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**THE EXTRATERRITORIAL EFFECT OF HOMESTEAD EXEMPTION
STATUTES: AN EMERGING ISSUE**

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**The Extraterritorial Effect of Homestead Exemption Statutes: An Emerging
Issue**

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[Editor's Note: William Houston Brown and Lawrence R. Ahern, III are two of the co-authors of Bankruptcy Exemption Manual, published by Thompson West and available on WestLaw. In the 2006 edition and in the pending 2007 edition, the authors explore in more detail the state authority for extraterritorial use of homestead exemptions.]

Recent amendments to the exemption provisions of the Bankruptcy Code will undoubtedly force bankruptcy practitioners and judges alike to take a closer look at existing and emerging law in the homestead exemption arena. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which, for the most part, became effective on October 17, 2005, amended 522(b)(3)(A) of the Bankruptcy Code to require a prebankruptcy look-back of at least 730 days. Assuming the debtor claims exemptions under state law, the applicable state exemption law is determined by looking to "the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition, or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place." 11

U.S.C.A. § 522(b)(3)(A). Note that the operative word is "domicile," not "residence." There you have it. A simple calculation, right ?

An example: Suppose, however, the debtor files a chapter 7 bankruptcy case in State A, where the debtor owns real property and has been domiciled for only 700 days. Prior to moving to State A, the debtor was domiciled in State B (an "opt-out" state) for more than 180 days. Under § 522(b)(3)(A), as amended by BAPCPA, the debtor's domicile for exemption purposes is State B. But the debtor sold his property in State B when he moved to State A, and now owns a home only in State A. Whether this debtor may claim a homestead exemption under state law will depend upon whether State B, which has opted out of the federal exemptions, has a homestead statute that permits its debtors to claim the homestead exemption for property physically situated in State A. In other words, does State B's law acknowledge the "extraterritorial effect" of its homestead? If the debtor is denied any state homestead, BAPCPA further provides that "[i]f the effect of the domiciliary requirement under subparagraph (A) [the 730-910-day lookback] is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d) [the federal exemption scheme]." 11 U.S.C.A. § 522(d)(1). This would limit the debtor to the federal homestead of \$18,450, despite State B's opt-out.

The issue: Thus, in light of these amendments affecting the debtor's available state exemptions, an important issue that will arise in many cases is whether or not a particular state permits the debtor to claim a homestead exemption in property located outside that state. Bankruptcy and state courts across the country have taken divergent views, and, of course, the wording of the homestead statutes may be determinative. This is an issue of interest not only to debtors but to case trustees and creditors alike.

The majority rule: The majority of states addressing the issue have determined that the state's homestead exemption is only available for property located within that state; that is, the homestead exemption statute has no extraterritorial effect. Although a few state homestead statutes expressly state that the exemption is available for property located within that state, see Alaska Stat. § 09.38.010, Haw. Rev. Stat. § 651-92(a), and Utah Code Ann. 1953 § 78-23-3(2)(a), for the most part, the interpretation has been left to the courts. Courts adopting the majority view have generally based their decisions on the premise that exemption laws are local in nature, arising from policy considerations regarding the sovereignty of the states.

A Kansas bankruptcy court recently addressed the issue in **In re Ginther**, 282 B.R. 16 (Bankr. D. Kan. 2002), and adhered to the majority position, holding that the Kansas homestead exemption statute had no extraterritorial application. In the **Ginther** case, the debtors sold their Kansas home and moved to Colorado. Soon thereafter, the debtors filed a bankruptcy petition in Kansas, claiming the Kansas homestead exemption in the proceeds from the sale of their Kansas

home, which they planned to reinvest in real property located in Colorado. The Kansas homestead exemption extends to proceeds from the sale of a homestead, provided the proceeds are intended to be used to obtain another homestead. The bankruptcy trustee objected to the claimed exemption, arguing that the Kansas homestead exemption could not be used to exempt proceeds to be used to purchase a home outside of Kansas.

The debtors argued that, because the Kansas homestead statute placed no express limitation on where the property is located, the exemption was applicable to property no matter where it was located. The court rejected this argument, refusing to find that "in the absence of this express limitation in the Kansas constitution and statute and the proceeds rule as adopted by Kansas case law, the Kansas Legislature intended to protect homesteads located outside state boundaries." **In re Ginther, 282 B.R. at 19.** Like most courts adhering to the majority view, the Kansas bankruptcy court looked to antiquated but pertinent case law, noting that "the Kansas Supreme Court has expressly held that one state's exemption laws do not have effect in another state," *Id.*, citing **Burlington & M.R.R. in Neb. v. Thompson, 1 Pac. 622** (Kan. 1884), and further observing that "other states have similarly held." **In re Ginther, 282 B.R. at 20.** In addition, the court found that "the rule of statutory construction applying exemption laws liberally may not be used to expand the statutory homestead exemption." **In re Ginther, 282 B.R. at 21**, citing **Nohinek v. Logsdon, 628 P.2d 257** (Kan. 1981).

The **Ginther** court reasoned that

Kansas would not have recognized an exemption for a Colorado homestead in the first instance. Thus, the proceeds from a voluntary sale of a Kansas homestead to be used to purchase a Colorado homestead, are not exempt. The debtors have manifestly stated their intention *not* to return to Kansas. Indeed, three months before filing this case, debtors attempted to purchase a home in Colorado Springs, relenting only when the economic uncertainties triggered by the events of September 11, 2001 occurred. Had debtors purchased a residence in Colorado, without question it would not have qualified for the Kansas homestead exemption in a subsequent Kansas bankruptcy filing. This Court agrees with the [Texas] bankruptcy court in *Peters* . . . where it stated: To reach a contrary result could lead to absurd results. . . . [T]hrough blatant forum shopping, a debtor could attempt to change the size, value or susceptibility to claims of creditors of real property located in other states. . . .

In re Ginther, 282 B.R. at 21, quoting **In re Peters, 91 B.R. 401, 404** (Bankr. W.D. Tex. 1988).

Another court contributed the following pertinent analysis :

This probable bar is inherent in the nature of our federal system, at one of its most basic levels: the limits on the ability of a state to exercise jurisdiction over assets that are not located on its very soil. Debtor proposes to shelter certain real estate from the claims of his creditor, by invoking the law of a state that is halfway across the continent from the real estate. Though the strength of the proposition has diminished over the Twentieth Century, each state in the United States still is in many respects an independent republic, insofar as the legal regulation of contractual relationships is concerned. When it comes to the enforcement of creditors' claims against real estate, the regulatory power of a legislature really goes no further than its own state's boundaries. The state of Minnesota has no business dictating to Florida judgment creditors, as to how they may enforce their claims against assets that are situated in Florida. This limitation, imposed as it is by the basic nature of federalism, cannot be unseated merely because a subject debtor happens to be involved in a bankruptcy case in federal court. . . .

In re Cochrane, 178 B.R. 1011, 1018 n. 8 (Bankr. D. Minn. 1995) (in dicta).

The minority rule: A substantial number of courts have held otherwise, adopting what is currently the minority position that the homestead exemption is not limited by state boundaries. One frequently cited case supporting this view is **Arrol v. Broach (In re Arrol), 170 F.3d 934** (9th Cir. 1999). In the **Arrol** case, the debtor moved from California to Michigan approximately two months prior to filing bankruptcy in California, which was the proper bankruptcy venue under 28 U.S.C.A. § 1408(1). The debtor claimed California's homestead exemption for his new residence located in Michigan. The bankruptcy trustee argued that California's conflict of law rules should apply, and that the California homestead exemption should have no extraterritorial effect. The Ninth Circuit disagreed, finding that the debtor was entitled to apply California's homestead exemption to his Michigan residence. The court first determined that it was unnecessary to consider California's conflict of law rules, finding that "the plain language of section 522(b)(2)(A) [regarding exemptions] points us to the state's exemption laws, not to its conflict of laws rules" **In re Arrol, 170 F.3d at 935**, and "[w]hatever California's conflicts of law jurisprudence may be is simply irrelevant." **In re Arrol, 170 F.3d at 936**.

The **Arrol** court turned then to the extraterritorial effect of the California homestead exemption statute and reasoned that the statute itself placed no limits on the homestead exemption to dwellings located within California. Furthermore, looking to California case law, the court reasoned that

In *Strangman v. Duke*, 140 Cal. App. 2d 185, 295 P.2d 12 (1956), the California court of appeals articulated the legislative goal of "provid[ing] a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will" *Id.* At 190, 295 P.2d 12 (internal quotations and citations omitted). This goal exists independently from state boundary lines.

In re Arrol, 170 F.3d at 936. The court then looked to the extraterritorial reach of California's automobile exemption law, reasoning that "the automobile exemption . . . reflects a concern for preserving a need for basic transportation. Similarly, the homestead exemption reflects a concern for preserving basic housing. Both exemptions address concerns that transcend state boundaries." **In re Arrol, 170 F.3d at 937.** Finally the court considered the "strong policy underlying both California law and federal bankruptcy law to interpret exemption statutes liberally in favor of the debtor." **In re Arrol, 170 F.3d at 937.**

The box score: Although not all states have addressed the issue of whether the homestead exemption applies to property located outside of the state, states that seem to adhere to the majority position that such exemptions have no extraterritorial application include: Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Michigan, Missouri, Nebraska, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, and Utah. On the other hand, states that have indicated that they follow the minority view, that homestead exemptions are not limited by state boundaries, include: Arizona, California, District of Columbia, Kentucky, Louisiana, Maryland, Minnesota, Oregon, New Hampshire, Rhode Island, South Dakota, Vermont, Virginia, and Washington. See **Brown, Ahern and MacLean, Bankruptcy Exemption Manual (2006 Edition and pending 2007 Edition)**, which is available on WestLaw for specific authority in these states.

