Is It or Isn't It? Property of the Estate and Exemptions in Consumer Bankruptcy

Concurrent Session

Hon. Paulette J. Delk, Moderator
U.S. Bankruptcy Court (W.D. Tenn.); Memphis

Bettye S. Bedwell
Attorney at Law; Memphis

Nancy R. Rigell
Chapter 13 Trustee's Office; Memphis

Robert B. Vandiver
Robert B. Vandiver, Jr., PLLC; Jackson, Tenn.

Recent Decisions on Property of the Bankruptcy Estate and Exemptions in Consumer Bankruptcy

Presented by:

Hon. Paulette J. Delk
United States Bankruptcy Judge
Western District of Tennessee

Bettye S. Bedwell, Esq.
Chapter 7 Trustee
Memphis, Tennessee

Nancy Rigell, Esq.
Chapter 13 Trustee's Office
Memphis, Tennessee

Robert B. Vandiver, Esq.
Robert E. Vandiver, Jr., P.L.L.C.
Jackson, Tennessee

Property of the Bankruptcy Estate

Hundley v. Marsh, ___ N.E.2d ___, No. SJC-10729, 2011 WL 754952 (Mass. March 7, 2011) – Debtor/husband and his non-debtor spouse filed a joint tax return for income earned solely by Debtor. Debtor and his spouse were to receive a tax refund of $94,910, and the Chapter 7 trustee claimed the entire refund for the bankruptcy estate, even though the Debtor disclosed only a one-half interest in the refund on his schedules. The trustee claimed that because 100% of the taxable income was earned by Debtor, 100% of the refund should be paid to the bankruptcy estate. The non-debtor spouse commenced an adversary proceeding to recover a 50% share of the refund. The Court noted that several approaches have emerged as to the ownership of a joint tax refund: (1) the majority rule divides the refund in proportion to each spouse's withholdings, since a refund is a direct result of excess payments and should therefore belong to the spouse who made the payments; (2) the second approach divides the refund in proportion to each spouse's income during the tax year; (3) a third approach is to divide the refund equally between the spouses; and (4) a fourth approach allocates the refund based on each spouse's hypothetical tax liability if the spouses had filed as married parties filing separately. After analyzing each approach in turn and rejecting the 50/50 approach proposed by the non-debtor spouse, the Court determined that the best-reasoned approach is to allocate the refund based on each spouse's hypothetical tax liability as if the spouses had filed as married parties filing separately. Because the non-debtor spouse generated no income, her tax liability would have been zero, and any interest in the refund would be equal to any contributions she made to the refund amount. A small portion of the refund is due to a child tax credit, and the non-debtor spouse may be entitled to some or all of that portion, as she contributed to the care and raising of the couple's three children.

Bakst v. Miller (In re Miller), 441 B.R. 154 (Bankr. S.D. Fla. 2010) – Chapter 7 Debtor's wife died on March 6, and named only her children as beneficiaries of an IRA. Debtor commenced his Chapter 7 case soon thereafter, on May 14, and received a discharge the following March. Thereafter, on April 29, Debtor filed an election to take his 30% elective share in his wife's estate. The Chapter 7 trustee then filed an adversary proceeding, claiming that the elective share was property of the bankruptcy estate, because the Debtor could have exercised his election upon the death of his wife, and should not be able to delay his entitlement to her estate in order to avoid the 180-day window under § 541(a)(5). Section 541(a)(5) pulls into the bankruptcy estate property that the debtor acquires or becomes entitled to acquire within 180 days of the date of filing the bankruptcy, by either bequest, devise, or inheritance. *See* 11 U.S.C. § 541(a)(5). The Court looked to Florida state law to determine the Debtor's interest in the elective share as of the commencement of the bankruptcy case, which provides that "an elective share interest does not exist until the statutory right of election is properly exercised." *In re Miller,* 441 B.R. at 156 (quoting *In re Brand,* 251 B.R. 912, 915 -16 (Bankr. S.D. Fla. 2000)). The Court found that, because the elective share did not exist as of the petition date, § 541(a)(1) was inapplicable. The Debtor's mere right to elect was not a property interest under § 541(a)(1). *In re Miller,* 441 B.R. at 157. Section 541(a)(5) was also inapplicable, because the Debtor did not make the election until 350 days after the bankruptcy case was commenced – well beyond the 180-day period prescribed in § 541(a)(5). Even if the trustee had filed a motion to require the Debtor to make the election earlier, a bankruptcy court has no authority to force such an election. The elective share was not property of the bankruptcy estate, as it was not acquired until 350 days after the petition date.

