**Bankr. Exemption Manual § 4:8**

**Bankruptcy Exemption Manual** | June 2020 Update

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**Chapter 4. State Opt Out and Limitations on State Exemptions (Section 522(b))**

# § 4:8. Homestead caps—Section 522(o), (p), and (q)

**West's Key Number Digest**

West's Key Number Digest, Bankruptcy 2774
West's Key Number Digest, Bankruptcy 2797.1
West's Key Number Digest, Bankruptcy 2798

**Legal Encyclopedias**

C.J.S., Bankruptcy § 172
C.J.S., Bankruptcy §§ 176 to 177
C.J.S., Bankruptcy § 182

Subsections (o), (p), and (q) of section 522 curb perceived abuses of the homestead exemption. These subsections apply to the debtor's homestead exemption even if the debtor's homestead choice is controlled by an opt-out state, thus significantly limiting the opt out. The court in In re Rensin, 600 B.R. 870, 889 (Bankr. S.D. Fla. 2019), concluded that the sections are "intended to work together." The debtor argued that when section 522(p) applied to property purchased within the 1,215 days preceding bankruptcy that section 522(o) was not applicable, but the court disagreed, holding that both sections 522(o) and (p) could apply. "Section 522(p) automatically limits the value of a homestead exemption where the home was acquired during the 1,215 days prior to the bankruptcy. Section 522(o) provides for a reduction in the homestead value claimed, including the capped homestead value when section 522(o) applies, where it is shown that the debtor used non-exempt assets to obtain value in a homestead with the intent to stymie creditors." Although the Florida home was acquired within the 1,215 days, the *Rensin* Court found that the debtor was not entitled to any Florida homestead exemption because of the application of section 522(o).

***10-year look-back for fraudulent transfers—Section 522(o)***

  

Subsection (o) enables the trustee to reduce the amount of an exemption by the amount that it might have increased as a result of efforts to defraud a creditor any time in the 10 years prior to the filing of the petition. 11 U.S.C.A. § 522(o) provides that:

> (o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—
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> (1) real or personal property that the debtor or a dependent of the debtor uses as a residence;
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> (2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
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> (3) a burial plot for the debtor or a dependent of the debtor; or
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> (4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;
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> 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 the 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 had held the property so disposed of.

Under section 522(o), prebankruptcy conversion of nonexempt assets to exempt assets is permissible as long as there was no intent to hinder, delay or defraud a creditor. See, for example, In re Wrobel, 508 B.R. 271 (Bankr. W.D. N.Y. 2014) (construing § 522(o), mere pre-bankruptcy conversion of non-exempt to exempt property is not sufficient for limitation of state homestead). Contrast In re Smither, 542 B.R. 39 (Bankr. D. Mass. 2015) (property was subject to reduction under section 522(o) to extent attributable to fraudulent conversion from nonexempt to exempt). See also § 8:2 for discussion of prebankruptcy conversion of assets.

The subsection is applied to limit a homestead only where there is actual intent to hinder, delay, or defraud. See In re Roberts, 527 B.R. 461 (Bankr. N.D. Fla. 2015); In re Corbett, 478 B.R. 62 (Bankr. D. Mass. 2012); In re Presto, 376 B.R. 554, 52 A.L.R. Fed. 2d 689 (Bankr. S.D. Tex. 2007). The trustee or objecting creditor bears the burden of proving the fraudulent intent. In re Coppaken, 572 B.R. 284 (Bankr. D. Kan. 2017) (judgment creditor satisfied burden of showing debtor's conversion of assets with requisite fraudulent intent); In re Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011) (trustee carried burden of showing intent to hinder, delay, or defraud creditors); In re Agnew, 355 B.R. 276 (Bankr. D. Kan. 2006); see also In re Sissom, 366 B.R. 677 (Bankr. S.D. Tex. 2007) (discussing elements of proof on actual intent). The burden of proof is preponderance of evidence. Wolters v. Lakey, 456 B.R. 687 (D. Kan. 2011); In re Cook, 460 B.R. 911 (Bankr. N.D. Fla. 2011). Construing section 522(o), the court in In re Maronde, 332 B.R. 593, 55 Collier Bankr. Cas. 2d (MB) 51, Bankr. L. Rep. (CCH) P 80394 (Bankr. D. Minn. 2005), stated some of the badges of fraud that the court may consider in passing on the debtor's intent to defraud a creditor:

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 of 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 lienor was transferred the assets to an insider of the debtor. *Maronde*, 332 B.R. at 600 (citing In re Northgate Computer Systems, Inc., 240 B.R. 328, 360–61 (Bankr. D. Minn. 1999)). The *Maronde* court reduced the debtor's homestead but also used the finding of fraudulent intent as a basis to find lack of good faith and denial of the Chapter 13 debtor's confirmation. See also In re Addison, 368 B.R. 791, Bankr. L. Rep. (CCH) P 80889 (B.A.P. 8th Cir. 2007), aff'd in part, rev'd on other grounds in part, 540 F.3d 805, 60 Collier Bankr. Cas. 2d (MB) 299, Bankr. L. Rep. (CCH) P 81298, 48 A.L.R. Fed. 2d 829 (8th Cir. 2008) (to determine whether debtor's eve of bankruptcy conversion of assets was effected with intent to hinder, delay, or defraud creditors, bankruptcy court appropriately used badge-of-fraud approach but erred in finding debtor's intent was such as to warrant the limitation of his exemption rights); In re Wilmoth, 397 B.R. 915, 61 Collier Bankr. Cas. 2d (MB) 463, Bankr. L. Rep. (CCH) P 81373 (B.A.P. 8th Cir. 2008) (section 522(o) did not change prior standard of determining fraudulent conversion of asset; it merely added 10-year look back); In re Lacounte, 342 B.R. 809, Bankr. L. Rep. (CCH) P 80653 (Bankr. D. Mont. 2005).

In In re Booth, 417 B.R. 820 (Bankr. M.D. Fla. 2009), the court held that the debtor did not commit any acts with the intent to hinder, delay, or defraud her creditors, therefore the Florida homestead exemption was allowed. The court stated:

> None of the traditional badges of fraud are present. She fully and credibly explained her actions.
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> The Debtor lives a modest lifestyle and had no financial problems until her daughter defaulted on the line of credit payments. She has no priority unsecured debts and she is current with her car payments. Her credit card debt is modest. Her credit card billing statements and Schedules reflect a history of responsible credit card use. She did not purchase luxury goods or take cash advances. She consistently paid her credit card bills. The balance of her Chase credit card was $351.56 when she incurred the home repair charges.
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> Even though the Debtor's income was decreasing in early 2009, her expenses were manageable. She was able to cover the first mortgage, her car and credit card payments, and living expenses. Her financial world collapsed with her daughter's disclosure of the line of credit default. The default was the tipping point, turning the Debtor's manageable financial situation to unmanageable. The Palmetto Road debt spiraled out of control. The economic crash made her situation desperate. Her business dwindled and Palmetto Road depreciated. The Debtor panicked. She made the best decisions she could under tremendous financial stress and without the benefit of comprehensive professional advice.

In re Booth, 417 B.R. 820, 825 (Bankr. M.D. Fla. 2009).

The Tenth Circuit Bankruptcy Appellate Panel in In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012), interpreted the statute's phrase "value of an interest in … real property" to refer to "the measure of the increase in monetary value of the economic interest in real property claimed as a homestead due to a fraudulent transfer of non-exempt funds into the property, rather than a title interpretation of the word 'interest.'" In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012). The BAP found no indication that Congress intended to change the view that "mere conversion of nonexempt property into exempt property, without fraudulent

intent, does not deprive the debtor of exemption rights in the converted property, … [with] the purpose of adding § 522(o) and § 522(p) in 2005 … to address the pre-BAPCPA 'mansion loophole' and to limit the value of homestead exemptions when there is fraud. This leads to our interpretation of § 522(o)—that the statute was enacted to prevent the fraudulent attempt to build up equity in a homestead." In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012). When there is no equity in the homestead property, "there is no value subject to reduction." In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012). The BAP affirmed the bankruptcy court's finding of no equity and overruling the trustee's objection to homestead exemption.

