HOMESTEAD EXEMPTIONS

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Optimizing a debtor's claim of exemptions, along with obtaining a discharge, is central to effective debt relief and the attainment of the proverbial fresh start. Two factors have combined to create a new and complicated world for debtors' attorneys in the exemption arena. The first factor is a citizenry that is increasingly transient. The second factor is the new exemption domiciliary provisions enacted by BAPCPA.[1] The new provisions offer new and rewarding opportunities to maximize debtors' homestead exemptions but also harbor risks, some of them well concealed, for the unwary. The purpose of this manuscript and the live presentation is to facilitate each attendee's ability to take advantage of the opportunities and to avoid the risks. [2]

I. APPLYING THE DOMICILIARY REQUIREMENTS TO THE TRANSIENT DEBTOR

In 2005, Congress substantially complicated the exemption choice scheme, especially when a debtor moves from one state to another before bankruptcy. For a useful discussion of many aspects of this problem, see Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions,* 22 Bankr. Dev. J. 401 (2006). Most notable of the 2005 changes here, of course, is the extension of required domicile in the "new" state from 91 days to 730 days – 8 times as long! Whereas before a debtor could claim a state's exemption laws if he'd lived in that state for the greater portion of the 180 days before bankruptcy (thus the 91 day rule), after BAPCPA if a debtor changes state domicile within 730 days of bankruptcy, he is relegated, for

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8 119 Stat. 23.

[2] I moderated a panel on exemptions at the Chicago annual meeting of the National Association of Consumer Bankruptcy Attorneys in May, 2009 with Professor Charles J. Tabb of the University of Illinois School of Law and Judge (Retired) William H. Brown of the Western District of Tennessee. Some of these materials were used at that meeting. I use them with their permission.

exemption purposes, to the state where he was domiciled for the greater portion of the 180 days before the 730-day period started.

The upshot is that a debtor's exemption options in bankruptcy may well end up being controlled by the laws of a state where he lived more than two years before he filed for bankruptcy – the "old" state. The "old" state's laws will then control both (i) the state exemption laws available to the debtor under § 522(b)(3)(A), and (ii) the "opt out" as regards the § 522(d) federal exemptions, under § 522(b)(1) and (2).

A problem arises when a debtor faces a situation where:

(i) he has moved within the 730 day period, and thus must look to old state law for his choice of exemptions,

(ii) old state has opted out of the federal exemptions, and

(iii) the exemption laws of old state are limited to "residents" or preclude extraterritorial application.

Congress was apparently concerned that such a debtor could be rendered exemption-less or exemption-impaired: no § 522(d) federal exemptions because of opt out, no new state exemptions because of the domiciliary requirement of §522(b)(3)(A), and no old state exemptions or reduced old state exemptions because of the limitation to residents or prohibition against extraterritorial effect. In reality, based on the language contained in their statutes many "wannabe opt out" states are not opt out states in these circumstances. This is because the opt-out provision applies only to "residents" of the state, persons "domiciled" in the state or "citizens" of the state.[3] Since the debtor has moved from the state, the opt-out provision does

[3] An example of such a statute is North Carolina's statute, N.C. Gen. Stat. §1C-1601(f), which provides: "The exemption provided in the Bankruptcy Code, 11 U.S.C. § 522(d), are not applicable to the residents of this State. The exemptions provided by this Article and by other statutory or common law of this State shall apply for purposes of the Bankruptcy Code, 11 U.S.C. § 522(b)."

not apply to him or her. The courts have overwhelmingly held that in these circumstances the debtor has the exemptions allowed under § 522(d) of the Bankruptcy Code. *See, e.g., In re Battle*, 366 B.R. 635 (Bankr. W.D. Tex. 2006) (Florida opt out law limited to "residents" and thus non-resident who had moved from Florida within 730 days and thus was governed by Florida law was able to elect 522(d) federal exemptions). *Accord In re Chandler*, 362 B.R. 723 (Bankr. N.D. W. Va. 2007) (Georgia opt out law limited to debtors "whose domicile is in Georgia" and thus not applicable to a non-resident who had moved to West Virginia); *In re Underwood*, 342 B.R. 358 (Bankr. N.D. Fla. 2006); *In re Crandall*, 346 B.R. 220 (Bankr. M.D. Fla. 2006).

