sussman shank LLP

ARTICLES

Quantum Leap! Oregon's Increased Homestead Exemption Makes Up For Lost Ground

JUNE 18, 2024

By Ann K. Chapman and Colleen A. Lowry

Published in the OSB Debtor-Creditor Section Newsletter, Spring 2024

On April 4, 2024, the Family Financial Protection Act (Senate Bill 1595, Or. Leg. Assembly, 2024) was signed into law in Oregon, making significant changes to the exemption amounts for a homestead and a vehicle, allowing up to $2,500 in financial accounts as not subject to garnishment no matter the source of these funds, increasing the amount of wages as exempt from garnishment, and adding changes to the Oregon Unlawful Debt Collection Practices Act (commonly known as "OUDCPA") at ORS 646.639 and 646.641.

While S.B. 1595 takes effect immediately upon passage and the changes made to the OUDCPA are effective immediately, the sections regarding exemptions and garnishment do not become operative until January 1, 2025. Family Financial Protection Act, S.B. 1595, 2024 Or. Reg. Sess., Section 32(1), Section 33.

Significant New Changes: Vehicle, Homestead, $2,500 as "Base Protected Amount"

Vehicle Exemption

For a vehicle under ORS 18.345(1)(d), the exemption amount has been raised from $3,000 to $10,000 per vehicle per person. However, there is a new section carved out as ORS 18.345(1)(d)(B) for debts arising from child support or spousal support obligations or a monetary award judgment that includes restitution, whereby the vehicle exemption is limited to $3,000. The carveout of this separate exemption amount for debts arising from child support, spousal support, and restitution judgments was a political compromise as the Oregon Department of Justice had raised concerns about the higher exemption amounts limiting recovery of these types of debts.

Homestead Exemption

For a homestead under ORS 18.395, the exemption amount has been raised from $40,000 to $150,000 for a single person and from $50,000 to $300,000 for a couple in a household. However, there is a new section carved out as ORS 18.395(1)(b) for debts arising from child support or spousal support obligations or a monetary award judgment that includes restitution whereby the homestead exemption is limited to $40,000 for a single person and $50,000 for a couple. Also, under new ORS 18.395(1)(d), the homestead exemption of $150,000/$300,000 is tied to the Consumer Price Index and will be adjusted on July 1st of each year beginning July 1, 2025. If the debt arises from child support, spousal support, or restitution, then the exemption amount of $40,000/$50,000 will not be adjusted for inflation.

$2,500 Not Subject to Garnishment: New ORS 18.785

Former ORS 18.784 (“Certain financial institution deposits not subject to garnishment”) has been repealed. S.B. 1595, Section 31. These provisions regarding federal benefit payments, certain retirement benefits exempt from execution, public assistance, unemployment compensation, black lung benefits, and workers’ compensation payments are now part of ORS 18.785 at ORS 18.785(2)(a)-(i). This provides for a significantly expanded ORS 18.785.

An important new provision is now found in ORS 18.785 that allows for up to $2,500 protected from garnishment at any financial institution. Under new ORS 18.785(2)(j), the $2,500 is referred to as the “base protected account balance” and is the combined total of all monies held in the judgment debtor’s accounts at one financial institution. Any amount exceeding the initial base protected amount of $2,500 is potentially subject to garnishment. Further analysis of any excess amount above $2,500 and whether it is subject to garnishment would be required by the financial institution. Also, under new ORS 18.785(2)(j), the base protected amount of $2,500 is tied to the Consumer Price Index and will be adjusted on July 1st of each year beginning July 1, 2025.

The new $2,500 amount not subject to garnishment applies to each financial institution that holds funds of the judgment debtor. Practically speaking, it would be difficult for different financial institutions to

coordinate with each other whether the $2,500 limit has been reached at one institution and to apply the $2,500 limit across multiple financial institutions. Therefore, hypothetically, a judgment debtor could protect up to $2,500 at multiple different financial institutions: for example, up to $2,500 in accounts at Bank A, up to $2,500 in accounts at Bank B, and up to $2,500 in accounts at Bank C. Certainly, the aim of the new law was to protect the judgment debtor's accounts from being wiped out through garnishment.

