

How To Claim Your Exemptions And Keep Your Essential Property And Income Safe From Creditors Without Filing Bankruptcy.

If you are reading this you have probably been sued, or - at a minimum - threatened with suit. If so, you should read our pamphlet called How To Represent Yourself In Justice Court.

Possibly, you have already had a judgment taken against you in court. If so, you should read What To Do If You've Lost A Civil Lawsuit and Bankruptcy; Is It Right For You? if you have not already done so.

If you have considered all your options and determined that you wish to claim your exemptions, here are a few things you should know.

1) What It Means To Be "Judgment Proof."

Mississippi, as have other states, and - also - the federal government, recognizes that it makes good sense as matter of public policy to allow people to keep certain things safe from their creditors. We the citizens, and our legislators, did not want creditors to have the ability to take everything a debtor owns and - literally - strip them bare, forcing them to become a burden upon the public. The laws allowing debtors to keep certain property safe from their creditors are called "exemptions." Mississippi exemptions are only available to Mississippi residents.

While unscrupulous debt collectors may threaten to take everything you have, the truth is that your exemptions allow you to keep many of your possessions safe from creditors. Your creditors know this, and have factored this fact into the cost of the money, which they loaned you.

However, remember that these exemptions do *not* apply to back taxes you may owe to the State or Federal Government. Nor do these exemptions apply to judgments for the payment of alimony, separate maintenance or child support. If you owe back taxes, alimony, maintenance or child support and cannot pay them you should consult a bankruptcy specialist who may be able to help you in certain very limited cases.

Nor, in most cases do your exemptions protect property in which you have voluntarily given away a security interest. Examples of such property include homes subject to mortgages, or cars still being paid off where the seller or lender has retained a security interest on the title.

Similarly your exemptions will generally not protect property, which has been subjected to statutory liens such as a landlord's lien, workman's lien or purchase money loan.

Your exemptions will protect your property from attachment due to the sort of unsecured debt, which often arises when you lose your job, or have an accident or

catastrophic illness. Credit card debt, open accounts, medical bills, legal bills, damage judgments, are all examples of this sort of indebtedness.

So, assuming your debts are not for taxes, alimony, maintenance or child support, or for items secured by a voluntarily given security interest or statutory lien, what can you keep safe? What follows is a partial list of state and federal exemptions. If you have questions, or if your assets do not clearly fall within one of the following categories, it is highly recommended that you consult an attorney for a complete discussion of this complicated area of law.

Before reading this list you should remember that it is not enough to know your exemptions. Generally, with a few exceptions, to get the benefit of their protection, ***you have to claim them***. In this connection, any property you fail to claim will be deemed to be nonexempt and unprotected. So, when you have figured out *all* the exemptions to which you are entitled, don't skip Section 4 captioned **How To Claim Your Exemptions** or the model form **Declaration of Exemptions** which is attached to this pamphlet.

2) **State And Federal Exemption Allowances:**

a) **Up To \$75,000.00 Of Equity In Your Homestead.** *Miss. Code Ann. Section 85-3-21*

Equity is the difference between how much your home is worth and how much you owe on it. In other words, your equity is how much money you would realize if you sold your home.

If you have been sued by someone who does not fall within the exceptions discussed above, and you claim your homestead exemption, they will not be allowed to force the sale of your home if your equity is within the \$75,000.00 homestead allowance. This homestead exemption is available to any householder, married or single, however you must occupy your home to be able to claim it.

If your equity in your homestead is more than \$75,000, and a judgment creditor does execute upon their judgment and force the sale of your home, they can only satisfy their judgment out of the amount your home realizes at sale in excess of \$75,000.00. Any sum realized less than or equal to \$75,000.00 you would be allowed to keep.

Mississippi state law is still unclear as to whether a husband and wife each have a \$75,000.00 exemption in their homestead or share the one homestead exemption jointly. However, at least one federal court decision says that they share just the one exemption.. *Joe T. Dehmer Distributors, Inc. v. Temple*, 826

F.2d 1463 (5th Cir. 1987). This is usually not a problem since it is the rare case where debtors will have more than \$75,000.00 equity in their home.

