders to coincide with the description set forth in CPLR § 5205(p).

CPLR § 5222(i)

The subdivision of the Section currently provides that restraining notices against a debtor's bank account are not effective for amounts less than or equal to, the product of two hundred forty and the applicable minimum hourly wage, absent a court determination that the amounts are unnecessary for the debtor's reasonable requirements. The measure defines the applicable minimum hourly wage as the highest general state minimum wage so as to give the broadest debtor protections in the same manner that the lowest general state minimum wage is used to make unemployment compensation available to the broadest set of unemployed individuals. The measure limits the exemption to natural persons in order to be consistent with CPLR §§ 5222-a, and 5232, that apply the exemption only to natural persons.

CPLR § 5222-a (b) 4.

The subdivision of the Section currently sets forth the form of the due-process notice of possible exemptions that creditors must provide in concert with the issuing of any restraining notices or notices of execution by levy affecting a natural person's account at a banking institution. The measure adds a description of the effect of an execution by levy. The measure revises the sample list of the funds that are exempt from such restraint to match those in the CPLR § 5222(e) notice, explicitly includes the fixed amount of bank deposits that is not subject to executions pursuant to CPLR § 5205(l) and all the kinds of benefits set forth in CPLR § 5205(l), rather than referring only to funds from pensions and retirement accounts, and adds a reference to the CPLR § 5205(i) exemption based on the minimum wage. The measure also provides for regular cost-of-living updates of the exempt amount arising from reasonably identifiable exempt deposits to a bank account. The amount was updated as of April 1, 2018 to $2,850 and will be again updated as of April 1, 2021. The measure also adds to the notice an explicit statement that the restrained assets may be released if the debtor can show that he or she satisfied the judgment or complied with the order.

CPLR § 5226.

The subdivision of the Section currently describes installment-payment orders, which are applicable to payments received by a judgement debtor, and how such orders may be obtained. The measure also explicitly provides that the benefit distributions that are exempt from the satisfaction of a money judgment under CPLR § 5205(q), are not subject to installment-payment orders. The measure clarifies that the provision does not affect exemptions for pension or profit-sharing benefits, public assistance benefits, workers' compensation benefits, or unemployment compensation benefits. Such benefits, however, may be used to determine the judgment debtor's income when the court determines the extent to which orders apply to non-exempt payments.

CPLR § 5230(a).

The subdivision of the Section currently specifies the form of executions. The measure clarifies the content of such notices and provides that the fixed amount of bank deposits that is not subject to executions pursuant to CPLR § 5205(l) is subject to cost-of-living updates. By providing that the banking exemption notices need only be part of executions on the judgment debtor's accounts with a banking institution, the notice will be less confusing if it is part of an execution on the judgment debtor's other assets. The measure also relies on the CPLR § 5222(i) definition of the applicable minimum hourly wage as the highest general state minimum wage and thereby maximizes the bank account balance that is not subject to restraint or execution in the same manner that the legislature chose to use the lowest general state minimum wage to determine unemployment compensation eligibility and thereby provide the benefit to the broadest set of unemployed individuals when it introduced multiple general minimum wages.

CPLR § 5230(e).

The subdivision of the Section currently defines the orders of support that may be enforced with an execution. The measure revises the definition of such orders of support to coincide with the description set forth in CPLR § 5205(p).

CPLR § 5231(b).

The subdivision of the Section currently describes the extent which an income execution may be applied to payments to a judgment debtor. The measure revises the description to include the term "gross income," which is used in the statutory notice presented in subdivision (g) of the Section. The measure also explicitly provides that the payments that are exempt from the satisfaction of a money judgment under CPLR § 5205(q), are not subject to execution. The measure clarifies that the provision does not affect exemptions for pension or profit-sharing benefits, public assistance benefits, workers' compensation benefits, or unemployment compensation benefits by referencing the description of those benefit payments in CPLR § 5205(l). The measure also relies on the CPLR § 5222(i) definition of the applicable minimum hourly wage as the highest general state minimum wage and thereby maximizes the weekly disposable earnings that are not subject to garnishment in the same manner that the legislature chose to use the lowest general state minimum wage to determine unemployment compensation eligibility and thereby provide the benefit to the broadest set of unemployed individuals when it introduced multiple general minimum wages. The measure also limits these exemptions to natural persons.

CPLR § 5231(c).

The subdivision of the Section currently defines a judgment debtor's earnings and disposable earnings that are used to limit the extent of an income execution. The measure expands the definition of earnings to include employer-plan payments from profit-sharing plans, 401(k) plans, 403(b) plans, 457(b) plans, rather than referring only those from retirement or pension plans. The measure also adds a definition of gross income, which is consistent with the statutory notice presented in subdivision (g) of the Section.

CPLR § 5231(g).

The subdivision of the Section currently sets forth the due-process notice to a judgment debtor that must be part of an income execution. The measure revises the notice to be more consistent with the substantive provision of CPLR § 5231 and the due-process notices set forth in CPLR §§ 5222, and 5222-a.

CPLR § 5232(d).

The subdivision of the Section currently defines the orders of support that may be enforced with levies upon personal property. The measure revises the definition of such orders to coincide with the description set forth in CPLR § 5205(p).

CPLR § 5232(e).

The subdivision of the Section currently exempts from levies by service of an execution $2,500 of funds in a bank account if any payments reasonably identifiable as statutorily exempt payments are deposited electronically or by direct deposit into such account 45 days before the service of a restraining notice. The measure provides for cost-of-living updates for such amount.

The measure clarifies that the provision does not affect exemptions for pension or profit-sharing benefits, public assistance benefits, workers' compensation benefits, or unemployment compensation benefits by referencing the description of those benefit payments in CPLR § 5205(l). The measure also relies on the CPLR § 5222(i) definition of the applicable minimum hourly wage as the highest general state minimum wage and thereby maximizes the bank account balance that is not subject to restraint or execution in the same manner that the legislature chose to use the lowest general state minimum wage to determine unemployment compensation eligibility and thereby provide the benefit to the broadest set of unemployed individuals when it introduced multiple general minimum wages. The measure also limits these exemptions to natural persons.

CPLR § 5241(a).

The subdivision of the Section currently sets forth the definition used to determine how to enforce an order of support. The measure also revises the definition of income and income payor limits to include payments from all the items set forth in CPLR § 5205(l), rather than referring only to payments from pension and retirement plans or from profit-sharing plans.

CPLR § 5241(b).

The subdivision of the Section currently sets forth the procedure for the issue of income executions to enforce an order of support. The measure clarifies that the executions in paragraph (1) are income executions, unlike the executions for medical support enforcements in paragraph (2).

Dr. & Cr. L. § 282

The Section currently protects benefits in bankruptcy, to the extent that the benefits are protected by the CPLR, Ins. L., or are rights to receive or are an interest, in non-retirement payments or interests in payments from profit-sharing plans, stock bonus plans, pension plans, individual retirement accounts or annuities, employer stock ownership plans, or 457 plans. The second set, unlike the first set, is not restricted to plans and accounts that are tax-qualified or are otherwise limited in tax benefits.

The measure does not change the CPLR reference but replaces the additional protection for benefits from plans and accounts that are not tax-qualified by a protection limited to (1) any distributions from tax-qualified plans or Section 403(b) plans that are New York government plans, and (2) property traceable to such distributions, including post-distribution earnings. The CPLR does not currently protect such government benefits.

Dr. & Cr. L. § 283

The Section currently sets forth an aggregate individual bankruptcy exemption list for certain annuity contracts and personal property. The measure provides that the aggregate limit does not apply to benefits from contracts that the CPLR governs pursuant to the Insurance Law, such as pension benefits funded with individual annuity contracts.

EPTL § 7-3.1

The Section currently permits a creditor to obtain benefits arising from an individual's disposition in trust for the use of that individual. There is currently an exemption for contributions to a Roth or traditional individual retirement account, Keogh plan, or corporate retirement or other plan that meet the requirements of IRC § 401(a). However, the Section does not impair the rights an individual otherwise has under the terms of a QDRO.

The measure clarifies that a creditor may enforce its claims using any of the CPLR enforcement tools applicable to the debtor's property, including turnover provisions, to the extent that a beneficiary's trust interest attributable to property contributed by the debtor. The benefits of a debtor that are protected before their distribution in CPLR § 5205(p) are treated as not subject to the enforcement mechanisms described in EPTL § 7-3.1(a). If EPTL § 7-3.1(b) explicitly references CPLR § 5205(p) there is no need to repeat or rephrase any of the provisions of such CPLR subdivision. This section overrides other debtor protections, so it is useful to add a paragraph that cross references and explicitly describes CPLR § 5205(p) as providing debtor protections for the benefits specified therein.

Ins. L. § 3212

The Section currently protects benefits arising under an annuity or other contract from an insurance company. Benefits are explicitly protected before their distribution from creditor claims other than those arising from a fraudulent conveyance. After their distribution, benefits are protected from creditor claims other than those arising from a fraudulent conveyance. In addition, if the creditor can show the payment would be just and proper, after due regard for the reasonable requirements of the judgment debtor, and his family, if dependent upon the judgment debtor, the creditor may enforce his claim. The statute does not mention the enforceability of domestic relations orders.

The measure provides that the Section does not apply to a plan or arrangement funded with annuity/insurance contracts, if the plan or arrangement was established to comply with the tax requirements set forth in CPLR 5205 §§ (p) and (q). This annuity/insurance contract carve-out would include annuity contracts distributed by a tax-qualified plan to pay a person's accrued plan benefits. However, if such plan or arrangement does not comply with those requirements, the plan or arrangement will be treated as funded with a trust. Thus, it would be subject to the usual self-settled trust rules, which do not apply to other annuity/insurance contracts.

LEGISLATIVE HISTORY:

None. New proposal.

BUDGET IMPLICATIONS:

Although it is anticipated that this will involve a very small number of cases, the state will find it easier to collect debts because the debtor exemption for benefits under the terms of individual

retirement arrangements will no longer apply to contributions subject to the federal excise tax for excess contributions.

EFFECTIVE DATE AND SEVERABILITY:

The bill will govern non-bankruptcy enforcement actions begun after the effective date, and bankruptcy petitions filed after the effective date. The bill includes a severability section.

MEMORANDUM IN SUPPORT OF LEGISLATION

INTRODUCED AT THE REQUEST OF:

TITLE OF BILL:

AN ACT to amend the civil practice law and rules, the debtor and creditor law, the estates, powers and trusts law, and the insurance law to harmonize the provisions governing how a person's creditor may enforce its claims against the person's benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, an individual retirement account or annuity, or similar plan or arrangement.

SUMMARY OF SPECIFIC PROVISIONS:

These amendments are intended to harmonize in an equitable and unambiguous fashion the debtor protections for benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or under the terms of a similar plan or arrangement in CPLR §§ 5101, 5205, 5222, 5222-a; 5226, 5230, 5231, 5232, and 5241; Dr. & Cr. L. §§ 282 and 283; EPTL § 7-3.1; and Ins. L. § 3212. The amendments provide that:

- A person's protected benefits would be any benefit to which such person is entitled under the terms of (a) a tax-qualified pension plan, profit-sharing plan, or stock bonus plan, (b) an individual retirement account or annuity or (c) a specified plan or arrangement receiving similar favorable treatment under the federal tax law. The same protections would apply to an individual who is a participant in such a plan or arrangement, and to a beneficiary of such individual. The funding vehicle for the plan or arrangement is irrelevant. However, there is no protection for any benefit derived from contributions treated as excess contributions for purposes of the federal income tax. Benefits from New York government plans, other than 457(b) plans, would be protected under sections addressing those plans and the Dr. & Cr. L.
- A person's creditors, other than the person's exception creditors, would not be able to enforce their claims against any of the person's protected benefits before their distribution, upon their distribution, or after their distribution.
- A person's exception creditors would be those that either are enforcing specified orders of support or domestic relations orders, or are adversely affected in a specified manner by the creditor's contributions to a plan or arrangement described above.

- The due process notice and the substantive provisions for restraining notices, income executions, non-income executions and levies against the bank account or other personal property of a judgment debtor, insofar as the notice and provisions pertain to benefits under the terms of a tax-qualified pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or under the terms of a similar plan or arrangement, would be clarified and be made consistent with each other, and with the exemption provisions governing those benefits.

JUSTIFICATION:

I. LAWS BY WHICH CREDITORS MAY ENFORCE JUDGMENTS

An exception creditor of a debtor may use at least five major mechanisms to satisfy a judgment, under New York State law, against benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, or of an individual retirement arrangement. For purposes of this paragraph, a "plan" shall denote such a plan or arrangement. First, a creditor may (1) restrain the plan from transferring a portion of the debtor's benefit out of the plan, or (2) restrain a third party that holds the debtor's personal property that has been acquired with distributed plan benefits from transferring that property. CPLR §§ 5222 and 5222-a. Second, a creditor may (1) compel the plan to turn over a portion of the debtor's undistributed benefits, or (2) compel a third party to turn over a portion of the debtor's personal property acquired with distributed plan benefits that the third party holds. CPLR § 5225. Third, a creditor may compel the debtor to make installment payments from the money payments that are being made or will be made to the debtor. CPLR § 5226. Fourth, a creditor may use an income execution to garnish a portion of the plan's benefit payments to the debtor. CPLR §§ 5230 and 5231. Fifth, a creditor may levy upon a portion of the debtor's undistributed plan benefits or upon a portion of the debtor's personal property acquired with distributed plan benefits. CPLR § 5232.

It does not appear that a debtor's creditors may use SCPA § 209 to enforce claims in Surrogate's Court against the debtor's benefits under a pension plan, profit-sharing plan, stock bonus plan. That section gives Surrogate's Court jurisdiction over matters pertaining to lifetime and testamentary trusts. Trusts that provide benefits from a pension plan, profit-sharing plan, or a stock bonus plan, are generally used for the sole purpose of paying such benefits. Such trusts are explicitly excluded from the definition of lifetime trusts. SCPA § 103(31). Thus, the benefits

are not provided by lifetime trusts. Such benefits are rarely, if ever, provided by testamentary trusts.

II. NEW YORK STATE LAWS PROTECTING AN INDIVIDUAL'S BENEFITS UNDER THE TERMS OF A PENSION/STOCK BONUS/PROFIT-SHARING PLAN, OR AN INDIVIDUAL RETIREMENT ARRANGEMENT, OR UNDER THE TERMS OF A SIMILAR PLAN OR ARRANGEMENT FROM THE INDIVIDUAL'S CREDITORS

The proposed legislation would amend the following New York laws:

1. CPLR § 5101, which currently sets forth how Article 52 may be used to enforce judgments and orders directing the payment of money.

2. CPLR § 5205(c), which currently prevents a person's non-bankruptcy creditors from enforcing claims against some or all of that person's undistributed benefits or benefit payments from specified plans. The subdivision seems to protect benefits from an individual retirement account, a Keogh plan, a retirement or other plan established by a corporation, which satisfies the requirements of § 401(a) of the Internal Revenue Code of 1986, as amended ("IRC"), rollovers from such plans, or a plan that satisfies the requirements of IRC § 457. However, the statutory reference to Keogh plans is limited on its face to Keogh plans established by corporations, although corporations do not and may not establish Keogh plans. Thus, no Keogh plans seem to be covered by the protections, despite the statutory clause that protections pertain to a partner of an entity sponsoring a Keogh plan. Furthermore, this CPLR subdivision does not mention benefits from an individual retirement annuity, or an annuity plan that satisfies the requirements of IRC §§ 403(a) or 403(b).

3. CPLR § 5205(d), which currently prevents a person's non-bankruptcy creditors from enforcing claims against some or all of the benefit payments from specified plans. This CPLR subdivision protects benefits from an individual retirement account plan, or "part of a Keogh, retirement or other plan described in subdivision (c) of [CPLR § 5205(c)]." Again, there seems be no protection for

benefits from a Keogh plan, an individual retirement annuity, or an annuity plan that satisfies the requirements of IRC §§ 403(a) or 403(b).

4. CPLR § 5205(l), which currently protects from creditor claims $2,850 (the initial $2,500 has been increased by regular cost-of-living adjustments) of funds in a bank account if any payments reasonably identifiable as statutorily exempt payments are deposited electronically or by direct deposit into such account 45 days before the service of a restraining notice. Payments from pension plans are mentioned. However, there is no explicit mention of any of the similar plans or arrangements whose payments are exempt from creditor claims under CPLR § 5205(d). Unlike the two CPLR sections that explicitly prevent the enforcement of restraining orders or levies against such funds, or the two CPLR sections that explicitly require notice of this exemption, the exemption is not limited to individuals.

5. CPLR § 5205(m), which currently assures that CPLR § 5205(l) does not limit the judgment debtor's exemption rights, but is not consistent with similar language in that subdivision.

6. CPLR § 5222(e), which currently sets forth the form of the due process notice of possible exemptions that creditors must provide in concert with the service of any notices restraining the debtor or a party, other than a banking institution, with the debtor’s property from selling, assigning or transferring the debtor’s property. The notice also must be provided in concert with levies by execution. CPLR § 5232(c). The exemptions include money and property from pensions, but there is no mention of money of property from any other exempt plans or arrangements, such as from individual retirement accounts.

7. CPLR § 5222(f), which currently defines differently than in CPLR § 5241 the orders of support that may be enforced with levies upon personal property.

8. CPLR § 5222(i), which currently provides that restraining notices against a debtor’s bank account are not effective for amounts less than or equal to, the product of two hundred forty and the applicable minimum hourly wage, absent a

court determination that the amounts are unnecessary for the debtor's reasonable requirements. The applicable minimum hourly wage is, however, not defined.

9. CPLR § 5222-a(b) 4, which currently sets forth the form of the due process notice of possible exemptions that creditors must provide in concert with the issue of any execution notices or restraining notices affecting a natural person's account at a banking institution. The exemptions include payments from pensions and retirement accounts, but there is no mention of payments from the plans or arrangements that are exempt under CPLR § 5205(d), such as profit-sharing plan benefit payments. There is also no mention in the notice that the debtor may prevent the execution or the restraint by overturning the judgment or order giving rise to the execution notice or the restraining notices.

10. CPLR § 5226, which currently describes installment payment orders, which are applicable to payments received by a judgement debtor, and how to obtain such orders. There is no mention that some payments received by judgment debtors may not be subject to installment payment orders.

11. CPLR § 5230(a), which currently specifies the form of executions. Judgment creditors must give notice that a fixed amount of bank deposits is not subject to creditor claims. However, the section does not describe the applicable exempt amount, its cost-of-living adjustments, or all the applicable prerequisites.

12. CPLR § 5230(e), which currently defines differently, than in CPLR § 5241, the orders of support that may be enforced with levies upon personal property.

13. CPLR § 5231(b), which currently sets forth the extent to which an income execution may be applied to payments to a judgment debtor. The subdivision never uses the term "gross income," which is used in the required statutory notice presented in subdivision (g). The subdivision mentions that some payments may not be subject to income executions, but does not describe such exempt payments.

14. CPLR § 5231(c), which currently defines a judgment debtor's earnings and disposable earnings. The definitions limit the extent of an income execution. The definitions include payments from retirement or pension programs, but do not

mention payments from profit-sharing plans, 401(k) plans, 403(b) plans, or 457(b) plans.

15. CPLR § 5231(g), which currently sets forth the due process notice to a judgment debtor that must be part of an income execution. However, the notice is not consistent with the substantive provisions of CPLR § 5231 or the due process notices set forth in CPLR § 5222, or § 5222-a.

16. CPLR § 5232(d), which currently defines the orders of support that may be enforced with levies upon personal property differently than in CPLR § 5241.

17. CPLR § 5232(e), which currently references the CPLR § 5205(l) exemption from levies by service of an execution $2,500 of funds in a bank account, if any payments reasonably identifiable as statutorily exempt payments are deposited electronically or by direct deposit into such account 45 days before the service of a restraining notice. However, the only mention of the cost-of-living update of this amount is in CPLR § 5205(l).

18. CPLR § 5241(a), which that currently sets forth the definition of an order of support. Orders of support do not currently include orders for the recovery of counsel fees used to enforce a past-due order. The statute currently provides that such orders govern payments from pension or retirement programs, but does not mention payments from profit-sharing plans, 401(k) plans, 403(b) plans, or 457(b) plans.

19. CPLR § 5241(b), which currently sets forth the procedure for the issue of executions to enforce an order of support. The measure clarifies that the executions in paragraph (1) are income executions, whereas the executions in paragraph (2) are limited to the provision of health care insurance.

20. Dr & Cr. L. § 282, which currently prevents an individual's bankruptcy creditors from enforcing claims against some of that individual's undistributed plan benefits, benefit payments, the individual's right to receive such payments, or the individual's interest in such payments. This section protects the distributed and undistributed benefits described in CPLR § 5205 and Ins. L. 3212, as well as non-

retirement payments from a pension plan, profit-sharing plan, individual retirement arrangement, or from a similar plan or arrangement. The requirement that the plan or arrangement comply with any IRC requirements is limited to those plans or arrangements that meet the section's narrow self-settled-like criteria. The section does not mention government plans that are protected from creditors by statutes other than the CPLR or the Ins. L.

21. Dr & Cr. L. § 283, which currently sets forth an aggregate individual bankruptcy exemption for certain annuity options and personal property. The section's annuity provisions are not affected by whether the annuity contracts fund a plan and arrangement described in CPLR § 5205. Thus, protected benefits from such plans and arrangements funded with annuities are limited in aggregate amount for bankruptcy purposes, but those funded with trusts are not so limited.

22. EPTL § 7-3.1, which currently prevents an individual's non-bankruptcy creditors from using the self-settled rules to enforce claims against the contributions made by or on behalf of the individual to an individual retirement account, Keogh plan, or to a retirement or other plan established by a corporation that satisfies the requirements of IRC § 401(a). Again, the section does not mention individual retirement annuities, or annuity plans that satisfy the requirements of IRC §§ 403(a) or 403(b).

23. Ins. L. § 3212, which currently prevents an individual's non-bankruptcy creditors from enforcing claims against some of the benefits from an annuity or other insurance company contract before and after their distribution. However, if the creditor can show the payment would be just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon the judgment debtor, the creditor may enforce his claim. The protections of the Ins. L section, unlike the CPLR and the EPTL Sections, do not depend on whether the contracts are part of a plan intended to comply with any IRC requirements.

The legislative history of these statutory provisions is summarized in the annexed memorandum entitled History of Statutory Protections for a Debtor's Benefits under the terms of a Pension, Profit-Sharing, Stock Bonus Plan, Individual Retirement Arrangement, Similar Plan,

or Arrangement ("History of Debtor Benefit Protections"). Many similar benefits from New York government employee benefit plans, as discussed therein, are protected from creditors outside bankruptcy under statutes that the proposed legislation does not amend. For example, benefits from the New York State Teachers Retirement System trusteed plan are protected by N.Y. Educ. L. § 524, rather than by the CPLR. In bankruptcy, however, the Debtor and Creditor law provisions that would be amended by the proposed legislation would explicitly protect such government benefits.

III. TAX TREATMENT OF A TAX-QUALIFIED PENSION, PROFIT-SHARING, STOCK BONUS PLAN, OR FROM SIMILAR PLANS AND ARRANGEMENTS, AND THEIR RESPECTIVE BENEFITS

Pension plans, profit-sharing plans, stock bonus plans, and similar plans and arrangements that comply with the IRC tax-qualification rules, which include limits on plan contributions/benefits, are tax-exempt. Employers may deduct their contributions to such plans. Tax deferrals are also provided for a participant in such a plan or arrangement, and for the participant's beneficiary or beneficiaries. Many, but not all of, these plan benefits are currently protected by one or more of the statutes that would be amended under the proposal. Thus, it is useful to understand those requirements and the tax advantages of meeting those requirements.

These requirements and tax advantages are discussed in detail in the attached memorandum entitled, Debtor Benefit Protection Tax Memorandum.

A pension, profit-sharing, or stock bonus plan, whose benefits are funded by an employer with a trust that meets the requirements of IRC § 401(a) shall be referred to as a tax-qualified trust plan. Such plans may be funded with custodial accounts, group annuity contracts, or other insurance contracts. IRC § 401(f). A pension, or profit-sharing plan, whose benefits are funded by an employer with individual annuity contracts issued by insurance companies, that meet the requirements of IRC § 404(a)(2), shall be referred to as a tax-qualified annuity plan. A pension, profit-sharing, or stock bonus plan that is a tax-qualified trust plan or a tax-qualified annuity plan shall be referred to as a tax-qualified plan. Before the enactment of the Self-Employed Individuals Tax Retirement Act of 1962, Public Law 87-79 § 3(b), 76 STAT. 809, at 819 (1962), sole proprietors and partnerships could not sponsor tax-qualified plans. That legislation

permitted a sole proprietor or a partnership to sponsor such plans, which were known as Keogh (HR-10) plans. Such a plan could be either a tax-qualified trust plan or a tax-qualified annuity plan.

If deferred compensation benefits are funded with annuity contracts issued by insurance companies or custodial accounts for regulated investment company stock that meet the requirements of IRC § 403(b), such plans shall be referred to as "§ 403(b) tax-deferred compensation arrangements," or "Section 403(b) plans." They may be sponsored only by a public educational organization or a tax-exempt organization. Unlike tax-qualified annuity plans, these plans are established to permit an employee to make pre-tax contributions of a portion of his or her compensation to a plan, and may, but need not, permit additional employer contributions.

Individual retirement accounts are funded with trusts or custodial accounts. IRC §§ 408(a) and (h). Individual retirement annuities are funded with annuity or endowment contracts issued by insurance companies. IRC § 408(b). Plans or arrangements that are funded with individual retirement accounts and/or internal retirement annuities shall be referred to as individual retirement arrangements. Benefits funded with individual retirement arrangements may be designated as Roth individual retirement arrangements. IRC § 408A(b). Distributions from such arrangements, unlike other individual retirement arrangements are generally not subject to any income tax. IRC § 408A(d)(1).

There are limits on the contributions that may be made to tax-qualified plans or to individual retirement arrangements. IRC §§ 401(a)(16), (17), and IRC §§ 408(a), (b), respectively. Contributions in excess of the plan limits prevent plans from qualifying for favorable tax treatment. In contrast, the tax-exemption of the earnings of individual retirement arrangements is unaffected by the amount of contributions, but an annual 6% excise tax is imposed on a participant if "excess contributions" remain with the arrangement. IRC § 4973/

If deferred compensation benefits are provided by tax-exempt organizations or state and local governments using a plan that meet the requirements of IRC § 457(b), then such plan shall be referred to as a Section 457(b) plan. If tax-exempt organizations or state and local governments provide deferred compensation benefits with a plan that does not meet the requirements of IRC § 457(b) but is subject to the requirements of IRC § 457, then such plan

shall be referred to as a Section 457(f) plan. Section 457 plans shall refer to those plans that are either a Section 457(b) plan or a Section 457(f) plan.

IV. AIMS OF PROPOSED AMENDMENTS

The proposed legislation addresses the following major issues with the current statutes:

1. Different New York statutes protect different benefits to different extents. In some cases, the statutes are in apparent conflict. For example, are benefits that are rolled over from a pension, profit sharing or stock bonus plan that is qualified under IRC § 401(a) to the same kind of plan governed by CPLR § 5205(c) or (d)? The former subdivision sets forth exception creditors, but the latter subdivision sets forth none. Similarly, are benefits under a pension, profit sharing or stock bonus plan that is qualified under IRC § 401(a) and funded with a group annuity contract governed by CPLR § 5205, or by N.Y. Ins. L. § 3212? The latter, but not the former, permits creditors to obtain such portion of the benefit payments as to the court may appear just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him.

2. The CPLR and EPTL provisions describe the protected benefits as those arising under a "retirement plan or other plan" complying with specified IRC Sections. This may not make apparent that the statutes protect non-retirement/savings benefits, such as (a) benefit payments to participants before their retirement, or (b) benefit payments to beneficiaries who do not receive benefits because of their retirement. *Cf. Clark v. Rameker*, 573 U.S. 122 (2014) (holding that under the federal bankruptcy law, which differs from the NYS statutes, individual retirement account beneficiaries are not entitled to the protections from their creditors that are available to the creators of such accounts). The full extent of the benefit protections would be clearer if the New York statutes, instead, consistently described the protection of "benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, individual retirement arrangement, or a similar plan or arrangement."

3. By not explicitly providing that the proceeds of benefit payments are protected, it may not be apparent that CPLR § 5205(d) protects benefit distributions after their receipt. Instead, this post-distribution protection is implied by providing at CPLR § 5205(d) 1 that creditors may only reach benefit payments if those payments are "unnecessary for the reasonable requirements of the debtor and his dependents." It is also why the notice prescribed in CPLR § 5222-a (b) 4 includes in the list of exempt bank funds, payments from a debtor's pension or retirement accounts that have been deposited in the debtor's bank account.

4. By referring to benefits from an individual retirement account, but not benefits from an individual retirement annuity, the CPLR and EPTL protections do not appear to apply to the latter benefits. Instead, the more limited debtor protections of the Ins. L. govern those benefits. There seems to be no compelling reason for failing to protect such widely-held benefits to the same extent as those from individual retirement accounts.

5. By explicitly providing that participant contributions to a tax-qualified plan, such as to a 401(k) plan, by owner-employees result in protected benefits under the CPLR and EPTL, but not mentioning contributions by participants who are not owner-employees to tax-qualified plans, it is arguable that the CPLR and EPTL protections do not apply to the benefits of such participants. There seems to be no compelling reason for failing to protect explicitly such widely-held benefits.

6. By providing in the CPLR and EPTL that only non-support orders that are qualified domestic relations orders, as defined under the IRC ("QDROs"), override the benefit protections, it appears that non-support orders, such as those that divide marital property, may not be enforced against the individual retirement arrangement benefits referenced in those sections. This is because the IRC QDRO definition does not apply to benefits from such arrangements. There seems to be no compelling reason for failing to permit the enforcement of non-support orders that have the same terms and effects on benefits under those arrangements that QDROs have on benefits under pension or profit-sharing plans for which the QDRO definition is applicable. However, by permitting payments pursuant to such QDRO-like orders, the recipient may be subject

to the same early-distribution tax penalties that would apply to early payments to the participant. In contrast, payments pursuant to a QDRO are not subject to those penalties.

7. By providing in CPLR § 5205(c) that the fraudulent conveyance provisions override the debtor protections for benefits from pension/profit-sharing benefits, but not the debtor protections for benefits from other trusts, the fraudulent conveyance provisions may appear not to override the latter. Such an implication is incorrect. The fraudulent conveyance doctrine overrides the latter. *See e.g., Jensen v. Jensen*, 256 A.D.2d 1162 (N.Y. App. Div. 4th Dep't 1998) (holding that fraudulent conveyance rules void a transfer to testamentary trust).

8. By not providing in CPLR § 5205(d) that the protections for benefit distributions yield to a support order or a QDRO domestic-relations order, such orders do not appear to be enforceable against benefit payments that were made to the debtor before the issue of such orders to the benefit provider. In contrast, orders issued before the payment of such benefits are enforceable against such payments under CPLR § 5205(c), and thus also under CPLR § 5205(d) against the proceeds of such payments. There seems to be no compelling reason for failing to permit the enforcement of those post-distribution domestic relations orders.

9. By not providing in the CPLR or the EPTL that benefits under the terms of tax-qualified corporate plans funded with annuities are protected in the same manner as those funded with trusts, the former benefits are less protected than the latter. This is the case even though the latter serve the same purpose and are granted the same favorable income-tax treatment, and may be transferred between annuity plans and trusteed plans without any income-tax consequence. There seems to be no compelling reason for this difference.

10. By not providing in the CPLR or the EPTL that benefits from Section 403(b) plans, such as many savings plans established by public schools or tax-exempt organizations, are protected to the same extent as those from tax-qualified 401(k) plans, the former benefits are less protected than the latter. This is the case even though benefits from both kinds of plans serve the same purpose, are granted the same

favorable income-tax treatment, and may be transferred between such plans without any income-tax consequence. There seems to be no compelling reason for the difference.

11. By limiting in the CPLR and EPTL the protection of benefits from Keogh (H.R.10) plans to those plans established by corporations, no Keogh plan benefits may be protected because Keogh plans do not include plans established by corporations.

12. By not providing in the CPLR or the EPTL for an explicit definition of a "Keogh (H.R.10) plan," the extent of the protections for benefits under the terms of Keogh plans is unclear. The CPLR does not explicitly limit Keogh plans, like corporate plans, to IRC § 401(a) plans. This raises a question about the extent of protection for Keogh plan benefits. On the one hand, Keogh plans may be funded with annuities, and thus be subject to the CPLR, but on the other hand, benefits from plans funded with annuities are subject to the Ins. L. which provides less protection for distributed benefits. Further, the concept of a "Keogh (H.R. 10) plan" has long been abandoned under the IRC, so that the reference itself is confusing.

13. By not providing in the CPLR, the Dr & Cr. L., or the EPTL, that a debtor who makes contributions that exceed the deductible limit under the Code to individual retirement arrangements or Section 403(b) plans is not subject to creditor claims to the extent of such excess, debtor protections are provided for unlimited contributions to such an arrangement or plan. This is because excess contributions do not affect the tax exemptions of such plans or arrangements, although they cause the participant/beneficiary of the plan or arrangement to incur an excise tax. In contrast, a violation of the contribution limits for tax-qualified plans, prevents such plans from being tax-qualified. Thus, the benefits of a participant/beneficiary would no longer be protected from creditor claims under the CPLR. It seems reasonable to prevent participants/ beneficiaries of such plans or arrangements from receiving debtor protections on such excess contributions, but to follow the IRC and continue to give them debtor protection for the remaining portion.

14. By not providing in the CPLR or the Dr & Cr. L. that a debtor who makes contributions to Section 457 plans is subject to creditor claims to the extent the contributions exceed the limits set forth in IRC § 457(b), debtor protections are

provided for unlimited contributions to such plans. It seems reasonable to prevent the abuses that may result from such contributions by limiting protections from creditor claims to contributions to plans that comply with the IRC 457(b) limits.

15. By not providing in the CPLR or the EPTL that s debtor's benefits under the terms of plans sponsored by trusts, limited-liability companies, and other forms of business, are protected to the same extent as benefits under the terms of plans sponsored by corporations, partnerships, or self-employed individuals. A debtor's benefits under the terms of the former plans are less protected than those under the terms of the latter plans. For example, these protections would not apply to a debtor's benefits under the terms of a tax-qualified trust plan sponsored by the New York Community Trust. Thus, employee contributions to the Trust's 401(k) plan could be treated as self-settled benefits subject to no debtor protections. In contrast, all a debtor's benefits under the terms of a tax-qualified annuity plan sponsored by any of those same entities would be protected under the Ins. L., which has no self-settled exception. There seems to be no compelling reason for such disparate treatment.

16. By providing in the CPLR and the EPTL for qualification under IRC sections, rather than in terms of the IRC subsections that set forth such requirements, there is ambiguity about the significance of the qualification requirements. For example, the tax qualifications for individual retirement accounts are set forth in subdivision (a) of IRC § 408, but the state statutes refer only to IRC § 408. However, this section contains additional requirements for other purposes in other subdivisions, such as the requirements for rollover contribution in subdivision (d).

17. By providing in the CPLR for a $2,500 bank account exemption if any reasonably identifiable exempt payments have been directly or electronically deposited into the debtor's account, the exemption is available for deposits of benefits from any of the plans or arrangements set forth in the CPLR. However, the illustrative list of such payments only mentions pensions. There is no mention of payments from profit-sharing plans or individual retirement arrangements. Thus, it may not be clear to all debtors and banks that reasonably identifiable funds from any such plan or arrangement trigger the $2,500 exemption.

