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EXEMPTIONS UNDER 2005 BANKRUPTCY ACT

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A. Longer Period for Determining Debtor's Domicile

In an apparent attempt to discourage debtors from moving to states with more generous exemption laws before filing bankruptcy, the 2005 Act substantially alters the domiciliary provision found in former § 522(b). The new requirements are found in § 522(b)(3)(A)(formerly § 522(b)(2)(A)).[2]

If the debtor elects or is required to claim exemptions under state law, the state exemption law that applies is determined by the state in which the debtor's domicile has been located for the 730 days immediately preceding the petition filing date, rather than the 180-day period that exists under current law. If the debtor's domicile has not been located in a single state for the 730-day period, then what controls is the state in which the debtor was domiciled for the 180 days immediately preceding the 730-day period or in which the debtor was domiciled for the longer portion of such 180-day period than in any other place.[3]

If the effect of § 522(b)(3)(A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property as specified under § 522(d).[4] The debtor is therefore permitted to exempt property under the federal exemption scheme in this situation even if the state of the debtor's domicile as determined by section 522(b)(3)(A) is an opt-out state. This could arise if the exemption law of the state of the debtor's domicile requires that the debtor must reside within the state to claim exemption rights or if the law does not permit an exemption to be taken on property located outside the state.

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[1] This article first appeared in NCLC Reports, *Bankruptcy and Foreclosure Ed.* (March/April 2005). Copyright ©2005 by the National Consumer Law Center, Inc.
[2] The domiciliary requirements take effect 180 days after the Act's enactment, for cases filed on or after October 17, 2005.
[3] § 522(b)(3)(A).
[4] § 522(b)(3). This provision is found in the last sentence of subsection 522(b)(3) and appears to be a separate clause that likely should have been codified as § 522(b)(3)(D).

The amendments to § 522(b) are certain to produce an abundance of court decisions on the extraterritorial application of state exemption laws. Courts are currently divided on this issue when the state law is silent as to its extraterritorial effect.[5]

The longer lookback period will mean greater uncertainty for debtors on critical matters affecting their cases, such as the property they will be able to keep after bankruptcy or the distributions that will need to be made in chapter 13 cases based on the best interest of creditors test. It will also mean that bankruptcy attorneys will need to become familiar with exemption laws in states other than where they practice.

B. New Category of Exempt Property: Retirement Funds

The 2005 Act adds a broad new category of property that may be claimed as exempt when the debtor claims exemptions under either the state or the federal exemption scheme. The first category is found in new Code § 522(b)(3)(C). It permits the debtor to exempt retirement funds to the extent they are in a fund or account that is exempt from taxation under § 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code ("IRC").[6] These sections of the IRC deal with pension, profit-sharing and stock bonus plans; employee annuities; individual retirement accounts (including Roth IRAs); deferred compensation plans of state, local government and tax-exempt organizations; and certain trusts.

Since this exemption is found in new § 522(b)(3), which covers exemptions under state and federal nonbankruptcy law, it may be exercised by the debtor even if the debtor's state has opted out of the federal exemption scheme. Therefore, § 522(b)(3)(C) should control over any state law that does not permit exemption of retirement funds or provides less protection.

An identical provision was also added as new § 522(d)(12) and allows the debtor to claim as exempt these same retirement funds when the debtor is permitted to claim exemptions under the federal scheme.[7] The exemption rights in § 522(d)(12) are apparently intended to supplement similar rights found in § 522(d)(10)(E), since Congress did not amend section 522(d)(10) when this new category of exempt funds was added by the 2005 Act. One big advantage in exempting retirement funds under § 522(d)(12), as compared to § 522(d)(10)(E), is that the debtor does not have to prove that such funds are necessary for the support of the debtor

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[5] *Compare In re* Drenttel, 403 F.3d 611 (8th Cir. 2005)(debtors who moved to Arizona but whose domiciliary state was Minnesota permitted to claim Minnesota homestead exemption on property purchased in Arizona); *In re* Arrol, 170 F.3d 934 (9th Cir. 1999)(debtor domiciled in California entitled to claim California homestead exemption in residence located in Michigan) *with In re* Sipka, 149 B.R. 181 (D.Kan. 1992); *In re* Ginther, 282 B.R. 16 (Bankr. D. Kan. 2002)(relying upon state court decisions holding that Kansas exemption laws do not have effect in other states, court held that debtor may not exempt Colorado property under Kansas homestead exemption).

