

# SENATE . . . . . No. 862

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## The Commonwealth of Massachusetts

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PRESENTED BY:

***Karen E. Spilka***

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*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to promote consumer rights and enhance exemptions in the small claims courts..

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PETITION OF:

NAME:

*Karen E. Spilka*

DISTRICT/ADDRESS:

# SENATE . . . . . No. 862

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By Ms. Spilka, a petition (accompanied by bill, Senate, No. 862) of Karen E. Spilka for legislation to promote consumer rights and enhance exemptions in the small claims courts. The Judiciary.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. 1802 OF 2009-2010.]

## The Commonwealth of Massachusetts

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In the Year Two Thousand Eleven  
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An Act to promote consumer rights and enhance exemptions in the small claims courts..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1                   SECTION 1. The General Laws are hereby amended by adding the following  
2 new chapter:

3                   Chapter 235A:

4                   Section 1. Definitions.

5                   The terms used in this chapter shall have the following meanings:

6                   (a) “Creditor” , the persons or entities making a claim against the Debtor.

7                   (b) “Claim”,::

(1) The right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(2) The right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(c) “Debt”, any liability on a Claim that gives rise to a legally enforceable monetary obligation or liability, whether arising out of contract, tort or otherwise, but shall not include any liability for which the Debtor is fully insured for all damages.

(d) “Debtor”, any individual or individuals that owe a Debt, whether owed individually, or jointly and/or severally with any other party that may have liability on such Debt.

(e) “Debtor’s Principal Residence”:

(1) A single- or multiple-family structure, including incidental property, together with the debtor’s interest in the land on which the structure is situated and the lands in which immediately adjacent, appurtenant or abutting such lands, that is occupied or which is intended to be occupied within the 60 days following the purchase or acquisition of the property as a primary residence by the debtor; and

(2) An individual condominium or cooperative unit, a mobile or manufactured home, boat or trailer, including the debtor’s

interest in the land on which such individual condominium or cooperative unit, a mobile or manufactured home, boat or trailer is situated together with, to the extent applicable, the lands owned by the debtor immediately adjacent or abutting such lands, that is occupied or which is intended to be occupied within the 60 days following the purchase or acquisition of the property as a primary residence by the debtor in which a possessory interest to such property is held, either in whole or in any part, by the debtor, regardless of whether such possessory interest is in the nature of a freehold estate, a leasehold estate, life tenancy, right of survivorship, fixed or contingent remainder interest, a whole or fractional beneficial interest in any trust expressly reflected in a Schedule of Beneficiaries recorded with the applicable County Registry of Deeds, or a license to occupy said premises coupled with an interest therein.

(g) “Domestic Support Obligation”, A debt, including any legal fees and expenses awarded incident thereto and any interest that accrues on that debt,

(1) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(2) that is actually in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(3) established or subject to establishment by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement or similar agreement; or

(ii) an order of a court of record; and

(4) has not been assigned to a non-governmental entity, unless that obligation is assigned voluntarily and in writing by the

spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(h) "Exempt" or "Exemption", The debtor's right to protect his or her equity in property to the extent provided under this chapter from subjection to a judicial lien, legal process, or proceeding to collect a debt and, to the extent made applicable by this chapter, a non-possessory non-purchase-money security interest.

(i) "Entity", A person, an estate, a trust, or governmental unit.

(j) "Equity", That sum in dollars that represents the fair market value of the debtor's interest in any property claimed as exempt in excess of the amounts due under the dollar sum of all security interests and all liens encumbering such property but only to the extent that such liens are not subject to avoidance under this chapter or any other provision of applicable state or federal law.

(k) "Judicial Lien", Any lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(l) "Lien", Any charge against or interest in property taken in order to secure payment of a debt or performance of any legally enforceable obligation.

(m) “Primary Proceeds”, The money, negotiable instruments, deposits or other property immediately realized from the liquidation, sale, hypothecation, encumbering of property of the debtor.

(n) “Secondary Proceeds”, The money, negotiable instruments, deposits or other property immediately realized from primary proceeds.

(o) “Security Agreement”, Any agreement that creates or provides for a security interest with respect to a claim of a creditor.

(p) "Security Interest", Any lien that is or was created or provided for by an agreement.

(q) “Statutory Lien”, A lien arising by force of statute under specified circumstances or conditions, but does not include a security interest or judicial lien.

## Section 2. Application of Chapter.

(a) The residents of the Commonwealth of Massachusetts are entitled to the exemptions provided by this Chapter. Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their resident state.