18. By failing to consider the likely federal preemption of the CPLR § 5205(c) exemption from state-law enforcement mechanisms for the debtor's ERISA plan benefits, when protections for savings and retirement benefits were added to such section, the draftspersons may have made the debtor protections for distributed plan benefits in CPLR § 5205(d) inapplicable to such benefits. CPLR § 5205(d) limits the exemption of plan benefits that have been distributed to a debtor to those "from trust the principal of which is exempt under subdivision (c) [of CPLR § 5205]." However, a debtor's ERISA plan benefits are not treated as so exempt. Thus, there is no basis to protect a debtor's distributed benefits from ERISA plans from creditor claims.

19. By failing to consistently refer to cost-of-living updates for the $2,500 exemption for bank deposits, such adjustments may not be made consistently. For example, the CPLR provisions governing the enforcement of restraining notices, executions, and levies by executions refer to the $2,500 exemption for bank deposits, but do not mention the updates. Thus, the exemption may not be the updated $2,850 for all debtor protection purposes despite the reference to making updates to those sections in CPLR § 5205(l).

20. By failing to define the applicable minimum hourly wage in CPLR § 5222(i), the CPLR also fails to set forth the extent of either the garnishment exemption, or the banking exemption that is available regardless of whether there have been any exempt deposits.

21. By failing to provide consistent and clear illustrative lists of exemptions in statutory notices, an unsophisticated debtor may not be able to understand the extent of his or her applicable exemptions. The CPLR requires that due process notices accompany restraining notices or levies against a judgment debtor or a party with the debtor's property. All the statutory illustrative lists of exemptions mention payments from pension plans and retirement accounts. However, the lists do not mention payments from profit-sharing plans, section 401(k) plans, section 403(b) plans, or section 457(b) plans. Nor are the lists otherwise consistent. Thus, despite statements about being able to "go to court without an attorney," an unsophisticated debtor who reads the notice may not realize the extent of the exemptions, including that the benefit

payments from all the plans and arrangements set forth in the CPLR are exempt. Thus, the notices fail to achieve their stated purpose.

22. By not explicitly providing in the CPLR that levies and installment payment orders are not permitted against benefit distributions protected by CPLR § 5205(q), levies and installment payment orders may be issued against funds derived from those benefits and may not be challenged by an unsophisticated debtor.

23. By failing to provide in the CPLR that all the enforcement mechanisms enforce the same set of orders of support, the enforceability of the order may vary with the mechanism chosen. There seems to be no compelling reason for such disparate treatment.

24. By providing in the Ins. L. for different protections for benefits funded with insurance or annuity contracts than the CPLR and EPTL provide for the same benefits funded with trusts or custodial accounts, the different benefits are protected differently. There seems to be no compelling reason for such disparate treatment.

V. BASIC ELEMENTS OF PROPOSED AMENDMENTS

The proposed amendments to CPLR §§ 5101, 5205, 5222, 5222-a, 5226, 5230, 5231, 5232, and 5241, and EPTL § 7-3.1 provide consistent protection of similar benefits in all the statutes. Benefits are similar if they are similar to those from tax-qualified trust plans. The proposed amendments narrow the bankruptcy protections of Dr & Cr. L. § 282 to the same set of similar benefits, plus the similar government benefits not protected by the CPLR. The proposed amendments to Dr & Cr. L. § 283 and Ins. L. § 3212 provide that the similar benefits are all governed by the rules applicable to plans and arrangements funded with trusts rather those applicable to plans and arrangements funded with annuities. Most of the detailed changes are in the CPLR, and referenced in the other statutes for consistency. The amendments:

(1) Establish in new CPLR § 5205(p) a comprehensive list of the protected benefits and exception creditors. Under this provision, protection would be extended to benefits before their distribution from the terms of a tax-qualified pension, profit-sharing, or stock bonus plan, an individual retirement arrangement, a Section 403(b) plan, or a Section 457(b) plan.

An individual retirement arrangement and certain 403(b) plans, unlike a tax-qualified pension, profit-sharing or stock bonus plan, may be tax-qualified regardless of the amount of the contributions made by a plan participant. However, if a participant contributes more than the applicable contribution limit, an excise tax is imposed on the participant for each year such excess remains on deposit with the plan. IRC §§ 4973(b), (c) and (f). Thus, the proposed provisions would not protect from a debtor's creditors any such excess contributions by the debtor.

No distinction is made between the benefits of a plan participant and those of a plan beneficiary. Both receive the same protections.

New York government benefits, other than Section 457(b) plan benefits, are protected from creditor claims by other state statutes. Thus, in order to avoid any conflicts, the non-bankruptcy changes would not affect those other government benefits

(2) Establish in new CPLR § 5205(q) protections for benefits during and after their distribution by referencing "payments made from property considered under subdivision (p) as held in a trust created by or proceeded from a person other than the judgment debtor." Thus, this exemption would likely be unaffected if, as described in the History of Debtor Benefit Protections, ERISA would preempt the CPLR § 5205(p) exemption applicable to ERISA plan because the subdivision (q) exemption depends on the description of those plans rather than the exemption of their benefits. The post-distribution protections of the benefit payments would explicitly apply to property traceable to such payments. Thus, the creditor protections would not depend on the character of the investment of the benefit distributions, but the debtor's ability to trace the distributions.

(3) Define those domestic relations orders, other than support orders, that may be enforced against all such benefits and their payments outside of bankruptcy. The current definition for non-support orders does not appear to apply to an individual retirement arrangement. Thus, the current definition would be modified so that it would apply to all protected plan benefits. It would be clear that such orders, and only such non-support orders, may be enforced against these benefits.

(4) Define in new CPLR § 5205(p) the support orders that may be enforced against all such benefits and their payments outside of bankruptcy.

(5) Expand the illustrative list of exempt benefit payments in the exemption notices that are associated with restraining notices and execution notices. The list would go beyond pension plan payments to include protected payments from similar plans and arrangements, such as profit-sharing plans, 401(k) plans and individual retirement accounts. Thus, debtors, banks and other holders of the debtor's personal property would be clearly informed that the deposits of all such payments are protected from creditor claims.

(6) Clearly and explicitly reference the benefit protections in the provisions for implementing restraining orders, levies, income executions, and installment orders. Thus, it would be clear that all these exemptions apply to each of those creditor enforcement mechanisms.

The proposed amendment to Dr. & Cr. L. § 282(2) would clarify that a bankruptcy debtor's exempt property includes all benefits protected under the CPLR, as well as (1) benefit payments from government plans that are tax-qualified pension plans, profit-sharing plans, or a Section 403(b) plan, except to the extent that the plan contributions attributable to the debtor would be subject to an excise tax is imposed for each year such excess remains on deposit with the plan, and (2) property traceable to such payments . Thus, government benefits would receive the same explicit debtor protections in bankruptcy that benefits from similar plans sponsored by a private entity would receive.

The proposed amendment to Dr. & Cr. L. § 283 would clarify that annuity contracts intended to fund benefits from plans and arrangements that if funded with a trust would be protected by CPLR § 5205 are not subject to the Dr. & Cr. L. § 283 bankruptcy limits on annuity contracts.

The proposed amendment to EPTL § 7-3.1 would clarify that benefits that CPLR § 5205(p) protects from creditor claims except under the conditions set forth in such CPLR subdivision, are not treated as self-settled benefits under EPTL § 7-3.1.

The proposed amendment to Ins. L. § 3212(g) would clarify that CPLR § 5205 govern benefits from annuity or other insurance contracts intended to fund benefits from plans and arrangements that are addressed by CPLR § 5205 and EPTL § 7-3.1.

VI. THE APPROACH AND INTENDED CHANGES FOR EACH PROPOSED AMENDMENT

A. THE APPROACH AND INTENDED CHANGES FOR THE PROPOSED AMENDMENTS TO THE CIVIL PRACTICE LAW AND RULES

The proposed changes to CPLR § 5101 would clarify that motion costs may be recovered when either a judgment or order is enforced under Article 52. They also would clarify that the reference to support orders that may be enforced under Article 52 are those described in the new CPLR § 5205(p). Thus, enforceable orders of support would be defined consistently.

The proposed amendments to the non-bankruptcy exemptions of CPLR § 5205 would present a set of clear debtor protections consistent with the overriding aim of protecting a person's benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, or similar plan or arrangement, with similar benefit/contribution limits. They do this by:

1. Moving the provisions for benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, or similar plan or arrangement to new subdivisions (p) and (q). This would recognize that the trust and other funding vehicles differ significantly from the personal trusts that are the main subject of subdivisions (c) and (d). However, in recognition of the importance of providing for family support, subdivision (c) would continue to permit support orders to be enforced against an individual's trust interest addressed in subdivision (c). The reference to qualified domestic relations orders, which apply only to benefits from a pension plan, profit-sharing plan, stock bonus plan, or a similar plan, is retained to address those plans funded with trusts not subject to new subdivision (p). The fraudulent transfer exception provisions currently associated only with a pension plan, profit-sharing plan, stock bonus plan, or a similar plan or arrangement would be explicitly applicable to an individual's trust interest addressed by subdivision (c).

   On the one hand, the concept of principal and income, so rooted in traditional trust law, is totally incongruous with the concept and operation of a tax-qualified trust plan. The former requires that principal and income be separately accounted for, and distributions from a trust be taxed differently, depending on whether the distribution is of principal or income. Similarly,

distributions from ordinary annuities that are purchased by an individual are treated partially as a non-taxable return of the investment in the annuity and partially as income subject to tax. Such distinctions are also totally incongruous with the concept and operation of annuities used to fund a tax-qualified annuity plan.

Distributions from tax-qualified trusts and tax-qualified annuity plans make no such differentiation. Instead, all monies and property held in a tax-qualified trust or annuity plan and any income generated therefrom is treated as a single pool of assets, without such differentiation between principal and income. A distribution under the terms of a tax-qualified trust or a tax-qualified annuity plan is taxed, if at all, as current income, irrespective of whether, in a traditional trust sense, it is principal or income, or in a traditional annuity sense, it is a return of investment or of income.

On the other hand, for bankruptcy reasons, traditional trust concepts are useful. In particular, by characterizing all the funding vehicles for such plans as spendthrift trusts, those vehicles may thereby be excluded from the debtor's bankruptcy estate. 11 U.S.C. § 541(c)(2).

Using distinct sections permits more clarity about the difference in the treatment of personal trusts and of trusts and other vehicles used to fund plans and arrangements whose benefits deserve both favorable tax treatment and protection against creditor claims. Subdivision (p) governs undistributed benefits, and (q) governs distributed benefits and property that is traceable to such distributions. The new subdivisions both explicitly state that subdivisions (c) and (d) are inapplicable to their respective subject matters.

2. Setting forth the different plans in distinct subparagraphs in subdivision (p). This would make it easier to read than a long paragraph that is currently part of subdivision (c).
3. Changing the subdivision (d) title from "Income Exemptions," to "Exemptions for Trust Income and Payments." This would more accurately reflect the content of the subdivision.

4. Referring to a plan that meets the requirements that meets the requirements under IRC section 401(a) rather than under section 401. This would clarify sections 401(b) through 401(o) do not impose additional requirements, but help determine whether there is compliance with those requirements
5. Including explicitly individual retirement accounts and individual retirement annuities. This would clarify that there is protection for benefits from all individual retirement arrangements whether funded with trusts, annuities or endowment contracts of insurance companies.
6. Referring to an arrangement that meets the requirements for an individual retirement account or annuity under sections 408(a) or 408(b) rather than under section 408. This would clarify that all benefits from such accounts or annuities received the same protection from debtor claims. This would clarify that the statute would overrule *In Re Todd*, 585 B.R. 297 (N.D. N.Y 2018) (holding that the CPLR does not protect the benefits of a beneficiary of an individual retirement account from the creditors of such beneficiary).
7. Excluding explicitly excess contributions to individual retirement arrangements. This would be more consistent with the underlying idea that similar favorable tax treatment merits similar favorable debtor protections. Individual retirement arrangements, unlike tax-qualified pension, profit-sharing, or stock bonus plans, qualify for tax exemptions regardless of the amount of the participant contributions. The IRC otherwise limits contributions by imposing an annual excess contribution annual penalty tax under IRC § 4973. Thus, this limit may be used to limit debtor protection. Therefore, creditors, such as the NYS Department of Taxation, would not have to rely on fraudulent-conveyance concepts to overturn such transfers. *Cf.* May 25, 1994 Letter of Tax Commissioner, James W. Wetzler re the bill, which became L 1994, ch.127 (suggesting such an exception be added to the bill that added protection from creditor claims for the debtor's corpus in an individual retirement account).
8. Protecting benefits explicitly under the terms of both tax-qualified trust plans and tax-qualified annuity plans. This would assure that benefits from both

kinds of plan receive the same protection. This is more consistent than the current treatment with the underlying aim that similar favorable tax treatment merits similar favorable debtor protections.

9. Excluding explicitly government plans, as defined in a manner similar to ERISA § 3(32) without citing the section. This would assure that the proposed changes would not affect the New York statutes governing the rights of a non-bankruptcy creditors to benefits from New York government plans.
10. Protecting benefits explicitly from Section 403(b) plans, such as those offered by TIAA. This would be more consistent with the underlying idea that similar favorable tax treatment merits favorable debtor protections. These arrangements are often used by public schools and exempt entities to provide benefits similar to those from tax-qualified pension or profit-sharing plans.
11. Imposing the same kind of IRC § 4973 limit on the debtor protections for excess contributions to Section 403(b) plans as that applied to individual retirement arrangements. This would be more consistent than the current treatment with the aim to treat similar benefits similarly.
12. Limiting the protection of Section 457 plan benefits to Section 457(b) benefits. This would limit the protections to those plans that, like tax-qualified trust plans, limit plan benefits/contributions. Thus, it would be more consistent than the current treatment with the aim to treat similar benefits similarly.
13. Describing the protected property as "property held in a trust for the judgment debtor which has been created by or which has proceeded from a person other than the judgment debtor." This would be clearer and more consistent with the treatment of such property than the current statutory phrase, "all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is . . . shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor." The new description is also more similar to the phrase used in the existing paragraph 1 of subdivision (c).

14. Defining the different kinds of benefits in distinct paragraphs, rather than as part of a single paragraph. This would make it easier for a reader to understand the benefits that subdivision (p) protects.
15. Deleting the exclusion of any owner-employee from self-settled rules. This would eliminate any issue about whether omitted owner-employee categories, such as members of limit liability companies, are subject to the self-settled rules. The removal of this exclusion implies that none of the protected benefits are explicitly considered self-settled under the general rule. This is more consistent than the current treatment with the underlying aim that similar favorable tax treatment, which does not depend on whether a participant is an owner-employee, merits similar favorable debtor protections.
16. Deleting the exclusion of any owner-employee from self-settled rules. This would eliminate any issue about whether the benefits of a non-owner-employee participant directly deciding on his plan contributions to tax-qualified plan, such as to a 401(k) plan, are fully protected because there are no exceptions to the protection. This is more consistent than the current treatment with the underlying idea that similar favorable tax treatment merits similar favorable debtor protections. This would clarify that the statute would overrule *Fordyce v. Fordyce*, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974) (holding that the protections of the pre-1982 CPLR § 5205 without these provisions did not apply to benefits arising from participant determined contributions).
17. Replacing the exclusion of any owner-employee from self-settled rules with an exclusion for benefits in a plan or arrangement derived from contributions by or on behalf of a judgment debtor. This would leave no doubt that the protected benefits are not subject to those self-settled rules.
18. Deleting references to rollover contributions is consistent with the general principle that all plan benefits are protected unless resulting from excess contributions described above. This would clarify that it is irrelevant whether plan assets arise from a direct transfer between covered plans or from a rollover by a plan participant of distributed funds.

19. Deleting the reference to IRC § 408A, which defines Roth IRAs. This would eliminate a redundant reference without affecting the meaning of the provision. That IRC section defines Roth IRAs as a subset of individual retirement arrangements.
20. Referring to all statutory sections with numbers rather than the words for those numbers. This would make it easier for a reader to understand the provision.
21. Presenting the excluded domestic relation orders in distinct paragraphs rather than as part of a single long paragraph. This would clarify the distinction between a support order and such orders.
22. Defining support orders upon which a default has been established in CPLR § 5241for purposes of CPLR § 5205(c) and (p). This would result in a consistent statutory definition.
23. Permitting in subdivision (c) the enforcement of support orders and the use of the fraudulent conveyance statutes to override the protections for trusts not described in new subdivisions (p) and (q). This would continue the current treatment for those trust benefits that are not from a covered plan or arrangement, but also not from a self-settled trust.
24. Including explicitly the appropriate parts of the QDRO definition of IRC § 414(p). This would clarify that a QDRO-like exception applies to plans and arrangements not subject to that IRC section, such as individual retirement arrangements. In particular the order must satisfy the QDRO disclosure requirements, and the QDRO substantive rules that the order may only change plan terms in the specified manners. Thus, such individual retirement arrangement benefits may be divided in the same manner as tax-qualified plan benefits in the course of a marital dissolution.
25. Keeping the fraudulent conveyance exception creditor for additions to a covered plan or arrangement but deleting the exception creditors who interpose claims within the 90-day period concluding on the date of the addition. This would eliminate a *de minimis* class of creditors. The current inclusion of such creditors seems to serve no useful purpose. There is no legislative history

explanation for its original introduction in 1982 as discussed in the History of Debtor Benefit Protections.

26. Defining the fraudulent exception creditors for any additions to a trust that is not considered self-settled, rather than just for additions to a covered plan or arrangement. This would clarify that the fraudulent transfer provisions are not limited to additions to a covered plan or arrangement.
27. Referring in subdivision (q) to "payments made from property considered under subdivision (p) as held in a trust created by or proceeded from a person other than the judgment debtor," rather than to principal that is exempt. This would clarify that all plan benefit distributions are protected in subdivision (q). Also, rather than rephrasing the kinds of benefits protected in subdivision (p), it is advisable to refer in subdivision (q) to subdivision (p)'s benefit characterization and thereby assure that both subdivisions protect the same benefits. This characterization also decouples the exemption in subdivision (q) from a possible ERISA preemption of the exemption in subdivision (p).
28. Establishing in new CPLR § 5205(q) protections for benefits during and after their distribution by referencing "payments made from property considered under subdivision (p) as held in a trust created by or proceeded from a person other than the judgment debtor." Thus, this exemption would likely be unaffected if, as described in the History of Debtor Benefit Protections, ERISA would preempt the CPLR § 5205(p) exemption applicable to ERISA plan because the subdivision (q) exemption depends on the description of those plans rather than the exemption of their benefits.
29. Providing in subdivision (q) that the section protects the "right to receive and the property that is traceable to any payments made from" the benefit plans or arrangements sources rather than, as is currently the case, protecting "payments made from" those sources would clarify the extent of the benefit protection. The proposed language, which is derived from 11 U.S.C. § 522(d)(11) (defining the extent of bankruptcy exemptions for certain insurance payments rather than for pension or profit-sharing payments) would clarify that the subdivision prevents the debtor's creditors from attaching (1) a payment by the

benefit plan to the debtor, or (2) the funds resulting in a traceable fashion from a deposit by a debtor in his or her bank account or mutual fund account. *See also* CPLR § 5222 (e) (describing how a notice of a restraining order must be accompanied by a notice stating that pension benefit payment deposits, may not be restrained).

30. Providing in subdivision (q) that the section shall not impair the rights of an individual under a domestic relations order that meets the requirement set forth in subdivision (p). This would clarify that a debtor may not avoid a domestic relations order obligation by relying on subdivision (q) to protect benefits distributed to a participant or transferred by such participant, which are transferred to a plans or arrangement described in subdivision (p). Nor would a debtor avoid a domestic relations order obligation against benefits under the terms of a plan or arrangement described in subdivision (p), which order arises after the distribution of such benefits from such a plan or arrangement.
31. Defining the IRC as "the Internal Revenue Code of 1986, as amended on [December 31, 2018], or under any corresponding section of the federal tax law effective at the date at issue." This would address the post-enactment modification of a specified Code section or its deletion, and its replacement by a Code section with a different Section number. In contrast, the current phrase, "the Internal Revenue Code of 1986, as amended," does not appear to encompass the change of a cited Code Section. For example, IRC § 402(a)(5), is currently cited in CPLR § 5205(c), even though it was deleted from the IRC and replaced by IRC § 402(c)(1) in 1992. Unemployment Compensation Act of 1992, Pub. L. No. 102-318, § 521(a), 106 STAT. 290, 300-10 (1992). Thus, the current law protects benefits resulting from pre-1992 rollovers but not later rollovers.
32. Using the gender-neutral term "spouse" rather than the term "wife" in the maintenance order exemption in subdivision (d). This would be more consistent with the language of other New York statutes.
33. Providing that the banking exemption in subdivision (l) be available only to individuals, who are generally described in the CPLR as natural persons. This

would be consistent with the CPLR provisions preventing restraining notice or execution notices being applied to such funds, and with the CPLR provisions requiring that exemption notices be distributed in concert with restraining notices or execution notices. In all cases, the aim is to avoid undue hardships for individual debtors.

34. Providing that the illustrative list of exempt payments in subdivision (l) used the determine the eligibility for a $2,500 exemption for a bank account includes payments from a profit-sharing plan, a Section 401(k) plan, a Section 403(b) plan, a Section 457(b) plan, an individual retirement account, or from an individual retirement annuity, as well as from a pension plan. This would assure that all debtors and banks could recognize that all such payments are exempt.
35. Providing that the cost-of-living updates for the $2,500 banking exemption apply to CPLR § 5222-a(b), but not to CPLR § 5222(e). This would assure that the update applies to the section that has the banking exemption notice, but not to the one that lacks such notice.
36. Providing that subdivision (m) declare that subdivision (l) does not alter the exemption rights that the judgment debtor otherwise has. This would be consistent with the similar provision in subdivision (m), which also references the illustrative exemption list in (l). Such consistency would assure that neither provision alters the exemptions. This is the same illustrative list set forth on page 1 of the statement by the Law Revision Commission in support of the bill that became L. 1990, ch. 178. That law added a broad statement of continued exemptions to CPLR § 5231, while making its execution provisions applicable to income from "any source."

The proposed changes to the exemption notice provisions of CPLR §§ 5222 and 5522-a would make it more likely that individual judgement debtors would understand that there are debtor protections for benefits under the terms of a pension plan, profit-sharing plan, stock bonus plan, or under the terms of a similar plan or arrangement as described in CPLR § 5205(l) by:

1. Organizing the list of illustrative exemptions more logically in the notice to individual judgment debtors set forth in subdivision (e) of CPLR § 5222. This

would make it more likely that the individual would recognize if any of the exemptions were present.

2. Having the list of illustrative exemptions in the notice to individual judgment debtors set forth in subdivision (e) of CPLR § 5222 include profit-sharing plan benefits, 401(k) plan benefits, 403(b) plan benefits, Section 457(b) plan benefits, individual retirement account benefits, and individual retirement annuity benefits, as well as pension plan benefits. This would make it more likely that the individual would recognize if any of the exemptions are applicable.
3. Deleting from the CPLR § 5222 notice any mention of the banking deposits exemption set forth CPLR § 5205(l). This would remove a distracting exemption that is inapplicable to restraining notices to depositories other than banking institutions.
4. Having the notice to individual judgment debtors in subdivision (b) of CPLR § 5222-a set forth two illustrative lists of funds that are exempt from restraint notices affecting an individual's bank account that explicitly include all the items set forth in CPLR § 5205(l). The two lists currently are inconsistent and refer only to funds from pensions and retirement accounts. This would make it more likely that a lay individual debtor would recognize if any of the exemptions were applicable.
5. Having the CPLR § 5222 and the CPLR § 5222-a notices, both include the same nineteen non-banking exemptions. This would make it more likely that a lay individual debtor would recognize if any of the exemptions were applicable.
6. Having the CPLR § 5222 and the CPLR § 5222-a notices, both include an explicit statement that the restrained assets may be released if the debtor can show that he or she satisfied the judgment or complied with the order. This would make it more likely that a lay individual debtor would realize this may be done in his or her response.
7. Having the CPLR § 5222 and the CPLR § 5222-a notices differ in that only the latter includes the reference to the banking exemptions of CPLR § 5205(l) and

CPLR § 5225(i). This would recognize that only the latter notice applies to funds on deposit with banking institutions.

CPLR §§ 5222 and 5222-a are also changed by:

1. Providing in CPLR § 5222 that the orders that may be enforced with restraining orders are those described in CPLR § 5205(p). Thus, enforceable orders of support would be defined consistently.
2. Defining in CPLR § 5222(i), the applicable minimum hourly wage. On or after December 31, 2016, there have been four distinct general New York State minimum hourly wages. However, the statute currently refers to the undefined New York State minimum hourly wage. By introducing and defining the term "applicable minimum hourly wage," the minimal exemption applicable to each of a debtor's bank accounts, namely the product of two-hundred-forty and this value, would be well-defined.
3. Defining in CPLR § 5222(i), the applicable minimum hourly wage as the highest general state or federal minimum wage, would give debtors a banking exemption for the largest balance. Such balance would be $3,600 for 2019. This definition would be consistent with the legislature's decision to use the lowest general state minimum wage and thereby make unemployment compensation available to the broadest set of unemployed individuals when it introduced four general state minimum wages in L. 2016, ch. 54, §§ 1–3. (Part K), eff. December 31, 2016.
4. Using the same exemption creditors in the banking exemption set forth CPLR § 5222(i) for the banking exemption set forth in CPLR § 5205(l). Thus, the court order reference would be replaced by the enforcement of a child support, spousal support, alimony, or maintenance obligation.
5. Providing that the banking exemption in CPLR § 5222(i) is available only to individuals, in the same manner as the banking exemption set forth in CPLR § 5205(l).
6. Deleting the provision in CPLR § 5222(i) that "a restraining notice shall be deemed void" if the balance of a debtor's banking account balance is less than

or equal to 90% of the amount that results in a restraining notice not applying to such accounts pursuant to the prior statutory sentence. Funds are exempt from debtor claims, whether the notice is void or does not apply to those funds. Thus, the 90% sentence is a consequence of the sentence without the 90% limitation.

7. Providing in the CPLR § 5222(e) notice the statutory references for exemptions from restraining notices and executions for personal property other than the debtor's bank accounts.
8. Referring to all statutory sections with numbers rather than the words for those numbers, would make it easier for a reader to understand the provision.

The installment payment provisions of CPLR § 5226 are also changed by:

1. Providing that installment payment orders explicitly apply only to payments that are being or will be received by a judgment debtor. This would clarify that they may not apply to payments received by the debtor before the issue of the order.
2. Providing that installment payment orders would explicitly not apply to payments that are protected from legal process after their receipt by the judgment debtor, as described in subdivisions (l) and (m) of CPLR § 5205. This would add clarity.
3. Providing that exempt payments shall be considered by the court in determining the extent to which non-exempt payments are subject to an installment payment order. This would clarify the treatment of such payments.

The execution provisions of CPLR § 5230 are also changed by:

1. Isolating and clarifying the bank deposits exemption pursuant to CPLR § 5205(l), and including its cost-of-living updates. This would make it easier for a reader to understand the prescribed notice provisions of an execution.
2. Isolating and clarifying the minimum wage exemptions. This would make it easier for a reader to understand the prescribed notice provisions of an execution.

3. Deleting the 90% limit from the notice provision in the CPLR § 5230(a) that "a restraining notice shall not apply" if the balance of a debtor's banking account balance is less than or equal to 90% of the amount that currently results in a restraining notice not applying to such accounts under CPLR § 5222(i) is consistent with the similar deletion in CPLR § 5222(i). Again, the 90% limitation is unnecessary and misleading. This deletion would make the notice most useful to a debtor. Such a debtor would like to know how large a bank balance would be exempt from the debtor's creditor claims.
4. Stating that the orders that may be enforced with executions are those described in CPLR § 5205(p). This would consistently define enforceable orders of support.
5. Referencing all statutory sections with numbers rather than the words for those numbers. This would make it easier for a reader to understand those sections.

The proposed changes to the income execution provisions of CPLR § 5231 would:

1. Limit the income executions to the judgment debtor's gross income, and define gross income. The latter is used and defined in the notice that must be part of an income execution.
2. Add a distinct paragraph describing the exemption from legal process for an illustrative set of payments that is defined by reference to the list in subdivision (l) of CPLR § 5205. This would clarify that such exemptions exist.
3. Explicitly include payments from profit-sharing and deferred compensation plans, as well as retirement or pension plans, in the earnings definition that is used to determine the minimal income, that must be made available to a judgment debtor before any income execution.
4. Referring to the CPLR § 5222(i) definition of the applicable minimum hourly wage would define an undefined phrase that is multiplied by thirty to determine the largest disposable earnings of a debtor that are exempt from garnishment. The weekly amount for 2019 would be $450. This definition would be consistent with the legislature's decision to use the lowest general state minimum wage and thereby make unemployment compensation available

to the broadest set of unemployed individuals when it introduced the four general state minimum wages in L. 2016, ch. 54, §§ 1–3. (Part K), eff December 31, 2016.

5. Make the notice that must be part of an execution more consistent with the substantive provision of CPLR § 5231 and the due process notices set forth in CPLR §§ 5222, and 5222-a. The notice would also explicitly reference CPLR § 5241, which provides that income executions to enforce orders of support are governed by different rules that other income executions.

The proposed changes to the personal property levy provisions of CPLR § 5232 would:

1. Clarify the exemption provisions for when a fixed amount of bank deposits is not subject to executions pursuant to CPLR § 5205(l), and explicitly mention the cost-of-living updates of such exempt amounts.

2. Referring to the CPLR § 5222(i) definition of the applicable minimum hourly wage would define an undefined phrase that is multiplied by two hundred forty to determine the largest bank balance of a debtor that is exempt from execution. The 2019 exemption would be $ 3,600. This definition would be consistent with the legislature's decision to use the lowest general state minimum wage and thereby make unemployment compensation available to the broadest set of unemployed individuals when it introduced the four general state minimum wages in L. 2016, ch. 54, §§ 1–3. (Part K), eff December 31, 2016.

3. Restrict the two banking exemptions to judgment debtors who are natural persons.

4. Clarify that the two banking exemptions are distinct from the other statutory exemptions with a distinct paragraph rather than a sentence at the end of a paragraph.

5. Define enforceable orders of support consistently by referring to those described in CPLR § 5205(p).

The proposed changes to the order of support provisions of CPLR § 5241 would provide that:

1. Defaults of orders of support include the failure to pay retroactive orders of support within thirty (30) days of the issuance of such order. This would eliminate the current disparity between Fam. Ct. Act § 440(1)(a), Dom. Rel. L. § 240(1)(j), and Dom. Rel. L. § 236(B)(9), which permit such enforcement, and CPLR §§. 5101, 5222, and 5232, which do not do so.
2. The definitions of income and income payor both reference payments pursuant to the terms of a public or private pension or retirement plan, profit sharing plan, 401(k) plan, 403(a) plan, 403(b) plan, 457(b) plan, individual retirement account, or an individual retirement annuity, rather than only payments from a small subset of such sources.
3. Executions to enforce support obligations be described consistently as income executions.

The proposed changes to CPLR § 5101 would provide that:

1. Motion costs may be recovered when either a judgment or order is enforced under Article 52.
2. The support orders that may be enforced under Article 52 are those defined as orders of support in CPLR § 5241 to assure that those orders are enforceable under enforcement provisions of Article 52.

B. THE APPROACH AND INTENDED CHANGES FOR THE PROPOSED AMENDMENTS TO THE DEBTOR AND CREDITOR LAW

The proposed changes to the bankruptcy exemptions of Dr. & Cr. L § 282 would clarify and present a set of debtor protections more consistent with the overriding aim of protecting an individual's benefits under the terms of a tax-qualified pension plan, profit-sharing plan, stock bonus plan, or a similar plan or arrangement.

First, retaining the current explicit references to CPLR § 5205 protections in the introductory paragraph would mean that those non-bankruptcy protections before, during and after the distributions of such benefits, would continue to apply in bankruptcy.

Second, changing the current provisions in subdivision (2), that protect additional benefit payments, by:

1. Including in the title of subdivision 2 the right to keep the distributions described therein would clarify those protections. In particular, debtors could receive and keep payments of a social security benefit, unemployment compensation, or of a local public assistance benefit. Such benefit payments are protected because the New York legislature believed those payments may be presumed to be needed to support such recipients. *Cf.* 42 U.S.C. § 407(a) (money paid as social security benefits shall not be subject to the operation of any bankruptcy law). It would make no sense for a bankruptcy exemption for the debtor's right to receive such payments, if the debtor did not also have the right to keep such benefits in bankruptcy.
2. Adding protection only for those benefit payments that are similar to those addressed by the CPLR, but are otherwise protected from creditor claims would make the bankruptcy protections consistent with the non-bankruptcy protections for such benefits. In particular, protection of payments from Section 403(b) government plans and tax-qualified government plans would assure that benefit payments from a Section 403(b) plan or from a tax-qualified plan are protected regardless of whether the plan sponsor is a public or non-public entity within or without bankruptcy.
3. Removing protections for benefits from non-governmental plans that do not qualify for the CPLR 5205 non-bankruptcy protection would assure that those benefits would qualify for no creditor protection within or without bankruptcy.
4. Removing the limit on protected benefit payments to those made on account of non-retirement reasons, *i.e.*, only for illness, disability, death, age, or length of service would eliminate any issue about which benefit payments are protected, and which are not. CPLR § 5205, which is incorporated into the provision, protects all payments. Thus, this change would assure consistent post-distribution

protection in bankruptcy of benefit payments from private and public pension plans in bankruptcy.

5. Removing the protection for payments derived from contributions that are subject to the IRS penalty tax on excess contributions. This would assure that debtors may not protect such contributed assets from creditors in bankruptcy. The same exclusion is present in CPLR § 5205, which is incorporated into the provision. Thus, this change would assure consistent protection in bankruptcy of benefit payments from private and public pension plans.
6. Adding the language used, in Dr. & Cr. L § 282(3) to exempt the proceeds of an award under a crime-victim's reparation law would clarify that the same post-distribution protection applies for bankruptcy and non-bankruptcy creditors. In particular, protecting "property that is traceable to" the benefit payment rather than protecting "an interest in" the benefit payment more clearly exempts the proceeds. If the proceeds were not protected, the benefits could not be used by the plan participant or beneficiary for the very purposes that justified the favorable tax treatment of those benefits. CPLR § 5205, which is incorporated into the section's introductory paragraph, also protects property that is traceable to benefit payments. Thus, the section would consistently protect in bankruptcy benefit payments from private and public pension plans after their distribution.
7. Deleting any reference to plans or arrangements created by the debtor or undefined insiders, which is similar to a self-settled limitation on trust benefit protections would eliminate a distracting superfluous limitation. Benefits in government plans never satisfy those conditions.
8. Identifying the statutory sections using numbers rather than words would make such references easier to read and understand.

Third, the proposed change to the title of Dr. & Cr. L § 282(3) would more accurately reflect the current content of the subdivision. In particular, the subdivision gives bankrupts the right to keep the distributions described therein.

The proposed changes to the bankruptcy exemptions of subdivision (1) Dr. & Cr. L § 283 would clarify the property to which the $10,000 limit applies and would exclude from such

property those annuity contracts which under Ins. L. § 3212(g) are otherwise exempt from Ins. L. § 3212. The CPLR governs those excluded contracts.

