



1 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.syn

§ Intro.syn Synopsis to Chapter Intro: INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

Intro.01. Debtor's Estate and Debtor's Property; Broadly Defined

Intro.02. Section 522 and the Debtor's Exemptions

[1] Debtor Required to List Exempt Property on Official Form 6, Schedule C Filed with Petition

[2] Debtor Must Choose State or Federal Exemptions

[3] Most States Have "Opted Out" of the Federal Code Exemptions

[4] State Exemptions, "Opting Out," and Federal Supremacy

[5] Tenancy by the Entirety Interests May Also Be Exempt

Intro.03. Continuing Effect of the 1984 Bankruptcy Amendments

[1] Practice of Stacking Ended

[2] Debtor-Spouses Must Elect Same Set of Exemptions

Intro.04. Continuing Effect of the Bankruptcy Reform Act of 1994

[1] Dollar Value of Exemptions Doubled

[2] Automatic Adjustment of Dollar Value of Exemptions

[3] Formula Used to Determine Whether a Lien Impairs an Exemption

[4] Restrictions Added on Debtor's Ability to Avoid Security Interests

Intro.05. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

[1] Background

[2] 2005 Amendments Affecting Exemptions; § 522

[a] Exempt Property Available to Satisfy Section 523(a)(5) Debts

[b] Retirement Funds Protected

[c] Domicile Requirements

[d] Reduction of Homestead Exemption for Fraud

[e] Household Good Definition Expanded

[f] Homestead Exemption Limitation



2 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.01

Intro.01. Debtor's Estate and Debtor's Property; Broadly Defined

Pursuant to *section 541 of the Code*, once a bankruptcy petition is filed under title 11, a case is commenced and an estate is created. Generally, the estate is comprised of all assets or property of the debtor. n1 This introduction to Volume 14 broadly discusses the individual debtor's exemptions, particularly as they relate to the state wherein the debtor is domiciled. n2

Under section 541(c), with few exclusions, property of the estate is defined broadly to include all legal and equitable interests of the debtor. It includes property owned prior to the filing of the bankruptcy petition and certain property acquired by the debtor within certain time periods after the filing, n3 and is administered for the benefit of the debtor's creditors.

FOOTNOTES:

(n1)Footnote 1. *See 11 U.S.C. § 541 and 14 Collier on Bankruptcy (Matthew Bender 15th Ed. Revised) (including compilation of state exemption statutes).*

(n2)Footnote 2. For a thorough discussion of all exemption issues, *see 4 Collier on Bankruptcy, PP 522.01 et seq . (Matthew Bender 15th Ed. Revised).*

(n3)Footnote 3. *See 11 U.S.C. § 541(a)(5).*



3 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.02

Intro.02. Section 522 and the Debtor's Exemptions

For most individual debtors, regardless of the chapter under which the debtor filed the petition, no section of the Bankruptcy Code is more important than section 522, which governs the debtor's rights in relation to exempt property and is crucial to the "fresh start" envisioned by drafters of the Code. The Code allows the debtor to prevent the distribution of certain property by claiming exemptions under section 522. In order for property to be exempt and excluded from property of the estate available to satisfy debts, the property must be claimed as exempt in writing in the debtor's schedules. n1 This property is specifically excluded from distribution to creditors. The general rule under the Bankruptcy Code n2 is that a debtor is permitted to choose between the scheme of federal exemptions prescribed in *section 522(d) of the Code* or the exemptions available under other federal law n3 and the law of the state in which the debtor is domiciled. n4 Most of the states, however, under section 522(b)(1) opted out of the federal Bankruptcy Code exemptions, and, in these states, the debtor has no choice but to use applicable state and non-Code federal exemptions.

[1] Debtor Required to List Exempt Property on Official Form 6, Schedule C Filed with Petition

Pursuant to *Federal Rule of Bankruptcy Procedure 4003(a)* relating to exemptions, the debtor is required to list the property claimed as exempt under *section 522 of the Bankruptcy Code* on the Schedule C of Official Form 6, the schedule of assets required to be filed under *Federal Rule of Bankruptcy Procedure 1007*. A dependent of the debtor may assert exemptions within a certain time period if the debtor fails to do so. n5 After a debtor has filed a list of exemptions, however, a dependent normally would not be permitted to file a different list of exemptions or supplement an incomplete list. n6 *Rule 4003* limits the time to file objections to a claim of exemption and places the burden of proof upon the objecting party. The rule does not permit informal objections to exemptions. n7

The Supreme Court in *Taylor v. Freeland & Kronz* n8 addressed the significance of filing a timely objection to exemptions. The Court found that the trustee's failure to file a timely objection resulted in allowance of the claimed exemption, even though the value of the claimed property exceeded what a debtor would otherwise be entitled to exempt.

Federal Rule of Bankruptcy Procedure 1009 permits an amendment of the debtor's schedules as a matter of course, even after the discharge is granted, n9 until the case is closed. Thus, a failure to claim property exempt may be corrected by an amendment, but that amendment should be made, filed with the bankruptcy court and written notice given to the trustee and all affected entities allowing them sufficient time to object. n10 The debtor's attempt to claim an additional

exemption by filing an amendment to the schedules could be rejected by the court if an objection is filed and the proof establishes that the debtor acted in bad faith or there is prejudice to a creditor. The prejudice to the creditor must outweigh any prejudice to the debtor. n11

Schedule C applies only to individual debtors. The Federal Rules of Bankruptcy Procedure require this list to be filed by a debtor as part of the schedules of property. The property must be fairly and specifically described so that the trustee and parties in interest can reasonably be expected to know what property the debtor claims as exempt. n12 In *In re Wenande*, n13 the court held that exempt property must be separately listed on debtors' schedule B-4 with sufficient detail to put the trustee on notice of questionable assertions; categorical designations of property, such as "stocks," "mineral interests," "accounts," "intangibles" and "personal property," were insufficient to constitute a listing of a claim of exemption within the meaning of *Federal Rule of Bankruptcy Procedure 4003*.

[2] Debtor Must Choose State or Federal Exemptions

Unless the state law that is applicable in the debtor's case n14 prohibits it, the debtor must select one or the other set of exemptions; debtors may not choose some from each. n15 However, debtors may not elect the exemptions codified in section 522(d) if the state wherein the debtor is domiciled has prohibited their selection by "opting out," thereby mandating the use of state exemption provisions. The state, in exercising its opt out power, must take affirmative action and specifically prohibit the use of the Code exemptions. A failure to act or address the issue will not deprive a debtor of a choice of exemptions. n16

The domicile of the debtor has become even more important in considering exemption claims since passage of the 2005 amendments to the Bankruptcy Code. Prior to passage of the new amendments, the debtor's domicile was established by where the debtor spent the majority of the 180 days prior to the filing of the petition. After passage of the Bankruptcy Code in 1978, some states opting out of the Federal Code exemptions offered unusually generous exemption schemes, most notably the homestead exemption. This resulted in the perception that debtors who had recently moved to these states were converting nonexempt assets to exempt assets, particularly the homestead, in order to maximize exempt property and shield the assets from creditors. New section 522(b)(3) provides that the applicable state law for purposes of claiming exemptions will be the place of the debtor's domicile for the 730 days before filing the bankruptcy petition. Further, it provides that if the debtor did not maintain a domicile in a single state during that time, then the applicable state law would be the place of the debtor's domicile for the majority of the 180 day period prior to the 730 days before filing the bankruptcy petition. n17 The clear intent of the 2005 amendments is to prevent possible abuse of the bankruptcy process by making it much more difficult for debtors to take advantage of one state's more generous exemptions.

A situation may develop, however, when the debtor is simply not eligible to claim any state exemption. For example, in one case, the debtors moved to Florida less than 730 days before the bankruptcy filing and, hence, could not claim Florida exemptions. They lived in Colorado prior to that time but, because of the move to Florida, were no longer residents of Colorado at the time of the bankruptcy filing. The bankruptcy court concluded that the debtors were entitled, under the savings provision of section 522(b)(3), to claim federal exemptions even though both Florida and Colorado are opt-out states and their residents are not permitted to claim the federal exemptions. n18

Section 522(b)(3) provides that "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)." This sentence follows subparagraph (C), but it is not intended as the subparagraphs are. A question has arisen in several courts as to whether this indicates that it modifies the entirety of paragraph (3) or just subparagraph (C), which deals only with the exemption of retirement funds. Most of the courts considering the question have concluded that it modifies all of paragraph (3). n19

In addition to the above provision, three homestead limitations were added in 2005 amendments to section 522. New

subsections (p) and (q), however, use language different from that found in new subsection (o). Unlike subsection (o), subsections (p) and (q) provide that, under subparagraph (b)(3)(A), they apply only "as a result of electing" to exempt property under state law. Thus, some courts, in an effort to give meaning to the plain words of the phrase "as a result of electing," have concluded that subsections (p) and (q) are applicable only in states that have not opted out of the federal exemption scheme because non-opt-out states are the only states in which an election is possible. n20 Other courts have disagreed and conclude that Congress intended the homestead limitations to apply when the debtor elects to exempt homestead property under section 522(b)(3)(A), but not when the debtor elects to exempt homestead property under section 522(b)(3)(B) held as a tenancy by the entireties or in a joint tenancy if that interest is otherwise exempt under nonbankruptcy law. Because the exemption under section 522(b)(3)(B) is available to debtors in all states to the extent recognized by state laws, even in opt-out states, the majority of the courts considering the issue have concluded that section 522(p) was designed to close the "mansion loophole" that existed in the Code before the 2005 amendments. n21

Finally, if subsections (p) and (q) are applicable, the debtor's homestead exemption claim in any property or interest acquired within 1,215 days before the filing of the bankruptcy petition may not exceed the amount of \$125,000. n22

[3] Most States Have "Opted Out" of the Federal Code Exemptions

A majority of states have already enacted legislation prohibiting debtors from electing the section 522(d) exemptions. n23 Although, as a result, a completely uniform exemption scheme has not been established under the Code, many states have, at the same time as they enacted the prohibitory legislation, updated and revised the state exemption provisions; in many instances the results closely reflect the provisions of section 522(d). n24 In some cases there are considerably more generous.

Thus, whether or not a particular state has enacted legislation prohibiting the use of the federal exemptions, familiarity with the state exemption provisions by practitioners is essential to adequate legal representation of an individual debtor or creditors of an individual debtor. State exemptions are the only ones available to debtors in most states, and are available as an alternative to Code exemptions in those states that have not "opted out."

[4] State Exemptions, "Opting Out," and Federal Supremacy

The exemption schemes of several states have been judicially scrutinized in the context of bankruptcy litigation.

The Court of Appeals for the Ninth Circuit has emphasized that the federal courts have the right to decide the merits of state exemptions, n25 but has stated that "state exemptions need not be identical or even comparable to exemptions established under federal law." n26

In *In re Sullivan*, n27 the Court of Appeals for the Seventh Circuit considered issues raised by section 522(b)(1), the "opt-out" provision of the Code. The court held the provision to be constitutional, relying primarily on an old Supreme Court decision, *Hanover National Bank v. Moyses*. n28 The *Sullivan* court regarded itself as being bound by the holding in *Moyes* that the Bankruptcy Clause of the Constitution n29 does not require nationally uniform exemptions. n30

The United States Supreme Court has also recognized that states have the ability to prohibit their citizens from claiming exemptions under section 522(d) and that this ability is very broad. In *Owen v. Owen*, n31 the Court noted that "[n]othing in subsection (b) (or elsewhere in the Code) limits a state's power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemptions at all." The statement, although *dicta* in the opinion, does reveal the Court's view of the scope of the state's power both to opt out and restrict exemptions even to allowing none at all. This power to restrict exemptions, however, is not completely unlimited. State exemption laws may not conflict with the provisions of the Bankruptcy Code. n32

[5] Tenancy by the Entirety Interests May Also Be Exempt

Additionally, pursuant to *section 522(b)(3)(B) of the Code*, n33 a debtor may exempt an interest in a tenancy by the entirety or joint tenancy to the extent that such an interest is exempt from process under state law. Thus, in the states where laws of real property still recognize the estate by the entirety as a form of ownership, and in those states which allow some degree of immunity from process as to joint tenancies, state law tends to play a significant part in determining the amount of property a debtor in title 11 proceedings may exempt. The application and implementation of state laws regarding entireties property is decided by bankruptcy courts on a state by state basis. n34

FOOTNOTES:

(n1)Footnote 1. *11 U.S.C. § 522(1); Fed. R. Bankr. P. 4003(a)*.

(n2)Footnote 2. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, *reprinted in* Vol. A Collier on Bankruptcy, App. Pt. 4(a) (Matthew Bender 15th Ed. Rev.).

(n3)Footnote 3. *See* federal non-Bankruptcy Code exemption statutes *infra*. *See also* P 522.02[3] *supra*.

(n4)Footnote 4. *11 U.S.C. § 522(b)*. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977), *reprinted in* Vol. C Collier on Bankruptcy, App. Pt. 4(d)(i) (Matthew Bender 15th Ed. Rev.). *See also* 4 Collier on Bankruptcy, PP 522.01 *et seq.* (Matthew Bender 15th Ed. Rev.).

(n5)Footnote 5. *See 11 U.S.C. § 522 (l)*; *see also Stephens v. Jensen Carter (In re Alexander)*, 288 B.R. 127, 130 (B.A.P. 8th Cir. 2003) (dependent only entitled to exemption claims available to the debtor); *In re Galloway*, 308 B.R. 709, 715-16 (Bankr. W.D. Pa. 2001) (debtor did not "fail" to list the exemption; debtor's attempt to claim the exemption was unsuccessful).

(n6)Footnote 6. *In re Duncan*, 294 B.R. 339, 344 (B.A.P. 10th Cir. 2003) (nondebtor spouse may not claim exemption in her own right as opposed to claiming an exemption on behalf of the debtor); *Kapila v. Morgan (In re Morgan)*, 286 B.R. 678, 683-84 (Bankr. E.D. Wis. 2002) ; *but see In re Crouch*, 33 B.R. 271 (Bankr. E.D.N.C. 1983) (nondebtor spouse permitted to claim additional exemptions because debtor's list filed in bad faith to avoid support obligations).

(n7)Footnote 7. *Canino v. Bleau (In re Canino)*, 185 B.R. 584 (B.A.P. 9th Cir. 1995) (trustee's seizure of assets is not an objection to exemptions).

(n8)Footnote 8. *503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992)* (debtor claimed exempt a cause of action for employment discrimination and listed the value as "unknown"); *see also* ch. 522, P 522.05 [2][a] and [b], *infra*.

(n9)Footnote 9. *Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir. 1998) .

(n10)Footnote 10. *In re Govoni*, 289 B.R. 500 (Bankr. D. Mass. 2002) .

(n11)Footnote 11. *Barroso-Herrans v. Lugo-Mender (In re Barroso-Herrans)*, 524 F.3d 341, 344 (1st Cir. 2008) ; *Kaelin v. Bassett (In re Kaelin)*, 308 F.3d 885 (8th Cir. 2002) ; *Martinson v. Michael (In re Michael)*, 163 F.3d 526 (9th Cir. 1998) ; *Lowe v. Sandoval (In re Sandoval)*, 103 F.3d 20 (5th Cir. 1997) ; *see also In re Daly*, 344 B.R. 304, 310-11 (Bankr. M.D. Pa. 2005) (discussing cases).

(n12)Footnote 12. *Barroso-Herrans v. Lugo-Mender (In re Barroso-Herrans)*, 524 F.3d 341, 344 (1st Cir. 2008) ("to be determined" and "tba" sufficient to put trustee on notice that entire value of the asset will be exempt if no objection filed); *In re Rosenzweig*, 245 B.R. 836, 840-41 (Bankr. D. Ill. 2000) ; *In re Wenande*, 107 B.R. 770 (Bankr. D. Wyo. 1989) (exemption denied when property not listed with sufficient particularity); *In re Hill*, 95 B.R. 293 (Bankr.

N.D.N.Y. 1988) (same); *In re Elliott*, 31 B.R. 33 (Bankr. S.D. Ohio 1983) .

(n13)Footnote 13. 107 B.R. 770 (Bankr. D. Wyo. 1989) ; see also *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir 2001) (debtor required to list exemptions and values and be as particular as is reasonable under the circumstances).

(n14)Footnote 14. The domicile of the debtor as of the date of filing of the petition must be determined. The state law that will be applicable to an individual debtor will be that of the debtor's domicile (not necessarily the residence) as defined by the relevant state law. Once the determination is made, the debtor's exemption choices can be analyzed.

(n15)Footnote 15. Debtors, however, may exempt certain retirement funds no matter which exemption scheme is chosen under either section 522(d)(12) or 522(b)(3)(c). 4 *Collier on Bankruptcy*, P 522.02, 522.09[12] and 522.10[8] (Matthew Bender 15th Ed. Rev.).

(n16)Footnote 16. 124 Cong. Rec. H11,115 (daily ed. Sept. 28, 1978), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(f)(i) (Matthew Bender 15th Ed. Rev.); S17,412 (daily ed. Oct. 6, 1978), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(f)(iii) (Matthew Bender 15th Ed. Rev.). See H.R. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977), reprinted in Vol. C *Collier on Bankruptcy*, App. Pt. 4(d)(i) (Matthew Bender 15th Ed. Rev.).

(n17)Footnote 17. 11 U.S.C. § 522(b)(3), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 307 (2005), effective in cases commenced on or after October 17, 2005.

(n18)Footnote 18. *In re Underwood*, 342 B.R. 358, 362 (Bankr. N.D. Fla. 2006) (explaining why it is logical to conclude that section 522(b)(3) provides this alternative election when a debtor is ineligible to claim any state exemptions); see also *In re Jewell*, 347 B.R. 120 (Bankr. W.D.N.Y. 2006) (agreeing with the conclusion reached by the court in *Underwood* and even providing a suggested version of how the provision might be better written to make the use of the alternative remedy absolutely clear).

(n19)Footnote 19. *In re Crandall*, 346 B.R. 220, 222 (Bankr. M.D. Fla. 2006) (referring to the alternative remedy as the "hanging paragraph" in section 522(b)(3) as modifying the entire provision); see also *In re Brooks*, 393 B.R. 80, 86 (Bankr. M.D. Pa. 2008) .

(n20)Footnote 20. *In re McNabb*, 54 C.B.C.2d 750, 326 B.R. 785 (Bankr. D. Ariz. 2006) (holding that subsection (p) of section 522 does not apply in states that have opted out because in those states the debtors do not have a right to elect between federal and state exemptions).

(n21)Footnote 21. *In re Kane*, 336 B.R. 477 (Bankr. D. Nev. 2006) (providing a thorough review of all cases); see also *In re Greene*, 346 B.R. 835 (Bankr. D. Nev. 2006); *In re Buonopane*, 344 B.R. 675 (Bankr. M.D. Fla. 2006); *In re Summers*, 344 B.R.108 (Bankr. D. Ariz. 2006); *In re Landahl*, 338 B.R. 920, 921 (Bankr. M.D. Fla. 2006); *In re Wagstaff*, 2006 Bankr. LEXIS 716 (Bankr. S.D. Fla. March 20, 2006); *In re Wayryman*, 332 B.R. 479, 484-86 (Bankr. S.D. Fla. 2005); *In re Virissimo*, 54 C.B.C.2d 1728, 332 B.R. 201, 205 (Bankr. D. Nev. 2005); *In re Kaplan*, 54 C.B.C.2d 1676, 331 B.R. 483 (Bankr. S.D. Fla. 2005).

(n22)Footnote 22. See *In re Sainler*, 344 B.R. 669, 674 (Bankr. M. D. Fla. 2006) (finding that the \$125,000 exemption cap of section 522(p) applies only to real property purchased or otherwise acquired by the debtor within 1,215 days of the petition filing date; the statute has no applicability to property acquired more than 1,215 days before the petition date even if the property's equity increases during the 1,215 day prepetition period).

(n23)Footnote 23. These states include: Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. Arkansas and New Hampshire had opted out; however, the opt out legislation was repealed. The District of Columbia, Puerto Rico and the Virgin Islands have not opted out of the

federal Bankruptcy Code exemptions.

(n24)Footnote 24. *See, e.g., California Civil Procedure Code §§ 703.140, 704.060*; 1980 Neb. Laws 1051, wherein the state of Nebraska exercised its right to make the federal exemptions unavailable and simultaneously raised the dollar amount of its homestead exemption.

(n25)Footnote 25. *Lafortune v. Naval Weapons Center Fed. Credit Union (In re Lafortune)*, 652 F.2d 842, 846 (9th Cir. 1981) ; *see also Cheeseman v. Nachman (In re Cheeseman)*, 656 F.2d 60, 4 C.B.C.2d 1218 (4th Cir. 1981) ("[W]e must adopt an interpretation of Virginia's law that does not conflict with the Act's exemption provision.")

(n26)Footnote 26. *England v. Golden (In re Golden)*, 789 F.2d 698 (9th Cir. 1986) .

(n27)Footnote 27. *680 F.2d 1131, 6 C.B.C.2d 972 (7th Cir. 1982)* , *cert. denied*, 459 U.S. 992, 103 S. Ct. 349, 74 L. Ed. 2d 388 (1982) .

(n28)Footnote 28. *186 U.S. 181, 22 S. Ct. 857, 46 L. Ed. 1113 (1902)* .

(n29)Footnote 29. *Art. 1, § 8, cl. 4 of the Constitution* provides that Congress may "establish uniform laws on the subject of Bankruptcies."

(n30)Footnote 30. *Sullivan* was followed with approval in *Rhodes v. Stewart*, 705 F.2d 159, 8 C.B.C.2d 451 (6th Cir. 1983), *cert. denied*, 464 U.S. 983, 104 S. Ct. 427, 78 L. Ed. 2d 361 (1983) (the reasoning of *Sullivan* was adopted by the Bankruptcy Appellate Panel for the Ninth Circuit in *Stinson v. Pitrat*, 36 B.R. 947 (B.A.P. 9th Cir. 1984)).

(n31)Footnote 31. *500 U.S. 305, 308, 111 S. Ct. 1833, 1835, 114 L. Ed. 2d 350, 357 (1991)* .

(n32)Footnote 32. *In re Schott*, 199 B.R. 586 (Bankr. E.D. Va. 1996) ; *see also In re Weinstein*, 164 F.3d 677 (1st Cir.) , *cert. denied*, 527 U.S. 1036, 119 S. Ct. 2394, 144 L. Ed. 2d 794 (1999) (section 522(c) preempts state exemption law). The expansion of exemptions does not constitute a violation of the contracts clause of the Constitution. *U.S. Const. Art. 1, § 10, cl. 1*. Creditors have no contractual right to a debtor's property, and legislative determination to expand exemptions is a reasonable means to protect the interests of citizens. *Seltzer v. Cochran (In re Seltzer)*, 104 F.3d 234 (9th Cir. 1996) .

(n33)Footnote 33. *11 U.S.C. § 522(b)(2)(B)* provides, in pertinent part, that a debtor may exempt "... an interest as a tenant by the entirety or joint tenant to the extent that such interest ... is exempt from process under applicable law."

(n34)Footnote 34. *See P 522.10[3] supra* for a review of property held as a tenancy by the entirety; *see also In re Weber*, 346 B.R. 346 (Bankr. D. Del. 2006) (holding that although the debtors transferred one-half interest in their home to a stepdaughter, the language in the deed did not express a clear intention to rebut the state presumption that a tenancy by the entireties existed).



4 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.03

Intro.03. Continuing Effect of the 1984 Bankruptcy Amendments

The Bankruptcy Amendments and Federal Judgeship Act of 1984, n1 included amendments to section 522 that reduced the exemptions available to debtors in some circumstances.

[1] Practice of Stacking Ended

Section 522(m) of the Code applies to each debtor separately in joint cases. Before the 1984 amendments, the practice of "stacking" exemptions occurred in joint cases filed in non-opt out states. One spouse would choose the federal exemptions and the other would choose the state exemptions, with the result that total amounts claimed exempt would be maximized. n2 This practice had been possible under the Code as originally enacted, and had in general received judicial approval. n3

[2] Debtor-Spouses Must Elect Same Set of Exemptions

Under section 522(b) as amended in 1984, n4 debtor spouses in a joint case elect either the state or the federal exemptions; in case of a disagreement, the federal exemptions apply. As before, each spouse is separately entitled to the full value of the exemptions available, n5 unless state law prohibits a couple from doubling certain state exemptions. n6

This prohibition against "stacking" applies only in joint cases filed under *section 302 of the Bankruptcy Code* and in individual cases when the debtors' estates are ordered to be jointly administered under *Federal Rule of Bankruptcy Procedure 1015(b)*. n7 It is possible, however, for spouses to file separate bankruptcy cases and not have their estates jointly administered, particularly when the assets and liabilities of the couple are sufficiently separate. In that case, joint administration would not be appropriate. The husband and wife could also file separate petitions at completely different times. One case might be closed before the other one is filed. Under this circumstance, joint administration is impossible. Parties in interest, however, might seek to reopen the first case for cause shown under section 350(b) and, if the court is convinced that the separate filings reveal a scheme to obtain greater exemptions than otherwise available, the reopening of the first case might be permitted and joint administration ordered, thereby limiting the debtors to a single system of exemptions.

FOOTNOTES:

(n1)Footnote 1. Pub. L. No. 98-353 (1984), *reprinted in* Vol. E Collier on Bankruptcy, App. Pt. 6(a) (Matthew Bender 15th Ed. Rev.).

(n2)Footnote 2. *See 11 U.S.C. § 522(b)*.

(n3)Footnote 3. *See, e.g., Canady v. Wilson (In re Canady)*, 653 F.2d 210, 4 C.B.C.2d 1327 (5th Cir. 1981) . *Accord Emmerich v. Lampi*, 6 C.B.C.2d 583, 19 B.R. 666 (B.A.P. 9th Cir. 1982) ; *In re Alvarez*, 5 C.B.C.2d 485, 14 B.R. 940 (Bankr. D. Colo. 1981) ; *Ageton v. Cervenka (In re Ageton)*, 5 C.B.C.2d 463, 14 B.R. 833 (B.A.P. 9th Cir. 1981). *Contra Kelley v. First Security Nat'l Bank & Trust Co. (In re Kelley)*, 6 C.B.C.2d 1078, 21 B.R. 375 (Bankr. N.D. Fla. 1982) . In *Canady v. Wilson, supra* , the court, at pages 1330-1331, held that "Although in some cases the debtors in a joint bankruptcy case may thereby achieve 'instant affluence' rather than just a 'fresh start,' we think it clear that the Congress contemplated that possibility." *See also In re Lowe*, 3 C.B.C.2d 363, 7 B.R. 248 (Bankr. E.D. Wash. 1980) .

(n4)Footnote 4. *See 11 U.S.C. § 522(m)*.

(n5)Footnote 5. *680 F.2d 1131, 6 C.B.C.2d 972 (7th Cir. 1982)* , *cert. denied*, 459 U.S. 992, 103 S. Ct. 349, 74 L. Ed. 2d 388 (1982) ; *see also In re Roberge*, 307B.R. 442, 448 (Bankr. D. Vt. 2004) (married debtors living apart and separated entitled to separate homestead exemptions; each separate property was the residence and homestead for a family); *In re Colwell*, 196 F.3d 1225 (11th Cir. 1999) (estranged spouses living apart in separate residences may each claim separate homestead exemption); *In re Pastrana*, 216 B.R. 948 (Bankr. D. Colo. 1998) ; *see also In re Hall*, 395 B.R. 722 (Bankr. D. Kan. 2008) (recognizing that spouses may claim separate exemptions in cars and tools of the trade).

(n6)Footnote 6. *See, e.g., Granger v. Watson (In re Granger)*, 754 F.2d 1490, 12 C.B.C.2d 194 (9th Cir. 1985); *First Nat'l Bank v. Norris*, 701 F.2d 902, 8 C.B.C.2d 1078 (11th Cir. 1984). *But cf. In re Nygard*, 13 C.B.C.2d 1101, 55 B.R. 623 (Bankr. E.D. Cal. 1985) , *aff'd*, 71 B.R. 779 (B.A.P. 9th Cir. 1985) .

(n7)Footnote 7. *11 U.S.C. § 522(b)*. *See also In re Steward*. 227 B.R. 895 (B.A.P. 9th Cir. 1998) .



5 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.04

Intro.04. Continuing Effect of the Bankruptcy Reform Act of 1994

The Bankruptcy Reform Act of 1994, which revamped a large part of the Bankruptcy Code, contained various substantive amendments to section 522. n1

[1] Dollar Value of Exemptions Doubled

Section 522(d) was amended to double the specified dollar limitations on federal exemptions for homesteads, motor vehicles, household goods and furnishings, jewelry, property exempted in lieu of the homestead, implements of trade, accrued dividends or loan value of unmaturing life insurance contracts and personal injury payments. n2

[2] Automatic Adjustment of Dollar Value of Exemptions

Importantly, the 1994 Reform Act amended section 104 by providing that on April 1, 1998, and at each three-year interval ending on April 1st thereafter, each dollar limitation in effect under section 522(d) will be adjusted for inflation, as represented by the Consumer Price Index for All Urban Consumers. n3 The Judicial Conference of the United States will publish the adjusted dollar limitations in the Federal Register no later than March 1st of each year in which the adjustments take effect, *i.e.*, one month in advance of the effective date. n4

[3] Formula Used to Determine Whether a Lien Impairs an Exemption

The 1994 Reform Act also made a number of important changes to section 522(f). n5 It created a new paragraph (2) setting forth a formula to be used to determine whether a lien "impairs" an exemption. n6 If a property is subject to more than one lien, a lien that has been avoided will not be considered when applying the formula with respect to other liens. n7 However, paragraph (2) does not pertain to judgments arising out of a mortgage foreclosure. n8

[4] Restrictions Added on Debtor's Ability to Avoid Security Interests

The 1994 Reform Act also added some restrictions to the debtor's ability to avoid certain security interests. This provision imposes a limited exception to the debtor's right to avoid nonpossessory, nonpurchase-money security interests in implements, professional books or tools of the trade of the debtor or a dependent of the debtor, or farm animals or crops of the debtor or a dependent of the debtor. n9

The restrictions apply only in cases in which the debtor has voluntarily chosen the state exemptions rather than the exemptions provided in section 522(d), or has been required to use state exemptions because the state has opted out of the federal exemption scheme. n10 In such cases, if the state either permits the debtor to claim exemptions that are unlimited in amount (except to the extent that the debtor has allowed the fixing of a consensual lien on property) or prohibits avoidance of a consensual lien on property that could otherwise be claimed as exempt, the debtor may not avoid a security interest on the types of property described above to the extent that the value of the property exceeds \$5,000. n11

FOOTNOTES:

(n1)Footnote 1. *See* H.R. 5116, §§ 108, 303, 304 & 310, *reprinted in* Vol. E Collier on Bankruptcy, App. Pt. 9(b) (Matthew Bender 15th Ed. Rev.).

(n2)Footnote 2. *See* section 522(d).

(n3)Footnote 3. *See* H.R. 5116, § 108(e)(2) (amending *11 U.S.C. § 104*), *reprinted in* Vol. E Collier on Bankruptcy, App. Pt. 9(a) (Matthew Bender 15th Ed. Rev.).

(n4)Footnote 4. *See* H.R. 5116, § 108(e)(2), (amending *11 U.S.C. § 104*), *reprinted in* Vol. E Collier on Bankruptcy, App. Pt. 9(b) (Matthew Bender 15th Ed. Rev.). For exemption amounts effective for cases filed on or after April 1, 2010, *see 75 Fed. Reg. 8748 (Feb. 25, 2010)* .

(n5)Footnote 5. *See 11 U.S.C. 522(f)(1) (A)*, which includes an exception stating that a debtor may not avoid judicial liens securing alimony, maintenance, or support obligations. *See also P 522.11[2], [3] and [4] supra*.

(n6)Footnote 6. *See 11 U.S.C. 522(f)(2)(A)*.

(n7)Footnote 7. *See 11 U.S.C. 522(f)(2)(B)*.

(n8)Footnote 8. *See 11 U.S.C. 522(f)(2)(C)*.

(n9)Footnote 9. *See 11 U.S.C. 522(f)(3)*.

(n10)Footnote 10. *See 11 U.S.C. 522(f)(3)*.

(n11)Footnote 11. *See § 522(f)(3)*.



6 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Intro INTRODUCTION The Significance of State Exemptions under the Bankruptcy Code

14-Intro Collier Bankruptcy Exemption Guide Intro.05

Intro.05. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

[1] Background

The Bankruptcy Reform Act of 1994, which revamped a large part of the Bankruptcy Code, also included a title creating a National Bankruptcy Review Commission to study the bankruptcy code and make suggestions with respect to further changes in the Code at the end of its two year term. n1

The Consumer Bankruptcy Working Group of the Bankruptcy Review Commission issued a memorandum on April 11, 1997 entitled "Expanded Proposal on Uniform Federal Exemptions." n2 The Working Group's memo stated "[w]hile bankruptcy law purportedly controls the ... entitlement to exemptions, the incomplete delegation of exemption law and policy has caused confusion, requiring reconciliation of state and federal laws." n3

Thus, the Review Commission proposed sweeping changes to exemption policy. These suggestions included having uniform federal exemptions, with no ability for the states to opt out, n4 a nationwide "lump sum property exemption" which could be used for different types of "necessary items" as well as property, n5 "exclusive homestead exemption policies for bankruptcy" n6 and the right to protect pension and retirement funds "held indirectly or directly in a trust that are exempt under *sections 408 or 501(a) of the Internal Revenue Code*" n7

On October 20, 1997, the National Bankruptcy Review Commission issued its final report entitled "Bankruptcy: The Next Twenty Years." Many sweeping changes were proposed in the Report's 1,300 pages. The first chapter contains the consumer bankruptcy proposals, some of which created much controversy with the recommendation that there be a more uniform homestead exemption. n8

Upon submission of the report, the Commission's work was formally over. The Commission, as mandated by the enabling statute, ceased to exist as of November 20, 1997. n9 Until 2005, multiple attempts were made to draft and enact legislation giving effect to or trying to overrule the Commission's report.

[2] 2005 Amendments Affecting Exemptions; § 522

[a] Exempt Property Available to Satisfy Section 523(a)(5) Debts

The 2005 amendments to the Code provided a first priority among unsecured debts to domestic support obligations.

These obligations may include debts owed to a spouse, former spouse or child of a debtor. n10 In addition, new section 522(c)(1) specifically provides that, notwithstanding any provision of applicable nonbankruptcy law to the contrary, exempt property shall be liable for a debt of a kind specified in section 523(a)(5). n11

[b] Retirement Funds Protected

The 2005 amendments to the Code provide the debtors will be permitted to exempt all funds in any account exempt from taxation under *sections 401, 403, 408, 408A, 414, 457 and 501(a) of the Internal Revenue Code*. There are exceptions, but, generally the new provisions protect retirement savings, and the protected funds are defined with more specificity. n12

[c] Domicile Requirements

The 2005 amendments to the Code provide that the applicable state law for purposes of claiming exemptions will be the place of the debtor's domicile for the 730 days before filing the bankruptcy petition. If the debtor did not maintain a domicile in a single state during that time, then the applicable law would be the place of the debtor's domicile for the majority of the 180-day period prior to the 730 days before filing the petition. n13

[d] Reduction of Homestead Exemption for Fraud

The 2005 amendments to the Code provide that the debtor's homestead exemption can be reduced to the extent it is attributable to nonexemptible property that the debtor disposed of within 10 years before the filing date of the bankruptcy petition with the intent to hinder, delay or defraud creditors. n14

[e] Household Good Definition Expanded

The 2005 amendments to the Code provide not only a list of what property would be categorized as household goods, but also includes a list of what property of the debtor cannot be claimed exempt as household goods for purposes of lien avoidance under section 522(f)(1)(B). n15

[f] Homestead Exemption Limitation

The 2005 amendments to the Code provide that the debtor may not exempt "any amount of interest" acquired by the debtor in the 1,215 days before the bankruptcy petition is filed that exceeds \$125,000 in a homestead or burial plot. The only exception to this limitation is the principal residence of a family farmer or to an interest transferred from a previous principal residence in the same state. Further, if the debtor has been convicted of a felony that proved that the bankruptcy case filing was an abuse of process or the debtor owes a debt arising from various securities statutes or from criminal, intentional, willful, or reckless misconduct that caused serious physical injury or death to another in the preceding five years, then the debtor may not exempt any amount of interest exceeding \$125,000 in homestead property. n16

FOOTNOTES:

(n1)Footnote 1. *See* Title VII, Bankruptcy Review Commission, *reprinted in* Vol. E Collier on Bankruptcy, App. Pt. 9(a) (Matthew Bender 15th Ed. Rev.).

(n2)Footnote 2. The Group invited comments from "all those interested in the consumer bankruptcy system."

(n3)Footnote 3. Consumer Bankruptcy Working Group of the Bankruptcy Review Commission, "Expanded Proposal on Uniform Federal Exemptions," at 4.

(n4)Footnote 4. *See* Consumer Bankruptcy Working Group of the Bankruptcy Review Commission, "Expanded

Proposal on Uniform Federal Exemptions," at 7.

(n5)Footnote 5. *See* Consumer Bankruptcy Working Group of the Bankruptcy Review Commission, "Expanded Proposal on Uniform Federal Exemptions," at 7.

(n6)Footnote 6. *See* Consumer Bankruptcy Working Group of the Bankruptcy Review Commission, "Expanded Proposal on Uniform Federal Exemptions," at 8-15.

(n7)Footnote 7. *See* Consumer Bankruptcy Working Group of the Bankruptcy Review Commission, "Expanded Proposal on Uniform Federal Exemptions," pgs 15-17.

(n8)Footnote 8. Commission Report, Chapter 1, 1.2.1, at 121-25, *reprinted in* Vol. G Collier on Bankruptcy, App. Pt. 44 (Matthew Bender 15th Ed. Rev.).

(n9)Footnote 9. Commission Report, pg. 74, *reprinted in* Vol. G Collier on Bankruptcy, App. Pt. 44 (Matthew Bender 15th Ed. Rev.).

(n10)Footnote 10. *11 U.S.C. § 507*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 212 (2005), effective in cases commenced on or after October 17, 2005.

(n11)Footnote 11. *2 11 U.S.C. § 522 (c)(1)*, as amended by Pub. L. 109-8, § 216 (2005), effective in cases commenced on or after October 17, 2005.

(n12)Footnote 12. *11 U.S.C. § 522(b)(3)(C), (b)(4), (b)(12)*, as amended by Pub. L. 109-8, § 224 (2005), effective in cases commenced on or after October 17, 2005.

(n13)Footnote 13. *11 U.S.C. § 522(b)(3)*, as amended by Pub. L. 109-8, § 307 (2005), effective in cases commenced on or after October 17, 2005.

(n14)Footnote 14. *11 U.S.C. § 522(o), (p), and (q)*, as amended by Pub. L. 109-8, § 308 (2005), effective in cases commenced filed on or after October 17, 2005.

(n15)Footnote 15. *11 U.S.C. § 522(f)(4)(A)-(B)*, as amended by Pub. L. 109-8, § 313 (2005), effective in cases commenced on or after October 17, 2005.

(n16)Footnote 16. *11 U.S.C. § 522(p) and (q)*, as amended by Pub. L. 109-8, § 322(a) (2005), effective in cases commenced on or after October 17, 2005; *see In re Larson*, 340 B.R. 444 (Bankr. D. Mass. 2006) (holding that "criminal act" in section 522(q)(B)(iv) does not require a conviction as is required under section 522 (q)(1)(A)).



7 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CA CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency Legislation Through Ch. 12 of the 2010 Regular Session

14-CA Collier Bankruptcy Exemption Guide CA.syn

§ CA.syn Synopsis to Chapter CA: CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency Legislation Through Ch. 12 of the 2010 Regular Session

§ CA.01 CALIFORNIA: DISCUSSION

§ CA.02 CALIFORNIA: CHECKLIST OF STATE EXEMPTIONS

§ CA.03 CALIFORNIA EXEMPTION STATUTES

§ CA.04 CALIFORNIA: BIBLIOGRAPHY



8 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CA CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency Legislation Through Ch. 12 of the 2010 Regular Session

14-CA Collier Bankruptcy Exemption Guide § CA.01

§ CA.01 CALIFORNIA: DISCUSSION

California has enacted legislation "opting out" of the federal exemptions. *Cal. Civ. Proc. Code § 703.130*. Therefore debtors in California are only permitted to exempt property under state law or federal law other than *11 U.S.C. § 522(d)*.

California law makes available two alternative sets of exemptions in bankruptcy cases. *Cal. Civ. Proc. Code § 703.140(a)* states that if a bankruptcy petition is filed, a debtor may utilize all the exemptions provided for in chapter 4 of title 9 of the California Code of Civil Procedure except for those listed in § 703.140(b); alternatively, a debtor may elect to utilize the § 703.140(b) exemptions in lieu of all other exemptions in the chapter, subject to the following conditions:

- (1) a husband and wife filing jointly must both elect the same alternative;
- (2) a married debtor filing individually can only elect the § 703.140(b) exemptions if both the debtor and the nonfiling spouse waive in writing the right to claim the other exemption alternative during the pendency of the case in any other bankruptcy case concerning either of them;
- (3) an unmarried debtor may elect either alternative, but not both.

Thus the alternatives are mutually exclusive and may not be combined on an individual petition, a joint petition, or on separate petitions filed simultaneously by married debtors. *Cal. Civ. Proc. Code § 703.140(b)* is based upon, and is practically identical in wording to, *11 U.S.C. § 522(d)* as it existed prior to being amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353.

Not explicitly addressed by § 703.140 is the extent of availability in bankruptcy proceedings of exemptions that are created by other chapters of California law. These exemptions are presented in the material that follows, but their effect in a bankruptcy context is unclear.

Editors' Comment

--One bankruptcy court has addressed the issue of whether credit union shares, exempt under California law, are exempt in a bankruptcy case. The court in *In re Petruzzelli*, 139 B.R. 241 (Bankr. E.D. Cal.

1992) , sustained the trustee's objection to the debtor's claim of exemption and held that "funds in credit union accounts are exempt only to the extent they are otherwise exempt []" under alternate provisions of California law. *139 B.R. 241, 242* .



9 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CA CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency Legislation Through Ch. 12 of the 2010 Regular Session

14-CA Collier Bankruptcy Exemption Guide § CA.02

§ CA.02 CALIFORNIA: CHECKLIST OF STATE EXEMPTIONS

The following exemptions are available to California debtors under California law:

Alimony, Maintenance and Support

-Exempt in the amount reasonably necessary for the support of debtor dependents -Cal. Civ. Proc. Code § 703.140(b)(10)(D)

Building Materials

-Debtor may exempt \$2,875 in materials for improvement of his principal place of residence -Cal. Civ. Proc. Code § 704.030

Cemeteries and Burial Funds

-Family plots are exempt; land held for purpose of sale as cemetery plots is not exempt -Cal. Civ. Proc. Code § 704.200

Claims for Negligence or Tortious Conduct

-A cause of action for personal injury or wrongful death is exempt; an award arising out of personal injury or wrongful death is exempt to the extent necessary for support of dependents except from a claim based on the providing of health care for the injury for which the award was made; if an award or settlement is payable periodically, the amount of such payments that may be applied to satisfy a judgment is that which may be withheld from a like amount of earnings under wage garnishment law -Cal. Civ. Proc. Code §§ 704.140 and .150

Crime Victim's Compensation

-Exempt -Cal. Civ. Proc. Code § 703.140(b)(11)(A)

Fidelity Bonds

-Money put up as a bond is exempt except in an action between an employer and employee or applicant -Cal. Lab. Code § 404

Fraternal Benefit Society Benefits

-Exempt

-Cal. Civ. Proc. Code §
704.170

Homestead or Residential Property

-Debtor who is a member of a family unit may exempt \$100,000 if at least one other family unit member owns no interest in homestead or only a community property interest with debtor; debtors over 55 with an income under \$15,000 (debtors without joint income) or \$20,000 (married debtors' joint income) may exempt \$175,000 if sale is involuntary; certain disabled debtors and debtors who are older than 65 may exempt \$175,000; all others may exempt \$75,000; spouses may not double the exemption; homestead may include but is not limited to: a house, a mobile home, a boat, or a condominium; proceeds exempt for six months

-Cal. Civ. Proc. Code §§
703.110, 704.710, .720 and
.730

Insurance Benefits

-Pursuant to Cal. Civ. Proc. Code § 704.100, unmaturing life insurance policies, but not the loan value, are exempt without making a claim; the aggregate loan value of unmaturing life insurance policies is exempt in the amount of \$11,475; if the debtor is married each spouse is entitled to a separate exemption which may be combined; benefits from mature life insurance policies are exempt to the extent necessary for support; Cal. Civ. Proc. Code § 704.130 provides exemptions for health and disability benefits; Cal. Civ. Proc. Code § 703.140 provides an alternative exemption of \$11,800 for unmaturing life insurance contracts, additional exemptions for other life insurance benefits, and exemptions for disability, unemployment, social security, veterans and other insurance benefits

-Cal. Civ. Proc. Code §§
703.140, 704.100 and 704.130

Miscellaneous Benefits

-All relocation benefits received from a public entity for displacement from a dwelling are exempt; financial aid for expenses while attending school provided by an institution of higher education is exempt; vacation credits accumulated by state employees are exempt

-Cal. Civ. Proc. Code §§
704.113, .180 and .190

Motor Vehicles

-Debtor may exempt \$2,725 in any combination of the aggregate equity in motor vehicles, the proceeds of an execution sale of a motor vehicle, and the proceeds of insurance or other indemnification for a motor vehicle; proceeds are exempt for 90 days after debtor actually receives them; no doubling of exemptions under Cal. Civ. Proc. Code § 704.010; Cal. Civ. Proc. Code § 703.140 provides an alternative exemption of \$3,525 in one motor vehicle

-Cal. Civ. Proc. Code §§
703.010 and 704.010

Partnership Property

-A partner is not a coowner of partnership property

-Cal. Corp. Code §§ 16501,

16503

Pension and Retirement Benefits

-Benefits under various public and private retirement plans are exempt except from judgments for child or spousal support

-Cal. Civ. Proc. Code §§ 704.110, .114 and .115; Cal. Gov't Code §§ 21255, 31452, 31913 and 32210; Cal. Pub. Util. Code §§ 12337, 25337, 28896, 50146, 95836 and 98196

Personal Property

-Pursuant to Cal. Civ. Proc. Code 703.140, debtor may exempt up to \$22,075 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; the debtor's interest, not to exceed \$550 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; jewelry is exempt up to \$1,425; any additional property worth \$1,175 is also exempt; necessary health aids are exempt; no doubling of exemptions; Cal. Civ. Proc. Code §§ 704.020, .040 and .050 provide alternative personal property exemptions, including an exemption of up to \$7,175 for jewelry, heirlooms, and works of art

-Cal. Civ. Proc. Code §§ 703.140, 704.020, .040 and .050

Prisoners' Property

-Funds held in trust for debtor confined in prison are exempt in the amount of \$1,425; if debtor is married each spouse is entitled to a separate exemption or the spouses may combine their exemptions

-Cal. Civ. Proc. Code § 704.090

Public Assistance

-Exempt

-Cal. Civ. Proc. Code § 704.170; Cal. Welf. & Inst. Code § 11002

Trade Implements

-Exempt up to \$7,175 under Cal. Civ. Proc. Code § 704.060 if used professionally by debtor or spouse; if used by debtor and spouse jointly in the exercise of the same business by which both earn a livelihood, the property is exempt up to \$14,350; such property may include tools, implements, materials, uniforms, furnishings, books, equipment, one commercial vehicle (limited in value to \$4,850 if used professionally by debtor and \$9,700 if used professionally by debtor and spouse jointly), and one vessel; Cal. Civ. Proc. Code § 703.140 provides an alternative exemption for \$2,200 for tools of the trade

-Cal. Civ. Proc. Code §§ 703.140 and 704.060

Trusts, Escrow and Deposit Account Property

-Escrow and trust funds exempt

-Cal. Fin. Code § 17410

Unemployment Compensation

-Exempt except from judgments for child or spousal support

-Cal. Civ. Proc. Code §
704.120

Wages

-One-half of the disposable earnings of the debtor, plus any amount withheld from the debtor's earnings pursuant to a wage assignment for support, is exempt from levy; upon motion of any interested party, the court shall make an equitable division of debtor's earnings, determining the amount to be withheld pursuant to the wage assignment for support

-Cal. Civ. Proc. Code §§
706.050, .051 and .052

Workers' Compensation

-Exempt except as otherwise provided in the Labor Code; up to 25% of temporary disability benefits may be withheld for support payments

-Cal. Civ. Proc. Code §
704.160; Cal. Lab. Code §
4901



10 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CA CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency
Legislation Through Ch. 12 of the 2010 Regular Session

14-CA Collier Bankruptcy Exemption Guide § CA.03

§ CA.03 CALIFORNIA EXEMPTION STATUTES

Cal. Civ. Proc. Code § 694.080. Exemptions

The exemptions from enforcement of a money judgment provided by this title do not apply to property levied upon or otherwise subjected to a lien prior to the operative date. Whether such property is exempt is determined by the exemptions provided by law at the time the lien was created.