Swimelar v. Baker (In re Baker), 604 F.3d 727 (2d Cir. 2010) – Prior to bankruptcy and as part of a wrongful death settlement, an insurance company agreed to purchase an annuity for the benefit of Debtor. Debtor subsequently filed a Chapter 13 bankruptcy case, and claimed an exemption in future annuity payments totaling $140,000. The Chapter 13 trustee objected to the claimed exemption, contending that the annuity contract was not property of the estate since it was owned by an insurance company and not by the Debtor, and therefore the funds to be received by Debtor would become property of the estate. The Court found that under New York law, a debtor can exempt annuity proceeds. Even though the insurance company owned the annuity contract, the proceeds payable under the contract were due solely to Debtor. The New York exemption for annuity proceeds was broad enough to allow Debtor to exempt the future proceeds from the bankruptcy estate.

In re Bailey, No. 10-8042, 2011 WL 834016 (B.A.P. 6th Cir. March 9, 2011)(*slip op.)* – Chapter 7 Debtor listed on Schedule B "Lawsuit . . . for reinstatement of job." The value of the claim was noted as "NONE." No exemption in the lawsuit was claimed. Debtor received a bankruptcy discharge. The Chapter 7 trustee subsequently filed a motion for compromise and settlement of the lawsuit, and an evidentiary hearing was held. The Debtor stipulated that, among other things, there was no available exemption to be claimed. The bankruptcy court approved the settlement. The Debtor then filed an amendment to Schedule C in order to exempt the settlement proceeds as "loss of future earnings," under the Ohio exemption statute. When the trustee objected, the Court found that Debtor was bound by his earlier stipulation at the evidentiary hearing on the trustee's motion for compromise and settlement. In addition, judicial estoppel applied to prevent the Debtor from claiming any exemption at this juncture; Debtor's prior stipulation was a "contrary position" from the position he asserted by claiming the exemption.

Reed v. City of Arlington, 620 F.3d 477 (5th Cir. 2010) – Debtor obtained a $1 million-plus judgment prepetition, then filed a no-asset Chapter 7 case but failed to list the judgment on his schedules, even though the Debtor was still defending an appeal of the judgment. Debtor discharged $300,000 of debt in the Chapter 7. Debtor claimed that if he prevailed on the appeal in state court, he should be allowed to collect the $1 million-plus judgment. Relying on principles of judicial estoppel, the Circuit Court determined that the Debtor could not collect the judgment due to his failure to schedule the judgment in his Chapter 7 bankruptcy case. For application of the judicial estoppel doctrine, three requirements must be met: (1) the debtor's position is clearly inconsistent with his previous position; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent. *Id.* at 480. Even though the Chapter 7 trustee was not made aware of the judgment award while the bankruptcy case was pending, the trustee could not pursue collection of the judgment either, as "it is not sufficient to distinguish the Debtor's conduct from that of the trustee in applying judicial estoppel." *Id.* at 482.

<u>Exemptions</u>

In re Hassen, 432 B.R. 343 (Bankr. D. Colo. 2010) – Debtor/husband resided in D.C. and

Debtor/wife resided in Virginia. Virginia is an "opt-out" state, so Debtor/wife was barred from electing § 522(b)(2) exemptions. She had to claim exemptions under § 522(b)(3). Debtor/husband resided in D.C., however, which is not an "opt-out" state, and if Debtor/husband had filed a non-joint case, he could have elected either § 522(b)(3) exemptions or the federal bankruptcy exemptions of § 522(b)(2). When spouses file a joint case, however, § 522(b)(1) specifies that one debtor may not elect exemptions under (2) and the other debtor elect exemptions under (3). Since one of the spouses(Debtor/wife) was barred from electing § 522(b)(2) exemptions, both could only claim exemptions under § 522(b)(3).