C. THE APPROACH AND INTENDED CHANGES FOR THE PROPOSED AMENDMENTS TO THE ESTATES, POWERS AND TRUSTS LAW

The proposed changes to EPTL § 7-3.1 would present a clearer set of debtor protections more consistent with the overriding aim of protecting a person's benefits under the terms of a tax-qualified pension plan, profit-sharing plan, stock bonus plan, or similar plan or arrangement, by:

1. Retitling the section would clarify that the Section's significance is similar to CPLR § 5205(p). The section currently refers to when a property transfer is void. Thus, this gives a creditor of the transferor the right to bring a turnover proceeding to obtain the trust property. The retitling refers to when a creditor may enforce claims against property contributed to a trust. This title would reflect the fact that the amended section would give a debtor's creditors all the CPLR enforcement rights against the debtor's trust interest attributable to the debtor's contribution. This is similar to the panoply of enforcement rights that Dr. & Cr. L. § 278 currently provides to a creditor whose claim has matured when a debtor's transfer is fraudulent against such creditor. Such a panoply would recognize that there are defined benefit plans in which there is no account allocable to a participant. Thus, a creditor may wish to garnish the benefit payments rather than try to compel the plan to make a lump sum distribution attributable to the self-settled contribution.
2. Using more descriptive words in paragraph (a) would clarify its meaning. Providing that a person's creditor may enforce claims against the "trust interest attributable to property contributed by" the judgment debtor would make it easier to grasp that the paragraph is the flip side of CPLR § 5205(c). That section similarly exempts from creditor claims property that is "held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Both phrases refer

to property that was self-settled by a debtor. The CPLR provides that benefits from specified plans and arrangements are not considered self-settled benefits. Thus, they are subject to the limited creditor remedies available to non-self-settled benefits. In contrast, the EPTL provides that the unlimited creditor remedies available for self-settled benefits are not applicable to the benefits from those same specified plans and arrangements.

3. The revised paragraph (a) provides that the enforceability of a creditor's claim is unaffected by whether the trust to which the individual has made a contribution has a spendthrift provision. The latter means that the property is not assignable. Thus, it would be clear that CPLR § 5201(b) which provides for the enforceability of judgments against assignable property, does not imply that a person's creditors may not enforce their claims against property the individual has contributed to a trust for the individual's benefit, whose interests are non-assignable.
4. Deleting the declaration that benefits from specified plans and arrangements are spendthrift benefits would not affect such characterization. Such characterization, *viz.*, the inability of creditors to enforce claim against those undistributed benefits, is already presented in CPLR § 5205(p) that sets forth the debtor protections for such benefits. By contrast, EPTL § 7-3.1 does not set forth any of the debtor protections for such benefits. Thus, deleting the characterization from the EPTL section would remove an unnecessary distraction.
5. Deleting the references to the exception creditors would not affect their rights to enforce their claims. Those rights are determined in CPLR § 5205(p), which describes when those creditors may override the benefit protections of that subdivision. By contrast, EPTL § 7-3.1 does not set forth any benefit protections that the exception creditors may override. Thus, deleting the exception creditors from the section would remove an unnecessary distraction.
6. Referencing the CPLR § 5205(p) benefit protections in paragraph (b), rather than rephrasing them, assures that EPTL § 7-3.1(b) does not affect the CPLR debtor protections. The two subdivisions would thus be consistent. The new paragraph (e) paragraph explicitly describing the CPLR provisions as debtor protections would highlight those effects in a section that overrides other debtor protections.

7. Identifying the statutory sections using numbers rather than words would make such references easier to read and understand.

D. THE APPROACH AND INTENDED CHANGES FOR THE PROPOSED AMENDMENTS TO THE INSURANCE LAW

The proposed changes would insure that the protections for benefits funded with annuity or insurance contracts are identical to those for benefits funded with trusts or custodial accounts by:

1. Using the existing statutory phrase references to "benefits, rights, powers, privileges and options," would assure that all those features are covered by the provisions governing benefits funded by trusts, which, as amended, would explicitly cover benefits funded by annuity or other contracts from insurance companies.
2. Describing the kinds of benefits that are funded by annuities or insurance contracts that are not governed by this section, but by the provisions governing the same benefits funded by trusts, would clarify which set of rules govern those benefits.
3. The annuity/insurance contract carve-out would include annuity contracts distributed by a tax-qualified plan to pay a person's accrued plan benefits. Such distributions often occur as part of the termination of tax-qualified defined benefit plans.
4. Adding this provision as a new subsection would clarify the significance of this provision

VII. THE FISCAL IMPACT OF THE PROPOSAL

This proposal would have a modest positive fiscal impact on the State, by making it easier for the State to recover tax obligations from an individual, who would no longer be able to avoid or make it difficult to enforce such tax claims by making contributions to (1) individual retirement arrangements or Section 403(b) plans that would be subject to the IRC § 4973 excess contribution penalties, or (2) Section 457 plans that are not Section 457(b) plans.

VIII. THE EFFECTIVE DATE AND SEVERABILITY OF THE PROPOSAL

The proposal would take effect on the ___ day of _________ 2019, the Effective Date. The bill will govern non-bankruptcy enforcement actions begun after the Effective Date, and bankruptcy petitions filed after the Effective date. Prior law will govern earlier actions and petitions. Similar provisions were used in Section 78 of L. 1993, ch. 59. That statute clarified the enforcement of orders of support outside of bankruptcy. Similar provisions were used in Section 2 of L. 1982, ch. 540 for bankruptcy filings. That statute set forth the state-law exemptions from the debtor's bankruptcy estate that were the only exemptions New York residents could use at such time.

The bill contains a severability section that is identical to that used in section 8 of L. 2008, ch. 575. That statute provided a $2,500 exemption for each bank account of a debtor into which payments that are reasonably identifiable as exempt from creditor claims are made electronically by direct deposits.

History of New York Statutory Protections for a Debtor's Benefits under the Terms of a Pension, Profit-Sharing, Stock Bonus Plan, Individual Retirement Arrangement, Similar Plan, or Arrangement

The Statutes before 1982 When Explicit Debtor Protections for Savings and Retirement Benefits Are First Added

I. Summary of pre-1982 Law

Before 1982, none of the thirteen statutes for which amendments are proposed mentioned pension, profit-sharing, stock bonus plans, or similar plans or arrangements. There were, however, some implicit debtor protections of benefits under the terms of those plans or arrangements, regardless of their tax qualities.

Current law has explicit debtor protections for undistributed benefits and benefit distributions from plans or arrangements complying with specified federal tax provisions. However, current law fails to protect benefits from all similar plans and arrangements in a similar manner. Moreover, the current law raises equity questions by protecting benefits from plans restricted to top executives, and arising from unlimited contributions to some plans and arrangements.

Before 1982, the only explicit references to benefits under the terms of a pension, profit-sharing, stock bonus plan, or from a similar plan or arrangement, in any related statutes other than exclusions from general EPTL rules, were EPTL §§ 13-3.2, 13-3.3 and Ins. L. § 200 (which is now Ins. L. § 4607), which are discussed below. Such benefits were explicitly excluded from

- the elective estate, EPTL § 5.-1.1 (for deaths after September 1, 1992, such benefits are explicitly included in the elective estate, EPTL § 5.-1.1-A),
- the rules against perpetuities for trusts, EPTL § 9.-1.6,
- the rules against the accumulation of trust income, EPTL § 9.-2.1, and
- the rules governing trust fiduciaries, EPTL § 11.-1.1.

None of these statutes affected the ability of an individual's creditors to enforce claims against the individual's plan benefits. Furthermore, SCPA § 102.31 then excluded trusts for the sole purpose of paying "pensions or profits" from the definition of lifetime trusts that are subject to the jurisdiction of the Surrogate's courts. EPTL § 1.2.20 with a similar exclusion was added to the EPTL in 1997. L. 1997, ch. 139.

Before 1982, property held in trust was protected against creditor claims unless the property was self-settled. CPLR § 5205(c). For non-self-settled trust benefits, 90% of trust payments were also protected from creditors unless "unnecessary for reasonable requirements of the judgment debtor and his dependents." CPLR § 5205(d). Thus, the benefits of beneficiaries from a stock bonus, pension, or profit-sharing plan funded with a trust were so protected, because their interests could not be self-settled. Such beneficiaries were treated similarly to recipients of current earnings for personal services. In both cases, creditors could obtain 10% of payments. The rest was protected from creditors unless "unnecessary for reasonable requirements of the judgment debtor and his dependents." CPLR § 5205(d).2

CPLR § 5205(d) did not explicitly address the treatment of investments of those trust distributions that were protected because they were necessary for the reasonable but not immediate requirements of the debtor. The case-law seemed to extend creditor protections to the investments of protected trust distributions. *Cf. Surace v. Danna*, 161 N.E. 315 (N.Y. 1928) (holding creditor protections for workers compensation distributions applied to investments of such a lump sum distribution in bank accounts, which presumably were interest-bearing), which cited *Yates County National Bank v. Carpenter,* 119 N. Y. 550 (N.Y. 1890) (holding that creditor protections for pension distributions applied to real estate investments of such distributions). However, some old cases do not extend creditor protection to all realized income from such investments without giving a clear reason for not doing so. *See e.g.*, *In re Shinberg*, 76 N.Y.S.2d 334 (Sup. Ct. N.Y. Co. 1947) (holding that state law protections of distributions of veteran's benefits do not extend to earnings on unspecified investments of a lump sum distribution without any analysis of the use of the earnings or the veteran's needs).

There was uncertainty in 1982 about the extent, if any, to which a pension or profit-sharing plan participant's benefits were self-settled. *See e.g.*, *Fordyce v. Fordyce*, 80 Misc. 2d

909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974) (claims of a creditor of an employee may be enforced only to the extent that the employee individually determined his plan contributions). Similar questions arose about the effect of EPTL § 7-3.1 on whether a person's creditor may enforce such a claim against the individual's benefits from a pension or profit-sharing plan. That section permitted creditors to use turnover proceedings to obtain self-settled trust property.

Moreover, there was uncertainty about whether CPLR § 5201(a), which only provides for the enforcement of creditor claims to property that could be assigned thereby prevents any garnishment of benefit payments from a tax-qualified stock bonus, pension, profit-sharing plan funded with a trust, whose plan terms must include anti-assignment prohibitions to be tax-qualified. *See e.g.*, *National Bank of North America v. IBEW Local No. 3 Pension and Vacation Funds*, 419 N.Y.S.2d 127 (N.Y. App. Div. 2d Dept. 1979) appeal dismissed 48 N.Y.2d 752 (1979) (holding that ERISA did not preempt state-law garnishments, which under state law were enforcing claims of a creditor of employee against benefit payments arising from such a tax-qualified plan subject to the 10 per cent and reasonable need limitations discussed above). Although as discussed below the U. S. Supreme Court would reject this holding for certain plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), such as the IBEW plan, not all pension/profit-sharing plans are subject to ERISA. Moreover, the tax regulations provide that the anti-assignment prohibition permits participants and beneficiaries to direct the plan to make benefit payments to a third party, as discussed below, which appears to make the benefits assignable. Treas. Reg. § 1.401-(13)(e). The final version of these regulations was filed on February 15, 1978. 43 Fed. Reg. 6943 (Feb. 17, 1978). Thus, CPLR § 5201(a) may not prevent the garnishment of a debtor's payments from a pension/profit sharing plan when ERISA does not govern the plan if the plan does not prohibit such voluntary assignments. However, it appears that few plans permit these assignments

Before 1982, property held in an annuity contract of an insurer was not subject to creditor claims absent a fraudulent transfer. Ins. L. § 166(4). There was no self-settled limitation on these protections, which probably reflected the fact that annuities often provided a benefit for the buyer, as well as his or her beneficiaries. However, under Ins. L. § 166(3), annuity benefit payments were subject to creditor claims as may appear just and proper to a court "after due regard for the reasonable requirements of the judgment debtor and his family." In contrast, there was less protection for benefits provided under the terms of plans funded with trusts because in

those cases, an individual's debtor could enforce a claim for up to 10% of the individual's benefit payments without having to show that such portion was not needed to meet the reasonable requirements of the debtor and the debtor's family.

Before 1982, there was no mention of the enforceability of family support orders and domestic relations orders in the CPLR, the EPTL, or the Ins. L. The equitable distribution system for marital dissolutions had been introduced in 1980 (L. 1980, ch. 281), and one of the factors that judges could rely upon in determining equitable distributions was "the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution." Dom. Rel. L. § 236B(5)(d)(4). Thus, there was uncertainty about the enforcement of such orders against pension/profit-sharing benefits.

Before 1982, there was similar silence, but less uncertainty about the applicability of the long-standing fraudulent transfer doctrine to pension/profit-sharing benefits, except for Ins. L. § 166(4), which explicitly referred to such doctrine. However, it seems likely that the fraudulent transfer doctrine was applicable to any benefits of a debtor from pension/profit-sharing benefit plans that may be protected by the CPLR. *Cf.*, *Glassman v. Glassman*, 309 N.Y. 436; 131 N.E.2d 721 (N.Y. 1956) (holding that a creditor could use the fraudulent transfer provisions of Debt. & Cred. L. § 273 to enforce its claim against the debtor's NYS Employee Retirement System benefits, although state sovereignty rather than the CPLR protections were at issue).

Thus, at the start of 1982, there were three obvious paradigms for a harmonious set of debtor protections for benefits from pension/profit-sharing plans and similar plans and arrangements that would also eliminate the uncertainty about the treatment of benefits funded with trusts. First, the CPLR § 5205 model for payments for personal services and for trust benefits. Creditors could not obtain benefits until their distribution. They could then obtain 10% and the portion of the rest that was not needed for the reasonable needs of the debtor and his dependents. Second, the Ins. L. § 166 model for payments from annuity contracts, including those funding pension/profit-sharing benefits. Creditors could not obtain benefits until their distribution. They could then obtain all that was not required for the reasonable needs of the debtor and his family. Third, the tax-qualified New York public employee pension/profit-sharing model. Creditors, other than those enforcing support orders or domestic relations orders could not enforce their claims before, during, or after the benefit distribution. *Cf. In re*

Distefano, 167 Misc. 678 (Sur. Ct., N.Y. Co. 1938) (holding that the payments to the beneficiary of the participant in the New York City Retirement System plan are not subject to the claims of the participant's creditors) and *Gramet v. New York State Teachers' Retirement System*, 102 Misc. 2d 731, (Sup. Ct., Albany Co. 1979) (holding that former spouse may not enforce claim for support arrearage against pension payments being made by the tax-qualified NYS Teachers Retirement System plan if the claim is based on a separation agreement contract rather than on a divorce judgment).

Starting in 1982, the legislature has enacted numerous amendments that protect benefits from specified tax-qualified pension/profit-sharing plans, specified individual retirement arrangements, or similar plans and arrangements. The current statutes do not result in a single consistent paradigm. Thus, these amendments did not harmonize the treatment of such benefits, even those that are protected, and left a number of uncertainties about the extent of the protections.

II. Pre-1982 New York Statutes and their Enactment Dates

CPLR § 5101. Enforcement of money judgment or order (Role of Article 52)

A money judgment and an order directing the payment of money, including motion costs, may be enforced as prescribed in article fifty-two.

These provisions were enacted in 1962 as part of the introduction of the CPLR. L. 1962, ch. 308. This section is self-explanatory. However, CPLR § 5105 provides that some judgments and orders may be enforced with contempt methods under Article 51. The predecessor of the CPLR, the Civil Practice Act, contained similar provisions in several different sections. Civil Practice Act §§ 504, 1303, 1520 and Rules of Civil Practice § 74.

CPLR § 5201(b) (Non-Bankruptcy Protections of Property that May Not be Assigned)

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

These provisions were enacted in 1962 as part of the introduction of the CPLR. L. 1962, ch. 308. The predecessor of the CPLR, the Civil Practice Act, contained similar provisions in several different sections. Civil Practice Act §§ 687-a(8) (a), 792(a), 913, 914, 915, 910(5), 916(0), 1191, 1192, 1196.

CPLR §§ 5205(c) and (d) (Non-Bankruptcy Protections of Trust Benefits)

(c) Trust exemption. Any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c);
2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment; and
3. payments pursuant to an award in a matrimonial action, for the support of a wife, where the wife is the judgment debtor, or for the support of a child, where the child is the judgment debtor; where the award was made by a court of the state, determination of the extent to which it is unnecessary shall be made by that court.

These provisions were enacted in 1962 as part of the introduction of the CPLR. L. 1962, ch. 308, although the provisions were initially CPLR §§ 5205(d) and (e), respectively. The provisions set forth the exemptions applicable to trust benefits before their distribution, during their distribution, and after their distribution. The predecessor of the CPLR, the Civil Practice Act, contained similar provisions. Civil Practice Act §§ 684 (1), 687-a(8) (b), (c) 792(c), (h); 793, and 1196.

CPLR §§ 5205(l) and (m) (Non-existent before 1982) (Non-Bankruptcy Protections of Banking Deposits)

There were no provisions setting forth any minimum exemptions for bank accounts in which exempt funds had been deposited.

CPLR § 5222 (Non-existent before 1982) (Requirements for Exemption Notices to Accompany Restraining Notices)

There were no such provisions. The provision describing how a restraining order may be used with respect a judgment debtor's personal property did not require that judgment debtors receive any exemption notice in concert with the any restraining order.

CPLR § 5222-a (Non-existent before 1982) (Requirements for Exemption Notices to Accompany Restraining Notices Affecting a Natural Person's Bank Account)

There were no statutory sections focused explicitly on the service of a restraining order or levy affecting the bank account of a judgment debtor, and thus no special exemption notice requirements for such orders.

CPLR § 5226 (Installment Payment Orders)

Installment payment order

Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

This provision was enacted in 1962 as part of the introduction of the CPLR, L. 1962, ch. 308, although the provision was initially CPLR § 5225. This provision supplements income executions and is used by a creditor to obtain all or portion of a judgment debtor's cash receipts to the extent the debtor is unable to attach the payments when made to the debtor. The predecessor of the CPLR, the Civil Practice Act, contained a similar provision. Civil Practice Act § 793.

CPLR § 5230 (Executions)

(a) Form. An execution shall specify the date of the judgment, the court in which it was entered, the amount of the judgment and the amount due thereon. An execution shall direct that only the property in which a named judgment debtor who is not deceased has an interest, or the debts owed to him, be levied upon or sold thereunder and shall specify the last known address of that judgment debtor. Where the judgment was entered in a court other than the supreme, county

or a family court, the execution shall also specify the date on which a transcript of the judgment was filed with the clerk of the county in which the judgment was entered. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

This provision was enacted in 1962 as part of the introduction of the CPLR, L. 1962, ch. 308, although the provisions was initially CPLR § 5229. This provision authorizes a debtor's creditor to obtain a portion of the debtor's property. The predecessor of the CPLR, the Civil Practice Act, contained similar provisions that were consolidated into this paragraph. Civil Practice Act §§ 222-a, 640, 641, 642, 643, 645(1), 658, 711 and 1199.

CPLR § 5231 (Income Executions)

(a) Form. An income execution shall specify, in addition to the requirements of subdivision (a) of section 5229 [now Section 5230], the name and address of the person from whom the judgment debtor is receiving or will receive money; the amount of money, the frequency of its payment and the amount of the installments to be collected therefrom; and shall contain a notice to the judgment debtor that he shall commence payment of the installments specified to the sheriff forthwith and that, upon his default, the execution will be served upon the person from whom he is receiving or will receive money.

(b) Issuance. Where a judgment debtor is receiving or will receive more than eighty-five dollars per week from any person, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the judgment debtor resides or, where the judgment debtor is a non-resident, the county in which he is employed.

(c) Service upon debtor. Within twenty days after an income execution is delivered to the sheriff, the sheriff shall serve a copy of it upon the judgment debtor, in the same manner as a summons.

This provision was enacted in 1962 as part of the introduction of the CPLR, L. 1962, ch. 308, although the provisions was initially CPLR § 5230. This provision authorizes a debtor's creditor to obtain a portion of the debtor's future income. The predecessor of the CPLR, the Civil Practice Act, contained a similar provision that were substantially changes by this provision. Civil Practice Act § 684.

CPLR § 5232 (Levies)

This provision was enacted in 1962 as part of the introduction of the CPLR, L. 1962, ch. 308, although the provisions was initially CPLR § 5231. At such time there were no provisions setting forth any minimum exemptions for bank accounts in which exempt funds had been deposited.

CPLR § 5241 (Income execution for support enforcement)

No CPLR sections focused on such income executions. However, at such time the following Pers. Prop. L. statute had the same focus, and explicitly mentioned pension fund payments as being subject to support claims:

§ 49-b. Income deduction by court order in support cases.

1. (a) When a person is ordered by a court of record to pay for the support of his or her children under the age of twenty-one, and/or spouse, and/or former spouse, the court, at the time an order of support is made or any time thereafter, upon a showing of good cause, shall order his employer, future employer, former employer, the auditor, comptroller, or disbursing officer of any pension fund, the state of New York or any political subdivision thereof, or the United States to deduct from all monies due or payable to such person. the entitlement to which is based upon remuneration for employment, past or present, such amounts as the court may find to be necessary to comply with its order for the support of his or her children under the age of twenty-one and/or his or her spouse and/or former spouse. In determining good cause, the court may take into consideration evidence of the degree of the respondent's past financial responsibility, credit references, credit history, and any other matter the court considers relevant in determining the likelihood of payment in accordance with the support order.

(b) When an order of support is made which orders that the payment be made to the support collection unit, the court, at the time such order of support is made, shall order the respondent's employer, future employer, former employer, the auditor, comptroller, or disbursing officer of any pension fund, the state of New York or any political subdivision thereof, or the United States to deduct from all monies due or payable to such person, the entitlement to which is based upon remuneration for employment, past or present, such amounts as the court may find to be necessary to comply with its orders for the support of his or her children under the age of twenty-one, and/or his or her spouse and/or former spouse, provided however that any such order shall provide that no such deduction shall be made unless and until the support collection unit established by the appropriate social services district has determined that such person's support payment arrears equal or exceed the total amount of monies payable in a specified number of payments determined by the court in the support order and a copy of the income deduction order and determination has been served upon such person's employer, future employer, former employer, the auditor, comptroller or disbursing officer of any pension fund, the state of New York or any political subdivision thereof, or the United States; and provided that such person shall be given notice of such determination at least fifteen days prior to service of such order and determination on such employer, future employer, former employer, the auditor, comptroller or disbursing officer of any pension fund, the state of New York or any political subdivision thereof, or the United States, and if such person pays all arrearages within such fifteen day period, such order and determination shall not be served and no deduction shall be required by reason of such determination, but such payment shall not affect or otherwise limit any determination made as a result of any subsequent delinquencies. Such employer, future employer, former employer, the auditor, comptroller or disbursing officer of any pension fund, the state of New York or any political subdivision thereof, or the United States shall deduct the amount as ordered from the monies due or payable and forward it monthly as directed in the order.

Db & Cr. L. § 282 (Non-existent before 1982) (Bankruptcy Protections for Benefits)

There were no distinct state bankruptcy provisions other than Ins. L. § 4607 discussed below. Bankruptcy protection was provided under the federal bankruptcy exemptions discussed below.

Db & Cr. L. § 283 (Non-existent before 1982) (Bankruptcy Protections for Personal Property and Annuity Contracts)

There were no distinct state bankruptcy provisions other than Ins. L. § 4607 discussed below. Bankruptcy protection was provided under the federal bankruptcy exemptions discussed below.

EPTL § 7-3.1. Disposition in trust for creator void as against creditors (Protection for Benefit Contributions)

A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

The provision was enacted in 1966, as part of the introduction of the EPTL. L. 1966, ch. 952. This provision authorizes a debtor's creditor to obtain property contributed by the debtor to a trust for his or her benefit. The predecessor of the EPTL, the Personal Property Law, contained similar provisions. Personal Property Law §§ 687-a(8)(b), 792(b), 793, and 1196.

Ins. L. § 166(3) (Insurance and Annuity Contract protections)

3. The benefits, rights, privileges and options which, under any annuity contract heretofore or hereafter issued are due or prospectively due the annuitant, who paid the consideration for the annuity contract, shall not be subject to execution nor shall the annuitant be compelled to exercise any such rights, powers or options contained in said annuity contract, nor shall creditors be allowed to interfere with or terminate the contract, except (a) as provided in subsection four [transfers with fraudulent intent] and except (b) that the court may order such annuitant to pay to a judgment creditor or apply on the judgment, in installments, such portion of such benefits, as to the court may appear just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders. The benefits, rights, privileges or options accruing under such contract to a beneficiary or assignee shall not be transferable nor subject to commutation, and if the benefits are payable periodically or at stated times, the same exemptions and exceptions contained herein for the annuitant, shall apply with respect to such beneficiary or assignee.

An annuity contract within the meaning of this section shall be any obligation to pay certain sums at stated times, during life or lives, or for a specified term or terms, issued for a

valuable consideration, regardless of whether or not such sums are payable to one or more persons, jointly or otherwise, but does not include payments under a life insurance policy at stated times during life or lives, or for a specified term or terms. . .

6. The provisions of this section applicable to any insurance policy or annuity contract shall likewise apply to group insurance policies or annuity contracts, to the certificates or contracts of fraternal benefit societies, and to the policies or contracts of cooperative life and accident insurance companies.

These provisions were enacted in 1962 when a $400/month ceiling on the protected benefits was deleted. L. 1962, ch. 362 § 195. This provision limits the ability of a debtor's creditor to obtain the debtor's annuity benefits. This section protects benefits from a pension, profit-sharing, or stock bonus plan, or similar plan funded with an annuity contract or insurance policy, individual or group, from an insurance company i.

The following New York statutes shall be disregarded in the discussion that follows:

- Article 10 of the Debtor and Creditor Law, which is entitled Fraudulent Conveyances. The article describes such conveyances and the remedies available to a creditor where a conveyance or obligation is fraudulent as to such creditor. The article has not been amended after 1982. It was introduced by L 1925, ch. 254, § 1. None of the article's statutes refer to benefits from a pension, retirement, stock bonus or profit-sharing plan or an individual retirement arrangement, although as discussed above, contributions to such a plan or arrangement may be fraudulent conveyances. Thus, the discussion of such conveyances will be limited to the references to fraudulent conveyances in the statutes under consideration.

- EPTL § 13-3.2, which limits the ability of creditors of a decedent to enforce claims against the beneficiaries of the decedent's interest in a pension, retirement,

stock bonus or profit-sharing plan. That section requires that designations be made in writing by the decedent. EPTL § 13-3.2(e). The section has not been amended substantively on or after 1982. It was introduced as Personal Property Law § 24-a by L. 1952, ch. 820, to clarify that the beneficiary designations were not subject to the Statute of Wills. 1951 Report of NY Law Rev Commn. at 639-640. The statute does not address the effectiveness of a default designation, *i.e.*, one not made by the decedent, or the limits, if any, on the ability of a decedent's creditor to enforce its claim against a default beneficiary. *But see Amex Assur. Co. v. Caripides*, 316 F.3d 154 (2d. Cir. 2003). (holding the default designee was entitled to the decedent's life insurance death benefits, but creditor rights were not at issue). As with the implicit pre-1982 CPLR protections, the section provides debtor protection for plan benefits regardless of whether the plan meet any tax-qualification requirements. However, unlike the CPLR, the protections are not limited by the debtor's reasonable requirements, and the beneficiary is only protected against the decedent's debtors. It does not affect the ability of a beneficiary's creditors to enforce claims against the beneficiary's plan benefits, which is the subject of the proposed legislation. Thus, it will be disregarded.

- EPTL § 13-3.3, which describes the requirements for a trustee to be a beneficiary of a life insurance contract, or a pension, retirement, death benefit, stock bonus or a profit-sharing plan. That section has not been amended on or after 1982. Prior to its amendment by L. 1976 ch. 626, the statute only applied to life insurance benefits. As with the prior section, this section provides debtor protection for plan benefits regardless of whether the plan meet any tax requirements. However,

the trust agreement may provide that the decedent's creditors has the right to collect some or all of their debts from the benefits. The section does not affect the ability of a beneficiary's creditors to enforce claims against the beneficiary's plan benefits, which is the subject of the proposed legislation. Thus, it will be disregarded.

- Ins. L. § 4607, which addresses a creditor's rights under bankruptcy law to a person's benefits from pension plans, whose funding was regulated by the Insurance Department. It was introduced as Ins. L. § 200 by L. 1939, ch. 882, and reenacted by L. L 1984, ch. 367, which renumbered the insurance law sections. This Section's bankruptcy provisions are superseded by Dr & Cr. L. § 282, which was enacted in 1982. Moreover, after the enactment of ERISA which preempts any state laws relating to most private pension plans, New York State now regulates the funding of a *de minimis* number of pension plans.

ERISA, which determines the extent of entitlements under the terms of many employee benefit plans, will also be disregarded for the purpose of this discussion. ERISA governs benefits under plans that provide retirement income to employees or defer income by employees until or after their termination of employment, which are often called ERISA pension plans. Although ERISA preempts state law relating to such plans, ERISA § 514(b), 29 U.S.C. § 1144, there is uncertainty about the extent of this preemption on the ability of a judgment creditor to enforce their claims against the ERISA benefits of a judgment debtor.

ERISA prohibits the alienation or assignment of benefits from most ERISA pension plans. ERISA § 206(d), 29 U.S.C. § 1056(d) (the "Alienation Prohibition"). However, a plan participant or beneficiary may direct the plan administrator to pay all or part of their benefits to

another person. Treas. Reg. § 1.401-(a)(13)(e). Such plans must provide a plan participant's spouse, if any, with survivor benefits. Thus, they are called Spousal Survivor Benefit Plans. ERISA § 205, 29 U.S.C. § 1055. ERISA requires that certain domestic relations orders, known as qualified domestic relations orders, be incorporated in the terms of Spousal Survivor Benefit Plans. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). Top-Hat Plans are unfunded ERISA pension plans maintained primarily for the purpose of providing deferred compensation to a select group of management or highly compensated employees. Top-Hat Pans are not subject to the Alienation Prohibition, but their terms may include similar prohibitions.

The Supreme Court has held that ERISA prevents the state-law garnishment of benefits of plans subject to the Alienation Prohibition, *i.e.*, Spousal Survivor Benefit Plans, but not the state-law garnishment of benefits of plans that are not subject to the Alienation Prohibition. *Mackey v. Lanier Collection,* 486 U.S. 825 (1988). *Cf. Planned Consumer Marketing, Inc. v Coats and Clark, Inc*. 71 N.Y.2d 442; 522 N.E.2d 30 (Ct. App. N.Y. 1988) holding before the issue of *Mackey* that ERISA does not preempt a state-law turnover proceeding to obtain funds contributed to a Spousal Survivor Benefit Plan to defraud creditors of the plan participants.

The *Mackey* Supreme Court stated in dicta that ERISA does not prevent the state law enforcement of debt claims against benefits distributed by Spousal Survivor Benefit Plan. *Mackey*, 486 U.S. at 836.

On the other hand, the Supreme Court later relied on the "core ERISA concern" of paying benefits in accord with the plan terms to find that a state law may not be used to wrest benefits from an ERISA plan beneficiary unless the plan terms provide for such deference. The Court thereby held that ERISA preempts the use of state community law to determine who is entitled to benefits that were distributed by an ERISA pension plan. *Boggs v. Boggs,* 520 U.S. 833 (1997).

Moreover; the Supreme Court also held that ERISA preempts a state law from revoking beneficiary designations on the participant's divorce to determine who is entitled to benefits distributed by an ERISA pension plan or by a life insurance plan. *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001).

The Supreme Court cast doubt on the implications of *Boggs* and *Egelhoff* in dicta within a footnote in *Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285 (2009). In particular, the Court after holding that ERISA preempted a state law separation agreement claim that pension benefits be paid to a person other than the participant's beneficiary, the court declined to express a view whether the claimant "could have brought an action" in state court to wrest the benefits from the beneficiary. *Id.*, at 300, n.10. On the other hand, the Supreme Court later supported the continued viability of the *Boggs* and *Egelhoff* approach by holding that a federally regulated beneficiary designation, under the Federal Employees Group Life Insurance Act, prevented a state law from being used to wrest the benefits from the plan beneficiary, when the plan terms provided for no such deference. *Hillman v. Maretta*, 569 U.S.483 (2013). As a result of *Hillman*, state law claims may not be enforced against any federal benefits provided to federal employees, before, during or after their distribution, other than those domestic relations orders set forth in the federal statutes governing those plans.

ERISA does not govern a substantial amount of benefits covered by the New York statutes discussed below. ERISA does not govern plans sponsored by governments. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1). ERISA does not govern plans sponsored by churches, unless the sponsor elects otherwise. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2). ERISA does not govern plans restricted to owner-employees, or owner-employees and a subset of their respective spouses. 29 C.F.R. § 2510.3-3(b). ERISA does not govern plans that do not systematically defer

benefit payments to the termination of covered employment or beyond, such as stock bonus plans and some profit-sharing plans. 29 CFR 2510.3-2(c). Finally, ERISA does not govern individual retirement arrangements or individual annuity contracts that have no relation to ERISA plans.

Post-1981 Amendments to CPLR, EPTL and Debt. & Cred. L. re Pension, Profit-Sharing, Stock Bonus Plan and Similar Benefits -Underscored Matter is new law to be added; Struck-Out Matter in brackets [–] is old law to be omitted

I. THE DEBTOR AND CREDITOR LAW PERTAINING EXPLICITLY TO PENSION, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

A. IN 1982, THE FIRST STATE LAW EXPLICITLY PROTECTING PENSION, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS WAS ENACTED AND EXEMPTS FROM THE BANKRUPTCY ESTATE THE RIGHT TO RECEIVE SUCH BENEFITS

Prior to 1982, only the federal bankruptcy exemptions introduced by the enactment of the 1978 Bankruptcy Act, Pub. L. No. 95-598, 92 STAT. 2549 (1978) (the "Bankruptcy Act") were available to New York residents. Those exemptions included only one provision that explicitly protected pension, retirement, stock bonus, profit sharing, or similar benefits. In particular, 11 U.S.C. § 522(d)(10) at such time for the following exemption unless state laws provide otherwise

> (10) The debtor's right to receive-- . . .
>
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1954.

In particular, the federal bankruptcy protections applied to plan benefits regardless of the plan's compliance with any tax requirements. This is similar to the implicit CPLR benefit protections, which were similarly limited to those reasonably necessary for the support of the debtor and his dependents. Unlike the CPLR, benefit protections are not available for all benefit payments, but for a list that does not include those for retirement purposes. Tax compliance requirements must only be complied with for a plan that had been established by an insider as now defined under section 101(31) of the United States Bankruptcy Act of 1978, *i.e.*, a relative or a partnership or corporation controlled by the debtor.

On July 20, 1982, New York State responded to the enactment of the Bankruptcy Act by enacting L. 1982, ch. 540. This act provided that New York domiciliaries could only use the state-law exemptions from the debtor's bankruptcy estate. Debt. & Cred. L § 284. Debt. & Cred. L § 282 included the following provision:

> § 282. Permissible Exemptions in Bankruptcy.
>
> Under section five hundred twenty-two of title eleven of the united states code, entitled "bankruptcy", an individual debtor domiciled, in this state may exempt from the property of the estate, to the extent permitted by subsection (b) thereof, only (i) personal and real property exempt from application to the satisfaction of money judgments under sections fifty-two hundred five and fifty-two hundred six of the civil practice law and rules , (ii) insurance policies and annuity contracts and the proceeds and avails thereof as provided in section one hundred sixty-six of the insurance law and (iii) the following property: . . . .
>
> 2. Bankruptcy Exemption for Right to Receive Benefits. The debtor's right to receive: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans benefit; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) a payment under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor s rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one a, four hundred three a, four hundred three b,

four hundred eight, four hundred nine or four hundred fifty-seven of the internal revenue code of nineteen hundred fifty- four.

The initial sentence includes non-bankruptcy exemptions. Among those exemptions are those available under CPLR § 5205. The CPLR section did not then explicitly mention any plan benefits, but as discussed below implicitly protected an individual who is the beneficiary of a pension, profit-sharing, or stock bonus plan funded with a trust. The exemptions available under Ins. L. § 166(3) are also referenced. As discussed above this implicitly protected a participant or beneficiary of a pension, profit-sharing, or stock bonus plan, or similar plan funded with an annuity contract or insurance policy, individual or group, from an insurance company.

Subdivision (2) was essentially a copy of 11 U.S.C. 522(d)(10) as then in effect with two unexplained additions.