In the unlikely event that you do have more than \$75,000.00 in equity, Mississippi state law is clear that either spouse can claim the full homestead amount and apply it to their individual interest in the marital home, typically one half. So, if one of you has substantial debts, while the other has none, the indebted spouse can claim the full exemption and apply it to completely protect his or her interest in the homestead. The unindebted spouse's interest - of course - needs no protection from creditors.

Alternatively, if you have more than \$75,000.00 equity in your home, and you and your spouse are both substantially indebted, or you are single, you may wish to consult a licensed attorney or financial adviser about reducing your equity to an amount within the homestead exemption by taking out a second mortgage. The proceeds so realized may be applied to your debts, or - instead - sheltered by placing them in a different category of exemptible asset. See discussion below.

Remember, however, your homestead exemption will not protect your home from being foreclosed on by creditors to whom you have given voluntary security interest. These are lenders such as the bank, which gave you money to purchase your house, or a any lender who subsequently loaned you money on your accumulated equity in exchange for a Deed of Trust or Mortgage. If you default on these lenders they can and will foreclose upon and sell your home.

b) Up To \$20,000.00 Of Equity In One Mobile Home, Trailer, Manufactured Housing, Or Similar Type Dwelling, Owned And Occupied By The Debtor As His Or Her Primary Residence. *Miss. Code Ann. Section 85-3-1(e).*

This exemption applies to mobile homes etc., which are on land not owned or being purchased by the debtor and which are therefore not claimed as homestead property under Miss. Code §85-3-21, discussed in section 4(a) above. Again, there is no Mississippi case indicating whether or not this exemption may be doubled for a married couple.

Obviously, if you can afford to do so, you should always arrange to purchase the land upon which you locate your trailer. Not only will this allow you to claim the much more generous \$75,000.00 homestead exemption, as well as obtaining certain tax benefits, but it will also prevent you from being held hostage to trailer lot rental increases, and/or the necessity of moving your trailer on short notice in the event of eviction.

Again remember, this exemption does not apply to holders of voluntarily given security interest, or statutory liens. So, for instance, a mobile home park

landlord who has taken a judgment for unpaid rent may not be affected by this exemption.

c) **Tangible Personal Property Not Exceeding \$10,000.00 In Cumulative Value.** *Miss. Code Section 85-3-1.*

This includes household goods as defined in the statute [clothing, furniture, appliances, one (1) radio and one (1) television, linens, china crockery, kitchenware, and personal effects (including wedding rings) of the debtor and his dependents; however works of art, electronic entertainment equipment except one (1) television and one (1) radio, jewelry (other than wedding rings) and items acquired as antiques are *not* included within the scope of household goods]. The definition of tangible personal property also includes wearing apparel, books, animals or crops, motor vehicles, implements, professional books or tools of the trade, cash on hand, professionally prescribed health aids, and any item of tangible personal property worth less than Two Hundred Dollars (\$200).

It is important to remember that while you can exempt “cash on hand,” as judicially interpreted this term does *not* include money in the bank, stocks, or bonds. Such monies may be exemptible, however, if they are part of a pension, profit-sharing, stock bonus or similar plan as defined in *Miss. Code Section 85-3-1(f)*. They may also be exempt if - for instance - they result from social security payments which are exempt by federal law under 42 U.S.C. Section 407 even after being placed in a bank account. Your funds may also be made exempt by the simple expedient of turning them into “cash on hand” and putting them some place secure like a safety deposit box. If you choose this last option, however, be aware that your funds will then count toward the cumulative \$10,000.00 cap on your tangible personal property exemption.

Again, there does not appear to be a case indicating whether this exemption can be doubled for a married couple, however, given that exemptions are to be construed liberally in favor of the exemptionist each debtor should claim the full amount as necessary to protect their respective personalty.