The opt out statutes in some states are absolute, containing language that provides that when that state's laws apply to a debtor in bankruptcy, the debtor is not entitled to claim the § 522(d) exemptions.[4] The problem arises when all or a portion of the state's exemptions are limited to residents of the state or persons domiciled in the state. Is that debtor exemption-less or exemption-impaired?

Congress tried to take care of this situation by adding a savings clause in the "hanging paragraph" following § 522(b)(3), providing that "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 under subsection [522](d)." The hanging paragraph effectively negates the opt out and makes the § 522(d) federal exemptions available to the otherwise exemption-less debtor.

One commentator has argued that the syllogism in the preceding paragraphs, which leads to the conclusion that but for the hanging paragraph the debtor would be without exemptions, is

[4] South Carolina's statute, S.C.Code Ann. § 15-41-35, is an example. It provides: "No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. § 522(d) except as may be expressly permitted by this chapter or by other provisions of law of this State."

flawed. *See* Bartell, *supra,* 22 Bankr. Dev. J. at 417-24. Professor Bartell argues that under the Supremacy Clause such a debtor should have available to him the substantive exemption laws of the old state, but with the old state's limitations to "residents" or to in-state property inapplicable. Her argument is that all Congress intended to incorporate by reference in § 522(b)(3)(A) was the listing of what types of property are exempt under the referenced state – not who is entitled to claim such exemptions, or where such property may be located. The latter two issues are controlled by the supreme federal law in § 522(b)(3)(A). Under this view, the hanging paragraph was unnecessary. *Id.* at 424.

A few courts have followed this view. *See, e.g., In re Camp*, 396 B.R. 194 (Bankr. W.D. Tex. 2008). Thus, the *Camp* court, looking at Florida law in the situation where the debtor had moved from Florida to Texas within the 730 day period, concluded that the federal choice of law rule in § 522(b)(3)(A) preempted Florida's limitation to "residents," both in the opt out statute and in the substantive exemption law. Accordingly, the debtor could not elect the federal exemptions in § 522(d), either directly under § 522(b)(2) (because the debtor was bound by Florida's opt out) or via the savings clause, since the debtor was not rendered exemption-less by his move to Texas. Instead, debtor could utilize the Florida exemptions with regard to his Texas property. In sum, under the minority view espoused by Professor Bartell and adopted in *Camp*, the choice of law rule of § 522(b)(3)(A) has three direct consequences: first, the debtor will be bound by the old state's opt out law (whether limited to "residents" or not); second, the debtor will be able to utilize old state's exemption laws (again irrespective of any limitation to "residents," and also irrespective of extraterritorial restrictions); and finally, as a necessary corollary of the first two, the savings clause would never apply, and thus the debtor could not use § 522(d) via that route, since the debtor would never be without exemptions.

The Tenth Circuit BAP specifically rejected the rationale employed in *Camp* on the grounds that it rendered the savings clause superrfluous. *See In re Stephens*, 402 B.R. 1 (B.A.P. 10th Cir. 2009). However, see *In re Smith*, 2009 WL 1109891 (Bankr. S.D. Tex. 2009), which followed *Camp* without analysis.

As previously stated, the prevailing view rejects *Camp* and ascribes effect to old state's limitations to "residents" (either in the opt out rule or the substantive exemption law). Preliminarily, under the prevailing view, the problem of the potentially "exemption-less" debtor (but for the savings clause) only arises if the old state's opt out law can be applied to non-residents. *See In re Williams*, 369 B.R. 470, 474 & n.2 (Bankr. W.D. Ark. 2007). Stated otherwise, if the old state's opt out law is limited to "residents" or persons "domiciled" in that state, and if the court does not agree with the *Camp* view that this limitation is preempted, then in effect the non-resident forced by the 730-day domicile rule to use old state's opt out law is not barred from electing directly under § 522(b)(1) and (2) to use the federal exemptions under § 522(d).

Assuming, then, that the debtor faces a situation where the new state exemptions are barred by the 730-day rule; old state exemptions are barred by limitation to residents or to in-state property; and opt out is barred as to non-residents by old state, we have the paradigmatic scenario for invocation of the savings clause. Numerous cases apply the savings clause to permit a debtor, who under the situation described above would be without any exemptions, to invoke § 522(d) exemptions. *See, e.g., In re Fabert*, 2008 WL 104104 (Bankr. D. Kan. 2008); *In re West*, 352 B.R. 905 (Bankr. M.D. Fla. 2006); *In re Jewell*, 347 B.R. 120 (Bankr. W.D.N.Y. 2006).

