Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #72

Date: 07-Oct-05
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **Kaplan – $125,000 Homestead Cap Applies**

We rarely send out a LISI commentary over the weekend – but then the Kaplan decision is important breaking news and we didn't want you to have to wait for this!

According to the decision in Kaplan, the new bankruptcy law is clear:

EQUITY DEVELOPED IN A HOMESTEAD DURING THE 1215 DAYS PRIOR TO FILING WILL BE AVAILABLE TO CREDITORS TO THE EXTENT THAT EQUITY EXCEEDS $125,000 – EVEN IN FLORIDA!

Tom Messana of **Ruden, McClosky** in Fort Lauderdale, Florida argued the Kaplan case for the Trustee in Bankruptcy. Tom and his partner, LISI Commentator **Jeff Baskies** provide us with an explanation of what happened in Kaplan and why this case is so important.

EXECUTIVE SUMMARY:

On October 6, 2005, US Bankruptcy Judge Robert A. Mark in Florida (a state famous for its liberal homestead exemption) found that the "Homestead Cap" of $125,000 as reflected in Section 522(p) of the Bankruptcy Code as amended by Section 322 of the Bankruptcy Abuse Prevention and Consumer Protection Act (referred to as "BAPCPA" or the New Bankruptcy Act) applied to the equity the debtor acquired in her home during the 1215 days prior to filing bankruptcy.

In a prior opinion from a bankruptcy court in Arizona (the case was In re McNabb), US Bankruptcy Judge Haines held that Section 322 of the BAPCPA (which creates new Section 522(p) of the Bankruptcy code, providing a cap on homestead value) did not apply in Arizona because Arizona opted out of the federal exemptions found in the Bankruptcy Code. In that case, the judge found the provisions of BAPCPA unambiguous and therefore ignored legislative history.

Yet he found a "glitch" in drafting that he ruled permitted the debtor to exempt the homestead without regard for the cap. Due to the reasoning of the Arizona opinion, the homestead limitation would likewise not apply in Florida. Until now, the McNabb opinion was the only case offering an interpretation of Section 522(p).

The debtor in the Florida case, Elona Kaplan, argued that the logic in McNabb similarly applied to her case as Florida also opted out of the federal exemptions. However, the Chapter 7 Trustee, Alan L. Goldberg, objected under the new provisions of the BAPCPA. Judge Mark directly rebutted the McNabb decision and held for the trustee Goldberg, making the equity in excess of $125,000 available to the trustee and the creditors.

FACTS:

In April of 2003, following a divorce, Elona Kaplan moved from New Jersey to a condo in Sunny Isles Beach in Miami-Dade County Florida.

Kaplan was quoted as saying: "I couldn't find a job. I was living off my savings,"

She apparently accumulated approximately $36,000 in credit card and other debt before filing for Chapter 7 bankruptcy on May 17, 2005. She claimed her condominium was exempt and valued the condo at $280,000 with a first mortgage of $181,000.

Since she owned her condo less than 1215 days, the bankruptcy trustee, Alan L. Goldberg, arranged an appraisal of the unit. Like most South Florida real estate, the appraisal showed a significant increase in value since she bought the unit, and reflected a market value of $325,000-350,000 and equity of approximately $144,000-169,000.

As this equity was the only asset available to the trustee to satisfy the creditors, Goldberg filed a motion objecting to the claim of exemptions.

Relying on In Re McNabb, Kaplan's lawyer argued the $125,000 homestead cap doesn't apply as Florida opted out of the federal exemptions and Florida law offers an unlimited homestead exemption.

Our firm, specifically Tom Messana (co-author below), represented the bankruptcy trustee Alan L. Goldberg and argued the logic of McNabb was wrong and the homestead cap did apply.

U.S. Bankruptcy Judge Robert A. Mark, agreed and ruled that the $125,000 limit on a debtor's interest in a homestead acquired within 1215 prior to filing bankruptcy applies in Florida.