The Eighth Circuit Bankruptcy Appellate Panel stressed the importance of the word "attributable" in the statute, holding that where a debtor's alleged fraudulent conversion of non-exempt assets was used to make improvements to the otherwise exempt homestead, the homestead is not automatically reduced by the full amount spent on the improvements; rather, section 522(o) requires a showing of the extent to which the improvements actually increased the value of the homestead attributable to the conversion. In re Crabtree, 562 B.R. 749, Bankr. L. Rep. (CCH) P 83058 (B.A.P. 8th Cir. 2017). To prove this reduction, the Court stated:

> Where a debtor fraudulently converts nonexempt assets to make improvements to his homestead, a bankruptcy court must therefore determine both the value of the debtor's interest in the homestead with those improvements and the value of the debtor's interest in the homestead without those improvements. In most such cases, the difference will be the value of the debtor's interest in the homestead that is "attributable" to the improvements and thus the amount by which the value of the debtor's interest in the homestead must be reduced. The amount the debtor spent on the improvements is relevant only to the extent an appraiser might take it into account in valuing the homestead with the improvements.

*In re Crabtree,* 562 B.R. at 753–754.

Assuming a reduction in homestead is established for purposes of section 522(o), the question then becomes how a trustee realizes recovery of the reduction. The debtor may still have an exemption, but it is reduced under the statute to the extent attributable to fraudulent disposition. However, if all proceeds attributable to property disposed of in the 10-year period were tainted with fraudulent intent, the entire homestead exemption may be denied. See, e.g., In re Rensin, 600 B.R. 870 (Bankr. S.D. Fla. 2019). The court in In re Colliau, 552 B.R. 158 (Bankr. W.D. Tex. 2016), agreed with another decision from its district, holding that it would be appropriate to impose an equitable lien on the property, permitting the trustee to sell the property to recover the amount of the reduced homestead exemption. The *Colliau* debtors had claimed exemption in 100% of the fair market value, but that value was reduced by $11,156 under section 522(o), and the trustee would be allowed to sell the property to recover $11,156, and the court concluded that it had authority to issue an equitable lien under section 105(a). The court gave the debtors 90 days to satisfy the lien before the trustee could sell the property. See also In re Sissom, 366 B.R. 677 (Bankr. S.D. Tex. 2007) (applying an equitable lien under section 522(o)).

Section 522(o) applies only to exemptions claimed under subsection (b)(3)(A) and not to those allowable under (b)(3)(B), meaning that entirety or joint interests that are protected under state law are not subject to section 522(o)'s restrictions. In re Hinton, 378 B.R. 371 (Bankr. M.D. Fla. 2007).

Although Florida had traditionally taken a liberal stance as to allowing its homestead exemption, courts in that state have held that to the extent the Florida homestead conflicts with section 522(o), "by virtue of the Supremacy Clause, 11 U.S.C.A. § 522(o) preempts Florida's constitutional homestead exemption." In re Garcia, 2010 WL 2697020 (Bankr. S.D. Fla. 2010). Accord In re Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011).

  

***$170,350 cap on increase in homestead value acquired within 1,215 days of petition—Section 522(p)***

Subsection (p) limits the amount of the homestead that was acquired within 1,215 days of filing the bankruptcy petition. The amount in the statute is subject to automatic adjustment every three years, under 11 U.S.C.A. § 104, and the most recent adjustment took effect April 1, 2019. As will be discussed later, some controversy results from the language used in this subsection, referring to "electing" state or local exemptions, a distinction from prior subsection (o), which simply refers to any homestead exemption "for purposes" of section 522(b)(3)(A). Section 522(p) provides:

> (p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor 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 $170,350 in value in—
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> (A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
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> (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
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> (C) a burial plot for the debtor or a dependent of the debtor; or
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> (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.
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> (2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.
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> (B) For purposes of paragraph (1), any amount of such interest 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.