In re Connor, 419 B.R. 304 (Bankr. E.D. N.C. 2009) – Debtor/husband lived in North Carolina during the 730 days prior to filing the Chapter 13 case, but Debtor/wife resided in Florida during part of the relevant time period, before joining her husband in North Carolina. On their Schedule C, the Debtors claimed the federal exemptions under § 522(d), even though North Carolina is an opt-out state. Florida is also an opt-out state, but it also requires a debtor to reside in the state in order to claim its exemptions. In determining what exemptions the Debtors could claim, the Court found that Debtor/wife was not eligible to claim Florida exemptions, since she was not residing in Florida at the time the bankruptcy case was commenced. She was also not eligible to claim North Carolina exemptions because of § 522(b)(3)'s requirement that she live in North Carolina during the 730 days prior to bankruptcy. Section 522(b)(1) prohibits married debtors from *electing* the federal and state exemptions. In opt-out states, debtors do not elect to claim state exemptions, but are *required* to claim state exemptions. *Id.* at 307. Because Debtor/wife could not elect to claim either state's exemptions, she was required to claim the federal exemptions. Since North Carolina law does not permit an election of federal exemptions, Debtor/husband was required to claim exemptions under North Carolina law.

Zebley v. Karavias (In re Karavias), 438 B.R. 86 (Bankr. W.D. Pa. 2010) – Chapter 7 Debtor moved from Virginia to Pennsylvania less than 730 days prior to bankruptcy. Debtor was ineligible to claim state law exemptions under either state, as he had not met the 730-day domiciliary requirement under § 522(b)(3)(A) to claim Pennsylvania exemptions, and was not eligible to claim Virginia exemptions since, under Virginia law, he was no longer a resident of that state. In determining which exemptions, if any, were available to the Debtor, the Court referred to the Savings Clause of § 522(b)(3), and found that if a debtor is ineligible to claim exemptions under the applicable state law, the debtor may claim the federal exemptions under
§ 522(d).

In re Capps, 438 B.R. 668 (Bankr. D. Idaho 2010) – Chapter 7 Debtor moved from Colorado to Idaho, where she rented an apartment while continuing to own a home in Colorado. The Debtor registered to vote, obtained a driver's license, registered vehicles, and filed taxes, all in Idaho. The Colorado home was occupied by Debtor's mother, and even though Debtor had resided in Idaho for the past 3 years, Debtor considered the Colorado property her home, wished to reside there permanently, and would live in Colorado if economic circumstances allowed. Debtor claimed her Colorado home exempt under Idaho's homestead exemption statute. Debtor did not claim a homestead in any Idaho property, nor any exemptions under Colorado law. In determining whether Debtor could claim the Colorado home under the Idaho exemption statute, the Court looked to the Idaho homestead exemption statute, and found that the statute was silent regarding extraterritorial reach. In such cases, courts are split as to whether the exemption can reach property in another state.

See Drenttel v. Jensen-Carter (In re Drenttel), 403 F.3d 611, 613 (8th Cir. 2005)(citing cases). The bankruptcy court previously found that, "due to lack of decisional support for applying the Idaho statute extraterritorially, and giving deference to the public policies of discouraging 'exemption shopping' and protecting creditors' expectations, the Idaho statute should not be applied extraterritorially." *In re Capps,* 438 B.R. at 673, citing *In re Halpin,* 94 I.B.C.R. 197 (Bankr. D. Idaho 1994). For a debtor to be able to utilize the federal exemptions under Code § 522(d), " the debtor must be ineligible for all state exemptions in all potential states." *In re Capps,* 438 B.R. at 674. Because the Debtor in this case could claim *some* exemptions (other than homestead) under Idaho law, then § 522(b)(3)(A)'s domicile requirements did not render the Debtor ineligible for *all* state exemptions, so therefore the federal exemptions were not triggered. Even assuming that the Idaho homestead exemption could be applied to property in Colorado, in this case the Debtor could be said to have abandoned any homestead in the Colorado property and had since established Idaho as the state of her principal residence.