(b) For the purposes of this section, the term “resident” shall mean an individual who has both manifested his intent to maintain his primary domicile in the Commonwealth of Massachusetts and has been physically present in the Commonwealth of Massachusetts for no less than the last 60 calendar days.

## Section 3. Homestead Exemption.

(a) Except as provided under subsection (c) below, a debtor's principal residence and the equity therein (the "homestead") shall be exempt from all laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies, whether or not the debtor has previously filed a declaration of homestead with any County Registry of Deeds, to the extent that the aggregate sum of the debtor's equity in the homestead and any and all equity in the homestead held by co-owners of the debtor that are family members of the debtor, does not exceed the sum of \$500,000.00.

(b) The homestead exemption set forth in subsection (a) and the debtor's right to claim such protections may be terminated with respect to any claim only by the execution of an express written waiver by the debtor, that has been recorded with the Registry of Deeds, specifically identifying the claim and creditor against whom the homestead exemption is no longer applicable; however, the debtor may not waive any protections held by any other person or persons with any legally cognizable interest in such homestead on record with the applicable County Registry of Deeds.

(c) The homestead exemption provided for under subsection (a) shall not apply with respect to:

(1) Any security interest created by a written security agreement executed by the debtor;

(2) Any lien for state, federal or local taxes;

(3) Any lien arising from the enforcement by any domestic support obligation.

Section 4. No Incarceration or Threat of Incarceration in any Mesne or  
Supplementary Process

(a) Notwithstanding any general or special law to the contrary, absent direct contempt such as the failure to appear before or obey an order of such court, no debtor shall be subject to physical arrest or incarceration on any mesne or supplementary process issued under chapter 224, nor shall any court have the jurisdiction to incarcerate any debtor on account of any judgment, execution, or order issued as part of any small claims proceeding under section 21 of chapter 218. A debtor's failure to pay a debt shall not constitute contempt of court.

(1) No lawyer, sheriff, officer of the court, clerk of court, or judge may intimate to a debtor, either directly or indirectly, that he may be arrested or incarcerated as a result of any failure to pay any debt arising from any judgment, execution, or order issued as part of any mesne or supplementary process issued under chapter 224 or any small claims proceeding under section 21 of chapter 218. The violation of the provisions of this section shall constitute a violation of the section 2 of chapter 93A, otherwise known as the Massachusetts Consumer Protection Act, as to any party other than a judge, magistrate or other officiating party.

Section 5. Avoidance of the Fixing of Judicial Liens and Certain Security  
Interests; Requirement for Obtaining Pre- and Post-Judgment Security in Civil Actions

(a) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under section 3 or 4 of this chapter, if such lien is:

(1) A judicial lien, other than a judicial lien that secures a debt for a domestic support obligation; or



(2) A non-possessory, non-purchase money security interest in household furnishings, household goods, wearing apparel, and home or gardening appliances, books, musical instruments or any pieces of art, any jewelry held primarily for the personal use of the debtor as an engagement or wedding ring that was acquired prior to or at the time of the debtor's marriage, any

jewelry held primarily for the personal use of the debtor other than as an engagement or wedding ring, any implements, professional books, or other personal property that is used as a tool of the debtor's trade or the trade of the spouse or any dependent of the debtor and any materials and stock necessary for carrying on such trade.

(b) For the purposes of this section, subject to subsection (c) below, a lien or liens shall be deemed to impair an exemption to the extent that the sum of (1) the lien or liens the fixing of which is sought to be avoided, (2) the aggregate of all other liens on the property in question and (3) the amount of the exemption that the debtor could claim in the absence of any lien on the property exceeds the fair market value of the property. In the case of a property subject to more than one lien that is subject to avoidance, a lien that has already been avoided shall not be considered in making the calculation under this subsection.

(c) With respect to any lien the fixing of which is sought to be avoided under subsection (b), to the extent that there exists any remaining equity in the property subject to such lien, after the application of the applicable exemption, the fixing of the lien in question may only be avoided to the extent of such remaining non-exempt equity.

(d) The debtor may initiate the avoidance of the fixing of a lien as an original action in the Superior Court or the District Court in the judicial district which the debtor resides in the

manner of an action for declaratory judgment, and such Superior Court or the District Court shall have subject-matter jurisdiction to entertain such original action. Alternatively, the debtor may bring such avoidance proceeding by way of motion, after notice and a hearing, in any action brought by such creditor who has obtained a lien subject to avoidance herein in which the debtor has been named a defendant, defendant-in-counterclaim, defendant-in-crossclaim, or third-party defendant.

