HOMESTEAD AND HOMESTEAD EXEMPTIONS

(AND, YES, YOU GET TO KEEP YOUR GOLF COURSE. OR AT LEAST HALF OF IT.)

UNIVERSITY OF TEXAS SCHOOL OF LAW

7TH ANNUAL CONSUMER BANKRUPTCY PRACTICE CONFERENCE

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522(b)(3) - The 730 Day Residency Requirement - Part I - Which Exemptions Apply?

522(b)(3)(A) provides that a debtor may exempt property under state or local law at the place "in which the debtor's domicile has been located for the 730 days immediately preceding the date of filing of the petition, or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period, or for a longer portion of such 180-day period than in any other place."

- 36 states have opted out - federal exemptions (and the wildcard) are ***not*** allowed.

- What happens to a debtor who moved to Texas in the last 730 days from an opt out state (ie, Nebraska) and bought a house here?

> -The debtor is prohibited from taking the Texas exemptions, so the Texas homestead is not available.
> -The Nebraska homestead exemption doesn't apply to dirt located in Texas.
> -Nebraska has opted out so the debtor can't use federal exemptions.
>
> See the savings clause at the end of 522(b)(3) - "If 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)."

There are no post-BAPCPA circuit court cases which have addressed extraterritorial application of homestead exemptions. There are a few pre-BAPCPA cases, but do not get in a big hurry to rely on any of them. See In re Drenttel, 403 F.3d 611 (8th Cir.2005) which held that the debtors could claim the Minnesota homestead exemption for real property located in Arizona. See, also, In re Arrol, 170 F.3d 934 (9th Cir.1999) which held that the debtor could claim the California homestead exemption for real property located in Michigan.

Judge Gargotta addressed this issue in In re Camp, 396 B.R. 194 (Bankr.W.D.Tex.2008), in a case where a debtor moved to Texas from Florida within the 730 day period prior to filing and resided in Florida during the 180 period preceding the 730 day period. Judge Gargotta held that notwithstanding the language in the Florida statute which limits its application to "residents" of the state of Florida, it was Congress' intent when they passed BAPCPA that the opt out provision in state laws be preempted by the choice of law provision in 522(b)(3). In effect, state law becomes part of federal law by mandate of BAPCPA. Judge Gargotta was reversed by Judge Yeakel citing In re Stephens, 402 .B.R. 1 (10th Cir.BAP 2009).

On January 21. 2011, the Fifth Circuit affirmed the District Court holding in In re Camp, 631 F.3d 757 (5th Cir.2011). Mr. Camp moved from Florida to Texas in 2007 and filed Chapter 7 in 2008, less than 730 days later. The question presented was what exemptions the debtor was allowed or required to claim. Section 522(b)(3)(A) was added by BAPCPA and provides that a debtor may claim the exemptions of the state where he was domiciled for the 730 day period prior to filing. If the debtor has not been domiciled in one state for the 730 day period, he may claim the exemptions of the state where he resided for the 180 day period prior to the 730 day period, or the state where he resided for the greatest part of such 180 period.

The problem is that Florida's exemption statutes say that specified property may be claimed as exempt by "residents of this state." Since Mr. Camp was no longer a resident of the state, he is not entitled to claim Florida exemptions. (Or so you might think.) Judge Gargotta held that BAPCPA required Mr. Camp to use the Florida exemptions, not withstanding the residency requirement, because that was the intent of Congress. The Fifth Circuit held that although Florida has opted out, the Florida exemptions are only available to residents and since Mr. Camp was no longer a resident, the Florida opt out statute did not preclude him (as a non–resident) from claiming the federal exemptions.

Personally, I think the Fifth Circuit got to the right result the wrong way. I think the court twisted the meaning of the statute. The court held that "Florida has opted out of the federal exemption scheme only with respect to Florida residents." By "its own express terms" the opt out statute does not apply to non-residents "who remain eligible to use the federal exemptions because nothing in Florida law specifically disallows them from doing so." The court cites several opinions interpreting Florida law, but only one is from Florida and it is from 1989 (slightly pre-BAPCPA) and I would suggest that a different result might result post-BAPCPA. (Of course, these residency questions came up very rarely prior to BAPCPA. Why would Florida or any other state have anticipated this issue prior to BAPCPA?)

The problem is that the drafters of BAPCPA (lobbyists for MBNA) did not think through the results of the proposed legislation. (Can you say "Law of Unintended Consequences?") They wanted a law which prohibited venue shopping to take advantage of generous state exemptions. I suspect that nobody ever bothered to look at individual state exemptions laws. Many state laws impose residency requirements for homestead or personal property, or both, and many prohibit extraterritorial application of their exemptions.

In In re Smith, 2009 WL 1109831 (Bankr.S.D.Tex.2009) Judge Schmidt ruled that a debtor who was domiciled in Texas for less than 730 days and was domiciled in Louisiana for the 180 day period preceding the 730 day period was limited to Louisiana exemptions (Louisiana is an opt out state) following Judge Gargotta's opinion in Camp and allowed the debtors to claim a $25,000 exemption on Texas property under Louisiana law. In In re Garrett, 429 B.R. 220 (Bankr.S.D.Tex.2010), Judge Isgur held that debtors who had moved to Texas from North Carolina were required to use North Carolina exemptions, notwithstanding that the North Carolina exemption statute prohibited extra-territorial application of the homestead exemption, and that the North Carolina statute was pre-empted to the extent it conflicted with the Bankruptcy Code. (He also held that the savings clause which says if you don't get any exemptions, you fall back to federal, is only to be used as a "last resort.") As a result, debtors were limited to $70,000 exemption of Texas residence under North Carolina statute. (Given the outcome of the appeal in Camp, these cases might have reached a different result.)

I think this is one of those cases where Judges Gargotta, Isgur and Schmidt reached the result

Congress intended, but not the result Congress provided for. When Congress said you have to use the exemptions from the state you came from, that should mean that you use those exemptions with any conditions and restrictions they may contain, i.e., residency. If Congress intended to abrogate some of those conditions and restrictions, they should have more clearly said so. (One has to assume this is simply one of those issues that nobody thought through all the way when the legislation was being drafted.) See, for comparison, In re Zibman, 268 F.3d 298 (5^{th} Cir.2001) which rejected the so-called snapshot rule for exemptions and held that courts must look to all the law and facts that exist when the case is filed. In that case, the debtors sold their homestead prior to filing, were holding the proceeds on the date of filing, and failed to reinvest the proceeds in a new homestead within six months and lost their exemption with respect to the proceeds.

Judge Lief Clark has also addressed this issue in a case where a debtor moved to Texas from Florida within the 730 day period prior to filing and resided in Florida during the 180 day period preceding the 730 day period. Judge Clark held that because the Florida exemptions are only available to "residents" of the state of Florida and the debtor was a former resident of the state of Florida on the date of filing, the debtor was entitled to use federal exemptions because the statute does not bar non-residents from using the federal exemptions. In re Battle, 06-50454-LMC-13 (W.D.Tex.12/12/06). I think Judge Clark reached the correct result, except for the reasoning for allowing non-residents to use federal exemptions. 522(b)(3) provides at the end: " If 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)."

I have attached a table which I prepared which indicates whether each state has "opted out" - statutorily prohibited its citizens from using federal exemptions, and the domiciliary requirements for application of those exemptions. (I make no representations and warranties regarding the accuracy of the table.) Some states, i.e., Florida allow only "residents" to claim in real or personal property. Some states, i.e., Arizona, have a residency requirement, but only for the homestead exemption, not for personal property. Several states have no residency requirement, but only allow a homestead exemption for property "occupied" as a homestead. (Seems like you would have to be a resident to occupy the property. I'm just telling you what the statutes say.) Texas, by contrast, has no residency requirement per se, but the Texas homestead exemption applies only to homesteads "in this state." All of this COULD lead to some interesting results.