Editors' Comment

--The operative date for this provision was July 1, 1983. This provision applies to all exemptions under Title 9, Enforcement of Judgments.

Cal. Civ. Proc. Code § 695.030. Property not subject to enforcement of money judgment

(a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

(b) The following property is subject to enforcement of a money judgment:

(1) An interest in a trust, to the extent provided by law.

(2) A cause of action for money or property that is the subject of a pending action or special proceeding.

Cal. Civ. Proc. Code § 703.010. Application of exemptions

14-CA Collier Bankruptcy Exemption Guide § CA.03

Except as otherwise provided by statute:

(a) The exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.

(b) The exemptions provided by this chapter or by any other statute do not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than a lien created pursuant to this division or pursuant to Title 6.5 (commencing with Section 481.010) (attachment).

Cal. Civ. Proc. Code § 703.020. Persons entitled to exemptions

(a) The exemptions provided by this chapter apply only to property of a natural person.

(b) The exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor or a person acting on behalf of the judgment debtor.

(2) In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.

Cal. Civ. Proc. Code § 703.030. Manner of claiming exemptions; effect of failure to claim

(a) An exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment.

(b) Except as otherwise specifically provided by statute, property that is described in this chapter or in any other statute as exempt without making a claim is not subject to any procedure for enforcement of a money judgment.

(c) Nothing in this section limits the authority of the court pursuant to Section 473 to relieve a person upon such terms as may be just from failure to claim an exemption within the time and in the manner prescribed in the applicable enforcement procedure.

Cal. Civ. Proc. Code § 703.040. Prior waiver of exemptions

A purported contractual or other prior waiver of the exemptions provided by this chapter or by any other statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is

sought, is against public policy and void.

Cal. Civ. Proc. Code § 703.050. Statutes governing exemptions

(a) The determination whether property is exempt or the amount of an exemption shall be made by application of the exemption statutes in effect (1) at the time the judgment creditor's lien on the property was created or (2) if the judgment creditor's lien on the property is the latest in a series of overlapping liens created when an earlier lien on the property in favor of the judgment creditor was in effect, at the time the earliest lien in the series of overlapping liens was created.

(b) This section applies to all judgments, whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of this section, and whether the judgment was entered before or after the operative date of this section.

(c) Notwithstanding subdivision (a), in the case of a levy of execution, the procedures to be followed in levying upon, selling, or releasing property, claiming, processing, opposing, and determining exemptions, and paying exemption proceeds, shall be governed by the law in effect at the time the levy of execution is made on the property.

Cal. Civ. Proc. Code § 703.060. Reserved power of state

(a) The Legislature finds and declares that generally persons who enter into contracts do not do so in reliance on an assumption that the exemptions in effect at the time of the contract will govern enforcement of any judgment based on the contract, that liens imposed on property are imposed not as a matter of right but as a matter of privilege granted by statute for purposes of priority, that no vested rights with respect to exemptions are created by the making of a contract or imposition of a lien, that application of exemptions and exemption procedures in effect at the time of enforcement of a judgment is essential to the proper balance between the rights of judgment debtors and judgment creditors and has a minimal effect on the economic stability essential for the maintenance of private and public faith in commercial matters, and that it is the policy of the state to treat all judgment debtors equally with respect to exemptions and exemption procedures in effect at the time of enforcement of a money judgment. To this end, the Legislature reserves the right to repeal, alter, or add to the exemptions and the procedures therefor at any time and intends, unless otherwise provided by statute, that any repeals, alterations, or additions apply upon their operative date to enforcement of all money judgments, whether based upon tort, contract, or other legal theory or cause of action that arose before or after the operative date of the repeals, alterations, or additions, whether the judgment was entered before or after the operative date of the repeals, alterations, or additions.

(b) All contracts shall be deemed to have been made and all liens on property shall be deemed to have been created in recognition of the power of the state to repeal, alter, and add to statutes providing for liens and exemptions from the enforcement of money judgments.

Cal. Civ. Proc. Code § 703.070. Application of exemptions where judgment is for child, family or spousal support

Except as otherwise provided by statute:

14-CA Collier Bankruptcy Exemption Guide § CA.03

(a) The exemptions provided by this chapter or by any other statute apply to a judgment for child, family, or spousal support.

(b) If property is exempt without making a claim, the property is not subject to being applied to the satisfaction of a judgment for child, family, or spousal support.

(c) Except as provided in subdivision (b), if property sought to be applied to the satisfaction of a judgment for child, family, or spousal support is shown to be exempt under subdivision (a) in appropriate proceedings, the court shall, upon noticed motion of the judgment creditor, determine the extent to which the exempt property nevertheless shall be applied to the satisfaction of the judgment. In making this determination, the court shall take into account the needs of the judgment creditor, the needs of the judgment debtor and all the persons the judgment debtor is required to support, and all other relevant circumstances. The court shall effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to the satisfaction of the judgment.

Cal. Civ. Proc. Code § 703.080. Tracing exempt funds

(a) Subject to any limitation provided in the particular exemption, a fund that is exempt remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent.

(b) The exemption claimant has the burden of tracing an exempt fund.

(c) The tracing of exempt funds in a deposit account shall be by application of the lowest intermediate balance principle unless the exemption claimant or the judgment creditor shows that some other method of tracing would better serve the interests of justice and equity under the circumstances of the case.

Cal. Civ. Proc. Code § 703.090. Costs in case of subsequent levy of exempt property

If a judgment creditor has failed to oppose a claim of exemption within the time allowed by Section 703.550 or if property has been determined by a court to be exempt, and the judgment creditor thereafter levies upon or otherwise seeks to apply the property toward the satisfaction of the same money judgment, the judgment creditor is not entitled to recover the subsequent costs of collection unless the property is applied to satisfaction of the judgment.

Cal. Civ. Proc. Code § 703.100. Time for determination of exemptions

(a) Subject to subdivision (b), the determination whether property is exempt shall be made under the circumstances existing at the earliest of the following times:

(1) The time of levy on the property.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(2) The time of the commencement of court proceedings for the application of the property to the satisfaction of the money judgment.

(3) The time a lien is created under Title 6.5 (commencing with Section 481.010) (attachment) or under this title.

(b) The court, in its discretion, may take into consideration any of the following changes that have occurred between the time of levy or commencement of enforcement proceedings or creation of the lien and the time of the hearing:

(1) A change in the use of the property if the exemption is based upon the use of property and if the property was used for the exempt purpose at the time of the levy or the commencement of enforcement proceedings or the creation of the lien but is used for a nonexempt purpose at the time of the hearing.

(2) A change in the value of the property if the exemption is based upon the value of property.

(3) A change in the financial circumstances of the judgment debtor and spouse and dependents of the judgment debtor if the exemption is based upon their needs.

Cal. Civ. Proc. Code § 703.110. Application of exemptions to marital property

If the judgment debtor is married:

(a) The exemptions provided by this chapter or by any other statute apply to all property that is subject to enforcement of a money judgment, including the interest of the spouse of the judgment debtor in community property. The fact that one or both spouses are judgment debtors under the judgment or that property sought to be applied to the satisfaction of the judgment is separate or community does not increase or reduce the number or amount of the exemptions. Where the property exempt under a particular exemption is limited to a specified maximum dollar amount, unless the exemption provision specifically provides otherwise, the two spouses together are entitled to one exemption limited to the specified maximum dollar amount, whether one or both of the spouses are judgment debtors under the judgment and whether the property sought to be applied to the satisfaction of the judgment is separate or community.

(b) If an exemption is required by statute to be applied first to property not before the court and then to property before the court, the application of the exemption to property not before the court shall be made to the community property and separate property of both spouses, whether or not such property is subject to enforcement of the money judgment.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(c) If the same exemption is claimed by the judgment debtor and the spouse of the judgment debtor for different property, and the property claimed by one spouse, but not both, is exempt, the exemption shall be applied as the spouses agree. If the spouses are unable to agree, the exemption shall be applied as directed by the court in its discretion.

Cal. Civ. Proc. Code § 703.115. Property taken into account in determining exemption

In determining an exemption based upon the needs of the judgment debtor and the spouse and dependents of the judgment debtor or an exemption based upon the needs of the judgment debtor and the family of the judgment debtor, the court shall take into account all property of the judgment debtor and, to the extent the judgment debtor has a spouse and dependents or family, all property of such spouse and dependents or family, including community property and separate property of the spouse, whether or not such property is subject to enforcement of the money judgment.

Cal. Civ. Proc. Code § 703.120. Continuing review of exemptions

(a) Ten years following the operative date of this title and every 10 years thereafter, the California Law Revision Commission shall review the exempt amounts provided in this chapter and in other statutes and recommend to the Governor and the Legislature any changes in exempt amounts that appear proper.

(b) Nothing in this section precludes the commission from making recommendations concerning exempt amounts more frequently than required by subdivision (a) or from making recommendations concerning any other aspect of this title, and the commission is authorized to maintain a continuing review of and submit recommendations concerning enforcement of judgments.

Cal. Civ. Proc. Code § 703.130. Exemptions in bankruptcy

Pursuant to the authority of paragraph (2) of subsection (b) of *Section 522 of Title 11 of the United States Code*, the exemptions set forth in subsection (d) of *Section 522 of Title 11 of the United States Code* (Bankruptcy) are not authorized in this state.

Editors' Comment

--An anti-alienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the section 541(c)(2) exclusion of property from the debtor's bankruptcy estate. See *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 26 C.B.C.2d 1119, reh'g denied, 505 U.S. 1239, 113 S. Ct. 13, 120 L. Ed. 2d 940 (1992); *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988). See also 4 *Collier on Bankruptcy*, P 522.09; 5 *Collier on Bankruptcy*, P 541.11 (Matthew Bender 15th Edition Revised).

Cal. Civ. Proc. Code § 703.140. Election of exemptions if bankruptcy petition is filed

(a) In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter including the homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

14-CA Collier Bankruptcy Exemption Guide § CA.03

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed twenty two thousand and seventy five dollars (\$22,075) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed three thousand five hundred and twenty five dollars (\$3,525) in value, in one motor vehicle.

(3) The debtor's interest, not to exceed five hundred fifty dollars (\$550) in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed one thousand four hundred and twenty five dollars (\$1,425) in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed in value one thousand one hundred and seventy five dollars (\$1,175) plus any unused amount of the exemption provided under paragraph (1), in any property.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(6) The debtor's aggregate interest, not to exceed two thousand two hundred dollars (\$2,200) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmaturred life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value eleven thousand eight hundred dollars (\$11,800), in any accrued dividend or interest under, or loan value of, any unmaturred life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive any of the following:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit.

(B) A veterans' benefit.

(C) A disability, illness, or unemployment benefit.

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(E) A payment under a stock bonus, pension, profit-sharing, 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, unless all of the following apply.

(i) That plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose.

(ii) The payment is on account of age or length of service.

(iii) That plan or contract does not qualify under *Section 401(a), 403(a), 403(b), 408 or 408A of the Internal Revenue Code of 1986*.

(11) The debtor's right to receive, or property that is traceable to, any of the following:

(A) An award under a crime victim's reparation law.

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of that individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(D) A payment, not to exceed twenty two thousand and seventy five dollars (\$22,075), on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.140(b) will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 703.150. Adjustment of dollar amounts in § 703.140(b), §§ 704.010 et seq.; Publication; Applicability

(a) On April 1, 2004, and at each three-year interval ending on April 1 thereafter, the dollar amounts of exemptions provided in subdivision (b) of Section 703.140 in effect immediately before that date shall be adjusted as provided in subdivision (d).

14-CA Collier Bankruptcy Exemption Guide § CA.03

(b) On April 1, 2007, and at each three-year interval ending on April 1 thereafter, the dollar amounts of exemptions provided in Article 3 (commencing with Section 704.010) in effect immediately before that date shall be adjusted as provided in subdivision (d).

(c) On April 1, 2010, and at each three-year interval ending on April 1 thereafter, the judicial council shall submit to the legislature the amount by which the dollar amounts of exemptions provided in subdivision (a) of section 704.730 in effect immediately before that date may be increased as provided in subdivision (d). Those increases shall not take effect unless they are approved by the legislature.

(d) The Judicial Council shall determine the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers, published by the Department of Industrial Relations, Division of Labor Statistics, for the most recent three-year period ending on December 31 preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars (\$25).

(e) Beginning April 1, 2004, the Judicial Council shall publish a list of the current dollar amounts of exemptions provided in subdivision (b) of Section 703.140 and in Article 3 (commencing with Section 704.010), together with the date of the next scheduled adjustment. In any year that the legislature votes to increase the exemptions provided in subdivision (a) of section 704.730, the judicial council shall publish a list of current dollar amounts of exemptions.

(f) Adjustments made under subdivision (a) do not apply with respect to cases commenced before the date of the adjustment, subject to any contrary rule applicable under the federal Bankruptcy Code. The applicability of adjustments made under subdivision (b) and (c) is governed by Section 703.050.

Cal. Civ. Proc. Code § 704.010. Motor vehicles

(a) Any combination of the following is exempt in the amount of two thousand seven hundred and twenty five dollars (\$2,725);

- (1) The aggregate equity in motor vehicles.
- (2) The proceeds of an execution sale of a motor vehicle.
- (3) The proceeds of insurance or other indemnification for the loss, damage, or destruction of a motor vehicle.

(b) Proceeds exempt under subdivision (a) are exempt for a period of 90 days after the time the proceeds are actually received by the judgment debtor.

(c) For the purpose of determining the equity, the fair market value of a motor vehicle shall be determined by reference to used car price guides customarily used by California automobile dealers unless the motor vehicle is not listed in such price guides.

(d) If the judgment debtor has only one motor vehicle and it is sold at an execution sale, the proceeds of the execution sale are exempt in the amount of two thousand five hundred fifty dollars (\$2,550) without making a claim. The levying officer shall consult and may rely upon the records of the Department of Motor Vehicles in determining whether the judgment debtor has only one motor vehicle. In the case covered by this subdivision, the exemption provided by subdivision (a) is not available.

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.010 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.020. Household furnishings and personal effects

(a) Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt in the following cases:

(1) If ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence.

(2) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if ordinarily and reasonably necessary to, and personally used or procured for use by, the spouse and members of the spouse's family at the spouse's principal place of residence.

(b) In determining whether an item of property is "ordinarily and reasonably necessary" under subdivision (a), the court shall take into account both of the following:

(1) The extent to which the particular type of item is ordinarily found in a household.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(2) Whether the particular item has extraordinary value as compared to the value of items of the same type found in other households.

(c) If an item of property for which an exemption is claimed pursuant to this section is an item of the type ordinarily found in a household but is determined not to be exempt because the item has extraordinary value as compared to the value of items of the same type found in other households, the proceeds obtained at an execution sale of the item are exempt in the amount determined by the court to be a reasonable amount sufficient to purchase a replacement of ordinary value if the court determines that a replacement is reasonably necessary. Proceeds exempt under this subdivision are exempt for a period of 90 days after the proceeds are actually received by the judgment debtor.

Cal. Civ. Proc. Code § 704.030. Materials for repair or improvement of residence

Material that in good faith is about to be applied to the repair or improvement of a residence is exempt if the equity in the material does not exceed two thousand eight hundred and seventy five dollars (\$2,875) in the following cases:

(a) If purchased in good faith for use in the repair or improvement of the judgment debtor's principal place of residence.

(b) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if purchased in good faith for use in the repair or improvement of the spouse's principal place of residence.

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.030 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.040. Jewelry, heirlooms, and works of art

Jewelry, heirlooms, and works of art are exempt to the extent that the aggregate equity therein does not exceed seven thousand one hundred and seventy five dollars (\$7,175).

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.040 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.050. Health aids

14-CA Collier Bankruptcy Exemption Guide § CA.03

Health aids reasonably necessary to enable the judgment debtor or the spouse or a dependent of the judgment debtor to work or sustain health, and prosthetic and orthopedic appliances, are exempt.

Cal. Civ. Proc. Code § 704.060. Personal property used in trade, business or profession

(a) Tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial motor vehicle, one vessel, and other personal property are exempt to the extent that the aggregate equity therein does not exceed:

(1) Seven thousand one hundred and seventy five dollars (\$7,175), if reasonably necessary to and actually used by the judgment debtor in the exercise of the trade, business, or profession by which the judgment debtor earns a livelihood.

(2) Seven thousand one hundred and seventy five dollars (\$7,175), if reasonably necessary to and actually used by the spouse of the judgment debtor in the exercise of the trade, business, or profession by which the spouse earns a livelihood.

(3) Fourteen thousand three hundred and fifty dollars (\$14,350), if reasonably necessary to and actually used by the judgment debtor and by the spouse of the judgment debtor in the exercise of the same trade, business, or profession by which both earn a livelihood. In the case covered by this paragraph, the exemptions provided in paragraphs (1) and (2) are not available.

(b) If property described in subdivision (a) is sold at an execution sale, or if it has been lost, damaged, or destroyed, the proceeds of the execution sale or of insurance or other indemnification are exempt for a period of 90 days after the proceeds are actually received by the judgment debtor or the judgment debtor's spouse. The amount exempt under this subdivision is the amount specified in subdivision (a) that applies to the particular case less the aggregate equity of any other property to which the exemption provided by subdivision (a) for the particular case has been applied.

(c) Notwithstanding subdivision (a), a motor vehicle is not exempt under subdivision (a) if there is a motor vehicle exempt under Section 704.010 which is reasonably adequate for use in the trade, business, or profession for which the exemption is claimed under this section.

(d) Notwithstanding subdivisions (a) and (b):

(1) The amount of the exemption for a commercial motor vehicle under paragraph (1) or (2) of subdivision (a) is limited to four thousand eight hundred fifty dollars (\$4,850).

(2) The amount of the exemption for a commercial motor vehicle under paragraph (3) of subdivision (a) is limited to nine thousand seven hundred dollars (\$9,700).

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.060 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.070. Paid earnings

(a) As used in this section:

(1) "Earnings withholding order" means an earnings withholding order under Chapter 5 (commencing with section 706.010) (Wage Garnishment Law).

(2) "Paid earnings" means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the levy. For the purposes of this paragraph, where earnings that have been paid to the employee are sought to be subjected to the enforcement of a money judgment other than by a levy, the date of levy is deemed to be the date the earnings were otherwise subjected to the enforcement of the judgment.

(3) "Earnings assignment order for support" means an earnings assignment order for support as defined in Section 706.011.

(b) Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:

(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

(2) Seventy-five percent of the paid earnings that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.

Cal. Civ. Proc. Code § 704.080. Deposit account in which public benefits or social security benefits are directly deposited

14-CA Collier Bankruptcy Exemption Guide § CA.03

(a) For the purposes of this section:

(1) "Deposit account" means a deposit account in which payments of public benefits or social security benefits are directly deposited by the government or its agent.

(2) "Social security benefits" means payments authorized by the Social Security Administration for regular retirement and survivors' benefits, supplemental security income benefits, coal miners' health benefits, and disability insurance benefits. "Public benefits" means aid payments authorized pursuant to subdivision (a) of Section 11450 of the Welfare and Institutions Code, payments for supportive services as described in Section 11323.2 of the Welfare and Institutions Code, and general assistance payments made pursuant to Section 17000.5 of the Welfare and Institutions Code.

(b) A deposit account is exempt without making a claim in the following amount:

(1) One thousand four hundred twenty five dollars (\$1,425) where one depositor is the designated payee of the directly deposited public benefits payments.

(2) Two thousand eight hundred seventy five dollars (\$2,875) where one depositor is the designated payee of directly deposited social security payments.

(3) Two thousand one hundred fifty dollars (\$2,150) where two or more depositors are the designated payees of the directly deposited public benefits payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (1) applies.

(4) Four thousand three hundred dollars (\$4,300) where two or more depositors are the designated payees of directly deposited social security payments, unless those depositors are joint payees of directly deposited payments that represent a benefit to only one of the depositors, in which case the exemption under paragraph (2) applies.

(c) The amount of a deposit account that exceeds the exemption provided in subdivision (b) is exempt to the extent that it consists of payments of public benefits or social security benefits.

(d) Notwithstanding Article 5 (commencing with Section 701.010) of Chapter 3, when a deposit account is levied upon or otherwise sought to be subjected to the enforcement of a money judgment, the financial institution that holds the deposit account shall either place the amount that exceeds the exemption provided in subdivision (b) in a suspense account or otherwise prohibit withdrawal of such amount pending notification of the failure of the judgment creditor to

file the affidavit required by this section or the judicial determination of the exempt status of the amount. Within 10 business days after the levy, the financial institution shall provide the levying officer with a written notice stating (1) that the deposit account is one in which payments of public benefits or social security benefits are directly deposited by the government or its agent and (2) the balance of the deposit account that exceeds the exemption provided by subdivision (b). Promptly upon receipt of the notice, the levying officer shall serve the notice on the judgment creditor. Service shall be made personally or by mail.

(e) Notwithstanding the procedure prescribed in Article 2 (commencing with Section 703.510), whether there is an amount exempt under subdivision (c) shall be determined as follows:

(1) Within five days after the levying officer serves the notice on the judgment creditor under subdivision (d), a judgment creditor who desires to claim that the amount is not exempt shall file with the court an affidavit alleging that the amount is not exempt and file a copy with the levying officer. The affidavit shall be in the form of the notice of opposition provided by Section 703.560, and a hearing shall be set and held, and notice given, as provided by Sections 703.570 and 703.580. For the purpose of this subdivision, the "notice of opposition to the claim of exemption" in Sections 703.570 and 703.580 means the affidavit under this subdivision.

(2) If the judgment creditor does not file the affidavit with the levying officer and give notice of hearing pursuant to Section 703.570 within the time provided in paragraph (1), the levying officer shall release the deposit account and shall notify the financial institution.

(3) The affidavit constitutes the pleading of the judgment creditor, subject to the power of the court to permit amendments in the interest of justice. The affidavit is deemed controverted and no counteraffidavit is required.

(4) At a hearing under this subdivision, the judgment debtor has the burden of proving that the excess amount is exempt.

(5) At the conclusion of the hearing, the court by order shall determine whether or not the amount of the deposit account is exempt pursuant to subdivision (c) in whole or in part and shall make an appropriate order for its prompt disposition. No findings are required in a proceeding under this subdivision.

(6) Upon determining the exemption claim for the deposit account under subdivision (c), the court shall immediately transmit a certified copy of the order of the court to the financial institution and to the levying officer. If the order determines that all or part of the excess is exempt under subdivision (c), with respect to the amount of the excess which is exempt, the financial institution shall transfer the exempt excess from the suspense account or otherwise release any restrictions on its withdrawal by the judgment debtor. The transfer or release shall be effected within three business days of the receipt of the certified copy of the court order by the financial institution.

(f) If the judgment debtor claims that a portion of the amount is exempt other than pursuant to subdivision (c), the claim of exemption shall be made pursuant to Article 2 (commencing with Section 703.510). If the judgment debtor also opposes the judgment creditor's affidavit regarding an amount exempt pursuant to subdivision (c), both exemptions shall be determined at the same hearing, provided the judgment debtor has complied with Article 2 (commencing with Section 703.510).

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.080 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.090. Inmate's trust account

(a) The funds of a judgment debtor confined in a prison or facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority or confined in any county or city jail, road camp, industrial farm, or other local correctional facility, held in trust for or to the credit of the judgment debtor, in an inmate's trust account or similar account by the state, county, or city, or any agency thereof, are exempt without making a claim in the amount of one thousand four hundred twenty five dollars (\$1,425). If the judgment debtor is married, each spouse is entitled to a separate exemption under this section or the spouses may combine their exemptions.

(b) Notwithstanding subdivision (a), if the judgment is for a restitution fine or order imposed pursuant to subdivision (a) of Section 13967 of the Government Code, as operative on or before September 28, 1994, or Section 1203.04 of the Penal Code, as operative on or before August 2, 1995, or Section 1202.4 of the Penal Code, the funds held in trust for, or to the credit of, a judgment debtor described in subdivision (a) are exempt in the amount of three hundred dollars (\$300) without making a claim.

The exemption provided in this subdivision is not subject to adjustment under Section 703.150.

Cal. Civ. Proc. Code § 704.100. Life insurance policies

(a) Unmatured life insurance policies (including endowment and annuity policies), but not the loan value of such policies, are exempt without making a claim.

(b) The aggregate loan value of unexpired life insurance policies (including endowment and annuity policies) is subject to the enforcement of a money judgment but is exempt in the amount of eleven thousand four hundred seventy five dollars (\$11,475). If the judgment debtor is married, each spouse is entitled to a separate exemption under this subdivision, and the exemptions of the spouses may be combined, regardless of whether the policies belong to either or both spouses and regardless of whether the spouse of the judgment debtor is also a judgment debtor under the judgment. The exemption provided by this subdivision shall be first applied to policies other than the policy before the court and then, if the exemption is not exhausted, to the policy before the court.

(c) Benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

Editors' Comment

--Pursuant to § 703.150, the dollar amounts of exemptions provided in § 704.100 will be adjusted at three year intervals ending on April 1, with the amount of the adjustment based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three year period ending on the preceding December 31. The most recent adjustment of exemption amounts became effective on April 1, 2010.

Cal. Civ. Proc. Code § 704.110. Public retirement and related benefits and contributions

(a) As used in this section:

(1) "Public entity" means the state, or a city, city and county, county, or other political subdivision of the state, or a public trust, public corporation, or public board, or the governing body of any of them, but does not include the United States except where expressly so provided.

(2) "Public retirement benefit" means a pension or an annuity, or a retirement, disability, death, or other benefit, paid or payable by a public retirement system.

(3) "Public retirement system" means a system established pursuant to statute by a public entity for retirement, annuity, or pension purposes or payment of disability or death benefits.

(b) All amounts held, controlled, or in process of distribution by a public entity derived from contributions by the public entity or by an officer or employee of the public entity for public retirement benefit purposes, and all rights and benefits accrued or accruing to any person under a public retirement system, are exempt without making a claim.

(c) Notwithstanding subdivision (b), where an amount described in subdivision (b) becomes payable to a person and is sought to be applied to the satisfaction of a judgment for child, family, or spousal support against that person:

(1) Except as provided in paragraph (2) and (3), the amount is exempt only to the extent that the court determines under subdivision (c) of Section 703.070.

(2) If the amount sought to be applied to the satisfaction of the judgment is payable periodically, the amount payable is subject to an earnings assignment order for support as defined in Section 706.011 or any other applicable enforcement

14-CA Collier Bankruptcy Exemption Guide § CA.03

procedure, but the amount to be withheld pursuant to the assignment order or other procedure shall not exceed the amount permitted to be withheld on an earnings withholding order for support under Section 706.052. The paying entity may deduct from each payment made pursuant to an earnings assignment order under this paragraph an amount reflecting the actual cost of administration caused by the assignment order up to two dollars (\$2) for each payment.

(3) If the intercept procedure provided for in Section 11357 of the Welfare and Institutions Code is used for benefits that are payable periodically, the amount to be withheld shall not exceed the amount permitted to be withheld on an earnings withholding order for support under Section 706.052.

(4) If the amount sought to be applied to the satisfaction of the judgment is payable as a lump-sum distribution, the amount payable is subject to the intercept procedure provided in Section 11357 of the Welfare and Institutions Code of any other applicable enforcement procedure.

(d) All amounts received by any person, a resident of the state, as a public retirement benefit or as a return of contributions and interest thereon from the United States or a public entity or from a public retirement system are exempt.

Cal. Civ. Proc. Code § 704.113. Public employee vacation credits

(a) As used in this section, "vacation credits" means vacation credits accumulated by a state employee pursuant to Section 18050 of the Government Code or by any other public employee pursuant to any law for the accumulation of vacation credits applicable to the employee.

(b) All vacation credits are exempt without making a claim.

(c) Amounts paid periodically or as a lump sum representing vacation credits are subject to any earnings withholding order served under Chapter 5 (commencing with Section 706.010) or any earnings assignment order for support as defined in Section 706.011 and are exempt to the same extent as earnings of a judgment debtor.

Cal. Civ. Proc. Code § 704.114. Compliance with order of earnings assignment

(a) Notwithstanding any other provision of law, service of an earnings assignment order for support or an order or notice to withhold income for child support on any public entity described in Section 704.110, other than the United States government, creates a lien on all employee contributions in the amount necessary to satisfy a support judgment as determined under Section 695.210 to the extent that the judgment remains unenforceable.

(b) The public entity shall comply with any request for a return of employee contributions by an employee named in the order or notice to withhold by delivering the contributions to the clerk of the court in which the support order was awarded or last registered, unless the entity has received a certified copy of an order or administrative notice terminating

the earnings assignment order for support.

(c) Upon receipt of moneys pursuant to this section, the clerk of the court, within 10 days, shall send written notice of the receipt of the deposit to the parties and to the local child support agency enforcing any order pursuant to Section 17400 of the Family Code.

(d) Moneys received pursuant to this section are subject to any procedure available to enforce an order for support, but if no enforcement procedure is commenced after 30 days have elapsed from the date the notice of receipt is sent, the clerk shall, upon request, return the moneys to the public entity that delivered the moneys to the court unless the public entity has informed the court in writing that the moneys shall be released to the employee.

(e) A court shall not directly or indirectly condition the issuance, modification, or termination of, or condition the terms or conditions of, any order for support upon the making of a request for the return of employee contributions by an employee.

Cal. Civ. Proc. Code § 704.115. Private retirement and related benefits and contributions

Editors' Comment

--An anti-alienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the section 541(c)(2) exclusion of property from the debtor's bankruptcy estate. *See Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 26 C.B.C.2d 1119, reh'g denied, 505 U.S. 1239, 113 S. Ct. 13, 120 L. Ed. 2d 940 (1992); *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988). *See also* 4 *Collier on Bankruptcy*, P 522.09; 5 *Collier on Bankruptcy*, P 541.11 (Matthew Bender 15th Edition Revised).

(a) As used in this section, "private retirement plan" means:

(1) Private retirement plans, including, but not limited to, union retirement plans.

(2) Profit-sharing plans designed and used for retirement purposes.

(3) Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code of 1986 as amended, including individual retirement accounts qualified under section 408 or 408A of that code, to the extent the amounts held in the plans, annuities, or accounts do not exceed the maximum amounts exempt from federal income taxation under that code.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(b) All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.

(c) Notwithstanding subdivision (b), where an amount described in subdivision (b) becomes payable to a person and is sought to be applied to the satisfaction of a judgment for child, family, or spousal support against that person:

(1) Except as provided in paragraph (2), the amount is exempt only to the extent that the court determines under subdivision (c) of Section 703.070.

(2) If the amount sought to be applied to the satisfaction of the judgment is payable periodically, the amount payable is subject to an earnings assignment order for support as defined in Section 706.011 or any other applicable enforcement procedure, but the amount to be withheld pursuant to the assignment order or other procedure shall not exceed the amount permitted to be withheld on an earnings withholding order for support under Section 706.052.

(d) After payment, the amounts described in subdivision (b) and all contributions and interest thereon returned to any member of a private retirement plan are exempt.

(e) Notwithstanding subdivisions (b) and (d), except as provided in subdivision (f), the amounts described in paragraph (3) of subdivision (a) are exempt only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires. In determining the amount to be exempt under this subdivision, the court shall allow the judgment debtor such additional amount as is necessary to pay any federal and state income taxes payable as a result of the applying of an amount described in paragraph (3) of subdivision (a) to the satisfaction of the money judgment.

(f) Where the amounts described in paragraph (3) of subdivision (a) are payable periodically, the amount of the periodic payment that may be applied to the satisfaction of a money judgment is the amount that may be withheld from a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law). To the extent a lump-sum distribution from an individual retirement account is treated differently from a periodic distribution under this subdivision, any lump-sum distribution from an account qualified under *Section 408A of the Internal Revenue Code* shall be treated the same as a lump-sum distribution from an account qualified under *Section 408 of the Internal Revenue Code* for purposes of determining whether any of that payment may be applied to the satisfaction of a money judgment.

Cal. Civ. Proc. Code § 704.120. Unemployment benefits and contributions; strike benefits

(a) Contributions by workers payable to the Unemployment Compensation Disability Fund and by employers payable to

the Unemployment Fund are exempt without making a claim.

(b) Before payment, amounts held for payment of the following benefits are exempt without making a claim:

(1) Benefits payable under Division 1 (commencing with Section 100) of the Unemployment Insurance Code.

(2) Incentives payable under Division 2 (commencing with Section 5000) of the Unemployment Insurance Code.

(3) Benefits payable under an employer's plan or system to supplement unemployment compensation benefits of the employees generally or for a class or group of employees.

(4) Unemployment benefits payable by a fraternal organization to its bona fide members.

(5) Benefits payable by a union due to a labor dispute.

(c) After payment, the benefits described in subdivision (b) are exempt.

(d) During the payment of benefits described in paragraph (1) of subdivision (b) to a judgment debtor under a support judgment, the judgment creditor may, through the appropriate local child support agency, seek to apply the benefit payment to satisfy the judgment as provided by Section 17518 of the Family Code.

(e) During the payment of benefits described in paragraphs (2) to (5), inclusive, of subdivision (b) to a judgment debtor under a support judgment, the judgment creditor may, directly or through the appropriate local child support agency, seek to apply the benefit payments to satisfy the judgment by an earnings assignment order for support as defined in Section 706.011 or any other applicable enforcement procedure. If the benefit is payable periodically, the amount to be withheld pursuant to the assignment order or other procedure shall be 25 percent of the amount of each periodic payment or any lower amount specified in writing by the judgment creditor or court order, rounded down to the nearest whole dollar. Otherwise the amount to be withheld shall be the amount the court determines under subdivision (c) of Section 703.070. The paying entity may deduct from each payment made pursuant to an assignment order under this subdivision an amount reflecting the actual cost of administration caused by the assignment order up to two dollars (\$2) for each payment.

Cal. Civ. Proc. Code § 704.130. Disability and health benefits

14-CA Collier Bankruptcy Exemption Guide § CA.03

(a) Before payment, benefits from a disability or health insurance policy or program are exempt without making a claim. After payment, the benefits are exempt.

(b) Subdivision (a) does not apply to benefits that are paid or payable to cover the cost of health care if the judgment creditor is a provider of health care whose claim is the basis on which the benefits are paid or payable.

(c) During the payment of disability benefits described in subdivision (a) to a judgment debtor under a support judgment, the judgment creditor or local child support agency may seek to apply the benefit payments to satisfy the judgment by an earnings assignment order for support, as defined in Section 706.011, or any other applicable enforcement procedure, but the amount to be withheld pursuant to the earnings assignment order or other procedure shall not exceed the amount permitted to be withheld on an earnings assignment order for support under Section 706.052.

Cal. Civ. Proc. Code § 704.140. Damages for personal injury

(a) Except as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for personal injury is exempt without making a claim.

(b) Except as provided in subdivisions (c) and (d), an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

(c) Subdivision (b) does not apply if the judgment creditor is a provider of health care whose claim is based on the providing of health care for the personal injury for which the award or settlement was made.

(d) Where an award of damages or a settlement arising out of personal injury is payable periodically, the amount of such periodic payment that may be applied to the satisfaction of a money judgment is the amount that may be withheld from a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

Cal. Civ. Proc. Code § 704.150. Damages for wrongful death

(a) Except as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for wrongful death is exempt without making a claim.

(b) Except as provided in subdivision (c), an award of damages or a settlement arising out of the wrongful death of the judgment debtor's spouse or a person on whom the judgment debtor or the judgment debtor's spouse was dependent is exempt to the extent reasonably necessary for support of the judgment debtor and the spouse and dependents of the judgment debtor.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(c) Where an award of damages or a settlement arising out of the wrongful death of the judgment debtor's spouse or a person on whom the judgment debtor or the judgment debtor's spouse was dependent is payable periodically, the amount of such a periodic payment that may be applied to the satisfaction of a money judgment is the amount that may be withheld from a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

Cal. Civ. Proc. Code § 704.160. Workers' compensation; exceptions

(a) Except as provided by Chapter 1 (commencing with Section 4900) of Part 3 of Division 4 of the Labor Code, before payment, a claim for workers' compensation or workers' compensation awarded or adjudged is exempt without making a claim. Except as specified in subdivision (b), after payment, the award is exempt.

(b) Notwithstanding any other provision of law, during the payment of workers' compensation temporary disability benefits described in subdivision (a) to a support judgment debtor, the support judgment creditor may, through the appropriate district attorney, seek to apply the workers' compensation temporary disability benefit payment to satisfy the support judgment as provided by Section 17404 of the Family Code.

(c) Notwithstanding any other provision of law, during the payment of workers' compensation temporary disability benefits described in subdivision (a) to a support judgment debtor under a support judgment, including a judgment for reimbursement of public assistance, the judgment creditor may, directly or through the appropriate district attorney, seek to apply the temporary disability benefit payments to satisfy the support judgment by an earnings assignment order for support, as defined in Section 5208 of the Family Code, or any other applicable enforcement procedure. The amount to be withheld pursuant to the earnings assignment order for support or other enforcement procedure shall be 25 percent of the amount of each periodic payment or any lower amount specified in writing by the judgment creditor or court order, rounded down to the nearest dollar. Otherwise, the amount to be withheld shall be the amount the court determines under subdivision (c) of Section 703.070. The paying entity may deduct from each payment made pursuant to an order assigning earnings under this subdivision an amount reflecting the actual cost of administration of this assignment, up to two dollars (\$2) for each payment.

(d) Unless the provision or context otherwise requires, the following definitions govern the construction of this section.

(1) "Judgment debtor" or "support judgment debtor" means a person who is owing a duty of support.

(2) "Judgment creditor" or "support judgment creditor" means the person to whom support has been ordered to be paid.

(3) "Support" refers to an obligation owing on behalf of a child, spouse, or family; or an amount owing pursuant to

14-CA Collier Bankruptcy Exemption Guide § CA.03

Section 17402 of the Family Code. It also includes past due support or arrearage when it exists.

Cal. Civ. Proc. Code § 704.170. Aid provided to needy persons

Before payment, aid provided pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code or similar aid provided by a charitable organization or a fraternal benefit society as defined in section 10990 of the Insurance Code, is exempt without making a claim. After payment, the aid is exempt.

Cal. Civ. Proc. Code § 704.180. Relocation benefits

Before payment, relocation benefits for displacement from a dwelling which are to be paid pursuant to Chapter 16 (commencing with Section 7260) of Division 7 of Title 1 of the Government Code or the federal "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" (*42 U.S.C. Sec. 4601 et seq.*), as amended, are exempt without making a claim. After payment, the benefits are exempt.

Cal. Civ. Proc. Code § 704.190. Financial aid provided to student by educational institution

(a) As used in this section, "institution of higher education" means "institution of higher education" as defined in *Section 1141(a) of Title 20 of the United States Code*, as amended.

(b) Before payment, financial aid for expenses while attending school provided to a student by an institution of higher education is exempt without making a claim. After payment, the aid is exempt.

Cal. Civ. Proc. Code § 704.200. Cemetery plots

(a) As used in this section:

(1) "Cemetery" has the meaning provided by Section 7003 of the Health and Safety Code.

(2) "Family plot" is a plot that satisfies the requirements of Section 8650 of the Health and Safety Code.

(3) "Plot" has the meaning provided by Section 7022 of the Health and Safety Code.

(b) A family plot is exempt without making a claim.

(c) Except as provided in subdivision (d), a cemetery plot for the judgment debtor and the spouse of the judgment debtor is exempt.

(d) Land held for the purpose of sale or disposition as cemetery plots or otherwise is not exempt.

Cal. Civ. Proc. Code § 704.210. Property not subject to enforcement of money judgment

Property that is not subject to enforcement of a money judgment is exempt without making a claim.

Cal. Civ. Proc. Code § 704.710. Definitions

As used in this article:

(a) "Dwelling" means a place where a person resides and may include but is not limited to the following:

(1) A house together with the outbuildings and the land upon which they are situated.

(2) A mobilehome together with the outbuildings and the land upon which they are situated.

(3) A boat or other waterborne vessel.

(4) A condominium, as defined in Section 783 of the Civil Code.

(5) A planned development, as defined in Section 11003 of the Business and Professions Code.

(6) A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code.

(7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

(b) "Family unit" means any of the following:

(1) The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

(2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

(A) The minor child or minor grandchild of the judgment debtor or the judgment debtor's spouse or the minor child or grandchild of a deceased spouse or former spouse.

(B) The minor brother or sister of the judgment debtor or judgment debtor's spouse or the minor child of a deceased brother or sister of either spouse.

(C) The father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor's spouse or the father, mother, grandfather, or grandmother of a deceased spouse.

(D) An unmarried relative described in this paragraph who has attained the age of majority and is unable to take care of or support himself or herself.

(3) The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Where exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by Section 704.720, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired.

(d) "Spouse" does not include a married person following entry of a judgment decreeing legal separation of the parties, unless such married persons reside together in the same dwelling.

Cal. Civ. Proc. Code § 704.720. Exemption from sale; Exemption of sale proceeds or indemnification

(a) A homestead is exempt from sale under this division to the extent provided in Section 704.800.

14-CA Collier Bankruptcy Exemption Guide § CA.03

(b) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. The proceeds are exempt for a period of six months after the time the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) If a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, that judgment debtor continues to be entitled to an exemption under this article until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time period as specified by court order. Nothing in this subdivision shall entitle the judgment debtor to more than one exempt homestead. Notwithstanding subdivision (d) of Section 704.710, for purposes of this article, "spouse" may include a separated or former spouse consistent with this subdivision.

Cal. Civ. Proc. Code § 704.730. Amount of homestead exemption

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial

gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than fifteen thousand dollars (\$15,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than twenty thousand dollars (\$20,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Cal. Civ. Proc. Code § 704.740. Court order for sale; exemption claim where court order for sale not required

(a) Except as provided in subdivision (b), the interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Cal. Corp. Code § 16504. Judgment

(a) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or that the circumstances of the case may require.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may

order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed in any of the following manners:

(1) By the judgment debtor.

(2) With property other than partnership property, by one or more of the other partners.

(3) With partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.

(d) This chapter does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

Cal. Fin. Code § 17410. Exemption of escrow and trust funds

(a) Escrow or trust funds are not subject to enforcement of a money judgment arising out of any claim against the licensee or person acting as escrow agent, and in no instance shall such escrow or trust funds be considered or treated as an asset of the licensee or person performing the functions of an escrow agent.

(b) Interest paid or payable on funds deposited in escrow by a licensee are not subject to enforcement of a money judgment arising out of any claim against the licensee or person acting as escrow agent.

Cal. Gov't Code § 21255. Exemption from process; unassignability

The right of a person to any benefit or other right under this part and the money in the retirement fund are not subject to execution or any process whatsoever except to the extent permitted by Section 704.110 of the Code of Civil Procedure, and are unassignable, except as specifically provided in this part.

Editors' Comment

--This provision refers to the Public Employees' Retirement System. *See Cal. Gov't Code §§ 20000 et seq.* (1980 and Supp. 1983). For substantially similar exemption provisions which apply to other pension and retirement systems, *see Cal. Gov't. Code §§ 31452* (1968) (County Employees' Retirement Fund);

14-CA Collier Bankruptcy Exemption Guide § CA.03

31913 (1968) (County Peace Officers' Retirement Fund); and 32210 (1968) (County Fire Service Retirement Fund); *Cal. Pub. Util. Code* §§ 12337 (municipal utility district officers and employees); 25337 (Alameda or Contra Costa county transit district employees); 28896 (San Francisco Bay Area Rapid Transit District employees); 50146 (San Joaquin Regional Transit District employees); 95836 (Santa Barbara Metropolitan Transit District employees); 98196 (Santa Cruz Metropolitan Transit District employees). The foregoing provisions expressly provide that the exemptions thereunder are allowed to the extent permitted by *Cal. Civ. Proc. Code*. § 704.110, *supra* .

Cal. Lab. Code § 404. Exemption of money put up as bond; Disposition

Any money put up as a bond under Sections 401, 402 and 403:

(a) Is not subject to enforcement of a money judgment except in an action between the employer and the employee or applicant, or their successors or assigns.

(b) Shall be returned to the employee or applicant together with accrued interest thereon, immediately upon the return of the money or property entrusted to the employee or applicant and upon the fulfillment of the agreement, subject only to the deduction necessary to balance accounts between the employer and employee or applicant.

Editors' Comment

--This provision refers to any bond that an employer requires employees or applicants to post.

Cal. Lab. Code § 4901. Claim or Compensation not subject to debts

No claim for compensation nor compensation awarded, adjudged, or paid, is subject to be taken for the debts of the party entitled to such compensation except as hereinafter provided.

Editors' Comment

--This provision refers to workers' compensation benefits. *See Cal. Lab. Code* §§ 3201 *et seq.*

Cal. Unemp. Ins. Code § 988. Employer's assets in case of insolvency or bankruptcy as not including workers' contributions

In case of the insolvency or bankruptcy of an employer, contributions by workers, payable as provided in this article, shall not be considered any part of the employer's assets and shall be paid to the director prior to the payment of any other claim against the employer.

Cal. Welf. & Inst. Code § 11002. Inalienability of aid

All aid given under a public assistance program shall be absolutely inalienable by any assignment, sale, or otherwise.