(e) In any civil action, a party that seeks to impose a judicial lien as security for the payment of a judgment before such judgment is received, including any attachment, attachment on trustee process, or any other legal or equitable remedy that may be considered to create a lien at law or in equity, shall, in addition to all other requirements provided for by other applicable law, provide proof demonstrating by a preponderance of evidence that the imposition of such lien requested as security will not be deemed to impair any claim of exemption to which the debtor might be entitled under section (4), above. To the extent that, after such lien is allowed by the court, it is determined that the fixing of the lien did in fact impair a claim of exemption under subsection (b), above, at the time that the request was made, not only will the lien be avoided, but the underlying claim or claims sought to be secured by such lien shall be dismissed by the court.

#### Section 6. Continuation of Exempt Status in Proceeds of Property

(a) Any real or personal property protected by the homestead exemption under section 3 of chapter 235A may be converted into primary proceeds or secondary proceeds without the loss of any protections provided under section 3 of chapter 235A to the extent of that the amount realized as primary proceeds or secondary proceeds does not, in aggregate, exceed the amount of

the homestead exemption under section 3 of chapter 235A, however, any interest or dividends arising from such primary proceeds or secondary proceeds, shall only be exempt to the extent provided under section 34 of chapter 235.

(b) Any property that is subject to a claim of exemption under section 34 of chapter 235 may be converted into primary proceeds without the loss of any protections provided under this chapter to the extent of that the amount realized as primary proceeds does not exceed the amount of the exemption set forth under section 34 of chapter 235.

(c) Any primary proceeds arising from exempt property that is subject to a claim of exemption under section 34 of chapter 235 may be converted into secondary proceeds without the loss of any protections provided under this chapter to the extent of that the amount realized as primary proceeds does not exceed the amount of the exemption set forth under section 34 of chapter 235, above.

(d) To the extent that secondary proceeds are used to purchase or are converted into any other real or personal property, such property purchased with or converted from such secondary proceeds, shall only be exempt to the extent that such property is or could be exempt under section 34 of chapter 235, above.

## Section 7. Notification of Exemption Rights in Any Action Involving Civil

### Process

(a) In addition to any pleading, paper, summons or writ utilized by the trial courts of the Commonwealth of Massachusetts in order to initiate any action involving civil process against one or more individual debtors on any debt, at the time of the service of any such civil process, the court or the plaintiff as the case may be shall serve upon such individual defendant a notice

explaining the defendant's exemption rights as provided in sections 2 through 6, inclusive, as well as the defendant's rights under section 34 of chapter 235.

(b) The administrative office of each department of the Trial Court shall promulgate the form of notice required by subsection (a) by certified mail.

(c) The notification requirements of subsection (a) shall apply to all original actions, counterclaims, third-party actions, cross-claims, including all matters involving any mesne or supplementary process issued under chapter 224 in which one or more individuals is or may be a debtor.

#### Section 8. Conflict with Prior Inconsistent Law

To the extent that any other provisions of prior statutory or common law directly conflict with the provisions of this Act, the provisions of this act shall control.

SECTION 2. Chapter 235 of the General Laws, as appearing in 2008 Official Edition, is hereby amended by striking out Section 34 and inserting in place thereof the following section:-

Section 34. Each debtor's equity in the following items of personal property shall be exempt from all laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies:

(a) The debtor's equity held in one motor vehicle, not to exceed \$6,000 in value;

(b) The debtor's equity and interests in all household furnishings, household goods, wearing apparel, and home or gardening appliances, without regard to such property's value,

219 other than the specific categories of such types of personal property otherwise provided for under  
220 this section;

221 (c) The debtor's combined equity in any books, musical instruments, jewelry or pieces of  
222 art not to exceed \$6,000 in total value;

223 (d) The debtor's equity and interests in all crops grown by the debtor as part of any  
224 commercial farming operations or enterprise regularly conducted by the debtor, whether or not  
225 such crops have been harvested, in an amount not to exceed \$30,000 in value;

226 (e) The debtor's equity in any vessel, whether registered with the Commonwealth of  
227 Massachusetts or documented with the United States Coast Guard, used as part of any  
228 commercial fishing operation or enterprise regularly conducted by the Debtor, in an amount not  
229 to exceed \$30,000

230 (f) The debtor's equity and interest in cattle, sheep, swine, or other animals kept or  
231 housed by the debtor as part of any commercial farming operations or enterprise regularly  
232 conducted by the debtor, in any amount not to exceed \$30,000 in value and any feed for such  
233 animals kept by the debtor in an amount not to exceed \$10,000 in value;

234 (g) The debtor's equity in or right to receive payment or property for maintenance or  
235 child support;

236 (h) The debtor's equity in any jewelry held primarily for the personal use of the debtor as  
237 an engagement or wedding ring that was acquired prior to or at the time of the debtor's marriage;