Camp v. Ingalls (In re Camp), 631 F.3d 757 (5th Cir. 2011) – Debtor lived in Florida for over 3 years before moving to Texas on April 30, 2007, where he later filed his Chapter 7 bankruptcy case on June 10, 2008 (less than 730 days from the date of his relocation to Texas). Debtor claimed the federal exemptions, and the Chapter 7 trustee objected, contending that the choice-of-law provision of § 522(b)(3)(A) pointed to Florida, an opt-out state, where Debtor had lived for a majority of the 180 days prior to the 730-day period immediately preceding the date of filing. The Florida exemption statute, however, only applies to Florida residents, so the non-Florida resident Debtor in this case was eligible to claim the federal exemptions. In reaching its decision, the Court looked to the plain meaning of the term "resident" in the Florida exemption statute, and also found that its decision would not open the floodgate to forum shopping, as the trustee alleged. "Congress has approved the federal exemptions for use in every state, and it has delegated to the states the power to decide whether those exemptions are available to a particular debtor. Thus, to the extent there is any forum shopping that arises . . . it is caused by Congress's decision to defer to state decision-making, and it results in the election of an exemption scheme that has Congress's explicit approval." *Id.* at 760.

In re Thiem, __ B.R. ____, No. 4:10-bk-19279-JMM, 2011 WL 182884 (Bankr. D. Ariz. Jan. 19, 2011) – Debtor inherited an IRA from her mother in 2005. Thereafter, Debtor took out only the required IRA distributions, leaving a balance of $10,000 on the petition date. Debtor filed bankruptcy under Chapter 7 in 2010 and claimed an exemption in the balance of the IRA. The Chapter 7 trustee objected to the claimed exemption, objecting to the Debtor's assertion that the funds in the inherited IRA retained their exempt status, or were exempt under either federal or state law. The Debtor's state opted out of the federal exemption scheme, and state law provided that a beneficiary may claim an exemption in the funds payable from another person's retirement plan. The Court addressed the issue of whether Debtor could claim an exemption in the inherited IRA under either state law or Bankruptcy Code § 522(b)(3)(C), or both, and reasoned that, even though a state has opted out of the federal exemptions, BAPCPA has made the retirement plan exemption available to all debtors through the provisions of § 522(b)(3), which effectively eliminates the opt-out. An inherited IRA is an account that meets the requirements of state and federal retirement exemption statutes. In addition, the retirement funds are exempt, for a debtor in an opt-out state, under § 522(b)(3)(C).

Chilton v. Moser, ___ B.R. ___, No. 4:10-CV-180, 2011 WL 938310 (E.D. Tex. March 16, 2011) – Debtor/wife inherited an IRA account from her mother, and the opened her own IRA account for the purpose of receiving her mother's IRA funds. None of the assets in the Debtor/wife's IRA account were contributions from the Debtors. Debtors then filed a petition under Chapter 7, and claimed the IRA as exempt under § 522(d)(12). Upon objection from the Chapter 7 trustee, the Debtors agreed to convert the case to a Chapter 13. The Chapter 13 trustee then voiced the same objection to the claimed exemption in the IRA. Because the IRA contained inherited funds and not "retirement funds," the bankruptcy court sustained the objection of the trustee and declared the funds non-exempt. On appeal, the District Court looked to recent case law and found that an inherited IRA constitutes "retirement funds" for purposes of exemption under § 522(d)(12), as that section does not require that the retirement funds be the Debtor's retirement funds, but can be those of a non-debtor as in this case – the retirement funds of Debtor's mother. The IRA was therefore exempt from the bankruptcy estate. The inherited IRA was also found to be tax-exempt, as section 408(e) of the Internal Revenue Code specifies that "*[a]ny* individual retirement account is exempt from taxation." This includes non-traditional, inherited IRAs.

In re Wilson, ____ B.R. ____, No. 8:09-bk-29815-MGW, 2011 WL 666514 (Bankr. M.D. Fla. Feb. 24, 2011) – A Florida Chapter 7 Debtor claimed exemptions in personal property, and a homestead exemption of $0.00. The trustee objected to the personal property exemptions, contending that the claimed exemption amount exceeded the allowed $2,000 personal property and vehicle exemptions under Florida law. The bankruptcy court sustained the trustee's objection and entered an order compelling turnover of the non-exempt property, which the trustee later had to enforce with a motion to compel. While the motion to compel was pending, the Debtor amended his schedule C to add a claim under Florida's "wildcard exemption," which allows a debtor who does not claim a homestead exemption to claim an additional $4,000 in personal property as exempt. The trustee objected to the amended schedule C on grounds of res judicata, collateral estoppel, laches, and lack of good faith. Debtor argued that, since he claimed a homestead exemption of zero, his original schedule C had effectively (if not explicitly) claimed the $4,000 wildcard exemption because the total personal property claimed as exempt equaled $6,000. The Court addressed whether the Debtor was precluded from making the late claim for the wildcard exemption, and found that the claim of the wildcard exemption was prejudicial to creditors and barred by res judicata. Allowance of the claim was prejudicial because the trustee continued forward in prosecuting the turnover of the Debtor's non-exempt property based on the assumption that the wildcard exemption had never been claimed, either when the case was commenced or later, when the trustee filed the motion for turnover. The Court also found that the claim was precluded under res judicata. The turnover order was final, and Debtor failed to appeal within the required 14 days.