11 of 85 DOCUMENTS

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CA CALIFORNIA Exemptions Current Through 2009-2010 Extraordinary Sessions 1-5, 7, and 8, and Urgency Legislation Through Ch. 12 of the 2010 Regular Session

14-CA Collier Bankruptcy Exemption Guide § CA.04

§ CA.04 CALIFORNIA: BIBLIOGRAPHY

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12 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide Survey.syn

§ Survey.syn Synopsis to Appendix Survey: Survey of States Recognizing Tenancy by the Entireties Exemption

Scope

AL ALASKA

AR ARKANSAS

DE DELAWARE

DC DISTRICT OF COLUMBIA

FL FLORIDA

HI HAWAII

IL ILLINOIS

IN INDIANA

KY KENTUCKY

MD MARYLAND

MA MASSACHUSETTS

MI MICHIGAN

MS MISSISSIPPI

MO MISSOURI

NJ NEW JERSEY

NY NEW YORK

NC NORTH CAROLINA

OH OHIO

OR OREGON

PA PENNSYLVANIA

RI RHODE ISLAND

TN TENNESSEE

VT VERMONT

VA VIRGINIA

VI VIRGIN ISLANDS

WY WYOMING



13 of 85 DOCUMENTS

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide Scope

Scope

11 U.S.C. section 522(b)(3)(B) provides that a debtor electing state exemptions may exempt:

any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.



14 of 85 DOCUMENTS

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

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AL ALASKA

Tenancies by the entirety with the right of survivorship are accorded statutory recognition. Alaska Stat. § 34.15.140.

With an exception for property held in a community property trust in accordance with the requirements of Alaska law or unless it is expressly declared otherwise in the conveyance or devise, a husband and wife who acquire title in real property hold the estate as tenants by the entirety. Alaska Stat. § 34.15.110.



15 of 85 DOCUMENTS

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide AR

AR ARKANSAS

Arkansas recognizes tenancies by the entirety, including tenancies by the entirety in personal property.

Ramsey v. Ramsey, 531 S.W.2d 28 (Ark. 1975); *Lowe v. Morrison*, 711 S.W.2d 833 (Ark. 1986) *Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996).

However, creditors may execute on a debtor-spouse's interest in a tenancy by the entirety.

Sieb's Hatcheries, Inc. v. Lindley, 111 F. Supp. 705 (W.D. Ark. 1953) *aff'd*, 209 F.2d 674 (8th Cir. 1954).

Once property is placed in the names of both husband and wife without specifying the manner in which they take, such property is presumed to be held by them as tenants by the entirety.

Jablonski v. Jablonski, 71 Ark. App. 33, 25 S.W.3d 433 (2000).

A third party may execute against a debtor spouse's interest in a tenancy by the entirety, subject to the nondebtor spouse's continued rights of possession, survivorship, and interest in half the rents and profits. Thus, an Arkansas debtor's interest as a tenant by the entirety would not be exempt under section 522(b)(2)(B), but would be subject to a nondebtor-spouse's rights.

Morris v. Solesbee, 892 S.W.2d 281 (Ark. App. 1995).



16 of 85 DOCUMENTS

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide DE

DE DELAWARE

Delaware continues to recognize some form of tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors.

Citizens Sav. Bank Inc. v. Astrin, 44 Del. 451, 61 A.2d 419 (Del. Super. Ct. 1948).

However, when the petition lists joint obligations of the debtor and spouse, a debtor may exempt under section 522(b)(2)(B) only that interest in entireties property which exceeds the amount of the joint obligations.

In re Hovatter, 25 B.R. 123 (Bankr. D. Del. 1982).

The tenancy by the entirety is recognized in both real and personal property. The personal property may include household goods jointly acquired during the marriage. Nonexempt property may be converted into property that is exempt by virtue of being held in a tenancy by the entirety.

Gayl v. Shader (In the Matter of Shader), 90 B.R. 85 (Bankr. D. Del. 1988).



17 of 85 DOCUMENTS

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide DC

DC DISTRICT OF COLUMBIA

The District of Columbia continues to recognize some form of tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors. Accordingly, a debtor's tenancy by the entirety interest may be exempted, pursuant to section 522(b)(2)(B), in bankruptcy proceedings. *In re Estate of Wall*, 440 F.2d 215 (D.C. Cir. 1971); *Travis v. Benson*, 360 A.2d 506, 509 (D.C. App. 1976); *see also* D.C. Code Ann. §15-502.



18 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide FL

FL FLORIDA

Florida continues to recognize tenancies by the entirety, including tenancies by the entirety in personal property, and to hold such interests exempt from the claims of creditors.

Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45 (Fla. 2001). *U.S. v. One Single Family Residence Without Buildings*, 894 F.2d 1511 (11th Cir. 1990); *U.S. v. Gurlley*, 415 F.2d 144 (5th Cir. 1969); *Miller v. Rosenthal*, 510 So.2d 1127 (Fla. Dist. Ct. App. 1987); *First Nat'l Bank v. Hector Supply Co.*, 254 So.2d 777 (Fla. 1971) (opinion "receded from" determination regarding presumption of tenancy by entireties for personal property to the extent inconsistent with *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45 (Fla. 2001)).

When property is held in a tenancy by the entireties, only the creditors of both spouses jointly may attach the entireties property; the property is not divisible on behalf of one spouse alone and cannot be reached to satisfy the obligation of only one spouse.

Buckeye Ret. Co., LLC, Ltd. v. Nassau Land & Trading Co., 943 So. 2d 223 (Fla. Dist. Ct. App. 1st Dist. 2006).

When real property is acquired specifically in the name of a husband and wife, a tenancy by the entireties is created, although fraud may be proven. With respect to personal property, the Florida Supreme Court has recently declined to follow an earlier view that held, in an action by the creditor of one

Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45 (Fla. 2001).

14a-Survey Collier Bankruptcy Exemption Guide FL

spouse seeking to garnish a joint bank account titled in the name of both spouses where the unities required to establish ownership as a tenancy by the entireties exist: (1) a presumption arises that shifts the burden to the creditor to prove that the subject account was not held as a tenancy by the entireties; (2) if the account signature card expressly states that the account is owned as a joint tenancy with right of survivorship, that statement alone does not constitute an express disclaimer that the account is not held as a tenancy by the entireties; and (3) if the signature card expressly disclaims the tenancy by the entireties form of ownership, the debtor may resort to extrinsic evidence to prove that a tenancy by the entireties was intended if the debtor establishes that the financial institution did not offer a tenancy by the entireties form of account ownership.

The tenants by the entireties concept as applied to personal property requires some proof of intent beyond mere testimony of the debtor or spouse. The debtors must prove that the tenancy was not a "hurried, after the fact creation" used to insulate property from creditors' claims.

In re Stanley, 122 B.R. 599 (Bankr. M.D. Fla. 1990); *see also Hurlbert v. Shackleton*, 560 So.2d 1276 (Fla. Dist. Ct. App. 1990).

When evidence indicated that funds drawn from a debtor's and his wife's joint account, the source of which came from the debtor's investment account and his wife's personal funds was used to purchase home furnishings, it was sufficient to prove intent to create entireties property.

In re Hill, 30 C.B.C.2d 1233, 163 B.R. 598 (Bankr. N.D. Fla. 1994).

A presumptive tenancy by entirety in personal property is created by the concurrence of the lapse of a number of years of marriage, continuous possession of the articles in question, and testimony by the debtor or spouse that the debtor's death would not occasion the return of the property to the original purchaser or donor.

In re Luna, 100 B.R. 605 (Bankr. S.D. Fla. 1989), *criticized by In re Bundy*, 235 B.R. 110 (Bankr. M.D. Fla. 1999) *see also In re Wincorp, Inc.*, 185 B.R. 914 (Bankr. S.D. Fla. 1995);

Personal property of the debtors, including their checking account, their interest in a profit-sharing plan, and an interest in a promissory note were held as tenants by the entireties because they were conveyed to the husband and wife with the intention of being held as such.

In re Golub, 80 B.R. 230 (Bankr. M.D. Fla. 1987).

However, a chapter 7 debtor's testimony, absent any other corroborative evidence, was held insufficient to prove that a shareholder loan receivable was owned by the debtor and spouse as tenants by the entireties.

In re Richardson, 151 B.R. 613 (Bankr. S.D. Fla. 1993).

Extrinsic evidence cannot establish an estate by the entirety in a motor vehicle or mobile home when Florida title is held in the names of the co-owners using the disjunctive form "or."

Amsouth Bank of Florida v. Hepner, 647 So.2d 907 (Fla. Dist. Ct. App. 1994); *see also Fla Stat. Ann. § 319.22(2)*.

Property, when deeded solely to a man with wording in the conveyance reading to husband as "a married man" did not convey a tenancy by the entirety or any legal or equitable interest in the property to his wife. No resulting or constructive

U.S. v. One Parcel of Real Estate at 3229 S.W. 23rd Street, Miami, Florida, 768 F. Supp. 340 (S.D. Fla. 1991).

14a-Survey Collier Bankruptcy Exemption Guide FL

trust arose in wife's favor by paying for improvements to property without having paid any part of purchase price.

Entireties property which is transferred to one of the spouses by court order in connection with dissolution of the marriage never becomes attachable by a creditor of the relinquishing spouse; there is no "twinkling of the eye" during which the property loses its entireties character while retaining its status of joint ownership.

Sharp v. Hamilton, 520 So.2d 9 (Fla. 1988); *see generally*, *Matter of Anderson*, 132 B.R. 657 (Bankr. M.D. Fla. 1991)

The plain language of § 522(b)(2)(B) directs courts to follow state substantive law with respect to entireties property; Florida law governing entireties property protects the rights of joint creditors.

In re McRae, 308 B.R. 572 (N.D. Fla. 2003).

A liquidation of the debtor's interest in a tenancy by the entirety is permitted based on the existence of joint claims against both spouses. The equity remaining after a claim continues to be exempt entirety property. Debtor's equity in entities property above amount of the joint obligation still qualifies for the section 522(b)(2)(B) exemption. The joint creditor of both tenants may attach entireties property, but the equity is exempt as to sole creditors of the tenants. A single oversecured joint debt will not trigger administration of tenancy by the entirety property. However, the presence of an unsecured or undersecured joint debt will subject entireties property to administration by a trustee whether or not the creditor obtained a judgment prepetition.

Hadley v. Koehler (Matter of Koehler), 19 B.R. 308 (Bankr. M.D. Fla. 1982); *accord In re Colston*, 87 B.R. 193 (Bankr. M.D. Fla. 1988); *In re Amici*, 99 B.R. 100 (Bankr. M.D. Fla. 1989); *In re Boyd*, 121 B.R. 622 (Bankr. N.D. Fla. 1989); *Cristol v. Traurig (In re Traurig)*, 34 B.R. 325 (Bankr. S.D. Fla. 1983); *In re Geoghegan*, 101 B.R. 329 (Bankr. M.D. Fla. 1989); *Pepenella v. Life Ins. Co. (In re Pepenella)*, 103 B.R. 299 (M.D. Fla. 1988). *But see In re Monzon*, 38 C.B.C.2d 1469, 214 B.R. 38 (Bankr. S.D. Fla. 1997); *In re Andersen*, 132 B.R. 657 (Bankr. M.D. Fla. 1991).

The enforcement of a criminal fine does not create an exception to the general rule that money judgments against one cotenant are not entitled to lien status against real property held in a tenancy by the entirety.

Baldwin v. U.S., 805 F. Supp. 1026 (S.D. Fla. 1992).

A creditor may attach entireties property when the creditor alleges sufficiently that the husband's transfer to his wife was an attempt to defraud creditors and proceeds against the debtor's property in a *quasi in rem* action.

Rodriguez v. Banco Industrial de Venezuela, C.A., 576 So.2d 870 (Fla. Dist. Ct. App. 1991).

When a third party assumes or pays off the debt of a debtor and spouse after a petition commencing a case under the Bankruptcy Code has been filed, it does not retroactively make entireties property exempt from process which occurred immediately before the petition was filed.

In re Kimmel, 131 B.R. 223 (Bankr. S.D. Fla. 1991).



19 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide HI***HI HAWAII**

Grants, conveyances, and devises of land or interests therein that are made to two or more persons are construed to create estates in common and not in joint tenancy or by the entireties, unless it manifestly appears that the grant was intended to create an estate in joint tenancy or by the entireties.

Haw. Rev. Stat. § 509-1.

Hawaii recognizes the validity of tenancies by the entirety and affords such tenancies the protections that have come to serve as their hallmarks. Creditors may not reach property formerly held in tenancy by the entirety when the tenant by the entirety incurred the debt before the severance of the tenancy by the entirety; if a debt arises after the termination of a tenancy by the entirety, then a creditor should be able to reach property transferred to the debtor upon the termination of the tenancy. When a court declares a spendthrift clause to be invalid, the court simply voids the spendthrift clause while leaving the rest of the trust intact, though subject to the reach of creditors.

Security Pac. Bank Wash. v. Chang, 80 F.3d 1412 (9th Cir. 1996); Traders Travel Int'l v. Howser, 69 Haw. 609, 753 P.2d 244 (Haw. 1988); Sawada v. Endo, 57 Haw. 608, 561 P.2d 1291, 1977 Haw. LEXIS 160 (Haw. 1977); *see also* Haw. Rev. Stat. § 509-2. Security Pacific Bank Washington v. Chang, 80 F.3d 1412 (9th Cir. 1996).

Hawaiian courts have extended recognition to tenancies by the entirety in personal, as well as, real property, provided that it manifestly appeared that the spouses intended to create such an estate.

In re Estate of Au, 59 Haw. 474, 583 P.2d 966 (1978); *Hawaii Traders Travel Int'l v. Howser*, 69 Haw. 609, 753 P.2d 244 (Haw. 1988).

Under Hawaii law, if one spouse owning entireties property is an innocent owner, the United States cannot obtain an interest in the property via civil forfeiture stemming from the drug offense conviction of the non-innocent owner; the United States would have the status of an unsecured judgment creditor.

U.S. v. Property In the Name of Alexander Morio Toki, 779 F. Supp. 1272 (D. Haw. 1991).



20 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide IL

IL ILLINOIS

Illinois stopped recognizing common-law tenancy by the entirety in 1861.	<i>Douds v. Fresen</i> , 392 Ill. 477, 64 N. E. 2d 729 (1946).
Since 1991, Illinois allows married couples to hold their homestead property as tenants by the entirety, and sometimes permits such an interest to be exempt from the claims of creditors. Neither husband nor wife has a separate or divisible interest in the property.	765 ILCS 1005/1c.
Property held in a tenancy by the entirety cannot be sold to satisfy the debt of only one spouse, unless the property was transferred into a tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.	<i>Premier Prop. Mgmt. v. Chavez</i> , 191 Ill. 2d 101, 728 N.E.2d 476, 245 Ill. Dec. 394 (2000).



21 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Untitled

Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide IN

IN INDIANA

Exemption for any interest the judgement debtor has in real estate held as a tenant by the entireties on the date of the filing of a bankruptcy petition, unless the debtor and the debtor's spouse are jointly liable for the debt. A homestead exemption is individually available to joint debtors in property held by them as tenants by the entireties. Ind. Code Ann. § 34-55-10-2.

The estate by the entireties is immune to seizure for the satisfaction of an individual debt of either spouse. *Enloe v. Franklin Bank & Trust Co.*, 445 N.E.2d 1005 (Ind. App. 1983).

However, rental income from entireties property does not retain the character of entireties ownership, thus one-half of such income is subject to the claims of the creditors of the debtor-spouse. *Rhodes v. Indiana Nat'l Bank*, 544 N.E.2d 179 (Ind. Ct. App. 1989).

Proceeds from the sale of entireties property are exempt so long as they are not divided and distributed between the spouses. *Lee Supply Corp. v. Agnew (In the Matter of Agnew)*, 818 F.2d 1284 (7th Cir. 1987); *see also In the Matter of Hunter*, 122 B.R. 349 (Bankr. N.D. Ind. 1990), (*citing Lockwood v. Exchange Bank*, 190 U.S. 294, 47 L. Ed. 1061, 23 S. Ct. 751 (1903)), *aff'd*, 970 F.2d 299, 27 C.B.C.2d 536 (7th Cir. 1992).

The equitable relief of mortgage foreclosure is not available to a mortgage company that took mortgage of entireties property from husband without ever checking for participation by wife despite questionable circumstances surrounding the loan transaction. *Beneficial Mortgage Co. of Indiana v. Powers*, 550 N.E.2d 793 (Ind. Ct. App. 1990).

14a-Survey Collier Bankruptcy Exemption Guide IN

A creditor's failure to obtain a judicial lien on a debtor's property that is owned by the entireties with a nondebtor spouse prior to the debtor's discharge precludes the creditor from taking any action to obtain a lien on the property.

Paeplow v. Foley, 972 F.2d 730 (7th Cir. 1992).



22 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide KY

KY KENTUCKY

Kentucky recognizes tenancies by the entirety; however, a creditor is permitted to execute upon a debtor-spouse's contingent right of survivorship.

United States v. Real Property Located at 5205 Mt. Howard Court Louisville, 755 F. Supp. 169 (W.D. Ky. 1990); *Hayes v. Schaefer*, 399 F.2d 300 (6th Cir. 1968); *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932).

A creditor with a judgment on a joint debt may levy upon the property itself and thus on the interests of both spouses. The debtor's interest in that portion of the entireties property reachable by joint creditors is therefore held to be not exempt.

In the Matter of Grosslight, 757 F.2d 773, 12 C.B.C.2d 525 (6th Cir. 1985); *see also In re Brown*, 60 F.2d 269 (W.D. Ky. 1932)

A chapter 7 debtor's prepetition transfer of an interest in entireties property is an avoidable fraudulent transfer when the transfer is to a nondebtor spouse for no consideration, the debtor's financial condition is questionable, and the debtor remains in possession of the property.

Cooper v. Osbourne (In re Osbourne), 124 B.R. 726 (Bankr. W.D. Ky. 1989)



23 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide MD***MD MARYLAND**

At times this interest is exempt from the claims of creditors. A tenancy by the entirety may exist in personal as well as real property. However, there is a presumption against joint tenancies in Maryland. Ownership by a husband and wife as joint tenants with right of survivorship is tantamount to ownership by the entireties.

If there are joint creditors, a debtor's entirety exemption will only be reduced by the amount of joint claims existing at the time the bankruptcy petition was filed; these claims need not have been reduced to judgment.

Entireties property may not be exempted from an individual debtor's bankruptcy estate to the extent that the debtor and a nonfiling spouse are indebted jointly, since such joint creditors are entitled to reach entireties property to satisfy their claims. However, entireties property held with a nonfiling spouse may be exempted from the estate after payment of joint creditors. Such property is not available for satisfaction of a claim by the trustee of the filing spouse's business partnership.

issuance of a state income tax refund check in the names of a husband and a wife did not create a tenancy by the entirety in the refund monies.

Md. Real Prop. Code Ann. § 4-108; *State v. Friedman*, 283 Md. 701, 393 A.2d 1356 (Md. 1978); *Greenblatt v. Ford*, 638 F.2d 14, 3 C.B.C.2d 549 (4th Cir. 1981); *State v. One 1984 Toyota Truck*, 311 Md. 171, 533 A.2d 659 (1987); *In re Pernia*, 165 B.R. 581 (Bankr. D. Md. 1994)

In re Sefren, 41 B.R. 747 (Bankr. D. Md. 1984)

Sumy v. Schlossberg, 777 F.2d 921, 13 C.B.C.2d 1213 (4th Cir. 1985); *In re R.L. Kelly & Sons*, 125 B.R. 945 (Bankr. D. Md. 1991). See also discussion in *Williams v. Peyton (In re Williams)*, 104 F.3d 688, 690, 37 C.B.C.2d 548 (4th Cir. 1997) ("...Virginia law is identical to Maryland law...").

Cruickshank-Wallace v. County Banking & Trust Co., 165 Md. App. 300, 885 A.2d 403 (2005), cert. denied, 391

Md. 114, 892 A.2d 477
(2006); *McClelland v. Mass-
inga*, 786 F.2d 1205 (4th Cir.
1986)(applying Maryland
law).



24 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide MA

MA MASSACHUSETTS

Massachusetts recognizes tenancies by the entirety.

Mass. Gen. Laws Ann. ch.
184 § 7.

The interest of a debtor spouse in property held as tenants by the entirety is not subject to seizure or execution by a creditor of the debtor spouse so long as the property is the principal residence of the nondebtor spouse, but both spouses are jointly or severally liable for debts incurred on account of necessities furnished to either spouse or to a member of their family.

Mass. Gen. Laws Ann. ch.
209, § 1.

The statute does not prohibit one spouse from encumbering his or her interest in entireties property without the other spouse's consent.

Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650 (Mass. 1993); *Normand v. Enos*, 13 Mass. L. Rep. 525 (Mass. Super. Ct. 2001).

However, a creditor of one spouse can obtain an attachment on a statutory tenancy by the entirety, an issue as to which the statute is silent.

Peebles v. Minnis, 402 Mass. 282, 521 N.E.2d 1372 (1988).

A trustee could proceed with a *Peebles* authorized attachment while the property was the residence of the nondebtor spouse, even in the absence of joint debts or debts for necessities.

In re McConchie, 94 B.R. 245 (Bankr. D. Mass. 1988).

However, the trustee could not go on to levy upon the property until such time as debtor divorced or survived the nondebtor spouse, or the couple sold the property.

A 1980 conveyance of a tenancy by the entirety to a straw who immediately reconveyed the property to the spouses in order to bring it under the new law was ruled to be avoidable as a fraudulent transfer. Because the husband was the debtor, the new law would have provided his interest some exemption protection, whereas prior law protected only the wife's interest.

Egan v. Oliver (In re Oliver), 38 B.R. 407 (Bankr. D. Mass. 1984).

14a-Survey Collier Bankruptcy Exemption Guide MA

A bank's mortgage, granted pre-divorce to a nondebtor husband, is not voided by the husband's pre-divorce transfer of his interest in entireties property to the debtor, because when the divorce becomes final, the bank's mortgage attaches to the interest that was transformed into a tenancy in common.

Hull v. North Adams Hoosac Sav. Bank (In re Hull), 169 B.R. 4 (Bankr. D. Mass. 1994).

A transfer by a chapter 13 debtor and nondebtor wife of entireties property into a trust for the benefit of the wife and child only, but controlled solely by the debtor, terminates the joint ownership and control required for a tenancy by the entirety, thus allowing a creditor to reach the entire trust *res*.

In re Cowles, 143 B.R. 5 (Bankr. D. Mass. 1992). *Distinguished by Lyons v. Federal Sav. Bank (In re Lyons)*, 193 B.R. 637 (Bankr. D. Mass. 1996).

Massachusetts law gives a husband "rights to" a house owned by the entireties to which an IRS tax lien could attach, thus the lien and resulting sale are valid at least with respect to the husband's interest.

Geisman v. U.S., 961 F.2d 1 (1st Cir.), *cert. denied*, 506 U.S. 891, 113 S. Ct. 261, 121 L. Ed. 2d 191 (1992).

A debtor who owns a home with his wife in a tenancy by the entirety has an interest greater than one half of the home's value but less than the full value of the home for purposes of the Massachusetts homestead exemption. This was because the debtor had a common-law property interest, which is what the debtor would receive if the property were sold.

In re Conroy, 224 B.R. 282 (Bankr. E.D. Mass. 1998).



25 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide MI***MI MICHIGAN**

Michigan continues to recognize tenancies by the entirety, and to hold such interests exempt from the claims of creditors.

SNB Bank & Trust v. Kensey, 378 N.W.2d 594, 145 Mich. App. 765 (Mich. App. 1985); *Mich. Nat'l Bank v. Chrysler (In re Trickett)*, 5 C.B.C.2d 85, 14 B.R. 85 (Bankr. W.D. Mich. 1981); *see Mich. Comp. Laws Ann. § 557.71.*

Under Michigan law, the full value of their interests as tenants by the entireties is exempt from the claims of the individual creditors of either one of them; this same value is exempt from the claims of individual creditors in their bankruptcy case.

Raynard v. Rogers (In re Raynard), 354 B.R. 834 (B.A.P. 6th Cir. 2006).

A federal judgment lien on entireties property, based on the sole obligation of the debtor spouse, is null and void to the extent it impairs the non-debtor spouse's interest in the entireties property. However, the lien can legitimately attach to the debtor spouse's individual survivorship interest.

Fischre v. U.S., 852 F. Supp. 628 (W.D. Mich. 1994).

In a criminal forfeiture proceeding, the proceeds from the sale of entireties property, which the parties stipulate to treat the same as entireties property, entitles the government to acquire only the interest that the noninnocent cotenant holds.

U.S. v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan, 910 F.2d 343 (6th Cir. 1990), *rehearing denied en banc*, 1990 U.S. App. LEXIS 22051 (6th Cir. 1990), *cert. denied sub nom*, *Marks v. U.S.*, 499 U.S. 947, 111 S. Ct. 1414, 113 L. Ed. 2d 467 (1991); *see also U.S. v. 44133 Duchess Drive, Canton, Wayne*

14a-Survey Collier Bankruptcy Exemption Guide MI

- A trustee is not prohibited from seeking to recover, as a preferential transfer or a fraudulent conveyance, the transfers of exempt or exemptible entireties property even though the transfers did not result in diminution of the estate.
- A debtor's interest in that portion of entireties property reachable by joint creditors is not exempt, but that property may be sold to satisfy joint claims, in which case any surplus proceeds are exempt.
- When a tenancy by the entirety is severed, each spouse is entitled to an undivided one-half interest. Therefore, after severance neither spouse may exempt more than a one-half interest in the residence. Upon divorce a tenancy by the entirety becomes a tenancy in common with each party owning an undivided one-half interest. However, the filing of a petition does not generally act to sever a tenancy by the entirety.
- Tenancies by the entirety in personalty are not favored.
- However, Mich. Comp. Laws Ann. § 557.151 provides that all bonds, certificates of stock, mortgages, promissory notes, debentures or other evidences of indebtedness payable to a husband and wife are presumed to be held jointly. This presumption has been construed to give rise to a tenancy by the entirety.
- A debtor's rights as a tenant by the entirety are determined as of the commencement of the case and cannot be improved by subsequent events. The property is nonexempt as to joint claims existing at the commencement of the case, even if they are settled thereafter.
- County, Mich.*, 863 F. Supp. 492 (E.D. Mich. 1994).
- Lasich v. Wickstrom (In the Matter of Wickstrom)*, 22 C.B.C.2d 1367, 113 B.R. 339 (Bankr. W.D. Mich. 1990).
- In the Matter of Grosslight*, 757 F.2d 773, 12 C.B.C.2d 525 (6th Cir. 1985), *See also In re Oberlies*, 94 B.R. 916 (Bankr. E.D. Mich. 1988).
- Matter of Ignasiak*, 22 B.R. 828 (Bankr. E.D. Mich. 1982).
- In the Matter of Jones*, 8 C.B.C.2d 1215, 31 B.R. 372 (Bankr. E.D. Mich. 1983), *aff'd*, 49 B.R. 990 (E.D. Mich. 1985); *Jackson v. Leith (In the Matter of Jackson)*, 92 B.R. 211 (W.D. Mich. 1988).
- DeYoung v. Messler*, 130 N.W.2d 38 (1964).
- In re Oberlies*, 94 B.R. 916 (Bankr. E.D. Mich. 1988).



26 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide MS

MS MISSISSIPPI

Mississippi decisions have recognized tenancies by the entirety. No reported decision in Mississippi has explicitly passed on the issue of whether such an interest would be exempt from creditors' claims. Thus, the significance of section 522(b)(2)(B) under Mississippi law awaits future judicial clarification. *Cuevas v. Cuevas*, 191 So. 2d 843 (Miss. 1966).



27 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Untitled

Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide MO***MO MISSOURI**

Missouri continues to recognize tenancies by the entirety, including tenancies by entirety in personal property, and, under the appropriate circumstances, permits such interests to be exempt from the claims of creditors under Mo. Ann. Stat. § 513.475(2). In a nonbankruptcy context, the Missouri courts have held that a creditor could not access entirety property if only one of the holders of the entirety interest was in debt to the creditor.

See also Miner v. Anderson (In the Matter of Anderson), 12 B.R. 483 (Bankr. W.D. Mo. 1981), *modified*, 15 B.R. 346 (Bankr. W.D. Mo. 1982); *Estate of Savage*, 650 S.W.2d 346 (Mo. 1983); *Rimmel v. Huth (In re Huth)*, 122 B.R. 724 (Bankr. E.D. Mo. 1988); *Garner v. Strauss (In re Garner)*, 952 F.2d 232, 26 C.B.C.2d 274 (8th Cir. 1991).

A deposit made into a bank or trust company account in the name of two persons or the survivor thereof who are husband and wife is considered a tenancy by the entirety unless otherwise specified.

Mo. Ann. Stat. § 362.470

A tenancy by the entireties is not created when the grantees are not legally married at the time of conveyance, even if they take title as husband and wife and eventually marry.

Snyder v. Snyder (Matter of Estate of Snyder), 880 S.W.2d 596 (Mo. Ct. App. 1994).

When, pursuant to a decree of legal separation, the trial court sets apart to each spouse a portion of the net proceeds of the sale of entireties property, the husband and wife remain owners by the entireties absent entry of a decree of dissolution of marriage.

Ronollo v. Jacobs, 775 S.W.2d 121 (Mo. Banc 1989).

When a promissory note is held presumptively by the entireties, a husband acting alone may not bind his wife on the settlement agreement with the makers of the note.

Steffens v. Forbes, 778 S.W.2d 22 (Mo. Ct. App. 1989); *see also Estate of Harvey v. Luther College*, 802 S.W.2d 585 (Mo. Ct. App.

14a-Survey Collier Bankruptcy Exemption Guide MO

A tenancy by the entirety continues to exist in the settlement sum a husband and wife receive from their insurance company for fire damage to marital property. The inclusion of their attorney's name and that of the circuit clerk's on the draft does not change the legal status of the settlement sum so as to place it outside the exception of the Division of Child Support Enforcement's authority to seek a lien on the settlement.

However, life insurance proceeds received by a husband and wife with the designation "to share proceeds equally," demonstrates the intent that the husband and wife take individual shares rather than one undivided interest, thus creating a tenancy in common and enabling the wife's judgment creditor to garnish her proceeds.

Judgment creditors of a debtor husband cannot reach a bank account held by husband and wife by the entireties.

Property held as tenants by the entireties is not exempt to the extent of joint obligations.

Property that had been transferred to the debtor's son prior to the petition and recovered by the trustee lost its entireties character by virtue of the transfer.

A portion of the proceeds received from the settlement of an automobile accident suit held by the entireties belonged to the husband's present wife and thus was exempt from garnishment by his former wife to satisfy child support arrearages.

1991).

Gaunt v. Shelter Mutual Insurance Company, 808 S.W.2d 401 (Mo. App. 1991).

Green Hills Production Credit Ass'n v. Blessing, 844 S.W.2d 5 (Mo. Ct. App. 1992).

Edgar v. Ruma, 823 S.W.2d 59 (Mo. Ct. App. 1991); *see also Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327 (Mo. Ct. App. 1991).

In re Townsend, 72 B.R. 960 (Bankr. W.D. Mo. 1987); *see also Garner v. Strauss (In re Garner)*, 952 F.2d 232, 26 C.B.C.2d 274 (8th Cir. 1991).

Rimmel v. Goldman (In re Goldman), 111 B.R. 230 (Bankr. E.D. Mo. 1990).

Wry v. Wade, 814 S.W.2d 655 (Mo. Ct. App. 1991).



28 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide NJ***NJ NEW JERSEY**

New Jersey accords a limited recognition to the tenancy by the entireties exemption. *King v. Greene*, 30 N.J. 395, 153 A.2d 49 (1959).

However, New Jersey does not recognize the existence of tenancies by the entirety in personal property. *In re Goldstein*, 66 B.R. 909 (Bankr. W.D. Pa. 1986).

Neither spouse may sever, alienate or otherwise affect their interest in the tenancy by entirety during the marriage or upon separation without the written consent of both spouses. N.J.S.A. 46:3-17.4.

When a trustee succeeds to a debtor spouse's interest in entireties property, the bankruptcy estate and the nondebtor spouse each own one-half of the property and the proceeds of any sale are divided accordingly. *Mueller v. Youmans (In re Youmans)*, 117 B.R. 113 (Bankr. D.N.J. 1990).

A judgment creditor who purchases a debtor's interest in entireties property at an execution sale is entitled to the equitable remedy of accounting upon the ouster of the creditor. *Bauer v. Migliaccio*, 235 N.J. Super. 127, 561 A.2d 674 (N.J. Super. Ct. 1989).

However, creditors of one spouse may levy on the entireties interest, but any interest they acquire remains subject to a nondebtor spouse's rights, including the right of survivorship and a one-half interest in the life estate for the joint lives of the tenants. *In re Goldstein*, 66 B.R. 909 (Bankr. W.D. Pa. 1986) (New Jersey law determinative).

It is within the discretion of the court to deny partition to a purchaser of one spouse's interest, leaving the creditor to resort to some other remedy. *Freda v. Commercial Trust Co.*, 118 N.J. 36, 570 A.2d 409 (1990).

The bankruptcy court held that land held by spouses as tenants by the entirety may not be partitioned. *Kohn v. Hursa (In the Matter of Hursa)*, 87 B.R. 313 (Bankr. D.N.J. 1988).



29 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide NY***NY NEW YORK**

New York recognizes tenancies by the entirety, but such interests are not held to be exempt from the claims of creditors. (such an interest would not be exempt pursuant to section 522(b)(2)(B) although it would remain subject to a nondebtor spouse's rights of occupancy, income and survivorship).

In re Weiss, 2 C.B.C.2d 426, 4 B.R. 327 (Bankr. S.D.N.Y. 1980)

A judgment lien against one debtor's interest in entireties property that is not discharged during a joint bankruptcy proceeding, is extinguished along with the debtor's interest in the property when the debtor dies.

Schwab v. Krauss, 566 N.Y.S.2d 974 (N.Y. App. Div. 3d Dept. 1991); *see also Kozyra v. Goldstein*, 146 Misc.2d 25, 550 N.Y.S.2d 229 (Sup. 1989).

A lien on a husband's interests in entireties property was held not to diminish or encumber his wife's one-half share of the proceeds from the sale of the property because proceeds were held as tenants in common.

Gossweiler v. Finance Investment Company (Bermuda), LTD., 163 A.D.2d 776, 558 N.Y.S.2d 741 (A.D. 3 Dept. 1990); *see also In re Morris*, 115 B.R. 752 (Bankr. E.D.N.Y. 1990).

A tenancy by the entirety is terminated at the time a divorce is granted, not when it is recorded.

Cary v. Fisher, 149 A.D.2d 890, 541 N.Y.S.2d 138 (N.Y. App. Div. 3d Dept. 1989),

Similarly, it was held that procurement of an *ex parte* foreign divorce decree by the judgment debtor's spouse transformed the tenancy by the entirety into a tenancy in common thus giving the creditor a valid lien on a one-half interest in the property.

Greenhouse Realty, Inc. v. St. George, 151 A.D.2d 7, 546 N.Y.S.2d 483 (N.Y. App. Div. 3d Dept. 1989).

The court granted, in light of a pending divorce action, the judgment debtor's wife a 90 day stay of the judgment creditor's foreclosure sale of a vacation home owned by the entireties.

BNY Financial Corp. v. Moran, 584 N.Y.S.2d 261 (N.Y. Sup. Ct. 1992).

14a-Survey Collier Bankruptcy Exemption Guide NY

- When a non-signing spouse has complete knowledge and participates in sale of entireties property, she is estopped from denying her husband's authority to execute the contract on her behalf.
- The residence of the debtor and the nondebtor spouse, owned as tenants by the entirety, could be sold by the trustee. Under the criteria set forth in section 363(h), the property could be sold if the benefit to the estate from such a sale would outweigh the non-economic detriment to the nondebtor spouse. The case was remanded to the bankruptcy court in order that it might evaluate benefit and detriment. On remand, however, the bankruptcy court held that section 363(h) does not permit the trustee to sell the entireties property free and clear of the nondebtor spouse's rights of ownership, survivorship and usufruct, when only the debtor's usufruct right is subject to the mandates of section 363(h).
- Additionally, section 363(h) could not be applied retroactively to an interest that vested and matured prior to the statute's effective date. Such application of section 363(h) to be unconstitutional in that it acted as a mechanism for redistribution of wealth, infringing on the rights of third parties who are neither debtors nor creditors in favor of only creditors of the debtor's estate. Such application thus violated the Takings Clause of the Fifth Amendment because it did not meet the "public use" requirement.
- When a nondebtor wife allowed the debtor to use rental income from their entireties property to operate a farm owned by the entireties, the nondebtor wife's share of the rents was considered property of the estate, and thus subject to the automatic stay.
- The death of a nondebtor spouse ten months after the bankruptcy filing was held to eliminate any interest her estate had in the entireties property.
- Jill Real Estate, Inc. v. Smyles*, 150 A.D.2d 640, 541 N.Y.S.2d 515 (N.Y. App. Div. 2d Dept. 1989).
- Community Nat'l Bank v. Persky (In re Persky)*, 893 F.2d 15, 21 C.B.C.2d 1460 (2d Cir. 1989).
- In re Persky*, 26 C.B.C.2d 238, 134 B.R. 689 (Bankr. E.D.N.Y. 1991); *see also In re Waxman*, 24 C.B.C.2d 2103, 128 B.R. 49 (Bankr. E.D.N.Y. 1991); *Kirschenbaum v. Feola (In the Matter of Feola)*, 22 B.R. 81 (Bankr. E.D.N.Y. 1982).
- Community Nat'l Bank v. Lyons (In re Lyons)*, 177 B.R. 767, *aff'd*, 177 B.R. 772 (Bankr. N.D.N.Y. 1994).
- In re Rerisi*, 30 C.B.C.2d 1069, 172 B.R. 525 (Bankr. E.D.N.Y. 1994).



30 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide NC

NC NORTH CAROLINA

North Carolina is one of the jurisdictions which continues to recognize some form of tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors. In "opting out" of the federal exemptions, the North Carolina Legislative did not mention tenancies by the entirety and thus did not intend to alter the common law doctrine of tenancy by the entirety. Accordingly, in North Carolina a debtor's tenancy by entirety interest may be exempted, pursuant to section 522(b)(2)(B), in bankruptcy proceedings.

Upon divorce, property formerly held by the entireties is held as tenants in common. The judgment creditor's lien against the debtor spouse's property immediately attaches to the debtor's undivided one-half interest in the property; upon being awarded the property, the nondebtor spouse takes title in fee simple absolute subject to the lien on the debtor's undivided interest.

However, a separation agreement that does not provide for an "in kind" division of entireties property does not dissolve the tenancy by the entirety.

The bankruptcy court vacated the automatic stay to permit a creditor with a claim against both the debtor and his nondebtor

N.C. Gen. Stat. § 39-13.6
Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963); *see also In re Banks*, 22 B.R. 891 (Bankr. W.D.N.C. 1982).

Union Grove Milling & Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 508 (N.C. App. 1991); *see, e.g., In the Matter of the Estate of Francis*, 381 S.E.2d 484 (N.C. App. 1989), *rehearing granted*, 325 N.C. 708, 388 S.E.2d 456 (1989), *reversed on other grounds*, 327 N.C. 101, 394 S.E.2d 150 (1990) (will dissent issue).

Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), *review denied*, 333 N.C. 343, 422 S.E.2d 704 (1993).

Southern Nat'l Bank v. Woolard (In the Matter of

14a-Survey Collier Bankruptcy Exemption Guide NC

spouse to obtain a judgment against property held by them as tenants by the entirety. The court explained that while creditors of one individual may not proceed against tenancies by the entirety, creditors of both tenants may do so.

Woolard), 13 B.R. 105 (Bankr. E.D.N.C. 1981); *see also In re Crouch*, 9 C.B.C.2d 443, 33 B.R. 271 (Bankr. E.D.N.C. 1983).

However, the filing of a joint petition by a husband and wife does not result in the automatic substantive consolidation of the two debtors' estates.

In re Chandler, 148 B.R. 13 (Bankr. E.D.N.C. 1992).



31 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide OH

OH OHIO

In 1985 the Ohio legislature enacted §§ 5302.20, 5302.21, recognizing "survivorship tenancies," and amended § 5302.17, replacing the "estate by the entireties" with the "survivorship tenancy." Section 5302.21 validates estates by the entireties created under former § 5302.17.

A deed executed while former § 5302.17 was in effect that conveys title to "husband and wife for their joint lives, remainder to the survivor of them," creates an estate by the entireties only when the word "entireties" is included in either the title or text of the deed.

Ohio courts have consistently adopted the "no interest reachable rule" wherein neither spouse can alienate entireties property individually and, therefore, creditors of one spouse cannot reach such property.

A nondebtor spouse is prohibited from asserting in a chapter 7 case the state homestead exemption to exclude his portion of entireties property sale proceeds that had been previously divided by the bankruptcy court.

In re Cline, 164 B.R. 592 (Bankr. S.D. Ohio 1994) Ohio Rev. Code Ann. § 5302.17 (1981).

Central Benefits Mut. Ins. Co. v. RIS Adm'rs Agency, 70 Ohio St. 3d 68, 637 N.E.2d 291 (Ohio 1994). [Note: this decision abrogates *Bahler v. Doenges*, 26 Ohio App. 3d 172, 499 N.E.2d 35 (Ohio Ct. App. 1986).]

In re Pernus, 143 B.R. 856 (Bankr. N.D. Ohio 1992).

Finneran v. Associates Fin. Servs., 151 B.R. 849 (Bankr. S.D. Ohio 1992), *aff'd*, 1994 U.S. App. LEXIS 20420 (6th Cir. Ohio Aug. 3, 1994).



32 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide OR

OR OREGON

Oregon recognizes tenancies by the entirety in real estate but not in personal property.

Or. Rev. Stat. § 108.090;
Stanley v. Mueller, 222 Or.
194, 350 P.2d 880 (1960).

Such interests have been held to be reachable by one spouse's creditors, subject to the nondebtor spouse's right to one-half the usufruct and to survivorship. Thus, the exemption created by section 522(b)(2)(B) would not be available in Oregon, but a debtor's interest in a tenancy by the entirety would remain subject to a nondebtor spouse's rights.

Gano v. Ohmart, 121 Or.
116, 254 P. 203 (1927); *see*
also Wilde v. Mounts, 95 Or.
App. 522, 769 P.2d 802
(1989).

Oregon does not recognize common law marriages, but it does allow for the equitable division of property accumulated during the period of cohabitation.

Wilbur v. DeLapp, 850 P.2d
1151, 1153 (Or. Ct. App.
1993); *see also Sticka v. Wil-*
bur (In re Wilbur), 126 F.3d
1218 (9th Cir. 1997).



33 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide PA***PA PENNSYLVANIA**

Pennsylvania is one of the jurisdictions which continues to recognize some form of tenancy by the entirety.

Stauffer v. Stauffer, 465 Pa. 558, 351 A.2d 236 (1976); *Johnson v. Johnson*, 2006 Pa. Super. 253, 908 A.2d 290 (2006); *Constitution Bank v. Olson*, 620 A.2d 1146 (Pa. Super. Ct. 1993); *Patwardhan v. Brabant*, 294 Pa. Super. 129, 439 A.2d 784 (1982).

Recognition is extended to tenancies by the entirety in personal, as well as real property.

In re Barsotti, 3 C.B.C.2d 306, 7 B.R. 205 (Bankr. W.D. Pa. 1980). *Accord, Martine v. Cipa (In the Matter of Cipa)*, 11 B.R. 968 (Bankr. W.D. Pa. 1981); *In re Fisher*, 27 B.R. 71 (Bankr. M.D. Pa. 1983).

Monies received from the sale of entireties property are impressed with the status of entireties property even when they are placed into a bank account owned by only one spouse; bank deposits payable to husband and wife or to husband or wife are presumed to be tenancies by the entireties.

Johnson v. Johnson, 2006 Pa. Super. 253, 908 A.2d 290 (2006);

Joint indebtedness precludes exemption under § 522(b)(2)(B) to the extent of the joint indebtedness.

In re Houck, 184 B.R. 21 (Bankr. E.D. Pa. 1995).

A judicial lien creditor of a debtor spouse can only reach whatever interest the debtor had in the entireties property while his wife, who had been discharged from the judgment, was alive.

Walters v. U.S. National Bank in Johnstown, 879 F.2d 95 (3d Cir. 1989); *see also In re Balber*, 112 B.R. 6 (Bankr. W.D. Pa. 1990).

However, a former wife stood in the position of a creditor

Coscia v. Hendrie, 629 A.2d

14a-Survey Collier Bankruptcy Exemption Guide PA

- against her former husband on a judgment for overdue child support, and thus prevailed in a motion to set aside as a fraudulent conveyance real property purchased by the insolvent former husband and held by the entireties with his current wife. 1024 (Pa. Super. Ct. 1993).
- A creditor of either spouse (but not both spouses) may not acquire an enforceable lien on entirety property. The most a creditor of either spouse may obtain is a presently unenforceable lien upon the spouse's expectancy of survivorship. *Napotnik v. Equibank & Parkvale Sav. Ass'n*, 679 F.2d 316 (3d Cir. 1982); *see also* Hodes Company v. Leretsis (*In re Leretsis*), 100 B.R. 757 (Bankr. W.D. Pa. 1989).
- Husband's creditor cannot obtain clear title to entireties property by proceeding against husband alone. *Howard Sav. Bank v. Cohen*, 414 Pa. Super. 555, 607 A.2d 1077 (1992).
- Bank could not execute upon entireties property held by a borrower and guarantor because execution would result in a division of the property via a sheriff's sale. *Polarine v. Tax Claim Bureau*, 557 A.2d 1175 (Pa. Comm. Ct. 1989).
- Tax sale of entireties property set aside because only husband received notice of the sale. *Syzbist v. Crissman (In re Cosper)*, 106 B.R. 377 (Bankr. M.D. Pa. 1989).
- Transfer to husband alone of entireties property severed tenancy by the entirety and potential creditor's lien actually attached. *Klebach v. Mellon Bank, N.A.*, 388 Pa. Super. 203, 565 A.2d 448 (1989).
- Lien did not attach to entireties property after divorce decree because the property was under the trial court's jurisdiction and held *in custodia legis*. *See also Keystone Sav. Ass'n v. Kitsock*, 429 Pa. Super. 561, 633 A.2d 165 (1993).
- Estates by the entireties have also been held to be immune from garnishment. *Garden State Standardbred Sales Co., Inc. v. Seese*, 417 Pa. Super. 15, 611 A.2d 1239 (1992).
- However, the debtor's interest in tenancy by the entirety property is not exempt from a creditor with a claim against both spouses. *Klebach v. Mellon Bank, N.A.*, 388 Pa. Super. 203, 565 A.2d 448 (1989); *accord McCormick v. Mid-State Bank & Trust Co.*, 22 B.R. 997 (W.D. Pa. 1982); *see also In re Beitman*, 25 B.R. 303 (Bankr. M.D. Pa. 1982) (creditor of joint debt may reach entirety property even if one spouse has filed petition).
- However, a debtor may exempt the equity in entireties property to the extent it exceeds the joint debts of the debtor and non-debtor spouse. *In re Maloney*, 27 C.B.C.2d 1730, 146 B.R. 168 (Bankr. W.D. Pa. 1992).
- The Government is entitled to obtain by forfeiture a non-innocent spouse's interest in entireties property that was used for illegal drug activity, but the innocent spouse has right to *U.S. v. Parcel of Real Property Known as 1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir.

exclusive possession and use of whole property during her life, 1991).
right to obtain title in fee simple absolute if non-innocent
spouse predeceases, protection against unilateral conveyance
by a cotenant and protection against levy of property by any
creditor of cotenant.