First, the insider exception is broadened to include plans established by the debtor, such as presumably an individual retirement agreement. However, unlike the implicit non-self-settled CPLR benefit protection exception, this explicit protection for payments reasonably needed to support the debtor and his dependents is limited to plans that comply with specified federal tax requirements. In particular, subdivision (2) protected the right to receive payments from a plan, contract, or arrangement that are qualifies under any of the following IRC sections:

401(a) [the plan is funded with a trust, custodial account, or annuity contract that meets the requirements of 401(a) and thus hereinafter described as a tax-qualified trust plan],

403(a) [the plan is funded with an individual annuity contract that meets the requirements of 403(a) and thus hereinafter described as a tax-qualified annuity plan],

403(b) [the plan is funded with an individual annuity contract that meets the requirements of 403(b)],

408 [the plan is funded with individual retirement accounts or individual annuity contracts that meet the requirements of 408],

409 [the plan is a tax-qualified trust plan designed to primarily invest in employer securities, which could have been omitted because such plan satisfies 401(a)] or

457 [the plan is a deferred compensation plan sponsored by a government or tax-exempt employer described in 457(e), and the plan is not subject to a 457(f)(2) exception].

A plan that is either a tax-qualified trust plan or a tax-qualified annuity plan shall be hereinafter described as a tax-qualified plan.

Second, although the federal statute contained no reference to § 457 of the Internal Revenue Code of 1986, as amended ("IRC"), the new state statute did, but only in its exception provision. This is particularly odd, because benefits from 457 plans, which can come only from governments and tax-exempt organization, may not come from insiders, and thus would never be subject to the exception. It would have seemed more sensible to have included the statutory reference in the general rule if there was doubt about whether such a plan is a "stock bonus, pension, profit sharing, or similar plan or contract." This addition is not mentioned in any of the comments included in the bill jacket.

The act also added Debt. & Cred. L. § 283 that included the following provision:

> § 283. Aggregate Individual Bankruptcy Exemption for Certain Annuities and Personal Property.
>
> 1. General Application. The aggregate amount the debtor may exempt from the property of the estate for personal property exempt from application to the satisfaction of a money judgment under subdivision (a) of section fifty-two hundred five of the civil practice law and rules and for benefits, rights, privileges, and options of annuity contracts described in the following sentence shall not exceed five thousand dollars. Annuity contracts subject to the foregoing limitation are those that are: (a) initially purchased by the debtor within six months of the debtor's filing a petition in bankruptcy, (b) not described in any paragraph of section eight hundred five (d) of the internal revenue code of nineteen hundred fifty-four, and (c) not purchased by application of proceeds under settlement options of annuity contracts purchased more than six months

before the debtor's filing a petition in bankruptcy or under settlement options of life insurance policies.

There was little explanation of this provision in the bill jacket other than statements, such as the following in the May 6, 1982 Memorandum in Support of the legislation prepared by the Business Council of the State of New York after describing the provision as one of the three major changes in the legislation:

> What this bill does do is reach individuals with over $17,400 of assets ($34,800) for couples) who can afford to contribute toward the satisfaction of their obligations and also the abusers of the system, who have taken advantage of the present uncapped law and utilized the loopholes by concentrating their assets in silver tableware, furs and other costly wedding apparel, works of art and other household furnishings and annuities.

There were no comments in the bill jacket from the New York State Bar Association ("NYSBA").

Under the act's Section 2, the act's new bankruptcy rules were effective for all bankruptcy petitions filed on or after the act's effective date of September 1, 1982.

The act contained no severability provision.

B. IN 1989, THE FIRST SUBSTANTIVE AMENDMENT TO THE DEBTOR AND CREDITOR LAW BROADENS THE EXTENT OF THE BANKRUPTCY EXEMPTION FOR PENSION, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

In 1989, subdivision 2 of Section 282 was changed by L. 1989, ch.280 § 4 to broaden the bankruptcy exemption. The subdivision was changed to read as follows:

2. Bankruptcy exemption for right to receive benefits. The debtor 's right to receive or the debtor 's interest in: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans benefit; (c) a disability, illness , or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) [~~a payment~~] all payments] under a stock bonus, pension, profit sharing, or similar plan or

contract on account of illness, disability, death, age, or length of service [~~to the extent reasonably necessary for the support of the debtor and any dependent of the debtor~~] unless (i) such plan or contract, except those qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor 's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one a, four hundred three a, four hundred three b, four hundred eight, four hundred nine or four hundred fifty-seven of the Internal Revenue Code of nineteen hundred [~~fifty-four~~] eighty-six, as amended.

Two major substantive changes were made. First, the exemption was made available for all non-retirement benefit payments, not merely to the extent those payments are reasonably necessary for the support of the debtor and any dependent of the debtor. Second, the exemption applies not only to the right to receive the payment from the plan, but also to the debtor's "interest in the payment." This language is unclear on its face. Does the "interest" refer to the fund from which the payment may be made, to the payment after it is received by the debtor, or both? The sponsors' memo declared that the changes were made to "clarify that a bankruptcy debtor's exempt property includes all interests in or payments from an ERISA-qualified retirement plan." Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Sheldon Silver, at 4. By using the phrase "payments from" an ERISA-qualified retirement plan, rather than the statutory phrase, "payment under" an ERISA-qualified retirement plan, the sponsors seem to imply that as amended the statute was intended to exempt distributed benefit payments. *See also In re Wydner* 454 B.R. 565 (Bankr. W.D.N.Y 2011) (holding that such distributed plan benefits are exempt property under this provision, regardless of the date of distribution but not the other benefits described in the same provision, such as workers compensation benefits, which are only protected if distributed after the bankruptcy).

The sponsors' reference to an "ERISA-qualified retirement plan" is somewhat inscrutable since the phrase does not appear in the statute being amended or the bill they proposed.

Moreover, the only payments not protected by the bill appear to be retirement payments. The sponsors appear to have referred to plans that meet the tax requirements set forth in Debt. & Cred. L. § 282(2). This is consistent with the wording of the IRC, which permits rollovers among "eligible retirement plans." However, that IRC term does not include all plans qualifying under IRC § 457, but only those qualifying under IRC § 457(b).

The addition of the statutory reference to plans qualifying under IRC Section 401(a) in the self-settled exception clause beginning with (i) is quite inscrutable because such an exception is already part of the phrase beginning with (iii). Thus, such benefits are protected if the insider exclusion is applicable. Moreover, since Section 401(a) of the IRC is restricted to pension, stock bonus, and profit-sharing plans, the addition is not needed to include such plans.

The April 13, 1989 NYSBA report letter sheds no light on the significance of any of the changes to Debt. & Cred. L. other than suggesting that the bill would, if enacted, clarify bankruptcy exemptions.

Under the act's Section 5, the act was effective immediately on the enactment date of July 1, 1989. Unlike the initial statute, the significance of the effective date is uncertain. Do the broadened exemptions apply to (i) all bankruptcy petitions, regardless of the filing date, or (ii) only the bankruptcy petitions filed on or after before the act's effective date of July 1, 1989?

The act contained no severability provision.

C. IN 1995, THE SECOND AMENDMENT TO THE DEBTOR AND CREDITOR LAW ADDS A SECOND EXPLICIT MENTION OF INDIVIDUAL RETIREMENT ACCOUNTS OR ANNUITIES TO THE BANKRUPTCY EXEMPTION FOR PENSION, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

In 1995, subdivision 2 of Section 282 was changed by L. 1995, ch. 93, § 4 to read as follows:

> 2. Bankruptcy exemption for right to receive benefits. The debtor's right to receive or the debtor's interest in: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans' benefit; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) all payments under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified under section 401 or 408 of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one a, four hundred three a, four hundred three b, four hundred eight, four hundred nine or four hundred fifty-seven of the Internal Revenue Code of nineteen hundred eighty-six, as amended.

The addition of the reference to benefits from plans funded with individual retirement accounts and/or individual retirement annuities ("individual retirement arrangements"), which are both defined in IRC § 408, in the exception clause beginning with (i) is as inscrutable as the 1989 addition of a similar reference to tax-qualified plans to the same clause because such an exception is already part of the clause beginning with (iii). The sponsor's memorandum in support of the bill does not mention the change. However, the Tax Commissioner's April 12, 1995 comment letter declares "Section 4 amends subdivision 2 of section 282 of the Debtor and Creditor Law so that an individual retirement account does not constitute part of a bankruptcy estate, and is thus exempt from a bankrupt's creditors." There is a similar comment in the NYSBA March 30, 1995 report from the NYSBA Committee on Civil Practice Law and Rules. However, it is not necessary to exclude individual retirement arrangement benefits twice rather than once from an exception to the rule exempting benefits from the debtor's bankruptcy estate in order to show that individual retirement arrangement benefits are not part of the debtor's

bankruptcy estate. *See also Rousey v. Jacoway*, 544 U.S. 320, 329-334 (2005) (holding that the original bankruptcy exemption the phrase "a stock bonus, pension, profit sharing, annuity, or similar plan or contract" includes individual retirement arrangement benefits and describing the Section 408 reference in the exception as confirming this interpretation).

Under the act's Section 5, the act was effective on September 1 following the act's enactment date of June 28, 1995. Again, the significance of the effective date is uncertain. Do the uncertain effects apply to (i) all bankruptcy petitions, regardless of the filing date, or (ii) only the bankruptcy petitions filed on or after before the act's effective date of September 1, 1989?

The act contained no severability provision.

D. THE THIRD AMENDMENT TO THE DEBTOR AND CREDITOR LAW IN 1998 ADDS AN EXPLICIT MENTION OF ROTH INDIVIDUAL RETIREMENT ACCOUNTS TO BANKRUPTCY EXEMPTION FOR PENSION, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

In 1998 subdivision 2 of Section 282 was changed by L. 1998, ch.206, § 3 to read as follows:

> 2. Bankruptcy exemption for right to receive benefits. The debtor's right to receive or the debtor's interest in: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans' benefit; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) all payments under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified under section 401 [~~or~~], 408 or 408A of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one [~~a~~] (a), four hundred three [~~a~~] (a), four hundred three [~~b~~] (b), four hundred eight, four hundred eight A, four hundred nine or four hundred fifty-seven of the Internal Revenue Code of nineteen hundred eighty-six, as amended.

The addition of the reference to Roth individual retirement accounts in the self-settled exception clause beginning with (i) and in the clause beginning with (iii) is even more inscrutable than the earlier additions to clause (i). The memorandum in support of the bill by its sponsors, Senator Goodman and Assemblyman Weinstein, refers to providing the same bankruptcy protection to Roth individual retirement arrangement benefits as to traditional individual retirement arrangement benefits. The June 11, 1998 report of the NYSBA Trusts & Estates Section report in favor of the bill had a similar explanation. No reason was given why two references to Roth individual retirement arrangement benefits were needed in the exception. Nor is there any discussion why this addition was needed. All Roth individual retirement arrangements must qualify under IRC § 408. IRC § 408A(b).

When L. 2001, ch. 141 added a reference to IRC Section 457 to CPLR § 5205(c) similar to the one for Roth individual retirement arrangement benefits in the above 1998 legislation, no corresponding change was made to the first list in Debt. & Cred. L § 282(2). Nor was there any discussion of the effect of the single reference to Section 457 plans in the exception to the exemption. This supports the idea that the first list may be omitted without changing the meaning of Debt. & Cred. L § 282(2).

There were no NYSBA comments in the bill jacket.

Under the act's Section 4, the act was effective on or after January 1, 1998. Thus, again, the significance of the effective date is uncertain. Do the uncertain effects apply to (i) all bankruptcy petitions, regardless of the filing date, or (ii) only the bankruptcy petitions filed on or after before the act's effective date of January 1, 1998?

The act contained no severability provision.

II. THE CIVIL PRACTICE LAW AND RULES PERTAINING EXPLICITLY TO PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

A. IN 1982, RESTRAINING NOTICES AND LEVIES PERTAINING TO PROPERTY OF JUDGMENT DEBTORS ARE FIRST REQUIRED TO BE ACCOMPANIED FOR DUE PROCESS REASONS BY A SAMPLE LIST OF EXEMPTIONS THAT REFERS TO PENSION BENEFITS

On March 2, 1982, a federal district court held in *Deary v. Guardian Loan Co. Inc.*, 534 F. Supp. 1178 (S.D.N.Y. 1982) that CPLR § 5222 violated the due process requirements of the U.S. Constitution. CPLR § 5222 authorizes a judgment creditor's attorney to issue a restraining notice and serve it upon any person except the judgment debtor's employer, thereby freezing the debtor's assets that such person may hold. The court found that the section was constitutionally defective in failing to afford the judgment debtor adequate protection against erroneous restraint or execution. *Id.*, at 1188. In particular, debtors were not informed of the exemptions to which they may have been entitled or the procedures for asserting those exemptions from creditor claims. *Id.* The court referred to the pension payments, received by the plaintiff as “90% exempt under 29 U.S.C. § 1056(d).” *Id.*, at 1182. However, there is no 90% rule in the cited federal statute, ERISA, but there is such a restriction in CPLR § 5205(d), which, as discussed above, then referred implicitly to benefits from pension plans funded with trusts.

On July 29, 1982, New York State responded to *Deary* with the enactment of L. 1982, ch. 882. This law added to CPLR § 5222 the following subdivision describing the notice that must be given to an individual judgment debtor no later than four days after the restraining notice has been served:

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR

Money or property belonging to you may have been taken or held in order careful to satisfy a judgment which has been entered against you. Read this

YOU HAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy Judgments. Such money or property is said to be “exempt" The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
J. Alimony or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions; and
9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred) provides a procedure for determination of a claim to an exemption.

In addition, these notice provisions for individual judgment creditors were incorporated into CPLR § 5232 that authorizes a sheriff to levy upon a judgment creditor's personal property, although *Deary* did not consider the constitutionality of such creditor enforcement devices. However, an earlier state decision had held that CPLR §§ 5222 and 5232 both violated the federal due process requirements. *Cole v. Goldberger*, 95 Misc.2d 720 (Sup. Ct. Broome Co. 1978). In particular, the following subdivision was added to CPLR § 5232 provision setting forth the notice that must be given to an individual judgment debtor no later than four days after the levy has been served:

(c) Notice to Judgment Debtor.

Where an execution does not state that a notice in the form presented by subdivision (c) of section fifty-two hundred twenty-two of this chapter has been duly

> served upon the judgment debtor or obligor within a year, the sheriff shall, not later than four days after service of the execution upon any garnishee, mail by first class mail, or personally deliver, to each judgment debtor or obligor who is a natural person, a copy of the execution together with such notice. The sheriff shall specify on the notice to judgment debtor or obligor the name and address of the judgment creditor or the judgment creditor's attorney or the support collection unit. The notice shall be mailed to the judgment debtor or obligor at his or her residence address; and in the event such mailing is returned as undeliverable by the post office, or if the residence address of the judgment debtor or obligor is unknown, then to the judgment debtor or obligor in care of the place of employment of the judgment debtor or obligor if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from a sheriff or concerns a debt; or if neither the residence nor the place of employment of the judgment debtor or obligor is known, then to the judgment debtor or obligor at any other known address.

The sponsor's memo states "The notice would contain a sample list of exemptions under state and federal law, and would inform the judgment debtor that he must act promptly pursuant to CPLR Sections 5239 and 5240 to obtain a determination of his claim." Every item other than pensions is only paid to individuals; pension beneficiaries need not be individuals. There is no explanation why the sample list includes "public or pension plans," in either this memo or any of the other items in the bill jacket. However, the individual judgment debtors, who the provision is intended to protect, often rely on the selected items, including pension payments, to meet their immediate living expenses. Thus, the notice would help debtors avoid the "serious, undue hardship" that could be created if there was no due process notice. *Id.,* at 1188. All the sample statutory items are a subset of the sample exemption list within the *Deary* decision, but there is no explanation why the sample statutory list fails to include some of the *Deary* items, such as proceeds from annuity contracts. *Cf. Deary,* at 1182 n. 6. It would appear that many individuals rely on annuity payments to meet their immediate living expenses in the same way that others rely on payments from pension or profit-sharing plans.

The New York State Attorney General, Robert Abrams, recommended in a July 13, 1982 letter that the bill be approved, after recommending that future legislation address a related issue, which would be addressed in 2008 as discussed below. In particular, Mr. Abrams stated:

> Finally, the bill does not address the key problem of whether or to what extent a judgment creditor may reach accounts in which exempt and non-exempt funds are commingled. This important question is certain to arise frequently under the new procedures, arid should be addressed by the Legislature.

Despite a July 2, 1982 letter from the Greater Upstate Law Project observing that the reference in CPLR § 5232(c) in the proposed legislation should be to the form presented in CPLR § 5232(e), the final legislation refers incorrectly to the notice in CPLR § 5222(c). Copies of the letter, and a similar observation in a July 15, 1982 letter from the Association of the Bar of the City of New York, are in the bill jacket and were addressed to the Governor's Counsel. Such correction was not made until the enactment of L. 1993, ch. 59, § 15, when references to an exemption from the debtor protections for levies by the New York State Support Collection Unit were also added to the statute.

There were no NYSBA comments in the bill jacket.

Under the act's Section 4, the act was effective on September 1, 1982. Thus, the act's notice requirements govern restraining notices and income executions issued after the act's effective date of September 1, 1982.

The act contained no severability provision.

B. IN 1985, CPLR PROVISIONS PROVIDING FOR THE ENFORCEMENT OF SUPPORT OBLIGATIONS WITH INCOME EXECUTIONS AND INCOME DEDUCTION ORDERS ARE INTRODUCED, AND THE PROVISIONS APPLY TO PAYMENTS FROM PENSION FUNDS OR PROFIT-SHARING PLANS

Before 1985, no explicit New York State CPLR provisions addressed the enforcement of support obligations, although PERS, PROP. L. § 49-b permitted such enforcement if good cause was shown. In 1985, New York State responded to the enactment of the Federal Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, and the need for a cost-effective child support enforcement system in New York by enacting L. 1985, ch. 809, which was called the New York State Support Enforcement Act of 1985. This law repealed PERS, PROP. L. § 49-b. Sections 2 and 3 of the law, respectively, added CPLR §§ 5241, and 5242. CPLR § 5241 provided that income executions could be used to enforce support obligations that were in arrears. The scope of the coverage of the law is shown by its subdivisions (a), (b), and (h), which read as follows:

(a) Definitions. As used in this section and in section fifty-two hundred forty-two of this chapter, the following terms shall have the following meanings:

1. "Order of support" means any temporary or final order, Judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, Judgment or decree, registered pursuant to section thirty-seven-a of the domestic relations law which directs the payment of alimony, maintenance, support or child support.

2. "Debtor" means any person directed to make payments by an order of support.

3. "Creditor" means any person entitled to enforce an order of support, including a support collection unit.

4. "Employer" means any employer, future employer, former employer, union or employees' organization.

5. "Income payor" includes:

(i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity-

(ii) the state of New York or any political subdivision thereof, or the United States; and

(iii) any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.

6. "Income" includes any earned, unearned, taxable or non-taxable income, workers' compensation, disability benefits, unemployment insurance benefits and federal social security benefits as defined in 42 U.S.C. section 662(f)(2), but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.

7. "Default" means the failure of a debtor to remit to a creditor three payments on the date due in the full amount directed by the order of support, or the accumulation of arrears equal to or greater than the amount directed to be paid for one month, whichever first occurs.

8. "Mistake of fact" means an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.

9. "Support collection unit" means any support collection unit established by a social services district pursuant to the provisions of section one hundred eleven-h of the social services law, or a local public agency where such agency is responsible for the performance of all the functions of the support collection unit pursuant to an agreement under the provisions of section one hundred eleven-h of the social services law.

(b) Issuance. When a debtor is in default, an execution for support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court. Where a debtor is receiving or will receive income, an execution for deductions therefrom in amounts not to exceed the limits set forth in subdivision (g) of this section may be served upon an employer or income payor after notice to the debtor. The amount of the deductions to be withheld shall be sufficient to ensure compliance with the direction in the order of support, and shall include an additional amount to be applied to the reduction of arrears. The creditor may amend the execution before or after service upon the employer or income payor to reflect additional arrears or payments made by the debtor after notice pursuant to subdivision (d) of this section, or to conform the execution to the facts found upon a determination made pursuant to subdivision (e) of this section.

(h) Priority. A levy pursuant to this section or an income deduction order pursuant to section 5242 of this chapter shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one execution pursuant to this section, or with an execution pursuant to this section and also an order pursuant to section 5242 of this chapter, and if the combined total amount of the deductions to be withheld exceeds the limits set forth in subdivision (g) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total. Any additional deduction authorized by subdivision (g) of this section to be applied to the reduction of arrears shall be applied to such arrears in proportion to the amount of arrears due to each creditor.

The newly enacted CPLR § 5242 permitted income deduction orders to be applied against the same items of income because the income definitions of CPLR § 5241 apply to CPLR § 5242. CPLR § 5241(a).

The sponsor's memo presented the following justification for the bill:

> Over the past decade, New York State has adopted and implemented procedures designed to improve child support enforcement. As recently as last year, the collection of child support was enhanced by legislation designed to provide some measure of additional protection for the children of New York.
>
> Even these most recent efforts have not been sufficient to make child support more than an empty promise for many children. The failure of court-ordered child support to provide reliable and sufficient assistance is a national disgrace. One in every five of this country's children live in single parent households, sixty percent of whom are legally entitled to support. More than half receive only partial payment or none at all. New York, like most other states, has focused in recent years on the staggering fiscal impact of unenforced support obligations and has sought to reduce or avoid unnecessary dependence on public assistance by improving child support enforcement. It is clear, however, that more attention must now be paid to the broader implications of this massive lawlessness, including its impact on children within families that somehow avoid public dependence even in the absence of regular and sufficient support.

Memorandum in Support of Bill by Sponsors, Senator William T. Smith and Assemblypersons Jerrold Nadler, George Friedman, Saul Weprin, Angelo Del Toro, May W. Newburger, William B. Hoyt, Helene Weinstein, and Gerdi E. Lipschutz (the "1985 Supporting Memo")

The new section contained at least two major improvements from PERS, PROP. L. § 49-b, which had been introduced by L. 1958, ch. 659 and subsequently amended ten times prior to its repeal by Section 23 of the 1985 legislation. First, no good cause needed to be shown to obtain an execution. If three payments were outstanding, an execution was available. Second, executions for support had priority over any other legal process or assignments. Third, by being part of the enforcement provisions of the CPLR, its interaction with the other CPLR enforcement provisions was clarified.

The sections provide that an income execution or an income deduction order may be used to obtain a portion of the debtor's income payments from an income payor. There was no discussion of why the income payor definition distinguishes between a profit-sharing plan, and stock bonus plan, while a disbursing officer refers only to any pension fund, or benefit program. Nor is there a discussion why the definition of income does not explicitly include such payments.

However, PERS, PROP. L. § 49-b, as amended by L. 1984, ch. 790, its last amendment prior to its repeal, used virtually the same language. At those times there were no explicit exemptions from any Article 52 enforcement mechanisms for benefits under the terms of a pension or profit-sharing plan.

There were no NYSBA comments in the bill jacket.

Under the act's Section 38, the act was effective on November 1, 1985. Thus, after such date income executions under CPLR § 5241 and income deduction orders may be obtained under CPLR § 5242. The same section provides that orders obtained prior to such date under PERS, PROP. L. § 49-b are not affected or impaired by the act.

The act contained no severability provision.

C. IN 1987, THE FIRST CPLR PROVISON EXPLICITLY PROTECTING PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS WAS ENACTED AND EXEMPTS FROM THE APPLICATION TO THE SATISFACTION OF MONEY JUDGMENTS A SUBSET OF SUCH "QUALIFIED" BENEFITS

Before 1987, there was no explicit New York State statutory protection from creditor claims for pension, profit sharing or stock bonus plans sponsored by private entities. However, CPLR § 5205, which exempted non-self-settled trust benefits from the application of money judgments, provided implicit protection to beneficiaries of such plans funded with trusts, as discussed above. Beneficiaries of such plans funded with group annuity contracts or custodial accounts were not so protected, even though such plans were treated as funded by trusts for tax-qualification purposes. IRC § 401(f). Beneficiaries of such plans funded with annuity or insurance contracts were, however, protected by the insurance provisions discussed above. However, there was no protection for beneficiaries of plans funded with custodial contracts.

Moreover, there was uncertainty about the extent to which a participant's benefits under the terms of a plan funded by a trust were self-settled, particularly if the participant controlled the plan contributions.

In 1987, New York State responded to litigation in the late 1970s and 1980 permitting creditors to enforce judgments against a debtor's profit-sharing benefits, and addressed both the funding and self-settled issues by enacting L. 1987, ch. 108, § 1. This law added explicit exemptions from the enforcement of money judgements for a debtor's benefits from certain Keogh plans and retirement plans by expanding CPLR § 5205(c) as follows:

> (c) Trust exemption. [~~Any~~]
>
> 1. Except as provided in paragraphs three and four of this subdivision, any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.
>
> > 2. For purposes of this subdivision, any trust, custodial account, annuity or insurance contract established as part of either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement plan.
> >
> > 3. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.
> >
> > 4. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

The amended statute explicitly protects a debtor's funds, while they are in the specified plans, unless the creditor is relying on a qualified domestic relations order as defined in the IRC (a "QDRO") or on the fraudulent-transaction exception.

The sponsors' memo states that this law

> would resolve the uncertainty in the present law by extending to Keogh and other specified pension plans maintained by self-employed individuals and partnerships the same protections from judgment creditors as are currently afforded to corporate pension plans. Thus, the qualified plan of a small grocery store owner and a solo legal or medical practitioner, like a plan maintained by a corporation, would be protected from the claims of non-family judgment creditors.
>
> Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Sheldon Silver (the "1987 Supporting Memo").

The 1987 Supporting Memo cited three decisions. In *Helmsley-Spear, Inc., v. Winter*, 52 N.Y.2d 984, 438 N.Y.S.2d 79 (1978) aff'g. 74 A.D.2d 195, 426 N.Y.S.2d 778 (N.Y. App. Div. 1st Dep't 1980), the New York Court of Appeals affirmed a decision that a plan participant's corporate employer, who was also the profit-sharing plan sponsor, could not set off against the plan's benefit payments the sponsor's theft losses attributable to the participant or obtain more than 10% of the distributions except as determined to be unnecessary for the reasonable requirements of the judgment debtor and his dependents). The appellate division explicitly disagreed with *National Bank of North America v. IBEW Local No. 3 Pension and Vacation Funds*, 419 N.Y.S.2d 127 (N.Y. App. Div. 2d Dept. 1979) appeal dismissed 48 N.Y.2d 752 (1979), which permitted such set offs. In contrast, creditors could obtain benefits from Keogh plans in the two other cited lower court decisions: (1) *Plymouth Rock Fuel Corp. v. Bank of New York*, 102 Misc.2d 235, 425 N.Y.S.2d 908 (App. Term, 2d Dept. 1979) (holding that a creditor could obtain a debtor's benefits from the profit-sharing plan established by his sole proprietorship, whose trust was treated as self-settled), and (2) *Lerner v. Williamsburg Savings*

Bank, 87 Misc.2d 65, 386 N.Y.S.2d 906 (N.Y. Civ. Ct. 1976) (holding that a creditor could obtain a debtor's benefits from a profit-sharing plan established by his partnership, whose trust was treated as self-settled). Moreover, in the two latter decisions, creditors obtained the funds from Keogh plans even though the debtors had not asked for their benefit payments. This was because the debtors could have obtained their benefits at the time of the action. Neither court mentioned the turnover proceeding available under EPTL § 7-3.1 for self-settled benefits**.**

The May 12, 1987 NYSBA comment letter supported the enactment of the legislation and observed

> This bill would resolve the question of whether or not Keogh and other specified pension plans maintained by self-employed individuals and partnerships are subject to creditors' claims, by amending CPLR Section 5205(c) and EPTL Section 7-3.1 to specifically exempt such plans from claims of a judgment creditor, even though the judgment debtor is a self-employed individual, a partner of the entity sponsoring the Keogh (HR-10) plan or a shareholder of the corporation sponsoring the retirement plan.

Thus, both the sponsors and the NYSBA wanted to exempt from creditor claims benefit distributions from pension and profit-sharing plans benefit distributions maintained by self-employed individuals and partnerships by a three-step process. First, all undistributed benefits from plans maintained by corporations or such entities are protected from creditor claims subject to the QDRO and fraudulent-conveyance exceptions. Second, assurance is given in the even though clause that the undistributed benefits of owners of such entities or corporations are protected. Third, because CPLR § 5205(d) protects 90% of the payments from trusts, the principal of which is exempt under CPLR § 5205(c), unless the income or payments are not necessary for the reasonable needs to the debtor and his dependents. Thus, because CPLR § 5205(c) protects all the property in such trusts, the benefit distributions are protected.

No explanation is given why the second step was needed to obtain the desired protection of undistributed benefits.

The NYSBA, like the sponsors, did not appear to recognize that the distinctions in the three cited holdings do not stem from whether the plan sponsor was a corporation or a partnership/sole proprietor, but whether the debtor determined the contribution to the plan. The courts in the cited decisions treated benefits as self-settled when the debtor had such authority, but not otherwise. Under this approach, it would be sensible to include within the "even though" exception only those participants who were corporate shareholders who could also control plan contributions.

The "even though" clause added by the amendment that addresses owner-participants creates a very significant issue for non-owner participants in tax-qualified plans, which are generally limited to plans that meet the requirements of Sections 401(a) or 404(a)(2) of the Internal Revenue Code of 1986, as amended. The only reason owner-participant contributions create self-settled issues is that such individuals may control plan contributions. Thus, under the *expressio unius est exclusio alterius* principle that if a clause applies to an explicit subset of items from a category the clause does not apply to items from the category not set forth, a non-owner participant who may choose to contribute part of his compensation to a pension or profit-sharing pursuant to the terms of a Keogh or corporate retirement plan, such as a 401(k) plan, may not use CPLR § 5205(c) to protect those contributed benefits from his or her creditors. *See e.g.*, *Fordyce v. Fordyce*, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974) (CPLR 5205, as in effect before the amendment, prevented the enforcement of the claims of a creditor of an employee, who was not an owner-participant, only to the extent that the employee did not determine plan contributions.)

The amendment also seems to give more protection to benefits from plans sponsored by sole proprietors or partnerships, called Keogh plans, than to benefits from plans sponsored by

corporations, even those that are professional corporations. The distinction does not reflect any difference in the tax treatment of the plans of incorporated and unincorporated businesses. Such differences were abolished three years earlier. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 § 237, 96 STAT. 324, 511-12 (1982), as amended by Deficit Reduction Act of 1984 § 713, Pub. L. No. 98-494, 98 STAT. 494, 958. Thus, the Internal Revenue Code of 1986, Pub. L. No. 99-514, 100 STAT. 2085 (1986) did not mention Keogh plans.

First, the law may protect benefits from Keogh plans that have more funding choices than from corporate plans. A Keogh plan must be tax-qualified, which means it may be either a tax-qualified annuity plan or a tax-qualified trust plan. Self-Employed Individuals Tax Retirement Act of 1962, Public Law 87-79 § 3(b), 76 STAT. 809, at 819 (1962). One may argue that the phrase "which is qualified under IRC section 401," applies only to corporate retirement plans. If so, for such plans and only such plans, protection extends only to benefits under the terms of a tax-qualified trust plan. However, for Keogh plans, protection would also extend to benefits under the terms of a tax-qualified annuity plan. As discussed below, subsequent New York legislation supports this interpretation.

Second, the amendment only protects benefits from a retirement plan sponsored by a corporation, but does not so limit protected Keogh plan benefits. Therefore, benefits from a Keogh profit-sharing plan, that is not a retirement plan, are protected. Although, as discussed above, a "retirement plan" is not a term of art, its presence would seem to have some significance under the usual statutory principles of interpretation. For example, if in-service distributions are permitted or distributions are permitted considerably before the attainment of age 65, a plan may not be treated as a retirement plan, and the benefits will be protected only if they are from a Keogh plan rather than a corporate plan.

The amendment also did not explicitly change Debt. & Cred. L. § 282, but changed it implicitly. The first paragraph of that section incorporates the non-bankruptcy exemptions of CPLR § 5205 as bankruptcy exemptions as permitted under the federal bankruptcy law. Thus, both the 5205(c) exemption for corporate retirement benefits and Keogh benefits, and the 5205(d) exemption for the benefit payments remained available bankruptcy exemptions. In addition, the Debt. & Cred. L. § 282(2) bankruptcy exemption for payments from those plans and other plans continued to apply subject to a reasonable needs exception. The latter exemption had no exception for QDROs or fraudulent transfers. However, that is not a significant distinction. The United States Bankruptcy Act does not permit discharge of most domestic relations orders, 11 U.S.C. §§ 523(a)(5) and (15), and has provisions to prevent fraudulent conveyances, 11 U.S.C. § 548.

There is no discussion in the legislative history of the choice of the three exception creditors.

There is no explanation why the only applicable domestic relations/family law exception creditors, those with QDROs, which the IRC limits to specified pension plans, profit-sharing plans, stock bonus plans and similar plans, applies to all non-self-settled trusts. Thus, no domestic relations orders would appear to be enforceable against an individual's interest in an inter vivos trusts or testamentary trust.

In contrast, the fraudulent conveyance exception creditors are explicitly limited to those for the protected benefits from pension plans, profit-sharing plans, or stock bonus plans. Thus, it would appear *a fortiori* that the fraudulent conveyance provisions are not enforceable against an individual's interest in an inter vivos trusts or testamentary trust. *But see Matter of Gard Entertainment Inc. v. Block*, 960 N.Y.S.2d 50 (Sup. Ct. NY Co. 2012) (holding that this

provision applies to transfers to an inter vivos trust without considering the provision's limiting language).

Similarly, additions to pension/profit-sharing/ stock bonus plans after the date that is ninety (90) days before the interposition of a creditor's claim are subject to such creditor's claims. The interposition of a claim is never defined, but it is logical to apply the CPLR § 203 definition, which would mean the start of the creditor's action. There is a similar irrebuttable presumption under Debt & Cred. L. § 273-a if a debtor makes a transfer without fair consideration after the interposition of the debtor's claim. However, even without the 90-day expansion, such a presumption is contrary to the thrust of the legislation, which is to protect a person's pension/profit-sharing benefits from the person's creditors. In contrast, the more general fraudulent conveyance provision, Debt & Cred. L. § 276, uses a facts-and-circumstances analysis to determine whether a transfer is fraudulent.

No explanation of the significance of this fraudulent conveyance rule appears when later legislation is adopted that expands the protected benefits, but does not change the rule. This occurs when debtor protections are extended to rollover transfers from an exempt plan to another exempt plan or to an individual retirement account, as occurred with L. 1989, ch. 84. Such rollovers, like all "additions" to exempt plans or arrangements, are literally subject to a creditor's claim if made within the period commencing after the date that is ninety (90) days before the commencement of the creditor's action. *But see Bayerische Hypo-und Vereinsbank AG v DeGiorgio*, 74 A.D.3d 492 (2d. Dept. 2010) (holding that rollovers to the debtor's individual retirement account within the 90-day period are not subject to creditor claims, but salary deposits to covered retirement plans are subject to such claims) and *Breslin Realty Development v. Morgan Stanley Smith Barney LLC,* 48 Misc. 3d 424 (Sup. Ct. Nassau Co. 2015) (holding that a

commercial creditor may enforce a claim relying on the 90-day interposition rule for non-rollover contributions, including rollovers of contribution made after the 90-day period begins). Similarly, no explanation accompanies the expansion of protections to benefits from the corpus of individual retirement accounts by the enactment of L. 1994, ch. 127, or to all benefits from individual retirement accounts by the enactment of L. 1995, ch. 93.