Dykstra Exterior, Inc. v. Nestlen (In re Nestlen), 441 B.R. 135 (B.A.P. 10th Cir. 2010) – Chapter 7 Debtors claimed a homestead exemption of $275,000 under Oklahoma law. Creditor objected to the exemption, contending that the Debtors had increased their equity in the property during the 1,215-day period prior to bankruptcy, and under § 522(p) of the Bankruptcy Code their homestead exemption was therefore limited to the $136,875 ceiling set forth in that section. Section 522(p) provides that a debtor may not exempt any amount of interest that was acquired that exceeds $136,875, during the 1,215 days prior to bankruptcy. During the relevant 1,215-day period, the Debtors spent between $80,000 and $100,000 to repair and add improvements to the home, paid off the mortgage, and then obtained an equity line of credit, $32,921 of which was still owed at the time

of bankruptcy. The creditor argued that by investing non-exempt funds in the home during the 1,215-day period, the Debtors increased their *equity* in the home in an amount in excess of the $136,875 permitted under § 522(p), so that any equity exceeding that amount was not exempt. *Id.* at 138. The Debtors argued that the phrase "interest that was acquired" was intended to pertain to cases where a debtor purchased and obtained *title* to the homestead during the look-back period. Affirming the bankruptcy court on a different theory, the BAP concluded that § 522(m), which provides that all sections of § 522 "apply separately with respect to each debtor in a joint case," effectively doubled the $136,875 exemption cap of § 522(p), since this was a joint case. *Id.* at 140. As a general rule, state law does not govern whether the § 522(p) cap is doubled by virtue of § 522(m).

Richardson v. Schafer (In re Schafer), ____ B.R. ____, Nos. 10-8030, 10-8031, 2011 WL 650545 (B.A.P. 6th Cir. Feb. 24, 2011) – The Chapter 7 trustee filed an objection to the Debtor's exemption claims pursuant to Michigan's exemption statute prescribed specifically for bankruptcy debtors, alleging that the bankruptcy-specific statute is unconstitutional. Michigan has not opted out of the federal exemption scheme, so Michigan debtors may choose between Michigan exemptions applicable to all residents, Michigan exemptions specifically prescribed for bankruptcy debtors, or the federal exemptions. The bankruptcy-specific statute allows a homestead exemption of $30,000 - $45,000, depending on the debtor's circumstances, whereas the homestead exemption available to all Michigan residents is capped at $3,500. The federal exemption is capped at $20,200. *See id.* at *7. The BAP concluded that the exemption statute that applied only to residents who have filed bankruptcy violates the Bankruptcy Clause of the Constitution, as the purpose of the Clause is for uniformity among the states. The Michigan bankruptcy-specific statute did not meet the uniformity requirement of the Bankruptcy Clause. Further, when the states adopted the Constitution, they ceded their authority for bankruptcy legislation to Congress. Even though Congress gives the states a choice of opting out of the federal exemptions, states may not enact their own bankruptcy laws. For these reasons, the Michigan bankruptcy-specific exemption statute was found to be unconstitutional.