[6] 26 U.S.C. §§ 401, 403, 408, 408A, 414, 457, 501(a).

[7] The new exemption provisions covering retirement funds take effect 180 days after the Act's enactment, for cases filed on or after October 17, 2005.

and the debtor's dependents.[8] However, § 522(d)(10)(E) still remains important as it permits the debtor to exempt payments from retirement plans that do not qualify for tax-exempt status under the Internal Revenue Code, subject to the exception in § 522(d)(10)(E)(i) for plans established by an insider that employed the debtor.

Both § 522(b)(3)(C) and § 522(d)(12) were intended by Congress to expand the protection of certain tax-exempt retirement plans that would not otherwise be protected as property excluded from the debtor's estate under § 541(c)(2).[9]

Guidelines for Exempting Retirement Funds

If the debtor's funds are in a retirement fund that has received a favorable determination (under § 7805 of the IRC), and that determination is in effect when the debtor's petition is filed, the funds are presumed to be exempt for purposes of § 522(d)(12) and § 522(b)(3)(C).[10] If such funds are in a retirement fund that has not received a favorable tax determination, they are exempt if the debtor demonstrates that:

(1) no prior unfavorable determination has been made by a court or the Internal Revenue Service, and

(2) the retirement fund is either in substantial compliance with applicable IRS requirements or that the debtor is not materially responsible for any failure of the retirement fund to be in substantial compliance with applicable IRS requirements.[11]

In addition, retirement funds continue to qualify for exemption under § 522(d)(12) and § 522(b)(3)(C) if they are directly transferred from a tax-exempt fund or account into another qualifying fund or account.[12] The debtor's exemption rights under these sections also continue to apply if there has been a distribution that qualifies as an eligible rollover distribution within the meaning of § 402(c) of the IRC, or is a distribution from a fund or account that is exempt from

[8] Another point of comparison relates to the scope of the exemptions. Although courts have generally held that § 522(d)(10) permits the debtor to exempt not only the right to distributions from a retirement plan but also the funds in the plan itself, *e.g., In re* Carmichael, 100 F.3d 375 (5th Cir. 1996), § 522(d)(12) resolves this issue by making clear that funds held in the account for future distribution are exempt.

[9] *See* H. Rep. No. 109-31, 109th Cong., 1st Sess., 63-64 (2005). In addition to the new exemption rights for retirement funds, Congress also provided that funds placed in an education individual retirement account, as defined in § 530(b)(1) of the Internal Revenue Code, and funds contributed to a tuition program, as defined in § 529(b)(1) of the Internal Revenue Code, before the filing of the petition, may be excluded from property of the estate if certain conditions are met pursuant to new § 541(b)(5) and (b)(6).

[10] 11 U.S.C. § 522(b)(4)(A).

[11] 11 U.S.C. § 522(b)(4)(B).

[12] 11 U.S.C. § 522(b)(4)(C).

taxation and is deposited to the extent allowed in such fund or account not later than 60 days after the distribution.[13]

New § 522(n) imposes a $1 million[14] cap on the value of an individual debtor's aggregate interest that may be exempted under either § 522(b)(3)(C) or § 522(d)(12) in IRAs established under § 408 or 408A of the IRC, other than a simplified employee pension account under § 408(k) or a simple retirement account under § 408(p) of the I.R.C. The limit also does not apply to amounts attributable to rollover contributions, and any earnings thereon, made under §§ 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the IRC. Although this dollar limit is set quite high and should protect most debtors' IRAs, § 522(n) also provides that the cap may be increased "if the interests of justice so require."

C. Limitations on State Homestead Exemptions

The 2005 Act adds three new subsections to § 522 that prevent the debtor from taking full advantage of state homestead exemptions under certain circumstances. These provisions deal with the prepetition conversion of nonexempt property with fraudulent intent (§ 522(o)), the acquisition of homestead property within 1215 days of the bankruptcy filing (§ 522(p)), and the commission of certain bad acts by the debtor (§ 522(q)). Unlike many other provisions in the 2005 Act that have a delayed effective date, these homestead provisions took effect for cases filed after enactment of Pub L. No. 109-8 (2005) on after April 20, 2005.[15]

All three subsections apply only to homestead property of the kind similar to that described in § 522(d)(1):

- real or personal property that the debtor or a dependent of the debtor uses as a residence;
- a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- a burial plot for the debtor or a dependent of the debtor; or
- real or personal property that the debtor or dependent of the debtor claims as a homestead.

