

NONRESIDENT ALIEN DEBTORS' EXEMPTION RIGHTS IN FLORIDA MAY EXCEED THOSE OF FLORIDA RESIDENT ALIENS AND FLORIDIANS

A recent decision by United States Bankruptcy Judge Robert A. Mark determined that federal exemptions, which are specifically opted out by Florida statute¹, are permitted to be used by nonresident aliens². *See In re Arispe*, 16 Fla. L. Weekly Fed. B 28 (Bankr.S.D.Fla. 2002), 2002 Bankr. LEXIS 1475.³ Before Judge Mark's decision, It was known that Florida residents were prohibited from utilizing the federal exemptions. After Judge Mark's decision, it is known that nonresident aliens of Florida can only utilize federal exemptions and Florida residents can only use Florida exemptions.

At first blush, this decision would not appear to be dramatic. Florida has received great recognition of being a haven for debtors because of recent Florida decisions which prohibit creditors from attacking large homesteads — even the homes of criminals.⁴ The homestead protection has recently evolved and persons can now convert nonexempt assets into a Florida homestead by moving away from their state and becoming a Florida resident after the creditors had begun chase.⁵ The conversion of the fleeing-out-of-state debtor's money into the Florida homestead was adjudicated not to be an act of fraudulent conversion⁶ which would prohibit the exemption from being defeated.⁷ This culminated with a bankruptcy court's decision to allow the exemption even though there was intent to hinder and delay and defraud creditors.⁸ That decision was appealed and ultimately delivered to the Eleventh Circuit, which directed the matter to the Florida Supreme Court.⁹ The Florida

Supreme Court determined that the Florida homestead exemption is nearly sacred and permitted the homestead exemption to prevail, even if the homestead was created to hinder, delay and defraud creditors.¹⁰

Until recently, numerous decisions entered by the bankruptcy courts and federal district courts determined that nonresident alien debtors have no Florida homestead rights.¹¹ The nonresident alien received no exemptions for his or her real property. The nonresident alien debtor was determined not to have any Florida homestead right¹² because he or she has no "intent" to reside in Florida.¹³ In short, nonresident aliens and nonresident alien debtors hold lesser rights in their homestead than criminals or those who converted assets to hinder, delay and defraud their creditors. Nonresident alien debtors who owned large homesteads with equity, by paraphrasing Rodney Dangerfield, "got no respect" in the Florida circuit courts or bankruptcy courts.

The terms "resident" or "residency" become extremely difficult to differentiate with "domicile" or "domiciliary" when reviewing bankruptcy law and Florida law. A general definition of nonresident alien is merely a person allowed in the United States without a green card or work permit.¹⁴ But, the exemption rights of the "nonresident alien" are determined by the opt-out statutes of federal¹⁵ and Florida law,¹⁶ which respectively apply the opt-out statute to "domiciles" and "residents." Concentrating on these distinguishable terms of the statutes helps one to understand how the court concluded that the

nondomiciliary Arispe was not subjected to a bankruptcy clause which pertained only to domiciles of a state.¹⁷

Before *Arispe*, little could be protected from creditors for the nonresident alien debtor. In fact, trustees often argued that nonresident alien debtors received no exemptions, as they were not Floridians — who were alleged to be the only persons afforded the Florida statutory exemptions (which were deemed the only exemptions allowed in a Florida bankruptcy case). Such objections were raised under the interpretation of the term “resident” as used in the Florida statutes. The opt out statute of Florida¹⁸ precludes residents from utilizing federal exemptions.¹⁹ The trustee in the *Arispe* case objected to the debtor’s utilization of any exemption arguing that because Arispe was residing (as opposed to being domiciled) in Florida. The trustee concluded that Florida exemptions — the only exemptions allowed in Florida under the opt-out Fla. Stat. § 222.20 (1979) — could not be used by the debtor as Arispe did not have the requisite *residency* to utilize the Florida exemptions.²⁰

Arispe concentrated on the term “domicile” as used in the Bankruptcy Code. Arispe countered that the federal — as opposed to the state — exemptions applied by analyzing the federal statute. His argument found favor with the court.