Schweizer v. Chambers (In re Schweizer), 399 Fed. Appx. 482 (11th Cir. 2010) – Debtor owned a 320-acre parcel of land encumbered by two judgment liens. One of the creditors brought an action in state court to foreclose its lien, and the state court judge specifically described the portion to be sold at foreclosure, and the 160-acre portion that the Debtor was allowed to exempt under state homestead exemption law. Debtor did not appeal the state court's decision. Before the foreclosure sale, Debtor commenced his Chapter 7 bankruptcy case. In his Schedule C, Debtor claimed an exemption in a 160-acre portion of the property different from that specified as exempt from foreclosure by the state court judge. Debtor then moved to avoid the liens as impairing his homestead exemption. The Court denied the Debtor's motion, reasoning that the state court determined and defined the extent of Debtor's homestead exemption, and therefore it determined his § 522(b) property interest. Therefore, at the time of the bankruptcy filing, the 160-acre parcel as defined by the state court, and not any other division of the Debtor's property, was subject to the lien avoidance protections of § 522(f). *Id.* at 484. The bankruptcy court was bound by the state court's determination of the 160 acres included in the Debtor's homestead exemption. "[Section] § 522(f) protections are only available if a lien impairs a debtor's § 522(b) exempt property." *Id.*

Moon v. Hurd (In re Hurd), 441 B.R. 116 (B.A.P. 8th Cir. 2010) – Chapter 7 Debtor claimed

exemption in a 20' x 6' horse trailer he was living in, under the Missouri statute exempting mobile homes used as the principal residence. In addition to using it as a place to sleep, the Debtor also used the trailer to transport horses. The trustee objected, arguing, among other things, that the horse trailer did not qualify as a mobile home. The Court looked to Missouri law to define the term "mobile home," and concluded that "mobile home" is synonymous with "manufactured home," which was defined as "a factory-built structure or structures which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length . . . ." Because the trailer was too small to meet the definition of "manufactured home, " it did not qualify for the exemption under Missouri law.

In re McMillin, 441 B.R. 348 (Bankr. D. Or. 2010) – For several years prior to bankruptcy the Chapter 7 Debtor collected auto parts from various places with the idea of reconstructing a 1926 Ford Model A automobile. By the time Debtor commenced his Chapter 7 case, all the necessary parts had been gathered, but were not assembled. Debtor claimed that his pile of unassembled auto parts constituted a "vehicle" for purposes of exemption, for which the applicable state statute allowed up to $3,000. The Court reasoned that the applicable statute did not define "vehicle," other than to make clear that the term encompasses an automobile. Looking to the plain meaning of the statute, and to the ordinary meaning assigned to the word "vehicle," the Court reasoned that, since the parts had never been assembled, they had never existed as an "automobile," and therefore the exemption could not apply to the collection of auto parts.

Gold v. Lewis (In re Lewis), 387 Fed. Appx. 530 (6th Cir. 2010) – Chapter 7 Debtor claimed her interest in her employer's buyout plan, which provided for installment payments to the Debtor, was exempt from the bankruptcy estate under § 522(d)(11)(E) as a "payment in compensation of a loss of future earnings of the debtor . . . ." 11 U.S.C. § 522(d)(11)(E). The trustee contended that the "loss of future earnings" pertained to a loss of earning capacity due to bodily injury. The Court noted, however, that (D) of the statute exempts a payment "on account of personal bodily injury," and determined that "the legislature has not tied the loss of future earnings to a bodily injury." *In re Lewis,* 387 Fed. Appx.at 533. The Debtor received payments from her employer in exchange for waiving her right to future earnings, which comes within the purview of the § 522(d)(11)(E) exemption.

Danduran v. Kaler (In re Danduran), 438 B.R. 658 (B.A.P. 8th Cir. 2010) – A North Dakota Debtor sold his home and netted $87,501.55 from the sale. Debtor deposited the funds in a savings account he opened specifically for that purpose. Debtor then filed his Chapter 7 bankruptcy petition, and claimed a homestead exemption under North Dakota law in the entire amount of the proceeds in his savings account. Under North Dakota law, the proceeds from the sale of a homestead are exempt to the same extent as the homestead. The trustee objected to the claimed exemption, contending that $7,700 of the funds were proceeds of the sale of non-exempt personal property that was sold with the Debtor's home. Debtor argued that the sale of the personal property was a permissible conversion of non-exempt property into exempt homestead proceeds, claiming that proceeds from the sale of personal property went towards payoff of the mortgage, thereby increasing the equity the Debtor could claim as exempt as homestead. With a nod toward "the Eighth Circuit's permissive approach to non-fraudulent, pre-bankruptcy planning," the Court found that the Debtor was entitled to claim the entire amount in his savings account as exempt. *Id.* at 661. There was no evidence that the Debtor acted fraudulent intent in converting non-exempt, personal property into exempt (homestead) property.