Conclusion: Because of the issues that may arise from BAPCPA's amendments to the Code's exemption provisions, it is important to take a look at whether the forum state's exemption laws will have extraterritorial effect. There may be rare instances in which the debtor has not satisfied either the 730 or the additional 180-day requirement, but the more common example will be where the debtor has not been domiciled in a single state for the full 730 days and the look-back is then to 180 days before that for the relevant homestead law. This article introduces only one aspect of the issues that can arise under the amended § 522(b)(3)(A). As noted at the beginning, the look-back is tied to the debtor's domicile, which may be different from the debtor's residence. All one must do is think of military personnel, who have not been physically residing in a state for a full 730 days but may claim that they have been domiciled there. That concept, however, may not be in tune always with a state's homestead statute, which may be tied to actual residency. As case law develops on BAPCPA's exemption

amendments, this Adviser and the Bankruptcy Exemption Manual will examine them. Stay tuned.

II. SELECTED RECENT EXEMPTION DECISIONS¹

Supreme Court

Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561 (2005) – The issue before the Supreme Court was whether bankruptcy debtors can claim an exemption in assets in an IRA under § 522(d)(10)(E), which provides that a debtor may exempt his/her right to receive “a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. . . .” 11 U.S.C. § 522(d)(10)(E). Deciding a split of authority among the Circuit Courts, the Supreme Court first determined whether the requirement was met that the payment was “on account of illness, disability, death, age, or length of service.” The bankruptcy trustee argued that the Debtors’ right to receive payment from their IRA accounts was not “because of “ the listed factors, but that the Debtors could withdraw funds for any reason and at any time at all, with an interest penalty. In other words, the IRAs provide for a right to payment on demand. The Supreme Court disagreed, finding that the Debtors’ right to payment from the IRAs is causally connected to their age because the interest penalty is removed when the accountholder turns 59 ½. Section 522(d)(10)(E) also requires the IRA to be a “stock bonus, pension, profitsharing, annuity, or similar plan[s] or contract[s].”(emphasis added). Finding that an IRA is a “similar plan or contract,” the Court reasoned that “[t]hose plans, like the [Debtors’] IRAs, provide a substitute for wages . . . and are not mere savings accounts.” *Rousey v. Jacoway*. 125 S.Ct. at 1568. All of the exemptable payments under § 522(d)(10) “concern income that substitutes for wages.” *Id.* at 1569. Because the Debtors’ IRAs confer a right to payment on account of age, and they are similar plans or contracts to those listed as exempt in § 522(d)(10), the Debtors could claim an exemption in the IRAs under § 522(d)(10)(E).

Section 522(b)

In re Urban, 361 B.R. 910, 924-25 (Bankr. D. Mont. 2007) – Section 522(b)(3)’s requirement for some debtors to use another state’s exemptions is constitutional under a uniformity analysis. The statute “applies uniformly throughout the United States to all debtors who seek protection under the Bankruptcy Code within 730 days of moving from one State to another.”

¹ Thanks to Donna T. Snow, Judicial Law Clerk, Western District of Tennessee, and Alisa C. Peters, Burr & Forman LLP, Nashville, for their help in collecting these case summaries.

In re Tracy, 2007 WL 420252 (Bankr. D. Idaho Feb. 2, 2007) (unpublished) – The 730-day look back is constitutional, reasoning that it applies uniformly across the United States to all bankruptcy debtors.

In re Wallace, 347 B.R. 626 (Bankr. W.D. Mich. 2006) - Upon the trustee's objection to a Michigan exemption statute available only to bankruptcy debtors, the Court found that bankruptcy-specific exemptions enacted by the Michigan legislature, which were not generally available to all Michigan debtors, but only those who had filed for bankruptcy relief, were unconstitutional, as intruding on power delegated exclusively to Congress by the Bankruptcy Clause of the Constitution.

In re Arispe, 289 B.R. 245 (Bankr. S.D. Fla. 2002) - The parties stipulated that the non-citizen debtor was not domiciled in Florida or in any of the states for the requisite look-back period, and the court concluded that the state's opt out could not preclude the debtor from some exemptions; thus, the debtor was able to use the section 522(d) exemptions in an opt out state. Although this case arose before the 2005 amendments, the result would appear to be the same under amended section 522(b).

In re Giffune, ___ B.R. ___, 2006 WL 1529196, at *9 (Bankr. N.D. Ill. 2006) - Under § 522(b)(3), it is not venue of the bankruptcy case nor location of property that determines the allowance of the bankruptcy debtor's exemptions, it is the location of the debtor's domicile.

In re Swartz, ___ B.R. ___, 2007 WL 247649 (Bankr. S.D. Fla. 2007) - Even though debtor was not domiciled in Florida during the 730 days preceding bankruptcy filing, the debtor's Florida real estate was not subject to administration by the trustee since it was owned as tenancy by entirety with his nondebtor spouse.

Drenttel v. Jensen-Carter (In re Drenttel), 403 F.3d 611 (8th Cir. 2005) – The Debtors claimed the Minnesota homestead exemption in their residence located in Arizona, and the bankruptcy trustee objected to the claimed exemption, contending that the Minnesota exemption should not be given extraterritorial effect. The Circuit Court first determined that state choice-of-law rules are inapplicable under these circumstances, instead turning to the language of the Minnesota homestead exemption statute to determine if it could be applied to property located outside of that state. Considering the purpose of the statute, protection of the debtor's homestead and family, the Court liberally construed the exemption statute in favor of the Debtors. Since the statute does not expressly preclude the use of the homestead exemption for an out-of-state property, it could be used to apply to the Debtors' Arizona residence.

In re Williams, ___ B.R. ___, 2007 WL 1520998 (Bankr. W.D. Ark. 2007) – Arkansas residents who did not meet 730 day requirement, had to use Iowa exemptions. Iowa's personal property exemptions are residency specific but its homestead is not; therefore, debtors who were not residents of Iowa could use Iowa's homestead exemption.

In re Underwood, 342 B.R. 358 (Bankr. N.D. Fla. 2006) - The Chapter 7 trustee objected to federal bankruptcy exemptions claimed by the debtor, on the theory that the debtor was limited to state law exemptions available to her under Colorado law, the state in which she had resided prior to moving to Florida less than 730 days earlier. The Court held that the debtor, who had moved to Florida less than 730 days prior to commencement of her bankruptcy case, was ineligible, pursuant to the 730-day domiciliary requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) to claim Florida state law exemptions; the debtor, as a nonresident of Colorado, was likewise ineligible to claim exemptions under Colorado law. The debtor was entitled to claim federal bankruptcy exemptions, despite the status of both Colorado and Florida as opt-out states. See also *In re Jewell*, --- B.R. ---- (Bankr. W.D.N.Y. 2006) (debtors' length of residency in neither New York nor Colorado entitled them to state exemptions so they may claim only federal exemptions); *In re West*, ___ B.R. __ (Bankr. M.D. Fla. 2006) (debtor's length of residency in neither Indiana nor Florida entitled them to state exemptions so they may claim only federal exemptions); *In re Crandall*, 2006 WL 2051367 (Bankr. M.D. Fla. July 21, 2006) (debtor not domiciled in Florida nor in prior state of New York for sufficient time could claim federal exemptions); *In re Chandler*, ___ B.R. ___ 2007 WL 643319 (Bankr. W.D. W. Va. March 1, 2007) (Georgia's opt out only applies to a defined Georgia domiciliary, and although the debtor had lived in Georgia for the longest period within the 180 days before bankruptcy, the debtor was not a Georgia domiciliary on petition date; therefore debtor is not bound by the opt out and can use federal exemptions.).

Morad v. Xifaras (In re Morad), 323 B.R. 818 (B.A.P. 1st Cir. 2005) – The issue before the Panel was whether the Debtor was domiciled in Florida for the 180-day period preceding bankruptcy so as to claim the benefit of the Florida statutory exemptions in real and personal property. The Panel acknowledged that “domicile means actual presence plus a present intent to remain there,” *Id.* at 824, and considered the Debtor's testimony at trial as to his intent to change his domicile from Massachusetts to Florida. During the relevant period, the Debtor continued to own property in Massachusetts and had a law practice there. Although the Debtor had a Florida drivers' license, he continued to have a Massachusetts drivers' license as well – an indication that he did not intend to change his domicile during the critical time period. The Debtor's bank accounts and doctors were in Massachusetts, and his wife worked there. The Debtor's “self-serving statements of intent are not controlling.” *Id.* at 826 (citation omitted).

Seung v. Silverman, 288 B.R. 174 (E.D.N.Y. 2003) - Joint debtors resided in different states. The debtor-husband resided in New York, a state which has opted out of the federal exemptions, so he was limited to state exemptions. The debtor-wife resided in New Jersey, a state which has not opted out of the federal exemptions, so she could elect either state or federal exemptions. On the chapter 7 trustee's objection to the debtor-wife's federal exemption claim, the court held that, under the express terms of section 522(b), both debtors were limited to the exemptions provided by the "opt out" state.