Under the act's Section 3, the act was effective on June 18, 1987. It is uncertain whether the act's enhanced debtor protections applies to (1) all legal process issued or entered on or after the effective date for any benefits from a Keogh or corporate retirement plan; (2) only legal process issued or entered on or after the effective date for any benefits from a Keogh or corporate retirement plan established after the effective date; or (3) only legal process issued or entered on or after the effective date for any benefits from a Keogh or corporate retirement plan attributable to contributions after the effective date (if the plan does not allocate earnings between such contributions and earlier contributions there may be questions about the proper allocation of those earnings).

The act contained no severability provision.

D. IN 1987, THE INCOME EXECUTION PROVISIONS OF THE CPLR ARE AMENDED SO THAT SUCH EXECUTIONS MUST INCLUDE DUE PROCESS NOTICES, AND EXECUTIONS ARE LIMITED IF THE JUDGEMENT DEBTOR'S DISPOSABLE EARNINGS ARE NOT ABOVE CERTAIN MULTIPLES OF THE FEDERAL OR NEW YORK STATE MINIMUM WAGES

On March 27, 1987, a federal district court held, in *Follette v. Vitanza,* 658 F. Supp. 492 (W.D.N.Y. 1987), that CPLR § 5231 violated the due process requirements of the U.S. Constitution. CPLR § 5231 authorizes a judgment creditor to obtain and deliver an income

execution to a sheriff in the county in which the judgment debtor resides, which the sheriff serves upon the judgment debtor, and if not paid promptly, the sheriff will levy upon the payor of the money described in the execution. The court cited the *Deary* decision, *id.*, at 509-13, which had held in 1982 that CPLR § 5222 violated the due process decision. The court found that the section was constitutionally defective in failing to give the judgment debtor notice at the time of the service of the execution of the procedures for challenging an erroneous execution, and the limits on income executions under the federal Consumer Credit Protection Act of 1968. *Id.,* at 513-14. On April 24, 1987, the court required that any future income executions must "contain thereon or annexed thereto a notice in substantial conformance with the form annexed." *Follette v. Vitanza,* 658 F. Supp. 512, at 517-19 (W.D.N.Y. 1987).

On August 7, 1987, New York State responded to *Follette* by enacting L. 1987, ch. 829 that required that a specified notice be part of the income execution. This law amended subdivisions (b) and (f) and added new subdivisions (c) and (g) to CPLR § 5222 that read as follows:

> (b) Issuance. Where a judgment debtor is receiving or will receive [~~more than eighty-five dollars per week~~] earnings from any person, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the Judgment debtor resides or, where the judgment debtor's a non-resident, the county in which he is employed; provided, however, that (i) no amount shall be withheld pursuant to an income execution for any week unless the disposable earnings of the judgment debtor for that week exceed thirty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 as in effect at the time the earnings are payable; (ii) the amount withheld pursuant to an income execution for any week shall not exceed twenty-five percent of the disposable earnings of the judgment debtor for that week, or, the amount by which the disposable earnings of the judgment debtor for that week exceed thirty times the federal wage prescribed by the Fair Labor Standards Act of 1938 as in effect at the time the earnings are payable, whichever is less; (iii) if the earnings of the judgment debtor are also subject to deductions for alimony, support or maintenance for family members or former spouses pursuant to section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article, the amount withheld pursuant to this section shall not exceed the amount by which twenty-five percent of the disposable earnings of the

judgment debtor for that week exceeds the amount deducted in accordance with section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article.

(c) Definition of earnings and disposable earnings.

(i) As used herein earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(ii) As used herein disposable earnings means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(f) Withholding of installments. A person served with an income execution shall withhold from money then or thereafter due to the judgment debtor installments [of ten percent thereof] as provided therein and pay them over to the sheriff. If such person shall fail to so pay the sheriff, the judgment creditor may commence a proceeding against him for accrued installments. If the money due to the judgment debtor consists of salary or wages and his employment is terminated by resignation or dismissal at any time after service of the execution the levy shall thereafter be Ineffective, and the execution shall 6e returned, unless the debtor is reinstated or re-employed within ninety days after such termination.

(g) Statement on income execution. Any income execution delivered to the sheriff on or after the effective date of this act, shall contain the following statement:

THIS INCOME EXECUTION DIRECTS THE WITHHOLDING OF UP TO TEN PERCENT OF THE JUDGMENT DEBTOR'S GROSS INCOME. IN CERTAIN CASES, HOWEVER, STATE OR FEDERAL LAW DOES NOT PERMIT THE WITHHOLDING OF THAT MUCH OF THE JUDGMENT DEBTOR'S GROSS INCOME. THE JUDGMENT DEBTOR IS REFERRED TO NEW YORK CIVIL PRACTICE LAW AND RULES § 5231 AND 15 UNITED STATES CODE § 1671 ET SEQ.

I. LIMITATIONS ON THE AMOUNT THAT CAN BE WITHHELD.

A. AN INCOME EXECUTION FOR INSTALLMENTS FROM A JUDGMENT DEBTOR'S GROSS INCOME CANNOT EXCEED TEN PERCENT (10%) OF THE JUDGMENT DEBTOR'S GROSS INCOME.

B. IF A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS ARE LESS THAN THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR ( ), NO DEDUCTION CAN BE MADE UNDER THIS INCOME EXECUTION.

C. A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS CANNOT BE REDUCED BELOW THE AMOUNT ARRIVED AT BY MULTIPLYING THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR ( ), UNDER THIS INCOME EXECUTION.

D. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S GROSS INCOME UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS EQUAL OR EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S

DISPOSABLE EARNINGS, NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S UNDER THIS INCOME EXECUTION.

E. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S GROSS INCOME UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS ARE LESS THAN TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, DEDUCTIONS MAY BE MADE UNDER THIS INCOME EXECUTION. HOWEVER, THE AMOUNT ARRIVED AT BY ADDING THE DEDUCTIONS MADE UNDER THIS EXECUTION TO THE DEDUCTIONS MADE UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES CANNOT EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS.

NOTE: NOTHING IN THIS NOTICE LIMITS THE PROPORTION OR AMOUNT WHICH MAY BE DEDUCTED UNDER ANY ORDER FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES.

II. EXPLANATION OF LIMITATIONS.

DEFINITIONS:

DISPOSABLE EARNINGS ARE THAT PART OF AN INDIVIDUAL'S EARNINGS LEFT AFTER DEDUCTING THOSE AMOUNTS THAT ARE REQUIRED BY LAW TO BE WITHHELD (FOR EXAMPLE, TAXES, SOCIAL SECURITY, AND UNEMPLOYMENT INSURANCE, BUT NOT DEDUCTIONS FOR UNION DUES, INSURANCE PLANS, ETC.).

GROSS INCOME IS SALARY, WAGES OR OTHER INCOME, INCLUDING ANY AND ALL OVERTIME EARNINGS, COMMISSIONS, AND INCOME FROM TRUSTS, BEFORE ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.

ILLUSTRATIONS:

IF DISPOSABLE EARNINGS IS	AMOUNT TO PAY OR DEDUCT FROM EARNINGS UNDER THIS INCOME EXECUTION IS
(A) 30 TIMES FEDERAL MINIMUM WAGE ( ) OR LESS	NO PAYMENT OR DEDUCTION ALLOWED
(B) MORE THAN 30 TIMES FEDERAL MINIMUM WAGE ( ) AND LESS THAN 40 TIMES FEDERAL MINIMUM WAGE ( )	THE LESSER OF: THE EXCESS OVER 30 TIMES THE FEDERAL MINIMUM WAGE ( ) IN DISPOSABLE EARNINGS, OR 10% OF GROSS EARNINGS
(C) 40 TIMES THE FEDERAL MINIMUM WAGE ( ) OR MORE	THE LESSER OF: 25% OF DISPOSABLE EARNINGS, OR 10% OF GROSS EARNINGS

III. NOTICE: YOU MAY BE ABLE TO CHALLENGE THIS INCOME EXECUTION THROUGH THE PROCEDURES PROVIDED IN CPLR § 5231 (i) AND CPLR § 5240

IF YOU THINK THAT THE AMOUNT OF YOUR EARNINGS BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD ACT PROMPTLY BECAUSE THE MONEY WILL BE APPLIED TO THE JUDGMENT. IF YOU CLAIM THAT THE AMOUNT OF YOUR EARNINGS BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD CONTACT YOUR EMPLOYER OR OTHER PERSON PAYING YOUR EARNINGS. FURTHER, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. NEW YORK STATE LAW PROVIDES TWO PROCEDURES THROUGH WHICH AN INCOME EXECUTION CAN BE CHALLENGED:

CPLR § 5231(i) MODIFICATION. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER MODIFYING AN INCOME EXECUTION.

CPLR § 5240 MODIFICATION OR PROTECTIVE ORDER: SUPERVISION OF ENFORCEMENT. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER DENYING, LIMITING, CONDITIONING, REGULATING, EXTENDING OR MODIFYING THE USE OF ANY POST-JUDGMENT ENFORCEMENT PROCEDURE, INCLUDING THE USE OF INCOME EXECUTIONS.

The sponsors' memo presented the following justification for the law:

> The proposed legislation would require an appropriate income execution statement designed to provide adequate notice to judgment debtors.
>
> Additionally, this bill will eliminate the current situation where reliance on the State exemptions can result in illegal deductions from earnings pursuant to income executions. Under current law not only judgment debtors can suffer from such illegal deductions, but judgment creditors and employers, especially small businesses, may be liable for either the service of or compliance with such illegal income executions. The provisions in this bill for an explanatory notice in "plain language" that would be served on employers would help small businesses understand how to comply with the law.
>
> The federal Consumer Protection Act also provides that if a judgment debtor's earnings are subject to court ordered deductions for the support of dependents than an income execution in favor of a general creditor can only be enforced to the extent that the total deducted for the support of the dependents and for the general creditor does not exceed 25% of the judgment debtor's disposal [sic] earnings. Since this requirement has no counterpart under current § 5231 of the Civil Practice Rules, it has caused time-consuming, expensive and unnecessary litigation which could have been avoided had § 5231 conformed to federal law, see, e.g., Liedka v. Liedka, 101 Misc. 2d 305; General Motors Acceptance Corp. v. Metropolitan Opera Association, 98 Misc. 2d 307; Long

> Island Trust Co. v. U. S. Postal Service, 647 F. 2d 336. This bill would also help resolve litigation challenging the legality of CPLR § 5231 under federal law. Follette v. Vitanza, 81-CV-965 (N. D. N. Y.)

Memorandum in Support of Bill by Assemblymen G. Oliver Koppell and Terence M. Zaleski

The Governor's Office of Employee Relations July 17, 1987 letter described the notice provisions as follows:

> The bill also adds a new subsection (g) to CPLR § 5231 setting forth a specific statement which every income execution delivered must contain. The statement notifies the recipient of the income execution of the state and federal statutory limitations on garnishment, defines the terms "disposable earnings" and "gross income", provides specific examples of the garnishment limitations and advises the garnishee of his/her right to challenge the income execution under CPLR 5231(g) and 5240.

The July 16, 1987 letter from Robert Abrams, the Attorney General stated, "The bill corrects the defects in Section 5231 and essentially adopts the language which the federal court approved as adequate notice in its order of April 24, 1987."

The May 27, 1987 memorandum of the New York State Bar Association supporting the bill stated:

> The bill also requires that an explanatory notice in "plain language" and specifying the correct exemptions, accompany all income executions. Such a notice would not only benefit the judgment debtor but would help small business understand how to comply with the law.

None of the supporting documents explain why the draftspersons did not copy the unambiguous description of the minimum wage in the Consumer Credit Protection Act of 1968, namely, "the Federal minimum hourly wage prescribed by section 6(a) (1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable." 15 U.S.C. § 1673(a)(2). Instead, the legislation refers to "the federal minimum hourly wage of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable," even though federal act defines multiple minimum wages.

Under the act's Section 4, the act was effective on August 7, 1987. Thus, the act's notice requirements govern any income executions issued after the act's effective date of August 7, 1987.

The act contained no severability provision.

E. IN 1988, THE CPLR IS AMENDED TO BROADEN THE SUPPORT ORDERS THAT ARE ENFORCEABLE TO INCLUDE EXPLICITLY THOSE ARISING FROM AGREEMENTS INCORPORATED BY REFERENCE IN DIVORCE JUDGMENTS

On October 10, 1985, the Court of Appeals of New York held in *Baker v. Baker,* 66 N.Y.2d 649 (New York 1985) that NY Dom. Rel. § 244, which provides for the enforcement of divorce judgements and orders, may not be used to enforce arrears in alimony that arose under the terms of a separation agreement that was referenced but not merged into the divorce judgment even though the court retained jurisdiction to enforce the surviving agreement. *Id.*, at 651-52. This, however, did not preclude a plenary action under the agreement. *Id.* Several appellate term courts then found that the expedited (non-plenary) enforcement procedures of NY Dom. Rel. § 244 could not be used to obtain support arrears that arose under the terms of agreements that survived and were not merged with the divorce judgments. *Petritis v. Petritis*, 131 A.D.2d 651 (2d. Dept. 1987), *Wells v. Wells*, 130 A.D.2d 487 (2d. Dept. 1987), and *Baratta v. Baratta*, 122 A.D.2d 3 (2d. Dept. 1986).

On July 25, 1988, New York State responded to these decisions by enacting L. 1988, ch. 327 to broaden the availability of the expedited enforcement procedures for support arrears of both NY Dom. Rel. § 244 and CPLR § 5241(a). In particular, the law amended paragraph one of

CPLR § 5241(a) to apply to agreements incorporated by reference to divorce judgments as follows:

> "Order of support" means any temporary or final order, judgment, agreement or stipulation incorporated by reference in such Judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, judgment or decree, registered pursuant to section thirty-seven-a of the domestic relations law which directs the payment of alimony, maintenance, support or child support.

The sponsors' memo gave the following justification for the bill:

> In 1987, several Appellate Divisions held that a marital stipulation or separation agreement which was incorporated by reference, but not merged in a decree of divorce, was not sufficient for the purpose of specifically enforcing the payment provisions. The courts further held that incorporation by reference cannot serve as a predicate to application for arrears because it does not provide a mandate by the court that the stipulation be carried out by the parties (see Baretta vs. Baretta, 122 A.D. 2 d 3,504 N. Y.S. 2 d 175 Wells vs. Wells, 515 NY Supp. 2d 70, Petritis vs, Petritis, 515 N. Y. S. 2d 734). As a result, actions for arrearages are being denied where the divorce decree does not specifically state the terms of the support obligation, but incorporates the separation agreement or marital stipulation by reference. This bill will clarify that incorporation by reference is an acceptable device under which the support obligations of the parties can be detailed and are therefore enforceable as part of the divorce decree or judgment.

Memorandum in Support of Bill by Senator May B. Goodhue

On July 20, 1988, the NYSBA Family Law Section approved the bill before it was enacted and described how overruling the *Baker* decision would "simplify" the enforcement of support obligations. On August 14, 1988, after the enactment of the law, the NYSBA Committee on the Civil Practice Laws and Rules also approved the law. The report observed that the law resolved a conflict between the First and Second Departments about whether NY Dom. Rel. § 244 applies to the enforcement of a stipulation that is referenced but not incorporated into the divorce judgment. Both letters are part of the bill jacket.

Under the act's Section 3, the act was effective on the July 25, 1988 date of its enactment. The significance of the act being effective immediately was set forth unambiguously, as follows:

> This act shall take effect immediately and shall apply to all judgments, orders or agreements or stipulations incorporated by reference in a judgment, relating to actions for divorce separation or annulment of a marriage or of support, entered or issued both before and after such date.

The act contained no severability provision.

F. IN 1989, THE CPLR IS AMENDED TO PROTECT KEOGH AND CORPORATE RETIREMENT BENEFITS THAT ARE ROLLED OVER TO INDIVIDUAL RETIREMENT ARRANGEMENTS

In 1989, New York State added protection for rollovers to traditional individual retirement arrangements from Keogh plans and corporate retirement plans by enacting L. 1989, ch. 84, §1, which amended CPLR § 5205 (c)(2) as follows:

> 2. for purposes of this subdivision any trust, custodial account, annuity or insurance contract established as part of, either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402(a)(5), 403 (a)(4) or 408(d)(3)of the Internal Revenue Code of 1986, shall be considered a trust which has been created or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement plan.

The sponsors' memo stated that this law "is a logical extension of the 1987 law, Chapter 108, on the satisfaction of trust exemptions. It specifically affords protection from judgment creditors to rollovers in qualified retirement plans in accordance with the 1987 legislation." Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Sheldon Silver. Like its predecessor, it did not explicitly change either CPLR § 5205(d) or Debt. & Cred. L. § 282, but, as described above, implicitly changed both because both incorporate the additional exemption. The Court of Appeals held, after the act's enactment, that a rollover by a participant from a corporate plan to an individual retirement account was protected from the

claims of the participant's creditors. *Bank Leumi Trust Co. v. Dime Sav. Bank, FSB*, 85 N.Y.2d 925, 650 N.E.2d 846 (N.Y. 1995).

The amendment's description of protected rollovers raises at least three major issues, none of which are mentioned in the bill jacket.

> First, does the reference to plans "created as a result of rollovers," limit the new benefit protections, in practice, to the benefits arising from rollovers to individual retirement arrangements? For this plan reference to have any significance, it would appear that only rollovers to a plan created for that purpose, or, perhaps, principally for that purpose, may be protected, rather than to a plan for which this is not the principal purpose. However, tax-qualified plans, unlike individual retirement arrangements, are rarely created principally to receive tax-free rollovers. They are usually created to receive contributions associated with employment on behalf of participants of the plan sponsor, but may include provisions to receive rollover contributions by those participants. On the other hand, if the legislature wanted to limit rollovers to individual retirement arrangement rollovers, why include the statutory references to rollovers to tax-qualified plans.
>
> Second, does the amended subdivision protect non-rollover contributions to an individual retirement arrangement created to receive rollovers, such as post-rollover participant contributions? On the one hand, the statute seems to extend protection to any benefit under the terms of an individual retirement arrangement so created, or at least to rollovers and participant contributions after the individual retirement arrangement is created to receive rollovers. If so, why not protect all

benefits from individual retirement accounts in the same manner as benefits from Keogh plans and corporate retirement plans. On the other hand, this analysis would not apply to individual retirement accounts created for other reasons, such as a part of a Simplified Employee Pension ("SEP") Plan, which is not a tax-qualified plan, but a pension plan funded with individual retirement accounts or annuities. *See e.g.*, *European American Bank & Trust Company v. H. Frenkel, Ltd.*, 147 Misc. 2d 423; 555 N.Y.S.2d 1016 (Sup. Ct. N.Y. Co. 1990) (holding that SEP benefits are not protected from creditor claims). In fact, as discussed below, the statute was later amended to protect explicitly benefits under the terms of any individual retirement account (one qualifying under IRC § 408(a), *i.e.*, any individual retirement arrangement funded with a trust or a custodial account).

Third, do the additions result in CPLR § 5205 protecting benefits under the terms of an individual retirement annuity or a tax-qualified annuity plan, even those that do not arise from rollovers? The amended subdivision (c) refers to rollovers pursuant to IRC § 402(a)(5) [now IRC § 402(c)(1)], which refers to rollovers from tax-qualified trust plans, IRC § 403(a)(4), which refers to rollovers from tax-qualified annuity plans, and IRC § 408(d)(3), which refers to rollovers from individual retirement arrangements, including individual retirement annuities. The amended subdivision (c) also appears to protect all the benefits of such plans and arrangements from creditor claims. Does this imply that all benefits from individual retirement annuities or tax-qualified annuity plans are protected? Unlike individual retirement accounts, the legislature never explicitly adopts such provisions.

Fourth, are rollovers excluded from the provision making "additions to an asset described in paragraph two" subject to the claim of a creditor, if the addition occurred after the date 90 days before the interposition of the creditor's claim? Rollovers, by definition would be occurring among assets which are generally exempt from creditor claims, but there is no exclusion for rollovers in the addition paragraph.

There were no NYSBA comments in the bill jacket.

Under the act's Section 2, the act was effective on its enactment date of May 11, 1989. Thus, the debtor protections would apply to a debtor's benefits that are derived from a specified rollover after the act's effective date of May 11, 1989.

The act contained no severability provision.

G. IN 1989, THE CPLR IS AMENDED TO BROADEN THE PROTECTIONS FOR BENEFITS FROM KEOGH PLANS OR CORPORATE RETIREMENT PLANS

In 1989, New York State responded to concerns about the bankruptcy treatment of a debtor's benefits in Keogh plans and corporate retirement plans by enacting L. 1989, ch. 280, §§ 1, 2, which amended CPLR §§ 5205 (c) and (d) as follows:

> (c) Trust exemption. 1. Except as provided in paragraphs [~~three and]~~ four and five of this subdivision, [~~any~~] all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.
>
> 2. For purposes of this subdivision, [~~any trust~~] all trusts, custodial ~~account~~ accounts, ~~annuity or~~ annuities, insurance ~~contract~~ contracts, monies, assets or interests established as part of, and all payments from, either a Keogh (HR-10) ~~plan or a~~], retirement or other plan established by a corporation,

which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a)(5), 403 (a)(4) or 408 (d)(3) of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.

[4] 5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c) provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities insurance contracts, monies, assets or interests established as part of a Keogh (HR-10), retirement, or other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part of as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;

The sponsors' memo stated that this law "advances the interests of New York retirement plan participants by ensuring that their retirement benefits are fully protected from the claims of

non-family creditors as described in the ERISA anti-alienation provisions, and by guaranteeing their plan's continued qualified tax status in the face of overly aggressive bankruptcy judges." Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Sheldon Silver at 3-4. The NYSBA April 13, 1989 report similarly described the bill as follows: "In summary, this bill clarifies the scope of New York protection for qualified retirement plan assets by making explicit the spendthrift trust status of such assets."

The amendment, however, did much more than treat property associated with Keogh plan benefits, corporate retirement benefits, or property rolled over into individual retirement accounts as being in a spendthrift trust rather than merely being in a trust that is not self-settled. Without any discussion in the bill jacket, the amendment also made five additional changes.

> First, the exemption for distributed benefits is unconditional. Before the amendment the exemption could be overridden to extent a court determines that such distributions amounts would be unnecessary for the debtor's reasonable requirements. The same change was made to Debt. & Cred. L § 284(2) when, as described above, it was also amended by the same 1989 statute
>
> Second, payments from such property are explicitly protected in both CPLR §§ 5205 (c) and (d), without any explanation of which provision applies to which payments. The former section permits individuals to enforce QDROs against payments, but the latter does not, which raises a question about the effectiveness of a QDRO addressing benefit payments. Before the amendment, there was no explicit protection in the latter.

Third, protected benefits from corporate plans may explicitly come only from a tax-qualified trust plan, *i.e.*, a pension, profit sharing or a stock bonus plan, rather than only from undefined retirement plans that are tax-qualified trust plans.

Fourth, the Keogh plan exemption may, for all practical purposes, have been eliminated because the statute seems to limit the exemption to the rare group of Keogh plans established by a corporation that permits a partnership or sole proprietor to participate in such plan.

Fifth, CPLR § 5205 (d) does not reference or repeat the language used in CPLR § 5205 (c) to describe protected benefits, but rephrases that language. Before the amendment, subdivision (d) did not explicitly mention the property.

Under the act's Section 5, the act was effective on its enactment date of July 7, 1989. The significance of the effective date is quite uncertain. Does the spendthrift characterization apply to (i) all bankruptcy petitions, regardless of the filing date, or (ii) only the bankruptcy petitions filed on or after before the act's effective date of July 17, 1989? Do the changes in the permissible process apply to (1) all legal process issued or entered on or after the effective date for any benefits from a specified plan or arrangement; (2) only all legal process issued or entered on or after the effective date for any benefits from a specified plan or arrangement established after the effective date; or (3) only all legal process issued or entered on or after the effective date for any benefits from a specified plan or arrangement attributable to contributions after the effective date (if the plan does not allocate earnings to such contributions there may be questions about the proper allocation)?

The act contained no severability provision.

H. IN 1990, THE CPLR 5231 IS AMENDED SO THAT INCOME EXECUTIONS MAY BE APPLIED TO ANY MONEY RECEIVED BY A JUDGEMENT DEBTOR NOT MERELY MONEY FROM THE DEBTOR'S EARNINGS

In 1990, New York State followed a Law Revision Commission request and broadened the applicability of income executions without affecting the existing exemptions from the enforcement of creditor claims protections by enacting L. 1990, ch. 178, § 1, which amended subdivisions (b) and (g) of CPLR § 5231 as follows:

> (b) Issuance. Where a judgment debtor is receiving or will receive money from any source [~~earnings from any person]~~, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the Judgment debtor resides or, where the judgment debtor's a non-resident, the county in which he is employed; provided, however, that (i) no amount shall be withheld from the judgment debtor's earnings pursuant to an income execution for any week unless the disposable earnings of the judgment debtor for that week exceed thirty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 as in effect at the time the earnings are payable; (ii) the amount withheld from the judgment debtor's earnings pursuant to an income execution for any week shall not exceed twenty-five percent of the disposable earnings of the judgment debtor for that week, or, the amount by which the disposable earnings of the judgment debtor for that week exceed thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938 as in effect at the time the earnings are payable, whichever is less; (iii) if the earnings of the judgment debtor are also subject to deductions for alimony, support or maintenance for family members or former spouses pursuant to section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article, the amount withheld from the judgment debtor's earnings pursuant to this section shall not exceed the amount by which twenty-five percent of the disposable earnings of the judgment debtor for that week exceeds the amount deducted from the judgment debtor's earnings in accordance with section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article. Nothing in this section shall be construed to modify, abrogate, impair, or affect any exemption from the satisfaction of a money judgment otherwise granted by law.
>
> (g) Statement on income execution. Any income execution delivered to the sheriff on or after the effective date of this act~~,~~ shall contain the following statement:

THIS INCOME EXECUTION DIRECTS THE WITHHOLDING OF UP TO TEN PERCENT OF THE JUDGMENT DEBTOR'S GROSS INCOME. IN CERTAIN CASES, HOWEVER, STATE ~~OR~~AND FEDERAL LAW DOES NOT PERMIT THE WITHHOLDING OF THAT MUCH OF THE JUDGMENT DEBTOR'S GROSS INCOME. THE JUDGMENT

DEBTOR IS REFERRED TO NEW YORK CIVIL PRACTICE LAW AND RULES § 5231 and 15 UNITED STATES CODE § 1671 ET SEQ.

I. LIMITATIONS ON THE AMOUNT THAT CAN BE WITHHELD.

A. AN INCOME EXECUTION FOR INSTALLMENTS FROM A JUDGMENT DEBTOR'S GROSS INCOME CANNOT EXCEED TEN PERCENT (10%) OF THE JUDGMENT DEBTOR'S GROSS INCOME.

B. IF A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS ARE LESS THAN THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR ( ), NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.

C. A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS CANNOT BE REDUCED BELOW THE AMOUNT ARRIVED AT BY MULTIPLYING THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR ( ), UNDER THIS INCOME EXECUTION.

D. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S GROSS INCOME[~~EARNINGS~~] UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS EQUAL OR EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.

E. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S GROSS INCOME[~~EARNINGS~~] UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS ARE LESS THAN TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, DEDUCTIONS MAY BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION. HOWEVER, THE AMOUNT ARRIVED AT BY ADDING THE DEDUCTIONS FROM EARNINGS MADE UNDER THE[~~THIS~~] EXECUTION TO THE DEDUCTIONS MADE FROM EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES CANNOT EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS.

NOTE: NOTHING IN THIS NOTICE LIMITS THE PROPORTION OR AMOUNT WHICH MAY BE DEDUCTED UNDER ANY ORDER FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES.

II. EXPLANATION OF LIMITATIONS.

DEFINITIONS:

DISPOSABLE EARNINGS ARE THAT PART OF AN INDIVIDUAL'S EARNINGS LEFT AFTER DEDUCTING THOSE AMOUNTS THAT ARE REQUIRED BY LAW TO BE WITHHELD (FOR EXAMPLE, TAXES, SOCIAL SECURITY, AND UNEMPLOYMENT INSURANCE, BUT NOT DEDUCTIONS FOR UNION DUES, INSURANCE PLANS, ETC.).

GROSS INCOME IS SALARY, WAGES OR OTHER INCOME, INCLUDING ANY AND ALL OVERTIME EARNINGS, COMMISSIONS, AND INCOME FROM TRUSTS, BEFORE ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.

ILLUSTRATIONS:

IF DISPOSABLE EARNINGS IS	AMOUNT TO PAY OR DEDUCT FROM EARNINGS UNDER THIS INCOME EXECUTION IS
(A) 30 TIMES FEDERAL MINIMUM WAGE ( ) OR LESS	NO PAYMENT OR DEDUCTION ALLOWED
(B) MORE THAN 30 TIMES FEDERAL MINIMUM WAGE ( ) AND LESS THAN 40 TIMES FEDERAL MINIMUM WAGE ( )	THE LESSER OF: THE EXCESS OVER 30 TIMES THE FEDERAL MINIMUM WAGE ( ) IN DISPOSABLE EARNINGS, OR 10% OF GROSS INCOME[EARNINGS]
(C) 40 TIMES THE FEDERAL MINIMUM WAGE ( ) OR MORE	THE LESSER OF: 25% OF DISPOSABLE EARNINGS, OR 10% OF GROSS INCOME[EARNINGS]

III. NOTICE: YOU MAY BE ABLE TO CHALLENGE THIS INCOME EXECUTION THROUGH THE PROCEDURES PROVIDED IN CPLR § 5231 (i) AND CPLR § 5240

IF YOU THINK THAT THE AMOUNT OF YOUR INCOME[EARNINGS] BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE AND[OR] FEDERAL LAW, YOU SHOULD ACT PROMPTLY BECAUSE THE MONEY WILL BE APPLIED TO THE JUDGMENT. IF YOU CLAIM THAT THE AMOUNT OF YOUR INCOME[EARNINGS] BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE AND[OR] FEDERAL LAW, YOU SHOULD CONTACT YOUR EMPLOYER OR OTHER PERSON PAYING YOUR INCOME[EARNINGS]. FURTHER, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. NEW YORK STATE LAW PROVIDES TWO PROCEDURES THROUGH WHICH AN INCOME EXECUTION CAN BE CHALLENGED:

CPLR § 5231(i) MODIFICATION. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER MODIFYING AN INCOME EXECUTION.

CPLR § 5240 MODIFICATION OR PROTECTIVE ORDER: SUPERVISION OF ENFORCEMENT. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER DENYING, LIMITING, CONDITIONING, REGULATING,

EXTENDING OR MODIFYING THE USE OF ANY POST-JUDGMENT ENFORCEMENT PROCEDURE, INCLUDING THE USE OF INCOME EXECUTIONS.

The sponsors' 1989 memo contained the following statement in support of the bill:

> In 1987 section 5231 of the CPLR was amended in order to remove a conflict between that section and the federal statutory provisions which govern the garnishment of a judgment debtor's earnings (e.g. salary). This 1987 amendment inadvertently eliminated the applicability of §5231 to unearned income (e.g. income from trusts).
>
> This bill restores the applicability of income executions to unearned income while retaining the accommodation made between New York and Federal law in 1987 with respect to the garnishment of earned income.
>
> Memorandum in Support of Bill by Senator Dale M. Volker

In contrast, the 1990 memorandum of support of the bill by the Law Revision Commission contained the following statement in support of the bill:

> In 1987 section 5231 of the CPLR was amended in order to remove a conflict between that section and the federal statutory provisions which govern the garnishment of a judgment debtor's earnings (e.g., salary). This 1987 amendment inadvertently eliminated the applicability of §5231 to unearned income (e.g., income from trusts).
>
> This bill restores the applicability of income executions to unearned income while retaining the accommodation made between New York and Federal law in 1987 with respect to the garnishment of earned income. It also expressly states that all current exemptions from garnishment, such as those granted by CPLR 5205, Labor Law §595, Social Services Law §137-a, Workers' Compensation Law §33, and other state and federal law, are left unaffected by the bill and are therefore preserved.

The final sentence is not in the sponsor's memo. Moreover, despite the explicit references by the Commission's memo to the exemptions respectively for payments from a trust, unemployment compensation, public assistance, and workers compensation, the Commission's proposal which the legislature adopted verbatim in 1990, mentions none. The Commission further discussed each of these exemptions in a July 13, 1989 letter to Lise Gelernter, the Assistant Counsel, in the Governor's Counsel Office, including the protection of 90% of a judgment debtor's earnings in CPLR 5205(d). This letter also observed that the term "money from any source" conforms the language of CPLR 5231 to that of CPLR 5226, which permits

installment orders against payments the creditor was not able garnish when being paid to the judgment debtor. A May 14, 1990 letter by the Commission to the Governor's counsel, indicates that the general exemption language was added in 1990 when the 1989 proposal was revised in response to questions about the continued viability of these exemptions.

The 1990 Commission report accompanying its memorandum discusses on page 6 how the amendment will permit executions against trust income as follows:

> The Commission recommends that CPLR §5231 be amended to restore the applicability of that section to unearned income. As a practical matter, bringing unearned income once again within §5231 would primarily affect income from trusts. Unearned income from other sources, e.g., rent, dividends, and interest, can usually be reached by executing against the sources themselves, i.e., the land, the stock, or the debt instruments. Income interests in trusts, however, can not be reached in the same way because such interests are generally non-assignable under §7-1.5 of the Estates Powers and Trusts Law, and the execution provisions of the CPLR §5201(a) allow judgments to be executed only against property which can be "assigned or transferred."

In other words, non-assignable income interests are not reachable by creditors prior to their distribution. They may be reached upon their distribution under the amended CPLR §5231. However, this is subject to the CPLR §5205(d) protection of 90% of such interest.

There were no NYSBA comments in the bill jacket.

Under the act's Section 4, the act was effective on its date of enactment, May 24, 1990. Thus, the act's enhancement of the applicability of income executions and revisions to the notice requirements must govern income executions issued and delivered after the act's effective date of May 24, 1990, but may not apply to those issued before such date.

The act contained no severability provision.

I. IN 1993, THE CPLR IS AMENDED TO CLARIFY THE ENFORCEMENT OF ORDERS OF SUPPORT

In 1993, New York State to clarify the enforcement of orders of support by enacting L. 1993, ch. 59, § 12, which amended CPLR § 5101 as follows:

> § 5101. Enforcement of money judgment or order. A money judgment and an order directing the payment of money, including motion costs, may be enforced as prescribed in article fifty-two. An order of support, alimony or maintenance of any court of competent jurisdiction where arrears/past-due support have not been reduced to judgment, including motion costs, may be enforced as prescribed in article fifty-two upon the default of a debtor as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article.

Section 13 of the statute made a similar amendment to CPLR § 5222(f) as follows:

> (f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivision nine of section two hundred thirty six of the domestic relations law.

Sections 14 and 15 of the law added similar provisions to respectively CPLR §§ 5230, and 5232. Section 16 of the law amended CPLR § 5234 to give child support orders a priority

over other orders. Sections 5 through 8 of the law added provisions to CPLR § 5241 addressing support orders to provide health insurance benefits.

The Assembly sponsors described the statute and its justification as follows:

> SUMMARY OF SPECIFIC PROVISIONS
>
> Sections 1-8 require the court to order a non-custodial parent in child support cases to enroll the child in the parent's health insurance plan, if the parent's employer will pay a substantial portion of any premium; authorize the Support Collection Unit (SCU) within DSS to issue an execution for medical support enforcement in accordance with provisions of a support order.
>
> Sections 9-16 authorize the enforcement of support orders by the SCU through all enforcement measures available for a money judgement under Article 52 of the Civil Practice Law and Rules (CPLR). . . .
>
> JUSTIFICATION
>
> . . . Improvements in the child support enforcement program are crucial to the economic well-being of children, not only for those receiving public assistance, but also for those whose standard of living is eroded because of lack of adequate income support from absent parents.
>
> April 4, 1993 Memorandum in Support of Bill.