34 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide RI

RI RHODE ISLAND

Rhode Island is one of the jurisdictions which continues to recognize some form of tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors. Such interests have been ruled to be exempt from execution, but nonetheless subject to attachment.

Cull v. Vадnais, 122 R.I. 249, 406 A.2d 1241, 1245 (1979).

A debtor's interest in property held as a tenant by the entirety is not "exempt from process," because under Rhode Island law, the property is subject to attachment. Therefore, the interest does not qualify as exempt property under federal bankruptcy law.

In re Gibbons, 13 C.B.C.2d 759, 52 B.R. 861 (Bankr. D.R.I. 1985).



35 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide TN***TN TENNESSEE**

Tenancies by the entirety in both real and personal property are recognized in Tennessee. *McKinney v. Kimery*, 2006 Tenn. App. LEXIS 626 (Tenn. Ct. App. Sept. 28, 2006). *In re Garretson*, 6 B.R. 127 (Bankr. E.D. Tenn. 1980).

A certificate of deposit issued to "husband or wife" has been held to be entireties property. *In re Garretson*, 6 B.R. 127 (Bankr. E.D. Tenn. 1980).

However, when funds are withdrawn by one spouse from a joint bank account held by the entireties, the funds cease to be entireties property upon withdrawal. *Mays v. Brighton Bank*, 832 S.W.2d 347 (Tenn. Ct. App. 1992), distinguished by, *Grahl v. David*, 1996 Tenn. App. LEXIS 475 (Tenn. Ct. App. 1996).

In a number of bankruptcy cases, Code section 522(b)(2)(B) has been applied to exempt all the debtor's rights in a tenancy by the entirety except the right of survivorship, which the trustee has been permitted to reach. *Waldschmidt v. Shaw (In re Shaw)*, 2 C.B.C.2d 599, 5 B.R. 107 (Bankr. M.D. Tenn. 1980); *Ray v. Dawson (In re Dawson)*, 5 C.B.C.2d 404, 14 B.R. 822 (E.D. Tenn. 1981); *In re Stewart*, 19 B.R. 165 (Bankr. E.D. Tenn. 1982); *In re Stephenson*, 19 B.R. 185 (Bankr. M.D. Tenn. 1982).

A judgment lien may be avoided when it impairs the homestead exemption of joint debtors in entireties property. *In re Maino*, 136 B.R. 1006 (Bankr. W.D. Tenn. 1992).

A third party's ownership or encumbrance of a debtor's survivorship interest does not impair the debtor's exempt interests in the entireties property. *In re Arango*, 136 B.R. 740 (Bankr. E.D. Tenn. 1992), *aff'd*, 992 F.2d 611 (6th Cir.

14a-Survey Collier Bankruptcy Exemption Guide TN

- A survivorship interest of one spouse's creditor in entireties property is not destroyed by a subsequent conveyance of the property pursuant to a divorce decree when the interest had attached prior to the actual divorce. 1993).
Third Nat'l Bank in Nashville v. Knobler, 789 S.W.2d 254 (Tenn. 1990).
- Because state law permits the sale and levy of a debtor's right of survivorship in entireties property, that right is not exempt property. *In re Walls*, 45 BR 145 (Bankr. D. Tenn. 1984).
- The district court ruled that the trustee could not sell the tenancy by the entirety to realize on the debtor's survivorship interest, in view of the restrictions on liquidating joint property set forth in section 363(h). *Ray v. Dawson (In re Dawson)*, 5 C.B.C.2d 404, 14 B.R. 822 (E.D. Tenn. 1981).
- Pre-Code case in which trustee allowed to sell debtor's survivorship interest in personal property held as tenant by the entirety. *But see In re Garretson*, 6 B.R. 127 (Bankr. E.D. Tenn. 1980).



36 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

*14a-Survey Collier Bankruptcy Exemption Guide VT***VT VERMONT**

Vermont is one of the jurisdictions that continues to recognize some form of tenancy by the entirety, and under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors. A spouse's interest in an estate by the entireties is immune from execution by a sole creditor of that spouse.

Vt. Stat. Ann. tit. 15, § 67.

It is also exempted from the bankruptcy estate by virtue of section 541.

In re Cerreta, 116 B.R. 402 (Bankr. D. Vt. 1990); *Lowell v. Lowell*, 138 Vt. 514, 419 A.2d 321 (1980).

Further, spouses may hold personal property as tenants by the entirety.

Beacon Milling Co. v. Larose, 138 Vt. 457, 418 A.2d 32 (1980), distinguished by *O'Donnell v. Bank of Vermont*, 66 Vt. 221, 692 A.2d 1212 (1997).

However, an estate by the entirety is liable for the joint debts of both spouses.

In re McQueen, 21 B.R. 736 (Bankr. D. Vt. 1982).

Accordingly, in Vermont a debtor's tenancy by the entirety interest may be exempted, pursuant to section 522(b)(2)(B), in bankruptcy proceedings. Creditors may, however, reach rent, profits or income from tenancy by entirety property.

Beacon Hill Co. v. Larose, 138 Vt. 457, 418 A.2d 32 (1980).

The Vermont legislature enacted a statute specifically prohibiting voluntary transfers of property held in a tenancy by the entirety unless both co-tenants effect the transfer.

Jakab v. Cendant Mortg. Corp. (In re *Jakab*), 293 B.R. 621, 2003 Bankr. LEXIS 731 (Bankr. D. Vt. 2003); Vt. Stat. Ann. tit. 27, § 141.



37 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide VA

VA VIRGINIA

Virginia is one of the jurisdictions that continues to recognize tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors.

In re Zimpel, 106 B.R. 451 (Bankr. E.D. Va. 1989); *Bass v. Thacker (In re Thacker)*, 5 B.R. 592 (Bankr. W.D. Va. 1980); *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951).

A husband and wife may own real or personal property as tenants by the entireties.

Va. Code Ann. § 55-20.2

A strict interpretation of Va. Code Ann. §§ 55-20 and 55-21 require that a deed conveying real property to a husband and wife specify an intent for a tenancy to be by the entirety; it is logical to infer that the same intent must be demonstrated as to personal property.

Kerr v. Dill, 2006 Va. Cir. LEXIS 207 (Va. Cir. Ct. Oct. 11, 2006).

A judicial lien on a chapter 7 debtor's property that is held by the entireties with a nondebtor spouse is avoidable as it impairs an exemption to which the debtor would be entitled as a tenant by the entirety, even though the lien cannot be enforced while the tenancy survives.

Massie v. Yamrose, 169 B.R. 585 (W.D. Va. 1994).

However, section 522(b)(2)(B) will not operate to exempt property that is subject to a claim on which both tenants are jointly liable.

Williams v. Peyton (In re Williams), 104 F.3d 688, 37 C.B.C.2d 548 (4th Cir. 1997); *Chippenham Hosp., Inc. v. Bondurant (In re Bondurant)*, 716 F.2d 1057 (4th Cir. 1983); *Ragsdale v. Genesco, Inc.*, 674 F.2d 277, 6 C.B.C.2d 1170 (4th Cir. 1982); *Waldrop v. Phillos (In*

14a-Survey Collier Bankruptcy Exemption Guide VA

Notes received in exchange for real property held by the entireties are not subject to levy by a creditor of only one of the tenants even if the notes do not contain right of survivorship language.

The bankruptcy court found no fraudulent intent in the debtor's transfer of entireties property on the eve of filing. The court held that since Virginia law exempts entireties property from claims of individual creditors, the creditor did not have a claim in the first place. However, when a debtor allegedly fraudulently transfers property held individually to that of property held by the entireties with her nondebtor spouse, the chapter 7 trustee is not required to bring suit to avoid the transfer within the 30 day limit for objecting to claims.

Even if one spouse files a chapter 13 petition thereby automatically staying proceedings as to him, a creditor holding a joint claim against both spouses is entitled to relief from the automatic stay and may satisfy his claim by reaching tenancy by entirety property.

A discharge may be modified to permit a creditor to enforce a claim on which both the debtor and his spouse are liable.

The bankruptcy court allowed a trustee to sell a residence held by the entireties by the debtor with his nondebtor spouse. It reasoned that the benefits of the sale, which included a 100% payout to all joint unsecured creditors, who would otherwise recover nothing, outweighed the burdens of potential displacement and psychological harm the sale might cause to the nondebtor spouse.

re Phillos), 5 C.B.C.2d 528, 14 B.R. 781 (Bankr. W.D. Va. 1981); *In re Martin*, 20 B.R. 374 (Bankr. E.D. Va. 1982).

Pitts v. United States, 408 S.E.2d 901 (Va. 1991); *see generally* *Ames v. Wickham (In re Wickham)*, 130 B.R. 35 (Bankr. E.D. Va. 1991).

In re Whitcomb, 140 B.R. 396 (Bankr. E.D. Va. 1992), *In re Harry*, 151 B.R. 735 (Bankr. W.D. Va. 1992).

In re Menefee, 22 B.R. 425 (Bankr. E.D. Va. 1982).

Community Bank v. Costley (In re Costley), 10 C.B.C.2d 1367, 39 B.R. 585 (Bankr. E.D. Va. 1984).

In re Harris, 155 B.R. 948 (Bankr. E.D. Va. 1993).



38 of 85 DOCUMENTS

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Untitled

Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide VI

VI VIRGIN ISLANDS

Tenancies by the entirety are recognized in the Virgin Islands. Virgin Islands decisional law regards such interests as exempt from process during the lives of the joint tenants; a creditor may only realize on the survivorship of a debtor-spouse after the death of the other tenant.

The entireties exemption is limited to real estate.

V.I. Code Ann. tit. 28, § 7; tit. 5, § 478(a) *Masonry Products, Inc. v. Tees*, 6 V.I. 108, 280 F. Supp. 654 (D. V.I. 1968).

In re Taylor, 2005 Bankr. LEXIS 578 (Bankr. D.V.I. Apr. 7, 2005).



39 of 85 DOCUMENTS

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Untitled

Survey Survey of States Recognizing Tenancy by the Entireties Exemption

14a-Survey Collier Bankruptcy Exemption Guide WY

WY WYOMING

Wyoming continues to recognize tenancy by the entirety, and, under the appropriate circumstances, permits such an interest to be exempt from the claims of creditors during the joint lives of the tenants. *Amick v. Elwood*, 77 Wyo. 269, 314 P.2d 944 (1957); *In re Anselmi*, 52 B.R. 479 (Bankr. D. Wyo. 1985).

The amount of entireties property that joint debtors may exempt is their equity in the entireties property, less the total sum of all joint claims against both debtors. The entireties property which is thus nonexempt is property of the estate which may be used to satisfy all creditors' claims, including claims against only one of the debtors. *In re Wenande*, 107 B.R. 770 (Bankr. D. Wyo. 1989).



40 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Exemptions Federal Non-Bankruptcy Code Exemptions

14a-Exemptions Collier Bankruptcy Exemption Guide Exemptions.syn

§ Exemptions.syn Synopsis to Appendix Exemptions: Federal Non-Bankruptcy Code Exemptions

§ 8130. Assignment of claim

§ 8346. Exemption from legal process; recovery of payments

§ 8437. Thrift Savings Fund

§ 8470. Exemption from legal process; recovery of payments

§ 1035. Deposits of savings

§ 1440. Annuities not subject to legal process

§ 1450. Payment of annuity: beneficiaries

§ 1673. Restriction on garnishment

§ 1675. Exemption for State-regulated garnishments

§ 4060. Assignment and attachment of moneys

§ 543. Liability of judgment funds for debts

§ 545. Liability of judgment funds for debts

§ 7448. Annuities to surviving spouses and dependent children of judges and special trial judges

§ 376. Annuities for survivors of certain judicial officials of the United States

§ 1056(d) Assignment or alienation of plan benefits

§ 775. Payments nonassignable and exempt from process

§ 916. Assignment and exemption from claims of creditors

§ 1562. Special provisions relating to pension

§ 1970. Beneficiaries; payment of insurance

§ 5301. Nonassignability and exempt status of benefits

§ 7297. Survivor annuities

§ 407. Assignment; amendment of section

§ 1717. Assignment of benefits; execution, levy, etc., against benefits

§ 231m. Assignability; exemption from levy

§ 352. Benefits

§ 11110. Seamen's clothing

§ 11111. Limit on amount recoverable on voyage

§ 403n. Retirement equity for spouses of certain employees

§ 2094. Attachment of Moneys

§ 524. Stay or vacation of execution of judgments, attachments, and garnishments

§ 525. Duration and term of stays; codefendants not in service

Scope DISCUSSION



41 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
5 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 8130

§ 8130. Assignment of claim

An assignment of a claim for compensation under this subchapter is void. Compensation and claims for compensation are exempt from claims of creditors.

Editors' Comment

--This provision refers to compensation paid to government employees for disability or death due to work injuries.



42 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
5 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 8346

§ 8346. Exemption from legal process; recovery of payments

(a) The money mentioned by this subchapter is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

(b) Recovery of payments under this subchapter may not be made from an individual when, in the judgement of the Office of Personnel Management, the individual is without fault and recovery would be against equity and good conscience. Withholding or recovery of money mentioned by this subchapter ... may be made only if the head of the agency on behalf of which the certification or payment was made certifies to the Office that the certification or payment involved fraud on the part of the former employee.

Editors' Comment

--This provision refers to civil service employee retirement annuity payments.



43 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
5 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 8437

§ 8437. Thrift Savings Fund

(a) There is established in the Treasury of the United States a Thrift Savings Fund.

(b) The Thrift Savings Fund consists of the sum of all amounts contributed under section 8432 of this title [5 USCS § 8432] and all amounts deposited under section 8479(b) of this title [5 USCS § 8479(b)], increased by the total net earnings from investments of sums in the Thrift Savings Fund or reduced by the total net losses from investments of the Thrift Savings Fund, and reduced by the total amount of payments made from the Thrift Savings Fund (including payments for administrative expenses).

(c) The sums in the Thrift Savings Fund are appropriated and shall remain available without fiscal year limitation--

(1) to invest under section 8438 of this title [5 USCS § 8438];

(2) to pay benefits or purchase annuity contracts under this subchapter [5 USCS §§ 8431 *et seq.*];

(3) to pay the administrative expenses of the Federal Retirement Thrift Investment Management System prescribed in subchapter VII of this chapter [5 USCS §§ 8471 *et seq.*];

(4) to make distributions for the purposes of section 8440(b) of this title [5 USCS § 8440(b)];

(5) to make loans to employees and Members as authorized under section 8433(g) of this title [5 USCS § 8433(g)];
and

(6) to purchase insurance as provided in section 8479(b)(2) of this title [5 USCS § 8479(b)(2)].

(d) Administrative expenses incurred to carry out this subchapter and subchapter VII of this chapter [5 USCS §§ 8431 *et seq.*, 8471 *et seq.*] shall be paid first out of any sums in the Thrift Savings Fund forfeited under section 8432(g) of this title [5 USCS § 8432(g)] and then out of net earnings in such Fund.

(e)

(1) Subject to subsection (d) and paragraphs (2) and (3), sums in the Thrift Savings Fund credited to the account of an employee, Member, former employee, or former Member may not be used for, or diverted to, purposes other than for the exclusive benefit of the employee, Member, former employee, or former Member or his beneficiaries under this subchapter [5 USCS §§ 8431 *et seq.*].

(2) Except as provided in paragraph (3), sums in the Thrift Savings Fund may not be assigned or alienated and are not subject to execution, levy, attachment, garnishment, or other legal process. For the purposes of this paragraph, a loan made from such Fund to an employee or Member shall not be considered to be an assignment or alienation.

(3) Moneys due or payable from the Thrift Savings Fund to any individual and, in the case of an individual who is an employee or Member (or former employee or Member), the balance in the account of the employee or Member (or former employee or Member) shall be subject to legal process for the enforcement of the individual's legal obligations to provide child support or make alimony payments as provided in section 459 of the Social Security Act (42 U.S.C. 659) or relating to the enforcement of a judgment for physically, sexually, or emotionally abusing a child as provided under section 8467(a) [5 USCS § 8467(a)]. For the purposes of this paragraph, an amount contributed for the benefit of an individual under section 8432(c)(1) [5 USCS § 8432(c)(1)] (including any earnings attributable thereto) shall not be considered part of the balance in such individual's account unless such amount is nonforfeitable, as determined under applicable provisions of section 8432(g) [5 USCS § 8432(g)].

(f) The sums in the Thrift Savings Fund shall not be appropriated for any purpose other than the purposes specified in this section and may not be used for any other purpose.

(g) All sums contributed to the Thrift Savings Fund by an employee or Member or by an employing agency for the benefit of such employee or Member and all net earnings in such Fund attributable to investment of such sums are held in such Fund in trust for such employee or Member.



44 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
5 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 8470

§ 8470. Exemption from legal process; recovery of payments

(a) An amount payable under subchapter II, IV, or V of this chapter [5 USCS §§ 8410 et seq., 8441 et seq., 8451 et seq.] is not assignable, either in law or equity, except under the provisions of section 8465 or 8467 [5 USCS § 8465 or 8467], or subject to execution, levy, attachment, garnishment or other legal process, except as otherwise may be provided by Federal laws.

(b) Recovery of payments under subchapter II, IV, or V [5 USCS §§ 8410 et seq., 8441 et seq., 8451 et seq.] of this chapter may not be made from an individual when, in the judgment of the Office, the individual is without fault and recovery would be against equity and good conscience. Withholding or recovery of money paid under subchapter II, IV, or V of this chapter [5 USCS §§ 8410 et seq., 8441 et seq., 8451 et seq.] on account of a certification or payment made by a former employee of the United States in the discharge of his official duties may be made only if the head of the agency on behalf of which the certification or payment was made certifies to the Office that the certification or payment involved fraud on the part of the former employee.

Editors' Comment

-- This provision refers to the Federal Employees' Retirement System. *See 5 U.S.C. § 8401 et seq.*



45 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
10 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1035

§ 1035. Deposits of savings

(a) Under joint regulations prescribed by the Secretaries concerned, a member of the armed forces who is on a permanent duty assignment outside the United States or its possessions may deposit during that tour of duty not more than his unallotted current pay and allowances in amounts of \$5 or more, with any branch, office, or officer of a uniformed service. Amounts so deposited shall be deposited in the Treasury and kept as a separate fund, and shall be accounted for in the same manner as public funds.

(b) Interest at a rate prescribed by the President, not to exceed 10 percent a year, will accrue on amounts deposited under this section. However, the maximum amount upon which interest may be paid under this subsection to any member is \$10,000, except that such limitation shall not apply to deposits made on or after September 1, 1966, in the case of those members in a missing status, during the Vietnam conflict, the Persian Gulf conflict, or a contingency operation. Interest under this subsection shall terminate 90 days after the member's return to the United States or its possessions.

(c) Except as provided in joint regulations prescribed by the Secretaries concerned, payments of deposits, and interest thereon, may not be made to the member while he is on duty outside the United States or its possessions.

(d) An amount deposited under this section, with interest thereon, is exempt from liability for the member's debts, including any indebtedness to the United States or any instrumentality thereof, and is not subject to forfeiture by sentence of a court-martial.

(e) The Secretary concerned, or his designee, may in the interest of a member who is in a missing status or his dependents, initiate, stop, modify, and change allotments, and authorize a withdrawal of deposits, made under this section, even though the member had an opportunity to deposit amounts under this section and elected not to do so. Interest may be computed from the day the member entered a missing status, or September 1, 1966, whichever is later.

(f) The Secretary of Defense may authorize a member of the armed forces who is on a temporary duty assignment outside of the United States or its possessions in support of a contingency operation to make deposits of unallotted current pay and allowances during that duty as provided in subsection (a). The Secretary shall prescribe regulations establishing standards and procedures for the administration of this subsection.

(g) In this section:

(1) The term "missing status" has the meaning given that term in section 551(2) of title 37.

(2) The term "Vietnam conflict" means the period beginning on February 28, 1961, and ending on May 7, 1975.

(3) The term "Persian Gulf conflict" means the period beginning on January 16, 1991, and ending on the date thereafter prescribed by Presidential proclamation or by law.

Editors' Comment

--This provision refers to deposits made in a U.S. Serviceman's Savings Institution while the depositor is on permanent duty outside the United States.



46 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
10 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1440

§ 1440. Annuities not subject to legal process

Except as provided in section 1437(c)(3)(B) of this title, no annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

Editors' Comment

--This provision refers to annuities paid to members of the armed services, based on retirement or retainer pay.



47 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
10 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1450

§ 1450. Payment of annuity: beneficiaries

(a) In general. Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as that person may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to the person's beneficiaries under the Plan, as follows:

(1) Surviving spouse or former spouse. The eligible surviving spouse or the eligible former spouse;

(2) Surviving children. The surviving dependent children in equal shares, if the eligible surviving spouse or the eligible former spouse is dead, dies, or otherwise becomes ineligible under this section.

(3) Dependent children. The dependent children in equal shares if the person to whom section 1448 of this title applies (with the concurrence of the person's spouse, if required under section 1448(a)(3) of this title) elected to provide an annuity for dependent children but not for the spouse or former spouse; or

(4) Natural person designated under "insurable interest" coverage. The natural person designated under section 1448(b)(1) of this title, unless the election to provide an annuity to the natural person has been changed as provided in subsection (f).

* * *

(i) Annuities exempt from certain legal process. Except as provided in subsection (1)(3)(B), an annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

* * *

Editors' Comment

--This refers to military survivor benefits annuities paid pursuant to the Survivor Benefit Plan. *See* 10 U.S.C. §§ 1447 *et seq.*



48 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
15 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1673

§ 1673. Restriction on garnishment

(a) Maximum allowable garnishment. Except as provided in subsection (b) of this section and in section 305, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions.

(1) The restrictions of subsection (a) of this section do not apply in the case of--

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an

administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code.

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed--

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

(c) Execution or enforcement of garnishment order or process prohibited. No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.



49 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
15 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1675

§ 1675. Exemption for State-regulated garnishments

The Secretary of Labor may by regulation exempt from the provisions of section 303(a) and (b)(2) garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 303(a) and (b)(2).



50 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
22 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 4060

§ 4060. Assignment and attachment of moneys

(a) Annuities and severance pay benefits.

(1) An individual entitled to an annuity from the Fund may make allotments or assignments of amounts from such annuity for such purposes as the Secretary of State in his or her sole discretion considers appropriate.

(2) Notwithstanding section 3477 of the Revised Statutes of the United States or any other law, a member of the Service who is entitled to receive benefits under section 609(b)(1) may assign to any person the whole or any part of those benefits. Any such assignment shall be on a form approved by the Secretary of the Treasury and a copy of such assignment form shall be deposited with the Secretary of the Treasury by the member executing the assignment.

(b) Participants or annuitants having former spouses

(1)

(A) In the case of any participant or annuitant who has a former spouse who is covered by a court order or who is a party to a spousal agreement--

(i) any right of the former spouse to any annuity under section 814(a) in connection with any retirement or

disability annuity of the participant, and the amount of any such annuity;

(ii) any right of the former spouse to a survivor annuity under section 814(b) or (c), and the amount of any such annuity; and

(iii) any right of the former spouse to any payment of a lump-sum credit under section 815(a) or (b);

shall be determined in accordance with that spousal agreement or court order, if and to the extent expressly provided for in the terms of that spousal agreement or court order.

(B) This paragraph shall not apply in the case of any spousal agreement or court order which, as determined by the Secretary of State--

(i) would provide for a survivor annuity for a spouse or any former spouse of a participant with respect to which there has not been an annuity reduction (or a salary reduction or payment under section 814(c)(3)); or

(ii) is otherwise inconsistent with the requirements of this subchapter.

(2) Except with respect to obligations between participants and former spouses, payments under this part which would otherwise be made to a participant or annuitant based upon his or her service shall be paid (in whole or in part) by the Secretary of State to another individual to the extent expressly provided for in the terms of any order or any court decree of legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of legal separation.

(3) Paragraphs (1) and (2) shall apply only to payments made under this subchapter for periods beginning after the date of receipt by the Secretary of State of written notice of such decree, order, or agreement, and such additional information and such documentation as the Secretary of State may require.

(4) Any payment under this subsection to an individual bars recovery by any other individual.

(5) The 10-year requirement of section 804(b)(6), or any other provision of this part, shall not be construed to affect the rights any spouse or individual formerly married to a participant or annuitant may have, under any law or rule of law of any State or the District of Columbia, with respect to an annuity of a participant or annuitant under this subchapter.

(c) Applicability of other provisions of law or remedies. None of the moneys mentioned in this subchapter shall be assignable either in law or equity, except under subsection (a) or (b) of this section, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal law.

Editors' Comment

--This provision refers to benefits or annuities, or payment to survivors of foreign service employees, pursuant to the Foreign Service Retirement & Disability System. *See* 22 U.S.C. §§ 4041 *et seq.*



51 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
25 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 543

§ 543. Liability of judgment funds for debts

In no event shall any portion of the said judgment fund become liable, payable, or subject to any debt or debts contracted prior to the passage of this Act by any Indian of the Klamath Tribe except debts to the United States or to the tribe.

Editors' Comment

--This provision refers to credits given to members of the Klamath Indian tribes in Oregon by the Secretary of the Interior pursuant to the Klamath Welfare Act. *See* 25 U.S.C. §§ 541 *et seq.*



52 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
25 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 545

§ 545. Liability of judgment funds for debts

In no event shall any portion of the funds hereby directed to be credited and paid become liable, payable, or subject to any debt or debts contracted prior to the passage of this Act by any Indian of the Klamath Tribe, except debts to the United States or to the tribe.

Editors' Comment

--This provision refers to credits given to members of the Klamath Indian tribes in Oregon by the Secretary of the Interior pursuant to the Klamath Welfare Act. *See* 25 U.S.C. §§ 541 *et seq.*



53 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
26 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 7448

§ 7448. Annuities to surviving spouses and dependent children of judges and special trial judges

(1) Method of payment of annuities. Annuities granted under the terms of this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity shall have accrued. None of the moneys mentioned in this section shall be assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.



54 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
28 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 376

§ 376. Annuities for survivors of certain judicial officials of the United States

(a) For the purposes of this section--

(1) "judicial official" means:

(A) a Justice or judge of the United States, as defined by section 451 of this title;

(B) a judge of the District Court of Guam, the District Court of the Northern Mariana Islands, or the District Court of the Virgin Islands;

(C) a Director of the Administrative Office of the United States Courts, after he or she has filed a waiver under subsection (a) of section 611 of this title;

(D) a Director of the Federal Judicial Center, after he or she has filed a waiver under subsection (a) of section 627 of this title;

(E) an administrative assistant to the Chief Justice of the United States, after he or she has filed a waiver in

accordance with both subsection (a) of section 677 and subsection (a) of section 611 of this title;

(F) a full-time bankruptcy judge or a full-time United States magistrate judge; or

(G) a judge of the United States Court of Federal Claims;

who notifies the Director of the Administrative Office of the United States Courts in writing of his or her intention to come within the purview of this section within six months after (i) the date upon which he or she takes office, (ii) the date upon which he or she marries, (iii) January 1, 1977, (iv) October 1, 1986, or (v) the date of the enactment of the Retirement and Survivor's Annuities for Bankruptcy Judges and Magistrates Act of 1988, in the case of a full-time bankruptcy judge or United States magistrate judge in active service on that date, (vi) the date of the enactment of the Federal Court Study Committee Implementation Act of 1990, in the case of a full-time judge of the Court of Federal Claims in active service on that date, or (vii) the date of the enactment of the Federal Courts Administration Act of 1992;

* * *

(n) Each annuity authorized under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity shall have accrued. No annuity authorized under this section shall be assignable, either in law or in equity, except as provided in subsections (s) and (t), or subject to execution, levy, attachment, garnishment, or other legal process.

Editors' Comment

--This provision refers to annuities paid to survivors of a Justice or judge of the United States, a Director of Administrative Office of the United States Courts, a Director of the Federal Judicial Center, or an administrative assistant to the Chief Justice of the United States, under the Judicial Survivor's Annuity Reform Act. An annuity in favor of a surviving spouse or ex-spouse is not exempt from the claims of the spouse or ex-spouse. *See* 28 U.S.C. § 376.



55 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Exemptions Federal Non-Bankruptcy Code Exemptions
29 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1056(d)

§ 1056(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by *section 4975 of the Internal Revenue Code of 1986* (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code.

(3)

(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

* * *

Editors' Comment

--This provision refers to pension benefits regulated by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* The exemption does not apply to alimony, maintenance or child support claims under a "qualified domestic relations order." *See* 29 U.S.C. § 1056(d)(3).

The Supreme Court held in *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 26 C.B.C.2d 1119, *reh'g denied*, 505 U.S. 1239, 113 S. Ct. 13, 120 L. Ed. 2d 940 (1992), that an anti-alienation provision in an ERISA-qualified pension plan constituted a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the section 541(c)(2) exclusion of property from the debtor's bankruptcy estate. *See also* 4 *Collier on Bankruptcy*, P 522.09; 5 *Collier on Bankruptcy*, P 541.11 (Matthew Bender 15th Edition Revised).



56 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
33 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 775

§ 775. Payments nonassignable and exempt from process

No payment under this Act shall be assignable, either in law or in equity, or be subject to execution, levy, lien, attachment, garnishment, or other legal process.

Editors' Comment

--This provision refers to benefits paid to surviving spouses of Lighthouse Service personnel, pursuant to 33 U.S.C. § 771.



57 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
33 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 916

§ 916. Assignment and exemption from claims of creditors

No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

Editors' Comment

--This provision refers to death and disability benefits paid pursuant to the Longshoremen's and Harbor Workers' Compensation Act. *See* 33 U.S.C. §§ 901 *et seq.*



58 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
38 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1562

§ 1562. Special provisions relating to pension

* * *

(c) Special pension shall not be subject to any attachment, execution, levy, tax lien, or detention under any process whatever.

Editors' Comment

--This provision refers to special pensions awarded persons on the Army, Navy, Air Force and Coast Guard Medal of Honor roll.



59 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
38 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1970

§ 1970. Beneficiaries; payment of insurance

* * *

(g) Any payments due or to become due under Servicemembers' Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, an insured or a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to (1) collection of amounts not deducted from the member's pay, or collected from him by the Secretary concerned under section 1969(a) of this title, (2) levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.) relating to the seizure of property for collection of taxes), and (3) the taxation of any property purchased in part or wholly out of such payments.

Editors' Comment

--This provision refers to benefits due or to become due under Servicemen's Group Life Insurance or Veteran's Group Life Insurance.



60 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
38 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 5301

§ 5301. Nonassignability and exempt status of benefits

(a)

(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3)

(A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act.

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.



61 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
38 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 7297

§ 7297. Survivor annuities

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Appeals for Veterans Claims.

(2) The term "judge" means a judge the chief judge or an associate judge of the Court who is in active service or who has retired under section 7296 of this title [38 USCS § 7296].

(3) The term "pay" means salary received under section 7253(e) of this title [38 USCS § 7253(e)] and retired pay received under section 7296 of this title [38 USCS § 7296].

(4) The term "retirement fund" means the Court of Appeals for Veterans Claims Retirement Fund established under section 7298 of this title [38 USCS § 7298].

(5) The term "surviving spouse" means a surviving spouse of an individual who (A) was married to such individual for at least one year immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

(6) The term "dependent child" has the meaning given the term "child" in section 376(a)(5) of title 28 [28 USCS § 376(a)(5)].

(7) The term "Member of Congress" means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

(8) The term "assassination" as applied to a judge shall have the meaning provided that term in section 376(a)(7) of title 28 [28 USCS § 376(a)(7)] as applied to a judicial official.

* * *

(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

* * *



62 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Exemptions Federal Non-Bankruptcy Code Exemptions
42 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 407

§ 407. Assignment; amendment of section

(a) The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

(c) Nothing in this section shall be construed to prohibit withholding taxes from any benefit under this title, if such withholding is done pursuant to a request made in accordance with *section 3402(p)(1) of the Internal Revenue Code of 1986* [26 USCS § 3402(p)(1)] by the person entitled to such benefit or such person's representative payee.

Editors' Comment

--This provision refers to Social Security benefits. This antiassignment provision also applies to supplemental security income for the aged, blind and disabled. *See* 42 U.S.C. § 1383(d)(1).



63 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Exemptions Federal Non-Bankruptcy Code Exemptions
42 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 1717

§ 1717. Assignment of benefits; execution, levy, etc., against benefits

The right of any person to any benefit under title I shall not be transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable (except money paid hereunder as reimbursement for funeral expenses or as reimbursement with respect to payments of workmen's compensation or in the nature of workmen's compensation benefits), or rights existing under such title, shall be subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

Editors' Comment

--This provision covers compensation paid for injury or death resulting from a war risk hazard.



64 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
45 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 231m

§ 231m. Assignability; exemption from levy

(a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954, n* notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

(b)

(1) This section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 2(b) of this Act from income taxable pursuant to the Federal income tax provisions of the Internal Revenue Code of 1954. n*

(2) The section shall not operate to prohibit the characterization or treatment of that portion of an annuity under this Act which is not computed under section 3(a), 4(a), or 4(f) under this Act, or any portion of a supplemental annuity under this Act, as community property for the purposes of, or property subject to, distribution in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree. The Board shall make payments of such portions in accordance with any such characterization or treatment or any such decree or settlement.

Editors' Comment

--This provision refers to retirement annuities paid pursuant to the Railroad Retirement Act of 1974. *See* 45 U.S.C. §§ 231 *et seq.*

FOOTNOTES:

(n1)Footnote *. Ed. Note: Now known as the Internal Revenue Code of 1986.

(n2)Footnote *. Ed. Note: Now known as the Internal Revenue Code of 1986.



65 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
45 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 352

§ 352. Benefits

* * *

(e) Assignment, taxation, garnishment, attachment, etc., of benefits.

Notwithstanding any other law of the United States, or of any State, Territory, or the District of Columbia, no benefits shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

Editors' Comment

--This provision refers to railroad workers' unemployment insurance benefits. *See* 45 U.S.C. §§ 351 *et seq.*



66 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
46 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 11110

§ 11110. Seamen's clothing

The clothing of a seaman is exempt from attachments and liens. A person detaining a seaman's clothing shall be fined not more than \$500, imprisoned for not more than 6 months, or both.



67 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
46 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 11111

§ 11111. Limit on amount recoverable on voyage

When a seaman is on a voyage on which a written agreement is required under this part, not more than \$1 is recoverable from the seaman by a person for a debt incurred by the seaman during the voyage for which the seaman is signed on until the voyage is ended.



68 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
50 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 403n

§ 403n. Retirement equity for spouses of certain employees

(a) Manner and extent of applicability The provisions of sections 102, 221(b)(1)-(3), 221(f), 221(g), 221(h)(2), 221(i), 221(l), 222, 223, 224, 225, 232(b), 241(b), 241(d), and 264(b) of the Central Intelligence Agency Retirement Act ([former n*] *50 U.S.C. 403* note) establishing certain requirements, limitations, rights, entitlements, and benefits relating to retirement annuities, survivor benefits, and lump-sum payments for a spouse or former spouse of an Agency employee who is a participant in the Central Intelligence Agency Retirement and Disability System shall apply in the same manner and to the same extent in the case of an Agency employee who is a participant in the Civil Service Retirement and Disability System.

(b) Regulations The Director of the Office of Personnel Management, in consultation with the Director of the Central Intelligence Agency, shall prescribe such regulations as may be necessary to implement the provisions of this section.

FOOTNOTES:

(n3)Footnote *. Ed. Note: The bracketed word "former" has been inserted in subsection (a) to indicate that the cited sections of the Central Intelligence Agency Retirement Act no longer appear as a note to *50 U.S.C. § 403*.



69 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
50 U.S.C.

14a-Exemptions Collier Bankruptcy Exemption Guide § 2094

§ 2094. Attachment of Moneys

(a) Exemption from legal process. Except as provided in subsections (b), (c), and (e), none of the moneys mentioned in this title shall be assignable either in law or equity, or be subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

(b) Payment to former spouses under court order or spousal agreement. In the case of any participant, former participant, or retired participant who has a former spouse who is covered by a court order or who is a party to a spousal agreement-

(1) any right of the former spouse to any annuity under section 222(a) in connection with any retirement or disability annuity of the participant, and the amount of any such annuity;

(2) any right of the former spouse of a participant or retired participant to a survivor annuity under section 222(b) or 222(c), and the amount of any such annuity; and

(3) any right of the former spouse of a former participant to any payment of a lump-sum credit under section 241(b), and the amount of any such payment;

shall be determined in accordance with that spousal agreement or court order, if and to the extent expressly provided for in the terms of the spousal agreement or court order that are not inconsistent with the requirements of this title.

(c) Other payments under court orders.

Payments under this title which would otherwise be made to a participant, former participant, or retired participant based upon that participant's service shall be paid, in whole or in part, by the Director to another individual if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

* * *

Editors' Comment

--This provision exempts CIA retirement benefits from attachment. *See* 50 U.S.C. § 403.



70 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
50 U.S.C. Appendix

14a-Exemptions Collier Bankruptcy Exemption Guide § 524

§ 524. Stay or vacation of execution of judgments, attachments, and garnishments

(a) Court action upon material affect determination If a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and shall on application by the servicemember--

(1) stay the execution of any judgment or order entered against the servicemember; and

(2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.

(b) Applicability This section applies to an action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after such service terminates.

Editors' Comment

--Under this provision of the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501 *et seq.*, a court may in its discretion stay an execution of judgment, and may vacate or stay any attachment or garnishment.



71 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions
50 U.S.C. Appendix

14a-Exemptions Collier Bankruptcy Exemption Guide § 525

§ 525. Duration and term of stays; codefendants not in service

(a) **Period of stay** A stay of an action, proceeding, attachment, or execution made pursuant to the provisions of this Act by a court may be ordered for the period of military service and 90 days thereafter, or for any part of that period. The court may set the terms and amounts for such installment payments as is considered reasonable by the court.

(b) **Codefendants** If the servicemember is a codefendant with others who are not in military service and who are not entitled to the relief and protections provided under this Act, the plaintiff may proceed against those other defendants with the approval of the court.

(c) **Inapplicability of section** This section does not apply to sections 202 and 701.



72 of 85 DOCUMENTS

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Exemptions Federal Non-Bankruptcy Code Exemptions

14a-Exemptions Collier Bankruptcy Exemption Guide Scope

Scope DISCUSSION

Section 522(b)(1) allows a debtor to exempt either property specified in § 522(d) (unless the state law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize) or, subject to subsections 522(o) and (p), any property that is exempt under federal law, other than subsection 522(d), or under state or local law applicable on the date of the filing of the petition at 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. If the debtor's domicile has not been located at a single state for the 730-day period, the applicable law is the law of 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 any other place.

Thus, exemptions found in federal law other than the Bankruptcy Code are allowable in bankruptcy only if the debtor does not use the exemptions set forth in § 522(d), either as a matter of choice or because a state "opt out" law precludes their use. n1 The following statutes from the United States Code constitute the exemptions that may be available under federal law other than the Bankruptcy Code.

FOOTNOTES:

(n4)Footnote 1. Section 522(b)(1) provides that a debtor may exempt property specified under section 522(d) "unless the State law that is applicable to the debtor ... specifically does not so authorize." A majority of the states have enacted legislation prohibiting debtors from electing the § 522(d) exemptions. These states include: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming.



73 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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Research Research Guide to Legislative History of 11 U.S.C. § 522(b)

14a-Research Collier Bankruptcy Exemption Guide Research.syn

§ Research.syn Synopsis to Appendix Research: Research Guide to Legislative History of 11 U.S.C. § 522(b)

Research Research Guide to Legislative History of 11 U.S.C. § 522(b)



74 of 85 DOCUMENTS

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Research Research Guide to Legislative History of 11 U.S.C. § 522(b)

14a-Research Collier Bankruptcy Exemption Guide Research

Research Research Guide to Legislative History of 11 U.S.C. § 522(b)

(1) *Report of the Commission on the Bankruptcy Laws of the United States*, App. Pt. 1. H.R. Doc. No. 93-137, 93d Cong., 1st Sess. 170-73, 195-96 (1973), reprinted in Vol. B *Collier on Bankruptcy*, App. Pt. 4(c) (Matthew Bender 15th Ed. Revised).

(2) Vol. B *Collier on Bankruptcy*, App. Pt. 4(c), at 125-30.

(3) *Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 619 (1977) (statement of the Commercial Law League of America).

(4) *Id.* at 650 (statement of Alvin O. Wiese, Jr., chairman, National Consumer Finance Association Subcommittee on Bankruptcy).

(5) *Id.* at 684 (statement of Hon. Joe Lee, Bankruptcy Judge).

(6) H.R. 8200, 95th Cong., 1st Sess. § 522 (1977) (as reported by the House Committee on the Judiciary, September 8, 1977), reprinted in Vol. B *Collier on Bankruptcy*, App. Pt. 4(d) (Matthew Bender 15th Ed. Revised).

(7) H.R. Rep. No. 595, 95th Cong., 1st Sess. 360-63 (1977), reprinted in Vol. C *Collier on Bankruptcy*, App. Pt. 4(d)(i) (Matthew Bender 15th Ed. Revised).

(8) S. Rep. No. 989, 95th Cong., 2d Sess. 75-77 (1978), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(e)(i) (Matthew Bender 15th Ed. Revised).

(9) 124 Cong. Rec. H11,095, 11,113 (daily ed. Sept. 28, 1978), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(f)(i) (Matthew Bender 15th Ed. Revised).

(10) 124 Cong. Rec. S17,412, 17,430 (daily ed. Oct. 6, 1978), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(e)(iii) (Matthew Bender 15th Ed. Revised).

(11) S. Rep. No. 65, 98th Cong., 1st Sess. 7-8 (1983) (This report accompanied Senate Bill No. 445, which was never enacted into law. The cited pages include comments concerning proposed amendments to section 522. Those proposals are substantially similar to provisions that subsequently were enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353. No committee report was issued for Pub. L. No. 98-353).



75 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CaseHi.syn

§ CaseHi.syn Synopsis to Chapter CaseHi: Case Highlights: Issues Concerning Exemptions in Bankruptcy

CH.01. State Lien Preservation Law vs. Section 522(f)

- [1] States Limit the Debtor's Ability to Avoid a Lien
- [2] Interplay of State Law and Bankruptcy Law; Owen v. Owen; States Cannot Circumvent Lien Avoidance
- [3] Valuation Issues in Avoidance--Excess Value Treatment
- [4] Extent and Order of Lien Avoidance
- [5] Determination of Exemptions--Functional Nexus Test
- [6] IRS Lien Issues
- [7] Denial of Discharge Does Not Bar Claim of Exemptions
- [8] Timing Issues for Objection to Exemptions, Limitations of Actions and When to Avoid Liens

CH.02. Homestead Exemption

- [1] Homestead Exemption Protected
- [2] Possession of Property
- [3] Mere Absence from Home Does Not Constitute Abandonment
- [4] Filing Required to Designate Homestead
- [5] Interpretation of Exclusions to Avoidance under Section 522(f)
- [6] Enforcement of Nondischargeable Debt Against Homestead

[7] Section 522 (d)(5); Wildcard Exemption

CH.03. Exemptions in Joint Cases

[1] Continuing Effect of 1984 Bankruptcy Amendments; Practice of Stacking Ended

[2] Some Types of Stacking Still Possible

[a] Doubling of Homestead Exemption Allowed in Some Jurisdictions or When Estates are Separately Administered

[b] Doubling of Motor Vehicle Exemption Allowed in Second Circuit

[c] Doubling of Personal Exemption Allowed in Oregon

[3] Doubling Not Allowed in the Eighth, Ninth and Eleventh Circuits

[4] Joint Debtors Living Apart

[a] Living in the Same State

[b] Living in Different States

[c] Debtors Living in Same State with One Choosing State Exemptions and One Choosing Federal Exemptions

[5] Lien Avoidance in Joint Cases with Lien Against Only One Debtor

CH.04. Tools of the Trade

[1] Tools of the Trade Exemption Sometimes Augmented

[2] Automobile as a Tool of the Trade

[a] Automobile Does Not Qualify

[b] Exemption of Automobiles Sometimes Allowed; Prohibition Not Absolute

[3] Liquor License as Tool of the Trade

[4] Unusual Tools May Qualify for Exemption

[5] Computer Equipment as a Tool of the Trade

[6] Liens on Tools Avoidable, But May Be Limited

CH.05. Controversy over Farm Equipment: Does It Qualify for Exemption?

[1] Farm Equipment May Qualify for Exemption Even If Debtors Not Technically Farmers

[2] Farmer's Non-Farmer Spouse Sometimes Allowed to Exempt Items as Tools of the Trade

[3] Large Pieces of Farm Equipment and Farm Animals May Qualify for Exemption

[4] Heavy Farm Equipment Does Not Qualify for Exemption

CH.06. Life Insurance: State Law Exemptions

[1] Life Insurance Exemption Unlimited

[2] Life Insurance Exemption Sometimes Limited

CH.07. Liens Arising from Divorce Proceedings

[1] Farrey v. Sanderfoot

[2] Lien Not Avoidable

[3] Liens Created Pursuant to Divorce Decree Treated Differently; Such Judicial Liens May Be Unavoidable

[4] The 2005 Amendments to the Bankruptcy Code

CH.08. Pension Law and Exemptions

[1] Patterson v. Shumate

[2] The Section 541(c)(2) Exclusion When a Retirement Plan, in Operation, Violates ERISA

[3] Application of the Anti-Alienation Provision of the Internal Revenue Code

[4] Statutorily and Non-Statutorily Prescribed Anti-Alienation Provisions

[5] Special Exception for IRS Tax Liens and Levies

[6] Further Analysis Regarding the Meaning of "ERISA Qualified"

[7] Debtor's Ability to Exempt Pension Often Controlled by State Law

[a] Exemptions for Public and Private Pensions

[8] State Law Exemption Statutes and ERISA Preemption

[9] Rousey v. Jacoway

CH.09. Prebankruptcy Planning and the Conversion of Nonexempt Assets into Exempt Property

[1] Overview

[2] Application of State Law

[3] Prebankruptcy Planning

- [a] General Right to Plan, Not to Defraud
- [b] Forms of Prebankruptcy Planning Allowed
- [c] Forms of Prebankruptcy Planning Not Permitted
- [d] Determination of Allowance of Claim of Exemption
 - [i] Debtor's Intent to Defraud
 - [ii] Extrinsic Evidence of Intent to Defraud

[4] Creditor's Remedies

- [a] Disallowing or Limiting the Exemption
- [b] Denial of Discharge
- [c] Dismissal for Bad Faith or Substantial Abuse
- [d] Imposition of Sanctions
- [e] Transfer Avoided as a Fraudulent Conveyance
- [f] Criminal Penalties

[5] Objections to Claim of Exemptions

- [a] Overview
- [b] Time of Objection
 - [i] Calculation of the Objection Period
 - [ii] No Exceptions Permitted
 - [iii] Amendments to Exemptions and Conversion of the Case
- [c] Burden of Proof
- [d] Section 522(g)

CH.10. Ethical Considerations in Exemption Planning

- [1] Attorney Must Advise Debtors of Exemption Options
- [2] Attorney Must Not Advocate Illegal Transfers of Property
- [3] Attorney Must Advise Reversal of Illegal Transfers of Property

[4] Taylor v. Freeland & Kronz

[5] No Bad Faith Exception to Federal Rule of Bankruptcy Procedure 4003(b) Filing Deadline

[6] "Exemption by Declaration"

[7] Debtor Should Make Good Faith Estimate of Asset Value



76 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.01

CH.01. State Lien Preservation Law vs. Section 522(f)

The Bankruptcy Code provides for the preservation of assets of the debtor through the use of exemptions. Under section 522, Congress has provided two sets of exemptions, the federal Bankruptcy Code exemptions and the individual state exemptions. Exemptions are available only to individuals; they are not available to corporations or similar entities. Most states have "opted out" of the use of the Bankruptcy Code exemptions and have provided state law exemptions for use by the debtors in those states. This unusual circumstance creates a hybrid of state law and federal law in the bankruptcy exemption setting. Accordingly, if a state has opted out of the federal exemptions, the interpretation of and right to the actual exemptions are generally governed by state law. However, the interpretation of impairment and lien avoidance issues is governed by federal law. n1

In interpreting this hybrid mix of exemption law, a court should interpret exemptions in as favorable a light toward the debtor as possible. Many courts reiterate the rule of statutory construction that, if it is possible to interpret an exemption in ways both favorable and unfavorable to the debtor, a court should interpret the exemption in a light favorable to the debtor. n2 However, because of the state law element in exemption law, entitlement to claim an exemption can be fact driven and unique from state to state. n3

In considering exemptions it is important to note that the Bankruptcy Code cannot be circumvented by state law. In *Little v. Reaves (In re Reaves)*, n4 the Court of Appeals for the Ninth Circuit held that even though California law requires an election of exemptions after bankruptcy proceedings, it contains no proscription against the consecutive use of exemptions first in the event of levy prior to bankruptcy and again after a bankruptcy petition has been filed.