Section 522(c)

In re Quezada, ___ B.R. ___, 2007 WL 438258 (Bankr. S.D. Fla. 2007) - The case trustee may not sell exempt property. The court observed that the exempt home might be subject to execution by the domestic support creditor, but once it was exempt it was no longer property of the bankruptcy estate; therefore, it could not be sold by the case trustee. Further, section 507(a)(1)(C)'s priority to the trustee is merely that—a priority; it does not provide authority for the trustee to liquidate exempt assets. However, the court indicated that the domestic support creditor could pursue collection against exempt property in the bankruptcy court. See also *In re Covington*, 2006 WL 2734253 (Bankr. E.D. Cal. 2006); *In re Ruppel*, ___ B. R. ___, 2007 WL 108941 (Bankr. D. Or. 2007). See *In re Deemer*, 360 B.R. 278 (Bankr. N.D. Iowa 2007) and *In re Elmarsi*, ___ B.R. ___, 2007 WL 1518618 (Bankr. E.D. N.Y. 2007), for discussions of what a former spouse must prove in order to establish a domestic support obligation.

In re Vandeventer, ___ B.R. ___, 2007 WL 1175734 (Bankr. C.D. Ill. 2007) - Trustee could not administer exempt assets for benefit of domestic support creditor, nor does § 522(c) give the trustee a basis to object to exemptions; however, trustee still must pay priority creditor from nonexempt assets.

In re Hyde, 334 B.R. 506 (Bankr. D. Mass. 2005) – The issue in this case was whether the sale proceeds of the Debtor's exempt homestead remained exempt pursuant to § 522(c), which provides that exempt assets are not liable for satisfaction for prepetition debts, except those enumerated and not applicable here. The creditor objected to the Debtor's claimed exemption in the sale proceeds, arguing that § 522(c) does not extend to the proceeds from the voluntary sale of assets, and that the state homestead exemption does not apply to proceeds from the sale of homestead property. The court looked to existing case law and noted that "property which is deemed to be exempt is deemed, as of that point, no longer to be property of the estate, so that its subsequent transformation does not restore it to the estate." *Id.* at 514 (citing *Owen v. Owen*, 500 U.S. 305, 307-08 (1991)). Reasoning that § 522(c) effectively "immunizes" exempt property against any liability for prepetition debts," the court found that

"such property is forever protected from the claims of pre-petition creditors, and is essentially removed from the bankruptcy process." *Id.* (citations and emphasis omitted). Adopting the majority view, the court concluded that a postpetition transformation of exempt property into a non-exempt property does not automatically render the sale proceeds exempt, but it does effectively remove the property from the bankruptcy estate, and transformation of that property into nonexempt property will not restore the property to the estate.

Section 522(h)

Smith v. Primus Automotive Financial (In re Smith), 333 B.R. 739 (Bankr. D. Md. 2005) – The Debtor instituted a preference action seeking to recover funds from a prepetition garnishment of the Debtor's checking account. The Creditor objected, contending that the Debtor lacked standing to bring such an action under § 522(g) and (h), which both grants and limits a debtor's right to avoid a transfer that could have been avoided by the trustee under § 547. The bankruptcy court noted that, "the requirement set forth in 522(h), 'to the extent that the debtor could have exempted such property under Subsection (g)(1) of this section' limits the debtor's standing to bring the avoidance action to cases in which the avoidable transfer was not a voluntary transfer of such property by the debtor and the debtor did not conceal such property." *Id.* at 743. The court found that the transfer at issue, the garnishment, occurred by operation of law and not as a voluntary act of the Debtor: "the transfer which Debtor seeks to avoid occurred at the time of the service of the writ of garnishment upon Garnishee. There is no question that a transfer of a property interest of a debtor by garnishment is an involuntary transfer of property." Therefore, the Debtor met the requirements for standing and summary judgment in favor of the Debtor was warranted.

Ryker v. Current (In re Ryker), 315 B.R. 664 (Bankr. D.N.J. 2004) – The Chapter 13 Debtor claimed a homestead exemption in commercial property that had been sold at foreclosure, and no one objected to the claimed exemption. The Debtor then attempted to avoid the sale as fraudulent under § 548(a) pursuant to § 522(h) which provides that a debtor may avoid a transfer to the extent that the property is exempt, if the trustee fails to do so. Courts are split on the issue of whether a Chapter 13 Debtor has standing to exercise the avoidance rights of a trustee. Citing *Hartford Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), the bankruptcy court reasoned that, as a general rule, a "natural reading of the statute reveals that a Chapter 13 debtor lacks standing to bring avoidance actions." *In re Ryker*, 315 B.R. at 669-70. The Debtor argued that the Fifth and Ninth Circuits permit a debtor to avoid a transfer of exempt property under § 522(h) if 5 requirements are met: "(i) the transfer was not a voluntary transfer of property by the debtor; (ii) the debtor did not conceal the property; (iii) the trustee did not attempt to avoid the transfer; (iv) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under § 522(g); and (v) the debtor seeks to exercise one of

the trustee's avoidance powers enumerated in § 522(h)." *Id.* at 671, citing *Realty Portfolio, Inc. v. Hamilton (Matter of Hamilton)*, 125 F.3d 292, 297 (5th Cir.1997) and *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250 (9th Cir.1995). Although the bankruptcy court agreed that § 522(h) provided a means for the Debtor to pursue the avoidance action, in this case, the Debtor failed to satisfy the fourth requirement because the property was not exempt: "Because the Property is commercial property, it is not eligible for the homestead exemption claimed by [the Debtor] under § 522(d)(1). Arguably [the Debtor] could still apply the 'wildcard' exemption under § 522(d)(5). However, [the Debtor] has already applied this exemption to various items of personalty and it is not available to be applied to the Property. Accordingly, the Court finds that [the Debtor] does not satisfy the fourth criteria of the test set forth in *Hamilton* and *DeMarah*, and he may not employ § 522(h) to avoid the foreclosure sale." *In re Ryker*, 315 B.R. at 673-674. The bankruptcy court advised, however, that the trustee could be substituted as the Plaintiff and real party in interest and could pursue the avoidance action.

Section 522(o)

Turner v. Keck (In re Keck), ___ B.R. ___, 2007 WL 643330 (Bankr. D. Kan. 2007) – Debtor's discharge is denied upon U.S. Trustee's complaint with findings of fraudulent transfers and false oaths. In addition, debtor acted with actual fraudulent intent to hinder, delay or defraud creditors by taking large cash advances on credit cards within one year of bankruptcy filing to pay down secured debt on his homestead, resulting in application of § 522(o)(4) to reduce debtor's homestead exemption by the amount of those transfers. Compare *In re Agnew*, 355 B.R. 276 (Bankr. D. Kan. 2006) (Trustee failed to prove actual intent in debtor's conversion of nonexempt assets, which was debtor's undivided 1/5 interest in 720 acre tract, to acquire homestead five days before filing bankruptcy.).

In re Sissom, ___ B.R. ___, 2007 WL 1406449 (Bankr. S.D. Tex. 2007) – Debtor disposed of nonexempt stock with actual intent to hinder, delay or defraud creditors, using \$50,000 from the sale to help purchase a homestead, resulting in application of § 522(o) to reduce debtor's homestead exemption by \$50,000, with the court discussing the elements and proof of actual intent in detail and discussing the other cases that had interpreted § 522(o).

In re Maronde, 332 B.R. 593 (Bankr. D. Minn. 2005) – The Chapter 13 Debtor took out a second mortgage on his home and then incurred financial difficulties. The Debtor initially took cash advances from several credit card accounts and attempted to pay down the second mortgage, but eventually these lenders stopped extending credit. At the time the Debtor incurred the credit card debt, he knew he had no ability to repay the advances. The Debtor then consulted with a bankruptcy attorney, and subsequently sold his non-exempt personal property and used the proceeds to completely pay off his second mortgage, leaving

substantial equity in his home to claim as exempt in bankruptcy. An issue before the bankruptcy court was whether, under new § 522(o), the Debtor could properly exempt equity in his homestead when, days before filing his bankruptcy case, he essentially converted non-exempt assets into an exempt asset. Section 522(o) provides that the value of a debtor's interest in a homestead "shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of." 11 U.S.C. § 522(o). The bankruptcy court focused on the "intent to hinder, delay, or defraud a creditor" language, and finding it similar to the nondischargeability language of § 727(a)(2), determined that cases decided under that section of the Code are applicable to a determination under § 522(o). Finding the Debtor's conduct to bear "badges of fraud," the court concluded that an inference of fraud was "inescapable. Debtor essentially transferred assets to himself; this was done at a time when he was insolvent; and the transfers constituted substantially all of his non-exempt assets. Debtor did not merely transmute non-exempt assets into exempt assets for the purpose of bankruptcy estate planning." *In re Maronde*, 332 B.R. at 600. Instead, the Debtor possessed the intent to defraud a creditor found in the limiting language of § 522(o), and the Debtor's exemption claim was accordingly denied.

In re Addison, ___ B.R. ___, 2007 WL 941691 (8th Cir. BAP 2007) - Chapter 7 trustee objected to debtor's homestead and individual retirement account (IRA) exemptions, and asserted that tuition savings plan accounts debtor had established for his children were estate property. BAP held that the steps the debtor took in converting nonexempt assets to exempt were taken with intent to hinder, delay and defraud creditors, and bankruptcy court could rely on traditional badges of fraud, as well as other factors showing fraudulent intent. The debtor's homestead exemption is capped under § 522(o).