> Example 1: Debtor moves from Texas within 730 days of filing and acquires a homestead in new state prior to filing. He is precluded from using the new state's exemptions because of the 730 day rule, but cannot use Texas exemptions because of non-extraterritorial application of Texas homestead. He is relegated to federal exemptions.
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> Example 2: Debtor moves from Texas within 730 days of filing and does not acquire a homestead in new state prior to filing. He is precluded form using the new state's exemptions because of the 730 day rule, but nothing prohibits application of Texas exemptions to personal property in another state, so he should be able to (be required to?) use Texas exemptions.

> Examples 3 and 4: Use these same scenarios but use Iowa exemptions which have no residency requirement for homestead, but do have a residency requirement for personal property.

In a case going the other way, an Oregon bankruptcy court held that an Oregon debtor could not claim a homestead exemption for property located in Oregon under Texas law because the Texas exemption statute specifically provides that it applies to "homesteads in this state" and this is part of the statute itself, not a choice of law provision. (The same analysis applies with respect to most state exemption statutes. See, e.g., Florida's statute which says a "resident" of the state of Florida may claim specific exemptions.) In re Tate, 2007 WL 81835 (Bankr.D.Or.2007)

There has been a rush of case law on this issue, most from or involving Florida. See, In re West, 2006 WL 2848140 (Bankr.M.D.Fla.2006); In re Jewell, 347 B.R. 120 (Bankr.W.D.N.Y.2006); In re Crandall, 346 B.R. 220 (Bankr.M.D.Fla.2006); and In re Underwood, 342 B.R. 358 (Bankr.N.D.Fla.2006). In West, the court held that a debtor who moved from Indiana to Florida within the 730 day period was not entitled to Indiana exemptions which were only available to residents of Indiana, was not entitled to Florida exemptions because he had not been a resident for the required 730 period, so was entitled to federal exemptions under 522(b)(3) even though Florida is an opt out state. In Jewell, the court held that debtors who had moved from Colorado to New York within the 730 day period were not entitled to Colorado exemptions which were only available to residents of Colorado, were not entitled to New York exemptions because they had not been residents for the required 730 day period, but were entitled to federal exemptions under 522(b)(3) even though both Colorado and New York are opt out states. Crandall and Underwood reached the same result as West, although different states were involved. (New York to Florida in Crandall and Colorado to Florida in Underwood.)

In an odd twist involving a couple who filed jointly in North Carolina, the husband was required to take state exemptions and the wife was required to take federal exemptions, notwithstanding 522(b)(1), because in this case the debtors were required to use those exemptions, there was no "election." (Husband had been a resident of North Carolina for more than 730 days, but wife had moved to North Carolina from Florida within 730 days and Florida restricts use of its exemptions to residents so she defaulted to federal.) In re Connor, 419 B.R. 304 (Bankr.E.D.N.C.2009).

522(b)(3) - The 730 Day Residency Requirement - Part II - Extraterritorial Application of State Homestead Laws

In Camp, the Fifth Circuit specifically declined to address the "corollary questions of (1) whether the choice-of-law provision in Section 522(b)(3)(A) preempts state-law restrictions on the extraterritorial application of state-law exemption schemes, and (2) whether the "savings clause" in the hanging paragraph at the end of Section 522(b) permits debtors to claim the federal exemptions when the applicable state law opts out of the federal scheme and, at the same time, restricts the extraterritorial application of the state-law exemption scheme, thereby rendering both exemption schemes unavailable to the debtor through the normal operation of the Bankruptcy

Code."

The result is that now courts (and debtor's attorneys prior to filing) must look at state exemption laws to determine whether those laws have a residency requirement, whether the language of the opt out statute prohibits non-residents from using federal exemptions (most state exemption statutes have language similar to Florida), whether state law permits extraterritorial application of the state law exemptions, and whether 522(b)(3) permits a debtor to claim federal exemptions when state law opts out of the federal exemption scheme and at the same time restricts extraterritorial application of state exemptions.

Let me suggest that the credit card companies (and their minions in Congress) did not intend to make the exemption analysis under the Code more complicated - they intended to limit venue shopping to take advantage of generous homestead laws. (If you haven't lived here for two years, you have to use the exemptions of the state where you came from. Period.) What they got is a mess.

Only five days after the Fifth Circuit ruled in Camp, Judge Leif Clark issued an opinion in In re Fernandez, 445 B.R. 730 (Bankr.W.D.Tex.2011) in which he addressed the extraterritorial application of Nevada's homestead exemption. In Fernandez, the debtor had purchased a home in El Paso, Texas some years ago and lived there until he lost his job. He then relocated to Nevada where he lived for seven years. He then returned to Texas in 2008 and filed Chapter 7 in 2009, less than 730 days before the filing.

Judge Clark held that the domiciliary limitation of Section 522(b)(3)(A) required the debtor to use Nevada exemptions unless as a result he was deprived of any exemption in which case he would be able to use federal exemptions under the "savings clause" of Section 522(b)(3). The problem for the debtor was that he had approximately $70,000 equity in his homestead and under the federal exemptions he would have been limited to $20,200. (Under the Texas homestead exemption his entire homestead would be protected. Under the Nevada exemption, his would be limited to $550,000. Either state exemption scheme would protect the entire homestead, if either exemption scheme was available.)

By its express terms, the Nevada homestead exemption is not limited to property located within Nevada. A review of Nevada court decisions, however, indicates that the Nevada legislature intended to provide homestead protection to Nevada residents. Since the debtor was no longer a Nevada resident, he could not use the Nevada exemption scheme to protect a homestead located in another state.

Judge Gargotta addressed the extraterritorial application of California exemptions in In re Arrendondo-Smith, 436 B.R. 412 (Bankr.W.D.Tex.2010). The facts are slightly convoluted, but the debtor owned a home in Texas, married, moved to California and established a homestead there with her husband, suffered significant medical issues, separated from her husband, moved back to Texas in June, 2009, filed for divorce and then filed Chapter 7 in October, 2009 while the divorce was pending.

Judge Gargotta concluded that although the California homestead exemption could be applied extraterritorially, a debtor is only entitled to one homestead and because the debtor had declared a homestead in California, she could not now abandon that claim and claim a homestead other than the family home in California. I find this opinion troubling because it offers no guidance on what it takes to abandon one homestead and establish another. This debtor had moved back to Texas and assumed physical occupancy of her former Texas homestead. She changed her voter registration, vehicle registration and driver's license to the State of Texas.

522(o) - Use of Proceeds of Fraudulent Asset Transfers to Acquire Homestead Interest

522(o) provides the value of an interest in "real or personal property that the debtor or a dependent of the debtor uses as a residence" or "real or personal property that the debtor or a dependent of the debtor claims as a homestead" shall be reduced "to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of filing of the petition with the intent to hinder, delay or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor has held the property so disposed of."