Section 522(o), (p) and (q) apply only when the debtor seeks to exempt homestead property under § 522(b)(3)(A)[16] by claiming an exemption under state law or federal law other than § 522(d). The new homestead limitations therefore do not restrict the ability of the debtor to exempt homestead property under § 522(b)(2)(formerly § 522(b)(1)) by making use of the federal homestead exemption found in § 522(d)(1), or to exempt homestead property under §

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[13] 11 U.S.C. § 522(b)(4)(D).
[14] This amount will be periodically adjusted pursuant to section 104 of the Bankruptcy Code to reflect changes in the Consumer Price Index.
[15] *See* § 1501(b) of Pub L. No. 109-8 (2005).
[16] Prior to the 2005 amendments, the right to claim exemptions under state law or nonbankruptcy federal law was provided for in § 522(b)(2)(A).

522(b)(3)(B)(formerly § 522(b)(2)(B)) held as a tenant by the entirety or by joint tenancy to the extent that the interest is exempt from process under nonbankruptcy law.

However, both § 522(p) and § 522(q) use language different than is found in § 522(o) in describing when the limitations apply. Sections 522(p) and (q), unlike § 522(o), state that the provisions apply only "as a result of electing under subsection (b)(3)(A) to exempt property under State or local law." Thus, in order to give meaning to the plain words of the phrase "as a result of electing," one court has held that § 522(p) and § 522(q) are applicable only in states which have not opted out of the federal exemption scheme, because non-opt out states are the only states where such an election is available.[17]

Homestead Restriction Based on Fraudulent Conversion of Nonexempt Property

Section 522(o) provides that the value of the debtor's interest in certain homestead property shall be reduced to the extent that it is attributable to any nonexempt property that the debtor disposed of within 10 years before the filing of the petition with the intent to hinder, delay or defraud a creditor. This restriction on the debtor's homestead exemption is therefore limited to the conversion of nonexempt property into exempt homestead property with fraudulent intent.

Significantly, the language of section 522(o) requires the court to look at whether the converted property could be exempted "if on such date the debtor had held the property so disposed of." Since the only other date in the subsection that could be referenced by the phrase "on such date" is the "10-year period ending on the date of the filing of the petition," it is the petition date that controls the determination of whether the interest is exemptible. This interpretation also gives meaning to the remaining words in the phrase "if ... the debtor had held the property so disposed of," since there would be no need to include this language if the relevant timeframe was the time of disposition, which is a time when the debtor would hold the property. Thus, if the property converted within the 10-year lookback period could be exempted under any applicable provision of § 522(b) at the time the petition is filed, then the debtor's exemptible interest in the homestead should not be reduced under this provision.

The statutory language also requires that the debtor intended to hinder, delay, or defraud some creditor at the time the property was disposed. Since § 522(o) uses the identical "intent to hinder, delay or defraud a creditor" language found in § 727(a)(2), courts may construe the required intent in a similar manner. Thus, a party in interest objecting to the debtor's homestead exemption should have to prove that the conversion of nonexempt property was done with a specific intent on the part of the debtor to defraud a creditor, and this intent must involve actual rather than constructive intent.[18]

Another question raised by the provision is whether § 522(o) would be applicable if no creditor who may have been hindered, delayed or defrauded is a "creditor" of the debtor at the

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[17] *In re* McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005).
[18] *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice, § 14.2.2.2 (7th ed. 2004).

time the petition is filed. Since "creditor" is defined in § 101(10) as an entity that has a claim against the debtor or the debtor's estate, a trustee or other party in interest should not prevail on an exemption objection under § 522(o) if the debts of the defrauded creditors have been satisfied prepetition. This interpretation is consistent with the apparent purpose of the provision, which is to protect the ability of defrauded creditors to recover on their claims.

Prior to the enactment of 2005 amendments, courts had uniformly held that the scope of an exemption created under state law and claimed in a bankruptcy proceeding was determined by state law.[19] This meant that the issue of conversion with fraudulent intent could not be asserted in some bankruptcy cases based on state law. For example, the Florida Supreme Court concluded, on a question certified to it by the Eleventh Circuit in a bankruptcy case,[20] that conversion of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors does not defeat the unlimited Florida homestead exemption because such a transfer is not an exception provided for in the Florida Constitution.[21] New § 522(o) overrules the outcome in the Florida *Havoco* case and permits the issue of fraudulent conversion to be raised despite contrary state law.