To illustrate how section 522(o) would alter the results of some pre-amendment cases, see *In re Potter*, 320 B.R. 753 (Bankr. M.D. Fla. 2005), where the chapter 7 debtors used a \$300,000 tax refund to make a down payment on a home in Florida just eighteen months prior to filing bankruptcy. The debtors admitted insolvency at the time of the purchase and stipulated that the \$300,000 would not have been exempt in its original form. Even though it was admitted that this transfer was fraudulent as to creditors, the court held that the state constitutionally-established homestead exemption could not be avoided as a fraudulent transfer. This result would be reversed by application of section 522(o) to those facts.

Section 522(p)

In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005) – The Chapter 7 Debtor resided in California from October, 2001, to April 15, 2004, at which time he moved to Arizona and purchased a home there. He subsequently filed his bankruptcy case in Arizona on April 28, 2005, and claimed the Arizona homestead exemption. Creditors and the Chapter 7 trustee objected to the claimed exemption, contending that Bankruptcy Code § 522(b)(3)(A) requires the Debtor to claim the \$50,000 California homestead exemption, and if the Arizona homestead exemption is allowed that § 522(p)(1) imposes a \$125,000 cap on the homestead claim because it was acquired less than 1215 prior to bankruptcy. The court determined first that, because new § 522(b)(3)(A) did not become effective until October 17, 2005, the case is governed by the Bankruptcy Code as it was prior to that date, and because the Debtor moved to Arizona more than 180 days prior to bankruptcy, the Debtor was entitled to claim the Arizona homestead exemption. Because § 522(p)(1) became effective on April 20, 2005, upon the enactment of BAPCPA, that section is applicable in this case, but because Arizona is an opt-out state and debtors cannot make any elections as to which exemptions to claim (i.e., state or federal), the \$125,000 cap does not come into play in this case, as § 522(p)(1) is triggered only “as a result of electing under [§ 522(b)(3)(A)] to exempt property under State or local law. . . .” 11 U.S.C. § 522(p)(1). The court set an evidentiary hearing to resolve a valuation issue in the case prior to ruling on the amount of the Debtor’s allowed exemption.

In re Bolden, 327 B.R. 657 (Bankr. C.D. Cal. 2005) – The Chapter 7 Debtor had eight separate tax liens on his property. The Debtor claimed a homestead exemption in the property and the trustee did not timely object to the exemption, but was nevertheless permitted to contest the priority of the homestead exemption with respect to the tax liens. Under § 522 (c), the homestead exemption did not have priority over the tax liens. It was in the best interest of the estate for the Debtor to turn the property over to the trustee for an expedient sale, and the Debtor’s motion for abandonment of the property by the trustee was accordingly denied.

In re Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005) – In this case the Debtors acquired their homestead within 1215 days prior to bankruptcy and so were limited to the \$125,000 homestead exemption cap under § 522(p), even though the state exemption statute allows a much more liberal exemption, and event though the state opted out of and does not allow the debtor a choice of claiming federal exemptions. Under the “plain meaning rule,” § 522(p) applies to all bankruptcy debtors in every jurisdiction, and not just to those debtors in states permitting use of the federal exemptions. The same result is supported by the legislative history of § 522(p). *Accord In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005). *But see In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005). Note: This issue has been certified to the Ninth Circuit Court of Appeals, which has not yet rendered a decision.

In re Summers, 344 B.R. 108 (Bankr. D. Ariz. 2006) - Upon the trustee's objection to the state law homestead exemption claimed by the debtors, who acquired their current homestead within 1,215 days of the petition date, the Court held that, contrary to *McNabb*, the cap on the maximum homestead exemption allowable to certain debtors under BAPCPA also applied in opt-out states and that the "safe harbor" exception to the cap could not be applied to increase effective state law homestead exemption available to the debtors above maximum homestead exemption allowable under state law.

In re Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006) - The Chapter 7 trustee objected to the homestead exemption claimed by the debtor prior to conversion of the case to one under Chapter 13. The Court held, contrary to *McNabb*, that the cap imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on the debtor's state law homestead exemption rights, if the debtor acquired the homestead within 1,215 days of petition date, is equally applicable in "opt out" states.

In re Kane, 336 B.R. 477 (Bankr. D. Nev. 2006) - The Chapter 7 trustee objected to the state homestead exemption claimed by the debtors, on the ground that the debtors had acquired their Nevada homestead fewer than 1,215 days before the petition date and were thus limited, pursuant to provision of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), to the state homestead exemption of no more than \$125,000. The Court held, contrary to *McNabb*, that the phrase "as a result of electing..." as used in the section of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) limiting the maximum state law homestead exemption available to debtors who have acquired their homestead within 1,215 days of petition date and who, as stated by legislature, have "elect[ed]" to claim state law exemptions, could not be given its plain and unambiguous meaning, so as to make this homestead cap applicable only to debtors in states which have not opted out of federal bankruptcy exemptions.

In re Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005) - The homestead exemption cap set forth in § 522(p) applies to all bankruptcy debtors, whether they reside in an opt-out state or not, but would not apply to limit the exemption a debtor can claim, to the extent that the value of the debtor's interest in his current residence is attributable to the accrual of equity the debtor acquired prior to the 1215-day period through ownership (and sale) of a prior residence in the same state.

In re Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005) - Holding *contra* to *In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005), the bankruptcy court found that the \$125,000 homestead exemption cap set forth in § 522(p) applies to all bankruptcy debtors, regardless of whether the home state has opted out of the federal exemption, and even if applicable state exemptions are much more generous or unlimited.

In re Rasmussen, 2006 WL 2588731 (Bkrtcy. M.D. Fla. 2006) - The debtors purchased their homestead in Florida for approximately \$350,000 in June 2002 and filed their bankruptcy petition in September 2006 (1,210 days after acquiring their homestead). On the petition date, the homestead had a value of \$750,000. This value included approximately \$400,000 of appreciation since its purchase. The debtors' equity in the homestead was \$175,000 on the petition date. The Court found that the debtors' total homestead exemption was \$250,000 (\$125,000 for both husband and wife). The Court also found that for purposes of determining the homestead exemption cap, the term "interest" meant equity in the homestead acquired by the debtor during the 1,215 day prepetition period and such interest did not include appreciation that occurred during that same time period.

In re Rogers, 354 B.R. 792 (N.D. Tex. 2006) - Subsection 522(p) was inapplicable to real property which the debtor inherited more than 1,215 days prepetition, although she began to occupy the property as a homestead within the 1,215-day period. Provision of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) limiting state law homestead exemption that debtors may claim for "any amount of interest" in real or personal property acquired within 1,215 days of petition date did not apply to limit state law homestead exemption rights of Chapter 7 debtor who acquired subject real property more than 1,215 days prior to commencement of her bankruptcy case.

In re Greene, 346 B.R. 835 (Bankr. D. Nev. 2006) - "Acquired" within the 1215-day period meant that the debtor began to use the property as a homestead within that time. The debtor purchased the property well before the 1215 days began but only began to live on it as a homestead within that period. Prior to using it as the homestead, the property was merely "naked land," exposed to execution and attachment under state law. Since the use as a homestead began within the 1215 days, the *Greene* court limited the homestead to the then \$125,000 cap.

In re Blair, 334 B.R. 374 (Bankr. N.D. Tex. 2005) - Chapter 7 Debtors claimed the unlimited Texas homestead exemption, seeking to exempt from the bankruptcy estate more than \$685,000 in equity in their home, and an unsecured creditor objected to the claim based on new § 522(p) of the Bankruptcy Code, which places a \$125,000 cap on a homestead exemption if the homestead was acquired by the debtor within 1215 days prior to bankruptcy. The Debtors had actually purchased the home 1773 days prior to bankruptcy, but had continued to make payments and build equity during the 1215 day period. The bankruptcy court reasoned that "one does not actually 'acquire' equity in a home. One acquires title to a home. The Debtors acquired title and fee to their home in early 2000, about five years before Congress passed the BAPCPA, and one and half years prior to the start of the 1215 day period applicable to their bankruptcy case.

. . . 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. This interpretation is consistent with other courts considering the applicability of § 522(p). See *In re Chouinard*, 358 B.R. 814 (Bankr. M.D. Fla. 2007) (Equity "passively" resulting from market appreciation is not counted against the \$125,000 cap.); *In re Virissimo*, 332 B.R. 201, 207 (Bankr.D.Nev.2005) ("The monetary cap applies if the debtor acquired such property within the 1,215-day period preceding the filing of the petition."); *In re Wayrynen*, 332 B.R. 479, 483 (Bankr.S.D.Fla.2005) ("[T]he \$125,000 limitation as to the value of a home acquired by a debtor within 1215 days of the debtor's bankruptcy filing."); *In re McNabb*, 326 B.R. 785, 788 (Bankr.D.Ariz.2005) ("Code § 522(p), as added by BAPCPA, applies a \$125,000 cap on a homestead if it was acquired by the debtor within 1215 days prepetition"). This is also the interpretation reached by commentators. See 4 COLLIER ON BANKRUPTCY ¶ 522.13 [2] (Lawrence P. King ed., 15th ed. rev.2005); see also Roger S. Cox, Sanders Baker, Asset Protection & Exemptions Under the New Act, presented at the University of Texas School of Law 24th Annual Bankruptcy Conference, November 10-11, 2005." *In re Blair*, 334 B.R. at 376-377. The bankruptcy court also looked to the legislative history and purpose of the statute, which is to prevent out-of-state residents from moving to states like Texas, with generous homestead exemptions, to file for bankruptcy simply to take advantage of the state's exemption laws. This was not the case here. For these reasons, the increase in value in the Debtors' equity during the 1215 day period prior to bankruptcy was not subject to the \$125,000 homestead exemption cap set forth in § 522(p).