Section 522(p) is concerned with an "interest" acquired by the debtor during the 1,215-day period preceding the filing of the petition. The term "interest" has been interpreted to refer to equity in the homestead property, rather than title or ownership interests. In re Meguerditchian, 566 B.R. 102 (Bankr. D. Mass. 2017); Parks v. Anderson, 406 B.R. 79, Bankr. L. Rep. (CCH) P 81492 (D. Kan. 2009); see also In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012), agreeing with the *Parks* interpretation of "interest" and applying it in section 522(o). The *Meguerditchian* Court found that the word "interest" appears in subsections (p)(1) and (p)(2)(B), and while not "expressly defined" in the statute, in section 541(a)(1) it is clear that the "interests of the debtor in property" of the bankruptcy estate can be "solely equitable in nature." In re Meguerditchian, 566 B.R. at 109. That Court further concluded that section 522(p)(1)'s reference to "interest" is in the context of "something quantifiable," with a focus of economic value, "and there is nothing unusual about speaking of an 'amount of' equity." In contrast, "it would be strange to speak of someone having an 'amount of' title, so title sits uneasily with subsection (p)(1) in this respect." In re Meguerditchian, 566 B.R. at 110. Going further, that Court found subsection (p)(2)(B)'s reference to transfer of an "interest" from one residence to another to "rule out any definition of 'amount of interest' that reduces it to title." Equity in one residence can be transferred to another, but title in one residence cannot be transferred into another residence. *In re Meguerditchian,* 566 B.R. at 110. That court also found that "the majority position is by far the more persuasive, that 'interest' in § 522(p) is plain in meaning and can only mean equity." *In re Meguerditchian,* 566 B.R. at 110.

  

Other courts have adopted a "title" interpretation of "interest." See cases cited in In re Willcut, 472 B.R. 88, 67 Collier Bankr. Cas. 2d (MB) 1636, Bankr. L. Rep. (CCH) P 82272 (B.A.P. 10th Cir. 2012), and see discussion below of interpretations of acquisition of the "interest."

If the debtor acquired the interest prior to the 1,215-day period, subsection (p) does not apply. While it may appear straightforward, application of the statute depends upon the facts and underlying state law. For example, the term "acquired" was interpreted by one court applying Minnesota law to mean that delivery of a deed and the debtor's acquisition of the property occurred when the conveying father instructed his attorney to record the deed, not at the time of the father's execution of the deed. Since the deed was recorded within the 1215-day period, section 522(p) applied. In re Bruess, 539 B.R. 560 (B.A.P. 8th Cir. 2015).

Section 522(p) was applied to limit the debtor's homestead where:

- The debtor partitioned community property with fraudulent intent to avoid the cap of section 522(p), resulting in the non-debtor spouse being limited to what she could recover under the debtor's capped homestead. Matter of Wiggains, 848 F.3d 655, 77 Collier Bankr. Cas. 2d (MB) 511 (5th Cir. 2017).

- The debtor had lived in the home for more than a decade prior to the petition date but only acquired legal title within 1,215 days of the petition date. In re Aroesty, 385 B.R. 1, Bankr. L. Rep. (CCH) P 81216 (B.A.P. 1st Cir. 2008). But compare In re Peake, 480 B.R. 367 (Bankr. D. Kan. 2012)(distinguishing Aroesty).

- The debtor acquired the property more than 1,215 days prior to commencement of the bankruptcy case, but, less than three months before filing for bankruptcy, converted nonexempt assets of $240,000 to pay the mortgagee significantly increasing the equity in the residence. Parks v. Anderson, 406 B.R. 79, Bankr. L. Rep. (CCH) P 81492 (D. Kan. 2009).

- The debtor acquired the interest in his residence, within section 522(p)'s meaning, when he conveyed the property to a trust of which he was the trustee. In re Stella, 470 B.R. 1 (Bankr. D. Mass. 2012).

- The debtor acquired the property more than 1,215 days prepetition but only began to use it as a homestead within the 1,215 days. However, on appeal, the court reversed, holding that debtor's acquisition of ownership interest outside of 1,215-day period protected his homestead exemption from monetary cap. In re Greene, 346 B.R. 835, 56 Collier Bankr. Cas. 2d (MB) 627, Bankr. L. Rep. (CCH) P 80798 (Bankr. D. Nev. 2006), subsequently aff'd in part, rev'd on other grounds in part, 583 F.3d 614, 62 Collier Bankr. Cas. 2d (MB) 829, Bankr. L. Rep. (CCH) P 81596 (9th Cir. 2009).

