

Can I keep all my assets if I file bankruptcy? (Part 3)

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In prior posts (2 November 2011 and 3 December 2011) we addressed this general topic; whether you can keep all your assets even after you file bankruptcy, which is asked by all those contemplating filing. The focus was on when you would be absolutely sure you would not lose the asset. As we discussed, you can always file (in conjunction with claiming your exemptions) and then see what happens. As long as the assets were properly listed, you can wait until your case closes, the time of certainty. But since ending the discussion there is not responsive (or very fun), we discussed some ways a debtor may attain certainty sooner than when the case closes. One of those ways we discussed was to attempt to exempt “100% of FMV (fair market value)” of an asset, even when the exemption provides a fixed (maximum) dollar amount. We now update and add to our earlier comments on the propriety of making such an exemption claim with a current event.

It is a recent decision of the Bankruptcy Appellate Panel for the First Circuit on this issue titled *In re Massey* decided on 27 February 2012 (BAP No. MW 11-060). The decision runs through prior decisions from local bankruptcy courts and throughout the country on this issue and concludes “[w]e agree with the consensus which has emerged from the foregoing cases that the Debtors’ exemption claim of “100% of FMV” was facially invalid.” It also rules that an evidentiary hearing in the bankruptcy court, which is typically held after an initial nonevidentiary hearing, was not required or necessary. This means the Bankruptcy Appellate Panel believes the issue can properly be decided without the bankruptcy court having to consider any particular facts. Quite to the point the court concluded there was “no legitimate reason [to claim the 100% of FMV exemption].”

This legal controversy stems from differing opinions on the proper interpretation of *Schwab v. Reilly* which is an opinion of the United States Supreme Court that discusses the 100% of FMV exemption. 130 S. Ct. 2652, 2668 (2010). *Schwab v. Reilly* was mentioned in our prior posts; those wanting to delve into this issue in more depth should read it.

Keep in mind, *In re Massey*, like other decisions issued by the Bankruptcy Appellate Panel, is not binding on other cases. It is also too soon to know whether *In re Massey* will be appealed to a higher court. However, it indicates that the legal position of claiming “100% of FMV” may not win the day in the end. At this time, although still far from settled and the final tally is not in, so to speak, the position of claiming a 100% of FMV exemption certainly looks an underdog. For those having studied this evolving issue and take the opposing view, *In re Massey* begs the question why Justice Thomas

even discussed the “100% of FMV” exemption claim in *Schwab v. Reilly*, seemingly as a legitimate legal position to take.

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