This is one of those sections that went in to effect in April, 2005 rather than October. The first case to address this provision was In re Maronde, 332 B.R. 593 (Bankr.D.Minn.2005). The debtor filed Chapter 13 on April 20, 2005. In June, 2003 the debtor purchased a home for $334,900 with a lien of $200,000 and the balance from the proceeds of the sale of a prior home. In October, 2003 the debtor took out a home equity line of credit. In December, 2005, the debtor drew $43,335 on the line which he used to purchase a truck and trailer. In February, 2004 the debtor drew down the remaining $5,888 on the line. Between November, 2004 and February, 2005 the debtor opened several new credit card accounts. Based upon the advice of a friend (not a lawyer), the debtor opened the credit card accounts with the intention of paying secured debt and then settling the new unsecured debt for less than the full amount. After meeting with an attorney in March, 2005, the debtor sold the trailer for cash and traded in the truck and received $13,708 back as part of the deal. On April 11, 2005 the debtor used $19,130 to pay the equity line to zero. None of these transactions were disclosed on the statement of financial affairs.

In analyzing the application of Sec. 522(o), the court first notes that Congress provided no definition for "intent to hinder, delay, or defraud a creditor." The court went on to note that the language is similar if not identical to Sec. 548(a)(1) and 727(a)(2) and that it is a "elemental" that similar words within a statutory body should be interpreted with the same meaning. The court also noted that since direct evidence of wrongful intent is rare, the court may infer intent from badges of fraud which the court enumerated as follows:

1. The transfer or obligation was to an insider;
2. The debtor retained possession or control of the property transferred after the transfer;
3. The transfer or obligation was disclosed or concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

5. The transfer was of substantially all the debtor's assets;
6. The debtor absconded;
7. The debtor removed or concealed assets;
8. The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. The debtor transferred the essential assets of the business to a leinor who transferred the assets to an insider of the debtor.

In this case, the debtor's stated plan was to obtain new credit card debt in order to pay down the secured debt on his homestead. When that plan failed because the credit card companies cut him off, the debtor went to Plan B which was to sell his non-exempt trailer and partially exempt truck to pay off his homestead line of credit, all within days of filing of the case. The court held that the debtor's conversion of nonexempt assets was "part and parcel of an overall scheme to defraud his creditors" so his homestead exemption was reduced by the amount of the proceeds of the truck and trailer he used to pay down his homestead.

Maronde was followed soon after by In re Lacounte, 342 B.R. 809 (Bankr.D.Mont.2005). In that case Mrs. Lacounte had a gambling problem (which she claimed resulted from job pressures) and over a two year period she accumulated $180,000 in unsecured debt. Mr. Lacounte apparently only learned of her debts when the house of cards collapsed in August, 2004. At that time, the debtors' daughter sought advice from two bankruptcy attorneys. As a result of that advice, the debtors sold three vehicles and a future interest in his mother's farm. In January, 2005 the debtors sold assets generating $42,800 and used $42,500 to pay down the debt on their homestead. Finally, in April, 2005, Mrs. Lacounte transferred her undivided interest in her mother's home back to her mother because of the risk that she might lose it as a result of the debtors' bankruptcy. A Chapter 7 petition was filed on April 21, 2005.

The Lacounte court went through much the same analysis as the Maronde court. The court reached much the same result based in part upon Mr. Lacounte's testimony that he was angry with the financial situation he found himself in through no fault of his own and that he could not justify giving up assets he had worked so hard for when he could simply sell those assets and apply the proceeds to his home loan.

Maronde and Lacounte have been followed in subsequent cases which have essentially adopted the same analysis. See, In re Agnew, 355 B.R. 276 (Bankr.D.Kan.2006) and In re Lyons, 355 B.R. 387 (Bankr.D.Mass.2006). In Agnew, the debtor acquired an interest in a homestead from his mother in exchange for non-exempt real property and all of debtor's farm equipment which was only partially exempt. Although the transfer occurred only five days prior to the debtors' Chapter 7 filing, the court declined to limit the debtors' homestead exemption because the uncontroverted testimony was that the transaction had been planned for some time for estate planning reasons and that the bankruptcy only influenced the timing of the transaction, not the substance of the transaction. The court also found it significant that the transfers in question were for reasonably equivalent value. (Agnew also includes a laundry list of potential badges of fraud.)

I would note that none of the cases which provide a list of factors includes when the debtor first obtained legal advice related to the filing of a bankruptcy, but all of these courts mention the issue in analyzing the debtor's intent. (I can say from personal experience that most judges want to know the answer to this question.)

Lyons involves a much easier question. In that case, the debtor purchased a homestead in April 1997, but only filed a homestead designation on August, 2004, two weeks after a creditor was granted an attachment on the property. The court concluded that the filing of the homestead designation did not fall within Sec. 522(o) as no property was disposed of by the debtor. (The creditor also argued that the debtor should be prohibited from claiming the homestead exemption because the debtor acquired the homestead interest within 1215 days of the filing. The court rejected this argument as well, because the filing of the homestead was not an acquisition of an interest in the homestead property.)

Texas cases which have addressed 522(o) have generally followed the analysis in Maronde and Lacounte and looked to cases under 727(a)(2) and 548(a)(1), and under the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code Sec. 24.001, et seq. (TUFTA), for what constitutes intent to hinder, delay or defraud creditors. In In re Fehmel, 2008 WL 2151797 (Bankr.W.D.Tex.2008) Judge Monroe held that a debtor's use of a corporate line of credit to make a down payment on the purchase of a personal homestead was not fraudulent as to creditors (and in particular to the bank that issued the line of credit) because although the loan officers "never meant" for the corporate line of credit to be used for personal expenses, there was apparently no contractual restriction prohibiting the debtor from doing so. Judge Monroe looked to TUFTA for its list of badges of fraud and although several of the enumerated badges were present, the debtor's business was profitable when the transfer was made, they were not insolvent at the time, and there was no pattern of sharp dealing so the court found that the debtors did not intend to hinder, delay of defraud. (Fehmel was appealed, but only on 522(p) as discussed below.)

Judge Akard, sitting as a visiting judge in Austin wrote in In re Whatley, 2010 WL 1379690 (Bankr.W.D.Tex.2010), that the United States Trustee and Chapter 7 trustee failed to prove fraudulent intent where the debtors paid $41,000 to pay off their homestead approximately 4.5 months prior to filing Chapter 7. The evidence in that case showed that the debtors non-exempt investment account had fallen in value by about 30% over less than a year, and the debtor's testimony that he liquidated the account and paid off his home to stop future losses was credible under the circumstances. (It was also helpful that this was a one creditor case, the creditor had engaged in conduct which did not impress the court, and the creditor convinced the US Trustee and the Chapter 7 trustee to "do the dirty work for it.")

Judge Gargotta, in an unreported case, In re Cipolla, 09-11199-CAG-7 (Bankr.W.D.Tex.2010) held that a debtor who pledged his unencumbered property in Missouri to finance the acquisition of a homestead in Texas did so with the intent to hinder, delay or defraud creditors, even though the transaction in question happened more than nine years prior to the filing of the case. Although only five of the thirteen badges of fraud listed in TUFTA were present, Judge Gargotta held the fact that the debtor was an attorney licensed in Missouri and Texas and presumptively had knowledge of each state's homestead exemptions (despite his denials to the contrary) and entered into the transaction shortly before incurring $300,000 in unsecured debt. (I spoke to the trustee about how he won this case and he said the debtor was a "serious asshole" on the stand and Judge Gargotta was not entirely impressed.) Judge Gargotta was affirmed at the district court level in Cipolla v. Roberts, A-10-CV-0173-JRN (D.W.D.Tex.2011). That decision is on appeal. (Technically, Judge Gargotta was affirmed in part and reversed in part, but basically he was reversed for a math error so the legal analysis stands.)