None of the bill jacket items discussed why if the bill was described as improving child enforcement, the bill seems to have curtailed child support enforcement, while clarifying that a broad range of Article 52 provisions may be used to enforce support obligations. In particular, (1) CPLR § 5241 authorizes income executions in case of all "defaults" in paying support obligations, but the amended CPLR § 5230, which seems to govern CPLR § 5241 income executions, does not permit executions to be used for retroactive child support defaults; (2) CPLR § 5242 authorizes income deduction orders for "defaults" in paying support obligations, unless the debtor is unable to make payments, but the amended CPLR § 5101 prohibits any enforcement of retroactive child support defaults under Article 52, which consists of CPLR §§ 5201- 5253; and (3) the CPLR § 5241 support order definition, which has no exception for

retroactive child support, was not used in the references to the enforceable support orders in the amended CPLR §§ 5101, 5222, 5230, or 5232.

There was no NYSBA comment letter on the legislation.

Under the act's Section 78(a) and (f), the provisions discussed above were effective on July 1, 1993, subject to the provision that any application of the pre-amendment provisions prior to the effective would not be affected. Thus, the amendments only govern legal process issued or entered on or after the effective date.

The following severability provision was the act's Section 77:

> If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

J. IN 1994, THE CPLR IS AMENDED TO BROADEN THE PROTECTIONS FOR BENEFITS FROM INDIVIDUAL RETIREMENT ACCOUNTS

In 1994, New York State sought to broaden the protections for benefits from individual retirement accounts by enacting L. 1994, ch. 127, § 1, which amended CPLR § 5205 (c)(2) as follows:

> 2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either the corpus of any trust qualifying as an individual retirement account under section four hundred eight of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4) or 408 (d) (3) of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan.

The sponsors' memo stated that this law "exempts IRA's from the application of money judgments which will provide protection to individuals who establish IRA accounts for their retirement." Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Arthur O. Eve. Like its predecessors, it did not explicitly change either CPLR § 5205(d) or Debt. & Cred. L. § 282, but as described, implicitly changed both because both incorporate the additional exemption added by the amendment. The issues pertaining to the expansion of debtor protection to more benefits are well illustrated in two comment letters.

First, the May 24, 1994 comment letter of the NYSBA Committee on Civil Practice Law and Rules recommended that the bill be approved for the following reasons, including the advisability of having consistent protections within and without bankruptcy:

> The subject legislation is commendable in that it excepts from the reach of judgment creditors the relatively modest assets usually found in IRAs and thereby serves the important public interest of ensuring that senior citizens have adequate resources with which to support themselves upon retirement. Moreover, there is no principled distinction between IRAs and the other assets already protected under the statute. Indeed, IRAs are more limited and generally relied upon by lower income, less advantaged individuals. Compared with 401ks, Keoghs, or other retirement plans, IRAs allow a much lower yearly contribution. Permitting judgment creditors to reach IRAs held by such individuals, while allowing the typically more substantial 401k and Keogh accounts of higher income individuals to escape execution would work an injustice.
>
> It should also be noted that IRAs are already among the kind of property exempt from creditors of New York debtors in bankruptcy. N.Y. Debt. & Cred. Law §282(iii)(2) (e). Excluding IRAs from the kinds of property subject to the enforcement of money judgments in New York thus would add consistency to New York's statutory scheme and remove an incentive in certain cases to file for federal bankruptcy protection.
>
> While there may certainly be an argument for capping the total amount of the exemptions allowed under CPLR §5205 to ensure that only what is necessary for a judgment debtor's reasonable needs is protected from judgment creditors, there is no principled justification for leaving IRAs unprotected in the existing statutory scheme. Accordingly, the proposed legislation should be APPROVED

Second, for the first and only time, an adopted enhancement of debtor protection for employee benefits generated opposition included within the bill jacket. In particular, the Tax

Commissioner, James W. Wetzler, recommended in a letter dated May 25, 1994, that the bill be rejected for the following reasons, including the concern that wealthy people would transfer funds to individual retirement arrangements to avoid creditors:

> In general, subdivision (c) of CPLR section 5205 exempts the corpus of certain trusts, while subdivision payments (d) exempts, to differing degrees, income and other payments from those trusts. This bill, insofar as it involves section 5205 of the CPLR, is similar to S. 4352/A. 4136 which also sought to amend section 5205 for the same purpose of exempting IRAs from application to satisfaction of judgments. However, unlike S .4352, the bill before you does not also amend paragraph 1 of subdivision (d) of section 5205. This provision exempts 90 percent of income or other payments from trusts specifically enumerated in subdivision of section 5205 of the CPLR except that, for those retirement trusts which are particularly described in paragraph 2 of (c), the exemption on income and other payments is 100 percent.
>
> The language in 5205 (d) is very specific, in that it describes the 100 percent income and payment exemption as applying only to a "Keogh (HR-10) retirement or other plan described in paragraph two of subdivision (c) of this Section." When described in paragraph 2 of section 5205(c), it is clear that only plans which qualify under IRC section 401 or rollovers from such plans are included. Even though the enumeration of trusts in paragraph 2 of subdivision as amended by this bill would also include the corpus of any trust as an IRA under section 408 of the IRC, that-type of IRC section 408 trust is not also mentioned in 5205(d). Nor is it subsumed by the existing language of 5205 (d). Thus, we conclude that this bill does not exempt 100 percent of income and other payments from an IRA, and that for IRAs, the 90 percent exemption applies. This conclusion seems warranted as well by the fact the Legislature passed this bill and not the more specific by S. 4432/A. 4136.
>
> This bill poses many problems regarding its interpretation and administration. For example, unlike S. 4352/ A. 4136, this bill does not expressly deal with the issue of whether excess contributions are available to creditors or are exempted. Also, under existing law in paragraph 5 of CPLR section 5205 (c) any contributions to, or any increase in the value to an IRA would be subject to application to a judgment if, among other things, they were made within 90 days prior to the interposition of a claim on which the judgment was based. For tax collection purposes, the claim on which our warrants are based is the service on the taxpayer of a notice of deficiency or notice of determination, or, in some cases, the issuance of the notice and demand or, possibly, the filing of a return. The problem is that information regarding these matters is generally subject to the secrecy provisions of the Tax Law and, thus, cannot be revealed to the bank holding the IRA (see, e. g., Tax Law sections 211, subd. 8; 697(e) and 1146). Given this, how can CPLR 5205 (c) even be applied to Tax Department levies? If this provision of the CPLR cannot be enforced, some individuals may be able to convert assets to cash and make contributions to an IRA in order to shield those assets from the State's collection efforts.

> The Compliance Division of the Department of Taxation and Finance levied upon 300 to 400 IRAs out of a total of approximately 65,000 levies made during the 1993-1994 fiscal year. The IRAs generally have balances exceeding the average amount available in other types of bank accounts upon which the Department levies. Occasionally a taxpayer will also use some other financial resource to pay off the tax liability and preserve an IRA, thus expediting our collection of tax revenues.
>
> Exempting IRAs from application to satisfaction of money judgments will result in a revenue loss for the State, although in view of the small number of levies made by the Tax Department on IRAs, that loss will probably tend for the time being to be minimal. It is possible, however, if this bill becomes law, that wealthy taxpayers will insulate their assets from satisfaction of substantial tax debt through contributions to IRAs. Also, this bill sets a precedent by treating IRAs in the same way Keogh and other IRC section 401 qualified pension and profit-sharing plans are exempted from application to judgment by section 5205 of the CPLR. An IRA is not the analytical equivalent of a Keogh or other retirement plans, primarily because an IRA is set up and entirely controlled by the beneficiary, whereas IRC section 401 plans are established by a third party grantor who or which is impartial and has no cause to conspire with a beneficiary to hide or secrete assets. Even where a 401 plan is established by a nominal employer, such as a one-man corporation, there are |independent records (e.g., corporate returns) to verify the legitimacy of retirement plan funding or contributions. Indeed, there are already other bills before the Legislature which would expand on this bill by granting exemptions, to simplified pension funds and other pensions or retirement accounts like IRAs (S. 5506-A/A. 6407-A).

None of the materials in the bill jacket mention why the exemption for individual retirement arrangements was limited to the corpus of an individual retirement account. In contrast, CPLR § 5205(c) at such time protected all of an individual's Keogh plan benefits from his or her creditors' claims. Nor was there any discussion of how to determine the corpus of an individual retirement account. Does it represent only the contributions to the individual retirement account, or does it include a portion of the income accruing on such property?

There was no discussion why the statutory addition was a reference to individual retirement accounts, which are defined in IRC § 408 (a), but not to individual retirement annuities, which are defined in IRC § 408 (b). The statute could have, instead, used the phrase individual retirement arrangements or individual retirement plans. Under IRC § 7701(a)(37) the

latter phrase is defined as either an individual retirement account or an individual retirement annuity.

There is also no discussion why the rollover language was retained, since the language seemed designed to protect rollover contributions to individual retirement accounts, but the amendment protects all individual retirement account contributions, not merely rollover contributions. This retention is particularly questionable because two years earlier the Unemployment Compensation Amendment Act of 1992 § 521(a), Pub. L. No. 102-318, 106 STAT. 290, 300-10, deleted IRC § 402(a)(5) and replaced it with IRC § 402(c)(1) for distributions in 1993 or later years. However, the CPLR reference to rollovers pursuant to IRC § 402(a)(5) was not changed. Thus, under the *expressio unius est exclusio alterius* principle that if a clause applies to an explicit subset of items from a category the clause does not apply to items from the category not set forth, rollovers from tax-qualified plans would not be protected after the December 31, 1992 effective date of the Unemployment Compensation Amendment Act of 1992. Furthermore, none of the later amendments to the CPLR in 1995, 1997, 1998, and 2001, described below, changed any of the rollover provisions of CPLR § 5205(c).

Under the act's Section 2, the act was effective on or after the first September 1 after the act's date of enactment of May 31, 1994. Again, the significance of the effective date of September 1, 1994 is uncertain Do the act's enhanced debtor protections apply to (1) all legal process issued or entered on or after the effective date for benefits from the corpus of an individual retirement account; (2) only all legal process issued or entered on or after the effective date for benefits from the corpus of an individual retirement account established after the effective date; or (3) only all legal process issued or entered on or after the effective date for any benefits from the corpus of an individual retirement account attributable to contributions after the

effective date (if the individual retirement account does not allocate earnings to such contributions there may be questions about the proper allocation)?

The act contained no severability provision.

K. IN 1995, THE CPLR IS AMENDED TO PROTECT INDIVIDUAL RETIREMENT ACCOUNT BENEFITS IN THE SAME FASHION AS PLAN BENFITS

In 1995, New York State sought to protect individual retirement account benefits in the same manner as plan benefits by enacting L. 1995, ch. 93, §§ 1, 2 which amended CPLR § 5205 (c)(2) and (d)(1) as follows:

> (c) 2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either [~~the corpus of~~] any trust [~~qualifying~~] or plan, which is qualified as an individual retirement account under section four hundred eight of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4) or 408 (d) (3) of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, [~~(ii)~~] or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or [~~(iii)~~] (iv) a shareholder of the corporation sponsoring the retirement or other plan.
>
> (d) 1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest established as part of an individual retirement account plan or as part of a Keogh (HR-10), retirement or other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the

> judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;

The sponsors' memo stated that L. 1994, ch. 127 failed "to amend sections of the law that is necessary to accomplish the effects of the chapter." New York State Senate Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Arthur O. Eve. In addition to advocating that laws be "clear, correct and enforceable," the Attorney General, Dennis C. Vacco, explained the deficiencies of the law in a June 14, 1995 memo as follows:

> **Current Law**: Section 5205(c) (2) of the Civil Practice Law and Rules (CPLR) designates which retirement assets of a judgment debtor are beyond the reach of a judgment creditor. Prior to 1994, Keogh, corporate plans and payments made from such retirement plans were the only investment vehicles that were exempt from invasion by judgment creditors.
>
> Chapter 127 of the Laws of 1994 changed this by adding "the corpus of any trust qualifying as an individual retirement account under § 408 of the United States Internal Revenue Code of 1986" to the other classes of retirement plans specified in § 5205. This was intended to broaden the exempt investments to include IRA's.
>
> The statutory terminology that existed prior to this 1994 amendment however, referred only to "plans" rather than "corpus." As a result, Chapter 127, while apparently intending to add individual Retirement plan to the group of retirement plans exempt from judgment creditors, was not drafted in parallel and consistent form to the preexisting law. Although the issue is presently undecided, this lack of language consistency could frustrate the purpose of Chapter 127 and diminish its intended effect.
>
> The present language of this statute thereby creates practical difficulties of implementation. Additionally, these difficulties are even further exacerbated by the fact that paragraph 2 of subdivision "c" of § 5205 does not presently set forth a reference to a "settlor or depositor to an IRA,". . .
>
> Laws need to be clear, correct and enforceable. When a law is enacted that is lacking in effectiveness, it must be promptly corrected, so that the statutory provisions guiding our society may always be respected and followed. Respect for the law is of paramount importance and it is strictly tied to its enforcement and clarity. This bill would promote both these goals.

Unlike his predecessor, who opposed an earlier individual retirement arrangement benefit expansion, the Tax Commissioner, Michael Urbach, expressed no opposition to the expansion of the individual retirement account benefit exemption, but observed in an April 12, 1995 letter,

that the amendment did not specifically address whether excess contributions and impermissible rollovers, which do not affect the individual retirement account's qualification, escape creditor claims under this proposal. Both concerns could be addressed with a reference to IRC § 4973(b), which imposes a tax on excess contributions to individual retirement accounts applies to impermissible rollovers, as well as other contributions.

There was again no discussion why the statutory addition was a reference to individual retirement accounts, which are defined in IRC § 408 (a), without a reference to individual retirement annuities.

Under the act's Section 5, the act was effective on or after the first September 1 after the act's date of enactment of June 28, 1995. Again, the significance of the effective date of September 1, 1995 is uncertain. Do the act's enhanced debtor protections apply to (1) all legal process issued or entered on or after the effective date for benefits under the terms of an individual retirement account; (2) only all legal process issued or entered on or after the effective date for benefits under the terms of an individual retirement account established after the effective date; or (3) only all legal process issued or entered on or after the effective date for any benefits under the terms of an individual retirement account attributable to contributions after the effective date (if the individual retirement account does not allocate earnings to such contributions there may be questions about the proper allocation)?

The act contained no severability provision.

L. IN 1997, THE CPLR IS AMENDED TO PREVENT THE PROTECTIONS FOR BENEFITS FROM KEOGH PLANS, CORPORATE RETIREMENT PLANS, OR INDIVIDUAL RETIREMENT ACCOUNTS FROM IMPAIRING THE ENFORCEMENT OF SUPPORT ORDERS

In 1997, New York State responded to concerns about the enforceability of support orders by enacting L. 1997, ch. 398, § 61 which amended paragraph 4 of CPLR § 5205 (c) as follows:

> 4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

The sponsors' memo stated that L. 1997, ch. 398 had the following purpose

> The bill would strengthen and enhance the tools available for the establishment of paternity and the establishment, enforcement, and collection of child support orders and would bring the state into compliance with the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The bill would also facilitate an automated, administrative method for review and adjustment of child support orders through the application of a cost of living adjustment. In addition, the bill would facilitate the interstate establishment of paternity and establishment and enforcement of child support orders through the enactment of the Uniform Interstate Family Support Act (UIFSA).
>
> Memorandum in Support of Bill by Senator Stephen M. Saland.

The only reference in the memo to the above change in Section 61 as the following:

> Sections 21, 26, 28, 29, 54-63, 67-75 and 134 through 136 authorizes the Department to use additional tools to aid in the establishment of paternity and the establishment and enforcement of child support, including the administrative power to subpoena government and private records, and impose liens on personal and real property.

There was no implicit or explicit corresponding change to CPLR § 5205 (d). This raises a question whether support orders may be enforced against benefits from a covered plan, that have been transferred to another covered plan, and may thus be subject to the protections of CPLR § 5205 (d) as well as CPLR § 5205 (c). For example, consider a benefit from a tax-qualified profit-sharing plan that is transferred or rolled over to a traditional individual retirement

account. Such benefit is both an undistributed benefit under CPLR § 5205 (c), and a distributed benefit under CPLR § 5205 (d). This raises the question whether support orders arising after the benefit transfer may be enforced against the transferred benefits. Such enforcement would apparently be permitted under subdivision (c) but not under (d). Which subdivision would control?

The bill jacket is limited to the bill, which has one-hundred forty-nine sections and takes up one hundred seven pages, and the governor's two-page memorandum in support of the bill. The governor's memo, like the sponsor's memo, emphasizes the improvement in child support enforcement tools, but does not discuss the exception exemption that was added to CPLR § 5205 (c). Thus, this legislative ambiguity is not addressed.

There was no NYSBA comment letter on the legislation.

Under the act's Section 149, the provision discussed above was effective on January 1, 1998. The significance of the effective date of January 1, 1998 is uncertain. Does the order of support exception apply to (1) all orders of support; or (2) only all orders of support entered on or after the effective date?

The following severability provision was the act's Section 148:

> If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgement shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

M. IN 1997, THE CPLR IS AMENDED TO EXPLICITLY SUBJECT PENSION AND RETIREMENT PAYMENTS TO INCOME EXECUTIONS TO ENFORCE SUPPORT ORDERS THAT ARE IN ARREARS

In 1997, New York State responded to concerns about the enforceability of support orders by enacting L. 1997, ch. 398, § 21 which amended the definition of income that is subject to an execution to enforce supports orders that are in arrears in paragraph 6 of CPLR § 5241(a) as follows:

> 6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits [~~and~~], payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.

The sponsor's memo, and the governor's memo discussed above, do not address these additions to the income definition. Thus, there is no explanation of the discrepancy between the pension and retirement benefits set forth above, and broader set of similar benefits exempt from creditor's claims pursuant to CPLR § 5205(c). The latter was amended as described above by the same law. This suggests that there may be no authority to issue income executions to collect support arrears against some of the benefits that are otherwise exempt from creditor claims, such as those from profit-sharing plans or individual retirement accounts that may not be a pension or retirement program. The continuing presence of the term profit-sharing plans as an example of an income payor in CPLR § 5241 adds even more confusion. Soc. Sec. L. 111-t, which was added by section 54 of the same L. 1997, ch. 398, raises the same issue. It similarly gives the New York State Department of Social Services the authority to attach the "public and private retirement funds" of an individual with support arrears. Does this apply to the profit-sharing plans or individual retirement accounts that are otherwise exempted?

The governor's memorandum in support of the bill, like the sponsor's memo, emphasizes the improvement in child support enforcement tools, without mentioning the pension reference added to definition 6 of CPLR § 5241 (a).

There was no NYSBA comment letter on the legislation.

Under the act's Section 149, the provision discussed above was effective on January 1, 1998. The significance of the effective date of January 1, 1998 is uncertain. Does the broadening of the income definition apply to (1) all orders of support; or (2) only all orders of support entered on or after the effective date?

The severability provision was the act's Section 148 presented in the prior section:

N. IN 1998, THE CPLR IS AMENDED TO PROVIDE ROTH INDIVIDUAL RETIREMENT ARRANGEMENTBENEFITS WITH THE SAME PROTECTIONS AS BENEFITS FROM TRADITIONAL INDIVIDUAL RETIREMENT ARRANGEMENTS

In 1998, New York State responded to the 1997 introduction of Roth individual retirement accounts in the Taxpayer Relief Act of 1997 by trying to give benefits from those individual retirement arrangements the same CPLR protections that are provided to benefits from traditional individual retirement arrangements by enacting L. 1998, ch. 206, § 1. That law amended Paragraph 2 of subdivision (c) of section 5205 as follows.

> 2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4) ~~or~~, 408 (d) (3) or 408A of

> the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

The justification for L. 1998, ch. 206 in the sponsors' memo was that "Roth IRAs should be afforded the same protection in bankruptcy and against judgments as traditional IRAs. There is a strong state and federal public policy in favor of protecting retirement vehicles." New York State Senate Memorandum in Support of Bill by Sponsors, Senator Roy M. Goodman and Assemblyman Helene Weinstein. The NYSBA Committee on Legislation of the Trusts and Estates Section similarly recommended approval of the proposal on June 11, 1998 because: "The creditor protection afforded to IRAs in these sections should be applicable as well to a Roth IRA which is essentially an ordinary IRA with special rules related to income limitations and the taxation of distributions."

However, all Roth individual retirement accounts must qualify under IRC § 408. IRC § 408A(b). Thus, there was no need for the amendment.

The amendment did not explicitly change CPLR § 5205(d). No such change is needed because the subdivision refers to the protections of benefits from individual retirement account plans, without making any distinction between Roth and traditional individual retirement accounts plans.

Under the act's Section 2, the act was effective on the September 1st following its date of enactment, May 31, 1994. The significance of the effective date of September 1, 1994 would be as uncertain as the change of L. 1995, ch. 93 that protected benefits under the terms of an

individual retirement account as under the terms of a plan, if the amendment had any substantive effect.

The act contained no severability provision

O. IN 2001, THE CPLR IS AMENDED TO PROVIDE SECTION 457 PLAN BENEFITS WITH SAME PROTECTIONS AS BENEFITS FROM PENSION, PROFIT-SHARING AND STOCK BONUS PLANS

In 2001, New York responded to decisions holding that a debtor's benefits from a Section 457(b) plan are part of the debtor's bankruptcy estate by enacting L 2001, ch. 141 to give such benefits the same CPLR protections provided to benefits from tax-qualified pension, profit-sharing and stock bonus plans. That law amended Paragraph 2 of subdivision (c) of section 5205 as follows:

> 2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, [or] a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

Section 457 plans are deferred compensation plans that may be established and maintained by either a government or a tax-exempt entity for its respective employees. They are

not tax-qualified plans. Such plans must meet the requirements of either Sections 401(a) or 404(a)(2) of the Internal Revenue Code of 1986, as amended. Section 457 plans may be either Section 457(b) plans or Section 457(f) plans.

> Section 457(b) plans must limit annual deferrals. Non-governmental Section 457(b) plans may not be funded, Section 457(b)(6), but governmental Section 457(b) plans must be funded. Section 457(g).
>
> Section 457(f) plans are deferred compensation plans that a government or tax-exempt entity may establish and maintain for its employees that do not meet one or more of the Section 457(b) requirements.

There is no discussion in any of the items in the bill jacket why the amendment did not refer to Section 457(b) plans, such as the NY Deferred Compensation Plan for Employees of the State of New York and Other Participating Public Jurisdictions ("NYS Deferred Comp Plan"), which was the only Section 457 plan mentioned in the bill jacket. The NYSBA letter dated July 16, 2001 expressed no position on the proposed legislation.

The justification for the amendment presented in the sponsor's memo, New York State Assembly Memorandum in Support of Bill by Sponsor, Assemblyman Paul Tokasz), emphasized the retirement aspects of Section 457 plans as follows:

> Section 457 of the Internal Revenue Code permits states to create deferred compensation plans for its public employees in a tax favored status as way to save for retirement. New York state established its deferred compensation plan in 1985 and today over 150,000 state and local employees are saving for retirement through it.
>
> The law recognizes that retirement plans and retirement savings plans (IRA, Keough [sic] plans and other qualified retirement plans) are essential to the financial well being of employees when they retire by specifically exempting them from bankruptcy judgements. While the New York state deferred compensation plan is essentially the same as those plans, the CPLR currently does not specifically exempt it from bankruptcy judgements.

> Recent court decisions, which are under appeal, have directed the NYS Deferred Compensation Plan to release the deferred compensation assets of participants in bankruptcy proceedings. Since an individual's assets in the deferred compensation plan are in the same form and for the same purpose as other retirement savings plans protected from bankruptcy proceedings, those assets should receive the same protections. This bill accomplishes that purpose.

The Chair of the New York Deferred Compensation Board, which governs the NYS Deferred Comp Plan, made a similar reference to uncited decisions in an August 6, 2001 letter supporting the change. The same letter described the plan as "created in 1985 pursuant to Section 457 of the Internal Revenue Code to provide public employees with a tax deferred retirement savings plan." The uncited court decisions may include *In re Johnson*, 254 B.R. 786 (Bankr. W.D. N.Y. 2000) (holding that CPLR 5205(c) did not cause a debtor's benefits from the NYS Deferred Comp Plan to be exempt from the debtor's bankruptcy estate). The decision was vacated less than two weeks after the Plan's letter. *In re Johnson*, 2001 Bankr. LEXIS 1332 (Bankr. W.D. N.Y. Aug. 17, 2001) (holding that the payment exemption of N.Y. Debt. & Cred. L. § 282(2) which has always referred to Section 457 plans resulted in a bankruptcy exemption so that the plan could not be compelled to pay the debtor's benefits to the bankruptcy trustee).

Again, there was only an implicit, corresponding change to the CPLR § 5205 (d) protections for benefit distributions. As discussed above, the protection for such benefit payments has been in the payment exemption in N.Y. Debt. & Cred. L. § 282(2), and thus in the general protections, since the statute's 1982 enactment.

There was no discussion why there was no addition to CPLR § 5205(c) of a provision for rollovers from IRC Section 457 plan. Such rollovers are permitted pursuant to IRC § 457(e)(16). Thus, under the *expressio unius est exclusio alterius* principle that if a clause applies to an explicit subset of items from a category the clause does not apply to items from the category not

set forth, it would appear that benefits arising from such rollovers are not protected under the CPLR § 5205(c) even if the plan benefits are otherwise protected.

Under the act's Section 2, the act was effective for all cases decided on or after October 1, 2001.

The act contained no severability provision

P. IN 2008, THE CPLR IS AMENDED TO PROVIDE A $2,500 EXEMPTION FOR THE DEBTOR'S BANK ACCOUNTS INTO WHICH EXEMPT PAYMENTS ARE MADE ELECTRONICALLY OR BY DIRECT DEPOSITS AND AN EXEMPTION FOR THE DEBTOR'S BANK ACCOUNT FUNDS WITH A VALUE LESS THAN OR EQUAL TO THE PRODUCT OF 240 AND THE APPLICABLE MINIMIMUM HOURLY WAGES

In 2008, New York enacted L. 2008, ch. 575, § 1, often called the Exempt Income Protection Act, in response to many reports that creditors would restrain a debtor's account to force its owner to pay a judgment even if the account contained deposits of exempt items, and the account could only be unfrozen with a court order or the consent of the creditor. Mr. Abrams, as discussed above, had warned in 1982 that this issue could arise, when he commented, as the New York State Attorney General, on the provision requiring creditors to give individual judgement debtors exemption notices in concert with restraining notices or execution notices. This law added the following subdivisions to CPLR § 5205 to provide for an inflation-adjusted portion of a bank account to which exempt deposits have been made within 45 days of the service of a restraining notice or an execution on the bank:

> (l) Exemption of banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit.
>
> 1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt payments were made to the judgment debtor's account in any banking institution during the forty-five day period preceding the date a restraining notice was served on

the banking institution or an execution was served upon the banking institution by a marshal or sheriff, then two thousand five hundred dollars in the judgment debtor's account is exempt from application to the satisfaction of a money judgment. Nothing in this subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659 or 38 U.S.C. § 5301. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, pursuant to this section or under any other provision of state or federal law, or shall affect the right of a judgment debtor to claim such exemption.

2. For purposes of this article, "statutorily exempt payments" means any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments processed and received pursuant to title IV-D of the Social Security Act; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.

3.(i) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this article in effect immediately before that date shall be adjusted as provided in subparagraph (ii) of this paragraph.

(ii) the superintendent of banks shall determine the amount of the adjustment based on the change in the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. Department of Labor, Bureau Of Labor Statistics, for the most recent three-year period ending on December thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars.

(iii) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the superintendent of banks shall publish the current dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this chapter, together with the date of the next scheduled adjustment. the publication shall be substantially in the form set below:

CURRENT DOLLAR AMOUNT OF EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL

PRACTICE LAW AND RULES Sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e)

The following is the current dollar amount of exemption from enforcement of money judgments under CPLR Sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e), as required by CPLR section 5205(l)(3):

(Amount)

This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year).

(iv) Adjustments made under subparagraph (i) of this paragraph shall not apply with respect to restraining notices served or executions effected before the date of the adjustment.

(m) Nothing in subdivision (l) of this section limits the judgment debtor's exemption rights in this section or under any other law.

(n) Notwithstanding any other provision of law to the contrary, the term "banking institution" when used in this article shall mean and include all banks, trust companies, savings banks, savings and loan associations, credit unions, foreign banking corporations incorporated, chartered, organized or licensed under the laws of this state, foreign banking corporations maintaining a branch in this state, and nationally chartered banks.

Section 3 of the law added the following subdivisions (h), (i), and (j) to CPLR § 5222 that prevent such exempt portion of an individual's bank account from being restrained:

(h) Effect of restraint on judgment debtor's banking institution account into which statutorily exempt payments are made electronically or by direct deposit. Notwithstanding the provisions of subdivision (b) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the restraining notice was served on the banking institution, then the banking institute

on shall not restrain two thousand five hundred dollars in the judgment debtor's account. If the account contains an amount equal to or less than two thousand five hundred dollars, the account shall not be restrained and the restraining notice shall be deemed void. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(i) Effect of restraint on judgment debtor's banking institution account. A restraining notice issued pursuant to this section shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Where a judgment debtor's account contains an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor), the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Nothing in this subdivision shall alter the exempt status of funds which are exempt from execution, levy, attachment or garnishment, under section fifty-two hundred five of this article or under any other provision of state or federal law, or the right of a judgment debtor to claim such exemption.

(j) Fee for banking institution's costs in processing a restraining notice for an account. In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

Section 7 of the law added the following subdivision (e) to CPLR § 5232 that prevents such exempt portion of an individual's bank account from being levied upon:

(e) Notwithstanding the provisions of subdivision (a) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section

fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the execution notice was served on the garnishee banking institution, then a garnishee banking institution shall not execute, levy, attach, garnish or otherwise restrain or encumber two thousand five hundred dollars in the judgment debtor's account. Notwithstanding the provisions of subdivision (a) of this section, an execution shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subsection shall be construed to limit a banking institution's right or obligation to restrain, remove or execute upon such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment, or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(f) Fee for banking institution's costs in processing a levy by service of execution when account contains only exempt, direct deposit or electronic payments. In the event that a banking institution cannot lawfully garnish or execute upon on a judgment debtor's banking institution account or funds are garnished or executed upon in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

The June 11, 2008 Memorandum in Support of Legislation by Helene Weinstein (“Weinstein Memo”) presented a very thorough explanation of why these additions represented a measured response to the concerns of both creditors and debtors:

New York and Federal laws exempt certain income from debt collection. Creditors cannot seize income such as Social Security, disability, pensions, public assistance, child support, and veteran's benefits. Federal law specifically prohibits the

use of the legal system to satisfy debts from veteran's benefits, Social Security (SS), Social Security Disability (SSD), and Supplemental Security Income (SSI). For 750,000 New Yorkers, Social Security is their only source of income. New York law also exempts benefits, such as pensions, public assistance, workers' compensation, unemployment insurance, as well as child support, and spousal support or maintenance. To ensure that money judgments do not render working New Yorkers unable to care for their or their families' most basic needs, New York also protects a baseline amount of every person's earnings. It exempts 90 percent of earnings deposited into a bank account within 60 days prior to the date the bank receives the restraining notice. New York law also protects from garnishment a set amount of wages which is equivalent to thirty hours per week of employment at minimum wage.

The exemption laws were enacted to ensure that safety-net income is not diverted from its intended purpose: helping the elderly, disabled, and poor to maintain the resources needed for food, rent, medicine and other basic necessities. Despite existing law, bank accounts containing legally exempt income are frozen with "restraining notices" issued pursuant to CPLR 5222, and hundreds of vulnerable New Yorkers lose access to the funds required for basic needs. The impact on low-income New Yorkers is devastating and puts families in peril of hunger, illness, loss of utilities, eviction and further loss of their limited income to bank fees.

CPLR 5222 enables creditors to ignore exemption laws by empowering them to freeze an account regardless of its contents. CPLR 5222 permits a judgment creditor's attorney to send a restraining notice to a bank holding a judgment debtor's account. Direct deposit of benefits has become nearly universal. Currently, over three million or 80 percent of all SS, SSD and SSI beneficiaries in New York receive their benefits through direct deposit, consistent with federal policy. Banks can easily identify accounts holding directly-deposited exempt income because each electronic deposit clearly states its source.

However, under current law, CPLR 5222 makes no allowance for direct deposit of exempt funds and, instead, requires the bank to freeze the account or to risk being held in contempt of court. Only after the account is frozen, does a debtor receive notice of the restraint. Working New Yorkers are even further disadvantaged because they are given no notice that 90% of their wages from the 60 days prior to the restraint is exempt. The burden is on the account holder to show that the account contains exempt income.

In the interim, the debtor is left without any financial resources. To make matters worse, currently the CPLR provides no specific procedure for a claim of exemption, and debtors are left guessing as to how to enforce their exemption rights. This system conflicts with federal and state policy and has reached epidemic proportions in New York.

Debtors often have difficulty getting an account released even though the creditor has no legal right to its contents. Banks can provide little help, as only the creditor or a judge can release the account. All too often, however, creditors ignore calls from debtors, demand a debt payment as a condition of releasing the account, or insist

on proof of the exemption that an elderly, disabled or poorly-educated person may be unable to produce, even when the bank possesses the necessary proof.

Moreover, using the courts to claim an exemption is complicated and extremely difficult without the aid of a lawyer. Seeking relief in court takes at least two weeks and usually longer. While the courts have prose forms to help litigants with a range of legal problems, there are no forms for exemption claims. In the worst cases, account holders do not understand their rights, while others give up trying to overcome the obstacles to releasing their accounts. The result is that creditors often take safety-net income from New Yorkers living on the margins. Those affected are unable to provide basic necessities for themselves and their families.

Those who regain access to their accounts discover that the bank has debited their accounts for legal processing, overdraft and bounced check fees, often totaling hundreds of dollars. For low-income debtors, such a loss often means skipping meals or forgoing medical treatment in order to pay the rent. The experience is so costly that many give up their bank accounts and revert to using expensive nontraditional financial services, including check cashing services. Numerous stories have been featured in the press regarding the seizure of exempt funds. Both the WALL STREET JOURNAL and the CHRISTIAN SCIENCE MONITOR have published articles which called attention to the problem.

It has become clear that a legislative solution is required. This bill would create a legal procedure by which judgment debtors are informed of which funds are exempt and provided an opportunity to assert that the funds in their account are exempt from seizure before the account is completely restrained or executed against. However, creditors will be able to restrain funds above the threshold levels and access non-exempt funds after the procedure has run its course. . . .

The new exemption presumes that a bank may at a nominal cost identify whether direct or electronic deposits are from exempt sources. Ms. Weinstein observed each direct or electronic deposit clearly states its source. If the bank merely has to identify whether the account title denotes a pension account, without checking whether the plan meets the tax requirement to qualify for an exemption, such identification is feasible. This is sensible because the $2,500 (inflation-adjusted) exemption does not affect the underlying exemption of the deposited funds, but is designed to give the individual debtor a reasonable opportunity to make such a determination without undue financial stress. The question then becomes whether a lay individual would understand the explicit exemption list in CPLR § 5205(l).

The CPLR § 5205(l) exemption list differs slightly from the sample exemption list on the disclosure notice introduced by L. 1982, ch. 880, although the term, sample, is not used in the 2008 legislation or its legislative back. In 1982, the list included public or private pensions, although there were no explicit exemptions for pension benefits in the section being amended at this time, CPLR § 5205. By 2008, the section contained explicit exemptions not only for distributed pension plan benefits, but for benefits distributed from profit-sharing plans, from stock bonus plans, from Section 457 plans, and from individual retirement accounts. Nevertheless, the 2008 list, like the 1982 list, only adds to public or private pensions, federally regulated black lung and railroad retirement benefits.