Under the prevailing view, though, a significant interpretive problem remains in applying the savings clause. Recall that the savings clause is triggered "if the effect of the domiciliary requirement under [§ 522(b)(3)(A)] is to render the debtor ineligible for *any* exemption." (emphasis added). The obvious question then is, what if old state's exemptions are partially available to non-residents? For example, it is not uncommon for a state's homestead exemption to be available only to residents of the state, but for the other exemptions to be available to residents and non-residents alike. So, for example, if debtor could exempt a pig under old state's exemption laws, but not a homestead, can he still invoke the savings clause and claim a homestead exemption under § 522(d)? Obviously, the trustee will object that the literal language of the trigger to the savings clause is not satisfied: application of the domiciliary requirements of § 522(b)(3)(A) does not in fact render debtor ineligible for "any" exemption. Debtor can still claim the pig as exempt under old state's laws. As far as the homestead, well … too bad.

Note that the problem just described lends credence to and is fodder for Professor Bartell's argument that the choice of law provision of § 522(b)(3)(A) preempts state exemption law choice of law provisions regarding residency and the like. As she argues, the savings clause is not only unnecessary, but it is also, in her words, "insufficient," because "[s]o long as applicable state law in the opt-out state permits the debtor any exemption, even if it denies the debtor others, the debtor is not allowed to elect federal exemptions." Bartell, *supra,* 22 Bankr. Dev. J. at 424-25. Thus, she assumes that in the "partial exemption" case under the prevailing view, debtor could not elect federal exemptions under § 522(d) pursuant to the savings clause. In short, better enjoy that pig.

Do the courts agree with this strict "plain meaning" interpretation of the savings clause trigger? Some certainly do. *See, e.g., In re Brooks*, 393 B.R. 80 (Bankr. M.D. Pa. 2008); *In re Katseanes*, 2007 WL 2962637 (Bankr. D. Idaho 2007). In *Brooks*, Maryland exemption law allowed a non-resident to claim some personal property as exempt, but also provided an additional $5,000 exemption for bankruptcy debtors but only if the debtor is "domiciled" in the state. The court upheld this limitation under Maryland law, and found the savings clause inapplicable since the debtor was not ineligible for "any" exemption. In *Katseanes*, a debtor who had moved from Utah to Idaho during the 730-day period and thus was relegated to Utah exemption law, was not able to claim a homestead exemption under Idaho law because of the domiciliary requirement of § 522(b)(3)(A), under Utah law because of a specific limitation in the Utah homestead exemption to in-state real estate (which the Idaho home assuredly was not), or under § 522(d) via the savings clause because the debtor was eligible for personal property exemptions under Utah law.

In contrast, the court in *In re Williams*, 369 B.R. 470 (Bankr. W.D. Ark. 2007), suggested fairly strongly in dictum that it would not look favorably on a proffered strictly literal interpretation of the reference to "any" exemption in the savings clause if doing so would deprive a debtor of all homestead exemptions:

> "Suffice it to say that the Congressional intent of the exemption statute is, and has always been, to give the debtor a "fresh start." Under the trustee's interpretation of the word "any," in this case that fresh start would have to begin without the one property interest accepted throughout the United States -- a homestead."

Id. at 476. The court did not have to reach the question because it determined that the operative old state homestead exemption law (Iowa) could be given extraterritorial effect and applied to an Arkansas homestead.

But is the meaning of the savings clause so "plain"? One can argue that the clause is susceptible to two interpretations. The syllogisms set out below implement the two interpretations. The first syllogism implements *Brooks* and *Katseanes*. The second syllogism carries out an interpretation suggested by the author of this manuscript.

FIRST SYLLOGISM:

1) Has the debtor's domicile changed within the 730 days prior to filing bankruptcy?

If the answer is yes, go to second question. If the answer is no, then the savings clause does not apply because any ineligibility for any exemption is not an "effect of the domiciliary requirement".

2) Is the debtor left with the inability to claim an exemption in any property (i.e. he has no exempt property) because his domicile changed within the 730 days prior to filing?