In *Bruin Portfolio, LLC v. Leicht (In re Leicht)*, n5 the bankruptcy appellate panel for the First Circuit struck down a portion of the Massachusetts homestead exemption, n6 which provided no protection against contract debts that existed prior to the acquisition of the homestead. n7 The bankruptcy appellate panel concluded that this treatment of an exemption frustrates the purpose behind the Bankruptcy Code's recognition of exemptions and the debtor's fresh start of section 522(c). n8

Section 522(f) of the Code allows a debtor to avoid judicial or nonpossessory, nonpurchase money liens when they impair certain of the debtor's exemptions. A debtor may avoid (remove) a lien on the debtor's interest in certain exempt property that is a judicial lien other than a lien securing an alimony, maintenance or support obligation, or is a nonpossessory, nonpurchase money security interest in certain property. n9 The 2005 amendments to the Code not only

provide a list of what property can be categorized as household goods, but also include a list of what property of the debtor cannot be claimed exempt as household goods for purposes of lien avoidance under section 522(f)(1)(B). n10

Liens created by agreement have sometimes been determined to be security interests as defined by the Code, which are unavoidable. The "interest of the debtor in property" that is avoidable is the debtor's equity in the property, i.e., the value of the property less the amount of the lien, and any other equitable or intangible interest the debtor might have in the property, such as the right of possession. n11

[1] States Limit the Debtor's Ability to Avoid a Lien

Some states do not limit the value of an item of exempt property. Section 522(f)(3) provides that a debtor who is limited to or chooses state exemptions cannot avoid a nonpossessory, nonpurchase money security interest in implements, professional books, tools of the trade of the debtor or a dependent of the debtor, or farm animals or crops of the debtor or a dependent of the debtor, to the extent the value of these items exceeds \$5,000.

[2] Interplay of State Law and Bankruptcy Law; *Owen v. Owen*; States Cannot Circumvent Lien Avoidance

The hybrid mixture of state law and bankruptcy exemption law raises interesting issues. For example, may state legislatures avoid Bankruptcy Code provisions by narrowly defining state exemptions? The answer is no. The U.S. Supreme Court has held that judicial liens can be avoided under section 522(f), even though a state has defined exempt property in such a way as to specifically exclude property encumbered by liens.

Some states attempted to exclude any exemption for property subject to a lien. If lien avoidance under section 522(f) were limited to property exempt under such a law, the lien could not be avoided. n12 However, the U.S. Supreme Court in *Owen v. Owen* n13 held that a lien can be avoided if the property would have qualified for the exemption but for the lien. Thus, state law cannot be used to circumvent lien avoidance provisions under the bankruptcy code.

In *Owen v. Owen*, the Court considered the Florida homestead exemption, n14 which exempts certain property from the bankruptcy estate but which had been interpreted to exclude from its protection property encumbered by liens that existed before the property acquired homestead status. The respondent, the former wife of the petitioner, obtained a judgment against her ex-husband for approximately \$160,000. The ex-husband subsequently acquired a condominium in the county in which the judgment was recorded and, under Florida law, the property became subject to the judgment lien. One year later, the Florida homestead law was amended and the condominium fell within the new definition of "homestead." The ex-husband subsequently filed a petition under chapter 7 of the Bankruptcy Code, claimed the condominium as exempt property under the homestead exemption and sought to avoid his ex-wife's pre-existing lien pursuant to section 522(f). The bankruptcy court permitted the exemption but refused to avoid the lien and the district court affirmed, following state constitutional interpretation which held the exemption inapplicable to pre-existing liens on the property. On appeal, the court of appeals affirmed.

The U.S. Supreme Court reversed the lower courts, holding that proper application of section 522(f) required that the statute be read to permit the avoidance of any lien that impairs an exemption that the debtor would have had if the lien had not existed. n15 Thus, the fact that Florida law removes lien-encumbered property from the scope of its homestead exemption does not preclude avoidance of the lien. The Court ruled that the critical inquiry is whether the debtor's property would have been exempt but for the lien, and remanded the case for consideration of this question.

The Court of Appeals for the Sixth Circuit in *Holland v Star Bank, N.A. (In re Holland)* n16 further defined the impact of *Owen*. In *Holland*, the debtors filed a voluntary petition under chapter 7 that was precipitated by the recording of judgment liens against the debtors' homestead property. The debtors claimed their interest in the homestead as exempt, and the creditor did not object to the exemption under *Federal Rule of Bankruptcy Procedure 4003(b)*. The debtors filed motions to avoid the creditor's lien to protect the debtors' interest in the homestead. This amount was below the allotted

state exemption.

The bankruptcy court denied the debtors' motion to avoid the lien. After the denial of a motion for rehearing by the bankruptcy court and an affirmance by the district court, the debtors appealed the ruling. In analyzing the case, the Court of Appeals cited the Supreme Court's *Owen* decision and the change in the legal landscape created by the 1994 amendments to the Bankruptcy Code. The court observed that prior to these changes in the law there had not been a federal definition of the words "impair an exemption." n17 Accordingly, the Court overruled its prior decision based on a state law interpretation of the term "impair an exemption," and determined that the lien could be avoided under the *Owen* test. n18

[3] Valuation Issues in Avoidance--Excess Value Treatment

Many valuation issues arise with a homestead exemption. Such valuation issues apply principles that can also be applied to personal property exemptions. n19 A debtor may employ section 522(f) to avoid certain liens on the residence up to the statutory maximum regardless of the amount of equity the debtor has in the property. n20 Additionally, even though a debtor has no equity in a residence, the debtor may have an interest in the property benefitted by the avoidance of a lien. n21

This concept was discussed in *In re Whitehead*, n22 even though the debtor did not have any equity in the homestead. Relying on the legislative history and purpose of exemptions under section 522 to allow the avoidance, the bankruptcy court opined that a debtor does not need to have any equity over the liens in a homestead to have a lien avoided under section 522. n23

In claiming an exemption, many states require the debtor to place a value on the item claimed as exempt. If no value is given, a trustee may object to the exemption and it may be sustained to the extent of any value of the exempt item in excess of the amount listed as exempt. n24 This result is in keeping with the concept that the debtor is the best one to know the valuation of property. n25 It is also in keeping with the lesson learned from the Supreme Court's decision in *Taylor v. Freeland & Kronz*. n26 The Court addressed the significance of filing a timely objection to exemptions, finding that the trustee's failure to file a timely objection resulted in allowance of the claimed exemption even though the value of the claimed property exceeded what the debtor would otherwise be entitled to exempt.

[4] Extent and Order of Lien Avoidance

The actual amount of a lien avoidance was addressed by the bankruptcy appellate panel in *Bank of America National Trust and Savings Association v. Hanger (In re Hanger)*. n27 There, the panel examined whether the lien avoidance calculation under section 522(f)(2) required the entire avoidance or partial avoidance of a creditor's lien. The panel determined that the creditor's lien could only be avoided in part. In reaching this conclusion, the panel provided a detailed analysis of the history of section 522(f) and the battle between partial avoidance and full avoidance. n28 The panel discussed and reconciled the full avoidance theory as enunciated in *In re Brantz*, n29 and favorably cited in *Owen*. n30

In addition, it is well settled that valid judicial liens that are being avoided under section 522(f) as impairing exemptions are to be deducted in reverse order of priority. n31 In applying the statutory formula to determine the extent of impairment, bankruptcy courts must add the total of all the liens and encumbrances against a debtor's property and not simply the value of liens that are senior to the judgment lien(s) the debtor is seeking to avoid. n32

Various ways to circumvent limitations on lien avoidance have been attempted. An example is the interesting approach tried (unsuccessfully) in *Toplitzky v. Hooten (In re Toplitzky)*. n33 The creditor sought to keep its lien by paying the debtor the amount of the impairment. The court ruled that a creditor cannot pay the debtor the amount of the claimed exemption and retain its lien. n34

Even if a debtor and a creditor voluntarily settle a lawsuit and place the proceeds of the sale of property into an escrow, the creditor's judicial lien is still an involuntary lien subject to avoidance under section 522. n35

[5] Determination of Exemptions--Functional Nexus Test

In determining whether an item can be validly claimed exempt before permitting lien avoidance, many courts use a functional nexus test. This test examines the use of the "exempt item" as it relates to the household. The 2005 amendments to the Code provide a list of what property can be categorized as household goods, but items on the list may still be broad enough to require an examination into the use of the item (i.e., appliances, personal effects). The items on the list in the amendments, however, will not, for the most part, require an examination into the use of the item claimed exempt. n36 The 2005 amendments also list items, which, under prior law, might have been considered household goods, as no longer available under that exemption claim.

The functional nexus test shows that all exemption litigation is highly fact specific. Because a court will look to the use of the item, debtors and creditors should be prepared to support their arguments with cold, hard facts. n37

[6] IRS Lien Issues

The interplay between sections 522 (exemptions) and 553 (setoff) was examined in *Alexander v Commissioner (In re Alexander)*. n38 In that case, the Internal Revenue Service used its right of setoff on property that the debtor claimed as exempt. The bankruptcy court ruled that the IRS cannot use its right of setoff when the debtor has a right to an exemption in the property subject to the right of offset. The court, in interpreting sections 522 and 553, attempted to give meaning to both sections and determined that Congress did not intend exempt property to be liable for discharged tax debts through setoff.

[7] Denial of Discharge Does Not Bar Claim of Exemptions

A debtor is entitled to claim exemptions in a chapter 7 case even when the discharge is denied. In *In re Clark*, n39 a debtor whose discharge had been denied, claimed an exemption in an Individual Retirement Account (IRA) and sought to avoid a judicial lien filed by a creditor (a receiver for an insurance company). The court reviewed the language of section 522 and determined that the debtor was entitled to the exemption and avoidance of the lien even though the discharge had been denied.

However, if a debtor conceals assets, such concealment can be a bar to the exemption especially if a debtor acts in bad faith. n40 The 2005 amendments to the Code also provide that if a debtor has been convicted of a felony that established that the bankruptcy case filing was an abuse of process or the debtor owes a debt arising from various securities statutes or from criminal, intentional, willful or reckless misconduct that caused serious physical injury or death to another in the preceding five years, then the debtor may not exempt any amount of interest exceeding \$125,000 in homestead property. n41

[8] Timing Issues for Objection to Exemptions, Limitations of Actions and When to Avoid Liens

A party in interest has 30 days after the meeting of creditors held under section 341(a) is concluded to object to exemptions claimed by a debtor. If a timely objection is not filed, the exemption will be allowed. n42 The time to object can be extended if the party in interest files a request before the initial time expires to extend the time to object to the exemption. n43 However, the U.S. Supreme Court as well as the Courts of Appeals for the Fifth and Eleventh Circuits have defined the full ramifications of what a failure to object means.

The U.S. Supreme Court, in *Taylor v. Freeland & Kronz*, held that a trustee may not contest the validity of a debtor's claimed exemption after failure to make a timely objection within the 30-day time period set forth in *Federal Rule of*

Bankruptcy Procedure 4003(b), even if the debtor had no colorable basis for claiming the exemption. n44

If a debtor fails to appear at the section 341(a) meeting, the examination period remains open, and the trustee can schedule another meeting to complete the examination. The last day for raising objections is 30 days after the last session of the section 341(a) creditors' meeting. The trustee can also continue the initial meeting in order to obtain additional testimony from the debtor or review documents evidencing the debtor's financial history. If a trustee fails to announce a date and time certain to which a section 341(a) meeting is adjourned within a reasonable time, the meeting may be deemed concluded, and the 30-day time period begins to run with the filing of that initial meeting. n45 Although a new 30-day objection period begins to run with the filing of an amendment to the debtor's exemption schedules, an objection, other than to the additional exemption, is untimely if it attempts to reopen the objection period as to assets already claimed exempt and to which there was no timely objection filed. n46

Because a claimed exemption is presumptively valid, an objecting party must prove the exemption is not proper. The objecting party must produce evidence to rebut the presumptively valid exemption whereupon the burden shifts to the debtor to demonstrate that the exemption claim is proper. The burden of persuasion always remains with the objecting party. n47 However, the debtor has the initial burden to state the exemptions with sufficient particularity so that all parties are able to ascertain those properties the debtor is claiming exempt from distribution to creditors. n48 One court found that even though the trustee failed to timely object to the debtors' claim of exemption in a personal injury cause of action, and the debtors' right to the exemption became unassailable, the trustee retained the right to contest whether any of the proceeds arising from the settlement were property "of the kind" that the debtors had exempted. n49

A party in interest's failure to object to an exemption does not bar the party from contesting a debtor's attempt to invalidate a lien. In *Crowell v. Theodore Bender Accounting, Inc. (In re Crowell)*, n50 a chapter 13 debtor sought to avoid a lien on a homestead. The debtor argued that since the creditor had not filed a timely objection to the debtor's claim of exemption, the creditor could not, in the lien avoidance action, assert the validity of its lien. The Court of Appeals for the Fifth Circuit disagreed with the debtor's position, observing that the issue of objection to exemption did not have any relevancy to an action to determine the validity of the lien. The court held that the debtor could not raise the issue of lien validity in an action and complain that the creditor defended the action. n51

In another case, the Court of Appeals for the Eleventh Circuit examined this issue from the trustee's position. n52 In *In re Levine*, a trustee who had not objected to exemptions of the debtor filed an adversary proceeding to avoid prepetition conveyances of exempt property by the debtor under section 544. The debtor asserted that the adversary proceeding was barred because the trustee had not objected to the exemptions. The court rejected this contention and held that the two year statute of limitations under section 546(a)(1)(A) governed the adversary proceeding. The court noted that the 30-day deadline in *Federal Rule of Bankruptcy Procedure 4003* deals with the actual claiming of the exemption. It observed that the adversary proceeding did not contest the exemption, but was an action to avoid a transfer of property of the debtor. n53

Subsequently, the Court of Appeals for the Eleventh Circuit in *Havaco of America, Ltd. V. Hill* n54 certified to the Florida Supreme Court, as unsettled but potentially a dispositive question of state law, the issue whether a debtor could exempt a Florida homestead after converting non-exempt assets with actual intent to hinder, delay or defraud creditors. The Florida Supreme Court explicitly held that the transfer of non-exempt assets into an exempt homestead even with the intent to hinder, delay or defraud creditors would not preclude the exemption. n55 In *In re Potter*, a bankruptcy court in Florida was called upon to reconcile the *Levine* and *Havaco* cases. The trustee in *Potter* argued that the strong arm clause could force the debtors to sell homestead property which they had purchased 18 months before filing a bankruptcy petition after converting non-exempt assets and stipulated that they intended to hinder, delay and defraud their creditors. The bankruptcy court concluded that the Florida homestead exemption could not be preempted by the strong-arm statute. n56

A bankruptcy court has ruled that a chapter 13 debtor cannot avoid a judicial lien that impairs a homestead exemption

until the debtor has completed the chapter 13 plan. n57 In reaching this conclusion, the court concluded that avoidance orders in a chapter 13 case are premised upon the debtor receiving a discharge; accordingly, lien avoidance cannot be available until the discharge is granted in the chapter 13 case. n58 In contrast, in *In re Murphy*, n59 the bankruptcy court held that a lien could be avoided in a chapter 13 case before the discharge is granted.

In dealing with the timing of claiming and objecting to exemptions, the importance of local rules and procedures cannot be ignored. Such an issue was decided by the Bankruptcy Appellate Panel for the Eighth Circuit in *McGowan v. Ries (In re McGowan)*. n60 In *McGowan*, a debtor filed a petition under chapter 7. The trustee discovered a conflict, and that trustee resigned at the original section 341 meeting. A new trustee was appointed; however, there was a delay in holding the rescheduled section 341 meeting. After the "real" section 341 meeting was held, the trustee objected to the debtor's homestead exemption. The debtor objected to the timeliness of the objection, pointing to a local rule that provided that the meeting of creditors was deemed to have been concluded on the first date set for such meeting. The bankruptcy court agreed that the objection was untimely; however, the court used section 105 to sustain the objection. The case was appealed, and the bankruptcy appellate panel held that the local rule must be read with reason and that the rule anticipated that the section 341 meeting could not be concluded until after it was begun. Therefore, the rule did not apply.

FOOTNOTES:

(n1)Footnote 1. *In re Strother*, 328 B.R. 818, 822 (B.A.P. 10th Cir. 2005) ; *In re Chiu*, 266 B.R. 743, 747 (B.A.P. 9th Cir. 2001) *aff'd* 304 F.3d 905 (2002) .

(n2)Footnote 2. *See, e.g., In re Lampe*, 331 F.3d 750, 754 (10th Cir. 2003) ; *Baumgart v. Alam (In re Alam)*, 359 B.R. 142, 147-48 (B.A.P. 6th Cir. 2006) ; *In re Hageman*, 388 B.R. 896, 899 (Bankr. C.D. Ill. 2008) ; *In re Mootosammy*, 387 B.R. 291, 295 (Bankr. M.D. Fla. 2008) ; *In re McCall*, 383 B.R. 419, 423 (Bankr. N.D. Ohio 2007) .

(n3)Footnote 3. *See Crawford v. First Family Financial Servs. of Ga. (In re Crawford)*, 226 B.R. 484 (Bankr. N.D. Ga. 1998) (illustrating the importance of strong evidence in exemption hearings.)

(n4)Footnote 4. 285 F.3d 1152 (9th Cir. 2002) .

(n5)Footnote 5. 222 B.R. 670 (B.A.P. 1st Cir. 1998) .

(n6)Footnote 6. *See also In re Weinstein*, 217 B.R. 5 (D. Mass. 1998) , *aff'd*, 164 F.3d 677 (1st Cir. 1999) . In this case, which predates the bankruptcy appellate panel's decision in *In re Leicht*, the district court ruled that the Massachusetts' homestead law was preempted by the Bankruptcy Code. *See also In re Euber*, 39 C.B.C.2d 970, 217 B.R. 448 (Bankr. D. Vt. 1998) (applying Vermont law and holding that section 522(b)(2)(A) would allow avoidance even if Vermont law did not allow avoidance).

(n7)Footnote 7. 222 B.R. 670, 673 .

(n8)Footnote 8. 222 B.R. 670, 681 .

(n9)Footnote 9. 11 U.S.C. § 522(f)(1). These issues are distinguished from liens securing an alimony, maintenance or support obligation, which are no longer avoidable, and are further detailed *infra*. *See 4 Collier on Bankruptcy, P 522.11* (Matthew Bender 15th ed. rev.); Sommer & McGarity, *Collier Family Law and the Bankruptcy Code, P 7.04* (Matthew Bender).

(n10)Footnote 10. 11 U.S.C. § 522(f)(4)(A), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8. § 313 (2005), effective in cases commenced on or after October 17, 2005.

(n11)Footnote 11. *In re Leicht*, 222 B.R. 670, 678-80 (B.A.P. 1st Cir. 1998) ; *In re Dubois*, 306 B.R. 423, 426-27 (Bankr. D. Me. 2004) . *In re Conyers*, 129 B.R. 470, 473 (Bankr. E.D. Ky. 1991) .

(n12)Footnote 12. In *Alu v. State of N.Y. Dept. of Taxation & Fin.*, 11 C.B.C.2d 1458, 41 B.R. 955 (E.D.N.Y. 1984), state law was interpreted as precluding the enforcement of any liens on a residence unless or until the debtor's equity exceeded the homestead exemption, at which time they would be enforceable only against the excess. *But see Galvan v. Galvan (In re Galvan)*, 22 C.B.C.2d 605, 110 B.R. 446 (B.A.P. 9th Cir. 1990). *See also In re Jordan*, 21 C.B.C.2d 164, 96 B.R. 284 (Bankr. W.D. Pa. 1989).

(n13)Footnote 13. 500 U.S. 305, 111 S. Ct. 1833, 114 L. Ed. 2d 350, 24 C.B.C.2d 850 (1991), *cert. denied*, 961 F.2d 170, 26 C.B.C.2d 1758 (11th Cir.), *cert. denied*, 495 U.S. 929, 113 S. Ct. 659, 121 L. Ed. 2d 584 (1992); *see also In re Prestegaard*, 139 B.R. 117 (Bankr. S.D.N.Y. 1992).

(n14)Footnote 14. Fla. Const. art. 10, § 4(a).

(n15)Footnote 15. *Owen v. Owen*, 500 U.S. 305, 312, 111 S. Ct. 1833, 1837, 114 L. Ed. 2d 350, 354, 24 C.B.C.2d 850, 855 (1991). The Court thus held that the "unanimously agreed-upon manner of applying § 522(f) to federal exemptions" was appropriate for state exemptions as well.

(n16)Footnote 16. 151 F.3d 547, 40 C.B.C.2d 560 (6th Cir. 1998). *See also In re Brinley*, 403 F.3d 415, 421 (6th Cir. 2005); *Kolich v. Antioch Laurel Veterinary Hosp. (In re Kolich)*, 328 F.3d 406, 410 (8th Cir. 2003); *In re Charnock*, 318 B.R. 720, 726-27 (B.A.P. 9th Cir. 2004).

(n17)Footnote 17. *Holland v. Star Bank, N.A. (In re Holland)*, 151 F.3d 547, 40 C.B.C.2d 560 (6th Cir. 1998).

(n18)Footnote 18. *In re Dixon*, 885 F.2d 327 (6th Cir. 1989); *see also Saal v. Helping People Succeed, Inc. (In re Saal)*, 338 B.R. 501, 504-05 (Bankr. D. Colo. 2006) (entire lien amount avoided even though judicial lien partially secured; "the mere existence of a judicial lien impairs the homestead exemption because it constitutes a cloud on the title"); *In re McMasters*, 220 B.R. 419 (Bankr. N.D. Okla. 1998) (Owen test used to avoid judicial lien on homestead exemption with emphasis on the "but for" language in Owen); *In re Duvall*, 218 B.R. 1008 (Bankr. W.D. Tex. 1998) (Owen test applied to tools of trade exemption to avoid lien under subsections 522(f)(2) and (3)).

(n19)Footnote 19. For a discussion of homestead valuations, *see P CH.02, infra*.

(n20)Footnote 20. *See In re Brown*, 81 B.R. 432 (N.D. Ohio 1985); *In re Henninger*, 13 C.B.C.2d 609, 53 B.R. 60 (Bankr. W.D.N.Y. 1985); *In re Berrong*, 13 C.B.C.2d 669, 53 B.R. 640 (Bankr. D. Colo. 1985); *In re Ricks*, 40 B.R. 507 (Bankr. D.D.C. 1984); *Schmidt v. Kessler (In re Schmidt)*, 10 C.B.C.2d 30, 36 B.R. 144 (Bankr. N.D. Ohio 1983).

(n21)Footnote 21. In *In re DiliBerto*, 28 C.B.C.2d 678, 150 B.R. 7 (Bankr. W.D.N.Y. 1993), the court held that for purposes of section 522(f)(1) the debtor could avoid a judgment lien even if the debtor had no equity in the property because it was over-encumbered by a tax lien superior to the judgment lien sought to be avoided.

(n22)Footnote 22. 226 B.R. 539 (Bankr. W.D.N.Y. 1998); *see also In re Sheckard*, 386 B.R. 118 (Bankr. E.D. Pa. 2008); *In re Male*, 362 B.R. 238 (Bankr. E.D.N.C. 2007).

(n23)Footnote 23. The court disagreed with the analysis of *In re Gonzalez*, 149 B.R. 9 (Bankr. D. Mass. 1993).

(n24)Footnote 24. *In re Solly*, 392 B.R. 692, 695 (Bankr. S.D. Tex. 2008) (citing valid concerns raised in *Taylor v. Freeland & Krontz*); *see also In re Forti*, 224 B.R. 323 (Bankr. D. Md. 1998).

(n25)Footnote 25. *In re Forti*, 224 B.R. 323, 329 (Bankr. D. Md. 1998).

(n26)Footnote 26. 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (debtor claimed exempt a cause of action for employment discrimination and listed the value as "unknown").

(n27)Footnote 27. 39 C.B.C.2d 677, 217 B.R. 592 (B.A.P. 9th Cir. 1997) ; see also *Nelson v. Scala*, 192 F.3d 32, 42 C.B.C.2d 1647 (1st Cir. 1999) (lien may only be avoided to the extent necessary to eliminate impairment); *S & C Home Loans, Inc. v. Farr (In re Farr)*, 278 B.R. 171 (B.A.P. 9th Cir. 2002) ; *In re Vokac*, 273 B.R. 553 (Bankr. N.D. Ill. 2002) .

(n28)Footnote 28. 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997) . But see *Saal v. Helping People Succeed, Inc. (In re Saal)*, 338 B.R. 501, 504-05 (Bankr. D. Colo. 2006) .

(n29)Footnote 29. 106 B.R. 62 (Bankr. E.D. Pa. 1989) .

(n30)Footnote 30. 500 U.S. 305, 111 S. Ct. 1833, 114 L. Ed. 2d 350, 24 C.B.C.2d 850 (1991) , on remand, 961 F.2d 170, 26 C.B.C.2d 1758 (11th Cir.) , cert. denied, 495 U.S. 929, 113 S. Ct. 659, 121 L. Ed. 2d 584 (1992) .

(n31)Footnote 31. *In re Meyer*, 373 B.R. 84, 87 (B.A.P. 9th Cir. 2007) (the reverse priority rule is a corollary to the § 522(f)(2)(A) statutory formula that liens be assessed for avoidance on a lien-by-lien basis and has the consequence of giving effect to the priority rules of applicable non-bankruptcy law); *In re White*, 337 B.R. 686, 691 (Bankr. N.D. Cal. 2005) .

(n32)Footnote 32. *In re Brinley*, 403 F.3d 415, 422-23 (6th Cir. 2005) , cert. denied 546 U.S. 1149, 126 S. Ct. 1164, 163 L.Ed.2d 1127 (2006) ; *In re Kolich*, 328 F.3d 406, 410 (8th Cir. 2003) .

(n33)Footnote 33. 227 B.R. 300 (B.A.P. 9th Cir. 1998) .

(n34)Footnote 34. See *In re Toplitzky*, 227 B.R. 300 (B.A.P. 9th Cir. 1998) .

(n35)Footnote 35. See *Berman v. Forti (In re Berman)*, 232 B.R. 653 (D. Md. 1999) , *aff'd*, 203 F.3d 820 (4th Cir. 2000) ; see also *In re Smith*, 382 B.R. 279 (Bankr. D. Md. 2006) (debtor's signature on consent to disbursement did not transform involuntary transfer into a voluntary transfer).

(n36)Footnote 36. 11 U.S.C. § 522(b)(4)(A), as amended by Pub. L. 109-8, § 313 (2005), effective in cases commenced on or after October 17, 2005.

(n37)Footnote 37. See *In re Crawford*, 226 B.R. 484 (Bankr. N.D. Ga. 1998) (gun used to protect home and computer used to educate children were household goods); see also *In re Giles*, 340 B.R. 543 (Bankr. E.D. Pa. 2006) (holding that the debtor's motor vehicle is a tool of the trade in the millinery business because it is used to transport goods to vending events).

(n38)Footnote 38. 225 B.R. 145 (Bankr. W.D. Ky. 1998) , *aff'd*, 245 B.R. 145 (W.D. Ky. 1999) . But see *United States v. Luongo (In re Luongo)*, 255 B.R. 424, 427 (N.D. Tex. 2000) (citing *Runnels v. I.R.S. (In re Runnels)*, 134 B.R. 562 (Bankr. E.D. Tex. 1991) ; *In re Bourne*, 262 B.R. 745, 752-53 (Bankr. E.D. Tenn. 2001) (reviewing but rejecting majority view that offset may not be used against exempt property and listing all cases).

(n39)Footnote 39. 217 B.R. 943 (Bankr. M.D. Fla. 1998) .

(n40)Footnote 40. See *Henkel v. Green (In re Green)*, 268 B.R. 628, 655 (Bankr. M.D. Fla. 2001) ; *In re Barber*, 223 B.R. 830 (Bankr. N.D. Ga. 1998) . See also *In re Yonikus*, 996 F.2d 866, 872 (7th Cir. 1993) ; *In re Wood*, 291 B.R. 219, 228 (1st Cir. 2003) .

(n41)Footnote 41. 11 U.S.C. § 522 (p) and (q), as amended by Pub. L. 109-8, § 322(a) (2005), effective in cases commenced on or after October 17, 2005; see *In re Larson*, 340 B.R. 444 (Bankr. D. Mass. 2006) (holding that "criminal act" in section 522 (q)(B)(iv) does not require a conviction as is required under section 522(q)(1)(A)).

(n42)Footnote 42. See *Fed. R. Bankr. P. 4003(b)*.

(n43)Footnote 43. See *In re Hice*, 223 B. R. 155 (Bankr. N.D. Ill. 1998) .

(n44)Footnote 44. 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992) . Accord *In re Green*, 31 F.3d 1098, 31 C.B.C.2d 1449 (11th Cir. 1994) ; *In re Heintz*, 36 C.B.C.2d 753, 198 B.R. 581 (B.A.P. 9th Cir. 1996) .

(n45)Footnote 45. *In re Smith*, 235 F.3d 472 (9th Cir. 2000) . Accord *In re James*, 260 B.R. 368 (Bankr. E.D.N.C. 2001) (discussing the approaches).

(n46)Footnote 46. *In re Bernard*, 40 F.3d 1028, 32 C.B.C.2d 508 (9th Cir. 1994) , cert. denied, 514 U.S. 1065, 115 S. Ct. 1695, 131 L. Ed. 2d 559 (1995) . Accord *In re Ulrich*, 37 C.B.C.2d 580, 203 B.R. 691 (Bankr. C.D. Ill. 1997) ; *In re Hickman*, 157 B.R. 336 (Bankr. N.D. Ohio 1993) .

(n47)Footnote 47. *In re Perry*, 345 F.3d 303 (5th Cir. 2003) ; *In re Lampe*, 331 F.3d 750 (10th Cir. 2003) .

(n48)Footnote 48. See *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001) (requiring debtor to list exemptions and values and be as particular as is reasonable under the circumstances); *In re Kleinman*, 32 C.B.C.2d 354, 172 B.R. 764 (Bankr. S.D.N.Y. 1994) .

(n49)Footnote 49. *Walsh v. Kelin (In re Kelin)*, 341 B.R. 521 (Bankr. W.D. Pa. 2006) .

(n50)Footnote 50. 138 F.3d 1031 (5th Cir. 1998) .

(n51)Footnote 51. See *In re Crowell*, 138 F.3d 1031, 1033 .

(n52)Footnote 52. See *Levine v. Weissing (In re Levine)*, 134 F.3d 1046 (11th Cir. 1998) ; *In re Potter*, 320 B.R. 753, 757-60 (Bankr. M.D. Fla. 2001) ; see also *Zubrod v. Duncan (In re Duncan)*, 329 F.3d 1195, 1202 (10th Cir. 2003) . But see *In re Butler*, 271 B.R. 807 (Bankr. E.D. Tenn. 2001) .

(n53)Footnote 53. See *In re Levine*, 134 F.3d 1046, 1053 ; see also *Canelos v. Mignini (In re Canelos)*, 38 C.B.C.2d 1024, 212 B.R. 249 (Bankr. D. Md. 1997) (creditor can contest the amount of exemption for the first time in defending a debtor's motion to avoid a lien).

(n54)Footnote 54. 197 F.3d 1135 (11th Cir. 1999) (certifying the question).

(n55)Footnote 55. 790 So. 2d 1018, 1028 (Fla. 2001) .

(n56)Footnote 56. 320 B.R. 753, 757-60 (Bankr. M.D. Fla. 2001) .

(n57)Footnote 57. See *In re Stroud*, 39 C.B.C.2d 1160, 219 B.R. 388 (Bankr. M.D.N.C. 1997) .

(n58)Footnote 58. See *In re Stroud*, 39 C.B.C.2d 1160, 1162, 219 B.R. 388, 390 . See also *In re King*, 290 B.R. 641, 651 (Bankr. C.D. Ill. 2003) (finding that the lien avoiding effect of the confirmed plan, while established at confirmation, is contingent upon receipt of the discharge).

(n59)Footnote 59. 226 B.R. 601 (Bankr. M.D. Tenn. 1998) (also finding that the remedies available in the event of dismissal prior to completion of the debtor's plan can be addressed at a dismissal hearing with a "request for conditions"); see also *In re Bennett*, 312 B.R. 843, 846 (Bankr. W.D. Ky. 2004) .

(n60)Footnote 60. 226 B.R. 13 (B.A.P. 8th Cir. 1998) .



77 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.02

CH.02. Homestead Exemption

The domicile of the debtor has become even more important in considering the homestead exemption claims since passage of the 2005 amendments to the Bankruptcy Code. Before the amendments, the debtor's domicile was established by where the debtor spent the majority of the 180 days prior to the filing of the petition. After passage of the Bankruptcy Code in 1978, some states opting out of the Federal Code exemptions offered unusually generous exemption schemes, most notably the homestead exemption. This resulted in the perception that debtors who had recently moved to these states were converting nonexempt assets to exempt assets, particularly the homestead, in order to maximize exempt property and shield the assets from creditors. New section 522(b)(3) provides that the applicable state law for purposes of claiming exemptions will be the place of the debtor's domicile for the 730 days before filing the bankruptcy petition. Further, it provides that if the debtor did not maintain a domicile in a single state during that time, then the applicable state law would be the place of the debtor's domicile for the majority of the 180 day period prior to the 730 days before filing the bankruptcy petition. The clear intent of the 2005 amendments is to prevent possible abuse of the bankruptcy process by making it much more difficult for debtors to take advantage of one state's more generous exemptions. n1

Because the homestead exemption is basic to the law of exemptions, most states have adopted such an exemption. n2 The character and nature of this exemption is varied and diverse in the United States, but it is important to note that a homestead exemption can be defeated. When a debtor's homestead is subject to a valid mortgage that is not subject to any of the trustee's or debtor's avoiding powers, and the property is sold because of its indivisibility, any surplus resulting from the sale may be dealt with in the case. n3

Normally it is assumed that state homestead laws have no extraterritorial effect outside of the state that enacts the law. However, in a unique case, the court in *Arrol v. Broach (In re Arrol)* n4 held that the California homestead exemption statute applied to a house located in Michigan. The court based its ruling on the fact that the California statute did not, by its own language, limit the exemption to property located in California. n5

A situation may develop, however, when the debtor is simply not eligible to claim any state exemption. For example, in one case the debtors moved to Florida less than 730 days before the bankruptcy filing and, hence, could not claim Florida exemptions. They lived in Colorado prior to that time but, because of the move to Florida, were no longer residents of Colorado at the time of the bankruptcy filing. The bankruptcy court concluded that the debtors were entitled, under the savings provision of section 522(b)(3), to claim federal exemptions even though both Florida and

Colorado are opt out states and their residents are not permitted to claim the federal exemptions. n6

Section 522(b)(3) provides that "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)." This sentence follows subparagraph (C), but it is not intended as the subparagraphs are. A question has arisen in several courts as to whether this indicates that it modifies the entirety of paragraph (3) or just subparagraph (C), which deals only with the exemption of retirement funds. Most of the courts considering the question have concluded it modifies all of paragraph (3). n7

In addition to the above provision, three homestead limitations were added in 2005 to section 522. New subsections (p) and (q), however, use language different from that found in new subsection (o). Unlike subsection (o), subsections (p) and (q) provide that, pursuant to subparagraph (b)(3)(A), they apply only "as a result of electing" to exempt property under state law. Thus, some courts, in an effort to give meaning to the plain words of the phrase "as a result of electing," have concluded that subsections (p) and (q) are applicable only in states that have not opted out of the federal exemption scheme, because non-opt-out states are the only states in which an election is possible. n8 Other courts have disagreed and concluded that Congress intended the homestead limitations to apply when the debtor elects to exempt homestead property under section 522 (b)(3)(A), but not when the debtor elects to exempt homestead property under section 522(b)(3)(B) held as a tenancy by the entireties or in a joint tenancy, if that interest is otherwise exempt under nonbankruptcy law. Because the exemption under section 522(b)(3)(B) is available to debtors in all states to the extent recognized by state laws, even in opt-out states, the majority of the courts considering the issue have concluded that section 522(p) was designed to close the "mansion loophole" that existed in the Code before the 2005 amendments. n9

Finally, if subsections (p) and (q) are applicable, the debtors homestead exemption claim in any property or interest acquired within 1,215 days before the filing of the bankruptcy petition may not exceed the amount of \$125,000. n10

A Florida bankruptcy court has held that property held as tenancy by the entireties can come into the estate. n11 In that case, debtor spouses owned real property as entireties property as of the petition date, but one spouse died during the pendency of the case. This death caused the real estate entireties character to vanish, and the real property came into the bankruptcy estate. n12

Practitioners reviewing and advising clients on the use of exemption laws, especially in the majority of states that have opted out of the federal exemptions, must examine both state and federal court decisions to understand their fact specific nature and resulting complexities in order to render good advice.

[1] Homestead Exemption Protected

If the homestead is owned jointly by a husband and wife, the debtors' exemption is protected by the Code in two ways:

- (1) the exemption is granted to the debtor or a dependent of the debtor with the debtor's spouse always defined as a dependent under section 522(a)(1); and
- (2) section 522(b)(2)(B) allows an exemption in the debtor's interest in property as a tenant by the entirety or joint tenant if the debtor chooses the state exemptions. n13

A state statute creating an exemption in entireties property under section 522(b)(2)(A) should be applied as preeminent to that state's common law permitting post discharge proceedings against that debtor's interest.

In *Community National Bank v. Persky (In re Persky)*, n14 the Court of Appeals for the Second Circuit ruled that the residence of the debtor and the nondebtor spouse, owned as tenants by the entirety, could be sold by the trustee if, under the criteria set forth in section 363(h), the benefit to the estate from such a sale would outweigh the noneconomic

detriment to the nondebtor spouse. The case was remanded to the bankruptcy court in order that it might evaluate benefit and detriment with the suggestion that it take into account actuarial calculations of the life expectancies of the spouses, respective contributions to the purchase price of the home, tax exemptions available on the property, prospects for acquiring a new home, special physical or mental handicaps, and minor children living at home. The *Perskey* court acknowledged that valuation of the spouses' relative interests was problematic, since the nondebtor tenant would acquire the entire fee outright if she survived the debtor, but apparently did not view the potential complexity of the valuation process as an insurmountable impediment to a sale. On remand, however, the bankruptcy court held that section 363(h) does not permit the trustee to sell the entireties property free and clear of the nondebtor spouse's rights of ownership, survivorship and usufruct, when only the debtor's usufruct right is subject to the mandates of section 363(h). Section 363(h) could not be applied retroactively to an interest that vested and matured prior to the statute's effective date.

[2] Possession of Property

Essential to the right of the homestead exemption is what a particular state law establishes as prerequisites for designation and occupancy of the property. Occupancy may be constructive as well as actual, but generally there must be some positive indication of an intent to occupy the premises; an undefined floating intention is inadequate. n15 A debtor's moving out of a homestead is not necessarily fatal to a homestead exemption. In one case, n16 a debtor moved from the homestead for a period of time prior to commencing a bankruptcy. The debtor did not lose the ability to claim the exemption and to avoid a judicial lien on the homestead. The debtor's evidence showed there was no intent to abandon the homestead and rebutted the presumption that the homestead was abandoned under state law.

The concept of possession can take unusual turns. In *In re Bowers*, n17 a chapter 13 trustee objected to a debtor's claimed homestead exemption because the debtor claimed as the homestead exemption an interest in a trust. The evidence before the bankruptcy court was that debtor had conveyed the homestead real estate to the trust, and that the debtor lived in the trust's *res* consisting of improved real estate. In interpreting section 522(d)(1), the court concluded that, although a debtor was entitled to exempt personal property that is used as a residence, the debtor must live in the personal property. Since the personal property that the debtor lived in was the *res* of the trust and not the exempt one-third interest of the trust, the bankruptcy court denied the exemption.

The concept of possession goes beyond ownership of a fee simple interest. For example, in *In re Hankel*, n18 a bankruptcy court ruled that the state homestead exemption reaches and protects a future interest in property. Additionally, in *In re DeMasi*, n19 the bankruptcy court ruled that the federal homestead exemption contained in section 522(d)(1) included a remainder interest in a residence. In both cases, the courts interpreted the law by examining the intent of the parties. In *DeMasi*, the court observed that the intent of the debtor to occupy the property as soon as the law allows was sufficient to provide homestead protection.

In *In re Groff*, n20 the court held that a possessory interest in real estate, such as an installment land sales agreement, is sufficient to trigger exemption protection. This issue arose in the context of an avoidance action under section 522. In a lengthy analysis, the court reasoned that an equitable interest in real estate such as an interest grounded in an installment sale's contract is sufficient to trigger the right to an avoidance action under section 522. In reaching this decision the court observed in a footnote that many courts hold that a possessory interest is all that is needed to claim a homestead exemption.

[3] Mere Absence from Home Does Not Constitute Abandonment

Mere absence alone is not sufficient to constitute an abandonment of the homestead unless an intent to abandon is shown. In *In re Jones*, n21 the debtor satisfied the Oklahoma homestead exemption requirements by actually reoccupying the residence she had not lived in for two previous years and by testifying that she intended to reside there permanently. Another bankruptcy court in *In re May* concluded the debtors could still avoid the creditor's lien impairing their homestead even though, after filing their chapter 7 petition, they entered into a contract to sell the premises and

moved prior to closing. n22 According to the court in *In re Dennison*, n23 a debtor must occupy the property or exhibit both an intent to occupy the property and an ability to control the time of occupation when claiming property as a homestead. In addition, because a debtor may convert nonexempt assets into exempt assets in contemplation of a title 11 case, n24 the debtor may abandon the homestead and acquire a more valuable one, even if this is done shortly before the commencement of a case under title 11.

[4] Filing Required to Designate Homestead

Some states require the filing of a declaration or other document in order to have a valid homestead exemption. n25 In *Ageton v. Cervanka (In re Ageton)*, the debtors had filed a joint bankruptcy petition as well as a joint homestead declaration under Arizona law. n26 The court found that the homestead was exempt under state law by virtue of the joint declaration, and this allowed Mr. Ageton alone to claim state exemptions. n27

In addition, in *In re Estate of Hinterleiter v. Conner*, n28 the court held that despite the survival of a decedent's son, a devise to the grandson of a remainder interest in the decedent's homestead was protected by the Florida homestead exemption. n29

The Bankruptcy Appellate Panel for the Eighth Circuit held that a married person may claim a homestead exemption under Nebraska law, regardless of whether the debtor is a "head of a family" under Nebraska law. n30

Some states require specific, detailed filing requirements to perfect the claim of a homestead exemption, while other states have less strict requirements. For example, in the Commonwealth of Virginia, the law requires a debtor to file a homestead deed within five days of the time of the meeting of creditors pursuant to *section 341(a) of the Bankruptcy Code*. In *In re Nguyen*, n31 the Court of Appeals for the Fourth Circuit affirmed the bankruptcy court's interpretation of the meaning of this five-day rule. The state clerk of the court received the homestead deed within the required time, but the clerk did not record the homestead until after the five-day period. The trustee objected to the exemption. The bankruptcy court allowed the exemption finding that the debtor had done all that the debtor could do to preserve the exemption.

A method of working around the strict filing requirements of a homestead exemption is through the use of amendment. For example, the Court of Appeals for the Ninth Circuit held in *Martinson v. Michael (In re Michael)* n32 that a debtor was allowed to amend the schedules to include a homestead exemption. Citing *Federal Rule of Bankruptcy Procedure 1009(a)*, the court found that a debtor has the right to amend the schedules to include a homestead. The court further held that such a right could only be denied upon the showing of bad faith by the debtor or prejudice to creditors. n33 In *In re Michael*, the debtors had failed to claim their homestead exemption at the time they filed their schedules. After this defect came to the debtors' attention, the problem was corrected post discharge. The court allowed the exemption because the court found the debtors to be lax but not guilty of bad faith. Failure to include assets in debtors' original schedules, however, is often viewed as reckless disregard and as bad faith. n34

[5] Interpretation of Exclusions to Avoidance under Section 522(f)

The Court of Appeals for the Ninth Circuit has addressed the ability of a debtor to avoid a judicial lien in *California Central Trust Bank-Corp v. Been (In re Been)*. n35 In that case, a junior lienholder's lien was "sold out" by a senior lienholder foreclosing on the mortgage. The junior lienholder instituted a separate, state court action to recover based upon the promissory note. The junior lienholder obtained a default judgment against the maker of the promissory note, and the judgment was docketed. Approximately two years later, the maker of the note filed a chapter 7 petition. The debtor listed the homestead as exempt and filed a motion to avoid the lien.

The bankruptcy court allowed a partial avoidance of the lien utilizing the section 522 (f)(2)(A) formula. The junior lien holder appealed, arguing that the lien was a result of a mortgage foreclosure and not avoidable under section 522(f). It

maintained that the lien was excluded from avoidance by the savings provision of section 522(f)(2)(C), which provides that creditors foreclosing on a mortgage cannot have their lien avoided under section 522(f)(2). The court of appeals ruled that the lienor's action was, under California law, an independent action under a note and not a foreclosure action. Accordingly, the lien could be avoided to the extent that it impaired the debtor's exemption under section 522(f).