In re Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006) - A judgment creditor objected to the Florida homestead exemption claimed by the Chapter 7 debtors. The Court held that the term "interest," as used in the section of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) applying a \$125,000 exemption cap on "any amount of interest that was acquired by the debtor" less than 1,215 days before the petition date, refers to real property purchased or otherwise acquired by a debtor within 1,215 days of the petition date, and it does not encompass the equity gained in property, to which a debtor acquired title more than 1,215 days before the petition date, as a result of appreciation or a decrease in secured debt during the 1,215-day period.

In re Greene, 346 B.R. 835 (Bkrtcy. D. Nev. 2006) - Although the debtor purchased the property in 1994, he did not have a homestead interest in the property until he started to live on it in August 2004, well within 1,215 days of filing the bankruptcy petition. Up to that point, the property remained "naked land," exposed to execution and attachment. The debtor's homestead exemption was limited to \$125,000, pursuant to § 522(p).

In re Walsh, 359 B.R. 389 (Bankr. D. Mass. 2007) – Section 522(p) is discussed in the context of the Chapter 13 trustee's objection to the debtor's plan under the best interests of creditors test, with court holding that the debtor did not have to devote the value of the homestead over the \$125,000 cap in order to satisfy that test.

In re Leung, 356 B.R. 317 (Bankr. D. Mass. 2006) – Debtor "acquired" an interest in property within the 1215 days when his wife gratuitously conveyed the property from herself to a tenancy by entirety.

Section 522(q)

In re Larson, 340 B.R. 444 (Bankr. D. Mass. 2006) - In an interpretation of what is required to meet the "criminal act" element of section 522(q)(1)(B)(iv), the debtor had not been "convicted" in the sense of going to trial and having a jury verdict of guilty; rather, the debtor had been involved in an automobile accident resulting in death of another driver. She was charged with vehicular homicide, and she entered into a pretrial diversion under which she was placed on probation. The state judge had, however, made findings sufficient to establish guilt of the vehicular homicide, for which a civil judgment had also been entered in the amount of \$1,000,000. The bankruptcy court determined that the state court findings were sufficient to constitute a "criminal act" under section 522(q). A further hearing was required, however, to determine the extent to which the debtor might need the claimed homestead in excess of the cap for her "reasonably necessary support." 11 U.S.C.A. § 522(q)(2). See also *Larson v. Howell*, 2007 WL 1444093 (Mass. May 15, 2007) (unpublished). Debtor's "admitt[ance] in state court to sufficient facts to be found guilty of motor vehicle homicide," limits her homestead exemption to \$125,000.

In re Rutland, 318 B.R. 588 (Bankr. M.D. Ala. 2004) – Although this case focused on whether the Debtor could claim the Alabama homestead exemption in funds prepaid as rent to the Debtor's landlord, the bankruptcy court noted that, if the trustee later successfully avoided the transfer to the landlord under § 550, § 522(q) would preclude the Debtor from exempting the recovered funds.

Homestead Issues

In re Lane, ___ B.R. ___, 2007 WL 778151 (Bankr. D. Or. 2007) – Debtor who owned homestead at time of bankruptcy filing had vested homestead under Oregon law and sale of that property postpetition by agreement with trustee did not destroy exemption, even though debtor did not reinvest proceeds in another homestead within one year of sale.

In re Konhoff, 341 B.R. 28 (Bankr. D. Ariz. 2006) - The Chapter 7 trustee objected to the state law homestead exemption claimed by the debtors in the proceeds from the sale of their residence. The Court held that whether the Chapter 7 debtors were entitled to the Arizona homestead exemption in funds, as being in nature of identifiable proceeds from the sale of their residence, was determined as of the date of commencement of their bankruptcy case, less than eight months after the sale, when the funds could still be traced to sales proceeds, and could not be affected by events that occurred postpetition. The bankruptcy court was reversed by the 9th Circuit BAP in 356 B.R. 201 (9th Cir. BAP 2006), where that court held that the debtor could not retain the sale proceeds as exempt when Arizona law required the proceeds to be reinvested in another residence within 18 months of a sale.

In re Wilson, 347 B.R. 880 (Bkrcty. E.D. Tenn. 2006) - Upon the trustee's objection to the Tennessee homestead exemption claimed by debtors in two adjoining tracts of land, the Court found that the homestead exemption to which the debtors were entitled under Tennessee law did not extend beyond the tract of property on which their home was located to an adjoining tract which the debtors acquired by separate conveyance at a later time.

Jenkins v. Hodes (In re Hodes), 402 F.3d 1005 (10th Cir. 2005) – In this involuntary Chapter 7 bankruptcy case, creditors objected to the Debtors' claim of a homestead exemption in funds deposited prepetition with a builder for improvements to an already-existing home. Between the time the involuntary petition was filed and the order for relief was entered, construction proceeded and the builder had expended \$8,966.67 of the \$225,000 deposit. The creditors failed to prosecute a § 303(f) motion to stop the debtors from disposing of property, and by the time the creditors had filed a supplemental brief in support of their objection to the claimed exemption, the builder had expended \$164,837.24 in construction. The Court looked to Kansas homestead exemption law and found that exemption is unlimited – homeowners may exempt the full value of their homes. The Circuit Court applied a theory of equitable conversion to uphold the exemption claim, finding that “[a]t the moment they entered into that enforceable contract, the deposit was equitably converted into the addition, and the builder’s consideration – the construction itself – was equitably converted into \$225,000. That the builder had not yet hammered a nail or installed a sheet of drywall is irrelevant, because the essential principle of equitable conversion is forward-looking.” *Id.* at 1012. The court limited its ruling, however, to improvements actually made, stating “we wish to make it clear that the [Debtors] may not claim as exempt any part of the deposit that is not actually spent on improvements to the homestead.” *Id.* at 1013.

Ladd v. Ries (In re Ladd), 319 B.R. 599 (B.A.P. 8th Cir. 2005) – The Chapter 7 Debtors asserted a homestead exemption in their real property under the federal exemption scheme set forth in § 522(d)(1), and the case trustee objected. The Debtors failed to respond the trustee’s objection and the bankruptcy court

accordingly entered an order sustaining the objection and disallowing the Debtor's homestead exemption claim. Over one year later, the Debtors amended their Schedule C and claimed a homestead exemption under the state homestead statute. The trustee again objected, this time claiming that the prior order disallowing the homestead exemption under the federal scheme was *res judicata* as to the homestead exemption issue. The Debtors contended that the trustee's objection to the federal exemption and the trustee's objection to the state exemption were not the same cause of action, because the second claim of exemption was merely an amended pleading within the bankruptcy proceeding, which could be made at any time while the bankruptcy case is pending. The Panel disagreed that *res judicata* was inapplicable, holding that "[a] debtor's right to liberally amend schedules does not override the application of *res judicata* which in this case prevents the Debtors from seeking to revisit the issue of the exemptibility of their homestead. If the Debtors believed they were entitled to a homestead exemption under any theory, including a theory other than the one asserted in their original Schedule C, they should have raised the issue in response to the Trustee's objection to their original federal homestead exemption. The Debtors cannot wait more than a year after the court decided the issue and attempt to relitigate the matter under a new theory." *Id.* at 606.

In re Jordan, 332 B.R. 472 (Bankr. M.D. Fla. 2005) – The Chapter 7 case trustee objected to the Debtors' claim of a homestead exemption, contending that the Debtors had already claimed a homestead exemption for other real property and they were only entitled to one homestead residence. The Debtors failed to disclose any ownership interest in the second property when they filed their original bankruptcy schedules. The Debtors amended their Schedule C to claim a homestead exemption in the second property instead of the property first listed. The bankruptcy court noted that "the Trustee's argument is off the mark for the obvious reason that the Debtors no longer claim two properties as exempt, but only claim the [second] Property as reflected in the Amended Schedule C, and not the [first, original] Property." *Id.* at 474. The Debtors are free to amend their schedules any time before the case is closed. However, there was an issue as to whether the Debtors forfeited their right to an exemption or their ability to amend their schedules based on their conduct. The Debtors' motion for summary judgment was therefore denied, and an evidentiary hearing was warranted.

In re Stone, 329 B.R. 860 (Bankr. N.D. Iowa 2005) – The Chapter 7 case trustee objected to the Debtor's homestead exemption claim, asserting that the Debtor, a resident of Iowa, could not claim a homestead exemption for property located in Wisconsin. The Debtor worked and lived in Iowa prior to moving to Wisconsin, where he then purchased a home. The Debtor subsequently filed his bankruptcy petition in Iowa, where most of his creditors were located. The liquidation of the Debtor's business occurred in Iowa within six months prior to his bankruptcy filing. At the time of the bankruptcy filing, the Debtor owned homes in both Iowa and Wisconsin. The bankruptcy court first determined that the Debtor's domicile

was Wisconsin, where the Debtor had resided for 143 days prior to bankruptcy, where his fiancée and children were living, and where the Debtor had opened a bank account and had obtained a driver's license. Therefore, the Wisconsin homestead exemption was applicable, and the Wisconsin homestead was exempt to the extent of the Debtor's equity in the property up to the \$40,000 Wisconsin limit.