If yes, then the savings clause applies and the debtor may elect to exempt property that is specified under § 522(d). If no, (i.e. the debtor is eligible to claim any exemption in *some* property, however small), then the savings clause does not apply. The debtor is left with less than a full complement of exemptions available to him under the laws of applicable state, as a non-resident or non-domiciliary of that state, pursuant to § 522(b)(3)(A), and the exemption in entireties property, if any, and retirement funds (§ 522(3)(B) and (C)).

SECOND SYLLOGISM:

1) Has the debtor's domicile changed within the 730 days prior to filing bankruptcy?

If the answer is yes, go to second question. If the answer is no, then the savings clause does not apply because any ineligibility for any exemption is not an "effect of the domiciliary requirement".

2) Is there *any* exemption for which the debtor would be eligible under the law of the applicable state for which he not eligible because his domicile changed within the 730 days prior to filing?

If no, then the debtor claims the exemptions of the applicable state. If yes, then the debtor may elect to exempt the property that is exempt under § 522(d).

ARGUMENTS ON BEHALF OF SECOND SYLLOGISM:

Assuming that the meaning of the savings clause is ambiguous, then an interpretation of the savings clause that will allow the use of the second syllogism will more effectively implement the presumed congressional intent in enacting the new domiciliary requirements and the savings clause. Here are five reasons why.

First Reason

Congress has enacted bankruptcy laws to give the honest, but unfortunate debtor a fresh start. *Local Loan v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). The two major components of the fresh start are the discharge of debts and ability to exempt property. As stated by Judge Brown, "…[E]xemption of a sufficient property, coupled with the expectation of a discharge of personal liability of prebankruptcy debts, have joined to form the basic concept of a financial fresh start for the 'honest but unfortunate debtor'." William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The 'Opt-Out' as Child of the First and Parent of the Second*, 71 Am. Bankr. L.J. 149, 163 (Spring 1997). To advance the fresh start, it is axiomatic that exemption statutes are to be liberally construed in favor of debtors. This quote from the First Circuit BAP is representative of pronouncements to this effect:

> …[I]t is well established that exemptions should be construed liberally in favor of the debtor. *See, e.g., In re Ciotta*, 222 B.R. 626, 630 Bankr. C.D. Cal.1998) ("Several bankruptcy courts have held that when Congress' intent is ambiguous, bankruptcy exemptions should be liberally interpreted in favor of the Debtor."); *In re Chavis*, 207 B.R. 845, 846 (Bankr. W.D. Pa.1997) ("Bankruptcy exemptions should be construed liberally in favor of debtors."); *Gaertner v. Claude (In re Claude)*, 206 B.R. 374, 377 (Bankr. W.D. Pa.1997) ("[I]f it is possible to construe an exemption statute in ways that are both favorable and unfavorable to a debtor, then the favorable methods should be chosen."); *In re Martinez-Whitford*, 199 B.R. 74, 77 (Bankr. D. Mass. 1996) ("It is axiomatic that bankruptcy exemptions should be liberally construed in favor of debtors.").

In re Christo, 228 B.R. 48, 50 (B.A.P. 1st Cir. 1999).

An interpretation of the law that relegates a debtor to less than a full complement of state law exemptions, and in some cases, with the inability to claim any homestead exemption, or in other cases to claim any personal property exemptions, can not be what Congress intended in changing the domiciliary requirement from 91 days to 730 days. Such a provision completely undermines the debtor's fresh start.

Second Reason

The savings clause provides that the debtor "may elect" the § 522(d) exemptions. Under the rationale of the first syllogism, the savings applies only when the debtor has no exemptions, i.e., he is exemption-less. If the provision applies only in such circumstances, the use of the term "may elect" is strange. Does such a debtor really have an election? On the other hand, assume that the debtor is not exemption-less, but exemption-impaired. He has lost one or more exemptions, such as the homestead exemption, normally available to debtors under the applicable state law. In such circumstances, he will compare the advantages and disadvantages of the § 522(d) exemptions as compared to less than a full array of state exemptions and elect which better facilitates his fresh start. Under this second syllogism the term "may elect" is not strange but appropriate.