Judge Bohm has written what are unquestionably the most detailed cases on 522(o). The first case was In re Sissom, 366 B.R. 677 (Bankr.S.D.Tex.2007) in which he sustained a 522(o) objection in part and overruled it in part. The debtor entered into a contract to sell non-exempt stock in a company he owned in February, 2006 for $200,000 and obtained a loan from the buyer for $50,000. Although the stock sale was by the debtor in his individual capacity, the debtor deposited $100,000 into the account of another company he owned and deposited another $50,000 into a sole management account of the debtor's spouse. In April, 2006, Ms. Sissom purchased a new homestead and paid $61,540.99 toward the purchase price in the form of two cashier's checks for $50,000 and $11,540.99. A few days later, $75,000 from the sale of their prior home was wired to her account.

Judge Bohm identified four elements which must be proven to satisfy 522(o):

1. The debtor disposed of property within 10 years preceding the bankruptcy filing;
2. The property the debtor disposed of was nonexempt;
3. Some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt associated with an existing homestead, or, alternatively, to buy a new principal residence used by dependents of the debtor, or reduce the debt associated with a pricipal residence used by dependents of the debtor; and
4. The debtor disposed of the nonexempt property with the intent to hinder, delay or defraud a creditor.

Judge Bohm held that the creditor satisfied the first two elements, as the debtor disposed of the nonexempt stock within ten years prior to filing, and partially satisfied the third element at least with respect to the $50,000 payment which was traceable to the stock sale. With respect to the intent issue, Judge Bohm looked to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code Sec. 24.001, et seq. for its list of badges of fraud and found that eleven of the thirteen enumerated badges were present. The debtor asserted several defenses which were dubious at best (and primarily of interest for entertainment purposes, i.e., that the nonexempt cash became exempt when it was commingled with exempt cash. Really?) In order to balance the interest of the debtor to avoid a forced sale of the homestead and the interest of the trustee in liquidating the nonexempt asset, Judge Bohm gave the debtor 120 days to pay the $50,000 to the trustee.

Judge Bohm's second 522(o) case was In re Presto, 376 B.R. 554 (Bankr.S.D.Tex.2007). Mr. Presto had the unfortunate distinction of being a vice-president at Enron North America, a subsidiary of Enron Corp. He was also one of several executives to receive a "lucrative" bonus payment several weeks prior to Enron's Chapter 11 filing. (In his case, $2,000,000.) Between 2001, when he recived the bonus, and 2005, when the Enron bankruptcy court ruled the bonuses were fraudulent transfers, Mr. Presto spent or lost the bonus money so his only remaining asset was his $500,000+ homestead. The Official Employment-Related Issues Committee of Enron Corp. (sure sounds official) objected to his homestead claim. On May 18, 2006, the debtor sold his prior homestead and netted $675,000. On the same day, he purchased his new homestead for $521,800 cash. On July 31, 2006, he filed Chapter 7. In the meantime, he made $119,102 in improvements to the new homestead (including $72,000 on a pool), which he valued at $550,000 in his schedules. The Committee offered no evidence of what the value of the property was or what portion of the value was attributable to the improvements, so Judge Bohm was essentially left with the debtor's valuation of $550,000 and held that $28,200 was nonexempt under 522(o). But see the analysis of 522(p) below.

In In re Ellis, 2011 WL 1457258 (Bankr.S.D.Tex.2011), Judge Paul cited Sissom and Presto in analyzing a series of transactions where the debtor sold several properties and used the equity from the sales to buy and improve a homestead. On November 30, 2009, the debtor sold a house and purchased another house. Between January 29, 2010 and May, 2010, he sold three other properties. He purchased the new home for $66,000 and spent another $120,000 in improvements prior to filing his bankruptcy case on August 27, 2010. The debtor listed the property as having a value of $80,290 based on the current tax appraisal. Although the court found that "no more than six" of the thirteen badges of fraud listed in Sissom were proven, it concluded that the debtor's conversion of substantially all of his non-exempt assets into a homestead, the timing within six months of filing, and the debtor's insolvency were insufficient to deny them a homestead exemption. (It should be noted that the court spent a significant portion of the opinion reciting that although there were significant omission in the debtor's schedules and SOFA, the information was provided to the debtor's attorney who has some history of shoddy paperwork. Apparently, Judge Paul was not inclined to punish the debtor for his choice of attorneys.)

Assuming Texas bankruptcy courts will uniformly follow the same general analysis as Maronde and Lacounte, attorneys should be familiar with Fifth Circuit case law interpreting 548(a)(1) and 727(a)(2). One of the early leading Fifth Circuit case interpreting 548(a)(1) is In re Moody, 862 F.2d 1194 (5th Cir.1989). You might want to look at the district court opinion, too, which is found at 77 B.R. 566 (D.S.D.Tex.1987). With respect to 727(a)(2), see In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Bowyer, 932 F.2d 1100 (5th Cir.1991); and In re Bowyer, 916 F.2d 1056 (5th Cir.1990). At the bankruptcy court level, see In re Rothrock, 96 B.R. 666 (Bankr.N.D.Tex.1989); In re Womble, 289 B.R. 836 (Bankr.N.D.Tex.2003); In re Lee, 309 B.R. 468 (Bankr.N.D.Tex.2004); and In re Jones, 327 B.R. 297 (Bankr.S.D.Tex.2005). You should also be aware that if you are facing a 522(o) claim and the payment on the homestead happened within one year of filing, there will also probably be a 727(a)(2) claim. See, e.g., Whatley, cited above.

522(p) - Cap on Homesteads Acquired Within 1215 Days of Filing

522(p) provides that a debtor who elects to use state exemptions "may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $146,450 in value in

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

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

(C) a burial plot for the debtor or a dependent of the debtor; or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead."

There are two statutory exceptions listed in 522(p)(2):

(A) The limitation does not apply "...to an exemption claimed... by a family farmer for the principal residence of such farmer."

(B) The limitation does not include "...any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State."

One of the issues courts have grappled with is what constitutes "acquiring" an "interest" in a homestead. See, e..g., In re Rogers, 354 B.R. 792 (D.N.D.Tex.2006). In that case the debtor inherited a tract of land in 1994. She subsequently married, she and her husband purchased a home, and then they divorced in 2004. After the divorce, she moved to the inherited tract. She then filed a Chapter 7 in September, 2005 and claimed the property valued at $359,000 as her homestead. A creditor objected because the property had not been her homestead for 1215 days prior to filing. The bankruptcy court denied the objection and the district court affirmed because it interpreted the meaning of an "interest" as being an ownership interest in the property and does not encompass the classification of the property as a homestead. Because it resolved the case on that issue, the court declined to reach the issue of what "acquire" means. Rogers was affirmed at both the district court In re Rogers, 354 B.R. 792 (D.W.D.Tex.2006) , and Fifth Circuit. In re Rogers, 513 F.3d 212 (5th Cir.2008). See, also, In re Lyons, 355 B.R. 387 (Bankr.D.Mass.2006), an early and oft cited case which reached the same result.

The Rogers court relied in part on In re Rasmussen, 349 B.R. 747 (Bankr.M.D.Fla.2006) which addressed the issue of whether appreciation in value of the property during the 1215 day period constituted an interest in the property. In that case, the debtors purchased the property in June, 2002 for $350,000 and filed Chapter 7 in September, 2006 - 1,210 days later. (Apparently, their bankruptcy attorney couldn't count or he would have waited six more days to file.) By the time of the filing, the house was worth $750,000, but was subject to a lien of $575,00 leaving equity of $175,000. The trustee contended that the joint debtors were only entitled to an exemption of $125,000 under 522(p) and that any appreciation in value of the property during the 1215 day period was an interest acquired. The court rejected both of these arguments. First, 522(m) provides that "this section shall apply separately with respect to each debtor in a joint case." The trustee contended that the $125,000 cap applied to the homestead rather than the debtors, but the court rejected that argument.