In re Boward, 334 B.R. 350 (Bankr. D. Mass. 2005) – Prior to filing bankruptcy, the Debtor and her husband commenced divorce proceedings in state court, and the Debtor moved out of the marital home in California and relocated to Massachusetts. The Debtor then transferred her interest in the California home to her husband, who sold it and paid the Debtor's share of the proceeds to her judgment creditor, and retained the balance for himself. The Debtor then filed her bankruptcy case in Massachusetts and claimed an exemption in the sale proceeds based on § 522(d)(1) of the Bankruptcy Code. The bankruptcy trustee recovered the sale proceeds paid to the judgment creditor, and objected the Debtor's claimed exemption in the proceeds. Although the Debtor could not exempt the proceeds under § 522(d)(1) since the property had been sold almost two months prior to bankruptcy, the Debtor could amend her schedule C to claim an exemption under California law.

In re Gandy, 327 B.R. 807 (Bankr. S.D. Tex. 2005) – The issue before the bankruptcy court was whether the Debtor's intent to use his undeveloped property as his future residence qualified as a residence for purposes of the homestead exemption under § 522(d)(1). Because the Debtor had "engaged in various preparatory actions to make this property his homestead such as: clearing the land, paving a driveway, securing a trailer to live in, and arranging for utilities," the court found that the Debtor's "overt acts" evidenced the Debtor's intent to reside on the property in the future. *Id.* at 809. However, at the time of filing the bankruptcy petition, the Debtor was not residing on the land and so, applying the plain language of § 522(d)(1), the bankruptcy court held that the Debtor could not exempt the property, as actual occupancy is required.

In re Raynard, 327 B.R. 623 (Bankr. W.D. Mich. 2005) – The Chapter 13 Debtors claimed a homestead exemption in their residence, located on one parcel, and also in their farm, located on a contiguous parcel. Both parcels were held by the Debtors as tenants by the entireties. The Debtors' plan proposed 100% payment to the Debtors' joint creditors, and a significantly less amount to the Debtors' individual creditors, so as to protect their entireties property from the claims of their joint creditors pursuant to § 522(b)(2)(B) and Michigan law stating that only creditors of both spouses may levy against property held by the entireties. The issue before the bankruptcy court was whether the discriminatory plan should be confirmed, or "whether the non-exempt portion of entireties property claimed as exempt under Section 522(b)(2)(B) is to be administered for the benefit of only the bankrupt debtor's joint creditors or for the benefit of the bankrupt debtor's individual creditors as well." *Id.* at 633. The bankruptcy court looked to existing

case law and the plain meaning of the statute, and concluded that the non-exempt portion of the Debtors' property should be administered for all unsecured creditors, without preference to the joint creditors. The proposed plan could not be confirmed.

In re Reed, 331 B.R. 44 (Bankr. D. Conn. 2005) – The Chapter 7 Debtor claimed a homestead exemption in property on which the Debtor did not live, and the Chapter 7 case trustee objected. Looking to the plain language of § 522(d)(1), the bankruptcy court found that, at the time the Debtor filed his petition, the Debtor was still married to his estranged spouse who resided on the property at issue, and the Debtor was then entitled to the homestead exemption as his wife qualified as his dependent for purposes of exemption under § 522(d)(1), even though the parties filed their Dissolution of Marriage Agreement the same day, but later in time, that the Debtor filed his bankruptcy petition.

In re Konhoff, 341 B.R. 28 (Bankr. D. Ariz. 2006) - Chapter 7 debtors are entitled to Arizona homestead exemption in proceeds from sale of home, since the proceeds were identifiable and the exemption was determined as of commencement of the case.

In re Melito, ___ B.R. ___, 2007 WL 30336 (Bankr. D. Mass. 2007) - A Massachusetts court, applying that state's homestead law, held that a chapter 13 debtor did not abandon the homestead when the debtor moved out of the property in contemplation of a sale. The net equity from the sale, after satisfaction of the mortgage, remained exempt. Compare *In re Foreacre*, 2006 WL 3833927 (Bankr. D. Ariz. 2006), where that court applied Arizona law to find that the debtor's failure to reinvest sale proceeds into a new homestead within eighteen months from the sale resulted in loss of the homestead exemption in the proceeds.

Lien Avoidance

Brinley v. LPP Mortgage, Ltd. (In re Brinley), 403 F.3d 415 (6th Cir. 2005) – The Debtor and his non-debtor spouse owned, as tenants by the entirety, real property valued at \$280,000. The property had three liens against it, consisting of a first mortgage of \$180,000, a judgment lien with second priority for \$112,418.35, and a third priority junior mortgage of \$80,345.09. The Debtor filed for protection under Chapter 7 of the Bankruptcy Code and claimed a statutory exemption in the property of \$6,000. The Debtor claimed that, because he only owned one-half of the property, his interest should be valued at \$140,000. The Circuit Court found, however, that the nature of a tenancy by the entirety is to give each tenant an interest in the whole, and therefore the full \$280,000 value could be attributed to the Debtor's interest. The court looked to the language of the relevant statute, 11 U.S.C. § 522(f)(2)(A), noting that a lien can only be avoided to the extent it impairs a debtor's exemption, and determined that the judgment lien could be partially avoided, leaving a judgment lien remaining on

the Debtor's property of \$13,654.91, which was the difference between the value of the original lien and the \$98,763.44 amount by which the Debtor's exemption was impaired (arrived at by adding the values of all liens on the property plus the \$6,000 exemption, less the value of the property).

The Cadle Co. v. Taras (In re Taras), No. 04-13727, 2005 WL 1006870 (April 29, 2005) (unpublished) – The Debtor owned real property as a tenant by the entirety with his non-debtor spouse, and the property was subject to three liens, one of which was the second priority judicial lien of The Cadle Company. The first and third liens, respectively, were held by the Debtor's mortgagee and the IRS. The Debtor sought to avoid the judicial lien as impairing his state law homestead exemption, and Cadle objected. The bankruptcy court looked to the formula of § 522(f)(2)(A) to determine the extent to which the lien impaired the Debtor's exemption, and included the junior tax lien in the calculation. Therefore, the sum of the liens and the exemption greatly exceeded the Debtor's interest in the property and the Debtor was permitted to avoid the judicial lien. The district court affirmed the ruling of the bankruptcy court and Cadle appealed to the Circuit, arguing the lower courts erred in including the junior tax lien in the calculation under § 522(f)(2)(A), and that state priority rules should be considered in determining whether a lien impairs an exemption. If the tax lien was omitted from the calculations, no amount of Cadle's judicial lien would be avoided. The issue on appeal was whether liens junior to the judicial lien to be avoided should be included in the calculation under § 522(f)(2)(A). The Circuit Court cited to the Eighth Circuit's opinion in *In re Kolich*, 328 F.3d 406 (8th Cir. 2003), for the proposition that "if Congress had intended to exclude junior liens from the calculation, it could have easily incorporated such language." *In re Taras*, 2005 WL 1006870 at *3, citing *In re Kolich*, 328 F.3d at 410. The court agreed with the Eighth Circuit and applied its reasoning to the case, holding that the junior tax lien should be included in the calculation for determining the extent to which a debtor's exemption is impaired, and therefore avoided the Cadle judicial lien in its entirety.

In re Shick, 418 F.3d 321 (3d Cir. 2005) – The issue before the Third Circuit was whether a lien held by the New Jersey Motor Vehicles Commission for unpaid vehicle surcharges and interest was a judicial lien, subject to avoidance by the Debtor as impairing her homestead exemption, or an unavoidable statutory lien. The Court looked to its prior decision in *Graffen v. City of Philadelphia*, 984 F.2d 91 (3d Cir. 1992), which involved a lien held by the City for unpaid water and sewer charges that had the effect of a judgment after it was docketed by the appropriate authorities. The *Graffen* Court found the lien to be statutory in nature because it was not obtained by "legal process or proceeding" within the definition of a judicial lien under § 101(36) of the Bankruptcy Code. *Id.* at 96. The court found *Graffen* persuasive because of the similarities of the water lien statute and the motor vehicle surcharge statute. The amount of the debt is determined as a matter of statute or administrative regulation, and not through a proceeding against the driver. The only duty of the court is to docket the certificates of debt;

there is no legal process or proceeding. For these reasons, the lien is a statutory lien and not subject to avoidance.

Moldo v. Charnock (In re Charnock), 318 B.R. 720 (B.A.P. 9th Cir. 2004) – The issue before the BAP was whether a judicial lien could be avoided under § 522(f)(2)(A) even though that lien was senior to an unavoidable consensual lien. The judicial lien creditor argued that the Debtor's preservation of the homestead was a windfall. Looking to the plain "all other liens" language of § 522(f)(2)(A)(ii) and the competing equities at work, the Panel reasoned that § 522(f) "was enacted to permit the avoidance of judicial liens that can interfere with the debtor's post-petition fresh start. This selective avoidance gives an advantage under federal law to secured creditors holding consensual liens, typically, residential mortgage lenders. But Congress intended to treat consensual lienholders more favorably, because their contractual relationships with the bankruptcy debtor typically allow the debtor to acquire equity in the exempt property by making post-petition mortgage payments." *Id.* at 727. Therefore, the statute permits avoidance of judicial liens that are senior in priority to an unavoidable consensual lien.