There is no discussion in the bill jacket of why the prior sample exemption list was changed. Neither the bill jacket nor the Weinstein Memo discuss the benefits protected by CPLR § 5205(c) or why certain benefits were added to the 1982 sample list. The Memo, however, refers to state laws providing exemptions for pension benefits, but cites no such laws. Thus, some banks may interpret pension benefits very narrowly, such as those plans that are titled ________ pension plan or ________ retirement plan, and wrongfully disregard direct and electronic deposits from 401(k) plans or individual retirement accounts, although it would be very inexpensive to also check for such titles.

The bill jacket, like the Weinstein Memo, also does not discuss why the new $2,500 exemption in CPLR § 5205(l) applies to all judgment debtors with bank accounts, whereas the other CPLR sections that explicitly prohibit the use of a restraining notice or an execution on such funds only do so for natural persons. However, the discussion in the Weinstein Memo with its reference to “working New Yorkers,” “vulnerable New Yorkers,” and “safety-net income,” seems to presume that the intention was to limit the bank benefit exemption to individuals, as is

the case with the exemption for wages shortly before or after the issuance of an income execution is delivered to the sheriff. However, as written the $2,500 exemption would apply to a bank account in which plan payments are made to a pension plan beneficiary that is a trust.

The $2,500 exemption amount was last updated as of April 1, 2018 to $2,850 and will be updated as of April 1, 2021. See http://www.dfs.ny.gov/legal/legal_notices.htm (last visited January 30, 2019).

Neither of the two banking exemptions introduced by this statute, CPLR §§ 5205(l) or 5222(i), require any action by the debtor to take effect. Either may take effect without precluding the other from taking effect. The notice to the debtor mentions those exemptions because debtors must sometimes remind banks that one or both exemptions have taken effect. On the other hand, to the extent a creditor obtains a court determination that the funds subject to CPLR § 5222(i) do not meet a reasonable needs test, creditors may restrain or obtain those funds.

There is no discussion in any of the supporting documents of four major issues about the CPLR § 5222(i) exemption for bank balances that may not be restrained or executed upon regardless of the source of the funds.

First, why does CPLR § 5222(i) provide two distinct amounts that each refer to 240 that are not subject to a restraining notice. The statute sets forth that the balance as of the enactment was $ 1,714, which is the product of 240 and $ 7.15, the state general minimum hourly wage at such time. However, this is followed by a sentence declaring “a restraining notice shall be deemed void” if the balance of a debtor’s banking account balance is less than or equal to 90 percent of such product. However, whether the notice is void or does not apply to the funds, the funds are not subject to a restraining notice. The draftspersons seemed to concur with this equality because they used the word “apply” when referring to the 90 percent rules in their

additions to CPLR § 5230(a). Thus, the 90 percent provision seems to be nugatory, and its removal would seem to have no effect on the rights of debtors or creditors.

Second, why is 240 hours used to determine the protected balance, which was initially $ 1,714? The 240 seems to have been determined as the product of 8 and 30 hours, which may have something to do with the sixty-day period to which Ms. Weinstein referred. However, 60 days consists of a bit more than 8 ½ weeks. If one assumes a 40-hour workweek, the total number of hours would be a bit more than 340 hours, not 240 hours. There may be some interest in 90 percent of those hours, which is 304 hours, because such compensation would only be subject to debtor claims to the extent a court determines that such funds do not meet a reasonable needs test. In such case, the initial protected bank balance under this exemption would be any amount less than or equal to $2,188. In contrast, 30 hours, is associated with the unrelated CPLR § 5231(b) provision prohibiting any garnishment of the debtor's earnings if the debtor's disposable earnings are less than, or equal to the product of thirty and the applicable minimum hourly wage.

Third, why has the applicable minimum hourly wage become even more ambiguous than it was when first introduced in 1987? Not only is the federal reference ambiguous, but the added state provision does not refer to a single minimum wage. Each government web site described in CPLR § 5222(i) as the source for the current minimum wages refers to more than one minimum wage. Thus, it is not clear whether one rate is to be chosen for all earners, or whether the rate should vary with the factors set forth in the relevant statutes. This question became particularly significant on December 31, 2016, when different minimum wages went into effect in three different parts of the states and for different sized employers.

Fourth, by not restricting the withdrawal of protected funds while the court determination is made whether they would meet a reasonable needs test for the debtor, the funds may be withdrawn for non-reasonable needs before the court determination, the determination may be rendered nugatory. On the other hand, if the funds were so restricted the very purpose of the exemption would be undermined, namely to permit debtors to pay for basic necessities while such an assessment is being made. Thus, the determination procedure may help creditors prospectively with respect to future deposits, but not retroactively with respect to past deposits.

There were no NYSBA comments in the bill jacket.

Under the act's Section 8, the act was effective on the January 1st following its date of enactment, that is September 25, 2008. Thus, on or after January 1, 2009, the inflation-adjusted $2,500 portion of each account of a person with a banking institution is not subject to creditor claims, other than those for child support and other maintenance obligations. Moreover, banking institutions may not charge any fees for processing a levy by service of execution against exempt funds.

The following severability provision was the act's Section 8:

> The provisions of this act shall be severable, and if any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Q. IN 2008, THE CPLR IS AMENDED TO CLARIFY THE NOTICE OF EXEMPTIONS THAT MUST ACCOMPANY RESTRAINING NOTICES IN GENERAL AND THE ONE WHEN A NOTICE AFFECTS AN INDIVIDUAL'S BANK ACCOUNT

In 2008, New York enacted L. 2008, ch. 575, § 2, that not only prevented creditors from enforcing claims against an inflation-adjusted portion of an individual debtor's bank account to which exempt deposits have been made recently, but required such creditors to give notice of such exemption if they tried to enforce any claims against such a bank account or other personal property. That section also amended the following subdivisions (d), and (e) to CPLR § 5222 that contain the notice provisions to be provided to individual judgment debtors as follows:

> (d) Notice to judgment debtor or obligor. [~~If~~] Except where the provisions of section fifty-two hundred twenty-two-a of this article are applicable, pursuant to subdivision (a) of such section, if a notice in the form prescribed in subdivision (e) of this section has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.
>
> (e) Content of notice. The notice required by subdivision (d) of this section shall be in substantially the following form and may be included in the restraining notice:
>
> NOTICE TO JUDGMENT DEBTOR
>
> Money or property belonging to you may have been taken or held in order careful to satisfy a judgment which has been entered against you. Read this
>
> YOU MAY BE ABLE TO GET YOUR MONEY BACK
>
> State and federal laws prevent certain money or property from being taken to satisfy Judgments. Such money or property is said to be "exempt" The following is a partial list of money which may be exempt:
>
> 1. Supplemental security income, (SSI);
> 2. Social security;

3. Public assistance (welfare);
J. [Alimony] Spousal support, maintenance (alimony) or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions; [and]
9. Veterans benefits[.];
10. Ninety percent of your wages or salary earned in the last sixty days;
11. Twenty-five hundred dollars of any bank account containing statutorily exempt payments that were deposited electronically or by direct deposit within the last forty-five days, including, but not limited to, your social security, supplemental security income, veterans benefits, public assistance, workers' compensation, unemployment insurance, public or private pensions, railroad retirement benefits, black lung benefits, or child support payments;
12. Railroad retirement; and
13. Black lung benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING [LEGAL AID] ANY FREE LEGAL SERVICES ORGANIZATION IF YOU QUALIFY. You can also go to court without an attorney to get your money back. Bring this notice with you when you go. You are allowed to try to prove to a judge that your money is exempt from collection under New York civil practice law and rules, sections fifty-two hundred twenty-two-a, fifty-two hundred thirty-nine and fifty-two hundred forty. If you do not have a lawyer, the clerk of the court may give you forms to help you prove your account contains exempt money that the creditor cannot collect. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred) provides a procedure for determination of a claim to an exemption.

Section 4 of the law added provisions describing the notice that must accompany a restraining notice or execution by levy on an individual judgment debtor’s bank for such restraint or levy to be valid. Such claims may be made to the extent that there are funds in excess of the CPLR § 5205(l) amount available, but the notice informs the debtor that he or she may rely on additional exemptions, as follows in subdivision (b) of CPLR § 5222-a:

(b) Service of exemption notice and exemption claim form.
1. Service with restraining notice upon banking institution. The person or support collection unit issuing the restraining notice pursuant to subdivision

(a) of section fifty-two hundred twenty-two of this article shall provide the banking institution with the restraining notice, a copy of the restraining notice, an exemption notice and two exemption claim forms with sections titled "ADDRESS A" and "ADDRESS B" completed. The exemption notice and exemption claim forms shall be in the forms set forth in paragraph four of this subdivision. The notice and the forms shall be served on the banking institution together with the restraining notice and copy of the restraining notice. Service must be accomplished in accordance with subdivision (a) or (g) of section fifty-two hundred twenty-two of this article. Failure to serve the notice and forms together with the restraining notice renders the restraining notice void, and the banking institution shall not restrain the account.

2. Service of execution by levy upon a garnishee banking institution. When serving an execution pursuant to subdivision (a) of section fifty-two hundred thirty-two of this article, the sheriff or support collection unit shall provide the banking institution with an exemption notice and two exemption claim forms, which shall be in the forms set forth in paragraph four of this subdivision. The sheriff or support collection unit shall serve both the exemption notice and the exemption claim forms on the banking institution together with the execution notice. Service must be accomplished in accordance with subdivision (a) of section fifty-two hundred thirty-two of this article. Failure to serve the notice and forms renders the execution void, and the banking institution shall not levy upon the account.

3. Service upon judgment debtor. Within two business days after receipt of the restraining notice or execution, exemption notice and exemption claim forms, the banking institution shall serve upon the judgment debtor the copy of the restraining notice, the exemption notice and two exemption claim forms. The banking institution shall serve the notice and forms by first class mail to the last known address of the judgment debtor. The inadvertent failure by a depository institution to provide the notice required by this subdivision shall not give rise to liability on the part of the depository institution.

4. Content of exemption notice and exemption claim form.

a. The exemption notice shall be in the following form:

"EXEMPTION NOTICE
as required by New York Law

YOUR BANK ACCOUNT IS RESTRAINED OR "FROZEN"

The attached Restraining Notice or notice of Levy by Execution has been issued against your bank account. You are receiving this notice because a creditor has obtained a money judgment against you, and one or more of your bank accounts has been restrained to pay the judgment. A money judgment is a court's decision that you owe money to a creditor. You should be aware that FUTURE DEPOSITS into your account(s) might also be restrained if you do not respond to this notice.

You may be able to "vacate" (remove) the judgment. If the judgment is vacated, your bank account will be released. Consult an attorney (including free legal services) or visit the court clerk for more information about how to do this.

Under state and federal law, certain types of funds cannot be taken from your bank account to pay a judgment. Such money is said to be "exempt."

DOES YOUR BANK ACCOUNT CONTAIN ANY OF THE FOLLOWING TYPES OF FUNDS?

1. Social security;

2. Social security disability (SSD);

3. Supplemental security income (SSI);

4. Public assistance (welfare);

5. Income earned while receiving SSI or public assistance;

6. Veterans benefits;

7. Unemployment insurance;

8. Payments from pension and retirement accounts;

9. Disability benefits;

10. Income earned in the last 60 days (90% of which is exempt);

11. Workers' compensation benefits;

12. Child support;

13. Spousal support or maintenance (alimony);

14. Railroad retirement; and/or

15. Black lung benefits.

If YES, you can claim that your money is exempt and cannot be taken.

To make the claim, you must

(a) complete the EXEMPTION CLAIM FORM attached;

(b) deliver or mail the form to the bank with the restrained or "frozen" account; and

(c) deliver or mail the form to the creditor or its attorney at the address listed on the form.

You must send the forms within 20 DAYS of the postmarked date on the envelope holding this notice. You may be able to get your account released faster if you send to the creditor or its attorney written proof that your money is exempt. Proof can include an award letter from the government, an annual statement from your pension, pay stubs, copies of checks, bank records showing the last two months of account activity, or other papers showing that the money in your bank account is exempt. If you send the creditor's attorney proof that the money in your account is exempt, the attorney must release that money within seven days. You do not need an attorney to make an exemption claim using the form."

b. The exemption claim form shall be in the following form:

NAME OF COURT, NAME OF COUNTY

_______________________________________ x

PLAINTIFFIPETITIONER/CLAIMANT INDEX NO.

V.

DEFENDANT/RESPONDENT EXEMPTION CLAIM FORM

_______________________________________ x

NAME AND ADDRESS OF JUDGMENT CREDITOR OR ATTORNEY

(To be completed by judgment creditor or attorney)

NAME AND ADDRESS OF FINANCIAL INSTITUTION

(To be completed by judgment creditor or attorney)

ADDRESS

A

ADDRESS

B

Directions: To claim that some or all of the funds in your account are exempt, complete both copies of this form, and make one copy for yourself. Mail or deliver one form to ADDRESS A and one form to ADDRESS B within twenty days of the date on the envelope holding this notice. ** If you have any documents, such as an award letter, an annual statement from your pension, paystubs, copies of checks or bank records showing the last two months of account activity, include copies of the documents with this form. Your account may be released more quickly.

I state that my account contains the following type(s) of funds (check all that apply):

______ Social security Social security disability (SSD)

______ Supplemental security income (SSI)

______ Public assistance

______ Wages while receiving SSI or public assistance

______ Veterans benefits

______ Unemployment insurance

______ Payments from pensions and retirement accounts

______ Income earned in the last 60 days (90% of which is exempt)

______ Child support

______ Spousal support or maintenance (alimony)

______ Workers' compensation

______ Railroad retirement or black lung benefits

______ Other (describe exemption): ______________________________

I request that any correspondence to me regarding my claim be sent to the following address:

____

(FILL IN YOUR COMPLETE ADDRESS)

I certify under penalty of perjury that the statement above is true to the best of my knowledge and belief.

____

DATE SIGNATURE OF JUDGMENT DEBTOR

Section 5 of the law added provisions that all execution notices must include in CPLR § 5230. Subdivision (a) is amended as follows to require that execution notices mention the bank account exemption of CPLR § 5205(l) and the limitations on executions of earnings:

> (b) Form. An execution shall specify the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount due thereon and it shall specify the names of the parties in whose favor and against whom the judgment or order was entered. An execution shall direct that only the property in which a named judgment debtor or obligor who is not deceased has an interest, or the debts owed to the named judgment debtor or obligor, be levied upon or sold thereunder and shall specify the last known address of that judgment debtor or obligor. An execution notice shall state that, pursuant to subdivision (l) of section fifty-two hundred five of this article, two thousand five hundred dollars of an account containing direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (1) of section fifty-two hundred five of this article, is exempt from execution and that the garnishee cannot levy upon or restrain two thousand five hundred dollars in such an account. An execution notice shall likewise state that pursuant to subdivision (i) of section fifty-two hundred twenty-two of this article, an execution shall not apply to an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Where the judgment or order was entered in a court other than the supreme, county or a family court, the execution shall also specify the date on which a transcript of the judgment or order was filed with the clerk of the county in which the judgment was entered. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of

> attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment or order was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

Helene Weinstein's July 29, 2008 letter to the Governor in support of the legislation describes why the required exemption notice, when a bank is served must show the debtor how to make an exemption claim, and the consensus in favor of the new notice procedures as follows:

> The new process as required by this legislation will have the judgment creditor serve the bank and debtor with a restraining notice as under current law. The creditor will also now have to include an exemption claim form and exemption notice which will educate debtors about exempt funds. The bank would forward these documents to the customer to ensure that there is actual notice since often the debtor's first inkling that things are amiss is a bounced check. If a debtor has exempt income, they may then use this form to claim same and they will be given the opportunity to submit proof. If the creditor disputes the assertion, then a court proceeding will determine whether or not the funds are exempt. This bill is supported by the AARP, Neighborhood Economic Development Advocacy Project, Empire Justice Center, MFY Legal Services, South Brooklyn Legal Services, Legal Aid Society, DC-37, Urban Justice Center, and NYPIRG. The NYS Bankers Association had initially objected but withdrew it after discussion and negotiation.

There is no discussion in the bill jacket of how any of the exemption lists were formulated. It is not clear why CPLR § 5222, which directs that notices on banking institution be determined by CPLR § 5222-a, requires that a restraining notice served on a non-bank depository, such as a brokerage firm, be accompanied by a notice of the $2,500 exemption applicable only to banking institutions. On the other hand, the CPLR § 5222-a notice that is titled your bank account is restrained does not mention the banking exemption. The exemption lists in the statutes are inconsistent in other ways. For example, the list in CPLR § 5222 refers to money from "public or private pensions," whereas the list in CPLR § 5222-a, refers to "payments from pensions and retirement accounts." Are benefits from individual retirement

accounts included in the second list, but not the first list? Neither makes clear that 401(k) plan benefits and profit-sharing plan benefits are exempt from creditor claims. Thus, lay creditors, who may not know that they should check CPLR § 5205(d) to determine the applicable exemptions for benefits deposited into their accounts, or fully understand the exemptions therein to which they may entitled. This may be particularly problematic and may raise due process concerns because both notices describe how recipients may act without legal counsel.

The legislative back contained numerous objections to the new procedures, particularly the new CPLR § 5222-a(c).3 requirement that all of an individual debtor's funds are released if the creditor does not object within eight days to an individual judgment creditor's exemption claim. The Commercial Lawyers Conference of New York June 26, 2008 letter set forth many of these objections about the workability of these provisions from the perspective of creditors. The New York State Department of Labor September 30, 2008 letter claimed that the Department would have difficulty complying with the law's new exemption procedures. The New York State Office of Temporary and Disability Assistance September 18, 2008 letter objected to the failure to disclose that many of the listed items are not exempt from family support claims, the reasonable need restrictions on the exemptions, and the burden of proof imposed on family support claimants.

There were no NYSBA comments in the bill jacket.

Under the act's Section 8, the act was effective on the January 1st following its date of enactment, September 25, 2008. Thus, on or after January 1, 2009, the requisite notices of the inflation-adjusted $2,500 exemption must accompany all restraining notices, with a special one for banking institutions.

The severability provision was the same as the one in the prior section.

R. IN 2009, THE CPLR IS AMENDED TO CLARIFY THAT STATE GOVERNMENT AND FAMILY SUPPORT CLAIMS ARE NOT SUBJECT TO THE EXEMPTION NOTICE REQUIREMENTS OR THE $2,500 BANKING EXEMPTION

In 2009, New York responded to criticism that the 2008 act made it unduly difficult for child support claims to be enforced and for New York State to enforce its obligations as discussed above by enacting L 2009, ch. 24, § 1. A new subdivision (o) was added to CPLR § 5205:

> (o) The provisions of subdivisions (1), (m) and (n) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice or execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.".

Similar additions were made to CPLR §§ 5222, 5222-a, 5230, and 5232 by Sections 3 through 10 of the law: There were also the following amendments by Section 2 of the law to paragraphs 1 and 2 of subdivision (l) of to CPLR § 5205:

> (l) Exemption of banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit.
>
> 1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt payments were made to the judgment debtor's account in any banking institution during the forty-five day period preceding the date a restraining notice was served on the banking institution or an execution was served upon the banking institution by a marshal or sheriff, then two thousand five hundred dollars in the judgment debtor's account is exempt from application to the satisfaction of a money judgment. Nothing in this subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659 or

> 38 U.S.C. § 5301 or to enforce a child support, spousal support, alimony or maintenance obligation. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, pursuant to this section or under any other provision of state or federal law, or shall affect the right of a judgment debtor to claim such exemption.
>
> 2. For purposes of this article, "statutorily exempt payments" means any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments [~~processed and received pursuant to title IV-D of the Social Security Act~~]; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.

There were no NYSBA comments in the bill jacket.

Under the act's Section 11, the act was effective on its date of enactment, May 4, 2009. Thus, on or after May 4, 2009, there would be explicit exclusions from the $2,500 banking account exemption for New York State obligations, and child support or other maintenance obligations. Therefore, the notices accompanying restraining notices would explicitly declare if such obligations were being enforced therein.

The act contained no severability provision.

III. THE ESTATES, POWERS AND TRUSTS LAW PERTAINING EXPLICITLY TO PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS

A. IN 1987, THE FIRST EPTLPROVISON EXPLICITLY PROTECTING PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS WAS ENACTED AND EXEMPTS FROM THE

DISPOSITION IN TRUST RULES A SUBSET OF SUCH "QUALIFIED" BENEFITS

Before 1987, there was no explicit EPTL protection from creditor claims for pension, profit sharing or stock bonus plans sponsored by private entities other than EPTL § 13-3.2 discussed above. However, EPTL § 7-3.1 which provided that "a disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator," seemed to permit a participant's creditors to obtain funds contributed to such a plan by a participant under certain circumstances, although there was uncertainty about those precise circumstances. Beneficiaries of plans funded with trusts do not create their plan benefits. Thus, their benefits were not subject to their creditor's claims under this provision.

In 1987, New York State responded to litigation in the late 1970s and 1980 permitting creditors to enforce judgments against a debtor's profit-sharing benefits and addressed the applicability of the provisions treating disposition in trust for the use of the creator against the creditors of the creditor by enacting L. 1987, ch. 108. This law added an explicit exemption from such characterizations for a debtor's benefits from certain Keogh plans and corporate retirement plans by revising EPTL § 7-3.1 as follows:

§ 7-3.1 Disposition in trust for creator void as against creditors
(a) A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

(b) (1) for purposes of paragraph (a) of this section, a trust, custodial account, annuity or insurance contract established as part of either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement plan: provided, however, that

> nothing in this section shall impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.
>
> (2) additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

There was no explanation why this amendment did not simply reference the corresponding CPLR language in the same legislation, but rather essentially repeated the language. There is no discussion in the legislative history of why the fraudulent-transaction exception was expanded to include additions within ninety days of the interposition of a creditor's claim as had been done in the amendment to CPLR § 5205(c). Nor was there a discussion of why this exception was included in EPTL § 7-3.1(b). The paragraph sets forth no creditor protections for which an exception was needed was needed to be set forth. Those protections are set forth in the CPLR, where the exceptions are properly set forth.

Under the act's Section 3, the act was effective on June 18, 1987. It is uncertain which trust additions are subject to the self-settled exception. Does it apply to (1) all trust additions; or (2) only additions on or after the effective date?

The act contained no severability provision.

B. IN 1989, THE EPTL IS AMENDED TO BROADEN THE PROTECTIONS FOR BENEFITS FROM KEOGH PLANS OR CORPORATE RETIREMENT PLANS

In 1989, as discussed above, New York State responded to concerns about the bankruptcy treatment of a debtor's benefits in Keogh plans and corporate retirement plans by enacting L.

1989, ch. 280, § 3 that clarified the spendthrift character of the plans by revising EPTL § 7-3.1 as follows:

> (b) (1) For purposes of paragraph (a) of this section, [~~a trust~~] trusts, custodial [~~account~~] accounts, [annuity or] annuities, insurance [~~contract~~] contracts, monies, assets or interests established as part of, and all payments from, either a Keogh (HR-10) plan or a retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan) [~~; provided, however, that nothing in this section shall impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended~~].
>
> (2) all trusts, custodial accounts, annuities, insurance contracts, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.
>
> (3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.
>
> (4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

The amendment was justified as follows:

> The bill clarifies the cloak of New York protection for qualified retirement plan assets by making explicit the spendthrift trust status of such assets. The bill advances the interests of New York retirement plan participants by ensuring that their retirement benefits are fully protected from the claims of non-family creditors as described in the ERISA anti-alienation provisions, and by guaranteeing their plan's continued qualified tax status in the face of overly aggressive bankruptcy judges.

Memorandum in Support of Bill by Sponsors, Senator Dale M. Volker and Assemblyman Sheldon Silver, at 4.

As with L. 1987, ch. 108, there is no discussion in the legislative history of why the spendthrift trust provision or the domestic relations provisions were included in EPTL § 7-3.1(b). The paragraph sets forth no creditor protections that need to be clarified or for which an exception was needed to be set forth. Those protections are set forth in the CPLR, where the clarification and exception are properly set forth.

Under the act's Section 5, the act was effective immediately on the enactment date of July 1, 1989. Unlike the more extensive changes for CPLR and Debt & Cred. L. in the same statute there was no question that the spendthrift change applied to all trusts on or after July 1, 1989. Both provisions thus appear in

The act contained no severability provision.

C. IN 1995, THE EPTL IS AMENDED TO PROTECT INDIVIDUAL RETIREMENT ARRANGEMENT BENEFITS IN THE SAME FASHION AS PLAN BENFITS

In 1995, New York State sought to protect individual retirement account benefits in the same manner as Keogh plan benefits by enacting L. 1995, ch. 93, § 3 that amended EPTL § 7-3.1(b) as follows:

> (b) (1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United

States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self- employed individual,[(ii)] or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or [(iii)](iv) a shareholder of the corporation sponsoring the retirement or other plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

There was no explanation why this change did not simply reference the corresponding CPLR § 5205(c) language in the same legislation, but again essentially repeated the language including some that had been added in 1994 when the CPLR, but not the EPTL was amended with respect to the protection of benefits from individual retirement accounts.

Under the act's Section 5, the act was effective on or after the first September 1 after the act's date of enactment of June 28, 1995. Again, the significance of the effective date of September 1, 1995 is uncertain. It is uncertain which individual retirement account additions are subject to the self-settled exception. Does it apply to (1) all individual retirement account additions; or (2) only additions on or after the effective date?

The act contained no severability provision.

For some reason, the EPTL was not amended in concert with the 1997 amendment adding creditors seeking family support as exception creditors with respect to the protections of CPLR § 5205(c). Such addition has never been made to the EPTL. As discussed above with respect to the fraudulent transfer exception and the domestic relations order exception, there is no need for such addition.

D. IN 1998, THE EPTL IS AMENDED TO PROTECT ROTH INDIVIDUAL RETIREMENT ACCOUNT BENEFITS IN THE SAME FASHION AS TRADITIONAL INDIVIDUAL RETIREMENT ARRANGEMENT BENFITS

In 1998, New York State sought to protect Roth individual retirement arrangement benefits in the same manner as individual retirement arrangement benefits by enacting L. 1998, ch. 206, § 2 that amended EPTL § 7-3.1(b) as follows:

> (b) (1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self- employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.
>
> (2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

> (3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.
> (4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

As with the similar amendment to the CPLR in the same legislation it is unclear why this amendment was needed. All Roth individual retirement arrangements must qualify under IRC § 408. IRC § 408A(b). Thus, the protections for individual retirement arrangements apply to all Roth individual retirement arrangements. Again, the effective date question is moot.

IV. THE INSURANCE LAW PERTAINING EXPLICITLY TO PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS FUNDED WITH ANNUITES

A. IN 1984, THE ONLY INSURANCE PROVISION THAT REGULATES CREDITOR RIGHTS TO PENSION, RETIREMENT, STOCK BONUS, PROFIT SHARING, OR SIMILAR BENEFITS FUNDED WITH ANNUITIES WAS ENACTED

In 1984, New York State recodified the Insurance Law by enacting L. 1984, ch. 367, § 1 which replaced Ins. L. § 166 by Ins. L. § 3212 with essentially the same language providing that an individual's benefits under the terms of a group annuity contract are protected as follows in the same fashion as those under the terms of individual annuity contract:

§ 3212. Exemption of Proceeds and Avails pf Certain Insurance and Annuity Contracts.

(d) (1) The benefits, rights, privileges and options which, under any annuity contract are due or prospectively due the annuitant, who paid the consideration for the annuity contract, shall not be subject to execution.

(2) The annuitant shall not be compelled to exercise any such rights, powers or options contained in the annuity contract, nor shall creditors be allowed to interfere with or terminate the contract, except as provided in subsection (e) hereof and except that the court may order the annuitant to pay to a judgment creditor or apply on the judgment in installments, a portion of such benefits that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders.

(3) The benefits, rights, privileges or options accruing under such contract to a beneficiary or assignee shall not be transferable nor subject to commutation. If the benefits are payable periodically or at stated times, the same exemptions and exceptions contained herein for the annuitant shall apply with respect to such beneficiary or assignee. . . .

(f) This section shall likewise apply to group insurance policies or annuity contracts, to the certificates or contracts of fraternal benefit societies, and to the policies or contracts of cooperative life and accident insurance companies.

Under the act's Section 5, the act was effective on September 1, 1984. In addition, there was a provision preventing the amendment from affecting or impairing an action prior to the effective date under the statute prior to the amendment.

The following severability provision was the act's Section 4:

> If any part or provision of this act or the application thereof to any person or circumstances be adjudged Invalid by any court of competent jurisdiction , such judgment shall be confined In its operation to the part, provision or application or persons or circumstances directly involved in the controversy in which such Judgment shall have been rendered and shall not affect or impair the validity of the remainder of this act or the application thereof to other persons or circumstances and the legislature hereby declares that it would have enacted this act or the remainder thereof had the invalidity of such provision or application thereof been apparent.

DEBTOR BENEFIT PROTECTION BACKGROUND TAX MEMORANDUM

Pension plans, profit-sharing plans, stock bonus plans, and similar plans and arrangements are entitled to similar favorable income-tax treatment if the plan or arrangement limits benefits/contributions and satisfies other requirements of the Internal Revenue Code of 1986, as amended ("IRC"). A participant in such a plan or arrangement, and the participant's beneficiary or beneficiaries, are also entitled to favorable income treatment for the benefits from such a plan or arrangement. The employers who sponsor such plans may also deduct their plan contributions. Many, but not all of, the benefits from such plans or arrangements are now protected by one or more of the New York State statutes that would be amended under the proposal. Thus, it is useful to understand the requirements and advantages of meeting the applicable tax requirements, so that protected benefits include all similar benefits, but only similar benefits. These tax requirements do not, by themselves, give plan participants or beneficiaries any non-tax benefit entitlements.

I. Tax-Qualified Trust Plans

If pension, profit-sharing, or stock bonus benefits are funded by an employer with a trust that meets the requirements of IRC § 401(a), then the employer may deduct its plan contributions, no income-tax is imposed on the plan earnings, and a plan participant/beneficiary pays no tax on the resulting benefits until the plan distributes the benefits. IRC §§ 404(a), 401(a) and 501(a), and 402(a), respectively. These plans may distribute annuity contracts to a plan participant or beneficiary, without changing the taxation of the benefits. The person would be taxed when the contract distributions of the plan benefits are made. IRC § 72(d). Such plans may not discriminate in favor of the highly compensated employees. IRC § 401(a)(4). Maximum limits are imposed on the plan benefits/contributions. IRC §§ 401(a)(16) and 415. There are also annual limits on employee contributions of pre-tax deferrals of compensation. IRC §§ 401(a)(30) and 402(g). Annual minimum benefit distributions are generally required after the participant attains age 70-½, unless the participant continues to work for the plan

sponsor after such date. IRC § 401(a)(9). A beneficiary may continue to defer taxes on the plan benefits after the participant's death by not immediately withdrawing the benefits, although beneficiaries must receive minimum distributions. *Id.* Failure to make minimum distributions generally results in a 50% penalty tax.

Such plans shall be hereinafter described as tax-qualified trust plans, although they may be funded with bank custodial accounts, group annuity contracts, or other contracts issued by insurance companies. IRC § 401(f). Such plans are not limited to those that may make benefit distributions following the participant's retirement or attainment of a retirement age, or even the termination of service. A participant in a defined-contribution pension plan may get a benefit distribution on his/her termination of employment regardless of the participant's age. A participant may get a benefit distribution from a profit-sharing or stock bonus plan even while employed by the plan sponsor. Treas. Reg. §§ 1.401-1(b)(ii) and (iii). In contrast, a participant in a defined-benefit pension plan may not, however, obtain in-service distributions before attaining the earlier of the plan's normal retirement date or the age 62. IRC § 401(a)(36).

The 401(k) provisions that permit employees to defer a portion of their compensation to tax-qualified trust plans were introduced as part of the Revenue Act of 1978, 95 Pub. L. No. 95-600 § 135, 92 STAT, 2763, 2785-87. The provisions were enacted to resolve questions about the permissibility of such features. STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE REVENUE ACT OF 1978 (1979) at 82-85. For tax-qualified 401(k) plans, pre-tax contributions are permitted. Treas. Reg. § 1.401(k)-1(a). For tax-qualified 401(k) plans, distributions may not generally be made before the employee's death, disability, attainment of age 59 ½, or termination of employment, and there is no requirement that any age be attained on such termination. IRC § 401(k)(2).

Benefit distributions from a tax-qualified trust plan before the participant's death, disability or attainment of age 59 ½ are generally subject to a 10 percent penalty tax. IRC §§ 72(t) and 4974(c). This early distribution penalty is never imposed on distributions to beneficiaries. In addition, no penalty is imposed if the withdrawal is used for medical expenses, or health insurance premiums for unemployed individuals. IRC §§ 72(t)(2)(B) and (D). Nor is a penalty imposed with respect to a distribution occurring following separation of service and the

attainment of age 55. IRC §§ 72(t)(2)(A)(v). Thus, the penalty may not be avoided if the payment is made on account of a participant's retirement before attaining the age of 55.

The CPLR and Debt. & Cred. L. protections for benefit distributions from tax-qualified trust plans are not affected by whether the payment is subject to an early distribution penalty.

II. Tax-Qualified Annuity Plans

If pension or profit-sharing benefits are funded by an employer with annuity contracts issued by insurance companies, and the contracts satisfy the requirements of IRC § 404(a)(2), then the employer may deduct its plan contributions, no income-tax is imposed on the plan earnings, and a plan participant/beneficiary pays no tax on the resulting benefits until the plan distributes the benefits. That section incorporates by reference a substantial portion of the substantive requirements for a tax-qualified trust plan, including the same non-discrimination rules, the same maximum limits on the plan contributions and benefits and the same minimum-distribution rules. IRC §§ 401(a)(4), 401(a)(9), 401(a)(16), and 404(a)(2). Such plans shall be hereinafter described as tax-qualified annuity plans. These plans permit employees to make after-tax contributions that are credited to their plan accounts. These plans do not appear to permit employees to make pre-tax contributions because there are no statutory provisions similar to the 401(k) features of tax-qualified trust plans that permit such contributions to tax-qualified trust plans. Moreover, the IRC § 401(a)(30) limits on 401(k) deferrals are not applicable to such plans. IRC §§ 403(a)(1) and 404(a)(2)

Benefit distributions from a tax-qualified annuity plan before the participant's death, disability or attainment of age 59-½ are generally subject to a 10 percent penalty tax. IRC §§ 72(t) and 4974(c). This penalty is never imposed on distributions to beneficiaries. The same penalty exceptions that apply to tax-qualified trust plans apply to tax-qualified annuity plans. Thus, the penalty may not be avoided if the payment is made on account of a participant's separation of service before attaining the age of 55.

The Ins. L. and Debt. & Cred. L. protections for benefit distributions from tax-qualified annuity plans are not affected by whether the payment is subject to an early distribution penalty.

III. Tax-Qualified Plans

A pension, profit-sharing, or stock bonus plan that is either a tax-qualified trust plan or a tax-qualified annuity plan shall be hereinafter described as a tax-qualified plan. Before the enactment of the Self-Employed Individuals Tax Retirement Act of 1962, Public Law 87-79 § 3(b), 76 STAT. 809, at 819 (1962), sole proprietors and partnerships could not sponsor tax-qualified plans. That legislation permitted a sole proprietor or a partnership to sponsor such plans, which were known as Keogh (HR-10) plans. Such a plan could be either a tax-qualified trust plan or a tax-qualified annuity plan. Keogh plans were initially subject to more stringent contribution and deduction limits than similar plans sponsored by corporations. These distinctions were eliminated by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 § 237, 96 STAT. 324, 511-12 (1982), as amended by Deficit Reduction Act of 1984 § 713, Pub. L. No. 98-494, 98 STAT. 494, 958. Thus, there is no longer any reason to distinguish Keogh plans from those plans sponsored by corporations. Nevertheless, the CPLR and the EPTL have made such a distinction since 1987. Both sections offered explicit protections for Keogh plan benefits starting in that same year.

