

## **PROGRAM SUMMARY 10-9-2021**

By: Gary R. Wallace-Program Summary Committee Chair

### **CDCBAA Holds Ninth Meeting and MCLE Program of 2021: “MIND YOUR Ps AND Qs (AND Os): THE 522 (HOMESTEAD) EXEMPTIONS.”**

On October 9, 2021, the CDCBAA held its ninth members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. The program topic was: “MIND YOUR Ps AND Qs (AND Os): THE 522 (HOMESTEAD) EXEMPTIONS.” The distinguished panel consisted of Brandon J. Iskander of Shulman Bastian Friedman & Bui LLP, and Derek W. May of the Law Offices of Derek W. May. CDCBAA President Hale Antico moderated.

Mr. Iskander began the discussion by noting that a motion under 11 U.S.C. Section 522(o) is a very serious matter for a debtor because it can be a “knockout blow” for an exemption. The *prima facie* elements of a fraudulent transfer claim under 522(o) are: (1) an increase in the value of the debtor’s homestead; (2) the increase is attributable to the disposition of nonexempt assets; (3) the disposition was made with an intent to delay, hinder or defraud a creditor; and (4) the disposition occurred during the ten-year period ending on the date the debtor’s bankruptcy petition was filed. See *In re Stanton*, 457 B.R. 80, 91 (Bankr. D. Nev. 2011).

Mr. Iskander further noted the importance of understanding that, while the intent element requires a showing of actual rather than mere constructive fraud, actual intent can nonetheless be established by circumstantial evidence or inferences drawn from a course of conduct. *In re Devers*, 759 F.2d 751, 753-754 (9<sup>th</sup> Cir. 1985). The panel pointed out that the passage of time relative to the filing and the existence of creditors is nearly always a relevant factor in the determination of the intent element in these cases. Procedurally, an objection under section 522(o) is recognized as a contested matter. But it can also be part of an adversary proceeding to deny discharge under the related section 727(a)(2).

Messrs. Iskander and May then discussed section 522(p), which limits the homestead when the debtor’s interest in exempt real property is acquired within 1215 days before the petition date. They noted that this subsection was enacted as part of the BAPCPA amendments primarily to address the so-called “mansion loophole” by which wealthy individuals could shield millions of dollars from creditors by filing bankruptcy after converting nonexempt assets into expensive and exempt homesteads in a state that offers unlimited homestead exemptions. It was noted that, in the Ninth Circuit, the debtor’s move-in date for a property that he/she already owned more than 1215 before filing is irrelevant to the 522(p) analysis. See *In re Greene v. Savage (In re Greene)*, 583 F.3d 614, 624 (9<sup>th</sup> Cir. 2009). Also, the transfer within 1215 days of filing from a limited liability company controlled by the debtor into a trust settled by the debtor does not suffice for 522(p). See *Caldwell v. Nelson*, 545 B.R. 605 (9<sup>th</sup> B.A.P. 2016). However, it is unclear under present law in the Ninth Circuit whether the term “interest” includes an equitable interest rather than legal title.

Finally, the panel briefly discussed section 522(q)'s less commonly used limitation on the exemption due to misconduct by the debtor in a prior bankruptcy filing. This subsection concerns debtors who have been convicted of felonies or violations of federal securities laws.

Participants were encouraged to ask questions and partake in several polls during the discussion, which the zoom technology permits them to do remotely.

An extremely helpful outline that contains pertinent statutory language and summaries of many cases, was provided to all registered participants.

The next CDCBAA members meeting and Zoom MCLE program will be held on January 29, 2022. The topic will be "16th Annual Review of 9th Circuit Decisions on Bankruptcy in 2021." Our panelists will include Hon. Deborah Saltzman, U.S. Bankruptcy Court - Central District of California, Hon. Scott Gan, U.S. Bankruptcy Court - District of Arizona, and Ninth Circuit Bankruptcy Appellate Panel, and our own M. Jonathan Hayes, Resnik Hayes Moradi, LLP. We hope you will join us.



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