It is important to note here that unlike homes, cars, trailers, and other assets, non-purchase money security interests in *household goods* can be eliminated in bankruptcy, and often may be challenged as illegal outside bankruptcy. It may also be possible to eliminate non-purchase money security interests in other personal items in bankruptcy. See booklet on Bankruptcy: Is It Right For You?

d) **Proceeds Of Insurance On Or Sale Of Exempt Property.** *Miss. Code Sections 85-3-1 and 85-3-49*

This means that if you declare an item as exempt, and either sell it, or in the event of its destruction receive insurance proceeds on it, those monies are also exempt.

e) **Income From Disability Insurance**. *Miss. Code Section 85-3-1.*

f) **Assets Held In Or Monies Payable From A Pension, Profit-Sharing, Stock Bonus or Similar Plan**. *Miss. Code Section 85-3-1.*

g) **Personal Injury Judgments Up To \$10,000.00**. *Miss. Code Section 85-3-17.*

h) **Worker's Compensation Benefits**. *Miss. Code Section 71-3-43*

i) **Unemployment Compensation Benefits**. *Miss Code Ann. Section 71-5-539*

j) **Old Age, Survivors, and Disability Benefits Under the Social Security Act**. 42 U.S.C. Section 407

These funds retain their exempt character even after being deposited in a bank account.

k) **Veteran's Benefits**. 38 U.S.C. Section 3101(a)

These funds retain their exempt character even after being deposited in a bank account.

l) **S.S.I Payments**: 42 U.S. C. Section 1383(d)(1)

l) **Wages** *Miss. Code Ann. Section 85-3-4.*

This exemption applies only if - after subtracting all amounts required by law to be withheld from your gross earnings from any one employer - your take home pay, also known as "disposable earnings," is less than thirty (30) times the minimum wage. After this point is reached 75% of your remaining disposable earnings are exempt.

Because this garnishment limit applies to wages from each employer, debtors who work two part time jobs may be completely exempt from garnishment.

As with other exemptions, this protection provided by this exemption is greatly reduced with regard to judgments for back taxes, alimony and child support.

m) **Cash Surrender Value of Whole Life or Universal Life Insurance Policy Up To \$50,000 (Possibly More)**. *Miss. Code Section 85-3-11.*

This statute on its face applies the \$50,000.00 limit only to that portion of cash value placed in the insurance policy within the last twelve (12) months. Consequently, it may be that there is no exemption limit on funds contributed prior to the last twelve months.

Unfortunately, this statute is not clear whether a living debtor may claim the benefit of this exemption, or only the insurance policy's stated beneficiary. However, at least one court has held that this exemption is available to a living debtor. *See In re Henderson*, 167 B.R. 67 (Bkrcty N.D. Miss. 1993)(holding funds available to debtor).

3) **When To Claim Your Exemptions**

With the exception of your homestead exemption typically there is neither occasion nor need to claim your exemptions until after a judgment is taken against you in a court of law.

Still, if you are being sued, or are being threatened with suit, or simply sensibly wish to structure your assets in such a way as to render them safe in the event you may someday be sued, you may wish to engage in what is sometimes called 'exemption planning,' or "defensive financial planning," or "asset protection." In essence this is no different than - for example - choosing to incorporate a business so as to limit your potential personal liability.

At the outset let us be clear that you cannot protect your assets from creditors by giving them away, or selling them for less than fair market value. Such transactions are called "fraudulent conveyances," and courts have no hesitation in setting them aside.

On the other hand you can structure your assets to take advantage of your lawful exemptions. For example it may make sense to take money out of your bank account where it is otherwise subject to garnishment and place it in a safety deposit box so that it becomes tangible personalty eligible for exemption up to the cumulative limit of \$10,000.00 provided by *Miss. Code Section 85-3-1*. Consultation with an attorney, accountant, or licensed financial planner may suggest other steps you may wish to take.

One such step is always appropriate. If you own or are purchasing your home, and have not already done so, you should file a declaration of homestead at your earliest opportunity with the Chancery Clerk's office in your county so as to obtain the significant tax benefits associated with such a declaration. A sample Homestead Declaration is attached hereto as Ex. A. This declaration will also protect your equity in your homestead up to a limit of \$75,000.00

If a judgment has been taken against you in a court of law you have two basic options with regard to declaring your exemptions. First, you can elect to do nothing

unless and until your judgment creditor initiates collection activity. Since the quantity, value, and nature of your possessions is inherently subject to change, and since the law is not clear as to whether you are entitled to amend your exemptions, and - if so - how often, it may make sense to wait until it becomes absolutely necessary to avoid collection before declaring your property exempt. Certainly you should give thought to the nature of your assets and potential exemptions as discussed above before filing any Declaration of Exemptions.