IV. Section 403(b) Trust Plans

If deferred compensation benefits are funded with annuity contracts issued by insurance companies or custodial accounts for regulated investment company stock, such as a mutual fund or an exchange-traded fund, that meet the requirements of IRC § 403(b), then no income-tax is imposed on the plan contributions, the earnings on the plan contributions, or on the resulting benefits until the plan distributes the benefits. Such plans are often called "§ 403(b) tax-deferred compensation arrangements," or "Section 403(b) plans" and may be sponsored only by a public educational organization or a tax-exempt organization. Tax-exempt hospitals often use such plans. Such plans permit an employee to make contributions of a portion of his compensation to

a plan, and may, but need not, permit additional employer contributions. Such plans may not discriminate in favor of the plan sponsor's highly compensated employees. IRC § 403(b)(1)(D). Section 403(b) plans must include the same minimum-distribution requirements as tax-qualified plans. IRC § 403(b)(10).

Section 403(b) plans are subject to the same annual limits on employee contributions of pre-tax deferrals of compensation as for 401(k) plans and for tax-qualified trust plans. IRC §§ 401(a)(30), 403(b)(1)(E), and 402(g). Exceeding such limits, however, may not prevent Section 403(b) plans funded with custodial accounts rather than with annuity contracts from qualifying for favorable tax treatment described above. In such case, however, an excise tax is imposed on the participant for each year such excess remains on deposit with the plan, which is described as a Section 403(b) plan. IRC § 4973(c).

If a Section 403(b) plan is funded with annuity contracts and the benefits are not attributable to salary reduction agreement, there are no restrictions on benefit distributions other than the minimum distributions discussed above. IRC § 403(b)(11). Otherwise, distributions may not generally be made before the participant's death, disability, attainment of age 59 ½, severance of employment, or, in the case of benefits attributable to salary reduction agreements, hardship. IRC §§ 403(b)(7)(A)(ii) and 403(b)(11). However, allowable benefit distributions from a Section § 403(b) plan before the participant's death, disability or attainment of age 59-½ are generally subject to a 10 percent penalty tax. IRC §§ 72(t) and 4974(c)

Benefit distributions may not generally be made before the termination of the participant's employment with the plan sponsor. IRC § 403(b)(11). However, benefit distributions from a Section § 403(b) plan before the participant's death, disability or attainment of age 59-½ are generally subject to a 10 percent penalty tax. IRC §§ 72(t) and 4974(c). The same penalty exceptions applicable to tax-qualified trust plans apply to these plans. Thus, this early distribution penalty is never imposed on distributions to beneficiaries.

The Ins. L. and Debt. & Cred. L. protections for benefit distributions from Section 403(b) plans are not affected by whether the payment is subject to an early distribution penalty.

V. Individual Retirement Account Plans, Individual Retirement Annuity Plans, and Individual Retirement Arrangements

Individuals do not have to depend on their employers to obtain tax-favored retirement/savings benefits. They may establish individual retirement arrangements, called individual retirement plans under IRC § 7701(a)(37), to do so. We will use the term, individual retirement arrangement, so as to more easily distinguish those associated with employer plans, discussed below, from those not so associated. Those arrangements funded with trusts or custodial accounts are called individual retirement accounts. IRC §§ 408(a) and (h). Those funded with individual annuities or endowment contracts issued by insurance companies are called individual retirement annuities. IRC § 408(b). The individual who contributes his compensation to an individual retirement arrangement shall be referred to as the individual retirement arrangement participant.

If an individual retirement arrangement meets the requirements of IRC § 408, then no income-tax is imposed on the earnings on the individual's plan contributions until the plan distributes the benefits. IRC §§ 408(d) and (e). Deductible contributions, other than direct plan transfers and rollover contributions from an eligible retirement plan discussed below, must be limited to the lesser of the compensation income of the participant for the year, or the deductible amount for the year. IRC § 219(b). For 2018, the deductible amount for those less than 50 is $5,500, and for those 50 and over before the end of 2018 it is $6,500. These amounts may be reduced if the participant or the participant's spouse participates in a tax-qualified plan for this year. IRC § 219(g). In the year that the individual attains the age of 70 ½, and in later years the deductible amount is zero.

The qualification requirements for an individual retirement arrangement do not include any contribution/benefit limits. However, if a participant contributes more to all such arrangements than the lesser of (a) the compensation income of the participant for the year, or (b) the deductible amount for a year, then a 6% excise tax is imposed on the participant for each year such excess contributions remain on deposit with the plan. IRC § 4973(a).

Individual retirement arrangements must comply with the same minimum-distribution requirements as tax-qualified plans. IRC §§ 408(a)(6) and (b)(3), but there is no exception for participants who are employed after attaining the age of 70 ½. As with tax-qualified plans, a beneficiary may continue to defer taxes on the plan benefits after the participant's death by not

immediately withdrawing the benefits, although there are minimum-distribution rules applicable to beneficiaries. IRC § 401(a)(9).

Benefit distributions may be made at any time. However, benefit distributions from an individual retirement arrangement before the participant's death, disability or attainment of age 59-½ are generally subject to a 10 percent penalty tax. IRC §§ 72(t) and 4974(c). The exceptions are similar to those for tax-qualified plans. There are also exceptions for distributions used for higher education expenses, or first home purchases. IRC §§ 72(t)(2), (E) and (F). This early distribution penalty is never imposed on distributions to beneficiaries. There is, however, no exception for the separation of service from the plan sponsor after attaining age 55. IRC § 72(t)(3)(A). Such an exception would make little sense because the individual retirement arrangement contribution eligibility generally does not depend upon the participant's employment with a plan sponsor, but, except as described below, on whether the participant has compensation income from any source.

Benefits from individual retirement accounts are protected by the CPLR, Debt. & Cred. L., but benefits from individual retirement annuities are protected only by the Debt. & Cred. L. and the Ins. L. The protections for benefit distributions from such arrangements are not affected by whether the payment is subject to an early distribution penalty.

VI. Roth Individual Retirement Arrangements

If benefits are funded with individual retirement arrangements that are designated as Roth individual retirement arrangements, then no income-tax is imposed on most plan distributions, or the earnings on the participant's plan contributions. IRC §§ 408(d), (e), and 408A(d). No deduction is available for any contributions to Roth individual retirement arrangements. IRC § 408A(c)(1). The IRC § 408A(c)(2) limit on the amount of contributions to Roth individual retirement arrangements does not affect the income tax avoidance benefits provided to participants and beneficiaries in such arrangements by IRC § 408A. However, if a participant contributes more than the lesser of the compensation income of the participant for the year, or the deductible amount to an arrangement that is a Roth arrangement (where the rule for a zero deductible amount for years on or after the participant attains the age of 70 ½ is disregarded), a 6% excise tax is imposed on the participant for each year such excess contributions remain on

deposit with the plan. IRC §§ 4973(a) and (f). The minimum-distribution rules for Roth individual retirement arrangements differ than those for individual retirement arrangements, which are not designated as Roth individual retirement arrangements, and called traditional individual retirement arrangements. Roth individual retirement arrangement beneficiaries, but not the Roth Plan's participant or the participant's surviving spouse, must comply with the same minimum-distribution requirements as tax-qualified plans. IRC §§ 403(a)(6), (b)(3) and 408A(c)(5).

Benefit distributions may be made at any time. However, accrued earnings will be taxed if those earnings are distributed within a five-year holding period determined by the participant's initial contribution to one of his or her Roth arrangements. IRC § 408A(d)(2)(B). Moreover, benefit distributions from a Roth individual retirement arrangement before the participant's death, disability, or attainment of age 59-½ are generally subject to the 10 percent early-distribution penalty to the extent they are so taxable, or attributable to a rollover within five years of the distribution to the extent of that the rollover was includible in gross income. IRC § 408A(d)(3)(F).

An individual retirement arrangement which is not designated as a Roth arrangement is known as a traditional individual retirement arrangement. The benefit protections for those under a traditional individual retirement arrangement are the same as those under a Roth individual retirement arrangement.

VII. Individual Retirement Arrangements That are Part of Employer Pension Plans

Individual retirement arrangements may be part of employer pension plans.

If they are part of a Simplified Employee Pension Plan, as defined under IRC § 408(k), then the qualified plan contribution limits must be satisfied for the individual retirement arrangement to qualify for the favorable tax treatment for much larger contributions to an individual retirement account or annuity than is ordinarily the case. IRC § 415(a). A Simple Retirement Plan, as defined under IRC § 408(p), permits employee deferrals as well as employer contribution to individual retirement arrangements. Individual retirement arrangements that are

part of a Simple Retirement Plan, unlike free-standing arrangements, must comply with contribution limits that are smaller than those applicable to a 401(k) plan. IRC § 408(p)(2). In particular, the SIMPLE Retirement Plan contribution limit in 2018 for those less than 50 is $ 12,500, and for those 50 and over before the end of 2018 it is $ 15,500. In contrast, the 401(k) Plan contribution limit for those less than 50 is $ 18,500, and for those 50 and over before the end of 2018 it is $ 24,500.

If an individual retirement arrangement is treated as part of a tax-qualified plan, the individual retirement arrangement will not thereby become subject to any contribution limits to qualify for favorable tax treatment, but only the usual qualification requirements of individual retirement arrangements. IRC § 408(q). Thus, as discussed above, no contribution limits affect the tax qualification of the arrangement, but the 6% excise tax of IRC 4973 would be applicable to any excess contributions. Such arrangements may be Roth or traditional individual retirement arrangements.

VIII. Non-Qualified Deferred Compensation Plans

If an employer promises to pay a portion of an employee's compensation in a future year, and the payment is not made under the terms of one or more of the qualified plan or arrangement discussed above, the payment is generally subject to the IRC § 409A. Such plans or arrangements shall be hereinafter described as IRC § 409A plans. For example, an excess benefit plan that provides employees with benefits in excess of the qualified plan limits is an IRC § 409A plan. The tax law does not limit the plan contributions to such plans or the benefits such plans may provide. Moreover, these plans may be limited to a select group of management or highly compensated employees. In contrast, the benefits from tax-qualified plans may not discriminate in favor of the sponsor's highly compensated employees. IRC §§ 401(a)(4) and 404(a)(2). However, Section IRC § 409A is not applicable to bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefits. IRC § 409A(d)(1)(B).

Under IRC § 409A, if certain conditions are satisfied, such as requiring employee deferral decisions before the year in which the compensation is earned, IRC § 409A(a)(4)(B), the deferral payments are not subject to taxation until the IRC § 409A(a) requirements are satisfied.

If the conditions are not satisfied, the compensation is taxable when it is no longer subject to a substantial risk of forfeiture even if it not then payable, and subject to a 20% penalty IRC § 409A(a). In contrast, IRC § 401(k) deferrals may and are usually made by an employee during the year the compensation is earned.

Section 409A plans are generally unfunded in order to defer taxation of the amount before their distribution. However, they may be funded with trusts that are subject to some, but not all of the employer's creditors, without triggering a tax. Such trusts are sometimes called rabbi trusts. *See e.g.*, IRS Notice 2000-56, 2000-2 C.B. 393. The debtor protections of the CPLR and the Debt. & Cred. L. may apply to the benefits from such plans, to the extent those benefits are not treated as available from self-settled trusts.

IX. Section 457(b) Deferred Compensation Plans, Section 457(f) Deferred Compensation Plans and Section 457 Plans

If deferred compensation benefits are provided by tax-exempt organizations or state and local governments using a plan that meet the requirements of IRC § 457(b), then no income-tax is imposed on the employee contributions, the earnings on the employee contributions or on the resulting benefits until the plan (1) distributes the benefits for government plans, or (2) pays or otherwise makes the benefits available for tax-exempt organization plans. IRC § 457(a). Such a plan shall be hereinafter described as a Section 457(b) plan. This treatment is similar to the treatment of tax-qualified plans, although these plans are not subject to non-discrimination rules and usually provide benefits primarily for the highly compensated employees. Like, tax-qualified plans, these plans must comply with contribution limits. IRC §§ 457(b)(2), (b)(3), and (e)(15). However, because the plan sponsors are not subject to income tax, there are no provisions for the deductibility of employer contributions. Section 457(b) plans must satisfy the same minimum-distribution requirements as tax-qualified plans. IRC § 457(d)(2).

Benefit distributions may not generally be made before the participant's termination of employment. IRC § 457(d). Section 457(b) plans of tax-exempt organizations may not be funded, but government plans must be funded with trusts, custodial accounts, or group annuity

contracts. IRC §§ 457(b)(6) and (g). Section 457(b) plans are not subject to the IRC § 409A rules. IRC §§ 409A(d)(1) (A) and (d)(2)(B).

The debtor protections of the CPLR and the Debt. & Cred. L. may apply to the benefits from such government plans, to the extent those benefits are not treated as available from self-settled trusts.

If tax-exempt organizations or state and local governments provide deferred compensation benefits with a plan that does not meet the requirements of IRC § 457(b) but is subject to the requirements of IRC § 457, then such plan shall be hereinafter described as a Section 457(f) plan. These plans are not subject to either the contribution limits or the minimum-distribution limits.

Section 457 plans shall refer to those plans that are either Section 457(b) plans or Section 457(f) plans.

Income tax is imposed on an individual's employee deferrals under a Section 457(f) plan, when the benefits are no longer subject to the risk of forfeiture even if they are not then available for payment. Although this results in a benefit tax deferral, there is often greater deferral available for Section 457(b) plan benefits, which, as described, defers tax until the benefit is either made available or distributed Moreover, Section 457(f) plans are also subject to IRC § 409A.Thus, they are often described as ineligible plans. *See e.g.*, IRS Publication 575, Pension and Annuity Income for use in preparing 2016 returns (Jan. 4, 2017) available at https://www.irs.gov/pub/irs-pdf/p575.pdf (last visited February 22, 2018).

X. Rollover and Direct Plan Transfer Rules

Rollovers are benefit distributions from an eligible retirement plan that the recipient contributes to another eligible retirement plan. *See e.g.*, IRC § 402(c). An eligible retirement plan is an individual retirement arrangement, tax-qualified plan, Section 403(b) plan, or a Section 457(b) deferred compensation plan. IRC § 402(c)(8)(B). Plan participants may rollover eligible rollover distributions, as defined in IRC § 402(c)(4), without triggering any income-taxes, if the receiving plan is not a Roth individual retirement arrangement. Distributions from a Roth

individual retirement arrangement may be rolled over into another Roth individual retirement arrangement in a tax-free fashion. IRC §§ 402(c)(8)(B), and 408A(d)(3)(B). Otherwise, there is no restriction on the eligible retirement plan to which the rollover is made. The rollovers must be made within 60 days of receipt of the benefit distribution. IRC § 408(d)(3) (distributions from individual retirement arrangements). IRC § 402(c) (distributions from tax-qualified trust plans). IRC § 403(a)(4) (distributions from tax-qualified annuity plans). IRC § 403(b)(8) (distributions from Section 403(b) plans). IRC § 457(e)(16) (distributions from Section 457(b) deferred compensation plans).

A participant's surviving spouse has the same rollover rights as a participant with respect to the participant's benefits from an eligible retirement plan. IRC § 402(c)(9) (distributions from tax-qualified trust plans). IRC § 403(a)(4)(B) (distributions from tax-qualified annuity plans). IRC § 403(b)(8)(B) (distributions from Section 403(b) plans); IRC 408(d)(3)(C) (distributions from individual retirement arrangements), IRC § 457(e)(16)(B) (distributions from Section 457(b) deferred compensation plans). Non-spousal beneficiaries may not make tax-free rollovers of the participant's benefits from an eligible retirement plan. An individual may only make only one nontaxable 60-day rollover between individual retirement arrangements, other than Roth individual retirement arrangements, in any 1-year period. IRC §§ 408(d)(3)(B) and 408A(e)(1) flush language. An individual may not make more than one nontaxable 60-day rollover within each 1-year period even if the rollovers involved different non-Roth individual retirement arrangements. IRS Announcement 2014-32, 2014-2 C.B. 907.

Individuals may avoid the rollover restrictions and still obtain tax-free treatment by directly transferring benefits between eligible plans. Direct transfers between individual retirement arrangements are not included in gross income. Rev. Rul. 78-406; 1978-2 C.B. 157. This allows one to avoid the 12-month limitation on rollovers between individual retirement arrangements. Direct transfers from tax-qualified trust plans to eligible retirement plans are not included in gross income. Treas. Reg. § 1.401(a)(31)-1 Q & A-5. Direct transfers from tax-qualified annuity plans to eligible retirement plans not included in gross income.
IRC § 403(a)(5). Direct transfers from Section 403(b) plans to eligible retirement plans are not includable in gross income. IRC § 403(b)(10). Direct transfers from Section 457(b) plans to eligible retirement plans are not includable in gross income. IRC § 457(e)(10). A non-spousal beneficiary may similarly avoid the rollover prohibition and make a tax-free transfer of the

participant's benefits from an eligible retirement plan other than an individual retirement arrangement into an inherited individual retirement arrangement. IRC § 402(c)(11) (distributions from tax-qualified trust plans). IRC § 403(a)(4)(B) (distributions from tax-qualified annuity plans). IRC § 403(b)(8)(B) (distributions from Section 403(b) plans). IRC § 457(e)(16)(B) (distributions from Section 457(b) deferred compensation plans).

IRC § 409A plans are not eligible retirement plans. Nor are Section 457(f) plans. Thus, tax-free rollovers and plan transfers may not be made to or from any of them by eligible retirement plans.

XI. Tax Effects of Domestic Relations Orders

IRC § 414(p) defines a qualified domestic relations order ("QDRO") as a domestic relations order that creates or recognizes rights of an alternate payee to a participant's benefits, while meeting substantive benefit requirements and giving the plan administrator and participant the requisite notices. The order may establish a right to a separate interest in the participant's benefits. In such case, the alternate payee may obtain benefits whenever such benefits are available, such as a survivor benefit at the participant's death or lifetime benefit payments even if the participant is not obtaining the benefits. The order may also establish a right to share in the participant's benefits. In such case, the alternate payee may obtain benefits only when the participant receives his or her benefits. QDROs are defined only for plans to which IRC § 401(a)(13) applies, such as for tax-qualified plans, and for certain other plans, such as Section 403(b) plans. IRC § 414(p)(9). For government plans and 457(b) plans, there are no notice or substantive benefit requirements for distributions pursuant to a domestic relations order to be treated as pursuant to a QDRO. IRC § 414(p)(11). QDROs are not defined for individual retirement arrangements. Nor are domestic relations order for individual retirement agents ever treated under the IRC as qualified domestic relations orders.

Alternate payees pursuant to the terms of a QDRO, who are the spouse or former spouse of a participant, are taxable when they receive benefit payments from a tax-qualified trust plan, IRC § 402(e)(1), a Section 403(b) plan, IRC § 414(p)(9), or a Section 457(b) plan, IRC

§ 414(p)(12). However, the participant may then deduct such amount as an alimony payment. IRC § 215. This deduction will not be available for divorce or separation instruments executed after December 31, 2018. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 § 11051(c). Payments pursuant to a QDRO to any alternate payees are not subject to the 10% early payment penalty. IRC § 72(t)(2)(C). However, if the alternate payee is not the participant's spouse or former spouse. *i.e.*, the benefit payment is fulfilling a support obligation to dependent, than the taxable portion of the payment is included in the participant's gross income. *See e.g.*, *Stahl v. Comm'r*, TC Memo 2001-2 (holding support payments from a tax-qualified trust plan to the participant's child were taxable to the participant).

Transfers of an interest in a participant's individual retirement arrangement to the participant's spouse of former spouse pursuant to a divorce or separation instrument (which include a decree to support the participant's spouse of former spouse) are not treated as a taxable transfer. IRC § 408(d)(6). Such transfers often occur as part of the allocation of property between the spouses or former spouses. After the transfer the arrangement is treated as the spouse's or former spouse's individual retirement arrangement. There is no such tax-free treatment if an interest is transferred to another party, such as the participant's dependent child. In such case, the participant would be taxable on all such distributions but could deduct the payments as maintenance. IRC § 71. This deduction will not be available for divorce or separation instruments executed after December 31, 2018. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 § 11051(c).

A participant's spouse or former spouse, who has received an interest in the participant's individual retirement arrangements pursuant to IRC § 408(d)(6) is subject to the same early distribution rules as the participant would be. In particular, distributions prior to the age of 59-½ are generally subject to the 10% early distribution penalty. There are no provisions exempting the spousal payments pursuant to a domestic relations order that is not a QDRO from those penalties, even if the order has the notice and substantive benefit characteristics of a QDRO.

Creating a More Equitable, Harmonious and Clear Set of Rules for the Protection of a Debtor's Benefits under the Terms of a Pension, Profit Sharing, Stock Bonus Plan, Individual Retirement Arrangement, or Similar Plan or Arrangement

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Current Non-Bankruptcy Law: Debtor protections for Benefits from

- Tax-Qualified Pension or Profit-Sharing Plans Sponsored by Corporations, and IRAs funded with Trusts & Custodial Accounts, IRC Section 457 Plans,
- Pre- and Post-Distribution — Fraudulent Transfer and Some Family Law/Domestic Relations Orders Exception
- All Plans Funded with Annuities & Individual Retirement Annuities Fraudulent Transfer Exception—Reasonable Requirements to Protect Benefits after Distribution
- Restraining Notices + Notice of Sample Exemptions—Payments from Pensions or from Pension and Retirement Accounts

Current Bankruptcy Law: Add Debtor protections for many Benefits from

- Pension/Profit-Sharing/Stock Bonus Plans and similar plans
- However, if debtor controls plan sponsor, plan must meet IRC requirements.

Creating a More Equitable, Harmonious and Clear Set of Rules for the Protection of a Debtor's Benefits under the Terms of a Pension, Profit Sharing, Stock Bonus Plan, Individual Retirement Arrangement, Similar Plan or Arrangement

PROPOSED BANKRUPTCY AND NON-BANKRUPTCY APPROACH:

- PROTECT A DEBTOR'S BENEFITS FROM PENSION PLANS, PROFIT-SHARING PLANS, SECTION 403(B) PLANS, SECTION 457(B) PLANS, INDIVIDUAL RETIREMENT ACCOUNTS, AND INDIVIUDAL RETIREMENT ANNUITIES THAT MEET IRC RULES, BUT NO PROTECTION FOR BENEFITS SUBJECT TO EXCISE TAX FOR EXCESS CONTRIBUTIONS

- PROTECT A DEBTOR'S BENEFITS BEFORE THEIR DISTRIBUTION, UPON THEIR DISTRIBUTION, OR AFTER THEIR DISTRIBUTION.

- EXEMPTION NOTICES MENTION PENSION PLANS, PROFIT-SHARING PLANS, 401(K) PLANS, 403(A) PLANS, 403(B) PLANS, 457(B) PLANS, AND INDIVIDUAL RETIREMENT ACCOUNTS OR ANNUITIES

- NO PROTECTION IF CLAIM FOR FRAUDULENT TRANSFER, FOR SUPPORT, OR FOR DOMESTIC RELATIONS ORDER SIMILAR TO QDRO.

- A DEBTOR'S BENEFITS FROM PLANS AND ARRANGEMENTS THAT VIOLATE IRC RULES WILL BE SUBJECT TO GENERAL TRUST RULES (INCLUDING SELF-SETTLED RULES)

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

1) INDIVIDUAL RETIREMENT ARRANGEMENTS ARE NOT TREATED CONSISTENTLY

- UNDER THE TRUST FORMAT A DEBTOR'S INDIVIDUAL RETIREMENT ACCOUNT BENEFITS ARE FULLY PROTECTED
- UNDER THE ANNUITY FORMAT A DEBTOR'S INDIVIDUAL RETIREMENT ANNUITY BENEFITS ARE ONLY PROTECTED WITH DUE REGARD FOR THE REASONABLE REQUIREMENTS OF THE JUDGMENT DEBTOR AND HIS FAMILY

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

2) PENSION AND PROFIT-SHARING PLANS IN WHICH PARTICIPANTS MAY CHOOSE WHETHER TO DEFER THEIR COMPENSATION ARE NOT TREATED CONSISTENTLY

- UNDER THE TRUST FORMAT A DEBTOR'S 401(K) PLAN AND 457(B) PLAN BENEFITS ARE FULLY PROTECTED
- UNDER THE ANNUITY FORMAT A DEBTOR'S 403(B) PLAN BENEFITS ARE ONLY PROTECTED WITH DUE REGARD FOR THE REASONABLE REQUIREMENTS OF THE JUDGMENT DEBTOR AND HIS FAMILY UNDER THE ANNUITY MODEL

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

3) PENSION AND PROFIT-SHARING PLANS IN WHICH EMPLOYERS DETERMINE CONTRIBUTIONS TO BE MADE ON BEHALF OF THEIR EMPLOYEES ARE NOT TREATED CONSISTENTLY

- UNDER THE TRUST FORMAT A DEBTOR'S DISTRIBUTED BENEFITS FROM PLANS THAT MEET THE REQUIREMENTS OF IRC 401(A) ARE FULLY PROTECTED
- UNDER THE ANNUITY FORMAT A DEBTOR'S DISTRIBUTED BENEFITS FROM PLANS THAT MEET THE REQUIREMENTS OF IRC 403(A) ARE ONLY PROTECTED WITH DUE REGARD FOR THE REASONABLE REQUIREMENTS OF THE JUDGMENT DEBTOR AND HIS FAMILY

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

4) A DEBTOR'S BENEFITS FROM A TRUST UNDER A PENSION AND PROFIT-SHARING PLAN THAT DOES NOT MEET THE REQUIREMENTS OF IRC SECTION 401(A), ARE TREATED DIFFERENTLY THAN BENEFITS FROM AN ANNUITY THAT DOES NOT MEET THE SIMILAR REQUIREMENTS OF IRC SECTION 403(A).

- A DEBTOR'S BENEFITS FROM TRUST PLANS ARE SUBJECT TO NO PROTECTONS UNDER THE SELF-SETTLED RULES, BUT BENEFITS FROM THE ANNUITY PLANS ARE FULLY PROTECTED

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

5) THE ENFORCEABILITY OF A JUDGMENT CREDITOR'S CLAIM IS DETERMINED BY WHEN THE CREDITOR BEGAN THE ACTION NOT MERELY THE KIND OF CLAIM.

- CLAIMS ARE ENFORCEABLE AGAINST ALL ADDITIONS TO PROTECTED PENSION/PROFIT SHARING PLANS, INDIVIDUAL AND SIMILAR ARRANGEMENTS THAT ARE MADE AFTER THE DATE 90 DAYS BEFORE THE ACTION WAS INTERPOSED
- ADDITIONS MAY INCLUDE ROLLOVER TRANSFERS AMONG THE PROTECTED PLANS AND ARRANGEMENTS EVEN THOUGH THE TRANSFER IS DIRECTLY FROM ONE PROTECTED PLAN TO ANOTHER PROTECTED PLAN

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

6) THE ENFORCEABILITY OF DOMESTIC RELATIONS ORDERS DEPENDS UPON THE KIND OF BENEFITS TO WHICH AN INDIVIDUAL IS ENTITLED

- DOMESTIC RELATIONS ORDERS THAT ARE ENFORCING SUPPORT OBLIGATIONS OR ARE QDROS ARE ENFORCEABLE AGAINST A DEBTOR'S BENEFITS FROM PLANS THAT MEET THE REQUIREMENTS OF IRC 401(A).

- ONLY DOMESTIC RELATIONS ORDERS THAT ARE ENFORCING SUPPORT OBLIGATIONS OR ARE QDROS ARE ENFORCEABLE AGAINST A DEBTOR'S INDIVIDUAL RETIREMENT ACCOUNTS.

- ALL DOMESTIC RELATIONS ORDERS ARE ENFORCEABLE AGAINST A DEBTOR'S INDIVIDUAL RETIREMENT ANNUITIES.

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

7) THERE ARE LIMITS ON THE AMOUNT OF A DEBTOR'S PROTECTED BENEFITS FROM PENSION AND PROFIT-SHARING PLANS BUT NO LIMITS ON THE PROTECTED BENEFITS FROM AN INDIVIDUAL RETIREMENT ACCOUNT

- THERE ARE LIMITS ON A DEBTOR'S BENEFITS/CONTRIBUTIONS FROM/TO PENSION OR PROFIT-SHARING PLANS THAT MEET THE REQUIREMENTS OF IRC 401(A), WHICH ARE THE PROTECTED PLANS UNDER THE CURRENT RULES.

- THERE ARE NO LIMITS ON A DEBTOR'S CONTRIBUTIONS TO AN INDIVIDUAL RETIREMENT ACCOUNT, ALTHOUGH THERE ARE LIMITS ON THE DEDUCTIONS FOR CONTRIBUTIONS TO SUCH ACCOUNTS AND FEDERAL LAW IMPOSES EXCISE TAXES ON "EXCESS CONTRIBUTIONS."

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

8) THERE ARE LIMITS ON THE AMOUNT OF A DEBTOR'S PROTECTED BENEFITS PENSION AND PROFIT-SHARING PLANS OUTSIDE BANKRUPTCY BUT MAY BE NO LIMITS ON A DEBTOR'S PROTECTED BENEFITS IN BANKRUPTCY

- THERE ARE LIMITS ON A DEBTOR'S BENEFITS/CONTRIBUTIONS FROM/TO CORPORATE PENSION OR PROFIT-SHARING PLANS THAT MEET THE REQUIREMENTS OF IRC 401(A), WHICH ARE THE PROTECTED PLANS OUTSIDE BANKRUPTCY.
- THE SAME LIMITS ON A DEBTOR'S BENEFITS/CONTRIBUTIONS TO CORPORATE PENSION OR PROFIT-SHARING PLANS APPLY ONLY IF THE DEBTOR IS A DIRECTOR, OFFICER, OR PERSON IN CONTROL OF THE CORPORATE SPONSOR.

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

9) EXEMPT PAYMENTS AND FUNDS ARE TREATED INCONSISTENTLY IN THE CPLR PROVISIONS CREDITORS USE TO ENFORCE THEIR JUDGMENTS

- THE DUE PROCESS NOTICE PROVISIONS EXPLAINING HOW A LAY PERSON MAY CHALLENGE A RESTRAINING ORDER AGAINST THE JUDGMENT DEBTOR'S BANK ACCOUNT PRESENTS AN ILLUSTRATIVE LIST OF EXEMPT DEPOSITS, WHICH INCLUDE PENSION BENEFIT DEPOSITS BUT NOT PROFIT-SHARING PLAN DEPOSITS
- THE DUE PROCESS PROVISION EXPLAINING HOW A LAY PERSON MAY CHALLENGE AN INCOME EXECUTION AGAINST THE JUDGMENT DEBTOR'S INCOME PRESENTS NO ILLUSTRATIVE LIST OF EXEMPT DEPOSITS, BUT REFERENCES A STATUTE THAT DOES NOT MENTION PENSION BENEFIT PAYMENTS.
- THE INSTALLMENT PAYMENT ORDER PROVISIONS, WHICH ARE USED TO THE EXTENT A CREDITOR MAY NOT OBTAIN AN INCOME EXECUTION BUT MUST OBTAIN PAYMENTS AFTER THEY HAVE BEEN DISTRIBUTED TO THE JUDGEMENT CREDITOR, DO NOT MENTION DEPOSITS THAT ARE EXEMPT FROM THESE ORDERS, SUCH AS PENSION BENEFIT PAYMENTS

EXAMPLES OF INEQUITIES AND INCONSISTENCIES IN CURRENT LAW

10) THE DUE PROCESS NOTICES THAT MUST ACCOMPANY LEVIES, EXECUTIONS, AND RESTRAINING NOTICE CONTAIN AMBIGUOUS LISTS OF PENSION AND PROFIT-SHARING BENEFITS EXEMPT FROM ENFORCEMENT OF CLAIMS

- CPLR § 5222 (NON-BANK ACCOUNTS)—references "PUBLIC OR PRIVATE PENSIONS"
- CPLR § 5222-a (BANK ACCOUNTS)—references "PAYMENTS FROM PENSIONS AND RETIREMENT ACCOUNTS"
- WHAT ABOUT 401(K) PLANS, PROFIT-SHARING PLANS

EXAMPLES OF AVOIDABLE ISSUES WITH THE CURRENT LAW

1) ALL BENEFITS FROM CORPORATE RETIREMENT BENEFIT PLANS THAT MEET THE REQUIREMENTS OF IRC SECTION 401(A) SEEM TO BE PROTECTED. HOWEVER, THERE ARE PROVISIONS THAT THE SELF-SETTLED RULES DO NOT APPLY TO JUDEMENT DEBTORS WHO ARE CORPORATE SHAREHOLDERS. THIS RAISES THE QUESTION WHETHER JUDGMENT DEBTORS WHO ARE NOT CORPORATE SHAREHOLDERS, BUT CHOOSE TO MAKE 401(K) CONTRIBUTIONS ARE SUBJECT TO THE SELF-SETTLED RULES.

- THE ISSUE MAY BE ELIMINATED BY DELETING THE UNNEEDED SELF-SETTLED LANGUAGE FROM THE PROVISIONS PERTAINING TO PENSION PLANS, PROFIT-SHARING PLANS, INDIVIDUAL RETIREMENT ARRANGEMENTS, AND SIMILAR PLANS AND ARRANGEMENTS.

EXAMPLES OF AVOIDABLE ISSUES WITH THE CURRENT LAW

2) CPLR 5205(C) PROTECTS ALL UNDISTRIBUTED BENEFITS AND BENEFIT PAYMENTS FROM "A KEOGH (HR-10), RETIREMENT OR OTHER PLAN ESTABLISHED BY A CORPORATION, WHICH IS QUALIFIED UNDER SECTION 401(A)." HOWEVER, KEOGH PLANS ARE NEVER CORPORATE PLANS, BUT MAY ONLY BE SPONSORED BY SOLE PROPRIETORS OR PARTNERSHIPS. THIS RAISES THE QUESTION WHETHER ANY BENEFITS FROM KEOGH PLANS ARE PROTECTED BY THE PROVISION, AND BY CPLR 5205(D) WHICH ONLY PROTECTS BENEFITS FROM PLANS DESCRIBED IN 5205(C).

- THE ISSUE MAY BE ELIMINATED BY DELETING THE UNNEEDED LANGUAGE ABOUT THE SPONSOR OF THE PLANS OTHER THAN TO EXCLUDE NEW YORK GOVERNMENT PENSION AND PROFIT-SHARING PLANS WHICH ARE PROTECTED BY STATUTES ESTABLISHING AND GOVERNING THOSE PLANS.

EXAMPLES OF AVOIDABLE ISSUES WITH THE CURRENT LAW

3) CPLR 5205(D) PROTECTS ALL A DEBTOR'S BENEFIT PAYMENTS AND BENEFIT DISTRIBUTIONS FROM "AN INDIVIDUAL RETIREMENT ACCOUNT PLAN." HOWEVER, FEW INDIVIDUAL RETIREMENT ACCOUNTS ARE PART OF SUCH PLANS, SUCH AS SIMPLIFIED EMPLOYEE PENSION PLANS FUNDED WITH INDIVIDUAL RETIREMENT ACCOUNTS. THIS RAISES THE QUESTION WHETHER A DEBTOR'S BENEFIT DISTRIBUTIONS FROM A FREE-STANDING INDIVIDUAL RETIREMENT ACCOUNT IS PROTECTED BY THIS PROVISION.

- THE ISSUE MAY BE ELIMINATED BY SIMPLY REFERENCING THE PROPERTY DESCRIBED IN CPLR 5205(C) OR IN THE NEW SUBDIVISON OF CPLR 5205 THAT WOULD DEAL WITH UNDISTRIBUTED BENEFITS FROM PENSION PLANS, PROFIT-SHARING PLANS, INDIVIDUAL RETIREMENT ARRANGEMENTS, OR SIMILAR PLANS AND ARRANGEMENTS.