- The spouses transferred homestead property between themselves within 1,215 days, with fact that they continually resided there not overcoming effect of transfer. In re Gentile, 483 B.R. 50 (Bankr. D. Mass. 2012).

- The debtors acquired the property within section 522(p)'s coverage when the prior conveyance was in fraud of creditors, and re-conveyance was within statutory time period. In re Dickey, 517 B.R. 5 (Bankr. D. Mass. 2014).

Section 522(p) was not applied to limit the debtor's homestead where:

- Under Nevada law, the debtor had sufficient beneficial and equitable interest in the property as homestead prior to transfer of legal title within the 1215 days from a limited liability company, so that section 522(p)(1) did not apply. In re Caldwell, 545 B.R. 605, Bankr. L. Rep. (CCH) P 82932 (B.A.P. 9th Cir. 2016).

- Section 522(p) was a limitation on the debtor's homestead exemption but did not convert a pre-bankruptcy unenforceable judgment lien, under Texas law, into an enforceable lien against the homestead. In re McCombs, 659 F.3d 503, 66 Collier Bankr. Cas. 2d (MB) 873, Bankr. L. Rep. (CCH) P 82086 (5th Cir. 2011).

- The debtor had inherited the property more than 1,215 days prepetition, although she had begun to occupy the property as a homestead within the 1,215-day period. In re Rogers, 513 F.3d 212, Bankr. L. Rep. (CCH) P 81081 (5th Cir. 2008).

  

- The objecting creditor failed to prove that the debtor acquired an interest in the homestead within 1,215 days before filing bankruptcy. In re Migell, 569 B.R. 918 (Bankr. M.D. Fla. 2017).

- The trustee failed to prove that the debtor acquired equity in the homestead in excess of section 522(p)'s cap. In re Schreiber, 466 B.R. 903 (Bankr. S.D. Tex. 2012).

- The debtor acquired the property more than 1,215 days prior to commencement of the bankruptcy case, although the debtor did not designate the property as a homestead until within the 1,215-day look-back period. In re Reinhard, 377 B.R. 315 (Bankr. N.D. Fla. 2007).

- The debtor acquired the property more than 1,215 days prior to commencement of the bankruptcy case, although the debtor did not establish residency by moving a recreational vehicle and tent onto the property until within 1,215-day period. In re Greene, 583 F.3d 614, 62 Collier Bankr. Cas. 2d (MB) 829, Bankr. L. Rep. (CCH) P 81596 (9th Cir. 2009).

- The debtor moved from a larger to a smaller home the debtor already owned. In re Jones, 397 B.R. 765 (Bankr. D. S.C. 2008).

- Under Kansas law, debtor may claim residential exemption in equitable interest in land, and transfer of legal title to self-settled trust and subsequent transfer back to debtor within 1,215 days did not trigger section 522(p). In re Peake, 480 B.R. 367 (Bankr. D. Kan. 2012) (distinguishing In re Aroesty, 385 B.R. 1, Bankr. L. Rep. (CCH) P 81216 (B.A.P. 1st Cir. 2008), based on difference in Massachusetts and Kansas law).

Another question under section 522(p) is whether the term "interest acquired" includes equity that accrues on the homestead within the 1,215 days. In re Blair, 334 B.R. 374, Bankr. L. Rep. (CCH) P 80415 (Bankr. N.D. Tex. 2005), considered this, distinguished "equity" from "interest," and held that subsection 522(p) does not apply to equity gained as a result of appreciation within the 1,215-day period; see also In re Sainlar, 344 B.R. 669, Bankr. L. Rep. (CCH) P 80712 (Bankr. M.D. Fla. 2006) (same). In Blair, the Chapter 7 debtors also continued to make mortgage payments while the case was pending, improving the equity value. These courts essentially found "interest" to mean an ownership interest, not the accumulation of equity gained after ownership was acquired; since the ownership was acquired outside the 1,215-day period, section 522(p) was not triggered. In what may foretell more case authority on this subject, another court concluded that the statute's term "interest" did encompass equity acquired during the 1,215-day period. In re Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006). In *Rasmussen*, the court's analysis focused on the term "acquired by the debtor," concluding that what the statute contemplated was the debtor's acquisition of an interest by active means, including purchase, making a down payment, or paying down a mortgage. In contrast to these "active" acquisitions, accumulating equity is, according to that court, a "passive" acquisition, and the court held that appreciation of equity by mere increase in market value was not an acquisition "by the debtor." While this is a thoughtful distinction, in an appropriate cases, it could be argued that a debtor acquired equity by knowingly, "actively" purchasing property, albeit outside that 1,215-day period, that the debtor knew would increase substantially in value, including during the 1,215 days. To find a debtor's "active" role in gaining equity may not be that difficult in the right case, and it is predictable that the *Rasmussen* rationale will be seen in new attacks by trustees on homesteads with equity issues. See In re Chouinard, 358 B.R. 814 (Bankr. M.D. Fla. 2006) (following *Rasmussen*'s passive market increase approach). The Fifth Circuit avoided adoption of a strict "title" or "equity" approach to section 522(p), holding that the debtor's Texas homestead exemption was limited by that statute when proof established that appreciation in value to the property within the 1,215 days pre-bankruptcy was attributed to actual improvements to the property, constituting "actively acquired home equity." In re Fehmel, 372 Fed. Appx. 507 (5th Cir. 2010).