Alternatively, you can file a declaration of exemptions with the court in which the judgment was obtained immediately after the judgment is issued. This has the virtue of heading off collection actions of which you may not be given advance notice, such as garnishment for instance. These collection actions, even if ultimately fruitless - still have the potential to cause you serious inconvenience. For example, a creditor's garnishment of a bank account containing exempt funds, while subject to being set aside, can still deprive you of access to your funds until the situation is resolved. Worse, it may result in checks being bounced while the account is frozen. If this is a concern, and your funds are such that they can be exempted even in a bank account, for instance Social Security or Veteran's Benefits, an immediate declaration of your exemptions may be an appropriate choice.

Immediate declaration of exemptions can also give you bargaining leverage in working out a compromise resolution with your creditor. Having said this, it is sometimes surprising how unreasonable a creditor may persist in being even when he has no realistic hope of collection.

However, even if you are reading this after the fact and have failed to claim your exemptions in specific property prior to its attachment and sale by the Sheriff or Constable it may not be too late to do so. Our Mississippi Supreme Court has held - at least where you were not required by the Sheriff to claim your exemptions - that your initial failure to assert your exemption rights does not destroy them and you are entitled to claim your exemptions and obtain the proceeds of the sale. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166 (Miss. 1915).

4) **How To Claim Your Exemptions**

Claiming your property as exempt can be done orally or in writing. Obviously, doing it in writing can eliminate subsequent confusion about what property has been claimed as exempt. If you do it in writing make sure you file a copy with the court in which the judgment was obtained and have a copy made and stamped "filed" for yourself.

Whether you choose to claim your property exempt orally or in writing the law appears to require that you identify all the property, which you are claiming as exempt. If you fail to do so the officer seizing the property is empowered to make a selection for you. *Miss. Code Section 85-3-3* provides:

“Where an officer shall be about to levy an execution or attachment on personal property, some of which shall be claimed as exempt, he shall demand of the defendant that he make selection that he make selection of such property as is exempt to him and in reference to which he has the right of selection, or, failing to do so, the officer shall make it for him, and any selection so made shall be conclusive on the defendant.

Once you have identified your property as exempt the Sheriff or other officer should not seize it, if he does so it is at peril of his personal liability. If a doubt arises as to the whether the property is in fact exempt the officer can demand that the judgment creditor furnish an indemnity bond conditioned to indemnify the officer and to pay you - the judgment debtor -all damages which you may sustain in the event of the property’s seizure and sale should it be proved to be exempt. *Miss. Code Section 85-3-5.*

As a practical matter, once you have identified property as exempt it is extremely unusual for it to be seized, either with or without a bond. If your property is seized you have the right to sue for its return under Miss. Code Section 85-3-7 and 85-3-9.

If you are married, and only one of you is indebted, then only that spouse need claim his or her exemptions, and they need only be applied to his or her respective interest in the couple’s jointly owned property. So, for instance, if one spouse owes \$75,000.00, and the marital home is worth \$150,000.00, they can fully exempt their half interest in the home. The same logic may be applied to other exemptions. Of course, in those instances where exemptions may be doubled for married couples, such allocation may not be necessary.

For your convenience attached hereto as Ex.. B is a form Declaration of Exemptions to assist you in identifying your property and declaring it exempt.

5) **How To Fill Out The Declaration Of Exemptions**

The attached Declaration of Exemptions form is meant as a guide only. You may use it or modify it as you wish. No warranties are made as to its adequacy.

If you do choose to use the Declaration of Exemptions attached hereto you should bear the following things in mind:

a) ***Tangible Personal Property***

The listed categories of items are for your convenience. If you do not have such items simply leave those lines blank, or write in “none.”

Do not rely on our list of categories. Look around your house and see what you own. If you have more items or different items from those we have listed you should write them on a separate sheet in similar format.

With regard to those items, which you do list try and put their number, and - also - any identifying characteristics. Thus instead of saying "T.V." say "One 19" Magnavox color T.V., Serial #XXXXXX." Instead of saying "kitchen chairs," say - for instance - "4 ladder back walnut kitchen chairs"

Obviously it may not be possible as a practical matter to list every item individually, clothing items come to mind, but if there is any one item which is particularly valuable, for either sentimental or financial reasons, then it would be wise to make sure it is identified. For instance: "one pink cashmere sweater, size 3".