Third Reason

The legislative history establishes that the purpose of the provision was to limit a debtor's ability to move to a state with a large homestead, purchase a "mansion", file bankruptcy, and exempt the mansion. H.R.Rep 109-31 states:

> The bill also restricts the so-called 'mansion loophole.' Under current bankruptcy law debtors living in certain states can shield from their creditors virtually all of the equity in their homes. In

> light of this, some debtors actually relocate to these states just to take advantage of their 'mansion loophole' laws. S.256 closes this loophole for abuse by requiring a debtor to be domiciliary in the state for at least two years before he or she can claim that state's homestead exemption; the current requirement can be as little as 91 days.

H.R.Rep. No. 109- 31, pt. 1, at 15-16, 109th Cong., 1st Sess. (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 102.

An interpretation of the law that denies a debtor access to the Bankruptcy Code (§ 522(d)) exemptions, while relegating him to less than a full complement of state exemptions, does nothing to advance the congressional intent to close the mansion loophole. An interpretation that grants a debtor, who would otherwise have less than a full complement of state exemptions, the moderate level of exemptions available pursuant to § 522(d) does not hinder the congressional intent to close the mansion loophole.

Fourth Reason

BAPCPA added to the exemptions available to debtors in opt-out jurisdictions certain retirement accounts. *See* § 522(b)(3)(C). Presumably Congress added this provision because it was aware of the facts that 1) a great many citizens have retirement accounts; 2) some of these accounts are property of the estate; and 3) some states do not allow them to be exempted. Congress wanted debtors in opt-out states to be able to exempt these retirement accounts. Therefore, the exemption is available to *every* debtor in an opt-out state. With this new exemption, then every debtor in an opt-out state with an IRA will have *some* exemption, and in some circumstances, the debtor would be able to exempt only the IRA.

Consider the following example:

> A debtor living in South Carolina sells her home and moves to Georgia. She reinvests the proceeds ($15,000) into a new home in Georgia. In addition to a vehicle and furnishings, she has $10,000 she rolled into an IRA from her job in South Carolina. She files bankruptcy one year later.

South Carolina's opt-out statute, S.C.Code Ann. § 15-41-35 provides: "No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. § 522(d) except as may be expressly permitted by this chapter or by other provisions of law of this State." Since the opt out is not conditioned on residency or domicile in South Carolina, the provision still applies to our debtor living and filing bankruptcy in Georgia. All of South Carolina's exemptions appear to be limited to debtors domiciled in South Carolina. However, the debtor is not left without *any* exemption. She can exempt her retirement account under § 522(b)(3)(C). In its efforts to make retirement accounts exempt for some debtors, Congress could not have intended to make them the *only* property a debtor could exempt. Consequently, an interpretation of the savings clause in accordance with the First Syllogism is proper.

Fifth Reason

Denying debtors the Bankruptcy Code exemptions and confining them to the exemptions of a particular state loses it rationale when the debtors are no longer domiciled in that state. In the landmark case of *Hanover National Bank v. Moyses*, 186 U.S. 181, 22 S. Ct. 857 (1902), the constitutionality of the Bankruptcy Act of 1898 was challenged for lack of uniformity because it provided that debtors were entitled to exempt only the property exempt under the laws of the state in which they had been domiciled for the greater portion of the 180 days prior to filing bankruptcy. The Supreme Court upheld the constitutionality of the Act. It reasoned that contracts are made with the knowledge of a particular state's exemptions, and that outside bankruptcy, the creditor's collection efforts would be constrained by those exemptions. With respect to the use of state exemptions, the Court stated

> We…hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.

186 U.S. at 190, 22 S. Ct. 857.

In a context in which the creditor's collection efforts are likely to occur in the debtor's new state, and consequently, with the debtor exempting his property under the laws of that state, the Supreme Court's rationale for upholding the use of state exemptions is undermined.[5] In the further context of a debtor who, if the savings clause is interpreted in accordance with First Syllogism, will be entitled to claim only a *portion* of a state's exemptions, application of the opt out provision and denial of access to the § 522(d) exemptions is absurd.[6]

II. EXTRATERRITORIAL EFFECT OF STATE EXEMPTIONS

Frequent issues arising since enactment of BAPCPA involve a variety of scenarios concerning whether a particular state's exemptions may be given extraterritorial effect; that is, assuming the debtor may or must claim exemptions from a state other than the one where the bankruptcy case is filed, does the exemption law of the non-filing state permit use by persons who no longer are residents of the state or whose property claimed as exempt is not located in that state. In Brown, Ahern & MacLean, *Bankruptcy Exemption Manual*, § 4.6, there is a listing of states by majority and minority view, with the majority view being that states generally do not permit use of their exemptions by persons not residing there or for property not located in that

[5] At least one court has entertained a constitutional challenge to BAPCPA's exemption provision for nonuniformity. The Ninth Circuit BAP upheld the constitutionality of the provision in *In re Urban*, 375 B.R. 882 (B.A.P 9th Cir. 2007).

