



# THE SUFFOLK LAWYER

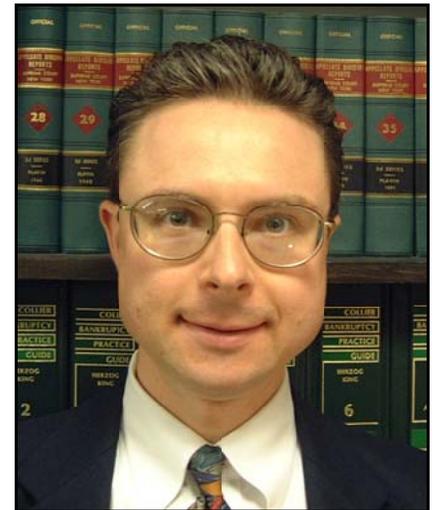
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## CONSUMER BANKRUPTCY

### Surprise Law Enactment – Homestead Exemption Increased

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For the very first time in the 15 years that I have been writing articles on bankruptcy law, I found it necessary to pull the article that I had just submitted because of some major late-breaking news that will immediately affect all consumer bankruptcy practitioners.

**The New Exemption is \$50,000.** On September 6, 2005, Governor George Pataki signed into law an amendment to the existing New York homestead exemption statute boosting the homestead exemption from \$10,000 to \$50,000. This new law came as a total surprise to the bankruptcy bar with

virtually no warning of any kind. This change will have a far-reaching impact on local bankruptcy practice, especially over the next five weeks, at which time the federal bankruptcy laws will drastically change on October 17, 2005. The new exemption will be an incredible boon for many home owners who previously could not consider Chapter 7 because of the built-up equity in their homes.

The amended statute is identical to the prior statute with the exception that the amount of the exemption has changed. Accordingly, it is reasonable to assume that just as now, a husband and wife filing jointly can double

their exemption for a total of \$100,000.

**History of the Prior \$10,000 Exemption.** The prior \$10,000 exemption statute contained in C.P.L.R. section 5206 was enacted some 28 years ago in 1977 at a time when the typical Long Island home was worth about \$40,000 to \$50,000. Despite several real estate booms and the effects of years of inflation, the 1977 exemption was never increased.

Senator Vincent Leibell who sponsored the bill, stated in his memo in support of the amendment, that the \$50,000 amount was a much more realistic figure and that the

previous amount of \$10,000 was so low that it was tantamount to having no exemption at all.

Apparently, the New York State legislature has for years regularly proposed legislation seeking to increase the homestead exemption. However, such legislation was routinely rejected or ignored in the Republican-run Senate, according to information in a New York Law Journal article. Since such legislation never made any progress over the course of a decade, the bankruptcy bar stopped paying attention many years ago.

**Practical Tips.** Consumer bankruptcy practitioners will have to immediately review all pending cases. The following are some practical tips to consider:

**Immediately Re-Evaluate All Open Files.** In all pending cases involving debtors with real estate where you have not yet filed the petition, you will need to re-analyze the effects of the new exemption to determine whether Chapter 7 will now be a feasible alternative to Chapter 13. In addition, you may have previously turned away some clients because the small \$10,000 exemption was insufficient at the time to make a bankruptcy filing workable. You should quickly contact these clients and have them come in again

**Re-Examine All Chapter 13 Cases That Have Not Been Discharged.** Even if you filed a Chapter 13 case several years ago, it may be possible to convert the case to one under Chapter 7, thereby enabling the debtor to stop having to make any further plan payments. However, you would need to be mindful of the good faith issues involved with Code section 707(b). In other words, if elimination of the monthly plan payment from the budget results in a significant increase in disposable income, then the United States Trustee can theoretically argue that the debtor should instead remain in Chapter 13.

However, many debtors supplemented their income in Chapter 13 with either second jobs or contributions from family members in order to have sufficient funds to pay into the plan. These situations would probably call for conversion to Chapter 7, assuming that equity was within the new exemption amount.

**Consider Amending the Schedule of Exemption in Certain Recently-Filed Cases.** If you recently filed a Chapter 7 real estate case in which the trustee has taken the position that there may be non-exempt equity in a home, or if you filed a Chapter 13 case in which the amount of plan payments are based on the amount of equity in the home, consider amending the schedule of exemptions to provide for the new amount. The ability of debtors to do this will most certainly be tested with litigation. The issue is whether a debtor can amend the exemptions post-petition to take advantage of the new exemption. Theoretically, a debtor can amend the schedules at any time while the case is pending. However, trustees will certainly litigate this issue. The answer as to whether amending the exemption schedules would be successful is up in the air, but would probably be worth the effort considering the amounts involved

**Rush, Rush, Rush to File Those Petitions!** The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," also known as S. 256, is the new federal law that will go into effect on October 17, 2005, making filing for bankruptcy relief much more difficult. The new law imposes a strict means test and has many other onerous and burdensome requirements. You will certainly want to file before the new law becomes effective. After that date, many potential debtors who could have taken advantage of the new homestead exemption by filing for Chapter 7 may instead be required to file Chapter 13 because of the

means test.

**Next Month.** In this column I had intended to discuss some of the issues that you will have to confront when the bankruptcy laws change on October 17, 2005. You will be able to read about that next month.

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*Editor's Note (revised 2008):  
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