COMMENT:

For asset protection planners everywhere, this decision is very

important. It is the second interpretation of the homestead cap in Section 522(p) of BAPCPA and it directly conflicts with the first.

Moreover, Judge Mark specifically took the McNabb decision to task. He stated the McNabb decision was based on "a very narrow and mechanical view, of statutory interpretation."

Further, Judge Mark found "the result to be wrong when the time-tested rules of statutory construction are applied with open eyes." In his opinion, Judge Mark found the legislative history to clearly and powerfully indicate an intention for the homestead cap to apply in Florida. He held that inquiry into the legislative history was proper due to the ambiguity of the statute and the absurdity of the result in McNabb. He stated "*Looking to the legislative history . . . there is no doubt about what Congress intended.*"

If Judge Mark's argument is correct, then it has implications for planning in every state that has opted out of the federal exemptions and whose homestead exemption exceeds $125,000 (FL, TX, KA, SD, IA, MN, and AZ).

Further, while this case deals with a home purchased within the 1215 days, a literal reading of the statute raises the argument that the date of the purchase of the home is not relevant. Instead, 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) would be exempted - but ONLY up to the value of $125,000 of equity.

Section 322 of the BAPCPA modifying Section 522(p) of the Bankruptcy Code states in part:

"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 in—

``(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

``(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;"

APPRAISALS REQUIRED:

If that interpretation applies, then procedurally, whenever a client files bankruptcy with a homestead, there will need to be an appraisal of the property value and the outstanding debt on the date of filing AND on the date that is 1215 days before filing. And to the extent

that the net equity increased by more than $125,000 in that time period, the excess would be an asset available to satisfy the claims of creditors.

If such a literal interpretation applies, then for example, if a client owns a home valued at $1 million (with no debt) on the date that is 1215 days before filing, and if the property is valued at $1.5 million on the date of the bankruptcy filing then $375,000 of the equity in the home can be used to satisfy creditors [$500,000 of total equity was "acquired" during that period and only $125,000 ($500,000 - $125,000) was exempted].

FORCED SALE OR REQUIREMENT OF MORTGAGE?

Thus, an order might be issued forcing the sale of the home to satisfy the creditors – or at the very least requiring a mortgage be taken out on the home to satisfy the creditors. It is important to note that any interest in a previous residence that was acquired prior to the 1215 days, which is later transferred into a different residence, is still exempt over and beyond the $125,000 cap.

MEANING OF "ACQUIRED" NOT DETERMINED:

The issue of what was meant by "acquired" was not squarely addressed in this case, as the homestead in the Kaplan case was in fact purchased within the 1215 days. The issue may arise, however, because the debtor in Kaplan only put a small amount of her own equity into the home. The majority of her equity is the result of rapid appreciation. But, the attorneys representing the winning side assert that the literal interpretation expressed above seems consistent with the legislative intent and seemed persuasive to the court.

Alternatively, it might be argued that the intent of "acquired" in that section meant a new homestead acquired in the 1215 days and if the client owned the homestead prior to that time, then the cap shouldn't apply at all (even if the equity grew by more than $125,000). However, while this matter was not directly addressed in the Kaplan case, if the literal interpretation of any equity acquired during the 1215 days applies, then this provision of the BAPCPA (the new 522 (p) of the Bankruptcy Code) will impact many more clients then otherwise might have been anticipated.

BOTTOM LINE:

The bottom line is that many more clients and the lawyers advising them in the area of asset protection may need to be wary of the new homestead provisions.

HOPE THIS HELPS YOU HELP OTHERS!

Jeff Baskies Tom Messana

Edited by Steve Leimberg

CITE AS:

Steve Leimberg's Asset Protection Planning Newsletter # 72 (October 7th, 2005) at http://www.leimbergservices.com

CITES:

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).

You'll find Judge Mark's opinion in Kaplan at www.ruden.com .