

## Will I be able to keep all of my assets if I file for chapter 7 bankruptcy? (Part 2)

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As stated in the prior blog posted on 2 November 2011, we are addressing a debtor's ability to keep his assets upon the filing of a chapter 7 bankruptcy. We stated that once the case is filed, generally your assets become part of the bankruptcy estate and are subject to liquidation. We also stated that once the case is over, whatever asset declared that was not liquidated now is the debtor's again. So we know the date when uncertainty begins, and we know the date that certainty arrives. But how can a debtor have more assurance while the case is still open? This is the question we address now.

There are only a few tactics to take. Initially, one must understand that there are exemption statutes that exempt an asset in its entirety, and other exemption statutes that only provide a (maximum) dollar amount. So, one way to increase the certainty you may retain an asset is to claim an exemption in the asset under an exemption statute that exempts the asset in its entirety. There is no magic here because there has to be such a statute that applies to the particular asset. Another way is to declare an exemption of "100% of FMV" under a statute, even if that statute has a maximum dollar amount. This way, the theory goes, if the trustee or someone else does not object, you are ensured 100% of the value of the asset even if there is a sale of the asset. Some people argue that if there is no objection that the asset itself is fully exempt and it cannot be sold. Either way, you are much more likely to keep the asset. The use of "100% of FMV" gained much attention when it was described, or some would say created, by the United States Supreme Court in its *Schwab v. Reilly* decision in 2010. 130 S. Ct. 2652, 2668 (2010).

However, the pro se debtor, or even experienced counsel, must beware. There are (presently) great dangers in claiming "100% of FMV." Some trustees recently seem to be taking the position that it is improper and objecting to it as a matter of course, despite its apparent endorsement by the United States Supreme Court. And the first group of cases that have been decided indicate that the trustees are winning that battle. (That means the debtor is losing.) The war is far from over though, and it is expected by this author and others that this legal conflict will be decided on the circuit level throughout the country within the next few years.

One may think that there may not be much downside to giving it a try and seeing if the trustee objects. Keep in mind that one significant detriment to drawing an objection is that the case remains open longer. This means the closing of the case and the time (of certainty) that a debtor is guaranteed to keep his assets is delayed, which is contrary to the debtor's initial goal.

In addition to the chance of drawing an objection from the trustee or someone else just on the basis of claiming "100% of FMV," the propriety of the exemption statute used, its maximum amount in relation to the value of the asset, and the case as a whole, are all given more attention. Although a debtor in bankruptcy pays the price of giving up his privacy and should have nothing to hide, it is still generally not a good move to cause more scrutiny of your exemptions, and your case overall, when in bankruptcy. So, this raises the question of whether it is worth it to claim "100% of FMV." The answer to that question can really only be provided by a competent bankruptcy attorney who fully understands the benefits, and

if those benefits outweigh the risks, after having had the chance to assess the debtor's entire financial picture and his goals and desires.

One other tactic used in this overall topic of keeping assets in bankruptcy will be addressed in yet another post.

If you are contemplating bankruptcy and have an asset that is near and dear to you, or just want to know more about how to keep assets in bankruptcy, feel free to give us a call.

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