[6] For an excellent discussion of the opt-out provision see William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: "The Opt-Out" as Child of the First and Parent of the Second*, 71 Am. Bankr. L.J. 149, 163 (Spring 1997).

state, but a strong minority of states do permit at least some of their exemptions to be used by nonresidents or for their property that is no longer located in that state.

The typical scenario involves homestead claims, where the debtor has moved from a state but because of the 730-day look-back for exemption purposes under 11 U.S.C. § 522(b)(3), the debtor may still be able, or required, to claim exemptions under the prior state of residency. If the debtor's homestead is now located in a new state, one where the bankruptcy case is filed, may the debtor claim the homestead exemption under the old state's laws? Or, if the actual property is still located in the old state but the debtor is no longer a resident of that state, may the debtor continue to claim a homestead under the old state's law? Or, perhaps the debtor is claiming an exemption in personal property that is no longer located in the prior state of residency; does that state's law permit exemption in, for example, a vehicle, that is no longer licensed in that state? To answer such questions, bankruptcy courts are often required to analyze the homestead and other exemption laws, both statutory and case authority, of the non-filing (prior residency) state. Some recent decisions illustrate this.

In re Varanasi, 394 B.R. 430 (Bankr. S.D. Ohio 2008). The Ohio Bankruptcy Court interpreted New Hampshire's homestead exemption, concluding that it may be used by the debtor to exempt property located in Ohio.

In re Jevne, 387 B.R. 301 (Bankr. S.D. Fla. 2008). The Florida Bankruptcy Court interpreted Rhode Island's homestead exemption, giving it extraterritorial effect to allow the debtor to claim homestead exemption in a Florida residence.

But in *In re Gosnick*, 400 B.R. 582 (Bankr. W.D. Mich. 2008), the Michigan Bankruptcy Court looked at its own state's law to conclude that "Michigan courts, for almost one hundred years, have held that its laws do not have extraterritorial application to real estate located in another state."[7] The debtor was not permitted to claim exemption under Michigan law on real estate located in Alabama.

An interesting byproduct of the extraterritorial issue is that the interpretation and application of exemption law is often by courts outside of the state whose laws are being used. The Tenth Circuit Bankruptcy Appellate Panel recently interpreted Iowa's homestead exemption law, both statutory and case, and disagreed with the bankruptcy judge's interpretation. In *Stephens v. Holbrook* (*In re Stephens*), 402 B.R. 1 (B.A.P. 10th Cir. 2009), the BAP concluded first that § 522(b) (2)'s choice of exemption law does not preempt state law, which prohibits application of that state's exemption to property located outside the state; instead, the fall back to federal bankruptcy exemptions becomes effective. However, the BAP interpreted Iowa law and concluded that its homestead exemption applied to a Chapter 7 debtor who filed in Oklahoma but had not lived there the 730 days before filing. Since Iowa's homestead law is silent as to its extraterritorial effect, the BAP looked to Iowa case law. Iowa's personal property exemption specifies that it is available only to residents of the state, but the homestead contains no such restriction. The old case law in the state did not interpret the current homestead statute, and the BAP applied the principle that the "legislature's inclusion of a residency requirement in its personal property exemption statute, while making no reference to residency in its homestead statute, is presumed to be intentional."

The *Stephens* opinion illustrates that the extraterritorial effect issue was not typically contemplated by state legislatures when exemption laws were written, often many years before enactment of BAPCPA. And, it illustrates that while one particular state exemption may specify

[7] The Michigan homestead exemption is not explicitly limited to residents of Michigan or to property located in Michigan. The court's reasoning is limited in scope and dubious in relevance.

that it applies only to residents of that state, or to property located within that state, other exemptions may not contain that specific restriction.