Milgard Tempering, Inc. v. Darosa (In re Darosa), 318 B.R. 871 (B.A.P. 9th Cir. 2004) – A judicial lien creditor objected to the Debtors' motions to avoid the judicial lien as impairing their respective homestead exemptions, contending that because the Debtors were jointly and severally liable on a senior statutory lien, the statutory lien should be reduced in amount by one-half for purposes of calculating the extent of each Debtor's impairment of the homestead exemption. If this calculation were used, both Debtors would have sufficient equity in their residences, even including the judicial lien, for Debtors to receive the full amount of their exemptions so that the judicial lien would not be entirely avoided as impairing those exemptions. On the other hand, if the entire amount of the statutory lien was included in the calculations, the judicial lien would impair the homestead exemptions and could be avoided in its entirety in each case. The Panel found that the Debtors were not contractually, statutorily or equitably subrogated to each other, so the amount of the statutory lien should not be halved for purposes of calculations of the impairment from liens. In addition, the Panel refused to deviate on equitable grounds from § 522(f)(2)(A)'s formula in order to account for a hypothetical future subrogation, even though a literal application of the formula could potentially result in a windfall for the Debtors. The bankruptcy court's order allowing the Debtors to avoid the judicial lien was therefore affirmed.

Wilding v. CitiFinancial Consumer Fin. Servs., Inc. (In re Wilding), 332 B.R. 487 (B.A.P. 1st Cir. 2005) – After receiving a Chapter 7 discharge, the Debtor learned that a debt he had listed as unsecured on his bankruptcy petition was in fact secured by a lien on his residence. The Debtor then reopened his bankruptcy case in order to avoid the judicial lien. While the motion was pending, however, the Debtor proceeded with the refinance of his residence and the judicial lien was

satisfied in full upon the closing of the refinance transaction, and the creditor released the lien. After the case was reopened, the Debtor filed a motion to avoid the lien, and the creditor objected on the grounds that the lien was satisfied, released, and was no longer in existence. The Panel agreed that when the motion to avoid the lien was filed, there was no lien to avoid. Therefore, "it was too late to employ the benefits of § 522(f). . . ," *Id.* at 491, and the lien could no longer be avoided. The Circuit, however, reversed, holding that the Bankruptcy Code permits a debtor to avoid a judicial lien that exists at the time of filing the bankruptcy petition, even though the lien had been satisfied after the case was closed. *In re Wilding*, 475 F.3d 428 (1st Circuit 2007).

Willis v. Strother (In re Strother), 328 B.R. 818 (B.A.P. 10th Cir. 2005) – The Debtor sought to avoid judgment liens on her property incurred as a result of unpaid construction work on her home. The judgment creditor objected to the avoidance, claiming that his lien was in fact a materialman's lien, statutory in nature, and therefore not subject to avoidance under § 522(f). The Panel reasoned that if the lien was in fact a materialman's lien, it was not property perfected and therefore unenforceable. Even though the Debtor would not have been able to avoid the lien under the state's exemption statute, § 522(f) of the Bankruptcy Code preempts state law and the judicial liens were avoidable as impairing the Debtor's homestead exemption. "[The creditor] did not establish that he had a consensual or statutory lien. [He] had judicial liens, which are the type of liens on exempt property that Congress has declared not worthy of surviving bankruptcy." *Id.* at 824.

Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88 (B.A.P. 9th Cir. 2004) – A judicial lien creditor alleges that notice of the Debtor's second motion to avoid its lien was insufficient to satisfy due process, and that the order granting the Debtor's motion is therefore void.. The Panel agreed that service failed to comply with Rule 7004(b)(3)'s requirements, and that the creditor's due process rights were violated. The creditor failed to respond to the Debtor's first motion to avoid its lien, but the motion was nevertheless denied because the Debtor failed to prove the value of the collateral at issue. The Debtor then filed a second motion to avoid the lien with more information about the value of the property, again without opposition, and the bankruptcy court granted the second motion by default. On appeal from the bankruptcy court's order, the creditor alleged a violation of its due process rights because the motion was not served on an officer, a managing or general agent, or any other authorized agent to receive service, and claimed that it would have opposed the motion if it had been properly served. The Debtor served the creditor's post office box and its state court attorney, which was inadequate to satisfy Rule 7004's requirements for service on a corporation. See Fed. R. Bankr. P. 7004(b)(3). "[V]alid service requires more than to address the document to a post office box." *In re Villar*, 317 B.R. at 93. As for service on the creditor's attorney, "Debtor did not provide any evidence that [the attorney] was either explicitly or implicitly appointed by [the creditor] to receive service of process on its behalf." *Id.* The bankruptcy

court's default judgment was void without effective service, and violated the creditor's due process rights. The order of the bankruptcy court was accordingly reversed.

In re Hague, 331 B.R. 524 (Bankr. D. Mass. 2005) – The Debtor's failure to avoid a judicial lien in her prior Chapter 7 case did not prevent the Debtor from avoiding the lien in her subsequent Chapter 13. The lien passed through the Chapter 7 unaffected, surviving the Debtor's discharge. The bankruptcy court reasoned that "there is nothing in the language of the Bankruptcy Code . . . to suggest that a judicial lien that is not avoided in an earlier Chapter 7 case may not be avoided in a subsequent Chapter 13 if the requirements of § 522(f) are met." *Id.* at 526. Citing with approval to *In re Grounder*, 266 B.R. 879 (Bankr. E.D. Cal. 2001), the court determined that the creditor's lien in the Chapter 13 would be unsecured: "As the creditor cannot foreclose upon its lien because of Debtors' Chapter 13 petition, it is essentially left with a nonrecourse debt. Because the Code provides that such a debt is entitled to an unsecured claim against the bankruptcy estate, so too is the creditor in this action entitled to an unsecured claim against the Debtors' estate." *Id.* at 528.

In re Hemric, 333 B.R. 81 (Bankr. M.D.N.C. 2005) – The Debtor claimed a \$10,000 homestead exemption in her property, which was encumbered by a \$79,000 mortgage and a \$165,164 judgment lien. The Debtor estimated the value of the real property to be \$97,500. The Debtor received a discharge and the bankruptcy case was closed. The Debtor then reopened the case in order to avoid the judgment lien pursuant to § 522(f). By this time the judgment lien had increased in amount to \$202,553. The issue was whether a judicial lien could be avoided if the amount of the lien exceeds the amount of the claimed exemption. The bankruptcy court looked to the formula prescribed in § 522(f)(2)(A) and determined that "the court is required to add the amount of the first mortgage on the property (\$79,000), the amount of the judgment lien (\$165,164), and the amount of the homestead exemption that the Debtor would be entitled to in the absence of any liens on the property (\$10,000). From this amount (\$254,164), the value of the property (\$97,500) is subtracted, which results in a total impairment of \$156,664. Because the total amount of the judgment lien to be avoided was \$165,164 as of the petition date, the unavoids portion of the judicial lien is \$8,500." *Id.* at 83. By setting forth this formula, Congress has determined that a judicial lien can be avoided even though the amount of the lien is greater than the Debtor's exemption in the property.

In re May, 329 B.R. 789 (Bankr. D.N.H. 2005) – In this Chapter 7 case, the Debtors moved to avoid a judgment lien on their homestead. The bankruptcy court first determined that a judgment creditor is not barred from raising the issue of a homestead exemption as a defense to a debtor's motion to avoid its lien, even though the creditor failed to object to the claimed exemption. The bankruptcy court then looked at the issue of whether the Debtors' postpetition sale of their property and move to another state constituted abandonment of the

property so as to deprive the Debtors of a homestead exemption. The court found that such conduct does not constitute abandonment, and that the homestead exemption was still available to the Debtors: "The Court cannot find, on the facts of this case, that entering into a purchase and sale agreement while still occupying the premises and then subsequently moving from the premises prior to the closing constitutes an abandonment of the homestead." *Id.* at 791. Because the judgment lien at issue impaired the valid homestead exemption, the lien could be avoided.

In re Rodriguez, 327 B.R. 86 (Bankr. D. Conn. 2005) – The Chapter 13 Debtor moved to avoid a judicial lien impairing his homestead exemption, and the judgment creditor objected, contending that the Debtor's motion was precluded as a result of an order entered in the Debtor's prior Chapter 7 case, stating that the judgment lien could be avoided but only to the extent it exceeded \$23,000, which was the extent to which it impaired the Debtor's homestead exemption pursuant to § 522(f)(2)(A) "impairment" calculation. The amount of the judgment lien was \$25,345.59. The Debtor contended that *res judicata* did not apply, because by the time the Chapter 13 case was commenced, setting a new date for valuation of the homestead and the existing mortgage, the formula for determining the extent of the impairment to the homestead exemption would be different. The bankruptcy court looked to the requirements for application of *res judicata* and determined that, because the prior order was a final order of a court of competent jurisdiction, and the Debtor was the same in both cases for purposes of privity, that *res judicata* applied and the prior order was controlling. "That the first motion was filed in a chapter 7 case and the Second Motion was filed in a subsequent chapter 13 case is irrelevant because the chapter of the underlying bankruptcy case does not alter the necessary elements of a Section 522(f) avoidance action." *Id.* at 93. Further, the difference in the balance of the mortgage between the first and second bankruptcy cases was not significant, and "[i]mmaterial factual differences do not remove a claim from the purview of *res judicata*." *Id.* (citation omitted).

In re Bartlett, 326 B.R. 436 (Bankr. N.D. Ind. 2005) – The issue in this case was whether the Debtors could reopen their bankruptcy case to amend their claimed exemptions to include a homestead exemption, and then move to avoid a judicial lien against the exempt property. Bankruptcy Rule 1009(a) limits the right to amend the schedules to "*any time before the case is closed.*" Fed. R. Bankr. P. 1009(a)(emphasis added). The case had been closed and thus the schedules could not be amended. "The court would also note that § 522 allows a debtor to claim "exempt[ions] from property of the estate . . ." 11 U.S.C. § 522(b). Upon the closing of the case the bankruptcy estate effectively ceases to exist and all scheduled property that has not otherwise been disposed of is abandoned. 11 U.S.C. § 554(c). Consequently, there is no longer an estate from which exemptions may be claimed. Whatever might have been left was returned to the debtor and, as such, is no longer subject to the possibility of being exempted

from the estate.” *Id.* at 440. The Debtors’ motion to reopen was accordingly denied.