Cap on Homestead Property Acquired During 1215-Day Period Before Filing

Under new § 522(p)(1), the debtor may not exempt "any amount of interest that was acquired" by the debtor during the 1215-day period before the filing of the petition that exceeds the amount of $125,000 in homestead property.[22] The monetary cap imposed by § 522(p)(1) does not apply to any interest transferred from a debtor's previous principal residence to the debtor's current principal residence, if the debtor's previous residence was acquired before the 1215-day period and both the previous and current residences are located in the same state.[23] In addition, the limitation does not apply to an exemption claimed on a principal residence by a family farmer.[24]

A significant question to be decided by the courts will be how the phrase "interest that was acquired" should be interpreted. Given that the apparent legislative intent for enacting § 522(p) was to discourage pre-bankruptcy exemption planning in which some debtors have taken advantage of unlimited or substantial homestead exemption laws, it would seem that the phrase should be construed as applying to homestead property interests that the debtor gains though his or her own affirmative actions or efforts. Under this view, § 522(p) should not apply to an interest attributable simply to an increase in the market value of the debtor's homestead during the 1215-day period, since that is not an interest "acquired" by the debtor. Similarly, this provision should not prevent the debtor from claiming as exempt an interest in a homestead property resulting from the application of mortgage payments, unless the debtor makes

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[19] *E.g., In re* Johnson, 880 F.2d 78 (8th Cir. 1989).
[20] Havoco of America, Ltd. v. Hill, 255 F.3d 1321 (11th Cir. 2001)
[21] Havoco of America, Ltd. v. Hill, 790 So.2d 1018 (Fla. 2001).
[22] This dollar limit is subject to automatic adjustment every three years to account for changes in the cost of living pursuant to Code § 104(b).
[23] 11 U.S.C. § 522(p)(2)(B).
[24] 11 U.S.C. § 522(p)(2)(A).

unscheduled, lump-sum payments that reduce the principal during the 1215-day period by more than $125,000.

Homestead Cap Based on Certain Criminal or Wrongful Conduct

Felony Conviction

The debtor may not exempt an interest in homestead property that exceeds $125,000 if the debtor has been convicted of certain criminal or unlawful conduct. Under new § 522(q)(1)(A), the cap would apply if the court determines, after notice and hearing on an objection to the exemption, that the debtor has been convicted of a felony (as defined by 18 U.S.C. § 3156),[25] "which under the circumstances, demonstrates that the filing of the case was an abuse" of the bankruptcy provisions. Based on the language of the provision, the felony conviction must occur prior to the filing of the petition, and any criminal activity of the debtor that takes place postpetition, such as during the three to five year pendency of a chapter 13 case, cannot provide the basis for an objection to a homestead exemption under § 522(q)(1)(A).

Although the statutory language is less than clear, it would seem that the objecting party would need to prove some connection between the felony conviction and the bankruptcy filing such that the filing would be deemed an abuse. This might be shown with proof that the debtor is attempting discharge civil liability owing to victims of the crime, or that the bankruptcy filing may affect the debtor's obligation to pay restitution related to the felony.

Liability on Certain Debts

A $125,000 cap on the debtor's exemptible homestead interest may also be invoked under new § 522(q)(1)(B) if the debtor owes a debt arising from certain unlawful conduct. The debt must arise from one of the four specified categories:

- any violation of state or federal securities laws (as defined in § 3(a)(47) of the Securities Exchange Act)[26] or any regulation or order issued under state or federal securities laws;
- 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 1934 or under section 6 of the Securities Act of 1933;
- any civil remedy under RICO[27]; or

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[25] The term "felony" is defined as an "offense punishable by a maximum term of imprisonment of more than one year." 18 U.S.C. § 3156

[26] The term "securities laws" means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), Sarbanes-Oxley Act of 2002, Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*), Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*). *See* 15 U.S.C. § 78c(a)(47).

- 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.

Standing and Ripeness?