In contrast, the Bankruptcy Appellate Panel for the Ninth Circuit ruled in *Weeks v. Pederson (In re Pederson)* n36 that a debtor cannot avoid a judicial lien on after acquired property. In making this determination, the appellate panel distinguished the case from *Owen v. Owen* and *Farrey v. Sanderfoot*. The appellate panel looked to the language of section 522(f) and held that the lien could not be avoided in that the lien attached to the property simultaneously with the debtor's acquisition of the property. n37

In *Miller v. Sul (In re Miller)*, the Court of Appeals for the Third Circuit rejected the debtor's contention that the entire mortgage obligation needed to be applied to the debtor's one-half interest in the property, which would result in no funds being left to apply toward a judgment lien. To do so, the court concluded, would result in a windfall to the debtor. n38

[6] Enforcement of Nondischargeable Debt Against Homestead

In *Davis v. Davis (In re Davis)*, n39 the Court of Appeals for the Fifth Circuit addressed a novel use of the bankruptcy court as a collection agency. After obtaining a nondischargeable judgment based on section 523(a)(5), the spouse of a chapter 11 debtor moved in the bankruptcy court to enforce the judgment under Texas state law. The bankruptcy court denied the creditor's request for seizure and turnover of the property, and the district court affirmed. The court of appeals also affirmed, finding that the nondischargeable support judgment did not itself create a liability and, therefore, a federal court could not enforce the judgment. n40 Accordingly, although section 522(c) would allow the enforcement of the judgment, the creditor was relegated to state courts for judgment enforcement.

The 2005 amendments to the Code assigned a first priority among unsecured debts to domestic support obligations. These obligations may include debts owed to a spouse, former spouse or child of a debtor. n41 In addition, new section 522(c)(1) specifically provides that, notwithstanding any provision of applicable nonbankruptcy law to the contrary, exempt property shall be liable for a debt of a kind specified in section 523(a)(5). n42 This change in the Code, however, does not create enforcement capability on the part of the federal courts. Rather the creditor must still look to the state courts for judgment enforcement.

[7] Section 522 (d)(5); Wildcard Exemption

The Court of Appeals for the Eighth Circuit has ruled that the "federal wildcard" exemption is available to a debtor even if the debtor does not have a homestead. n43

FOOTNOTES:

(n1)Footnote 1. *11 U.S. C. § 522(b)(3)*, amended by Pub. L. 109-8, § 307 (2005), effective in cases commenced on or after October 17, 2005.

(n2)Footnote 2. When a homestead exemption is inconsistent with state or local zoning law, a bankruptcy court may exercise its equitable powers and authorize a zoning change to ensure that the debtor will have a smaller but adequate homestead. *In re Lloyd*, 37 F.3d 271, 31 C.B.C.2d 1786 (7th Cir. 1994) .

(n3)Footnote 3. *Johnston v. Skiles (In re Peterson)* 106 B.R. 229 (Bankr. D. Mont. 1989) (debtors who had not properly filed a declaration of homestead under state law prior to the date of filing the petition may not claim a homestead exemption in the bankruptcy case).

(n4)Footnote 4. *170 F.3d 934 (9th Cir. 1999)* . Accord *In re Drenttel*, 309 B.R. 320, 327 (B.A.P. 8th Cir. 2004) .

(n5)Footnote 5. *170 F.3d 934, 936-37* .

(n6)Footnote 6. *In re Underwood, 342 B.R. 358, 362 (Bankr. N.D. Fla. 2006)* (explaining why it is logical to conclude that section 522(b)(3) provides this alternative election when a debtor is ineligible to claim any state exemptions); *see also In re Jewell, 347 B.R. 120 (Bankr. W.D.N.Y. 2006)* (agreeing with the conclusion reached by the court in *Underwood* and even providing a suggested version of how the provision might be better written to make the use of the alternative remedy absolutely clear).

(n7)Footnote 7. *In re Crandall, 346 B.R. 220, 222 (Bankr. M.D. Fla. 2006)* (referring to the alternative remedy as the "hanging paragraph" in section 522(b)(3) as modifying the entire provision).

(n8)Footnote 8. *In re McNabb, 54 C.B.C.2d 750, 326 B.R. 785 (Bankr. D. Ariz. 2006)* (holding that subsection (p) of section 522 does not apply in states that have opted out because in those states the debtors do not have a right to elect between federal and state exemptions).

(n9)Footnote 9. *In re Kane, 336 B.R. 477 (Bankr. D. Nev. 2006)* (providing a thorough review of all cases); *see also In re Greene, 346 B.R.835 (Bankr. D. Nev. 2006)* ; *In re Buonopane, 2006 Bankr. LEXIS 989 (Bankr. M.D. Fla. June 1, 2006)* ; *In re Summers, 344 B.R. 108 (Bankr. D. Ariz. 2006)* ; *In re Landahl, 338 B.R. 920, 921 (Bankr. M.D. Fla. 2006)* ; *In re Wagstaff, 2006 Bankr. LEXIS 716 (Bankr. S.D. Fla. Mar. 17, 2006)* ; *In re Wayrynen, 332 B.R. 479, 484-86 (Bankr. S.D. Fla. 2005)* ; *In re Virissimo, 54 C.B.C.2d 1728, 332 B.R. 201, 205 (Bankr. D. Nev. 2005)* ; *In re Kaplan, 54 C.B.C.2d 1676, 331 B.R. 483 (Bankr. S.D. Fla. 2005)* .

(n10)Footnote 10. *See In re Sainlar, 344 B.R. 669, 674 (Bankr. M.D. Fla. 2006)* (finding that the \$125,000 exemption cap of section 522(p) applies only to real property purchased or otherwise acquired by the debtor within 1,215 days of the petition filing date; the statute has no applicability to property acquired more than 1,215 days before the petition date even if the property's equity increases during the 1,215 day prepetition period).

(n11)Footnote 11. *In re Tharp, 237 B.R. 213 (Bankr. M.D. Fla. 1999)* .

(n12)Footnote 12. *237 B.R. 213, 215-17* .

(n13)Footnote 13. *See In re Hunter, 970 F.2d 299, 27 C.B.C.2d 536 (7th Cir. 1992)* ; *see also In re Weber, 346 B.R. 346 (Bankr. D. Del. 2006)* (holding that although debtors transferred one-half interest in their home to a stepdaughter, the language in the deed did not express a clear intention to rebut the presumption that a tenancy by the entireties existed); *In re Maloney, 27 C.B.C.2d 730, 146 B.R. 168 (Bankr. W.D. Pa. 1992)* ; *In re Brinley, 403 F.3d 415 (6th Cir. 2005)* .

(n14)Footnote 14. *893 F.2d 15, 21 C.B.C.2d 1460 (2d Cir. 1989)* ; *In re Persky, 26 C.B.C.2d 238, 134 B.R. 81 (Bankr. E.D.N.Y. 1991)* ; *see also In re Moulterie, 398 B.R. 501 (Bankr. E.D.N.Y. 2008)* .

(n15)Footnote 15. *See In re Casserino, 379 F.3d 1069 (9th Cir. 2004)* ; *In re Peterson, 897 F.2d 935, 22 C.B.C.2d 1147 (8th Cir. 1990)* ; *In re Wynn, 369 B.R. 605 (Bankr. D. Ore. 2007)* ; *In re Maloney, 311 B.R. 525 (Bankr. W.D. Mo. 2004)* ; *In re Blackburn, 286 F. Supp. 33 (E.D. Cal. 1968)* .

(n16)Footnote 16. *In re Koopal, 226 B.R. 888 (Bankr. D. Idaho 1998)* .

(n17)Footnote 17. *222 B.R. 191 (Bankr. D. Mass. 1998)* .

(n18)Footnote 18. *223 B.R. 728, 731-32 (Bankr. D.N.D. 1998)* . *See also In re Murphy, 292 B.R. 403 (Bankr. D. N.D. 2003)* (allowing exemption even though debtor moved from premises in order to attend college, initially put property up for sale and later rented it to a third party). *But see In re Pettit, 231 B.R. 101, 103 (Bankr. M.D. Fla. 1999)* (discussing and adopting contrary rulings); *In re Lewis, 226 B.R. 703 (Bankr. N.D. Fla. 1998)* ; *see also In re Plaster,*

271 B.R. 202, 207 (Bankr. M.D. Fla. 2001) .

(n19)Footnote 19. 227 B.R. 586 (Bankr. D.R.I. 1998) .

(n20)Footnote 20. 223 B.R. 697 (Bankr. S.D. Ill. 1998) . *But see In re Kingsmore*, 295 B.R. 812 (Bankr. D.S.C. 2002) .

(n21)Footnote 21. 107 B.R. 350 (Bankr. E.D. Okla. 1989) . *See In re Maloney*, 311 B.R. 525 (Bankr. W.D. Mo. 2004) ; *see also In re Lloyd*, 394 B.R. 605 (Bankr. S.D. Fla. 2008) (finding that debtor did not abandon Florida homestead even though she leased the property and lived in California because it was easier to make a living and was pursuing a romantic relationship); *In re Dubravsky*, 374 B.R. 467 (Bankr. D.N.H. 2007) (temporary absence due to pending divorce does not result in loss of homestead); *In re Patterson*, 275 B.R. 578 (Bankr. D. Colo. 2002) (debtor's absence from the property was temporary for purposes of remodeling).

(n22)Footnote 22. 329 B.R. 789 (Bankr. D. N.H. 2005) .

(n23)Footnote 23. 129 B.R. 609, 611 (Bankr. E.D. Miss. 1991) ("An intent to occupy the premises must be exhibited by both a declaration of such intent and overt acts in support of such intention").

(n24)Footnote 24. *See In re Raymond*, 987 F.2d 675 (10th Cir. 1993) ; *see also 4 Collier on Bankruptcy*, P 522.04 (Matthew Bender 15th ed. rev.).

(n25)Footnote 25. *In re Reider*, 31 F.3d 1102, 31 C.B.C.2d 1409 (11th Cir. 1994) ; *In re Ageton*, 5 C.B.C.2d 463, 14 B.R. 833 (B.A.P. 9th Cir. 1981) .

(n26)Footnote 26. 5 C.B.C.2d 463, 14 B.R. 833 (B.A.P. 9th Cir. 1981) ; *see also In re Birch*, 16 C.B.C.2d 849, 72 B.R. 103 (Bankr. D.N.H. 1987) .

(n27)Footnote 27. Mrs. Ageton could then claim federal exemptions, a result that is no longer allowed under section 522(b). However, the case supports the proposition that a debtor in a one spouse bankruptcy can still claim the state exemptions in a state requiring a declaration by both spouses.

(n28)Footnote 28. 692 So. 2d 234 (Fla. App. 1997) ; *see also Walker v. Mickler*, 699 So. 2d 687 (1997) , *aff'g*, 687 So. 2d 1328 (1997) .

(n29)Footnote 29. Florida Const. art. X, § 4; *see also Fla. Stat. Ann.* § 731.201(18), as to who is an heir.

(n30)Footnote 30. *See Stumpf v. Roberts (In re Roberts)*, 215 B.R. 197 (B.A.P. 8th Cir. 1998) ; *Neb. Rev. Stat.* § 40-115.

(n31)Footnote 31. 211 F.3d 105 (4th Cir. 2000) .

(n32)Footnote 32. 163 F.3d 526 (9th Cir. 1998) . *See also Opel v. Daly (In re Daly)*, 344 B.R. 304, 312 (Bankr. M.D. Pa. 2005) (concluding that there is a marked difference between allowing a debtor to file an amendment to the exemption schedule and the allowance of an exemption); *In re Bowden*, 254 B.R. 907, 909 (Bankr. D. Idaho 2000) (permitting amendment a year and a half after case commenced to increase dollar amount claimed in home equity).

(n33)Footnote 33. *In re Rolland*, 317 B.R. 402, 415 (Bankr. C.D. Cal. 2004) (debtor's amendment filed in bad faith).

(n34)Footnote 34. *In re Barrows*, 399 B.R. 506, 510 (Bankr. D. Minn. 2009) (concealment of bank account evidence of bad faith); *In re Thomasma*, 399 B.R. 20 (Bankr. W.D. Mich. 2008) .

(n35)Footnote 35. *153 F.3d 1034 (9th Cir. 1998)* . See also *In re Linane*, 291 B.R. 457, 460 (Bankr. N.D. Ill. 2003) .

(n36)Footnote 36. *41 C.B.C.2d 785, 230 B.R. 158 (B.A.P. 9th Cir. 1999)* , following *The Law Offices of Moore & Moore v. Stoneking (In re Stoneking)*, 40 C.B.C.2d 1408, 225 B.R. 690 (B.A.P. 9th Cir. 1998) .

(n37)Footnote 37. See *230 B.R. 158, 162-63* . Contra *In re Laborde*, 231 B.R. 162 (Bankr. W.D.N.Y. 1999) .

(n38)Footnote 38. *299 F.3d 183 (3d Cir. 2002)* .

(n39)Footnote 39. *170 F.3d 475 (5th Cir. 1999)* , (en banc) cert. denied, *528 U.S. 822, 120 S. Ct. 67, 145 L. Ed. 2d 57 (1999)* .

(n40)Footnote 40. *170 F.3d 475, 479-81* . See also *In re Farr*, 278 B.R. 171, 181 (B.A.P. 9th Cir. 2002) .

(n41)Footnote 41. *11 U.S.C. § 507*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 212 (2005), effective in cases commenced on or after October 17, 2005.

(n42)Footnote 42. *11 U.S.C. § 522(c)(1)*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 216 (2005), effective in cases commenced on or after October 17, 2005.

(n43)Footnote 43. See *Martin v. Cox (In re Martin)*, 140 F.3d 806 (8th Cir. 1998) ; see also *In re Kelin*, 341 B.R. 521 (Bankr. W.D. Pa. 2006) .



78 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.03

CH.03. Exemptions in Joint Cases

In joint cases, section 522 applies separately to each debtor. Prior to 1984, the practice of "stacking" exemptions in joint cases, whereby one debtor would choose federal exemptions and the other would choose state exemptions, was sanctioned in numerous decisions. n1

[1] Continuing Effect of 1984 Bankruptcy Amendments; Practice of Stacking Ended

The Bankruptcy Amendments and Federal Judgeship Act of 1984 n2 amended subsections (b) and (m) of section 522 to prohibit the practice of stacking. n3 Stacking is no longer permitted under the Code, even absent a specific order of joint administration or consolidation.

[2] Some Types of Stacking Still Possible

Despite the prohibition on stacking, it still is possible in certain jurisdictions for joint debtors selecting the state exemptions to double the monetary amount of their exemptions.

[a] Doubling of Homestead Exemption Allowed in Some Jurisdictions or When Estates are Separately Administered

For example, in *Cheeseman v. Nachman (In re Cheeseman)*, n4 the Court of Appeals for the Fourth Circuit held that a married couple filing a joint petition was entitled to double the Virginia homestead exemption. And the Court of Appeals for the Second Circuit, in *John T. Mather Memorial Hospital v. Pearl (In re Pearl)*, n5 held that it was proper for the bankruptcy court to allow husband and wife debtors "to aggregate the New York State homestead, and thus receive the benefit of a real property exclusion from their estate of up to a maximum of \$20,000, rather than \$10,000."

It is possible, however, for spouses to file separate bankruptcy cases and not have their estates jointly administered, particularly when the assets and liabilities of the couple are sufficiently separate. In that case, joint administration would not be appropriate. The husband and wife could also file separate petitions at completely different times. One of those cases might even be closed before the second one is filed. Under this circumstance, joint administration is impossible. Parties in interest, however, might seek to reopen the first case for cause shown under section 350(b) and, if a court is convinced that the separate filings reveal a scheme to obtain greater exemptions than otherwise available, the reopening of the first case might be permitted and joint administration ordered, thereby limiting the debtors to a single system of

exemptions.

[b] Doubling of Motor Vehicle Exemption Allowed in Second Circuit

In *In re Miller*, n6 the bankruptcy court held that a husband and wife who were joint debtors in a chapter 7 case could each claim the \$2,400 motor vehicle exemption for the same automobile under *N.Y. Debtor & Creditor Law section 282*. The court relied upon *John T. Mather Memorial Hospital v. Pearl*, n7 which allowed joint debtors to aggregate their \$10,000 homestead exemptions pursuant to N.Y. Civil Practice Law & Rules section 5206 and *N.Y. Debtor & Creditor Law section 282*. In response to the trustee's argument that section 282 allows only a single exemption for joint debtors, the bankruptcy court noted that section 522(m), which governs even in states that have opted out, provides that section 522 generally "appl[ies] separately with respect to each debtor in a joint case." n8

[c] Doubling of Personal Exemption Allowed in Oregon

An Oregon bankruptcy court allowed debtors to double a \$400 general personal property exemption in *In re Wilson*. n9 The *Wilson* decision was based not on section 522(m), which the court suggested would be inapplicable in an "opt-out" state such as Oregon, but on liberal interpretation of an ambiguous state law.

[3] Doubling Not Allowed in the Eighth, Ninth and Eleventh Circuits

The Court of Appeals for the Eleventh Circuit, however, in *First National Bank v. Norris*, n10 held that section 522(m) "does not operate to give separate homestead exemptions to joint debtors under Alabama law." (Since Alabama is an "opt-out" state, the debtors had no choice but to utilize state law exemptions.) Noting that *Alabama Code § 6-10-11* allows only one homestead exemption to debtors in a joint case, the court held that "although section 522(m) would allow separate federal homestead exemptions to debtors in a joint case, the federal exemptions do not apply in Alabama."

The Courts of Appeals for the Eighth and Ninth Circuits have taken the same position as the Eleventh Circuit. n11 The Court of Appeals for the Ninth Circuit has upheld statutes in Oregon and California that restrict joint debtors to exemptions less than double the amounts allowed individual debtors, rejecting an argument that the California law violates the *Fourteenth Amendment's equal protection clause*. n12

A concurring opinion in the case from the Eighth Circuit cautions that the court's ruling "appears to create some incentive for husbands and wives to leave each other and establish, or purport to establish, separate homesteads." n13

[4] Joint Debtors Living Apart

[a] Living in the Same State

Debtors who live apart can claim a homestead exemption only in the property that the respective spouse occupies. A bankruptcy court addressed this issue in *In re Pastrana*, n14 in which married but separated debtors filed a joint chapter 7 petition. Each debtor claimed as exempt the real property in which each lived, and each parcel of real estate was jointly titled in both debtors' names. In reviewing the issue, the court determined that both debtors' living apart effected a severance of the joint tenancy of the debtors. n15 Accordingly, the court ruled this severance entitled the trustee to a one-half share of the exempt and nonexempt property for each debtor. n16

The Court of Appeals for the Eleventh Circuit agreed with the bankruptcy court's interpretation of the result of separated debtors and bankruptcy exemptions. In *Colwell v. Royal International Trading Corp. (In re Colwell)*, n17 Florida's constitution homestead exemption was interpreted to allow estranged spouses who were living apart to both claim an exemption in a homestead. n18 The court in its analysis described the constitutional mandate imposed by the homestead exemption that was the basis for the ruling.

[b] Living in Different States

The issue of different residences in different states affects a joint case. In *In re Andrews*, n19 spouses who were separated, but not divorced, and who lived in different states, filed a joint petition. The court allowed the petition; however, the court forced the nonresident spouse to use the state exemptions where the case was filed.

[c] Debtors Living in Same State with One Choosing State Exemptions and One Choosing Federal Exemptions

The issue of which exemptions apply to cases filed by separated spouses arose in *Flinn v. Morris (In re Steward)*, n20 Spouses in that case filed separate bankruptcy petitions that were later consolidated. The first debtor chose the federal exemptions, and the second debtor chose the state exemptions. The trustee for the first debtor objected to the use of the state exemptions, arguing that since the second debtor had not objected to the first debtor's exemptions, the second debtor was bound by that first debtor's election. The bankruptcy court denied the objection filed by the trustee and the trustee appealed. The bankruptcy appellate panel affirmed the bankruptcy court. The court held that after the substantive consolidation, if the parties still did not elect the same set of exemptions, pursuant to California law, they would be deemed to elect the state exemptions. n21

[5] Lien Avoidance in Joint Cases with Lien Against Only One Debtor

A bankruptcy court in Maryland determined that joint debtors cannot avoid a lien against joint tenancy property when the lien is against only one debtor. In *Giles v. Chevy Chase Bank, FSB (In re Giles)*, n22 the bankruptcy court held that the lien could not be avoided because the lien did not impair joint tenancy property under state law. The court supported this position by noting that a creditor's lien against one debtor does not attach to joint tenancy property under Maryland law.

FOOTNOTES:

(n1)Footnote 1. See *Allen v. Hale County State Bank (In the Matter of Allen)*, 725 F.2d 290, 10 C.B.C.2d 333 (5th Cir. 1984) ; *In re Cannady*, 653 F.2d 210, 4 C.B.C.2d 1327 (5th Cir. 1981) ; *In re Jones*, 8 C.B.C.2d 1347, 31 B.R. 20 (Bankr. W. D. Wash. 1983) ; *Emmerich v. Lampi*, 6 C.B.C.2d 583, 19 B.R. 666 (B.A.P. 9th Cir. 1982) ; *Ageton v. Cervenka (In re Ageton)*, 5 C.B.C.2d 463, 14 B.R. 833 (B.A.P. 9th Cir. 1981) ; *In re Alvarez*, 5 C.B.C.2d 485, 14 B.R. 940 (Bankr. D. Colo. 1981) .

(n2)Footnote 2. Pub. L. No. 98-353 (1984), reprinted in Collier on Bankruptcy, App. Pt. 6(a) (Matthew Bender 15th ed. rev.).

(n3)Footnote 3. See 11 U.S.C. § 522(b).

(n4)Footnote 4. 656 F.2d 60, 4 C.B.C.2d 1218 (4th Cir. 1981) ; see also *In re Longmore*, 273 B.R. 633 (Bankr. D. Nev. 2001) . But see *In re Garran*, 274 B.R. 570 (Bankr. D. Mass. 2002) .

(n5)Footnote 5. 723 F.2d 193, 9 C.B.C.2d 670 (2d Cir. 1981) ; *In re Roberge*, 307 B.R. 442, 448 (Bankr. D. Vt. 2004) (married debtors living apart and separated entitled to separate homestead exemptions; each separate property was the residence and homestead for a family); see also *In re Colwell*, 196 F. 3d 1225 (11th Cir. 1999) (estranged spouses living apart in separate residences may each claim separate homestead exemption); *In re Pastrana*, 216 B.R. 948 (Bankr. D. Colo. 1998) .

(n6)Footnote 6. 31 C.B.C.2d 339, 167 B.R. 782 (Bankr. S.D.N.Y. 1994) ; *In re Hall*, 395 B.R. 722 (Bankr. D. Kan. 2008) (recognizing spouses may claim separate exemptions in cars and tools of the trade). But see *In re Garvin*, 262 B.R. 529 (Bankr. D. Mont. 2001) .

- (n7)Footnote 7. 723 F.2d 193, 9 C.B.C.2d 670 (2d Cir. 1983) .
- (n8)Footnote 8. 31 C.B.C.2d 339, 167 B.R. 782 (Bankr. S.D.N.Y. 1994) .
- (n9)Footnote 9. 22 B.R. 146 (Bankr. D. Or. 1982) .
- (n10)Footnote 10. 701 F.2d 902, 8 C.B.C.2d 1078 (11th Cir. 1983) .
- (n11)Footnote 11. *Talmadge v. Duck (In re Talmadge)*, 832 F.2d 1120, 17 C.B.C.2d 1140 (9th Cir. 1987) ; *Pike County Bank v. Stevens (In re Stevens)*, 829 F.2d 693 (8th Cir. 1987) ; *In re Granger*, 754 F.2d 1490, 14 C.B.C.2d 194 (9th Cir. 1985) .
- (n12)Footnote 12. *Talmadge v. Duck (In re Talmadge)*, 832 F.2d 1120, 1125, 17 C.B.C.2d 1140, 1145 (9th Cir. 1987) .
- (n13)Footnote 13. *Pike County Bank v. Stevens (In re Stevens)*, 829 F.2d 693, 696 (8th Cir. 1987) , (Arnold, J., concurring).
- (n14)Footnote 14. 216 B.R. 948 (Bankr. D. Colo. 1998) .
- (n15)Footnote 15. *Id.* at 950 .
- (n16)Footnote 16. *See id.*
- (n17)Footnote 17. 196 F.3d 1225 (11th Cir. 1999) . *See also In re Roberge*, 307 B.R. 442, 446 (Bankr. D. Vt. 2004) .
- (n18)Footnote 18. *Id.*
- (n19)Footnote 19. 225 B.R. 485 (Bankr. D. Idaho 1998) . An important factor in *Andrews* was that the majority of the joint assets were located in the state where the petition was filed.
- (n20)Footnote 20. 227 B.R. 895 (B.A.P. 9th Cir.) .
- (n21)Footnote 21. 227 B.R. 895, 900-01 . The debtors never reached an agreement as to which set of exemptions to choose. Therefore, pursuant to California law, the debtors were presumed to elect the state exemptions. *See Cal. Civ. Pro. Code § 703.140(a)*.
- (n22)Footnote 22. 222 B.R. 766 (Bankr. D. Md. 1998) . *Accord In re Patenaude*, 259 B.R. 481 (Bankr. D. Mass. 2001) .



79 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.04

CH.04. Tools of the Trade

What is a "tool of the trade" and who may claim such an exemption? n1 As one court noted, a debtor may exempt property as a tool of the trade if the property is reasonably necessary, convenient or suitable to the production of the debtor's work or enables artisans to retain tools of modest value so that they are not forced out of their trade. n2 Such tools and implements of a debtor's trade are exempt in most states. Temporary abatement of work by the debtor in a trade, even on the date the bankruptcy petition is filed, is not always fatal to a claim of exemption for tools or implements of the trade. n3

[1] Tools of the Trade Exemption Sometimes Augmented

In *Augustine v. United States*, n4 which involved use of the federal exemption scheme as it existed prior to the 1984 amendments, n5 debtors were permitted to allocate the unused portion of their \$7,900 general exemption to augment the \$750 specifically allowed for "tools of the trade." In an analogous decision involving state rather than federal exemption law, a district court permitted debtors to exempt up to \$4,750 in "tools of the trade" by aggregating the \$750 allowed for "tools of the trade" and the \$4,000 allowed for personal property. n6

[2] Automobile as a Tool of the Trade

Whether and when an automobile qualifies as a "tool of the trade" is an issue endlessly litigated since the enactment of the Code.

[a] Automobile Does Not Qualify

Many courts have stated unequivocally that an automobile cannot be considered a tool of the trade. n7

[b] Exemption of Automobiles Sometimes Allowed; Prohibition Not Absolute

The Court of Appeals for the Tenth Circuit has ruled that a tools-of-the-trade exemption is not applicable under Wyoming law to a vehicle used solely for commuting to work. n8 However, a pickup truck, if it is a "reasonable necessity" to the debtor's trade, may be considered a tool of the trade. n9 A truck used by a carpenter to haul building materials may be considered a tool of the trade. n10

By contrast, other courts have endorsed the rule enunciated by the Bankruptcy Appellate Panel for the Ninth Circuit, that a motor vehicle can be a tool of the debtor's trade if it is necessary to and used by the debtor to carry on his or her work, regardless of whether it is specially remodeled for the debtor's trade. n11 One court held that the debtor's 1990 Acura Legend could be claimed exempt up to \$10,000 under Virginia's tools-of-the-trade exemption statute if the debtor "absolutely needs [it] to continue working efficiently and competently" in his field. n12 The fact that the vehicle was a luxury car did not matter to the court. In *In re Breen*, n13 the court held that the tools of the trade exemption requires that the "claimed trade or profession" actually figure in the support of the debtor and the debtor's family, and allowed the debtor carpenter to exempt a pickup truck.

[3] Liquor License as Tool of the Trade

Some cases have held that a liquor license is not a "tool of the trade." The court in *In re Stubenhofer* held that a liquor license "confers a right or privilege to transact a type of business" and cannot be compared to personal property such as a book or a hammer. n14 Another court, however, found that, although the liquor license did not fall within the scope of Ohio's tools of the trade exemption, the debtors could claim it under their wild card exemption. n15 In both of these cases, it should be noted that the states, Pennsylvania and Ohio, allowed liquor licenses to be transferred. State statutes should always be consulted.

[4] Unusual Tools May Qualify for Exemption

In *In re Page*, n16 a "spiritual lyric lecturer" active in the music business for many years was entitled to exempt a piano as a tool of the trade. One court has found that restaurant equipment qualified. n17 Another court found that a cargo trailer used to haul food and equipment for a catering business was a tool of the trade. n18 The Court of Appeals for the Fifth Circuit, however, strictly construed a state statute that a school bus was a motor vehicle and could not qualify as a tool of the trade. n19

[5] Computer Equipment as a Tool of the Trade

When computer equipment, including in many instances, compatible attachments and furniture, is used in the debtor's business and, minimally, for personal use, it may qualify as a tool of the trade and can be properly claimed exempt in that category. n20

[6] Liens on Tools Avoidable, But May Be Limited

Some courts have held that chapter 7 debtors may avoid a nonpossessory, nonpurchase money security interest in tools of the trade under *section 522 of the Bankruptcy Code*. One court held that section 522(f)(3) limits the amount that may be avoided to \$5,000. n21 Another court held that section 522(f)(3) only limits the amount of avoidance provided to the debtors by subsections 522(f)(1) and (2). n22

FOOTNOTES:

(n1)Footnote 1. *See, e.g., In re Currie*, 9 C.B.C.2d 726, 34 B.R. 745 (Bankr. D. Kan. 1983) ; *see also In re Stewart*, 110 B.R. 11 (Bankr. D. Idaho 1989) (three horses were tools of the trade).

(n2)Footnote 2. *In re Hively*, 358 B.R. 752 (Bankr. C.D. Ill. 2007) .

(n3)Footnote 3. *In re Lampe*, 278 B.R. 205 (B.A.P. 10th Cir. 2002) ; *In re Cordova*, 394 B.R. 389 (Bankr. E.D. Va. 2008) ; *In re Henke*, 294 B.R. 105 (Bankr. D.N.D. 2003) .

(n4)Footnote 4. 675 F.2d 582, 6 C.B.C.2d 1053 (3d Cir. 1982) ("debtor may avoid liens on farm implements of substantial value").

(n5)Footnote 5. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (1984), reprinted in Collier on Bankruptcy, App. Pt. 6(a) (Matthew Bender 15th ed. rev.).

(n6)Footnote 6. *In re Miller*, 30 B.R. 819 (M.D. Tenn. 1983) . *Accord Nazarene Fed. Credit Union v. McNutt (In re McNutt)*, 19 C.B.C.2d 660, 87 B.R. 84 (B.A.P. 9th Cir. 1988) (truck used to haul drywall is a "tool of the trade").

(n7)Footnote 7. *In re Nowak*, 48 B.R. 290 (W.D. Wis. 1984) ; *In re Nipper*, 243 B.R. 33 (Bankr. E.D. Tenn. 1999) ; see also *In the Matter of Meyers*, 1 C.B.C.2d 470, 2 B.R. 603 (Bankr. E.D. Mi. 1980) ; *In re Dubrock*, 2 C.B.C.2d 776, 5 B.R. 353 (Bankr. W.D. Ky. 1980) .

(n8)Footnote 8. *Johnston v. Barney*, 842 F.2d 1221 (10th Cir. 1988) .

(n9)Footnote 9. *In re Breen*, 123 B.R. 357 (B.A.P. 9th Cir. 1991) ; *In re Graettinger*, 20 C.B.C.2d 519, 95 B.R. 632 (Bankr. N.D. Iowa 1988) . See also *In re Van Winkle*, 265 B.R. 247 (Bankr. D. Colo. 2001) (contract truck driver's vehicle exempt).

(n10)Footnote 10. See also *Nazarene Fed. Credit Union v. McNutt (In re McNutt)*, 19 C.B.C.2d 660, 87 B.R. 84 (B.A.P. 9th Cir. 1988) (motor vehicle necessary to and used by the debtor for work, trade or occupation can be considered a tool of the trade). But see *In re Johnson*, 160 B.R. 613 (Bankr. D. Minn. 1993) (van was incidental to debtor's work as plumber; exemption denied).

(n11)Footnote 11. *Nazarene Fed. Credit Union v. McNutt (In re McNutt)*, 19 C.B.C.2d 660, 87 B.R. 84 (B.A.P. 9th Cir. 1988) ; *In re Spykstra*, 86 B.R. 656 (Bankr. D. Colo. 1988) (debtor's car used to travel to and from work may be claimed exempt under Colorado statute; debtor's snowblower may not; see also *In re Sackett*, 394 B.R. 544 (Bankr. D. Colo. 2008) (finding that high end sports utility vehicle for nurse who hauled supplies is tool of the trade and listing factors to consider); *In re Giles*, 340 B.R. 543 (Bankr. E.D. Pa. 2006) (holding that the debtor's motor vehicle is a tool of the trade for millinery business because it was used to transport good to vending events).

(n12)Footnote 12. *Monticello Arcade Limited Partnership v. Lyall (In re Lyall)*, 191 B.R. 78 (E.D. Va. 1996) .

(n13)Footnote 13. 123 B.R. 357 (B.A.P. 9th Cir. 1991) .

(n14)Footnote 14. 31 B.R. 820, 821 (Bankr. W.D. Pa. 1983) (holding that the right or privilege of a license is not subject to exemption under section 522(d)(5)). *In re Caylor*, 31 B.R. 821 (Bankr. W.D. Pa. 1983) .

(n15)Footnote 15. *In re Johnson*, 255 B.R. 554 (Bankr. S.D. Ohio 2000) .

(n16)Footnote 16. 131 B.R. 530 (Bankr. D.R.I. 1991) .

(n17)Footnote 17. *In re Aurelio*, 252 B.R. 102 (Bankr. N.D. Miss. 2000) .

(n18)Footnote 18. *In re Hively*, 358 B.R. 752 (Bankr. C.D. Ill. 2007) .

(n19)Footnote 19. *In re Belsome*, 434 F.3d 774 (5th Cir. 2005) .

(n20)Footnote 20. *In re Siegel*, 214 B.R. 329, 332 (W.D. Tenn. 1997) (debtor was practicing attorney); *In re Carson*, 184 B.R. 587 (Bankr. N.D. Okla. 1995) .

(n21)Footnote 21. *In re Parrish*, 186 B.R. 246 (Bankr. W.D. Wisc. 1995) ; *United States v. Ehlen (In re Ehlen)*, 207 B.R. 179 (Bankr. W.D. Wisc. 1997) .

(n22)Footnote 22. *In re Duvall*, 218 B.R. 1008 (Bankr. W.D. Tex. 1998) .



80 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.05

CH.05. Controversy over Farm Equipment: Does It Qualify for Exemption?

Courts are often required to consider the circumstances under which a debtor may exempt farming equipment as "tools of the trade."

[1] Farm Equipment May Qualify for Exemption Even If Debtors Not Technically Farmers

In *Production Credit Association v. LaFond (In re LaFond)*, n1 debtors who were not "farmers" under the Code's definition, were nonetheless permitted to exempt farming equipment as "tools of the trade." n2 However, to be a farmer allowed to use section 522(f)(1)(B)(ii) to avoid a lien, the debtor must have been engaged in farming. n3 In *Johnson*, the bankruptcy appellate panel found that, although the debtor had engaged in farming in the past, no farming had occurred recently. Accordingly, the debtor was not a farmer allowed to avoid farm equipment as a tool of the trade. It is interesting to note that the panel did hold that a farmer could have two professions and still be considered a farmer for avoidance purposes. It also recognized that most true farmers do practice other professions, and such additional income is required to allow farmers to subsist. n4

[2] Farmer's Non-Farmer Spouse Sometimes Allowed to Exempt Items as Tools of the Trade

A Wisconsin bankruptcy court allowed a farmer's wife a "tools of the trade" exemption in equipment primarily used by the husband in his farming operations, citing Wisconsin law providing for equal property and partnership in a marriage and noting that both debtors participated in the purchase of the equipment and other farm-related activities. n5

In *In re Currie*, n6 the district court held that when the wife is a farmer and the husband is not, both spouses are entitled to apply the Kansas tools of the trade exemption to farming equipment. Even if the debtors used the equipment "for household purposes at the time of the security agreements, their evidence of [farming] use on the petition date is what is pertinent." In *In re Schmitt*, n7 the court held that a farmer's wife is a farmer for purpose of calculating exemptions even though she draws no salary.

However, in *In re Indvik*, n8 the court held that when a farmer's spouse makes no essential contribution to the operation of the farm, the spouse may not claim an exemption for farm implements as tools of the trade.

[3] Large Pieces of Farm Equipment and Farm Animals May Qualify for Exemption

Another Wisconsin case concerning farm equipment is *In re Thompson*.⁹ The Court of Appeals for the Seventh Circuit held that a debtor could use the "generous" state exemption statute, coupled with section 522(f)(2)(B), to exempt 15 items of farm equipment, including tractors and a combine. In *In re Erickson*,¹⁰ the problem for the court was the fact that the items of farm machinery described under the depression era exemption law, a "hay loader" and a "mower," were obsolete, having been supplanted by more modern, more versatile, and more expensive items, a bailer and haybine. The court found that the relationship between the older machines and their modern replacements was sufficiently close as to bring the bailer and the haybine within the ambit of the exemption.

The Court of Appeals for the Second Circuit held that under Vermont law¹¹ three bulls used for dairy breeding stock valued together at \$1,050 were exempt as "tools of the trade" of dairy farmer codebtors.¹² It noted that the Vermont courts have long treated exemption statutes as "remedial in nature" and requiring "a liberal construction in favor of the debtor."

In *In re Gray*,¹³ horses and cattle used by the chapter 7 debtor to teach others how to rope and ride were found to be exempt as tools of the trade. The bankruptcy court in *In re Larson*¹⁴ also allowed an exemption for farm animals finding that the breeding stock on which the debtor-rancher relied to produce future calves were tools of the trade because income was not from livestock held for sale.

[4] Heavy Farm Equipment Does Not Qualify for Exemption

The Court of Appeals for the Seventh Circuit in *In the Matter of Patterson*¹⁵ held that items of farm machinery are not tools of the trade under section 522(d). The court acknowledged that state exemption statutes might be broader, but ruled that section 522(d)(6) covered only personal hand tools of modest value and excluded capital assets as tools of a debtor's trade.

FOOTNOTES:

(n1)Footnote 1. 791 F.2d 623, 14 C.B.C.2d 1185 (8th Cir. 1986) ; see *Smith v. Giles*, 35 B.R. 377 (Bankr. W.D. Va. 1983) .

(n2)Footnote 2. Accord *Central Nat'l Bank v. Liming (In re Liming)*, 797 F.2d 895 (10th Cir. 1986) ; *Meadows v. Farmers & Merchants Nat'l Bank (In re Meadows)*, 75 B.R. 357 (W.D. Va. 1987) ; *In re Miller*, 370 B.R. 914 (Bankr. D. Minn. 2007) ; *In re Decker*, 34 B.R. 640 (Bankr. N.D. Ind. 1983) . But see *In re Goss*, 352 B.R. 306 (Bankr. E.D. Okla. 2006) (caring for one cow and a calf did not establish that the debtor was continuing in cattle ranching); *Holman v. Farmers Home Admin. (In re Holman)*, 8 C.B.C.2d 4, 26 B.R. 110 (Bankr. M.D. Tenn. 1983) .

(n3)Footnote 3. See *Johnson v. Border State Bank (In re Johnson)*, 230 B.R. 608 (B.A.P. 8th Cir. 1999) .

(n4)Footnote 4. *Johnson*, 230 B.R. 608, 610 (B.A.P. 8th Cir. 1999) . See also *In re Larson*, 260 B.R. 174 (Bankr. D. Colo. 2001) (permitting exemption for farm equipment even though debtor worked 40 hours per week as a trucker and only raised cattle in spare time).

(n5)Footnote 5. *In re Flake*, 32 B.R. 360 (Bankr. W.D. Wis. 1983) ; see also *In re Johnson*, 54 B.R. 976 (Bankr. W.D. Mo. 1985) ; *In re Schmitt*, 56 B.R. 708 (Bankr. N.D. Iowa 1985) . But see *In re Miller*, 370 B.R. 914 (Bankr. D. Minn. 2007) .

(n6)Footnote 6. 9 C.B.C.2d 726, 34 B.R. 745 (D. Kan. 1983) .

(n7)Footnote 7. *In re Schmitt*, 56 B.R. 708 (Bankr. N.D. Iowa 1986) .

(n8)Footnote 8. 23 C.B.C.2d 948, 118 B.R. 993 (Bankr. N.D. Iowa 1990) . And by analogy, see *In re Bryan*, 126 B.R. 108 (Bankr. D.N.M. 1991) , in which a doctor's wife attempted to claim \$1,500 in medical equipment under the

tools of the trade exemption using the theory that her husband's practice was community property. The court disagreed, saying that the exemption was confined to the trade of the person claiming the exemption.

(n9)Footnote 9. *867 F.2d 416, 22 C.B.C.2d 1191 (7th Cir. 1990)* . *But see In re Sugarek, 117 B.R. 271 (Bankr. S.D. Tex. 1989)* (tools of the trade exemption not limited to low value hand tools; may also include harvester disc, planter and tractor).

(n10)Footnote 10. *815 F.2d 1090 (7th Cir. 1987)* (\$1 million combine not exempt).

(n11)Footnote 11. *See Vt. Stat. Ann. tit. 12, § 2740(2) supra.*

(n12)Footnote 12. *In re Parrotte, 22 F.3d 472 (2d Cir. 1994)* , *rev'g, 143 B.R. 622 (Bankr. D. Vt. 1992)* ; *In re Patterson, 825 F.2d 1140, 17 C.B.C.2d 339 (7th Cir. 1987)* . *But see In re Wilson, 182 F.3d 319 (5th Cir. 1999)* .

(n13)Footnote 13. *303 B.R. 632 (Bankr. W.D. Mo. 2003)* .

(n14)Footnote 14. *260 B.R. 174 (Bankr. D. Colo. 2001)* .

(n15)Footnote 15. *825 F.2d 1140, 17 C.B.C.2d 339 (7th Cir. 1987)* (51 cows and a tractor not exempt).



81 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.06

CH.06. Life Insurance: State Law Exemptions

Many states allow the debtor to exempt all or part of the proceeds from a life insurance policy.

[1] Life Insurance Exemption Unlimited

In *In re Manicure*, n1 the court held that the statutory dollar amount restriction applied only to the cash surrender value of a policy, so that the policy's face value could be exempt without limit. In *In re Worthington*, n2 the bankruptcy court held that the state statute permitted a claim of exemption in the cash surrender value of life insurance policies and that "any monetary value in life insurance policies owned by its citizens is exempt without monetary limitation." In *In the Matter of Morris*, n3 Alabama's dollar limitation on its personal property exemption was held not to apply to life insurance. The bankruptcy court noted that the limitation on the personal property exemption predated, and was not explicitly referred to, in the exemption for life insurance.

These cases illustrate, importantly, that state statutes are often fact specific and the language of the statute must be considered when advising debtors. n4

[2] Life Insurance Exemption Sometimes Limited

In contrast, state statutes may limit the dollar amount of a life insurance exemption to an amount providing sufficiently for the benefit of a family. n5 In addition, in *Federal Savings & Loan Insurance Co. v. Holt (In re Holt)*, n6 the Court of Appeals for the Eighth Circuit held that the exemption for the debtors' life insurance benefits and policies' cash surrender value is limited to a \$500 ceiling under the Arkansas Constitution. n7

FOOTNOTES:

(n1)Footnote 1. 29 B.R. 248 (Bankr. W.D. Va. 1983) . See also *Wornick v. Gaffney*, 544 F.3d 486 (2d Cir. 2008) .

(n2)Footnote 2. 28 B.R. 736 (Bankr. W.D. Ky. 1983) .

(n3)Footnote 3. 30 B.R. 392 (Bankr. N.D. Ala. 1983) .

(n4)Footnote 4. *In re Trautman*, 496 F.3d 366 (5th Cir. 2007) (must be able to meet statutory requirements).

(n5)Footnote 5. See *In re Hogg*, 76 B.R. 735 (Bankr. D.S.D. 1987) , *aff'd*, 877 F.2d 691 (9th Cir. 1989) ; see also *In re Miller*, 370 B.R. 914 (Bankr. D. Minn. 2007) .

(n6)Footnote 6. 894 F.2d 1005, 22 C.B.C.2d 337 (8th Cir. 1990) ; see also *In re Griller*, 127 B.R. 215, 217 (Bankr. W.D. Ark. 1990) . But see *In re Criswell*, 152 B.R. 264, 265 (Bankr. W.D. Ark. 1992) (§ 16-66-217 allows use of federal exemptions to obtain more than the \$500 limit).

(n7)Footnote 7. Ark. Const. art. 9, § 2.



82 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.07

CH.07. Liens Arising from Divorce Proceedings

In 1991, the U.S. Supreme Court settled a controversy among the courts of appeal as to whether liens on the marital homestead, created at the time of the dissolution of the marriage, are avoidable under section 522(f)(1).

[1] *Farrey v. Sanderfoot*

The U.S. Supreme Court in *Farrey v. Sanderfoot* held that a debtor whose interest in the encumbered property was created by a divorce decree simultaneously with the lien on that property could not avoid the lien under section 522(f). n1 In *Farrey*, the parties had agreed that their divorce decree, which awarded each party one-half of the marital assets, extinguished their prior joint tenancy in the property and created new interests in its place, i.e., ownership in fee simple of the marital residence for the ex-husband and a debt secured by a lien on the property for the ex-wife. The ex-husband failed to make the required payments to his ex-wife, filed a chapter 7 petition and listed the residence as exempt homestead property pursuant to a Wisconsin statute. He then sought to avoid his ex-wife's lien by filing a motion pursuant to section 522(f)(1), claiming that her judicial lien impaired his homestead exemption. The bankruptcy court denied the motion but the district court reversed, holding that the lien was avoidable under section 522 because it was "fixed on an interest of the debtor in the property." On appeal, the court of appeals affirmed the district court, ruling that because the ex-wife's pre-existing interest in the property had been dissolved by the decree, the lien had necessarily attached to the debtor's property interest.

In reversing the lower courts, the Supreme Court analyzed the language of the statute as well as its purpose and legislative history, and held that the debtor's interest in the exempt property must precede the attachment of the lien in order to qualify under section 522(f)(1). n2 Accordingly, the lien in *Farrey* could not encumber an interest of the debtor, who possessed only a fee simple interest which did not pre-exist the lien but rather was created simultaneously with it, and section 522, therefore, could not be used to avoid the lien. The Court also noted that, even if the parties' previous interests in the property had not been extinguished but merely reordered so that the wife's interest in the joint tenancy was transferred to the husband, the lien could not be avoided. The Court reasoned that under these circumstances the lien merely attached to the wife's, not the husband's, preexisting interest in the property. n3

[2] Lien Not Avoidable

The bankruptcy court in *In re Farrar* n4 held that a lien associated with a divorce decree could not be avoided. In the case, the husband filed a chapter 7 petition. He claimed a homestead exemption in a life estate and sought to avoid his

former spouse's lien. In interpreting *Farrey v. Sanderfoot*, the court ruled that the lien could not be avoided. The bankruptcy court, in reviewing Vermont law and federal precedent, determined that the lien arose at the time of the divorce decree; accordingly, the lien was not avoidable.

The Bankruptcy Appellate Panel for the Ninth Circuit had an opportunity to examine the scope of *Farrey v. Sanderfoot* in *Law Offices of Moore & Moore v. Stoneking (In re Stoneking)*, n5 which raised the issue of whether a debtor can avoid a lien placed on a community property residence if the residence later becomes the debtor's separate property. In that case, a law firm that had represented the nondebtor spouse possessed a judicial lien against the debtor's residence. The lien arose prior to the filing of the petition, and the debtor lived in a community property state. The bankruptcy court granted the motion to avoid the lien, and the creditor appealed.

