Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #75

Date: 08-Dec-05
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **In re: Kevin Blair and Susan Blair: Important New Bankruptcy Decision**

In re: Kevin Blair and Susan Blair: New Bankruptcy Decision

The dynamic duo of **Jeff Baskies** and **Tom Messana** of **Ruden, McClosky** in Ft. Lauderdale, FL tell LISI members about Blair, a case that says,

Equity generated by routine mortgage payments did not constitute the acquisition of "interests" in a homestead within 1215 days of filing bankruptcy.

Blair is important because it is the first BAPCPA case to address the question of

What is the meaning of
"any amount of interest that was acquired"
by the debtor?

Here's the story:

EXECUTIVE SUMMARY:

On November 21, 2005, US Bankruptcy Judge Harlin D. Hale ruled that where debtors' equity in their homestead increased during the 1215 days prior to filing Bankruptcy, as a result, at least in part, of routine mortgage payments, said debtors' increased equity did not constitute an "interest" in homestead "acquired" within the 1215 days preceding filing, as described in the provisions regarding the $125,000 "Homestead Cap" provided in Section 522(p) of the Bankruptcy Code as amended by Section 322 of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), as applied in an opt-out state - Texas.

This decision is the first to expressly hold that the increase in value of the debtors' home (which was purchased more than 1215 days pre-filing) was not subject to the $125,000 cap, even though the trustee alleged the equity appreciated more than $125,000 during that 1215 day time period.

FACTS:

July 18, 2000: 1773 days before filing for bankruptcy, Kevin and Susan Blair purchased a homestead property in University Park, Texas.

May 27, 2005: Kevin and Susan filed for bankruptcy and claimed the equity in their homestead valued at $688,606 was exempt.

August 17, 2005: An unsecured Creditor, Southwest Security Bank, filed its objections to the claimed exemptions. In its Objection, the bank claimed the estate had an interest in "any and all interest that the Debtors acquired between January 27, 2002 (1215 days prior to the Petition Date) and the Petition Date which exceeds $125,000."

The decision does not provide the mortgage balances and/or appraised values of the homes on any of the relevant dates. Instead the Court focused on the legal analysis necessary to determine

"whether a debtor, who acquired title and fee to real property outside of the 1215 day

period prior to the Petition Date, but continued to make regular payments and build equity in the property during the 1215 day period, are (sic) subject to the $125,000 cap on their homestead exemption provided in section 522(p)."

The bank argued that ANY increase in the equity in the house during the 1215 day period prior to filing should be subject to the $125,000 cap and any additional increase in equity should not be exempt.

Ultimately, Judge Hale disagreed with the bank and ruled in favor of the debtors. He held

"that the increase in the value of the equity in the debtors' homestead, which was acquired over 1215 days prior to the Petition Date, is not subject to the $125,000 cap in section 522 (p)".

COMMENT:

CASE OF FIRST IMPRESSION: WHAT DOES "ACQUIRED" MEAN?

In reaching the holding in this case, Judge Hale was faced with the issue none of the prior courts addressed – what is the meaning of "any amount of interest that was acquired" by the debtor?

In relevant part, section 522(p) provides that

"a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value..."

ACQUIRE DOES NOT MEAN MERE ACCRETION:

Judge Hale found that for purposes of that section, the intent was to apply to people who ACQUIRE homes, NOT to those who have mere accretions in value to their existing homes. As he ruled, "one does not actually "acquire" equity in a home. One acquires title to a home."

In this case, the Debtors acquired title to their home 5 years before filing. Thus he ruled,

"the"interest" the Debtors acquired was the actual purchase of the home, which was completed well before the 1215-day period. Thus, the "interest" held by the debtors in their homestead is outside the 1215-day period and not subject to the $125,000 cap."

DECISION FOLLOWS LEGISLATIVE HISTORY:

Judge Hale also looked to the legislative history to help. Even if the term "interest" were ambiguous enough to warrant a review of legislative history, he held, the Debtors would still prevail. He noted the comments calling Section 522(p) the "mansion loophole" and noted it seemed to have been enacted to prevent debtors from moving to a more favorable state before filing. And since the Blairs owned the home for 5 years, that was not the case at hand.

WHY BLAIR IS SO IMPORTANT:

This case is very important as it is the first opinion offering insight into what is meant by "any amount of interest that was acquired by the debtor" in § 522(p)(1). In previous commentaries, we stated our apprehension over the potential for a literal reading of the statute raising the argument that the date of the purchase of the home might not be relevant. If that interpretation applied, ANY equity acquired during the 1215 days prior to filing (whether by paying down mortgage principal or by rapid appreciation in the real estate

market) might be exempted - only up to the value of $125,000 of equity.

IT APPEARS GROWTH THROUGH EQUITY OR MARKET FORCES NOT THE ACQUISITION OF AN INTEREST:

This Texas opinion indicates that the harsh result we feared might not appertain.

Instead, if other courts follow Blair, then homes purchased more than 1215 days before filing are exempted regardless of any appreciation in the equity caused by regular payments of mortgages.

Also presumptively the same is true for appreciation of equity by market forces.

DON'T GET CUTE:

Caution: It's likely that irregular payments of mortgages (such as a lump sum payment to reduce the debt within 1215 days prior to filing) will not be dealt with the same way. Instead, they may be subject to the $125,000 cap, or they may be subject to the fraudulent conversion or fraudulent conveyance provisions and perhaps thus subject to different rules.

For the sake of debtors, Blair is a big success. However, Blair is only the first decision on this subject. Stay tuned to LISI!

HOPE THIS HELPS YOU HELP OTHERS

Jeff Baskies Tom Messana

CITE AS:

Steve Leimberg's Employee Benefits and Retirement Planning Newsletter # 75 (December 9th, 2005) at **http://www.leimbergservices.com**

CITES:

In re: Kevin Blair and Susan Blair US Bankruptcy Court, N.D., Texas, Dallas, No. 05-35922-HDH-7; In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005); In re Kaplan, Chapter 7, Case No. 05-14491-BKC-RAM (Bankr. S.D. Fla. 2005); In re Wayrynen, Chapter 7, Case No. 05-32144-BKC-SHF (Bankr. S.D. Fla. 2005); In re Virissimo and In re Heisel, Chapter 7, Case Nos. BK-S-13605-LBR and BK-S-05-15667-LBR