III. THE ENTIRETIES TRAP?

Another curious problem, or trap, relates to the exemptions granted to a debtor pursuant to § 522(b)(3)(A)-(C) when that debtor utilizes the non-Bankruptcy Code exemptions. The most significant of these is entireties exemption. Consider the following hypothetical: A married couple owns their home as tenants by entirety in North Carolina. There is $100,000 equity in the home. North Carolina recognizes the entireties exemption. They have no joint unsecured debt. Husband has $50,000 in unsecured debt, and wife has $25,000 in unsecured debt. They sell their home in North Carolina, move to Illinois, and reinvest the $100,000 into a new residence in Illinois. Illinois also recognizes the entireties exemption if the property is the debtors' principal residence. Each debtor owns an unencumbered vehicle worth $5,000. They own $8,000 in household furnishings, and are entitled to a $4,000 tax refund.

The debtors file bankruptcy one year after moving to Illinois. Given the respective state exemption laws and the Code's domiciliary and choice of exemption provisions, the following appears to be the case:

1. Illinois exemption law does not apply since the debtors have not been domiciled in Illinois (the new state) for 730 days;

2. North Carolina law controls for determining exemptions because the debtor was domiciled in North Carolina (the old state) for the 180 days immediately preceding the 730 days prior to filing;

3. North Carolina is an opt-out state, but the Bankruptcy Code exemptions in § 522(d) are available because NC opted-out only as to its "residents"; and

4. North Carolina's exemptions are not available for the debtors because the exemptions are limited to NC residents.

The debtor's attorney claims exemptions as follows:

1. Exempts all of the personal property utilizing the exemptions provided by § 522(d).

2. Exempts the residence utilizing the Illinois tenants by the entirety exemption, under § 522(b)(3)(B).

The chapter 7 trustee objects, asserting that pursuant to § 522(b)(1), the debtor may choose exemptions from either § 522(d) (via 522(b)(2)) or 522(b)(3), but not from both. The election provision in § 522(b)(1) appears to support the trustee's position, as it says plainly that a debtor may exempt property "listed in either paragraph (2) or, in the alternative, paragraph (3)."

To explore the potential conflict in having to choose between claiming either the Bankruptcy Code exemptions or the entireties exemption, one need to look no further than cases from a non opt-out state that allows a debtor to elect to claim the Bankruptcy Code exemptions are that recognize tenancy by entirety. Pennsylvania is such a state. An illustrative case is *In re Romano*, 378 B.R. 454 (Bankr. E.D. Pa. 2007). The debtor owned his residence in Pennsylvania as tenants by the entirety with his wife. The property had an approximately $90,000 in equity. He owned a trailer home worth $15,000 in Florida with his wife as tenants by the entirety. Finally, he owned an unencumbered vehicle worth $6,000 and IRA's worth $18,000. He attempted to claim the vehicle and IRA's as exempt, utilizing the exemption afforded by § 522(d). He claimed the residence and the Florida trailer home exempt as entireties.

There are some unusual procedural issues in *Romano*, but boiled down to the essentials, this is what happened. The creditor objected to the debtor's attempt to claim both the entireties exemption and the § 522(d) exemptions. The debtor did not respond, and the court entered an order that the debtor would be deemed to have elected the § 522(d) exemptions, and denied the entireties exemption. The substantial actions toward this took liquidation of the Florida trailer and the Pennsylvania residence. The debtor subsequently attempted to amend his exemptions to claim the entireties exemption under Pennsylvania and Florida law, along with Pennsylvania's exemptions. The court denied the request due to the prejudice to them and the creditor in allowing an amendment. One presumes that those attorneys in non-opt-out states that recognize tenants by the entirety, have become adept at weighing the competing factors in choosing between the entireties exemption or the § 522 (d) exemptions. However, the calculation is different in the scenario presented here. The debtor who is a life-long resident of Pennsylvania still gets his other Pennsylvania exemptions in personal property if he elects to take the entireties exemption. The Pennsylvania debtor who has moved into Pennsylvania within two years prior to filing from a state whose exemptions are not extra-territorial has no exemption for personal property.[8]