238 (i) The debtor's equity in any implements, professional books, or other personal property  
239 that is used as a tool of the debtor's trade or the trade of the spouse or any dependent of the

240 debtor and any materials and stock necessary for carrying on such trade, in an amount not to  
241 exceed \$15,000;

242 (j) The debtor's equity in one or more deposit, brokerage or mutual fund accounts in any  
243 insured depository institution, stock brokerage or mutual fund, notwithstanding any claim of set-  
244 off or recoupment made by any creditor on any claim arising by any agreement created or  
245 established at the time or as part of the creation of such account with such insured depository  
246 institution or brokerage, not to exceed \$5,000;

247 (k) The debtor's equity in any annuity or pension in a Credit Union Retirement  
248 Association under Chapter 171;

249 (l) The debtor's equity in any group annuity contract under chapter 175;

250 (m) The debtor's equity in any interest in annuity, pension or retirement benefit provided  
251 for under chapter 32;

252 (n) The debtor's equity in any form of retirement funds to the extent that those funds or  
253 account is exempt from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the  
254 Internal Revenue Code of 1986;

255 (o) The debtor's equity in any annuity, pension, Keough, profit sharing plan or other  
256 retirement plan established and subject to Title I of the Employee Retirement Income Security  
257 Act of 1974, including but not limited to any retirement or savings plans described in Sections  
258 401(a), 403, and 457 of the Internal Revenue Code, and any annuity or similar contract  
259 purchased with the proceeds of such annuity, pension, profit sharing plan or other retirement  
260 plan;

261 (p) The debtor's equity in any lump-sum payment or stream of payments made as an  
262 award or benefit for workmens' compensation under Chapter 152;

263 (q) The debtor's equity in and right to receive payments as public assistance, a social  
264 security benefit, an unemployment compensation benefit, a veteran's benefit, a disability, illness  
265 or unemployment benefit;

266 (r) The debtor's equity in, right to receive or other property that is traceable as primary or  
267 secondary proceeds to:

268 (1) An award under a crime victim's reparation law;

269 (2) An award from the Massachusetts Client Security Board;

270 (3) A payment or series of payments on account of the wrongful death of an  
271 individual of whom the debtor was a dependent;

272 (4) A payment or series of payments under a life insurance contract that insured the  
273 life of an individual of whom the debtor  
274 was a dependent;

275 (5) A payment or series of payments on account of personal injuries, either  
276 physical, mental or both, suffered by the debtor, a

277 family member of the debtor, or a dependent of the debtor in compensation for  
278 loss of future earnings, the cost of future

279 medical treatment or therapy, or for actual pecuniary loss other than a claim for  
280 loss or consortium, society, pain and

281 suffering or other element of damages in sounding in tort;

282 (6) A payment or series of payments on account of personal injuries, either  
283 physical, mental or both, suffered by the debtor, a family member of the debtor, or a dependent  
284 of the debtor in compensation for a claim for loss or consortium, society, pain and suffering or  
285 other element of damages in sounding in tort, not to exceed \$100,000;

286 (s) The debtor's equity in any accrued dividend or interest under, or any loan value of any  
287 unmatured life insurance contract owned by the debtor under which the insured is the debtor, a  
288 family member of the debtor or a dependent of the debtor, not to exceed \$15,000;

289 (t) The debtor's equity in and right to receive payments under a policy of insurance on  
290 account of the debtor's mental or physical disability;

291 (u) The debtor's equity in and right to receive payments as a benefit under a policy of  
292 insurance on the life of the debtor, a family member of the debtor, or a dependent of the debtor;  
293 and

294 (v) To the extent that a debtor files a bankruptcy case under Title 11 of the United States  
295 Code, the debtor may exempt any additional personal property interest to an aggregate maximum  
296 of \$20,000 per each individual debtor

297 SECTION 3: Section 22 of chapter 218 of the General Laws, as appearing in  
298 2008 Official Edition, is hereby amended by striking out, in line 7, the words, "first class" and  
299 inserting in place thereof the following word:- "certified"

300 SECTION 4: Said section 22 of chapter 218, as so appearing, is hereby  
301 amended by inserting after the first paragraph the following new paragraph:-



302                   Notwithstanding any other general or special law to the contrary, the interests  
303   of any debtor in any tangible or intangible form of property shall not be subject to any seizure,  
304   attachment, levy on execution and sale for payment of debts or legacies, or any other type of  
305   judicial lien, with respect to any judgment, execution, or order issued as part of any small claims  
306   proceeding under section 21 of chapter 218, for any combined debt of less than \$1,300 owed to a  
307   single creditor.