Second, the court held that the acquisition of equity during the 1215 day period was the acquisition of an interest in the property, but distinguished equity obtained by "active conduct on the part of the debtor" (making a down payment or paying down the mortgage) and passive conduct (appreciation) and held that the "by the debtor" after "acquires" requires active conduct by the debtor so appreciation in value is not subject to the $125,000 cap. See, also, In re Sainlar, 344 B.R. 669 (Bankr.M.D.Fla.2006) which held that equity gained during the 1215 day period, whether as a result of appreciation or a decrease in secured debt, is not acquired and is not subject to the cap.

Judge Bohm addressed the acquisition issue in In re Presto, discussed above under 522(o). The 522 issue arose because the debtor acquired his current homestead within the 1215 day period and had rolled the prior equity from another homestead located in Texas. The wrinkle is that he had acquired his ex-wife's ½ community property interest in the prior homestead incident to a divorce within the 1215 day period. Judge Bohm held that the conveyance from her to him by Special Warranty Deed transferred an "interest" which he "acquired" during the 1215 day period. The court did hold, however, that his community interest in the property was acquired more than 1215 days prior to filing, so his one-half interest was not subject to the $125,000 cap. Judge Bohm then undertook a detailed analysis of what portion of the total value of the property, if any, is subject to the cap. (Judge Bohm even admied that he had to "fashion a value from circumstantial evidence in the record" and that he had "no better evidence " of the amount of the lien on the property than the balance at the time of the divorce some months ago. Essentially, this was all an educated guess.) At the end of the analysis, Judg Bohm concluded that the final nonexempt portion of the homestead pursuant to 522(p) was $105,000.

Judge Hale in In re Blair, 334 B.R. 374 (Bankr.N.D.Tex.2005) distinguished between acquiring "equity" in a home and acquiring "title" (the title theory versus the equity theory) and opined that one does not actually "acquire" equity, one acquires title. He held that increased equity "acquired" by paying down the mortgage during the 1215 day period is not subject to the cap.

Contrast Rogers with In re Greene, 346 B.R. 835 (Bankr.D.Nev.2006), which holds that under Nevada law, a homestead interest is a separate property interest from fee title and that because the debtor established his homestead on the property within the 1215 day period, it was subject to the cap. In that case the debtor purchased a 67 acre tract of unimproved land in 1994. In August, 2004 he moved a travel trailer onto the property and filed a homestead declaration and filed a Chapter 13 two weeks later, having never occupied the property. A creditor objected to the claimed exemption and the debtor voluntarily dismissed the case in February, 2005. In October, 2005 he filed a Chapter 7 and the same creditor objected to the homestead exemption. The court held that because he was actually occupying the property, he was entitled to the homestead exemption, but that because he acquired the homestead interest (as opposed to fee title) within the 1215 day period, his homestead was capped at $125,000. This decision turns on interpretation of Nevada law and is included here as a reminder that cases may have completely different results if the decision is based on state law, so don't assume anything from reading cases from other states.

There is one twist on appreciation in value during the 1215 day period. In In re Fehmel, 2008 WL 2151797 (Bankr.W,D.Tex.2008), reconsideration denied, 2008 WL 2736890 (Bankr.W.D.Tex.2008), Judge Monroe was faced with a situation where the debtors acquired a piece of property during the 1215 day period and made substantial improvements to the property, i.e., "extensively remodeled the main house ... built a 50' by 50' barn, 1,620 sq. ft. enclosed workshop and an 1,100 sq. ft. guest apartment with full kitchen and bath." The property was purchased for $375,000 in May, 2005 and was valued at $700,000 when the Chapter 7 was filed in August, 2007. Adopting the "title theory", Judge Monroe held that if a homestead is acquired within the 1215 day period, the cap applies unless one of the two statutory exceptions applies. Any increase in equity during the 1215 day period is subject to the cap, regardless of the source. (i.e., market appreciation or improvements.)

Judge Monroe also addressed the issue of whether the debtors could claim the benefit of the rollover exception. In this case, the debtors acquired their new homestead prior to selling their old homestead. When they sold the old homestead, they deposited the proceeds in a corporate bank account, out of which some of the improvements to the new homestead were made. Judge Monroe first held that the debtors had the burden of tracing the proceeds of the old homestead into the new homestead and because the funds were commingled with other monies, the debtors were unable to meet that burden. More importantly, Judge Monroe held that it is "horn book law" that if a debtor purchases a new homestead, any remaining proceeds of a prior homestead are instantly rendered nonexempt. Because the debtors acquired the new homestead prior to selling the old homestead, any proceeds ultimately received from the old homestead were nonexempt.

On appeal, the debtors argued that Judge Monroe should have used the "equity theory" rather than the title theory and focused their argument more on the effect of "market forces" which increased the value of their homestead. The district court declined to expressly adopt either the title theory or the equity theory, concluding that Judge Monroe's decision could be upheld under either theory because the increase in value of the property (from $370,000 to $700,000) was "more likely than not" from the $200,000+ in improvements made to the property during the 1215 day period. In re Fehmel, Civil Action 6:08-cv-00215-WSS (D.W.D.Tex.2008).

The Fifth Circuit "agreed" with the debtors that the value of the improvements and market forces acted "synergistically" to increase its value more than the cost of the improvements, but that once the creditor met its burden of showing that the exemption is improperly claimed, the burden then shifts to the debtor to show by "unequivocal evidence" what amount was attributable to market forces. Since the debtor failed to meet that burden, none of the appreciation in value was protected. In re Fehmel, 372 Fed. Appx. 507 (5th Cir.2010).

Contrast In re Anderson, 374 B.R. 848 (Bankr.D.Kan.2007), which adopted the title theory and held that the cap does not apply to a homestead acquired more than 1215 days prior to filing, even if the debtor substantially increases his equity during the 1215 day period. In that case, the debtor acquired his homestead in 1998 for $350,000. In July 2005, the debtor paid $240,000 to reduce his mortgage balance, then filed Chapter 7 three months later. (Why this isn't a 522(o) case rather than a 522(p) case is beyond me.)

Judge Paul got the dubious opportunity to address one of the goofiest 522(p) cases. (Actually, we aren't sure it's a 522(p) case because the objection did not state a statutory basis. Judge Paul guessed, and we are simply adopting her guess.) In In re Fadhli, 2009 WL 2461037 (Bankr.S.D.Tex.2009), a creditor objected to the debtors' homestead exemption because it was acquired within 1215 days and it exceeds the value of the debtors' prior homestead. A few small problems, however. The debtors listed the value of the property as $175,000 with a lien of $169,649, so they only had equity of $5,350. The debtors also elected to use federal exemptions. The 522(p) cap applies only if the debtor elects to use state exemptions. (Oops.) In addition, the cap at the time was $136,875, well above the value of the equity. (Apparently, the creditor's argument was based upon the value of the property, not the value of the equity. Oops.) Not surprisingly, debtor wins this one.