In re Hall, 327 B.R. 424 (Bankr. W.D. Mo. 2005) – The Debtors reopened their bankruptcy case in an effort to avoid a lien approximately two years after receiving a discharge, arguing that the court should value the affected property as of the date the original petition was filed for purposes of calculating the extent of impairment under § 522(f)(2). The lien creditors contended that circumstances had changed significantly since the original case was filed, making avoidance of the lien inappropriate and inequitable. The Debtors had obtained a contract to sell the property, which had greatly appreciated in value over the past two years due to improvements. In addition, the priority and amount of existing liens had changed. If the bankruptcy court looked to the present value of the collateral and the circumstances, instead of values of the property and liens at the time the case was filed, the judgment lien would only be avoidable in part under the formula set forth in § 522(f)(2). The bankruptcy court determined, based on existing case law and the legislative history of § 522, that the date the bankruptcy petition was filed was the correct point in time to value the property for purposes of avoidance. “Debtors clearly could (and probably should) have avoided the lien at any time before the case was originally closed. Recognizing that, by applying the same set of facts which would have been before the Court had the motion been filed at that time seems appropriate, limited only by the application of equitable principles when the delay and change in circumstances result in undue prejudice to the creditor.” *Id.* at 428. Finding no prejudice to the creditors in this case, the court overruled the creditors’ objection and granted the Debtors’ motion to avoid the judgment lien.

In re Vizard, 327 B.R. 515 (Bankr. D. Mass. 2005) – The Debtor and his wife owned property as joint tenants at the time a state court judgment was entered against the Debtor and a lien was placed on the property against the Debtor’s interest only. The Debtor and his wife then transferred the property to the wife only in order to refinance the property. The judgment lien was neither satisfied nor discharged at the time of the transfer. The property was then transferred back to the Debtor and his wife as tenants by the entirety. The Debtor filed a Chapter 7 bankruptcy petition and, pursuant to § 522(f), attempted to avoid the judicial lien encumbering the property in its entirety. The lien creditor objected, contending that since the lien attached before the Debtor took his current interest in the property, as a tenant by the entirety, the lien is unavoidable since § 522(f)(1) provides that “the debtor may avoid *the fixing of a lien on an interest of the debtor in property* .” *Id.* at 518, citing 11 U.S.C. § 522(f)(1) (emphasis added). The bankruptcy court looked to Massachusetts law and found that, in order to terminate a homestead, the property must be conveyed and the estate of homestead must not have been reserved in the deed conveying the property. *In re Vizard*, 327 B.R. at 518-19. In this case, the deed conveying the property to the Debtor’s wife individually did not specifically reserve the homestead, so the Debtor’s interest in the property and the homestead were extinguished. “[A]n

attachment that occurs prior to the Debtor's acquisition of an interest is not 'on the debtor's interest.'" *Id.* at 519. Therefore, the Debtor was unable to utilize § 522(f) to avoid the lien.

In re Hartman, 335 B.R. 176 (Bankr. D. Kan. 2005) – The question presented in this case was whether the Debtor could avoid a judgment lien on property the Debtor obtained in his divorce decree. The divorce decree provided a judgment in favor of the Debtor's ex-spouse, and at the same time awarded the Debtor the real property at issue. The Debtor's ex-spouse argued that, under these circumstances, the judicial lien could not be avoided because it attached simultaneously when the Debtor obtained the property, and a judicial lien can only be avoided under § 522(f)(1) if it attaches after the debtor obtains the property. The bankruptcy court looked to the Supreme Court decision in *Farrey v. Sanderfoot*, 500 U.S. 291 (1991), which stated that: "The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid 'the fixing' of the lien on the debtor's interest in property. The gerund 'fixing' refers to a temporal event. That event--the fastening of a liability-- presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as 'an interest of the debtor in property.' Therefore, unless the debtor had the property interest to which the lien attached at some time *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1)." *In re Hartman*, 335 B.R. at 179 (quoting *Sanderfoot*). Since in this case the granting of the judicial lien to the ex-spouse was simultaneous with the Debtor's obtaining a fee simple interest in the real property, the Debtor never possessed the property before the lien was "fixed," and could not use § 522(f) to avoid the lien.

In re Adell, 321 B.R. 573 (Bankr. M.D. Fla. 2005) – The Michigan bankruptcy court awarded a multimillion judgment against the Debtor, and approximately 10 days later the Debtor went to Florida and purchased a homestead, and also took steps to establish his residency in Florida. The Michigan court then entered an order declaring that the Florida home did not qualify as a homestead because § 303(i) of the Bankruptcy Code trumps the Florida homestead statute, and because the Debtor was not a bona fide resident of Florida. The Debtor then filed a Chapter 11 bankruptcy petition in the Florida Bankruptcy Court, and the judgment creditor objected to the claimed homestead exemption. The Florida court held that the Michigan order was not binding on the Florida bankruptcy court, and it was unwilling to concede that § 303 (i) of the Bankruptcy Code trumped the Florida homestead statute. The court found instead that the Debtor was entitled to the Florida homestead exemption, and that the judgment lien impaired the exemption and was therefore avoidable and no longer enforceable under § 522(f)(1)(A). For a companion decision giving additional facts of this case, see *In re Adell*, 321 B.R. 562 (Bankr. M.D. Fla. 2005)(finding that the Michigan order regarding the availability of the Florida homestead exemption was not binding on the Florida court, and that an equitable lien or constructive trust was inappropriate in this case).

In re Cunningham, 354 B.R. 547 (D. Mass. 2006) - Proceeds from Chapter 7 debtor's voluntary, postpetition sale of exempt homestead property were protected from creditor's prepetition, nondischargeable debt.

Objections to Exemptions

In re Einkorn, 330 B.R. 570 (Bankr. E.D. Mich. 2005) – The Chapter 7 Debtors claimed an exemption of \$1,000 in their timeshare, which they valued at \$1,000 but which was encumbered by a \$1,000 lien. No objections were filed. The trustee later filed a motion for authority to sell the timeshare, with the lien attaching to the sale proceeds. The Debtors contended that because there was no equity in the timeshare, the property was entirely exempt. They claimed that the trustee's motion was, in effect, an untimely objection to their claim of exemption and the property was exempt under § 522(l) of the Bankruptcy Code. Relying on the rationale of the court in *In re Heflin*, 215 B.R. 530, 535-36 (Bankr. W.D. Mich. 1997), the court quoted: "If this court were to accept the Debtor's arguments, then the Trustee would be placed in the untenable position of having to 'object first and ask questions later' in every case where the claimed exemption exceeded the estimated fair market value minus secured claims. It would also provide an incentive for savvy (or less than candid) debtors to purposely underestimate the fair market value of the property in the hope that a trustee would fail to object and then be prevented from subsequently administering the property on behalf of the estate." Finding this reasoning persuasive, the bankruptcy court limited the Debtors' exemption to the \$1 originally claimed, and granted the trustee's motion to sell the property free and clear of liens, with the existing lien attaching to the sale proceeds.

In re Fonke, 321 B.R. 199 (Bankr. S.D. Tex. 2005) – In this case, the Debtor originally filed his bankruptcy case under Chapter 13 of the Bankruptcy Code, including his list of exempt property. Neither the Chapter 13 trustee nor any creditor objected. The case was subsequently converted to a Chapter 7 case, and the Chapter 7 case trustee objected to the Debtor's claimed exemptions. Citing the majority position, the Debtor contended that the trustee's objection was not timely, and that Bankruptcy Rule 4003(b)'s deadline for objections was not renewed upon conversion of the case to Chapter 7. The bankruptcy court first looked to Rule 1019(2) for guidance, which provides that a new time period will not commence for filing claims, or a dischargeability complaint in a reconverted Chapter 7 case. The court also noted the minority position of some courts, that the plain language of Rule 4003(b) controls and under the provisions of § 341(a), a new meeting of creditors must be called and parties in interest then have 30 days from the conclusion of the meeting of creditors to object to a claimed exemption. The bankruptcy court, however, declined to follow either the majority or minority analyses, instead focusing on Rule 4003(b), which provides that a party in interest may file an objection to the list of property claimed as exempt only within 30 days after any amendment to the schedules is filed, whichever is

later. After that, per § 522(l), property is exempt and is removed from the estate, and § 522(c) protects the property from the reach of prepetition creditors. If Rule 4003(b) is interpreted to create a right to object after the original deadline, § 522(c) would be a nullity. The deadline for objection does not recommence upon conversion of a case from Chapter 13 to Chapter 7. Therefore, the trustee's objection was untimely and was overruled.

In re Bush, --- B.R. ---- (Bankr. E.D. Wash. 2006) - Rule 4003(b) requires the *filing* of the objection within 30 days of the conclusion of the creditors' meeting, it does not specify the time for notice the court held that the 30-day time limit for filing was intended to provide the debtor with timely notice that the trustee or other interested party objected to an exemption claim. Thus, in this case where the trustee made a timely filing but did not mail out a notice of the filing until 87 days later, the objection was held to be untimely and was dismissed.