In re Moore, 442 B.R. 865 (Bankr. N.D. Tex. 2010) – In these combined Chapter 13 cases, the trustee objected to the Debtors' claims of exemptions of "100% of FMV" in assets, prompted by the Supreme Court's decision in *Schwab v. Reilly,* ___ U.S. ___, 130 S.Ct. 2652 (2010). The *Schwab* Court held that under Bankruptcy Code § 522(l), "in order for an estate to retain ownership of an asset a party is not required to object timely to an exemption claimed under Code § 522(d) of an interest in the asset unless the debtor makes it clear that he . . . intends to exempt the entire asset." *In re Moore,* 442 B.R. at 866, citing *Schwab,* 130 S.Ct. at 2667. The *Schwab* Court then went on to suggest that a debtor could indicate his intention "by listing the exempt value as 'full fair market value (FMV)' or '100% of FMV.. . .'" *In re Moore,* 442 B.R. at 866, quoting *Schwab*, 130 S.Ct. at 2668. The Bankruptcy Court noted that "the Supreme Court offered direction to debtors seeking to force the issue of whether exemption of an interest in an asset covered the entire asset. Debtors have here done no more than follow the Court's direction." *In re Moore,* 442 B.R. at 867- 868. In this case, Debtors claimed the exemptions and clearly established their intentions to remove the entire assets from the estate. The trustee is now entitled to an evidentiary hearing, with the burden of proof on the Debtors to establish that the claim of "100% of FMV" is within the statutory limit set forth in the applicable exemption statute.

Gebhart v. Gaughan (In re Gebhart), 621 F.3d 1206 (9th Cir. 2010) – In this consolidated appeal, Debtors filed under Chapter 7 of the Bankruptcy Code at a time when their home equity was less than the homestead exemption cap, so the Debtors were allowed a homestead exemption with no objection from the Chapter 7 trustee. Debtors therefore planned to continue paying the mortgages and to retain their homes. Both Debtors received a Chapter 7 discharge, but the bankruptcy cases were not closed. After two years, however, the home equity increased so that Debtors had equity above the homestead exemption amount. The bankruptcy trustees argued that the post-petition increase in value was property of the bankruptcy estate. The Court found that the Debtors could not exempt the post-petition increase in value, reasoning that the homestead exemption does not permit the exemption of the entire property, but instead permits exemption of specific dollar amounts. Precedent in the Circuit and provisions of § 541(a)(6) dictated that "the estate is entitled to post-petition appreciation in the value of property a portion of which is otherwise exempt." *Id.* at 1211. Bankruptcy debtors cannot be certain about the status of property until the case is closed, or until the trustee abandons the property. If the trustee acted inappropriately in keeping the case open without activity, abandonment of an asset to the detriment of the creditors is not a remedy. A debtor can always petition the Court under § 554(b) for abandonment of any property of the estate that is burdensome or of inconsequential value and benefit. *Id.*

In re Magee, ___ B.R. ___, No. 08-37600, 2011 WL 482723 (Bankr. S.D.N.Y. Feb. 3, 2011) – In Debtor's previous Chapter 7 bankruptcy case, Debtor exempted $10,000 in home equity under the New York homestead exemption statute. The Debtor received his discharge, subject to a judgment lien on his residence. After the Debtor's Chapter 7 case was discharged, the New York homestead exemption statute was revised to increase the homestead exemption to $50,000. Some time after this statutory revision, the Debtor filed a Chapter 13 case and claimed the $50,000 homestead exemption. The judgment creditor objected, alleging that the Debtor was not entitled to his $50,000 homestead exemption because he took the $10,000 homestead exemption in his Chapter 7 case, and that the doctrine of res judicata limited the Debtor to a $10,000 homestead exemption in the Chapter 13 case as well. The Court found that, because each bankruptcy case was a separate and unrelated legal event, the exemptions taken in the prior case do not bind the Debtor in the current case, and res

judicata did not apply. The two cases involved different estates, different trustees, and were filed under different chapters of the Code. The homestead exemption of $50,000 was allowed because that was the amount prescribed by the New York statute at the time the Chapter 13 case was commenced.

.