Judge Hale got the dubious opportunity to address one of the more bizarre homestead cap cases in In Re Kim, Adv. 08-03440 (Bankr.N.D.Tex.2009). In that case Mr. Kim filed a Chapter 7 and claimed his homestead valued at $1,127,880 as fully exempt. A creditor objected and Judge Hale ruled that his homestead claim was capped at $136,875 pursuant to 522(p), but left open the issue of whether and to what extent Mrs. Kim, who did not file, was entitled to a homestead exemption. Mr. Kim then sued Mrs. Kim seeking declaratory relief to determine what interest his bankruptcy estate had in the property and to determine her rights to the property. (The creditor intervened.) Judge Hale ruled that because the property was property of the estate, the Bankruptcy Code determines which exemptions are available and that the exemption under the Code was limited to $136,875. Judge Hale then ruled that only a debtor is entitled to claim exemptions, relying in large part on In re McCombs, 2007 WL 4411909 (Bankr.S.D.Tex.2007). Since the case was before the court on cross motions for summary judgment, Judge Hale declined to rule on whether Mrs. Kim had a separate property interest or resulting trust interest based upon her *alleged* payment of part of the purchase price with her separate property.

Judge Monroe got the scary case for debtor's attorneys. In re Green, 2007 WL 1093791 (Bankr.W.D.Tex. 2007), new trial denied, 2007 WL1308311, involved an involuntary Chapter 7 filed by the debtor wife's aunt who held a $550,000 judgment against her niece and the niece's husband. In a prior Chapter 7, the aunt objected to the debtors' discharge and Judge Monroe found violations of 727(a)(2)(A) and 727(a)(4)(A). This involuntary case was filed by the aunt to take advantage of the 522(p) cap on homestead. In 2004, the debtors sold their home in California, liquidated an investment account netting "$300,000 plus", and along with spare change of $60,000 they had lying around, purchased a homestead in Texas for $1,440,000 cash. (The only issue addressed in this opinion was how many creditors each debtor had and whether the sole petitioning creditor could file an involuntary. If you are ever inclined to file an involuntary, don't; but if you feel like you just absolutely have to, read this opinion first.) This is the scary case for debtor's attorneys because it raises the ugly question of whether creditors can effectively use involuntary cases as a means to attack homesteads, even where there was no "bad" conduct on the part of the debtor.

Judge Bohm (in a rare fit of brevity) took only ten pages to dispose of a similar issue in McCombs. In that case, the debtor and his spouse were estranged. He filed a Chapter 7. The homestead was sold and the wife, the IRS and a judgment creditor all took the position that they had first claim to the proceeds in excess of the $125,000 cap. The wife was claiming that they had agreed to a partition of the property and she was entitled to all of the proceeds, or that it was gift from him to her, or that it an agreement incident to a divorce, or that her homestead rights trumped everyone else's claim under state law. Judge Bohm ruled that the "partition" was invalid under Texas law. (And questioned the veracity of the partition because a different version of the document appeared half way through the litigation. Don't you hate it when that happens?) He also ruled that the partition agreement did not evidence a gift and that it was not an agreement incident to a divorce for the apparently not obvious enough reason that there was no divorce. Finally, he ruled that only a debtor may claim exemptions, otherwise any couple could do what this couple did: have only one spouse file and let the non-filing spouse avoid the cap of 522(p), clearly not the result Congress intended.

In In re Tinsley, 09-36036-SGJ-7 (Bankr.N.D.Tex.2009) the debtor occupied the property at filing but did not have record title to the property. His father had passed away and he was the designated beneficiary of the property, but the property was still part of his father's probate estate. The Court cited Wallace v. Rogers, 513 F.3d 212 (5th Cir.2008) as the controlling authority. That case held that a debtor acquires a vested economic interest on the date of the death of the testator. Judge Jernigan held that because the debtor's father passed away within the 1215 day period, he acquired a vested economic interest within that period, and the 522(p) cap applied. The court then was required to determine whether the statutory exception applied for the principal residence of a family farmer. The court held that the property qualified as the debtor's primary residence, essentially for the same reasons that the property qualified as a homestead. The court then held that the debtor qualified as family farmer based on the definition of "family farmer" in Section 101(18)(A)

There have been several unreported cases in Texas involving the 522(p) cap issue, many of which have involved unfortunate fact patterns in which the debtor acquired the money to acquire the homestead as a result of a gift from parents or as a result of an inheritance. The source of the funds to acquire the homestead is not relevant.

Be very careful about older clients who have a valuable homestead with significant equity. I have seen several clients who had transferred their homestead into one of the those "avoid probate" trusts. The problem is the debtor no longer owns the property - the trust does. Prior to BAPCPA, my practice had always been to have the client revoke the trust and deed the property back to themselves individually. I am concerned that under the new law, that constitutes the "acquiring" of an interest in the property. Judge Monroe ruled in a pre-BAPCPA case that the transfer into the trust had no legal effect, so the debtor could still claim the homestead. That ruling was appealed and affirmed at the district court level. In re Basedow, 1:06-cv-002420LY (D.W.D.Tex.2006). Judge Yeakel's decision was appealed to the Fifth Circuit, but that appeal was dismissed.

The Texas legislature fixed this problem in September, 2009 with the passage of Texas Property Code Section 41.0021 which provides that a homestead titled in a "qualifying trust" can be exempted as a homestead even though the debtor does not hold title to the property. Read the statute for what it takes for the trust to qualify. (Most of the self settled avoid probate trusts I have seen satisfy the statute.)

See, for comparison, In re Khan, 375 B.R. 5 (1st Cir. BAP 2007), which affirmed a bankruptcy court opinion that a transfer from a self settled trust back to an individual debtor was the acquisition of an interest in property. (This is the scary result I am worried about.) See, also, In re Buonopane, 2006 WL 2347746 (Bankr.M.D.Fla.2006) which holds that under Florida law, any beneficial ownership interest (i.e., under a trust) would support a claim of homestead, but since the debtor never used the property as a primary residence until within the 1215 day period, his homestead was capped at $125,000.

522(q) - The Catch All Cap

522(q)(1) limits a debtors homestead to $146,450 if -

> (A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provision of this tile; or
>
> (B) the debtor owes a debt arising from -
>
> > (i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), and State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;
> >
> > (ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 11934 or under section 6 of the Securities Act of 1933;
> >
> > (iii) any civil remedy under section 1964 of title 18; or
> >
> > (iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

522(q)(2) provides that paragraph 1 shall not apply "to the extent the amount of an interest in property ... is reasonably necessary for the support of the debtor and any dependent of the debtor."

There actually are a few cases under this section. Judge Bohm also ruled on 522(q) claims in In re Presto, discussed previously under 522(o) and 522(p). In this case, the debtor received a tax refund check payable to both him and his ex-wife pursuant to an amended tax return he filed and signed for her. He then cashed the refund check. He later notified her of its receipt, but tendered payments rather than tendering the full amount due her. The Committee, which had nothing to do with the issue, objected under 522(q)(1)(B)(ii) because the debtor owed his ex-wife a fiduciary duty under their divorce decree and his conduct constituted fraud, deceit or manipulation with respect to her. Judge Bohm sustained that objection and limited the debtor's homestead exemption under 522(q) to $125,000.

See, also, In re Larson, 513 F.3d 325 (1st Cir.2008), which held that a state court's finding that a debtor was criminally liable for negligent vehicular homicide triggered the cap under 522(q)(1)(B)(iv). In that case, the debtor admitted the facts to the court which made the determination and continued the case for a year. (This is apparently the Massachusetts form of deferred adjudication.) No conviction was entered. Ms. Larson admitted that she was attempting to take a shortcut through a parking lot and turned in front of a motorcycle, striking the motorcycle and causing the death of one of the riders. This was not a drunk driving case. This was a "I just didn't see them" case. The bankruptcy court held that the statute, by its terms, applies not only to intentional crimes, but crimes of negligence as well, and that the language of the statute does not require a conviction.