Section 522(q)(1) does not specify who has standing to initiate a proceeding under the subsection, so presumably it would include any party in interest who timely files an objection to the debtor's exemption based on the procedures in Bankruptcy Rule 4003(b) and (c). However, a creditor or other party having no relation to the felony conviction may have a difficult time proving that the bankruptcy filing was an "abuse," particularly if the crime victim has not objected to the debtor's exemption claim. In fact, a crime victim who has a related civil judgment or claim against the debtor may oppose an objection to the debtor's homestead exemption, preferring instead to pursue a nondischargeability action.[28] Similar standing and proof problems might exist if a party other than the creditor who is owed a debt listed in § 522(q)(1)(B) asserts an exemption objection, particularly if the debt is unliquidated and the debtor offers defenses to owing the debt.

A related question is whether a court has jurisdiction in chapter 13 cases, before the completion of the plan, to adjudicate an exemption objection based on a debt owing under § 522(q)(1)(B), if the debtor is proposing to pay the debt in full as part of the chapter 13 plan.[29] This could create problems for courts that follow the majority view that the time to object to a claimed exemption under Bankruptcy Rule 4003(b) does not recommence if a chapter 13 case is converted to chapter 7.[30] The Suggested Interim Rules avoid this issue by providing in Rule 4003(b)(2) that an objection to a claim of exemption based on § 522(q) may be filed at any time before the closing of the case.[31]

No Cap if Homestead Reasonably Necessary for Support

Section 522(q)(2) provides that the dollar limit contained in § 522(q)(1) shall not apply to the extent that the amount of any interest in homestead property is reasonably necessary for the support of the debtor and any dependent of the debtor.[32] This would permit the court to deny application of the $125,000 cap on the debtor's exemptible interest based on a reasonably

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[27] *See* 18 U.S.C. § 1964.
[28] The crime victim might prefer that the debtor keep his or her homestead, even though it is protected under § 522(c), so as to be in a better position to satisfy the nondischargeable debt.
[29] *See , e.g., In re* Campbell, 313 B.R. 313 (B.A.P. 10th Cir. 2004).
[30] *See, e.g., In re* Rogers, 278 B.R. 201 (Bankr.D.Nev. 2002); *In re* Ferretti, 230 B.R. 883 (Bankr.S.D.Fla. 1999), *aff'd without opinion*, Dibraccio v. Ferretti, 268 F.3d 1065 (11th Cir. 2001); *see also In re* Bell, 225 F.3d 203 (2d Cir. 2000) (conversion from Chapter 11 to Chapter 7); *but see In re* Campbell, 313 B.R. 313 (B.A.P. 10th Cir. 2004).
[31] *See* Interim Bankruptcy Rule 4003(b)(2).
[32] Section 522(a)(1) defines "dependent" as including the debtor's spouse, whether or not actually dependent. This definition is ordinarily not relevant to the application of state exemption laws. However, it should apply in any consideration of whether § 522(q)(2) prevents the application of the $125,000 cap on a state homestead exemption.

necessary test like that found in other subsections of § 522,[33] and other sections of the Code.[34] For no apparent reason, this exemption from the homestead cap may be asserted by the debtor only in response to an objection to a claim of exemption based on § 522(q) and not an objection based on § 522(p). Congress was apparently more sympathetic to a debtor who commits securities fraud or criminal acts causing serious personal injury than a debtor who may have innocently acquired homestead property within 1215 days of filing the petition. [35]

A determination as to whether the homestead interest in question is reasonably necessary, based on court interpretations of identical language found in other provisions of § 522, such as § 522(d)(10), would therefore require the court to consider the debtor's (and dependents) age, health, earning capacity, present and future financial needs and ability, other assets, future financial obligations such as alimony and child support, and any special needs of the debtor and dependents.[36] In the context of the debtor's potential loss of homestead property if the monetary cap were applied, the debtor may wish to present additional evidence on matters such as any potential difficulty the debtor may have in finding suitable and affordable replacement housing, the length of time the debtor has lived in the community, the costs of relocation, the safety of the debtor's current neighborhood as compared to potential replacement housing, and the impact relocation may have on the debtor's future income and the education of the debtor's children.

How Long Must Debtor Wait for Discharge?