In the *Meguerditchian* case, discussed above in the context of "equity," a trustee argued that section 522(p)'s cap should apply when it was alleged that the debtor acquired "equity" within the 1,215 days by rolling over the proceeds from sale of a previous residence to pay down a mortgage on the present homestead. The court concluded that section 522(p)(2)(B) protected this type of acquisition of equity, excluding from the statutory cap such amount of interest "transferred from a debtor's previous principal residence into the debtor's current principal residence. Notably, this subsection requires only a transfer 'into the debtor's current principal residence'; it does not require that the transfer have funded the acquisition of the current form of title of the current principle residence." *In re Meguerditchian,* 566 B.R. at 116. That court found the only other case directly addressing the issue

  

to be In re Welch, 486 B.R. 1 (Bankr. D. Mass. 2013), and the *Meguerditchian* Court concluded that *Welch* "stands for the proposition that a simple change in the form of title to equity that a debtor already owns is not an acquisition of interest within the meaning of subsection (p)(1)." *In re Meguerditchian,* 566 B.R. at 117. Although the issue was raised on appeal in In re Khan, 375 B.R. 5, Bankr. L. Rep. (CCH) P 81024 (B.A.P. 1st Cir. 2007), the *Meguerditchian* Court found that it was not decided. In re Meguerditchian, 566 B.R. at 117.

The same court that had decided *Welch* applied section 522(p)'s cap when a debtor actively acquired his entire equity ownership within the 1,215 look-back period. In re Zakarian, 570 B.R. 680 (Bankr. D. Mass. 2017). In that case, the Chapter 7 debtor had been the trustee of a trust of which his wife was beneficiary, with the debtor having no beneficial interest in the property under that trust, but the trust conveyed the property to the spouses as tenants by entirety within the 1,215 days before the husband filed bankruptcy. The court concluded that the debtor actively acquired his equity interest and his homestead exemption was capped.

It has been held that the trustee may not keep the case open to wait for the value of the homestead to appreciate in value so that the trustee could potentially recover value above section 522(p)'s statutory cap. In re Colliau, 552 B.R. 158 (Bankr. W.D. Tex. 2016). That court held that the "snapshot rule," which had been reaffirmed by the Fifth Circuit in In re Brown, 807 F.3d 701 (5th Cir. 2015), required that "exemptions are determined by the law and facts as they exist on the petition date and that they do not change due to subsequent events." *Colliau,* 552 B.R. at n. 24 (citing cases on "snapshot rule").

