Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #74

Date: 17-Nov-05
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **3rd Bankruptcy Court Opinion Confirms $125,000 Homestead Cap Applies Even in Opt-Out States**

Jeff Baskies and **Tom Messana** of **Ruden, McClosky** , Ft. Lauderdale, FL have just informed us of yet another case which holds that, even in so-called "opt-out" states, the new BAPCPA cap on homesteads applies.

Here's Jeff and Tom's report:

EXECUTIVE SUMMARY:

On October 31, 2005, US Bankruptcy Judge Linda B. Riegle issued the third decision of the month holding 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 ("BAPCPA") applied in an opt-out state - Nevada. This decision is the third consecutive decision to expressly disagree with Judge Haines in the McNabb case from Arizona.

FACTS:

The Nevada decision applies to two cases argued and resolved simultaneously. The first case is In re Robert and Odette Virissimo and the second case is In re Cheryl Heisel.

The debtors in both of the Nevada cases filed petitions in Nevada for bankruptcy protection after April 20, 2005 (BAPCPA). In both cases, the debtors claimed homestead exemption on property that was purchased within 1215 days of the bankruptcy filings.

The Verissimo's moved to Nevada in October 2003. Although she was a Nevada resident, Ms. Heisel did not own a home until she purchased one in January 2003.

Thus, in both Nevada cases, the debtors purchased homes in Nevada within the 1215 days and did not own homesteads in Nevada before that time. Obviously, in both cases, the equity in the properties exceeded $125,000.

Nevada is an "opt-out" state. Nevada law provides a $200,000 homestead protection (effective for the dates of the filings of these two cases). Nevada's homestead protection increased to $350,000 effective July 1, 2005.

The trustee objected to the claimed homestead exemptions in the

separate Chapter 7 cases, and the Court heard arguments on October 17, 2005.

Ultimately, Judge Riegle disagreed with the debtors and found the $125,000 exemption cap applied to their cases.

COMMENT:

THE ELECTION PROCESS:

One reason this opinion is interesting (aside from its obviously being only the fourth interpretation of this very controversial federal law) is Judge Reigle's analysis of the phrase "as a result of electing" and also her agreement with Kaplan and Wayrynen on the application and interpretation of the relevant legislative history.

The debtors in both cases argued that the homestead cap in BAPCPA did not apply as the McNabb decision should be applied. They asserted that the "as a result of electing" provision was clear and thus exempted from the cap states which opted out of the federal exemptions and thus did not allow an "election" as to homestead.

In a tone deferential to Judge Haines, Judge Riegle clearly disagreed not only with his decision in McNabb but with his logic. She wrote "this court believes that Judge Haines has not focused on the mechanics of the statute and the language used in setting forth the debtor's rights."

Judge Riegle said that "technically, under the terms of the statute, THERE IS AN ELECTION. That election may become ineffective if the debtor chooses a federal exemption in an opt-out state, but the debtor nonetheless makes an "election" within the meaning of the statute.

The steps are as follows. Under 11 U.S.C. § 541 all property is property of the estate. If the debtor wishes to exempt property he must engage in an act to do so. 11 U.S.C. § 522(l). Pursuant to § 522 (b)(1), he may elect to choose property listed in 11 U.S.C. § 522(b) (2) or (b)(3). … Given the language of the statute, the debtor makes an election as to whether to exempt property and whether to use paragraph (b)(2) or paragraph (b)(3). If he "elects" paragraph (b)(2) in Nevada, or any other opt-out state, and if a party timely objects, then he is denied the exemption. … Similarly, if the debtor fails to choose any exemptions, no property is exempted."

Thus, the court found that the plain meaning of the section was satisfied and an election was made, so there was no doubt the 1215 day provision and the $125,000 cap applied. "The effect of § 522 as written is that an election is made. What property is ultimately

exempted depends upon the process of objection. Thus the plain meaning of the statute is preserved. Whether or not a state allows the property which is set forth in 11 U.S.C. § 522(d) to be exempted, the debtor elects which exemptions to claim. "

RESORT TO LEGISLATIVE HISTORY NECESSARY:

Nevertheless, the court recognized that given her plain meaning analysis and given Judge Haines' contrary plain meaning analysis, a defect in the statute exists which creates an ambiguity that causes the court to look to the legislative history for guidance.

In her analysis of the legislative history, Judge Riegle cites to Judge Mark and concludes that "it is obvious that Congress intended to eliminate some of (the) anomalies created by the use of state homestead exemptions and create a more uniform, predictable set of exemptions. Congress wanted to close what it perceived was the abuse of exemptions caused, in part, by the varying state laws and overly generous homesteads."

POTENTIALLY MAJOR ISSUE UNRESOLVED:

Unfortunately, like those before it, this case offered no insight into the potential issue of what is meant by "any amount of interest that was acquired by the debtor" in § 522(p)(1). The authors previously asserted the potential for a literal reading of the statute raising 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 only up to the value of $125,000 of equity.

PLANNING:

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. (That issue was not directly addressed in this case.)

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.

HOPE THIS HELPS YOU HELP OTHERS

Jeff Baskies Tom Messana

Edited by Steve Leimberg

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CITES:

In re Virissimo and In re Heisel, Chapter 7, Case Nos. BK-S-13605-LBR and BK-S-05-15667-LBR

In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005)
http://www.leimbergservices.com/openfile.cfm?filename=D:\inetpub\wwwroot\all\lis_app_69.html&fn=lis_app_69

In re Kaplan, Chapter 7, Case No. 05-14491-BKC-RAM 331 BR 483 (Bankr. S.D. Fla. 2005)
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In re Wayrynen, Chapter 7, Case No. 05-32144-BKC-SHF (Bankr. S.D. Fla. 2005) http://www.leimbergservices.com/openfile.cfm?filename=D:\inetpub\wwwroot\all\lis_app_73.html&fn=lis_app_73