The 2005 Act also adds new § 727(a)(12), § 1141(d)(5)(C), § 1228(f) and § 1328(h), which provide that the entry of the debtor's discharge may be delayed in a chapter 7, 11, 12 or 13 case pending the outcome of any criminal and civil proceedings against the debtor referred to in § 522(q)(1). If a motion to delay or postpone discharge is filed under these sections,[37] and after notice and hearing held 10 days before the date discharge would otherwise enter, the court shall not grant the discharge if it finds that there is reasonable cause to believe that (1) § 522(q)(1) may be applicable, and (2) there is a pending proceeding in which the debtor may be found guilty of a felony described in § 522(q)(1)(A) or liable for a debt described in § 522(q)(1)(B). These provisions are not intended to provide grounds for the denial of a discharge, but simply provide a procedural mechanism for delaying the entry of discharge until the events that could trigger a potential exemption objection under § 522(q) are determined.[38]

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[33] *E.g.,* §§ 522(d)(10) and (d)(11).
[34] *E.g.,* § 1325(b)(2)(A).
[35] Congress was apparently more sympathetic to a debtor who commits securities fraud or criminal acts causing serious personal injury than a debtor who may innocently acquire homestead property within 1215 days filing of the petition.
[36] *See, e.g., In re* Mann, 201 B.R. 910 (Bankr.E.D. Mich. 1996); *In re* Cramer, 281 B.R. 193 (Bankr.E.D. Pa. 2002); *see also* National Consumer Law Center, Consumer Bankruptcy Law and Practice, § 12.3.3 (7th ed. 2004).
[37] *See* Interim Rule Bankruptcy Rule 4004(I).
[38] These provisions are found in § 330 of S.256, which is entitled: "Delay of Discharge During Pendency of Certain Proceedings." Presumably, Congress sought to include these provisions because of the implications under § 522(c) of the entry of a discharge before a § 522(q) exemption objection is resolved.

Given the first condition is that § 522(q)(1) must be applicable, a debtor's discharge may not be delayed if the debtor is not claiming homestead property as exempt or has not claimed as exempt a homestead interest in excess of $125,000, the debtor is claiming homestead property as exempt under § 522(b)(2) or (b)(3)(B), the potential felony conviction did not cause the debtor's bankruptcy filing to be abusive, the debt alleged to be owed is not of the type described in section 522(q)(1), or the homestead property is reasonably necessary for the support of the debtor and any dependent of the debtor.

The second condition requires the court, if a motion to delay is filed, to have reasonable cause to believe that one of the identified types of proceedings is pending against the debtor and that the debtor may be found guilty or liable in such proceeding. The debtor should therefore have the right to be heard on any claims or defenses asserted in the proceeding that would establish that the debtor may not be guilty or liable. However, to avoid the possibility of the debtor making self-incriminating statements, this would not likely occur if a criminal proceeding is pending. Moreover, even as to a pending civil matter, the bankruptcy court may prefer to abstain and permit the court in which the proceeding is pending to determine the underlying debt. In such case, the entry of the debtor's discharge will be delayed until resolution of the criminal or civil proceeding.

A problem with the drafting of these new delay in discharge provisions is that they conflict with the language used in § 522(q) in regard to a criminal conviction. Section 522(q)(1)(A) provides that the homestead cap may apply if "the debtor *has been convicted* of a felony." Since exemptions are determined on the date the petition is filed,[39] this should mean that no objection may be brought under § 522(q) if the debtor has not been convicted of a felony prior to the filing of the petition. However, the delay in discharge provisions, as in § 727(a)(12) for example, provide that the discharge may be delayed if there is a pending proceeding in which "the debtor *may be found guilty* of a felony," suggesting that the conviction could occur postpetition. Given the conflict between these provisions, and since § 522(q) is the more specific provision which controls a debtor's substantive rights under the Code relating to exemptions rather than procedural matters relating to the timing of discharge entry, § 522(q) should control. Thus, the discharge should not be delayed if the debtor had not been convicted of a felony prior to the filing of the petition.

This new potential barrier to the granting of a discharge could mean that some debtors will have to wait months or even years before their bankruptcy cases are concluded and they get a discharge. This is particularly troublesome in chapter 7 cases in which debtors ordinarily are granted a discharge approximately three to four months after the filing of the petition. This could place some debtors in an extended period of uncertainty about their financial situation, during which time they will be effectively locked out the financial marketplace and denied a fresh start. While courts are generally not inclined to grant a motion for voluntary dismissal of a chapter 7 case in response to an exemption objection, courts may be more willing to do so under these circumstances.

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[39] *E.g.*, Lowe v. Sandoval (*In re* Sandoval), 103 F.3d 20 (5th Cir. 1997).