Contrast In re Burns, 395 B.R. 756 (Bankr.M.D.Fla.2008), which was a case where the debtors' dog ran out into the street and caused a motorcyclist to crash, resulting in serious injury. (The dog died, too.) The court held that the creditor must prove "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is present." The court rejected the contention that the accident was the result of reckless misconduct where the dog in question had no prior history of chasing motorcycles or aggressive behavior.

As a procedural note, Judge Jernigan held in In re Yeckel, 2010 WL 4697695 (Bankr.N.D.Tex.2010) that (then proposed) new Bankruptcy Rule 4003(b)(3) made the deadline to object to exemptions under 522(q) closing of the estate. (Rather than 30 days after conclusion of the creditors' meeting.) The Northern District adopted the proposed rules by a standing order which provided that it would "apply to cases and proceedings governed by the Reform Act" - not that it would apply to cases filed in the future.

General Homestead Issues

The Golf Course

In one of those odd cases that we all shake our heads over, Judge Clark got to address the issue of whether you get to claim your golf course as a rural homestead under Texas law. See In re Schott, 449 B.R. 697 (Bankr.W.D.Tex.2011). This case is actually instructive for three distinct issues. The first is what does "contiguous" mean, and more specifically, does the bisection of a property by a county road make the tracts noncontiguous. The second issue is if a rural homestead consists of noncontiguous tracts, is occasional, sporadic use of the noncontiguous tract for recreational purposes sufficient to impress the property with a homestead character, especially where, as here, the debtor had begun developing the property for non-homestead purposes. Finally, what is required to establish abandonment of a homestead once a showing of homestead is established.

Judge Clark held that the debtor's occupancy of the clubhouse on one of the tracts for a period of three years was sufficient to establish that the debtor intended the property to be his homestead.

Because he held that the tracts were not contiguous because they were bisected by a county road, he was required to undertake a "fact-intensive inquiry" to determine whether the debtor's use of the noncontiguous tract was used for "home purposes" or the "comfort, convenience, or support of the debtor or his family." He held that using the property for occasional walks was insufficient, especially in light of acts undertaken to develop the property for resort purposes.

Finally, he held that the party asserting abandonment of a homestead must show that the debtor moved from the property with the intention of not returning and that evidence of such abandonment must be undeniably clear and must show "beyond almost the shadow, at least of all reasonable ground for dispute, that there has been a total abandonment with an intention not to return."

The Sand Pit

The US District Court for the Eastern District addressed the equally entertaining question of whether a commercial sand pit may qualify as a homestead. In Mitchell v. Stringfellow, 4:09cv302 (D.N.D.Tex.2010), the court held that the sand pit did not qualify as a homestead because the principal use of the property was to produce income and the family use was "not only secondary and subordinate, but of trivial importance." The court further opined that operation of the sand pit had converted the property to a "wasteland" and that destruction of the surface had amounted to an abandonment of the homestead. It also worthy of note that the debtor and his wife controlled two corporations that filed Chapter 11 cases that went badly and that they had both been convicted of "several" counts of fraud arising out of their "bankruptcy shenanigans." They also deeded their Oklahoma homestead to their son before moving a mobile home on to the Texas property, all while the corporate bankruptcies were pending.

Multiple Rural Tracts

Judge Parker recently addressed the issue of qualification of multiple noncontiguous tracts as a rural homestead in In Re Deitz, 2011 WL 671959 (Bankr.E.D.Tex.2011). In that case, the debtor and her non-filing spouse lived on a .75 acre tract in Flint, Texas. They also owned a 14.929 acre tract in Noonday, Texas and a one-half interest in a 23.5 acre tract near Brushy Creek, Texas. The debtor claimed all three tracts as part of her rural homestead. The court initially rejected the trustee's objection that the property located in Flint was not rural because although it was in a platted subdivision, it was not served by police protection. The court went on to find that the Noonday property was sufficiently used for the purposes of a home as the debtor had maintained a vegetable garden on the property for several years, they cut firewood for their personal use, they stored a tractor and other personal property on the tract, occasionally cut hay and used it for "various recreational pursuits." The court found that the Brushy Creek property was not used sufficiently for the purposes of a home as they had sold timber off the property on one occasion and used it only occasionally for recreation.

Interest Necessary to Support Homestead/Dual Residence Ambiguity Scenario

In In re Tinsley, 09-36036-SGJ-7 (Bankr.N.D.Tex.2010) The debtor conducted ranching operations on a parcel of property titled in his father's name. His father passed away approximately one year prior to the bankruptcy filing and the debtor was the designated beneficiary of the ranch property although the probate proceeding had not been completed. Approximately one month after his father passed away, he married a woman who owned a home about 8 miles away. He continued to operate his ranching business on the property on an almost daily basis, but slept at her home each night. In a lengthy opinion, Judge Jernigan ruled that although the debtor did not own the property, case law established that a person who had a "present possessory interest" in property could claim a homestead interest and the debtor's status as the heir to the property and his multiple years of use of the property for his ranching operations established a sufficient possessory interest.

The court then analyzed the dual residence scenario where a debtor has an interest in more than one property which might support a homestead claim. Because the debtor's new wife owned a home and a married couple may only claim one homestead, the court was required to make a factual determination of whether one property was clearly occupied as the homestead or whether there was sufficient ambiguity as to use. The court found that there was ambiguity as to which property was used as the debtor's homestead so the court deferred to the debtor's stated subjective intent and the Texas Constitution's liberal homestead construction. (The Tinsley court also addressed a 522(p) objection which is addressed above.)

Abandonment

In re McKeithan, 10-60825 (Bankr.E,D,Tex.2011) involves an elderly lady who, as a result of serious medical issues moved from her home in Corpus Christi to live with her daughter, first in Baton Rouge and later in Tyler. Although she changed the address on her driver's license and her voter registration to her daughter's Tyler address, she maintained the utilities at her Corpus Christi home in her name and occupied the property occasionally when she visited Corpus Christi. Except for clothes and small personal items, all of her home furnishings remained in the Corpus Christi house. When she filed Chapter 7, both the trustee and a creditor objected to her homestead exemption contending she had abandoned her homestead interest. Judge Parker undertook a review of the standard for abandonment and concluded that she was compelled to move in with her daughter out of necessity and that "An act of necessity is not a voluntary abandonment of the homestead." Although it was "uncertain" that she would ever be able to return to the Corpus Christi home and live there, that uncertainty was "far from sufficient under Texas law to establish an intent" to abandon her homestead.

Proceeds

In a rather odd case in which Judge Paul expressly stated "the court's holding is limited to the narrow situation presented", she held that proceeds of the sale of a portion of a homestead in the form of a note were exempt and that the six month period to reinvest the proceeds commenced each year when the annual note payment was due. This is kind of a sad case. The debtor and his wife were both unemployed. Hurricane Ike trashed their house and they were forced to move into a small outbuilding on the property. The city came in and condemned the main house and they didn't have the funds to demolish it, so they sold three acres to an adjoining property owner for $25,000 cash and a $50,000 note payable in three annual installments. The plan was to use the cash to demolish the house and use the installment payments to build a house on the remaining two acres. In re Mills, 2011 WL 1810487 (Bankr.S.D.Tex.2011).