Since some states have opted out of the federal exemption scheme and mandate the debtor's use of state law exemptions, while other states permit the debtor to elect whether to claim exemptions under federal or state law, the question has arisen as to whether subsections (p) and (q), which both use the term "electing," apply both in opt-out states and in non-opt-out states. Most courts agree that the cap on homesteads fixed by section 522(p) applies in every state, whether or not the state has opted out of the federal exemptions. In In re Wayrynen, 332 B.R. 479, Bankr. L. Rep. (CCH) P 80391 (Bankr. S.D. Fla. 2005), the court held that the phrase in subsection (p), "as a result of electing under subsection (b)(3)(A) to exempt property under State or local law," could not be interpreted to make the provision applicable only to debtors in states where a debtor may elect between federal and state schemes but not in states where the debtor has no choice other than the state scheme. "The gravamen of § 522(p)(1) is to limit the ability of individuals desiring to take advantage of the lenient exemption provisions of 'debtor-friendly' states by relocating to such states." *Wayrynen*, 332 B.R. at 486. Again, in In re Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005), the court held the provision to apply in both opt-out and non-opt-out states. Agreeing that the caps applied in opt-out states, another court, in In re Summers, 344 B.R. 108 (Bankr. D. Ariz. 2006), held that the caps did not permit debtors to increase the effective state-law homestead. See also In re Kaplan, 331 B.R. 483, 54 Collier Bankr. Cas. 2d (MB) 1676 (Bankr. S.D. Fla. 2005); In re Landahl, 338 B.R. 920, Bankr. L. Rep. (CCH) P 80514 (Bankr. M.D. Fla. 2006); In re Kane, 336 B.R. 477, 55 Collier Bankr. Cas. 2d (MB) 1148, Bankr. L. Rep. (CCH) P 80492 (Bankr. D. Nev. 2006); In re Greene, 346 B.R. 835, 56 Collier Bankr. Cas. 2d (MB) 627, Bankr. L. Rep. (CCH) P 80798 (Bankr. D. Nev. 2006), subsequently aff'd in part, rev'd on other grounds in part, 583 F.3d 614, 62 Collier Bankr. Cas. 2d (MB) 829, Bankr. L. Rep. (CCH) P 81596 (9th Cir. 2009); In re Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006).

So far, in only one reported case has the court held that section 522(p)'s cap does not apply to debtors in opt-out states. In re McNabb, 326 B.R. 785, 54 Collier Bankr. Cas. 2d (MB) 750, Bankr. L. Rep. (CCH) P 80333 (Bankr. D. Ariz. 2005) (rejected by, In re Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006)). In this case, the court held that the Code's homestead cap applies only in non-opt-out states. The court rather reluctantly found the statute's "plain meaning" of the phrase in subsection (p), "as a result of electing under subsection (b)(3)(A) to exempt property under State or local law," to compel the application of the statute only to debtors who may choose between federal and state exemptions, not to debtors in states allowing only state exemptions. In its criticism of the *McNabb* holding, the court in In re Kaplan, 331 B.R. 483, 54 Collier Bankr. Cas. 2d (MB) 1676 (Bankr. S.D. Fla. 2005), noted that "[m]ore than two-thirds of the states have opted out of the federal exemptions and, if *McNabb* is followed, these new caps would only apply in Texas and Minnesota, not in states like Arizona or Florida, in which debtors must utilize state exemptions." *Kaplan*, 331 B.R. at 484.

  

In view of the specific language "electing," it is somewhat surprising that only the *McNabb* court reached this result. At this point, no appellate court has spoken on the issue, which future editions of this manual will continue to follow. For further examination of the new sections 522(o), (p), and (q), see Howard, Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost, 79 Am. Bankr. L.J. 397, 402 (2005) (available on Westlaw).

The meaning of section 522(b)(1)'s "election" was an issue in In re Connor, 419 B.R. 304 (Bankr. E.D. N.C. 2009), discussed previously in §§ 3:9 and 4:6. In *Connor*, the court held that when one joint debtor was not eligible for a state-law exemption, but the other joint debtor was, the noneligible debtor was forced to use section 522(d) exemptions under section 522(b)(3)'s domiciliary requirements; therefore, no "election" was made by that debtor, resulting in the husband and wife using different exemption schemes. The *Connor* court did not discuss the *McNabb* or other court's discussion of election in the context of section 522(p).

Since joint debtors are each entitled to their exemptions, joint debtors may stack their capped homestead exemptions. See In re Nestlen, 441 B.R. 135, Bankr. L. Rep. (CCH) P 81915 (B.A.P. 10th Cir. 2010) (statutory cap of section 522(p) was doubled in joint case filed by spouses); In re Limperis, 370 B.R. 859 (Bankr. S.D. Fla. 2007) (where the homestead exemption was unlimited as to value under Florida law but was limited by the section 522(p) cap to $125,000 (now $170,350) as to each debtor for residential property acquired during the 1,215-day period, joint Chapter 13 debtors' were entitled to stack their Florida homestead exemptions in the maximum amount of $250,000).