The bankruptcy appellate panel, in interpreting the case, refused to extend *Farrey v. Sanderfoot* beyond its limits and original reasoning, holding that, if the residence had been community property as of the petition date, the debtor would have had the right to claim the homestead exemption and, assuming all other elements of section 522(f) were satisfied, to avoid a judicial lien that impaired that exemption. "The filing by a spouse of an individual bankruptcy petition creates an estate which encompasses community property that is under the spouse's joint management and control as of the date of the petition. The right to claim exemptions rests solely in that spouse." n6 The panel paid special attention to the language in footnote number 3 of *Farrey v. Sanderfoot*, in which the Supreme Court limited the holding in *Farrey* to apply to liens created simultaneously with the creation of the new property interest. n7

[3] Liens Created Pursuant to Divorce Decree Treated Differently; Such Judicial Liens May Be Unavoidable

Liens created pursuant to a marital settlement agreement or a divorce judgment to secure payment of a property division are sometimes treated differently from other judicial liens. Judicial liens created pursuant to a contested property division that impair a debtor's interest in an exempt asset are not avoidable to the extent the debtor acquired the interest subject to the lien or the lien was created at the same time the debtor's ownership interest was created. The debtor is considered to have taken the property subject to the lien. n8 However, if the exempt property to which the lien attaches was owned by the debtor before the judgment of divorce created the lien, the lien is subject to avoidance under section 522(f). n9

[4] The 2005 Amendments to the Bankruptcy Code

The 2005 Amendments to the Bankruptcy Code n10 amended section 522(c)(1), which specifically provides that, notwithstanding any provision of applicable nonbankruptcy law to the contrary, exempt property shall be liable for a debt of a kind specified in section 523(a)(5).

FOOTNOTES:

(n1)Footnote 1. 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337, 24 C.B.C.2d 841 (1991) .

(n2)Footnote 2. 500 U.S. 291, 296, 111 S. Ct. 1825, 1830, 114 L. Ed. 2d 337, 344, 24 C.B.C.2d 841, 846 .

(n3)Footnote 3. 500 U.S. 291, 300, 111 S. Ct. 1825, 1831, 114 L. Ed. 2d 337, 347, 24 C.B.C.2d 841, 847 ; see also *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815 (9th Cir. 1997) , cert. denied, 523 U.S. 1005, 118 S. Ct. 1187, 140 L. Ed. 2d 318 (1998) , in which the court held that the debtor could not discharge the award of part of his pension plan benefits to his ex-wife in a divorce settlement because the QDRO (qualified domestic relations order), however faulty, made the ex-wife's interest a debt against the pension plan and not the debtor.

(n4)Footnote 4. 219 B.R. 48 (Bankr. D. Vt. 1998) .

(n5)Footnote 5. 40 C.B.C.2d 1408, 225 B.R. 690 (B.A.P. 9th Cir. 1998) ; see also *In re Scott*, 2009 WL 612487 (Bankr. C.D. Cal. Mar. 4, 2009) (also examining the scope of *Farey v. Sanderfoot*); *In re Banner*, 394 B.R. 292, 300

(Bankr. D. Conn. 2008) .

(n6)Footnote 6. See *In re Stoneking*, 40 C.B.C.2d 1408, 225 B.R. 690, 695 (quoting *In re Homan*, 112 B.R. 356, 359 (B.A.P. 9th Cir. 1989) (citations omitted)).

(n7)Footnote 7. *Id.* at 695.

(n8)Footnote 8. *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337, 24 C.B.C.2d 841 (1991)

(n9)Footnote 9. *In re Parrish*, 144 B.R. 349 (Bankr. W.D. Tex. 1992) , *aff'd*, 7 F.3d 76 (5th Cir. 1993) , *cert. denied*, 511 U.S. 1006, 114 S. Ct. 1373, 128 L. Ed. 2d 49 (1992) ; *see also Gendreau v. Gendreau* (*In re Gendreau*), 122 F.3d 815 (9th Cir. 1997) , *cert. denied*, 523 U.S. 1005, 118 S. Ct. 1187, 140 L. Ed. 2d 318 (1998) , in which the court held that the debtor could not discharge the award of part of his pension plan benefits to his ex-wife in a divorce settlement because the QDRO (qualified domestic relations order), however faulty, made the ex-wife's interest a debt against the pension plan and not the debtor; *accord In re Carbaugh*, 278 B.R. 512 (B.A.P. 10th Cir. 2002) .

(n10)Footnote 10. Pub. L. 109-8. § 212 (2005), effective in cases commenced on or after October 17, 2005.



83 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

*14a-CaseHi Collier Bankruptcy Exemption Guide CH.08***CH.08. Pension Law and Exemptions**

The treatment of pensions and retirement benefits under bankruptcy exemption law involves considerations of state law and federal law. Two *Bankruptcy Code* sections, 541(c)(2) and 522, are the focal points in determining whether federal or state law applies. A significant body of case law regarding whether an individual debtor's bankruptcy estate must include retirement plan savings, as well as relevant Supreme Court decisions, *Patterson v. Shumate* and *Rousey v. Jacoway*, provide help and aid in making this determination. n1 In addition, the 2005 amendments to the Bankruptcy Code pretty much settle any remaining issues raised by the old case law. Subject to certain limitations, retirement funds covered under sections 401, 403, 408, 408A, 414, 457 or 501(a) of the *Internal Revenue Code* will no longer be considered property of the debtor's estate for cases filed on or after October 17, 2005. This will be so regardless of whether state or federal exemption laws are applied. Likewise, the new amendments protect retirement funds that were transferred from one type of retirement account to another type of retirement account outlined in the *Internal Revenue Code*. n2

[1] *Patterson v. Shumate*

There was formerly a question as to whether a debtor's interest in ERISA-qualified plans were excluded from property of the estate pursuant to section 541. This debate was settled by the Supreme Court in *Patterson v. Shumate*, n3 thereby resolving a conflict among the circuits over the interpretation of the phrase "applicable nonbankruptcy law" in section 541(c)(2). It held that a debtor's interest in an ERISA-qualified plan is excluded from a bankruptcy estate under the "applicable non-bankruptcy law exclusion" of section 541(c)(2). n4 The Court expressly overruled the approach taken by several courts of appeal that had held that "applicable nonbankruptcy law" referred only to state law. n5

Under *Patterson*, section 541(c)(2) clearly excludes pension assets from the bankruptcy estate if the debtor has no access to the funds. The application of *Patterson* and section 541(c)(2) was less obvious, however, particularly in situations where the debtor has access to the pension assets either prepetition or shortly after the commencement of the bankruptcy code case.

In *In re Bartholomew*, n6 the chapter 7 trustee argued that section 541(c)(2) did not apply to certain assets distributed from an ERISA qualified pension plan after the commencement of the case because the debtor had taken all the steps necessary to withdraw the funds prepetition. After the filing of the bankruptcy petition, the pension assets were transferred to an individual retirement account (IRA) that was not ERISA qualified. The court found the assets to be

exempt under section 541(c)(2), reasoning that if the property is excluded from the estate at the time of the filing of the case, a subsequent change in its form does not bring it into the estate unless another provision of section 541(a) would capture it as a postpetition asset. n7

[2] The Section 541(c)(2) Exclusion When a Retirement Plan, in Operation, Violates ERISA

Courts are divided on the issue of whether an exclusion under section 541(c)(2) should be denied upon a showing that, in operation, a retirement plan fails to constitute an ERISA plan. For example, some courts have disallowed the section 541(c)(2) exclusion when it was found that a retirement plan's sole remaining participants at the time of the bankruptcy case were the owners of the employer, and that the plan did not qualify as an ERISA employee benefit plan because the plan did not cover any "employees." n8 Even when the retirement plan included participants other than the owners of the plan sponsor at the time of the commencement of the case, courts have held that the plan assets attributable to the owners are not eligible for the section 541(c)(2) exclusion when the owners fail to administer the plan in compliance with ERISA and the Internal Revenue Code, but rather make use of the plan as a personal bank. n9

Other courts take the view that if a plan is regulated by ERISA because it is described in ERISA'S coverage provisions, whether the plan, in operation, complies with ERISA is not relevant to the issue of whether the section 541(c)(2) exclusion is available, so long as the plan has a valid ERISA anti-alienation provision. For example, in *In re Baker*, n10 a creditor argued that the debtor's majority shareholder's profit-sharing plan account balance should be included in the property of the estate. By the time of the filing of the bankruptcy case, the shareholder had "borrowed" a significant portion of his profit account balance to support the failing business, and he was the only remaining participant in the plan. The plan loans allegedly failed to comply with ERISA in various respects. The creditor claimed that the shareholder was the "employer," not an "employee," and the debtor's plan could thus not constitute an "employee pension benefit plan" covered by ERISA. n11 The creditor further asserted that the shareholder was an ERISA fiduciary and had flouted ERISA duties and that therefore it would be inequitable to permit the use of ERISA as a shield to protect the ERISA plan assets. n12 The court rejected each of creditor's arguments, stating that whether the shareholder was the sole remaining participant, or violated ERISA, was irrelevant to whether the plan was "ERISA-qualified." n13 The court reasoned that the relevant inquiry is whether the plan was subject to ERISA regulation, not whether the plan or debtor complies with ERISA. n14 The court said it understood "ERISA-qualified" to mean nothing more complex than containing the anti-alienation provision required by *section 206(d)(1) of ERISA*. n15

The 2005 amendments to the Code resolved many of these issues, and did so in a way that will generally favor exemptions. New section 522(b)(4) provides the general rule that retirement funds are presumptively exemptible if they are held in a fund that has previously received a favorable determination from the IRS, as long as that determination is still in effect on the date of filing. n16 Even if the fund in question has not received a favorable determination, the funds are still exempt as long as one of the following two things is true: (a) no prior determination to the contrary has been made by a court or by the IRS and the fund is in substantial compliance with the applicable requirements of the Internal Revenue Code, or (b) the fund is not in substantial compliance with those requirements, but the debtor is not 'materially responsible' for that failure. n17

[3] Application of the Anti-Alienation Provision of the Internal Revenue Code

Courts generally hold that if a retirement plan does not constitute a valid ERISA-covered plan, but is nevertheless tax-qualified and subject to the anti-alienation provisions of *Internal Revenue Code section 401(a)(13)*, the section 541(c)(2) exemption does not apply. n18 The courts reason that the anti-alienation provisions of the Internal Revenue Code relate solely to the criteria for tax qualification under the Internal Revenue Code. n19 A transfer in violation of the Internal Revenue Code's anti-alienation provisions could result in tax consequences. n20 However, the Internal Revenue Code does not provide for any substantive rights that a beneficiary or participant of a qualified retirement trust can enforce. In the absence of such a statutorily defined private right of action, the section 541(c)(2) exemption is deemed to be inapplicable. The assets of a tax-qualified plan that is not deemed to be ERISA qualified may nevertheless be

protected under section 541(c)(2), however, if the plan contains a anti-alienation provision that is enforceable under applicable state nonbankruptcy law. n21

[4] Statutorily and Non-Statutorily Prescribed Anti-Alienation Provisions

Courts have ruled that if an anti-alienation provision is not specifically mandated by ERISA with respect to a plan, any such provision "gratuitously" contained in the plan cannot be relied upon as a basis for a section 541(c)(2) exclusion. n22 On the other hand, if a transfer restriction applies to the plan under applicable nonbankruptcy law, the absence of such a provision in the plan itself is not necessarily fatal to a section 541(c)(2) exclusion. n23

[5] Special Exception for IRS Tax Liens and Levies

An exception to ERISA's anti-alienation rule exists with respect to IRS tax liens and levies. n24 *Section 6321 of the Internal Revenue Code* provides that if any person liable to pay any tax neglects or refuses to pay it after demand, the amount becomes a lien in favor of the government upon all property and rights to the property, whether real or personal, belonging to the taxpayer. *Section 6331 of the Internal Revenue Code* further provides that the government may collect any such tax by levy upon all property and rights to property (subject to certain exceptions) on which the government has a lien.

In *Shanbaum v. United States*, n25 the Court of Appeals for the Fifth Circuit held that ERISA pension benefits are not exempt from IRS levy, in light of *section 6334(c) of the Internal Revenue Code*, which provides that, notwithstanding any other law of the United States, no property is exempt from levy other than property specifically exempted by statute, and section 1144(d) of ERISA, which provides that ERISA should not be construed to alter or supersede any law of the United States. Additionally, in *United States v. Sawaf*, n26 the court held that the anti-alienation provision of ERISA did not prohibit the IRS from garnishing taxpayers' vested interest in ERISA-qualified pension funds in order to satisfy judgments for unpaid income taxes. In *McIntyre v. United States (In re McIntyre)*, n27 the court held that the IRS can levy on one spouse's community property interest in an ERISA disability pension plan in satisfaction of the other spouse's tax debt, and that ERISA's anti-alienation provision does not act to bar the IRS from levying community property in pension benefits.

Courts are split on the issue of whether, despite a valid anti-alienation provision in a pension plan, the debtor's interest in such plan should be treated as property of the bankruptcy estate for the limited purpose of securing an IRS levy. n28 Many courts hold that the pension assets are exempt from the bankruptcy estate under section 541(c)(2), such that the IRS cannot possibly have a secured interest in such assets in the bankruptcy context. n29 Other courts reason that because *section 6321 of the Internal Revenue Code* defeats the anti-alienation and anti-assignment provisions of the pension plan, those restrictions are not "enforceable under applicable nonbankruptcy law," such that section 541(c)(2) does not exempt the pension assets from the bankruptcy estate for purposes of an IRS levy. n30

[6] Further Analysis Regarding the Meaning of "ERISA Qualified"

Courts have applied different tests for determining whether a plan is ERISA qualified. n31 Courts have generally used either a two-step inquiry or a three-step inquiry to determine whether a plan is subject to ERISA. Under the two-step inquiry, courts determine (1) whether the plan is "subject to" ERISA, and (2) whether the plan includes an anti-alienation clause that is enforceable under ERISA. n32 Under the three-step inquiry, a court must also determine whether the plan qualifies for tax-exempt status under the Internal Revenue Code. n33 Even when courts seek to determine whether a plan is tax-qualified, however, that prong of the analysis is generally not determinative. n34

[7] Debtor's Ability to Exempt Pension Often Controlled by State Law

Under section 522, a debtor may generally choose between state and federal nonbankruptcy law exemptions, and the exemptions specified in section 522(d), unless the state in which the debtor is domiciled has "opted out" of the section

522(d) exemptions.

[a] Exemptions for Public and Private Pensions

Most states, including those that have opted out of the section 522(d) exemptions, have enacted statutes providing for public and private pension exemptions. n35 In addition, some states have enacted specific exemptions for individual retirement accounts. Such statutes vary, but generally a debtor is permitted to exempt governmental pensions in their entirety, provided the plan qualifies for favorable tax treatment. n36 The statutes further provide that private pensions are exempt either entirely or to the extent necessary for the support of the debtor or a dependent. n37

[8] State Law Exemption Statutes and ERISA Preemption

To the extent state law exemptions are relied upon under section 522, bankruptcy courts are often called upon to decide whether the state law exemptions are preempted by ERISA. *Section 514(a) of ERISA* n38 provides, subject to certain exceptions, that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."

[9] *Rousey v. Jacoway*

Because individual retirement accounts ("IRAs") are not generally subject to ERISA's anti-alienation of benefits requirement, n39 before the 2005 Supreme Court decision in *Rousey v. Jacoway* and the 2005 amendments to the Bankruptcy Code, there was a split of authority regarding whether an IRA was necessarily exempt under section 522(d)(10)(E) by qualifying as a "similar plan or contract" as required under that section. n40 Courts that held in favor of exempting all IRA assets from the bankruptcy estate reasoned, in part, that IRAs, like the four types of plans or contracts listed in section 522(d)(10)(E)--"stock bonus, pension, profitsharing, annuity"--are "substitutes for future earnings in that they are designed to provide retirement benefits to individuals." n41 Also, such courts focused on the language in section 522(d)(10)(E)(iii) that specifically denied exemption to those "similar plans or contracts" that fail to qualify under *section 408 of the Internal Revenue Code*, a provision dealing exclusively with IRAs. n42 These courts reasoned that this express reference to IRAs in section 522(d)(10)(E)(iii) evidences Congress' intent that IRAs are generally to be included in the phrase "similar plan or contract." n43

Other courts held that section 522(d)(10)(E) mandated that a debtor's right to receive payment from an IRA be exempt only if it is "on account of illness, disability, death, age, or length of service" and only to the extent reasonably necessary to support debtor and debtor's dependents. n44 Under this reasoning, in order to be exempt under section 522(d)(10)(E), the right to receive payment from an IRA had to be an immediate right, and not the right to receive future payments. n45 These courts viewed the exemption of the right to receive future payments under an IRA as inequitable because it may have had the effect of sheltering such assets from creditors even though the debtor was not of retirement age, had other means of support, and could have elected to withdraw such funds from the IRA in order to reduce or possibly eliminate such debts. n46

The Supreme Court in *Rousey v. Jacoway* agreed with the courts that found the IRA is a "similar plan or contract" within the meaning of section 522(d)(10)(E) and are designed to provide retirement benefits similar to the plans or contracts listed in that section, provide income as a substitute for wages and do not operate merely as savings accounts. Finally, if that didn't settle the issue, the 2005 amendments to the Bankruptcy Code erased any remaining question as to whether retirements funds, whether they be IRAs or otherwise, with one exception, are protected. n47

FOOTNOTES:

(n1)Footnote 1. 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 26 C.B.C.2d 1119, reh'g denied, 505 U.S. 1239, 113 S. Ct. 13, 120 L. Ed. 2d 940 (1992); 544 U.S. 320, 125 S. Ct. 1561, 161 L. Ed. 2d 563 (2005).

(n2)Footnote 2. 11 U.S.C. §§ 522(b)(3)(C) (state exemptions) and 522(d)(12) (federal exemptions), as amended by

Pub. L. 109-8, § 216, is effective for all cases filed on or after October 17, 2005. *See generally* Howard, *Exemptions Under the 2005 Amendments: A Tale of Opportunity Lost*, 79 *Am. Bankr. L.J.* 397, 412-18 (2005).

(n3)Footnote 3. 504 *U.S.* 753, 112 *S. Ct.* 2242, 119 *L. Ed. 2d* 519, 26 *C.B.C.2d* 1119, *reh'g denied*, 505 *U.S.* 1239, 113 *S. Ct.* 13, 120 *L. Ed. 2d* 940, 26 *C.B.C.2d* 1119 (1992) .

(n4)Footnote 4. 504 *U.S.* 753, 759, 112 *S. Ct.* 2242, 2247, 119 *L. Ed. 2d* 519, 528, 26 *C.B.C.2d* 1119, 1123 .

(n5)Footnote 5. The Court in *Patterson* noted that section 522(d)(10)(E) includes "a much broader category of interests than § 541(c)(2) excludes," including pension plans that do not qualify under ERISA. 504 *U.S.* 753, 759, 112 *S. Ct.* 2242, 2247, 119 *L. Ed. 2d* 519, 527, 26 *C.B.C.2d* 1119, 1123 .

(n6)Footnote 6. 214 *B.R.* 322 (*S.D. Ohio* 1997) .

(n7)Footnote 7. 214 *B.R.* 322, 327 ; *see also In re Kim*, 257 *B.R.* 680 (9th *Cir.* 2000) (where debtor was covered under a public pension plan pre-petition, and immediately "retired," became reemployed and began drawing funds from the pension plan post-petition, the pension money was exempt from the bankruptcy estate because the funds were held in a retirement plan as of the petition date and were exempt regardless of the debtor's post-petition use of the funds); *In re Parks*, 255 *B.R.* 768 (*D. Utah* 2000) (where debtor was entitled to a 401(k) plan distribution pre-petition due to a termination of employment, but didn't roll the funds into a non-ERISA qualified IRA until after the bankruptcy was filed, the 401(k) funds were exempt from the bankruptcy estate because a determination of what property is included in the bankruptcy estate, as well as what property is exempt, is measured as of the date of filing).

(n8)Footnote 8. *See In re Kaplan v. First Chicago, Inc.*, 189 *B.R.* 882 (*E.D. Pa.* 1995) ; *see also Nationwide Mutual Insurance Co. v. Darden*, 503 *U.S.* 318, 112 *S. Ct.* 1344, 117 *L. Ed. 2d* 581 (1992) ; *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 *F.2d* 178 (6th *Cir.* 1992) (a plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA); *In re Watson v. Proctor*, 214 *B.R.* 597 (*B.A.P.* 9th *Cir.* 1997) ; *In re Acosta*, 182 *B.R.* 561 (*N.D. Cal.* 1994) (a sole shareholder of a corporation does not qualify as an ERISA employee because a sole shareholder is deemed to be an employer and an employer is prohibited from receiving any benefit from an ERISA plan); *In re Orkin*, 170 *B.R.* 751 (*D. Mass.* 1994) (court found that a debtor who was employer, sole employee and sole participant under the plan could not qualify as an "employee" under ERISA); *In re Hall*, 151 *B.R.* 412 (*W.D. Mich.* 1993) (debtor and spouse did not constitute "employees" under ERISA); *In re Witwer*, 148 *B.R.* 930 (*C.D. Cal.* 1992) (bankruptcy court held debtor was not a participant under ERISA because the applicable regulations "unambiguously bar a sole shareholder from employee status").

(n9)Footnote 9. *See, e.g., In re Harris*, 188 *B.R.* 444 (*M.D. Fla.* 1995) ; *In re Goldsheim*, 244 *B.R.* 595 (*D. Md.* 2000) .

(n10)Footnote 10. 114 *F.3d* 636, 37 *C.B.C.2d* 1711 (7th *Cir.* 1997) .

(n11)Footnote 11. 114 *F.3d* 636, 638, 37 *C.B.C.2d* 1711, 1714 .

(n12)Footnote 12. 114 *F.3d* 636, 638-39, 37 *C.B.C.2d* 1711, 1715 .

(n13)Footnote 13. 114 *F.3d* 636, 637, 37 *C.B.C.2d* 1711, 1715 ; *see also In re Craig*, 204 *B.R.* 750 (*D.N.D.* 1996) .

(n14)Footnote 14. 114 *F.3d* 636, 637, 37 *C.B.C.2d* 1711, 1715 ; *In re Craig*, 204 *B.R.* 750 (*D.N.D.* 1996) .

(n15)Footnote 15. 114 *F.3d* 636, 637, 37 *C.B.C.2d* 1711, 1715 (quoting *Patterson v. Shumate*, 504 *U.S.* 753, 755, 112 *S. Ct.* 2242, 2244, 119 *L. Ed. 2d* 519, 26 *C.B.C.2d* 1119 (1992)) .

(n16)Footnote 16. 11 *U.S.C.* § 522(b)(4)(A).

(n17)Footnote 17. *11 U.S.C. § 522(b)(4)(B)*.

(n18)Footnote 18. *See In re Kellogg, 179 B.R. 379 (D. Mass. 1995) ; In re Acosta, 182 B.R. 561 (N.D. Cal. 1994) ; In re Witwer, 148 B.R. 930 (C.D. Cal. 1992) .*

(n19)Footnote 19. *In re Kellogg, 179 B.R. 379 (D. Mass. 1995) ; In re Acosta, 182 B.R. 561 (N.D. Cal. 1994) ; In re Witwer, 148 B.R. 930 (C.D. Cal. 1992) .*

(n20)Footnote 20. *In re Kellogg, 179 B.R. 379 (D. Mass. 1995) ; In re Acosta, 182 B.R. 561 (N.D. Cal. 1994) ; In re Witwer, 148 B.R. 930 (C.D. Cal. 1992) .*

(n21)Footnote 21. *See Southern California Permanente Medical Group v. Howard M. Ehrenberg (In re Moses), 215 B.R. 27 (B.A.P. 9th Cir. 1997) , aff'd, 167 F.3d 470 (9th Cir. 1999) (finding that a anti-alienation provision in a tax-qualified "Keogh" plan, which was not ERISA qualified, was nevertheless enforceable under applicable nonbankruptcy state spendthrift trust law); In re CRS Stream, Inc., 217 B.R. 365 (D. Mass. 1998) (a simplified employee pension (SEP), which was tax-qualified, was not ERISA qualified but went on to analyze the SEP's anti-alienation provision under state laws relating to spendthrift clauses); In re Dunn, 215 B.R. 121 (E.D. Mich. 1997) (ruling that a anti-alienation provision in a state governmental plan that was not subject to ERISA, but that was tax-qualified, was not enforceable under applicable state nonbankruptcy law such that a section 541(c)(2) exclusion was not available); In re Copulous, 210 B.R. 61, 64 (D.N.J. 1997) (tax-qualified pension plan assets excluded from the bankruptcy estate because plan's anti-alienation provision was enforceable under applicable state nonbankruptcy law); In re Johnson, 35 C.B.C.2d 251, 191 B.R. 75 (M.D. Pa. 1996) (finding nonalienability provision of Internal Revenue Code section 403(b) retirement plan enforceable under applicable state nonbankruptcy law).*

(n22)Footnote 22. *See, e.g., Wilcox v. General Retirement System of the City of Detroit, 225 B.R. 151 (E.D. Mich. 1998) (public employee's interest in tax-qualified annuity savings plan was part of his bankruptcy estate despite the anti-alienation provision contained in the plan); In re Kellogg, 179 B.R. 379 (D. Mass. 1995) (an anti-alienation provision in a simplified employee pension plan (SEP) could not support a section 541(c)(2) exclusion because ERISA does not require SEPs to contain such a provision).*

(n23)Footnote 23. *See In re Meehan, 102 F.3d 1209, 37 C.B.C.2d 375 (11th Cir. 1997) (individual retirement account (IRA) assets were subject to the section 541(c)(2) exclusion even though the IRA contained no anti-alienation provision, when applicable state law imposed a restriction on transfer by garnishment on IRA assets). But see In re Zott, 225 B.R. 160 (E.D. Mich. 1998) (specifically disagreeing with the holding in Meehan).*

(n24)Footnote 24. *See Jones v. Internal Revenue Service, 37 C.B.C.2d 1402, 206 B.R. 614, 619 (D.D.C. 1997) ; Treas. Reg. § 1.401(a)-13(b)(2).*

(n25)Footnote 25. *32 F.3d 180 (5th Cir. 1994) .*

(n26)Footnote 26. *74 F.3d 119 (6th Cir. 1996) .*

(n27)Footnote 27. *1998 U.S. Dist. LEXIS 15032 (N.D. Cal. Sept. 14, 1998) .*

(n28)Footnote 28. *See IRS v. Snyder, 2003 U.S. App. LEXIS 18998, at 7 (9th Cir. May 14, 2003) .*

(n29)Footnote 29. *See, e.g., IRS v. Snyder, 343 F.3d 1171 (9th Cir. 2003) (Holding that although exclusion of debtor's interest in a pension plan from the bankruptcy estate precludes the IRS from attaining secured status in the bankruptcy proceeding, the IRS' liens against debtor's interest are not extinguished or otherwise affected; the liens continue to exist, but outside of bankruptcy.); In re Wingfield, 284 B.R. 787, 790 (E.D. Va. 2002) ("The debtor's interest in his plan is not property of the estate for purposes of establishing the IRS' secured claim."); Persky v. United States (In re) In re Persky, 1998 U.S. Dist. LEXIS 15509, at 5 (E.D. Pa. Oct. 5, 1998) ("The IRS has a lien on Mr. Persky's*

interest in the Trust but for purposes of bankruptcy, the IRS does not have a secured claim against the estate because the Trust is not property of the estate."); *In re Keyes*, 255 B.R. 819, 822 (Bankr. E.D. Va. 2000) ("The Supreme Court's ruling in *Patterson* is clear that ERISA qualified plans do not become part of the bankruptcy estate. Therefore, the IRS' claim cannot be treated as secured because it does not have a 'lien on property in which the estate has an interest,' as required by 506(a)."); *In re Wilson*, 206 B.R. 808, 810 (Bankr. W.D.N.C. 1996) (Holding that the IRS did have a lien on debtor's interest in pension assets, but as the assets never became property of the bankruptcy estate, the IRS could not hold a secured claim against the bankruptcy estate).

(n30)Footnote 30. *See, e.g., In re Berry*, 268 B.R. 819, 824 (Bankr. E.D. Tenn. 2001) ("Because of the far reaching collection power granted [to the IRS] § 6321, the anti-assignment and anti-alienation provisions of the [Trust] are not "restrictions enforceable under applicable nonbankruptcy law."); *Jones v. IRS (In re Jones)*, 206 B.R. 614, 621 (Bankr. D.D.C. 1997) ("The [pension] would in effect have a split personality by remaining property of the estate for purposes of federal tax claims even though it is not property of the estate for purposes of other creditors' claims."); *In re Lyons*, 148 B.R. 88, 94 (Bankr. D.D.C. 1992) ("Under § 541(c)(1) the debtor's pension rights remain property of the estate and under § 506(a) the IRS has an allowed claim against the pension rights to the extent of their value."); *In re Perkins*, 134 B.R. 408, 411 (Bankr. E.D. Cal. 1991) ("Applicable nonbankruptcy law (being the law applied for attachment and levy of federal tax liens) does not 'restrict the transfer of a beneficial interest of the debtor in trust' and the [debtor's] technical 'property of the estate' argument loses its foundational premise.").

(n31)Footnote 31. *See In re Baker*, 114 F.3d 636, 638 (7th Cir. 1997); *Kaler v. Craig (In re Craig)*, 204 B.R. 756, 760 (D.N.D. 1997); *In re Watson*, 192 B.R. 238 (D. Nev. 1996); *In re Harris*, 188 B.R. 444 (M.D. Fla. 1995); *In re Bennett*, 185 B.R. 4, 6 (W.D.N.Y. 1995); *In re Yaeger*, 1998 Bankr. LEXIS 775 (Bankr. D. Minn. June 24, 1998).

(n32)Footnote 32. *See In re Bennett*, 185 B.R. 4, 6 (W.D.N.Y. 1995); *In re Hanes*, 162 B.R. 733, 740 (E.D. Va. 1994).

(n33)Footnote 33. *In re Harris*, 188 B.R. 444, 449 (M.D. Fla. 1995); *In re Orkin*, 170 B.R. 751, 753 (D. Mass. 1994); *In re Hall*, 151 B.R. 412, 419-20 (W.D. Mich. 1993); *In re Sirois*, 144 B.R. 12, 14 (D. Mass. 1992).

(n34)Footnote 34. *See In re Craig*, 204 B.R. 756, 759 (D.N.D. 1997) (pensions plans that ceased to be tax-qualified due to the plan sponsor's failure to timely amend the plans to comply with applicable legislative changes in the Internal Revenue Code was nevertheless "ERISA-Qualified").

(n35)Footnote 35. *See* checklists in individual state chapters for related statutes.

(n36)Footnote 36. *See generally* 15 Collier on Bankruptcy, chs. TX4 and TX17 (Matthew Bender 15th ed. rev.) on bankruptcy taxation.

(n37)Footnote 37. 11 U.S.C. § 522(d)(10)(E). In *In re McKeag*, 111 B.R. 815 (Bankr. D. Minn. 1990), the court held that the Minnesota exemption for teachers' pension, while containing no dollar limit or "reasonable necessity" limit, does not conflict with Minnesota constitutional prohibition on unlimited exemptions because the pension is a limited percentage of a limited salary. *See also Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 523 U.S. 1005, 118 S. Ct. 1187, 140 L. Ed. 2d 318 (1998), in which the court held that the debtor could not discharge the award of part of his pension plan benefits to his ex-wife in a divorce settlement because the QDRO (qualified domestic relations order), however faulty, made the ex-wife's interest a debt against the pension plan and not the debtor.

(n38)Footnote 38. 29 U.S.C. § 1144(a).

(n39)Footnote 39. *See* 29 C.F.R. § 2510.3-2(d)(1).

(n40)Footnote 40. *See Dale v. Puerner*, 264 B.R. 875, 878 (W.D. Mich. 2001).

(n41)Footnote 41. *See In re Brucher*, 243 F.3d 242, 243 (6th Cir. 2001) .

(n42)Footnote 42. *Id.*

(n43)Footnote 43. *Id.*

(n44)Footnote 44. *See Dale v. Puerner*, 264 B.R. 875, 879 (W.D. Mich. 2001) .

(n45)Footnote 45. *Id. at 877* .

(n46)Footnote 46. *See, e.g., Dale v. Puerner*, 264 B.R. 875, 879-80 (W.D. Mich. 2001) .

(n47)Footnote 47. The only exception is an IRA account other than a SEP IRA under *section 408(k) of the Internal Revenue Code* or a simplified employee pension under *section 408(p)*, not created by a rollover from a non-IRA account, to the extent it exceeds \$1,000,000, unless the court increases the amount in the interests of justice. *11 U.S.C. § 522 (c)(n)*, as amended by Pub. L. 109-8, § 224, is effective for all cases filed on or after October 17, 2005.



84 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.09

CH.09. Prebankruptcy Planning and the Conversion of Nonexempt Assets into Exempt Property

[1] Overview

One of the most important questions in bankruptcy practice is whether, and to what extent, a debtor may shield assets from the reach of creditors as exempt property of the estate. Under the Bankruptcy Code, any state is permitted to establish a scheme of exemptions entirely apart from the exemptions afforded debtors under section 522(d). In states that have created generous or open-ended exemptions, particularly with regard to homesteads, n1 debtors may be able to shelter large sums from the claims of creditors.

To take advantage of these exemptions, many debtors before filing for bankruptcy relief, engage in "prebankruptcy planning" by reorganizing their assets in order to protect as much property as possible from the reach of creditors. Indeed, the mere claiming of an exemption is planning and affects what property is available for distribution to creditors. One important step in prebankruptcy planning is identifying assets that normally cannot be claimed as exempt and converting them into exempt property. This, however, leads to the frequently litigated issue of whether a debtor is trying to hinder, delay or defraud creditors, or merely acting in good faith to take advantage of a legal right.

In examining court rulings on this issue, it is important to bear in mind that the cases are fact specific, and the activities in each situation must be viewed individually. n2

[2] Application of State Law

State law usually plays a major, and sometimes decisive, role in how the federal courts treat a debtor's exemption claim because the exemptions in question are authorized by state constitutions or statutes. Indeed, the Court of Appeals for the Fifth Circuit has held that "[w]hile the Code requires that, when the debtor claims a state created exemption, the scope of the claim is determined by state law." n3 The Court of Appeals for the Eighth Circuit is in accord: "When the debtor claims a state created exemption, the scope of the claim is determined by state law." n4

State procedural rules may also apply if the state opts out of the federal exemption scheme. A state may impose procedural rules regarding exemptions, and a debtor must comply with those rules in order to claim an exemption. For example, if a state requires that a homestead exemption claim be filed with the state clerk in order for the exemption to be valid, a debtor must timely comply with that state procedural rule in order to claim a homestead exemption under section 522. n5

[3] Prebankruptcy Planning

[a] General Right to Plan, Not to Defraud

Most courts hold that the conversion of nonexempt to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive a debtor of the exemption to which he or she would otherwise be entitled. n6 The courts reach this conclusion after considering the legislative history underlying the enactment of the Bankruptcy Reform Act of 1978:

As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law. n7

This excerpt, relied upon by a number of courts, n8 has been interpreted to mean that debtors should be allowed to convert nonexempt assets into exempt property or else the results could be extremely harsh, especially in jurisdictions in which exemption allowances are minimal. n9 Not all courts agree with this view. The court in *In re Spoor Weston* referred to the passage as an "artless paraphrase" of a bankruptcy judge's letter condemning prebankruptcy planning as fraudulent. n10

[b] Forms of Prebankruptcy Planning Allowed

Accordingly, asset conversions undertaken in the course of prebankruptcy planning are, absent actual fraudulent intent on the part of the debtor, usually seen as permissible. n11 In addition, several courts have explicitly recognized that a debtor is permitted to make full use of statutory exemptions, notwithstanding any desire on the debtor's part to shield assets from creditors. n12 Finally, the mere conversion of assets from nonexempt to exempt on the eve of bankruptcy--even if the purpose is to protect property from the reach of creditors--has been held insufficient evidence of intent to hinder, delay or defraud creditors. n13

Some courts have noted that the purported conversion of nonexempt assets to exempt assets is not within the realm of prebankruptcy planning, but rather, merely demonstrates a course of conduct that is permissible. For example, if long married debtors consistently place their assets in accounts held as tenants by the entirety, fraudulent intent will not be found when they deposit proceeds from the sale of stock into such an account. n14 Further, if the conversion of assets occurred more than one year prior to the bankruptcy case, and the debtor provides a credible explanation for the conversion of a nonexempt asset, the objection may be overruled. n15

[c] Forms of Prebankruptcy Planning Not Permitted

The case authority distinguishes between converting assets into a residence for the purpose of holding a homestead, and thereby putting it beyond the reach of creditors, and acquiring title to a homestead for no reason other than to defraud creditors. Thus, bankruptcy planning undertaken with the specific purpose of shielding assets from creditors, such as purchasing a homestead, is impermissible under the Bankruptcy Code. n16 The circumstances of a sham relocation to another state, n17 or a radical change in life-style, indicate the fraudulent intent behind the transfers. n18

Despite "generous and open ended" homestead exemptions, bankruptcy planning, such as using nonexempt funds to pay down a mortgage loan on a homestead, may also be impermissible under the Code. n19 Retitling real property by transferring it to a tenancy by the entirety may be an improper conversion of a nonexempt asset if the purpose is only to insulate the property from a particular creditor or class of creditors. n20

Also the court in *In re Spoor Weston* held that, despite Oklahoma's "generous and open-ended" homestead exemption, bankruptcy planning such as using nonexempt funds to pay down a mortgage loan on a homestead was impermissible under the Code. n21

[d] Determination of Allowance of Claim of Exemption

Whether a debtor acts with intent to defraud when converting non-exempt assets into exempt property is a question of fact and is reviewed by an appellate court under the clearly erroneous standard. n22

[i] Debtor's Intent to Defraud

The issue of the debtor's intent in making the conversion is an important qualification of the otherwise permissive view of prebankruptcy planning. A conversion of assets to maximize the amount of exempt property will be disallowed under section 548(a) if a court finds proof, other than the act of conversion itself, that the debtor made the conversion with the actual intent to hinder, delay or defraud a creditor. n23 This intent may be inferred from the circumstances of the debtor's conduct. n24

In *In re Armstrong*, n25 the Court of Appeals for the Eighth Circuit addressed the issue of whether the legal standard for ruling on an objection to a debtor's exemption on the ground of fraudulent intent is the same as the one used in ruling on an objection to the debtor's chapter 7 discharge, which may also be grounded in fraudulent intent. The bankruptcy court allowed the debtors' claim of exemption for annuities on the ground that, upon review of the transactions involved in the debtors' acquisition of the exempt annuities, it could not find extrinsic evidence of fraud that required denial of the exemption. n26 In a later opinion in the same case, however, the same bankruptcy court denied the debtors' discharge under section 727(a)(2)(A), finding that the "general chronology" of the transactions by which the debtors had acquired their annuities indicated a "sharp pattern of dealing" constituting extrinsic evidence of intent to hinder, delay or defraud a creditor. n27

The debtors appealed, arguing that the bankruptcy court was inconsistent in denying their discharge for the same asset conversion that the court had earlier approved in its exemption order. The Eighth Circuit, citing its decision in *Norwest Bank Nebraska v. Tveten*, n28 found that the standard applied in determining whether discharge should be granted is the same as that used to determine whether an exemption is permissible. n29 The court of appeals concluded that the bankruptcy court had correctly applied the same standard in both cases, n30 finding that "the bankruptcy court made clear that the *entire course of the [debtors'] transactions* was included in the *discharge* inquiry, while the facts scrutinized in the *exemption* inquiry were far more limited." n31 Thus, the Eighth Circuit affirmed the bankruptcy court's denial of the debtors' discharge.

The 2005 amendments to the Code added section 522(o) and provided that if conversion of non-exempt assets into homestead property is done with fraudulent intent, the claim of exemption could be challenged even though the conversion under state law would not be defeated. n32 The new section provides that, in the event of fraudulent intent, the value of the debtor's interest in the homestead could be reduced to the extent that it is attributable to any property the debtor could not exempt, and that had been disposed of within 10 years before the filing of the bankruptcy petition. n33

[ii] Extrinsic Evidence of Intent to Defraud

In as much as direct evidence of a fraudulent intent rarely exists, most courts focus on extrinsic evidence to determine a debtor's intent to hinder, delay or defraud a creditor. n34 The extrinsic evidence, referred to as "badges of fraud," is often considered by the courts in determining whether a debtor possesses the requisite intent and includes the following:

- Was credit obtained in order to purchase exempt property? n35
- Did the conversion occur after the entry of a large judgment against the debtor? n36
- Was there a sharp pattern of dealing immediately before bankruptcy? n37

- Was the converted property of high value or were large sums of money converted into exempt forms, and the form of exempt property taken? n38
- Did the debtor misrepresent the value of assets or keep the conversion secret? n39
- Did the conversion cause the debtor's insolvency? n40
- Did the debtor pay or receive inadequate consideration for the property transferred in connection with the conversion? n41 and
- Did a family, friendship or close associate relationship exist between the debtor and any recipient of property transferred in connection with the conversion? n42

One court has found that if more than half of the badges are present, there is an inference of fraud in the transfer of assets. n43 It is not necessary that the intent to remove assets from the reach of creditors be the "sole purpose," of the transfer. n44

Although each of these factors may be relevant to the determination of the debtor's fraudulent intent in converting assets, the courts are not limited to these factors and may consider any other facts bearing upon the issue of fraudulent intent. n45 It is worthwhile to note that the courts focus primarily upon two factors: (1) the timing of the conversion of assets, and (2) whether there has been an attempt to conceal the assets, conceal the conversion of the assets, n46 or otherwise mislead the creditors. n47 Thus, for example, fraud has been found to exist when the conversion occurs after the demand for payment and just before a lawsuit is filed, and the transfer violates a state court injunction. n48

[4] Creditor's Remedies

Courts have permitted or imposed various remedies when a debtor converts assets with an intent to hinder, delay or defraud. The court may disallow the exemption, the trustee may prevail in an action to set aside the conveyance as a fraudulent transfer, the case may be dismissed for bad faith or substantial abuse, sanctions may be imposed, and criminal liability may be pursued. The most frequently granted remedy, however, is denial of discharge. Indeed, in *In re Armstrong*, the Court of Appeals for the Eighth Circuit denied the debtor's discharge, but allowed the claim of exemptions to stand. n49

[a] Disallowing or Limiting the Exemption

Disallowance of an exemption is a judicially imposed remedy based upon equitable principles, rather than express statutory authority. Although state law may be applied to bar an exemption claim, n50 it is not certain which section of the Code, if any, may be invoked for this purpose. n51 There is authority, however, for the proposition that even if fraud in the conversion of assets is demonstrated, the bankruptcy court does not have the authority to disallow the exemption claim if the exemption is based upon a state constitutional right. n52

If the exemption is found to be improper, i.e., if the debtor fraudulently converted nonexempt assets to exempt assets, the court may disallow the exemption entirely or disallow that portion fraudulently converted, n53 as the facts warrant. n54 One court not only disallowed the exemption in its entirety, rather than merely reducing the amount claimed to the level permitted by state law, it also enjoined the debtors from amending their claim of exemptions to prohibit any further exemption in intangible personal property. n55

Courts have also imposed equitable liens in favor of the trustee upon debtor's property upon a finding of an improper claim of exemption. n56

[b] Denial of Discharge

The most frequently granted remedy, denial of the debtor's discharge, n57 may be considered more appropriate than disallowance of the exemption. n58 Virtually all of the exceptions to discharge may be relevant if a fraudulent conversion of exempt assets has occurred, n59 including section 727(a)(4)(B), which governs presentment of fraudulent claims and was noted by the Supreme Court in *Taylor v. Freeland & Kronz*. n60 Moreover, although section 727(a)(2) focuses upon transactions made within the one year prior to the filing of the bankruptcy case, the doctrine of continuing concealment may apply to a transfer made more than one year before the bankruptcy. n61

In addition, creditors may wish to consider whether there is a basis in law or fact supporting an objection to the dischargeability of debt under section 523(a). n62

[c] Dismissal for Bad Faith or Substantial Abuse

Section 707(a) permits dismissal of a chapter 7 case for cause, and section 707(b) provides for dismissal of a chapter 7 case if granting relief would be a substantial abuse of the provisions of chapter 7. n63 Section 1307 permits dismissal of a chapter 13 case for cause, which is generally construed to include bad faith. n64 These are potential, although rarely utilized, remedies in this context.

[d] Imposition of Sanctions

Under *Code section 105(a)* or *Rule 9011*, the bankruptcy courts are authorized to impose sanctions when a debtor claims exemptions which are not supported by the facts or the law. n65 An attorney for the debtor may also be sanctioned as the facts may warrant. n66

Indeed, in *Taylor v. Freeland & Kronz*, the U.S. Supreme Court expressly indicated that sanctions may be appropriate if debtors claim an exemption to which they are not entitled. In *Taylor*, the Court ruled that a trustee could not contest the validity of a claimed exemption after the *Rule 4003(b)* 30-day period had expired, even though the debtor had no colorable basis for claiming the exemption. In so ruling, the Court noted that various penalties exist for engaging in improper conduct in bankruptcy proceedings, and expressly referenced, among other civil and criminal penalties, *Rule 9011* sanctions for "signing certain documents not well grounded in fact and ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." n67

The imposition of sanctions may be in addition to other remedies imposed for an improper claim of exemption. Thus, the court may disallow an exemption, impose sanctions to deter future conduct n68 and may order the debtor to reimburse the estate for its reasonable attorney fees incurred in objecting to the claimed exemption. n69

[e] Transfer Avoided as a Fraudulent Conveyance

The fact that the assets may no longer be property of the estate, i.e., were claimed exempt, does not preclude any rights the trustee may have to recover preferences or fraudulent transfers under *section 547, 548 or 550 of the Bankruptcy Code*. Thus, even if the trustee fails to timely object to an improper claim of exemption, and thereby forfeits the ability to litigate that issue, n70 or the state constitution does not permit disallowance of the exemption, n71 the courts may still permit a trustee to file an adversary proceeding to set aside the transfer of nonexempt assets as a fraudulent conveyance. n72

The two year statute of limitations for filing such an avoidance action, rather than the 30-day limit under *Rule 4003* for filing objections to exemptions, applies to the trustee's avoidance action. Moreover, the conversion of nonexempt to exempt assets may be a transfer for avoidance purposes. n73 Finally, although section 548 focuses upon transactions made within the one year prior to the filing of the bankruptcy case, the doctrine of continuing concealment may apply to

a transfer made more than one year before the bankruptcy. n74

[f] Criminal Penalties

Section 152 of title 18, imposing criminal penalties for fraud in bankruptcy cases, may also be applicable if the debtor commits fraud in the transfer or assertion of a claim of exemption. n75

[5] Objections to Claim of Exemptions

[a] Overview

Rule 4003 requires debtors to claim their exemptions on the Official Form 6, Schedule C--Property Claimed as Exempt. *Rule 4003(b)* provides a time limit to file objections to a claim of exemption, and *Rule 4003(d)* provides that the burden of proof is upon the objecting party.