The Mills court cited an opinion by Judge Clark in In re Bading, 376 B.R. 143 (Bankr.W.D.Tex.2007) Judge Clark was faced with a scenario where the debtor owned two adjoining tracts. Her house was on one tract, but both clearly qualified as a homestead. An abstract of judgment creditor refused to release its lien on one of the tracts so the debtor was faced with a "Hobson's choice" of losing the buyer or selling the homestead in two transactions, which she ultimately did. The creditor then contended that the proceeds of the first sale should no longer be exempt as they were not reinvested in a homestead within six months. Judge Clark held that the sale of part of the homestead did not constitute a sale of the homestead, so the sale was not completed until the sale of the second tract. He alternatively held that the six month reinvestment period should be tolled until the completion of the second sale. (In a footnote, Judge Clark states that even though the abstract of judgment was unenforceable as a matter of law, "title companies are notorious cowards.")

Multiple Home Equity Loans

In a case that makes the lender look stupid because the lender's position was ...... well, stupid, Judge Clark ruled that Texas Constitution Article 16, Sec.50(a)(6)(K) which provides that a home equity loan must be "the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described in Subsections (a)(1)-(a)(5) or Subsection (a)(8) of this section" actually means what it says. (What a crazy notion.) In re Lovelace, 443 B.R. 494 Bankr.W.D.Tex.2011). In that case, the debtors purchased their homestead in May, 2009. They obtained a home equity loan in April, 2003, part of which paid off the purchase money loan. In October, 2004 the debtors obtained another hone equity loan, part of which paid off the prior home equity loan, part of which paid off the purchase money loan. In October, 2006, the debtors obtained a home equity loan in the amount of $57,799 from USAA, FSB. USAA contended that one of the statutory exceptions applied - that the existing debt was "a refinance of a lien against a homestead" because the existing lien was, at least in part, (and at least indirectly) a refinance of the purchase money loan. Judge Clark correctly concluded that if USAA was correct, any home equity lender could avoid the prohibition against having more than one equity loan at a time by requiring the borrower to pay, at least in part, a prior lien. (I understand that USAA was grasping at straws, but really?)

Lien Stripping in Chapter 13

Section 1322(b)(2) provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence..." This is commonly referred to as the "anti-modification" provision applicable to primary residence.

Case law has imprinted Section 506 on top of Section 1322(b)(2). A secured claim is secured only to the extent there is value to secure that claim. This can lead to slightly bizarre results. Assume a debtor owns a primary residence with a fair market value of $100,000. Assume a first lien of $99,000 and a second lien of $50,000. Because there is some (any) value/equity to secure the second lien, the debtor may not modify (i.e., lien strip) the second lien. Assume the same home, but with a first lien of $101,000 and a second lien of $50,000. Because there is no value/equity to secure the second lien, the debtor may strip the lien in a Chapter 13 and the "lienholder" gets paid nothing on its lien.

The Fifth Circuit has recognized the validity of lien stripping in the context of a wholly undersecured junior lien in Matter of Bartee, 212 F.3d 277 (5th Cir.2000), rehearing and rehearing en banc denied, 228 F.3d 411. The court was careful to distinguish between "undersecured claims" (a lien supported by collateral valued at less than the amount of the claim) and "wholly undersecured claims."(a lien for which the supporting collateral holds no remaining value after satisfaction of senior encumbrances).

We have not had a lot of lien stripping issues in Texas for two reasons (at least in my opinion). First, the real estate market in Texas never went as insane as it did in other areas that we are all too familiar with. (Phoenix, Las Vegas, Miami, Denver, the whole state of California.) Because (perceived) values never increased as much in Texas, there is less likelihood that values will fall as much.

Second, homeowners are effectively prohibited from piling debt on their Texas homesteads. I have had clients from other states who have second and third and fourth liens on their houses. In Texas, a home equity loan can not exceed 80% of the value of the property at the time of the extension of credit. Assume a property with a value of $150,000 and an existing purchase money lien of $100,000. The maximum allowable amount of a home equity loan with those numbers is $20,000. For the second lien to be wholly unsecured, the property would have to fall below $100,000. Not likely given the Texas real estate market.

A more likely issue is the debtor who bought a house in 2006 or 2007 for $1,000,000 and the debtor did an 80/20 or 80/15/5 mortgage. The first lien is $800,000 and it is not at all unlikely that the value of the property has fallen below $800,000. The bigger problem here is convincing the bankruptcy judge that a Chapter 13 debtor needs to keep his homestead that was worth $1,00,000 but is now worth "only" $650,000 (and that he is now $150,000 upside down on). (Expect a bad faith objection and a lack of empathy from the bankruptcy judge.) (See. e.g., Essex, below.)

The basic issue in these cases is the value of the homestead. This is a fact question, not a legal question. (Which means the judge decides and will almost never be reversed on appeal.) If you represent a debtor, you will need to obtain an appraisal from an independent third party professional. A debtor is "qualified" to testify regarding the value of his assets, but the debtor's testimony is always suspect in that it is inherently self serving and his qualification to offer that opinion is questionable. An expert can rely on hearsay (i.e., what other properties in the neighborhood are selling for), but a debtor who is not an expert cannot rely on hearsay, so his testimony about the sale of the house down the street is objectionable.. You can submit the tax appraisal (public record), but tax appraisals are not terribly reliable. The judge will be looking for a "real" opinion as to the value of the property.

Lien Stripping and Mobile Homes

An important "exception" to the anti-modification provision is that it applies only to "real property" that is the debtor's principal residence. A mobile home which is financed separately from the land is considered to be a vehicle under Texas law and is not real property for the purposes of Section 1322(b)(2). I have had many cases where the debtor owns a mobile home worth $20,000 subject to a lien with a balance of $50,000 and a contractual interest rate of 12% or more. In a lot of these cases, the debtor's payment is $400 per month for twenty years, If we cram down the lien, the debtor might have to pay $500 per month, but only for five years. Do the math. If there is any way the debtor can make the payments, think about cramming down the mobile home. (Just as an anecdotal observation, mobile home lenders rarely fight us on these cases. Apparently, they don't really want another mobile home repo.)

Where the land and the mobile home are financed together, the analysis is more problematic. See, In re Lara, 2008 WL 961892 (Bankr.S.D.Tex.2008). In that case the land and mobile home were financed together, but the creditor had not complied with Texas Property Code Sec. 2.001 which converts a mobile home from personal property to real property IF the lender complies with the statute. (The statement of ownership and location has to say that the owner has elected to treat the mobile home as real property and a certified copy of the statement of ownership and location must be filed in the real property records in the county in which the home is located.) The result is that the mobile home was still personal property. Congress apparently tried to fix this by defining "debtor's principal residence" in Section 101(13A) to include "a mobile or manufactured home, or a trailer." Judge Steen said nice try but no cigar, because although congress changed the definition, it did not change 1322(b)(2) which still applies to a debt "secured **only** by a security interest in **real property** that is the debtor's principal residence..." Since **part of the collateral** is personal property (the mobile home), the claim is not secured **only by** real property and 1322(b)(2) does not apply.

Chapter 13 Plan Confirmation

The US District Court for the Western District in Viegelahn v. Essex, 2011 WL 2551392 (D.W.D.Tex.2011) recently reversed a confirmation order in a Chapter 13 case where the debtors were proposing to keep their homestead which had little or no equity on which they owed $656,000 and which they purchased at a time when they had not filed their federal income taxes for several years. The IRS was owed $256,498 of which $136,681was an unsecured claim. The debtors' plan proposed to pay a whopping 1% on that claim. Citing In re Chaffin, 816 F.2d 1070 (5th Cir.1987), modified, In re Chaffin, 846 F.2d 215 (5th Cir.1988), the court applied a totality of the circumstances test and held that under the totality of the circumstances, the plan was not proposed in good faith.