In filling out the form you will see column headings for "Item," "Value," "#(for number)." "Lien/creditors" and "Equity" In filling these out you will identify the "item," for instance "One 5 year old GE Refrigerator."

In the "value" column you will list the item's "value." This is not what you paid for the item, nor what you owe on it, nor what it would cost for you to replace it. Rather it is the price it would bring if you had to sell it. If you are unsure what it would bring you can look for items of similar type, age, and condition for sale in the paper. For instance, if your refrigerator would bring a price of \$300.00, then you should put a value of \$300.00 in the column under "value."

In the "#" column put the number of the items you possess. For instance in the case of your refrigerator if it is your only one put "1".

In the "Lien/creditors" column you should list what you owe on the item and to whom. For instance you might still owe \$200.00 to Sears on your refrigerator. So, you would list \$200.00 owed to Sears. If you had a second lien to a different creditor you would list this as well.

In the "equity" column you will put the figure, which results after you subtract what you owe on the item from its value. In the case of the refrigerator this will be \$100.00, which is the amount remaining after you subtract what you owe from what the refrigerator is worth. It is this value, which you will declare exempt.

If you owe more than any item is worth you will have zero equity in the item and should indicate this in the equity column.

When you have finished you will total up your equity in your tangible personal property. If it totals more than Ten Thousand Dollars (\$10,000.00) you will need to strike items or double check your assessment of their value and revise as appropriate until the total is \$10,000.00 or less. Married couples filing a joint declaration should

be able claim up to \$10,000.00 of tangible personal property exempt each; \$20,000.00 cumulative.

b) *Homestead*

With regard to your homestead after listing its value and subtracting what you still owe always claim your full homestead allowance even if it exceeds your actual equity. This is because unlike most personalty, which tends to depreciate, your equity in your homestead will tend to increase over time as your property's value appreciates. In the event you sell your home at some future date, perhaps many years later, you will not wish to argue over why you claimed as exempt an amount less than the equity realized at the subsequent sale.

You will note on the attached form language to the effect that "Each signatory hereto claims his or her full \$75,000.00 exemption (\$150,000 cumulative) as per Mississippi Code Section 85-3-1 et. Seq. or such greater amount as it may be amended to ensure that you receive your full exemption.

In claiming a homestead remember that adjacent lots can all be part of one homestead subject only to the limit of 160 acres and value of Seventy-Five Thousand Dollars. (\$75,000.00).

Also remember that a manufactured or mobile home occupied as a home by the debtor, and which sits permanently (i.e. on a foundation with the wheels removed) on land owned or being purchased by the debtor, will qualify for the homestead exemption.

If you own or are purchasing a mobile home, trailer or manufactured home, and do not own or are not purchasing the land on which it sits, it will not qualify for the homestead exemption. However, it will qualify for a separate \$20,000.00 exemption.

c) *General*

While perhaps not strictly necessary with regard to exemptions not involving real estate, there is a statutory requirement that homestead declarations must be notarized. If you have filed your homestead declaration with the Chancery Clerk this will in all likelihood already have been done. If not, you should have a notary witness your signature on the form Declaration of Exemptions attached hereto. You should also file your homestead declaration with the Chancery Clerk's office in addition to filing it with the court in which the judgment was obtained against you.

Remember, again, items omitted from your Declaration of Exemptions may lose their exempt status. When in doubt err on the side of inclusivity.

Remember also that the lower the value of any given possession, the more such items you can declare exempt without exceeding your cumulative allowance. In

consequence your Declaration of Exemptions is not a place to exercise false pride. If you can in good faith choose between two values for an item, and one of them is lower, you should choose the lower value.

Finally, remember that as indicated on the form both you and your spouse are each entitled to claim the full statutory exemption in the event you are married.

The foregoing pamphlet and attached form(s) is informational only and has been provided free of charge. While every effort has been made at the time of writing to be accurate, no warranties, express or implied, are made regarding the accuracy of the information provided. No attorney/client relationship is created by virtue of a reader's reliance upon the foregoing pamphlet.

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