A party in interest may, upon a showing of cause, obtain an extension of time to file an objection to exemptions. Prior to the 2000 amendments to the Federal Rules of Bankruptcy Procedure, a trustee or creditor was required to obtain an order granting an extension of time to object to a claim of exemptions before the original or any subsequently granted extension of time period expired. Under the 2000 amendment to *Rule 4003*, any party in interest may obtain an extension of time upon a showing of cause made in a timely filed motion. The amendment clarifies that the court has authority to grant a timely request even after the time period for filing the objection has expired as long as the motion is filed before the time period expires.

[b] Time of Objection

[i] Calculation of the Objection Period

An objection to a claim of exemption must be filed within 30 days after the conclusion of the section 341(a) meeting of creditors.

In *Taylor v. Freeland & Kronz*, n76 the U.S. Supreme Court held that a trustee could not contest the validity of a claimed exemption after the 30-day period under *Rule 4003(b)* had expired, even though the debtor had no colorable basis for claiming the exemption. Thus, in order to obtain a disallowance of the claim of exemption, the objection must be timely filed. If no objection is timely filed, the property is exempted from property of the estate and is not subject to distribution to the creditors. n77

The 30-day objection period does not begin to run until the debtor gives notice regarding the property claimed exempt or the trustee and creditors receive actual notice of the claim of exemption. For example, a claim of exemption regarding wages does not put the trustee or creditors on notice that the debtor also seeks to claim an exemption in other funds. Thus, a trustee's objection to the claim of exemptions in an escrow account is timely if it is filed within 30 days after the trustee receives actual notice of the claim of exemption. n78

A chapter 7 trustee should not adjourn a section 341(a) meeting to a time uncertain or indefinitely in order to keep the objection period open. n79 Rather, under the "bright line rule," the trustee must continue the meeting to a specified date to preserve the running of the 30-day period to object to a claim of exemption. n80

[ii] No Exceptions Permitted

There are no actual notice or bad faith exceptions to the requirement that an objection to an exemption be timely filed. Thus, an untimely filed objection must be dismissed even if the trustee timely serves an objection upon the debtor, and even if the debtors initially conceal the asset. n81 Moreover, there are no constructive or informal objections to claims

of exemption. Thus, a seizure by the trustee of property claimed as exempt does not constitute an objection to exemptions. n82

[iii] Amendments to Exemptions and Conversion of the Case

As a general rule, an amendment to the schedules will not reopen the objection period as to assets already claimed exempt. n83 However, with regard to items newly claimed as exempt, a new period will commence for filing an objection to that claim of exemption. n84

A new time period arises upon reconversion to chapter 7 so that a new chapter 7 trustee, in a case that was converted to chapter 13 and then reconverted to chapter 7, may object to debtor's claim of exemptions despite the fact that the time period expired in the original chapter 7 phase of the case without objection. n85

[c] Burden of Proof

Rule 4003(d) expressly provides that an objecting creditor or trustee has the burden of proving, by a preponderance of the evidence, that the debtor undertook an asset conversion with an intent to hinder, delay or defraud creditors. n86 Similarly, if a creditor or trustee seeks denial of discharge on the basis that the debtor converted assets with the intent to hinder, delay or defraud a creditor, the same preponderance of the evidence standard, applies. n87 The debtor does have the burden, however, to clearly state the exemptions claimed so that all parties are able to ascertain the properties the debtor claims to be exempt from distribution. n88

[d] Section 522(g)

If a trustee recovers property transferred by the debtor, section 522(g) generally precludes the debtor from claiming the recovered property as exempt. If transferred property is recovered, it is to be distributed according the Bankruptcy Code and may not be claimed exempt, absent a showing under the provisions of section 522(g). n89 The trustee is not required to file a separate adversary proceeding for this subsection to apply. A "recovery" may occur if the debtor amends schedules, at the trustee's insistence, to include property transferred prepetition and originally omitted. n90

FOOTNOTES:

(n1)Footnote 1. *See, e.g.,* Fla. Const. art. X, § 4(a); *Iowa Code Ann. § 561.2*; *Kan. Stat. Ann. § 60-2301*; *Minn. Stat. Ann. §§ 510.01 &.02*; Okla. Const. art. XII, § 1; *S.D. Codified Laws Ann. §§ 43-31-1, -2, -3, -4 & -5*; Tex. Const. art. XVI, §§ 50 & 51. *But see CH.02, supra* regarding the 2005 amendments to the Bankruptcy Code, which changed the requirements to establish domicile for purposes of claiming exemptions. Making a move to an open-ended exemption state is now much more difficult.

(n2)Footnote 2. *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006 (8th Cir. 2000) ; *In re Carey*, 938 F.2d 1073, 1077 (10th Cir. 1991) . *See also In re Beverly*, 374 B.R. 221 (B.A.P. 9th Cir. 2007) ; *In re Crater*, 286 B.R. 756, 766 (Bankr. D. Ariz. 2002) .

(n3)Footnote 3. *In re Reed*, 700 F.2d 986, 991, 8 C.B.C.2d 370 (5th Cir. 1983) .

(n4)Footnote 4. *Hanson v. First Nat'l Bank*, 848 F.2d 866, 868, 19 C.B.C.2d 247, 249 (9th Cir. 1988) . *See In re Johnson*, 880 F.2d 78, 82-83, 21 C.B.C.2d 498, 504 (8th Cir. 1989) (declining to scrutinize the amount of money involved in a conversion of nonexempt assets into exempt homestead property because of "Minnesota's strong social policy in favor of homestead exemptions"); *In re Armstrong*, 93 B.R. 197, 202 (Bankr. D. Neb. 1988) (upholding debtors' exemption claim based on Nebraska law: "Both the type of property which is claimed as exempt and the manner in which such property is created should be considered to be a state law question subject only to consideration of the federal 'extrinsic evidence of fraud' standard articulated in Eighth Circuit decisions."), *aff'd*, 931 F.2d 1233 (8th Cir. 1991) .

(n5)Footnote 5. *In re Nguyen*, 211 F.3d 105 (4th Cir. 2000) .

(n6)Footnote 6. *In re Soza*, 542 F.3d 1060 (5th Cir. 2008) ; *In re Addison*, 540 F.3d 805 (8th Cir. 2008) ; *In re Jennings*, 535 F.3d 1333 (11th Cir. 2008) ; *In re Scrivner*, 535 F.3d 1258 (10th Cir. 2008) ; *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004) ; *In re Smiley*, 864 F.2d 562, 566 (7th Cir. 1989) ; *Ford v. Poston*, 773 F.2d 52, 54, 13 C.B.C.2d 632, 634 (4th Cir. 1985) .

(n7)Footnote 7. H.R. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in Collier on Bankruptcy*, App. Pt. 4(d)(i) (Matthew Bender 15th ed. rev.).

(n8)Footnote 8. *In re Soza*, 542 F.3d 1060 (5th Cir. 2008) ; *In re Addison*, 540 F.3d 805 (8th Cir. 2008) ; *In re Jennings*, 535 F.3d 1333 (11th Cir. 2008) ; *In re Scrivner*, 535 F.3d 1258 (10th Cir. 2008) ; *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004) ; *In re Smiley*, 864 F.2d 562, 566 (7th Cir. 1989) .

(n9)Footnote 9. *See Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 874, 19 C.B.C.2d 287, 290 (8th Cir. 1988) (citing *Treatise*); *In re Reed*, 700 F.2d 986, 990, 8 C.B.C.2d 370, 374 (5th Cir. 1983) (same); *In re Ford*, 53 B.R. 444, 448 (W.D. Va. 1984) (same), *aff'd sub nom Ford v. Poston*, 773 F.2d 52, 13 C.B.C.2d 632 (4th Cir. 1985) .

(n10)Footnote 10. 139 B.R. 1009, 1014 (Bankr. N.D. Okla. 1992) , *aff'd*, 13 F.3d 407 (11th Cir. 1993) .

(n11)Footnote 11. *See, e.g., In re Carey*, 938 F.2d 1073, 1076 (10th Cir. 1991) ; *In re Bowyer*, 932 F.2d 1100, 1102-03 (5th Cir. 1991) ; *In re Armstrong*, 931 F.2d 1233, 1238 (8th Cir. 1991) ; *In re Smiley*, 864 F.2d 562, 566-67 (7th Cir. 1989) ; *In re Daniel*, 771 F.2d 1352, 1358, 13 C.B.C.2d 793 (9th Cir. 1985) , *cert. denied sub nom., Daniel v. Security Pac. Nat'l Bank*, 475 U.S. 1016, 106 S. Ct. 1199, 89 L. Ed. 2d 313 (1986) ; *In re Reed*, 700 F.2d 986, 991, 8 C.B.C.2d 370 (5th Cir. 1983) ; *In re Beckman*, 104 B.R. 866, 869 (Bankr. S.D. Ohio 1989) ; *In re Wilbur*, 206 B.R. 1002 (Bankr. M.D. Fla. 1997) ; *In re Davidson*, 30 C.B.C.2d 1676, 1680, 164 B.R. 782, 785 (Bankr. S.D. Fla. 1994) , *aff'd in part, rev'd in part*, 178 B.R. 544 (S.D. Fla. 1994) ; *In re Oberst*, 91 B.R. 97, 100 (Bankr. C.D. Cal. 1988) ; *see also In re Adlman*, 541 F.2d 999, 1003-05 (2d Cir. 1976) (pre-Code case); *Wudrick v. Clements*, 451 F.2d 988, 989 (9th Cir. 1971) (same).

(n12)Footnote 12. *See, e.g., In re Smiley*, 864 F.2d 562, 567 (7th Cir. 1989) ; *Ford v. Poston*, 773 F.2d 52, 54, 13 C.B.C.2d 632, 634 (4th Cir. 1985) . *See also In re Dunbar*, 313 B.R. 430, 435-37 (Bankr. C.D. Ill. 2004) ; *In re Crater*, 286 B.R. 756 (Bankr. D. Ariz. 2002) .

(n13)Footnote 13. *See Ford v. Poston*, 773 F.2d 52, 54, 13 C.B.C.2d 632, 634 (4th Cir. 1985) ; *see also In re Luthje*, 107 B.R. 292, 295 (Bankr. D. Mont. 1989) ("Generally, a Debtor's conversion of non-exempt property into exempt property on the eve of bankruptcy is not fraudulent per se."). *But see Park Nat'l Bank v. Whitney (In re Whitney)*, 21 C.B.C.2d 1282, 107 B.R. 645 (Bankr. D. Minn. 1989) (when an objection to Minnesota's unlimited homestead exemption is based on prebankruptcy conversion of nonexempt property into exempt property, the objector must prove the debtor's alleged fraudulent intent with evidence in addition to and apart from the value of the nonexempt assets converted).

(n14)Footnote 14. *In re Allen*, 203 B.R. 786 (Bankr. M.D. Fla. 1996) ; *see also In re Mathews*, 2009 WL 19339 (11th Cir. 2009) .

(n15)Footnote 15. *In re Wilbur*, 206 B.R. 1002, 1008 (Bankr. M.D. Fla. 1997) .

(n16)Footnote 16. *In re Lordy*, 214 B.R. 650 (Bankr. S.D. Fla. 1997) ; *In re Coplan*, 156 B.R. 88, 90-91 (Bankr. M.D. Fla. 1993) ; *In re Schwarb*, 150 B.R. 470, 473 (Bankr. M.D. Fla. 1993) .

(n17)Footnote 17. *In re Lordy*, 214 B.R. 650 (Bankr. S.D. Fla. 1997) ; *see also In re Urban*, 361 B.R. 910, 917-18 (Bankr. D. Mont. 2007) (discussing cases).

(n18)Footnote 18. *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006 (8th Cir. 2000) (seriously ill 90-year-old debtor who lived in a nursing home liquidated all of his assets and purchased a homestead).

(n19)Footnote 19. *In re Spoor-Weston, Inc.*, 139 B.R. 1009, 1013-17 (Bankr. N.D. Okla. 1992) (granting an equitable lien on the debtors' homestead to secure payment of the amount "wrongfully diverted"), *aff'd*, 13 F.3d 407 (10th Cir. 1993) .

(n20)Footnote 20. *Voiland v. Gillissie (In re Gillissie)*, 215 B.R. 370 (Bankr. N.D. Ill. 1997) .

(n21)Footnote 21. *In re Spoor-Weston, Inc.*, 139 B.R. 1009, 1013-1015, 1016-17 (Bankr. N.D. Okla. 1992) , *aff'd*, 13 F.3d 407 (10th Cir. 1993) .

(n22)Footnote 22. *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006 (8th Cir. 2000) ; *see also Murphey v. Crater (In re Crater)*, 49 C.B.C.2d 1829, 286 B.R. 756, 766 (Bankr. D. Ariz. 2002) (holding that various badges of fraud must be intrinsically indicative of fraudulent intent).

(n23)Footnote 23. *See In re Crater*, 286 B.R. 756, 761 (Bankr. D. Ariz. 2002) ; *see In re Lee*, 309 B.R. 468, 482 (Bankr. W.D. Tex. 2004) ; *In re Glunk*, 342 B.R. 717 (Bankr. E.D. Pa. 2006) . *See also In re Carey*, 938 F.2d 1073, 1077 (10th Cir. 1991) ("To deny a discharge under § 727(a)(2) [for converting property], a court must find *actual* intent to defraud creditors. '[T]he desire to convert assets into exempt forms by itself' does not constitute actual intent to defraud; 'extrinsic evidence of fraudulent intent is required to establish fraud.' ") (emphasis in original); *In re Johnson*, 880 F.2d 78, 81, 21 C.B.C.2d 498 (8th Cir. 1989) ("the desire to convert assets into exempt forms by itself does not constitute fraud; extrinsic evidence of fraudulent intent is required to establish fraud.").

(n24)Footnote 24. *See In re Smiley*, 864 F.2d 562, 566 (7th Cir. 1989) ; *In re Reed*, 700 F.2d 986, 991, 8 C.B.C.2d 370, 376 (5th Cir. 1983) ; *see also In re Hill*, 163 B.R. 598, 602 (Bankr. N.D. Fla. 1994) ("a debtor loses his entitlement to claim as exempt any asset converted with the specific intent to defraud creditors," which "may be inferred from the facts and circumstances involved in the case").

(n25)Footnote 25. 931 F.2d 1233 (8th Cir. 1991) , *aff'g*, 93 B.R. 197 (Bankr. D. Neb. 1988) and 97 B.R. 565 (Bankr. D. Neb. 1989) .

(n26)Footnote 26. *See In re Armstrong*, 93 B.R. 197, 202-03 (Bankr. D. Neb. 1988) , *aff'd*, 931 F.2d 1233 (8th Cir. 1991) .

(n27)Footnote 27. *See In re Armstrong*, 97 B.R. 565, 569 (Bankr. D. Neb. 1989) , *aff'd*, 931 F.2d 1233 (8th Cir. 1991) ; *see also In re Herrman*, 355 B.R. 287, 292 (Bankr. D. Kan. 2006) .

(n28)Footnote 28. 848 F.2d 871, 19 C.B.C.2d 287 (8th Cir. 1988) .

(n29)Footnote 29. *In re Armstrong*, 931 F.2d 1233, 1239 (8th Cir. 1991) .

(n30)Footnote 30. *See id.*

(n31)Footnote 31. *See In re Armstrong*, 931 F.2d 1233, 1239 (8th Cir. 1991) (emphasis added).

(n32)Footnote 32. 11 U.S.C. § 522(o), added by Pub. L. 109-8, § 308(2) (2005), effective as to cases commenced on or after October 17, 2005.

(n33)Footnote 33. For a thorough discussion, *see 4 Collier on Bankruptcy*, P 522.08[5] and [5][a] (Matthew Bender 15th Ed. Revised); *see also In re Maronde*, 55 C.B.C.2d 51, 332 B.R. 593, 600 (Bankr. D. Minn. 2005) (holding that paying down an equity line of credit on debtor's home before filing bankruptcy petition was done with intent to defraud subject to the limitation of section 522(o)).

(n34)Footnote 34. See *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006 (8th Cir. 2000) ; *Levine v. Weissing (In re Levine)*, 134 F.3d 1046 (11th Cir. 1998) ; *In re Carey*, 938 F.2d 1073, 1077 (10th Cir. 1991) (discussing extrinsic evidence of "fraudulent intent"); *In re Smiley*, 864 F.2d 562, 567 (7th Cir. 1989) ; *Ford v. Poston*, 773 F.2d 52, 54, 13 C.B.C.2d 632 (4th Cir. 1985) ; *In re Wilmoth*, 397 B.R. 915 (B.A.P. 8th Cir. 2008) .

(n35)Footnote 35. See *In re Smiley*, 864 F.2d 562, 567 (7th Cir. 1989) ; 6 *Collier on Bankruptcy*, P 727.02 (Matthew Bender 15th ed. rev.).

(n36)Footnote 36. See *In re Smiley*, 864 F.2d 562, 567 (7th Cir. 1989) ; *Ford v. Poston*, 773 F.2d 52, 55, 13 C.B.C.2d 632, 635 (4th Cir. 1985) ; *In re Davidson*, 30 C.B.C.2d 1676, 164 B.R. 782, 786 (Bankr. S.D. Fla. 1994) , *aff'd in part, rev'd in part*, 178 B.R. 544 (S.D. Fla. 1994) ; *In re Swecker*, 157 B.R. 694, 695-96 (Bankr. M.D. Fla. 1993) ; 6 *Collier on Bankruptcy*, P 727.02[3][f]-[g] (Matthew Bender 15th ed. rev.).

(n37)Footnote 37. See *In re Smiley*, 864 F.2d 562, 567-68 (7th Cir. 1989) (discussing *In re Reed*, 700 F.2d 986, 8 C.B.C.2d 370, 376 (5th Cir. 1983)) ; *In re Herrman*, 355 B.R. 287, 292 (Bankr. D. Kan. 2006) ; 6 *Collier on Bankruptcy*, P 727.02[3][f]-[g] (Matthew Bender 15th ed. rev.).

(n38)Footnote 38. See *In re Johnson*, 880 F.2d 78, 82, 21 C.B.C.2d 498, 503 (8th Cir. 1989) (explaining *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 19 C.B.C.2d 287 (8th Cir. 1988) : " *Tveten* establishes that where an exemption, other than a homestead exemption, is not limited in amount [by state statute], the amount of property converted into exempt forms and the form taken may be considered in determining whether fraudulent intent exists"); see also 6 *Collier on Bankruptcy*, P 727.02[3][f]-[g] (Matthew Bender 15th ed. rev.). *But see In re Smiley*, 864 F.2d 562, 567 n.3 (7th Cir. 1989) ("we do not find a large claim of exemptions to be evidence of fraud.").

(n39)Footnote 39. See *In re Johnson*, 880 F.2d 78, 82, 21 C.B.C.2d 498, 502 (8th Cir. 1989) ; *In re Smiley*, 864 F.2d 562, 568 (7th Cir. 1989) ; *In re Holt*, 97 B.R. 997, 1000 (W.D. Ark. 1988) , *aff'd*, 894 F.2d 1005, 22 C.B.C.2d 337 (10th Cir. 1990) ; *In re Smith*, 22 C.B.C.2d 1558, 1568, 113 B.R. 579, 586-87 (Bankr. D.N.D. 1990) ; 6 *Collier on Bankruptcy*, P 727.02[3][f]-[g] (Matthew Bender 15th ed. rev.); see also *Henkel v. Green (In re Green)*, 268 B.R. 628 (Bankr. M.D. Fla. 2001) (citing *In re Doan*, 672 F.2d 831 (11th Cir. 1982) in support of its conclusion that debtors cannot exempt assets they purposely failed to disclose in initial schedules).

(n40)Footnote 40. See *In re Smiley*, 864 F.2d 562, 567 (7th Cir. 1989) ; *In re Beckman*, 104 B.R. 866, 870 (Bankr. S.D. Ohio 1989) ; 6 *Collier on Bankruptcy*, P 727.02[3][f]-[g] (Matthew Bender 15th ed. rev.).

(n41)Footnote 41. See *In re Johnson*, 880 F.2d 78, 82, 21 C.B.C.2d 498, 503 (8th Cir. 1989) ; *In re Fine*, 89 B.R. 167, 175-76 (Bankr. D. Kan. 1988) .

(n42)Footnote 42. See *In re Fine*, 89 B.R. 167, 175 (Bankr. D. Kan. 1988) ; see also *In re Agnew*, 355 B.R. 276 (Bankr. D. Kan. 2006) ; *In re Hamblen*, 354 B.R. 322 (Bankr. N.D. Ga. 2006) (sale proceeds deposited to bank account debtor opened in mother's name); *In re Laines*, 352 B.R. 397 (Bankr. E.D. Va. 2005) .

(n43)Footnote 43. *Voiland v. Gillissie (In re Gillissie)*, 215 B.R. 370 (Bankr. N.D. Ill. 1997) ; see also *In re Soza*, 542 F.3d 1060 (5th Cir. 2008) (several of the indicia of fraud must be found); *Freeland v. Enodis Corp.*, 540 F.3d 721 (7th Cir. 2008) (one badge does not constitute fraud *per se*); *In re Comm. Loan Corp.*, 396 B.R. 730 (Bankr. N.D. Ill. 2008) (badges of fraud need only be sufficient in number; list is not exhaustive).

(n44)Footnote 44. *Id.*

(n45)Footnote 45. *Jensen v. Dietz (In re Sholdan)*, 217 F.3d 1006 (8th Cir. 2000) .

(n46)Footnote 46. *Levine v. Weissing (In re Levine)*, 134 F.3d 1046 (11th Cir. 1998) .

(n47)Footnote 47. *See, e.g., In re Kravitz*, 40 C.B.C.2d 182, 225 B.R. 515 (Bankr. D. Mass. 1998) ; *In re Lordy*, 214 B.R. 650 (Bankr. S.D. Fla. 1997) ; *In re Wilbur*, 206 B.R. 1002 (Bankr. M.D. Fla. 1997) .

(n48)Footnote 48. *In re Kravitz*, 40 C.B.C.2d 182, 225 B.R. 515 (Bankr. D. Mass. 1998) .

(n49)Footnote 49. *See, e.g., In re Armstrong*, 931 F.2d 1233, 1237-38 (8th Cir. 1991) .

(n50)Footnote 50. *See, e.g., In re Mueller*, 867 F.2d 568, 569, 20 C.B.C.2d 1431, 1433 (10th Cir. 1989) ; *In re Summers*, 85 B.R. 121, 124-27 (Bankr. D. Or. 1988) .

(n51)Footnote 51. *Compare In re Hayes*, 119 B.R. 86, 88-89 (Bankr. E.D. Va. 1990) (in the absence of Virginia authority providing for forfeiture of the homestead exemption in cases of fraudulent conduct, a trustee cannot object to a debtor's exemption claim, but must instead seek denial of discharge under 11 U.S.C. § 727), with *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 874, 19 C.B.C.2d 287, 290 (8th Cir. 1988) ("A debtor's right to a discharge unlike his right to an exemption, is determined by federal, not state, law.") (emphasis in original), and *In re Davidson*, 30 C.B.C.2d 1676, 1683, 164 B.R. 782, 787-88 (Bankr. S.D. Fla. 1994) (there is nothing in 11 U.S.C. § 522 that allows a court to deny an exemption on the basis that property was converted with the intent to hinder, delay or defraud a creditor, and refusing to exercise equitable powers under 11 U.S.C. § 105 since there was no "strong showing of abuse"), and *In re Mackey*, 158 B.R. 509, 512-13 (Bankr. M.D. Fla. 1993) (sustaining, without citing any statutory authority, creditors' objections to a debtor's claim of exemptions for annuities by reason of the debtor's intent to hinder, delay or defraud creditors).

(n52)Footnote 52. *See, e.g., In re Hendricks*, 237 B.R. 821 (Bankr. M.D. Fla. 1999) (citing *In re Clements*, 194 B.R. 923 (Bankr. M.D. Fla. 1996)) . *But see In re Wilbur*, 206 B.R. 1002 (Bankr. M.D. Fla. 1997) (disagreeing with Clements).

(n53)Footnote 53. *See, e.g., In re Coplan*, 156 B.R. 88 (Bankr. M.D. Fla. 1993) (exemption limited to that which would have been allowed prior to conversion of nonexempt assets); *In re Beckman*, 104 B.R. 866, 870 (Bankr. S.D. Ohio 1989) .

(n54)Footnote 54. *But see In re Clemmer*, 184 B.R. 935 (Bankr. E.D. Tenn. 1993) (debtor's prepetition bad faith was insufficient to support denial of exemptions).

(n55)Footnote 55. *In re Slentz*, 157 B.R. 418 (Bankr. N.D. Ind. 1993) .

(n56)Footnote 56. *See, e.g., In re Spoor-Weston, Inc.*, 139 B.R. 1009, 1013-17 (Bankr. N.D. Okla. 1992) .

(n57)Footnote 57. *See In re Armstrong*, 931 F.2d 1233, 1237-38 (8th Cir. 1991) (allowing exemption claim, but denying discharge under section 727(a)(2)(A)); *In re Lordy*, 214 B.R. 650 (Bankr. S.D. Fla. 1997) (noting that conversion of the assets itself may be evidence of fraudulent intent under section 727); *see also In re Smiley*, 864 F.2d 562, 568-69 (7th Cir. 1989) (same); *Norwest Bank Nebraska v. Tveten*, 848 F.2d 871, 874-76, 19 C.B.C.2d 287, 290-293 (8th Cir. 1988) (applying 11 U.S.C. §§ 727(a)(2) & 1141(d)(3)(C)); *In re Reed*, 700 F.2d 986, 992, 8 C.B.C.2d 370, 376 (5th Cir. 1983) (applying 11 U.S.C. § 727(a)(2)(A)); *In re Ford*, 53 B.R. 444, 446-50 (W.D. Va. 1984) (same), *aff'd sub nom. Ford v. Poston*, 773 F.2d 52, 13 C.B.C.2d 632 (4th Cir. 1985) ; *In re Levine*, 166 B.R. 967, 970 (Bankr. M.D. Fla. 1994) (same); *In re Luthje*, 107 B.R. 292, 294-96 (Bankr. D. Mont. 1990) (same). *See generally* 6 Collier on Bankruptcy, ch. 727 (Matthew Bender 15th ed. rev.).

(n58)Footnote 58. *In re Sumerell*, 194 B.R. 818 (Bankr. E.D. Tenn. 1996) . In order for discharge to be denied, an adversary proceeding must be timely filed. *Fed. R. Bankr. P. 7001*; 11 U.S.C. § 727.

(n59)Footnote 59. *See generally In re Sumerell*, 194 B.R. 818, 835 & n.28 (Bankr. E.D. Tenn. 1996) .

(n60)Footnote 60. 503 U.S. 638, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992) .

(n61)Footnote 61. See *In re Olivier*, 819 F.2d 550, 16 C.B.C.2d 1330 (5th Cir. 1987) .

(n62)Footnote 62. See generally *In re Sumerell*, 194 B.R. 818, 835 (Bankr. E.D. Tenn. 1996) ; 4 Collier on Bankruptcy, ch. 523 (Matthew Bender 15th ed. rev.).

(n63)Footnote 63. See generally 6 Collier on Bankruptcy, ch. 707 (Matthew Bender 15th ed. rev.). See *In re Zick*, 931 F.2d 1124 (6th Cir. 1991) (lack of good faith is cause for dismissal). In addition, the existence of a large number of claimed exempt assets is relevant to the determination under section 707. *In re Kornfield*, 164 F.3d 778, 41 C.B.C.2d 739 (2d Cir. 1999) ; cf. *In re Lamanna*, 153 F.3d 1, 40 C.B.C.2d 937 (1st Cir. 1998) .

(n64)Footnote 64. See generally 8 Collier on Bankruptcy, ch 1307 (Matthew Bender 15th ed. rev.). See *In re Leavitt*, 171 F.3d 1219, 41 C.B.C.2d 1035 (9th Cir. 1999) (factors considered for bad faith determination); see also *In re Nassar*, 216 B.R. 606 (Bankr. S.D. Tex. 1998) (failure to provide accurate information about assets is cause of dismissal).

(n65)Footnote 65. *In re Lemons*, 285 B.R. 327, 332 (Bankr. W.D. Okla. 2002) ; *In re Smith*, 143 B.R. 912 (Bankr. D. Neb. 1992) . See generally 2 Collier on Bankruptcy, ch. 105; 10 Collier on Bankruptcy, ch. 9011 (Matthew Bender 15th ed. rev.).

(n66)Footnote 66. *In re Smith*, 143 B.R. 912, 914 (Bankr. D. Neb. 1992) . See generally 2 Collier on Bankruptcy, ch. 105; 10 Collier on Bankruptcy, ch. 9011 (Matthew Bender 15th ed. rev.).

(n67)Footnote 67. 503 U.S. 638, 644, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280, 288 .

(n68)Footnote 68. Cf. *In re Barowsky*, 102 B.R. 250 (D. Wyo. 1989) (sanctions imposed where valuation of collateral on schedules bore no reasonable relation to actual value), *aff'd*, 946 F.2d 1516 (10th Cir. 1991) .

(n69)Footnote 69. *In re Slentz*, 157 B.R. 418 (Bankr. N.D. Ind. 1993) .

(n70)Footnote 70. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992) .

(n71)Footnote 71. *In re Hendricks*, 237 B.R. 821 (Bankr. M.D. Fla. 1999) .

(n72)Footnote 72. See *Levine v. Weissing* (*In re Levine*), 134 F.3d 1046 (11th Cir. 1998) ; *In re Page*, 42 C.B.C.2d 2013, 240 B.R. 548 (Bankr. W.D. Mich. 1999) ; *In re Hendricks*, 237 B.R. 821 (Bankr. M.D. Fla. 1999) ; *In re Beckman*, 104 B.R. 866 (Bankr. S.D. Ohio 1989) . See generally 5 Collier on Bankruptcy, ch. 548 (Matthew Bender 15th ed. rev.).

(n73)Footnote 73. *Levine v. Weissing* (*In re Levine*), 134 F.3d 1046 (11th Cir. 1998) ; *In re Harry*, 151 B.R. 735 (Bankr. W.D. Va. 1992) .

(n74)Footnote 74. See *In re Olivier*, 819 F.2d 550, 16 C.B.C.2d 1330 (5th Cir. 1987) . See also *In re Pratt*, 411 F.3d 561, 567 (5th Cir. 2005) .

(n75)Footnote 75. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992) . See generally 1 Collier on Bankruptcy, P 7.02 (Matthew Bender 15th ed. rev.). See 18 U.S.C. § 157.

(n76)Footnote 76. 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992) .

(n77)Footnote 77. *In re Gamble*, 168 F.3d 442 (11th Cir. 1999) .

(n78)Footnote 78. *Preblich v. Battley*, 181 F.3d 1048 (9th Cir. 1999) .

(n79)Footnote 79. *In re Clark*, 262 B.R. 508, 515 (B.A.P. 9th Cir. 2001) ; *see also In re Friedheim*, 336 B.R. 110, 112 (Bankr. N.D. Tex. 2005) (acceptable practice is for trustee to give written notice of continued meeting within a reasonable time).

(n80)Footnote 80. *In re Hurdle*, 240 B.R. 617 (Bankr. C.D. Cal. 1999) . *But see In re DiGregorio*, 34 C.B.C.2d 738,187 B.R.273 (Bankr. N.D. Ill. 1995) (debtor must move for a conclusion of the meeting if the trustee fails to conclude it promptly). *See also In re Peres*, 530 F.3d 375 (5th Cir. 2008) (adjournment for 11 months unreasonable); *In re Williams*, 2008 WL 728942 (Bankr. D. Md. 2008) (discussing three lines of cases with regard to how long a meeting of creditors can be adjourned; indefinite time is unreasonable).

(n81)Footnote 81. *In re Boyd*, 243 B.R. 756 (N.D. Cal. 2000) .

(n82)Footnote 82. *In re Canino*, 185 B.R. 584 (B.A.P. 9th Cir. 1995) .

(n83)Footnote 83. *In re Hickman*, 157 B.R. 336 (Bankr. N.D. Ohio 1993) .

(n84)Footnote 84. *In re Indvik*, 23 C.B.C.2d 948, 118 B.R. 993 (Bankr. N.D. Iowa 1990) .

(n85)Footnote 85. *In re Mims*, 249 B.R. 378 (Bankr. D.N.J. 2000) ; *In re de Kleinman*, 32 C.B.C.2d 354, 172 B.R. 764 (Bankr. S.D.N.Y. 1994) . *But see In re Brown*, 178 B.R. 722 (Bankr. E.D. Tenn. 1995) .

(n86)Footnote 86. *In re Perry*, 345 F.3d 303 (5th Cir. 2003) ; *In re Lampe*, 331 F.3d 750 (10th Cir. 2003) ; *In re Carter*, 182 F.3d 1027, 1029-30 n.3 (9th Cir. 1999) .

(n87)Footnote 87. *In re Serafini*, 938 F.2d 1156, 1157, 25 C.B.C.2d 489, 489 (10th Cir. 1991) ; *In re Levine*, 166 B.R. 967, 970 (Bankr. M.D. Fla. 1994) ; *see also Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755, 24 C.B.C.2d 1 (1991) .

(n88)Footnote 88. *See Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001) (requiring debtor to list exemptions and values and be as particular as is reasonable under the circumstances); *In re de Kleinman*, 32 C.B.C.2d 354, 172 B.R. 764 (Bankr. S.D.N.Y. 1994) . *Barroso-Herrans v. Lugo-Mender* (*In re Barroso-Herrans*, 524 F.3d 341, 344 (1st Cir. 2008) ("to be determined" and "tba" sufficient to put trustee on notice that entire value of the asset will be exempt if no objection filed); *In re Rosenzweig*, 245 B.R. 836, 840-41 (Bankr. D. Ill. 2000).

(n89)Footnote 89. *See generally* 4 Collier on Bankruptcy, ch. 522 (Matthew Bender 15th ed. rev.); *In re Kuhnel*, 495 F.3d 1177 (10th Cir. 2007) ; *In re Sullivan*, 387 B.R. 353 (B.A.P. 1st Cir. 2008) .

(n90)Footnote 90. *Glass v. Hitt* (*In re Glass*), 60 F.3d 565, 33 C.B.C.2d 1597 (9th Cir. 1995) ; *see also In re Hill*, 387 B.R. 339, 346 (B.A.P. 1st Cir. 2008) ; *In re Ringham*, 294 B.R. 204 (Bankr. D. Mass. 2003) .



85 of 85 DOCUMENTS

Collier Bankruptcy Exemption Guide

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CaseHi Case Highlights: Issues Concerning Exemptions in Bankruptcy

14a-CaseHi Collier Bankruptcy Exemption Guide CH.10

CH.10. Ethical Considerations in Exemption Planning

Attorneys advising debtors with regard to available exemptions prior to filing a bankruptcy petition face an ethical dilemma. The debtor may or may not know the full range of exemptions available. Indeed, it is unlikely that the debtor realizes that certain unencumbered, nonexempt assets could be sold and the proceeds used to purchase new, or increase existing, exempt property. For example, in some instances it may be permissible to sell an otherwise nonexempt, unencumbered asset and use those proceeds to increase equity in the homestead. n1 Absent the conversion from non-exempt to exempt status, the trustee ordinarily would be able to sell the property, making the proceeds available to pay unsecured creditors.

[1] Attorney Must Advise Debtors of Exemption Options

Bankruptcy attorneys not only know which assets can be claimed exempt, they have an obligation to advise debtors as to the full extent of property that they may keep to insure their fresh start. Because attorneys also assist debtors in the preparation of schedules listing all assets and debts, they are in the best position to analyze what and how much property may be claimed as exempt or otherwise lawfully shielded from the reach of the trustee and creditors.

However, the debtor's attorney is also aware that the debtor's discharge may be denied if it is determined that the debtor "with intent to hinder, delay or defraud a creditor ... transferred" property beyond the reach of the creditors and trustee prepetition. n2 If a determination is made that the debtor transferred property with fraudulent intent, the debtor may be subject to criminal prosecution for bankruptcy fraud. n3

The fact that counsel does not sign the schedules is not justification to ignore the assertion of claims of exemption which are unsupported by law. Attorneys must scrutinize the legal basis for the claimed exemptions. n4

[2] Attorney Must Not Advocate Illegal Transfers of Property

Cases involving prebankruptcy planning and conversion of nonexempt assets into exempt assets are fact intensive. The outcome of such planning is sufficiently unpredictable that a debtor's attorney must also advise the debtor that there can be dire consequences to transferring property, even if the effect is to transfer property to oneself. Thus, the very reason for filing a bankruptcy petition, discharge of debts, would be futile. If, in fact, the debtor is unaware of all the consequences, attorneys could be exposing themselves to malpractice actions by the client or the trustee, n5 lawsuits from disgruntled creditors, n6 fee disgorgement n7 and state disciplinary action. n8

A debtor, who, despite counsel's advice, wishes to aggressively, and perhaps excessively, transfer nonexempt assets into exempt assets should secure some kind of written acknowledgment from clients that they have been counseled as to the possible effect of the transfers. The client should be further advised that the attorney client privilege may not protect the client's disclosures to the attorney as the crime fraud exception may apply if the debtor seeks advice in order to facilitate improper conversion of assets. n9 If the client wishes to pursue exemption limits beyond what the attorney believes to be proper, the attorney should advise the debtor to find other counsel.

[3] Attorney Must Advise Reversal of Illegal Transfers of Property

Similarly, the attorney may discover in the course of the initial prebankruptcy interview that the debtor, even a guileless one, has already engaged in prebankruptcy planning by transferring potentially exempt assets to family members or friends. If the attorney for the debtor becomes aware of the transfers, the transfers can and must be reversed so that the property can be properly claimed exempt, thereby avoiding not only exemption litigation and loss of the ability to exempt the property, n10 but also forestalling an objection to discharge under section 727(a)(2). The attorney's role in prebankruptcy planning and correction of improper "planning" is understood by the courts which encourage counsel to ensure that reversals of improper transfers are effected, prepetition. n11 It is important to ensure that the corrections are made prior to filing the petition because, under section 522(g), if the trustee "recovers" the property, the debtor may lose the ability to subsequently claim an exemption in the recovered property. n12

[4] *Taylor v. Freeland & Kronz*

The U.S. Supreme Court held in *Taylor v. Freeland & Kronz* n13 that, unless a party in interest timely objects, n14 property the debtor claims as exempt will be exempted from the estate, even if there is no colorable basis for the exemption under state or federal law. An attorney is also aware of the strong admonition in *Taylor* that debtors and attorneys are subject to several different penalties for improper conduct in bankruptcy proceedings, including denial of discharge, sanctions under *Rule 9011*, and criminal fraud penalties. n15 The attorney should also consider that disciplinary action could be initiated for ethical violations.

[5] No Bad Faith Exception to Federal Rule of Bankruptcy Procedure 4003(b) Filing Deadline

In *Taylor v. Freeland & Kronz*, n16 the Supreme Court held that there was no "bad faith" exception to the deadline for filing an objection to a claim of exemptions; even if there was no colorable basis for the exemptions claimed, objections had to be filed within the time set by *Federal Rule of Bankruptcy Procedure 4003(b)*. n17 The Court concluded that deadlines must be observed because they prompt parties to act, and they promote finality.

The trustee also has a duty, however, to act in good faith under the Bankruptcy Code and Rules. A trustee should not, for example, adjourn a section 341(a) meeting without stating a specific date for the continuation of the meeting in order to extend the deadline for objecting to a claim of exemption. n18 If the trustee is uncertain whether an objection should be filed, an extension of the time period in which to object should be requested from the court. n19

[6] "Exemption by Declaration"

Thus, practitioners must educate debtors as to availability of exemptions and, arguably, should make them aware of the Supreme Court's decision in *Taylor*. The ethical dilemma for the attorney is whether to advise the debtor to claim as exempt only that property to which the debtor is entitled under the relevant state or federal law, or claim property over and above the limitations, taking a chance that, given the short 30-day time period for objections, the creditors or the trustee will not be vigilant. The attorney's dilemma could be exacerbated should the trustee or creditors not be vigilant, for it is in that circumstance that creditors would be more likely to seek sanctions for improper exemptions in order to recover any distribution they may have lost due to the debtor's exemption by declaration. Indeed, a court may deem it appropriate to issue an order to show cause why sanctions should not be imposed on its own motion. n20 Thus, the

attorney's dilemma could be compounded, rather than alleviated, by the failure of a creditor or the trustee to object to improper exemptions. In view of these difficulties, as well as the ethical obligations imposed upon attorneys, the better course is to fully advise the debtor of the law and advise that only proper exemptions be taken.

[7] Debtor Should Make Good Faith Estimate of Asset Value

There can be situations in which the value of an asset is not known at the time of bankruptcy. For example, a debtor may have a potential cause of action against a third party as a result of a prepetition automobile accident. Clearly, the lawsuit is property of the estate, and, under state and federal exemption schemes, a portion of any award may be a legitimate exemption. The debtor must list the lawsuit on the bankruptcy schedules. The question arises as to whether the debtor should specifically list as exempt that amount allowed by the exemption laws or simply include only a vague listing of any damage award in the lawsuit. The Court of Appeals for the Eighth Circuit distinguished the facts in *Taylor* and rejected a debtor's contention that listing "unknown" as the current market value of an exemption was sufficient as a matter of law to make the asset fully exempt because section 522(d) limits the amount of the exemption. n21

Under *Taylor*, n22 if there is no timely objection, the debtor would be able to keep whatever the amount of the award, even if the award is more than the debtor would be entitled to exempt under existing exemption schemes. Again, the attorney must counsel debtor and make some determination as to the probable recovery of the asset in order to make the good faith claim and characterization of the exemption. n23

FOOTNOTES:

(n1)Footnote 1. *See 4 Collier on Bankruptcy, P 522.08[4]* (Matthew Bender 15th ed. rev.).

(n2)Footnote 2. *See, e.g., In re Armstrong, 931 F.2d 1233, 1237-38 (8th Cir. 1991) ; In re Lordy, 214 B.R. 650 (Bankr. S.D. Fla. 1997)* (noting that conversion of the assets itself may be evidence of fraudulent intent under section 727).

(n3)Footnote 3. *See 18 U.S.C. § 157; 11 U.S.C. § 727(a)(2)*. Indeed, if fraudulent intent is found which gives the court or trustee reasonable grounds to believe that a violation of law occurred, they are required to report the facts to the United States attorney. *18 U.S.C. § 3057(a)*. *See generally* 1 Collier on Bankruptcy, ch. 7 (Matthew Bender 15th ed. rev.) on bankruptcy crimes.

(n4)Footnote 4. *In re Smith, 143 B.R. 912, 914 (Bankr. D. Neb. 1992)* .

(n5)Footnote 5. *In re FMI Forwarding Co., Inc., 2004 U.S. Dist. LEXIS 10941 (S.D.N.Y. June 4, 2004) ; In re Env'tl Research and Dev., Inc., 12 C.B.C.2d 1296, 46 B.R. 775, 779 (S.D.N.Y. 1985)* (if underlying transfers are fraudulent, court has jurisdiction over trustee's malpractice claim); *see In re Olivier, 819 F.2d 550, 16 C.B.C.2d 1330 (5th Cir. 1987)* .

(n6)Footnote 6. *McElhanon v. Hing, 151 Ariz. 403, 728 P.2d 273 (1986) , cert. denied, 481 U.S. 1030, 107 S. Ct. 1956, 95 L. Ed. 2d 529 (1987)* (attorney liable to judgment creditor for conspiracy to defraud).

(n7)Footnote 7. *Cf. In re Granite Sheet Metal Works, Inc., 159 B.R. 840 (Bankr. S.D. Ill. 1993)* (attorney assisted, prepetition, in transferring assets to insiders).

(n8)Footnote 8. *Townsend v. State Bar of California, 32 Cal. 2d 592, 197 P.2d 326 (1948)* (three-year suspension for advising client to convey property); *In re Pfingst, 53 A.D.2d 268, 385 N.Y.S.2d 806 (2d Dep't 1976)* (disbarment for participating in fraudulent conveyances in contemplation of bankruptcy). *See generally* Model Rules of Professional Conduct Rule 1.2(d) (1983) ("a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...").

(n9)Footnote 9. *See In re Campbell, 248 B.R. 435 (Bankr. M.D. Fla. 2000)* .

(n10)Footnote 10. *11 U.S.C. § 522(g)*. See generally 4 Collier on Bankruptcy, PP 522.01, 522.08 (Matthew Bender 15th ed. rev.).

(n11)Footnote 11. See *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1345, 14 C.B.C.2d 740, 747 (9th Cir. 1986).

(n12)Footnote 12. See 1 Collier on Bankruptcy, P 9.05[d] *supra* .

(n13)Footnote 13. *503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992)* .

(n14)Footnote 14. *Rule 4003(b)* requires that objections be made within 30 days after the conclusion of the first meeting of creditors, held pursuant to *Rule 2003(a)*, or the filing of any amended schedules. Extensions of time to object may be granted only if the motion for an extension is made prior to the expiration of the objection time. See *Fed. R. Bankr. P. 4003, 9006(b)(1), (3)*.

See *In re Wenande, 107 B.R.770 (Bankr. D. Wyo. 1989)* (exempt property must be separately listed on debtors' schedule B-4 with sufficient detail to put the trustee on notice of questionable assertions; categorical designations of property, such as "stocks," "mineral interests," "accounts," "intangibles" and "personal property," are insufficient to constitute a listing of a claim of exemption within the meaning of *Rule 4003*).

(n15)Footnote 15. *503 U.S. 638, 644, 112 S. Ct. 1644, 1648, 118 L. Ed. 2d 280, 287, 26 C.B.C.2d 487, 491 (1992)* .

(n16)Footnote 16. *503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992)* .

(n17)Footnote 17. *In re Boyd, 243 B.R. 756 (N.D. Cal. 2000)* .

(n18)Footnote 18. *In re Clark, 262 B.R. 508, 515 (B.A.P. 9th Cir. 2001)* .

(n19)Footnote 19. *In re Hurdle, 240 B.R. 617 (Bankr. C.D. Cal. 1999)* . But see *In re DiGregorio, 187 B.R.273 (Bankr. N.D. Ill. 1995)* (debtor must move for a conclusion of the meeting if the trustee fails to conclude it promptly). See also CH.09[5][b] n.80, *supra*.

(n20)Footnote 20. *In re Smith, 143 B.R. 912 (Bankr. D. Neb. 1992)* .

(n21)Footnote 21. *Stroebner v. Wick (In re Wick)*, 276 F.3d 412 (8th Cir. 2002) .

(n22)Footnote 22. *503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 26 C.B.C.2d 487 (1992)* .

(n23)Footnote 23. The trustee has the burden to timely object to improper or excessive exemption claims by the debtor. If the value of the asset is contingent and it cannot be determined until after the time limit to object, the trustee must still timely raise the objection, or, within the 30 day time period, move to extend the time to object. *Barroso-Herrans v. Lugo-Mender (In re Barroso Herrans)*, 524 F.3d 341, 344 (1st Cir. 2008) ("to be determined" and "tba" sufficient to put trustee on notice that entire value of the asset will be exempt if no objection filed); *In re Green, 31 F.3d 1098, 31 C.B.C.2d 1449 (11th Cir. 1994)* .