The $2,500 "base protected account balance" does not appear to be applicable for bankruptcy purposes as an exemption that can be used on Schedule C: Exemptions. In other words, the $2,500 does not appear to be an additional "wildcard" exemption that could potentially be added to the existing $400 "wildcard" exemption under ORS 18.345(1)(p), which is used for an exemption in any personal property.

The $2,500 amount is not included at ORS 18.345, with the other personal property exemptions typically used for bankruptcy purposes. It is included in the new and greatly expanded ORS 18.785, which is the section involving garnishment review by a financial institution. The $2,500 is referred to as "the amount not subject to garnishment" at new ORS 18.785(1)(a), which contains a definition of the "base protected account balance" but then later referred to as an "exempted amount" at new ORS 18.785(2)(j).

The new NOTICE OF EXEMPT PROPERTY AND INSTRUCTIONS FOR CHALLENGE TO GARNISHMENT form refers to the $2,500 as "exempt under ORS 18.785." It is not entirely clear, but it does not appear that the $2,500 protected from garnishment was also intended to be a new exemption used for bankruptcy filing purposes on Schedule C. Odds are it is not an additional exemption available to a debtor in bankruptcy.

ORS 18.348 involving the exemption of funds in a financial institution that are reasonably identifiable and traceable to wages up to $7,500 has not been changed in any respect and is available to a debtor filing bankruptcy.

Changes to Garnishment Forms Required

Due to the significant changes to the state exemptions, the garnishment forms—such as the instruction forms, wage exemption calculation form, and notice of exempt property—all must be updated to include the new amounts and other changes.

Impact on Judgment Lien Avoidance Inside and Outside of Bankruptcy

As far as the impact of the increased exemption amounts affecting judgment lien avoidance or discharge of judgment liens against the homestead, under 11 U.S.C. § 522(f) of the Bankruptcy Code, the Debtor

must use the exemption amounts that existed at the time the bankruptcy petition was filed to avoid a judgment lien through bankruptcy.

However, under ORS 18.412, which is the alternative for discharging a judgment lien against a homestead under the state statutes, the applicable homestead exemption would be the homestead exemption that is in existence at the time that the Notice of Intent to Discharge Judgment Lien is filed in the county court records where the judgment was entered. This is not a change from current law, but the increased homestead exemption of $150,000/$300,000 may affect the ability of creditors to collect sale proceeds for a judgment lien that was entered before the increased homestead exemption took effect. See also State ex rel. Nilsen v. Jones, 577 P.2d 541,588 (Or. Ct. App. 1978) (Homestead exemption increased from $7,500 to $12,000; held that $12,000 exemption allowed under state process to discharge judgment lien).

Hypotheticals

Questions will inevitably arise about how the new law regarding exemptions will be implemented in practice, especially given the separate exemption amounts that depend on the nature of the debt.

Hypothetical #1: Debtor's Car

Scenario A: Debtor owns a vehicle valued at $20,000, with a $10,000 lien against the vehicle. He owes a judgment for back child support of $4,000. Can the child support creditor execute on the vehicle subject to the first lien?

Answer: Outside of bankruptcy, the child support creditor could execute on the vehicle subject to the first lien on the vehicle. The vehicle could be sold for $20,000, costs of sale paid of 15%, or $3,000, vehicle lien paid off of $10,000, exemption paid to Debtor of $3,000, leaving child support paid of $4,000.

Scenario B: What if the vehicle is worth only $17,000, and the first lien is $10,000? Costs of sale are $2,550 (15%), leaving $4,450, and the Debtor claims a $3,000 exemption. Can the child support creditor levy on the vehicle now if their proceeds are only $1,450 after the exemption of $3,000 and payoff of the first lien as long as the Debtor gets his exemption of $3,000?

Answer: Yes.

Scenario C: What if the vehicle is worth $20,000, a lien of $10,000, and is co-owned with a girlfriend who doesn't owe back child support but is also on the debt to the first lien creditor?

Answer: In this case, if the co-owned vehicle were sold for $20,000, costs of sale paid of $3,000 (15%), but charged against the Debtor's half of the equity, the scenario would look like this:

Value of $20,000 minus the joint lien of $10,000 leaves equity of $10,000—half of the equity being the Debtor's equity, or $5,000. The costs of sale of $3,000 would be charged against the Debtor's half of the equity. Debtor's equity of $5,000 minus the costs of sale of $3,000 minus Debtor's available exemption of $3,000 leaves no equity available for the child support creditor. Therefore, the sale could not occur.