Let's change the facts just a little: assume instead that debtor is bound by old state's opt-out law, which can be applied to non-residents. Now, the debtor would be claiming the federal exemptions of § 522(d) not pursuant to § 522(b)(2) – where the election rule of § 522(b)(1) plainly applies -- but instead under the savings clause of the hanging paragraph following § 522(b)(3). Debtor now could try to argue that he could claim both entireties property under § 522(b)(3)(B) and federal exemptions under § 522(d) via the savings clause. How so? In essence, the debtor would argue that he was claiming an election solely under § 522(b)(3). The

[8] Any assertion that in the absence of joint debts, the entireties property is not property of the estate, and immune from liquidation by the trustee, with or without an exemption, is contradicted by § 541(a)(1), which includes all the debtor's interest in a property in the estate, and § 363(h), which in certain conditions authorizes a trustee to sell both the estate's interest and a co-owner's interest in entireties property.

debtor would argue that the savings clause reference to ineligibility for "any exemption" due to application of the domiciliary requirement of § 522(b)(3)(A) must refer to state exemption laws under (b)(3)(A), and thus the savings clause in effect was to work as part and parcel of, not in lieu of, the general (b)(3) choice. If the debtor is going under (b)(3) generally, including the savings clause, there is no bar to also then using (b)(3)(B). Stated otherwise, the debtor would argue that the § 522(d) exemptions are being claimed through the savings clause, which in turn is simply substituting for the unavailable (b)(3)(A) state law exemptions.

Now let's go full circle and return to the facts with which we began the discussion. North Carolina law applies, and the debtor is entitled to the § 522(d) exemptions because North Carolina's opt-out statute applies only to residents. Debtor asserts that he wants the entireties exemption and he can get the entireties exemption only if he chooses exemptions under §522 (b)(3). However, when he tries to claim North Carolina's exemptions, he is not able to claim any of those exemptions because under North Carolina law, he must be a resident. The effect of all of this (i.e. the domiciliary requirements) is to make him ineligible for some exemptions. However, under the first syllogism, he gets the § 522(d) exemptions under the savings clause. However, he does not lose the entireties exemption because he elected that as his exemption.

IV. "FREEZING" JUDICIAL LIENS

Section 522(f)(1)(A) allows a debtor to avoid a judicial lien on an interest of the debtor in property to the extent that such lien impairs an exemption on that property. All of us regularly utilize § 522(f)(1)(A) to avoid judicial liens on residences. Some of us may be forgoing the opportunity to avoid judicial liens on the other property that could provide substantial benefits to our clients in the future. The avoiding of a judicial lien can provide such a benefit even when the amount of the exemption is nominal.

Consider this example:

A debtor, who

1,000 is $16,000, leaving $4,000 of the lien non-avoidable. When the debtor sells the property the amount of the judgment lien to be paid would be $4,000, and interest on the $4,000 at the judgment rate of claims the §522(d) exemptions, owns a residence with $19,200 in equity (exclusive of judgment liens) and a rental house worth $100,000 encumbered by a $95,000 deed of trust. Both properties are encumbered by a $20,000 judgment lien. The debtor's attorney utilizes §522(f)(1)(A) to avoid the judgment lien from the debtor's residence, but takes no action to avoid the judgment lien on the rental house. The debtor sells the rental house 5 years later for $125,000. The mortgage debt at that point is $87,500 and the judgment amount is $28,000 at that point. The judgment lien must be paid in full to convey good title.

Suppose the debtor's attorney had claimed an exempt interest in the rental property of $1,000, utilizing a portion of the available wildcard exemptions, and filed a motion to avoid the judgment lien. Utilizing the formula mandated by §522(f)(2)(A), the portion of the lien that impairs the debtor's exemption of $interest.

We recommend that the order in such cases be very specific as to what portion of the judgment lien survives to make sure the amount of the lien is "frozen".

The conclusions of law should contain the following provisions:

1) Pursuant to §522(f)(1)(A), the judgment lien of ABC, Corp. impairs the exemption of the debtor to the extent that the sum of the lien, all other liens on the property, the amount of the debtor's exemption exceeds the value of the debtor's interest in the property.

2) Application of the formula is as follows:

The lien:	$20,000
All other liens:	$95,000
Exemption:	$1,000
TOTAL	$116,000
Value of debtor's interest in the property	$100,000
Amount of Impairment	$16,000

3) The judgment of $20,000 is avoided in the amount of $16,000. $4,000 of the judgment remains a valid, unavoided lien against the property.