***$170,350 cap on homestead value where fraud or crime involved—Section 522(q)***

Like subsection (p)'s reference to "electing" state or local exemptions, subsection (q) limits the amount of the homestead to $170,350 if fraud or criminal activity was involved in its acquisition. The amount in the statute is subject to automatic adjustment every three years, under 11 U.S.C.A. § 104, and the most recent adjustment took effect April 1, 2019. 11 U.S.C.A. § 522(q) provides:

> (q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $170,350 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 provisions of this title; 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), any 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 1934 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 five years.

  

> (2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

One court has interpreted this subsection in the context of what is required to meet the "criminal act" element of section 522(q)(1)(B)(iv). In re Larson, 340 B.R. 444, Bankr. L. Rep. (CCH) P 80511 (Bankr. D. Mass. 2006), opinion aff'd, Bankr. L. Rep. (CCH) P 80951, 2007 WL 1444093 (D. Mass. 2007), aff'd, 513 F.3d 325, 59 Collier Bankr. Cas. 2d (MB) 90, Bankr. L. Rep. (CCH) P 81109 (1st Cir. 2008). In Larson, the debtor had not been "convicted" in the sense of going to trial and having a jury verdict of guilty; rather, the debtor had been involved in an automobile accident resulting in death of another driver. She was charged with vehicular homicide, and she entered into a pretrial diversion under which she was placed on probation. The state judge had, however, made findings sufficient to establish guilt of the vehicular homicide, for which a civil judgment had also been entered in the amount of $1 million. The bankruptcy court determined that the state court findings were sufficient to constitute a "criminal act" under section 522(q). A further hearing was required, however, to determine the extent to which the debtor might need the claimed homestead in excess of the cap for her "reasonably necessary support." 11 U.S.C.A. § 522(q)(2). For interpretation of "reckless misconduct" see In re Burns, 395 B.R. 756 (Bankr. M.D. Fla. 2008). See also In re Bounds, 491 B.R. 440 (Bankr. W.D. Tex. 2013), concluding that proof of an increased amount reasonably necessary must be by preponderance of evidence and finding that the debtor failed that burden.

The combination of the look-back period, the issues raised by extraterritorial use of state exemptions, and the possible applications of subsections 522(o), (p), or (q) raise an unknown number of possible scenarios. To illustrate the difficulty of determining the applicable law and the effect of these subsections, here is just an example of one of endless potential fact variations:

> A Tennessee businessman left his business partnership after a conflict with his former partners. This conflict resulted in extensive litigation and the risk of a judgment in the amount of $5 million. The businessman liquidated his real estate and other liquid assets in Tennessee where his homestead exemption would be $5,000 (or $7,500 in a joint filing). The assets were liquidated after first transferring them to his wife's name. They moved on January 1, 2005, to the state of Florida where they acquired a home with $500,000 equity.

Assuming that the former business partners succeed in obtaining an overwhelming judgment, the debtor has several difficult choices:

- If he files within two years (730 days) after moving his domicile to Florida, his homestead exemption will be capped at the amount of the Tennessee limit ($5,000/$25,000). If Tennessee, like some states, prohibits nonresidents from using its rules, he may be governed by the federal exemption scheme, with its $25,150 homestead. 11 U.S.C.A. § 522(d)(1).

- If he files more than two years but less than three years and four months (1,215 days) after acquiring the Florida home, the (otherwise unlimited) Florida exemption will be capped at $170,350. 11 U.S.C.A. § 522(p).

- If he files more than 1,215 days after acquiring the house but within 10 years and if the value in the house can be found to be attributable to the disposition of property with intent to hinder, delay, or defraud a creditor, all or such attributable part of the homestead exemption may be set aside. 11 U.S.C.A. § 522(o).

  

Footnotes

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|---|---|
| a0 | United States Bankruptcy Judge, Western District of Tennessee |
| a1 | of the Tennessee Bar |
| a2 | of the Tennessee Bar |