Application of Homestead Cap in Joint Cases

If § 522(p) or (q) is applicable, a debtor may not exempt any interest that "exceeds in the aggregate" $125,000 in value in homestead property. The use of the word "aggregate" in referring to the debtor's interest, consistent with its application in other subsections such as § 522(d)(6),[40] suggests Congress intended that the dollar limit is to be applied to the combined interests of the debtor in the various forms of property listed in § 522(p)(1)(A) through (D). It is not intended to impose an overall $125,000 cap on the amount both debtors in a joint case may exempt in a homestead under a state exemption law. This construction is supported by the fact that the 2005 Act did not amend § 522(m), which states that § 522 applies separately with respect to each debtor in a joint case.

Thus, if state law permits the "doubling" of a state homestead exemption by joint debtors, the dollar limit in § 522(p) or (q), if applicable, should apply separately to each debtor's homestead interest and exemption claim. Section 522(p) or (q), if applicable, will not prevent each debtor in a joint case from claiming as exempt based an available exemption a homestead interest up to the amount of $125,000. For example, if the cap under § 522(q) were imposed in a joint case as to each debtor's homestead interest, the debtors could claim as exempt their total interest in homestead property up to the amount of $250,000, if state law provides that each debtor may exempt at least $125,000 in homestead property.

In addition, the dollar limit in sections 522(p) or (q) would not apply to each debtor's homestead interest in a joint case if only one of the debtors has been convicted of a felony or is liable on a debt specified in § 522(q)(1)(B).

D. Lien Avoidance on Household Goods

The 1978 Code did not define "household goods" for purposes of § 522(f) lien avoidance, though most courts held that that it included certain basic items of personal property "kept in or around the home and used to facilitate the day to day living of the debtor and the debtor's dependents."[41] Courts often rejected application of the restrictive definition of household goods in the FTC Credit Practices Rule.[42]

New section 522(f)(4) has added a narrow definition of "household goods", similar to the FTC Rule, that would be applicable in § 522(f)(1) lien avoidance proceedings. Section 522(f)(4)(A) provides that the term "household goods" means:

- clothing;
- furniture;

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[40] Section 522(d)(6) provides that a debtor who elects federal exemptions may exempt "[t]he debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor." 11 U.S.C. § 522(d)(6).

[41] *In re* McGreevy, 955 F.2d 957, 960 (4th Cir. 1992).

[42] 16 C.F.R. § 444.1(i). *See In re* Reid, 121 B.R. 875 (Bankr.D.N.M. 1990).

- appliances;
- 1 radio;
- 1 television;
- 1 VCR;
- linens;
- china, crockery, and kitchenware;
- educational materials and educational equipment primarily for the use of minor dependent children of the debtor;
- medical equipment and supplies;
- furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;
- personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and
- 1 personal computer and related equipment.

Section 522(f)(4)(B) provides that the term "household goods" does not include:

- works of art (unless by or of the debtor, or any relative of the debtor);
- electronic entertainment equipment with a fair market value of more than $500 in the aggregate (except 1 television, 1 radio, and 1 VCR);
- items acquired as antiques with a fair market value of more than $500 in the aggregate; [43]
- jewelry with a fair market value of more than $500 in the aggregate (except wedding rings);
- and a computer (except as provided for in section 522(f)(4)(A)), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

One problem with the dollar limits in this subsection is that finance companies which make loans secured by personal property often have consumers sign a personal property list that includes inflated values. While this is often done by such lenders to support the charging of higher premiums on personal property insurance sold in connection with these loans, such finance companies will now have another reason to engage in this practice.

Like many provisions of the 2005 Act that were drafted approximately 8 years ago when the first bill was introduced and were not amended or updated prior to passage, this subsection refers to a VCR even though many consumers have replaced this item with a DVD player. Of course, this reflects the problem of having a laundry list of items in a statutory provision that will inevitably become obsolete. Hopefully, courts will expand the list to include reasonable substitutes for listed items.

[43] This would appear not to include items that become an antique after being acquired by the debtor.

In any event, the new definition should not pose much of a problem because no other changes were made to § 522(f)(1)(B). Some of the categories of items that continue to be listed in § 522(f)(1)(B) are broad and provide for overlapping coverage. To the extent that an item is excluded from the household goods category based on the definition in § 522(f)(4), the debtor should still be able to avoid a nonpossessory, nonpurchase-money lien on the item if it falls within another category listed in § 522(f)(1)(B), such as "appliances" or "household furnishings."