

## WEALTH PRESERVATION AND TAX PLANNING ALERT

### Florida Residents May Not Be Subject to BAPCPA Homestead Cap

by Mayrav Teller, Esq.

At the end of last month, a Bankruptcy Court case in Arizona (*In re McNabb*, 1005 WL 1525101 (Bankr.D.Ariz.)) held that the Bankruptcy Code's \$125,000 homestead cap, as added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), applies only to states that have not opted out of the federal exemption scheme. Florida, among others, has opted out, and therefore this case is of particular importance to Florida residents because it suggests that the \$125,000 bankruptcy homestead cap DOES NOT APPLY to Florida residents.

The relevant section of the Bankruptcy Code applies a \$125,000 cap on a homestead if it was acquired by the debtor within 1215 days (3 years and 4 months) before petitioning for bankruptcy. Florida's Constitution, by contrast, offers a homestead exemption of *unlimited* value for the permanent residence of a natural person. Geographic limitations, however, do apply to Florida's exemption: In the case of a homestead located within a municipality, the homestead is limited to one-half acre of contiguous land; and in the case of a homestead located outside of a municipality, the homestead is limited to 160 acres of contiguous land. Clearly, if *In re McNabb* holds up as precedent in Florida, Florida residents – or, more specifically, Florida debtors – will be better off.



The *McNabb* decision turns on the wording of the provision imposing the cap. As the bankruptcy court explains, "the \$125,000 cap applies 'only as a result of electing ... to exempt property under State or local law.'" Under the Bankruptcy Code, the debtor can elect to use federal exemptions or state exemptions; however, if a state opts out of the Bankruptcy Code exemptions – as Florida did and, relevant to the *McNabb* case, as Arizona did – the debtor does not get to "elect" state exemptions. Rather, those are the only exemptions available to the debtor, so there is no election to be made.

So, under the *McNabb* analysis, the \$125,000 BAPCPA Homestead cap applies to residents of Texas and Minnesota (because those are "opt-in" states with a creditor homestead limitation) but does not apply to resident of states such as Florida, South Dakota, Iowa and Kansas (because those are "opt-out" states with a creditor homestead limitation).

Three things to keep in mind: First, as an Arizona case, *In re McNabb* is not binding in Florida but rather is persuasive authority; so, a bankruptcy court in Florida may decline to follow the case as precedent. Second, a technical amendments bill may be in the works to fix various glitches in BAPCPA, and that bill may change section 522(p) to

#### Bankruptcy Court suggests that the BAPCPA cap on homestead exemption does not apply to Florida residents

make the cap applicable to opt out states. Third, even if *In re McNabb* remains good law, and section 522(p) is not changed by Congress, we should not forget that the very important 10-year look-back provision of 522(o) still applies to opt-out states. Under that look-back provision, the value of the homestead exemption will be reduced to the extent that it is elected for assets that the debtor put into the home within 10 years before filing for bankruptcy with the intent to hinder, delay or defraud a creditor— a

phrase which could be interpreted broadly. For example, if a debtor pays down the mortgage on his homestead at any time within the 10 year period prior to filing bankruptcy, and it can be established that the pay down was with the *intent to hinder, delay or defraud* a creditor, the amount of the pay down is not exempt.

Note, however, that this 10-year fraudulent conveyance analysis is contrary to existing Florida law as set forth in *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001). In *Havoco*, a judgment was entered against a resident of Tennessee on December 19, 1990. The enforceability of the judgment was delayed until January 2, 1991. With full knowledge of the judgment, the debtor purchased a Florida home on December 30, 1990, with nonexempt funds that would have been available to the known creditor. In other words, the debtor intentionally converted the non-exempt funds into Florida homestead property. The Florida Supreme Court reasoned that when an equitable lien is sought against homestead real property, there must be proof of some fraudulent or otherwise egregious act by the beneficiary of the homestead protection, and the creditor did not provide such proof. The court also noted that the debtor's conversion of funds to avoid a creditor was not one of the three exceptions to the homestead exemption under the Florida Constitution. Therefore, the Florida Supreme Court refused to extend equitable principles to permit the creditor to proceed against the debtor's homestead. As recently as July 6 of this year, a Florida court applied *Havoco's* high standard for imposition of an equitable lien on constitutionally protected homestead property (See *In re McClung*, 2005 Bankr. LEXIS 1301 (Bankr. M.D. Fla. July 6, 2005)). Of course, the result reached in *Havoco* and *McClung* may differ if a similar debtor is subject to bankruptcy under the new rules promulgated by the BAPCPA. ■

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