Hypothetical #2: Real Estate

Scenario A: Husband and wife file a Chapter 13 bankruptcy case. The husband is 80 years old. His wife is 50 and in perfect health. Their plan provides for a small monthly payment and sale of the house in four years. The parties married 15 years ago—before there was any past due spousal support. The parties hold the property as tenants by the entirety. Their property is worth $400,000, and a lien of $90,000 is owed to the first mortgage holder. The husband owes a past due spousal support obligation to an ex-spouse of $75,000, and she has a judgment against the real property. Debtor's wife owes no spousal support or child support. If they file bankruptcy jointly, are they limited to the $50,000 homestead exemption because of the husband's spousal support obligation? Or is the husband limited to $40,000, while the wife can assert an exemption of $150,000, for a combined homestead exemption of $190,000?

Answer: The combined homestead exemption should be $190,000. Or should it? In this scenario, under a Chapter 13 bankruptcy case, the equity would be determined by the value of the real property of $400,000 minus the mortgage lien of $90,000 minus costs of sale of 7% ($28,000), leaving equity of $282,000—half of the equity being $141,000 each for the husband and wife if you split the equity down the middle. The husband's equity of $141,000 would be reduced by the judgment lien against him of $75,000, leaving $66,000 of equity against which his homestead exemption of $40,000 would apply. That would leave $26,000 for other creditors in the Chapter 13 case.

However, should the husband get to keep all $66,000 because the judgment lien where the spousal support is owed would be completely paid off in the Chapter 13 case through a sale and wouldn't be an unsecured creditor in the case? If a child support or spousal support judgment is paid in full on a secured basis in a Chapter 13 case, should Debtor be allowed some remaining amount of the homestead exemption as to other creditors?

Scenario B: Same facts, but the husband has been diagnosed with pancreatic cancer and is expected to die within the next six months. His wife doesn't file. If the husband is near death, is his equity in the property worth anything close to his homestead exemption—whether the exemption is $40,000 or $150,000? Could husband claim his half-interest is worth substantially less than $66,000 (the equity if you split it down the middle and the spousal support judgment is paid off)? Could he assert a homestead exemption of $150,000? Could he assert that a trustee in

Chapter 7 couldn't prevail on a 363 motion to force the sale of the property if his wife doesn't file with him, thereby reducing the value of his interest in the homestead?

Answer: Husband could argue that his tenancy by the entirety interest is worth far less than half of the equity for multiple reasons (e.g., his entirety interest provides only a possessory interest, and with death imminent and likely before his spouse—and his interest soon to evaporate upon his death free and clear of any liens against the property—what is that entirety interest worth?). Further, in Chapter 7 (the relevant inquiry in determining the liquidation value in Chapter 13), could a trustee force the sale of the entire property and prevail on a 363 motion?

Scenario C: Same facts, except the husband also owes a second ex-wife he was married to in Utah $3,000 of past due child support, which has never been reduced to judgment in Oregon. Does this limit the husband's homestead exemption to $40,000?

Answer: Most likely, yes. Even if the husband can successfully argue that the lien owed for the spousal support judgment is secured and that his plan proposes a sale and payment in full of that spousal support judgment, a second child support obligation that isn't reduced to judgment would likely reduce his homestead exemption to $40,000. New ORS 18.395(1)(b) states that the homestead is limited to $40,000/$50,000 if there is a "liability in any form" that arises from a child support or spousal support obligation. The fact that a child support obligation from another state is not reduced to a judgment in Oregon should still prevent the Debtor from claiming the higher exemption amount.

Query: Would a savvy Debtor's lawyer approach the ex-wife with the child support judgment prior to filing an offer to stipulate to judgment before filing, thereby putting the second ex-wife in the same position to be paid upon sale, or simply find a way for the Debtor to pay her before he files? Would it matter if the judgment was entered or payment was made within 90 days of filing the case?

In summary, we have lots of questions we will face once this legislation becomes law on January 1, 2025. Feels a little like 2005 on a smaller scale for the old timers among us!

Related Attoneys

Ann K. Chapman
Special Counsel
503.972.9599 x163
achapman@sussmanshank.com

Colleen A. Lowry
Attorney
503.972.9594 x159

sussman shank LLP

clowry@sussmanshank.com