In *Arispe*, Judge Mark describes the applicable Bankruptcy Code sections and how they are woven with the Florida statutes.²¹ Statutory interpretation

— as opposed to a review of case law — delivered the court to its conclusion. Interestingly, no case had been published on this issue in any state. In fact, the *Arispe* decision does not cite any case law to support its conclusion²². The United States Supreme Court has encouraged courts to enter opinions based upon what may be deemed clearly written statutory construction.²³ Distinguishing the term “resident” of Fla. Stat. § 222.20 from the term “domicile” of 11 U.S.C. § 522(b) was the court’s first analysis. The court chose not to read the opt out section of the Florida statutes which prohibits *residents* from utilizing the federal exemptions under 11 U.S.C. § 522(d)(1998) of the Bankruptcy Code. Instead, by reading a strict interpretation of the federal statute, Judge Mark concluded that 11 U.S.C. § 522(b)(2)(A)’s opt-out provision would not apply to a nonresident alien debtor as 11 U.S.C. § 522(b)(2)(A) only affects debtors who are *domiciled* in Florida (or any other state). Without a Florida or a U.S. domicile, nonresident alien debtors are not restricted by 11 U.S.C. § 522(b)(2)(A). As the court stated, “Since it is stipulated that the debtor was not domiciled in Florida or any state in the 180 days prior to filing the petition, § 522(b)(2)(A)’s deference to a state to opt-out is never initiated. As such, argues the Debtor, he is not subject to Florida’s Opt-Out Statute and is entitled to the Federal Exemptions.” *Arispe* at B 29. Judge Mark concluded by citing Collier’s treatise on bankruptcy that, “If no state’s law is applicable due to the debtor’s lack of domicile, the federal exemptions set forth in section

522(d) are still available.”²⁴

The *Arispe* decision was based upon the “domicile” language of 11 U.S.C. § 522(b) as opposed to the policies of the Bankruptcy Code. But, the court mentioned that it did not want any debtor to be treated as a “naked debtor” or someone prohibited from utilizing any exemption, federal or state. Judge Mark concluded that, “Congress provided an opportunity for these foreign citizens to seek relief in our bankruptcy courts. Surely Congress did not intend to deprive them of the right to exempt a portion of their assets.” *Arispe* at B 29.

The same conclusion could be found by concentrating on the term “resident” by merely negating the language of the Florida statute — Fla. Stat. § 222.20.²⁵ When negating the opt-out statute, one can conclude that parties who are not residents of Florida can exempt property through the federal exemptions. This is more easily explained by graphically altering Fla. Stat. § 222.20. The original statute reads as follows:

In accordance with the provisions of § 522(d) of the Bankruptcy Code..., *residents* of this state shall *not* be entitled to the federal exemptions provided for in § 522(d) of the Bankruptcy Code. [Emphasis added.]

By negating the subject noun and verb, or negate Fla. Stat. § 222.20, the changed language would read as follows for nonresident aliens:

In accordance with the provisions of § 522(d) of the Bankruptcy Code..., *nonresidents* of this state shall ~~not~~ be entitled to the federal exemptions provided for in § 522(d) of the Bankruptcy Code.

The Collier provision²⁶ relied upon by Judge Mark reaches the same conclusion as the negative interpretation of Fla. Stat. § 222.20 described above. The Collier provision does not explain how a nonresident alien located in an “opt-out state” can utilize federal exemptions. Collier merely concludes that the nonresident alien gets federal exemptions. Judge Mark clarified this conclusion by asserting that the lack of domicile prohibits the opt-out provision of 11 U.S.C. § 522(b)(2)(A) from being triggered. The negative interpretation of Fla. Stat. § 222.20 logically explains how a negative reading of the Florida “opt-out” statute delivers federal exemptions to nonresidents.

The result is that Florida bankruptcy practitioners will have to learn the federal exemptions for the rare nonresident alien client (who is now known not to be a Florida domicile). When a debtor has the right to utilize the federal exemptions, he or she has the capability of receiving greater exemption than those provided under Florida law. This is especially true for those who seek to protect tangible personal property, as opposed to real property or large intangibles like whole life insurance or well funded pension plans and IRA accounts.

A laundry list of the basic federal exemptions is listed in the box below.

Box 1

Subsection of 11 U.S.C. § 522(d)	Description	Amount Exempt \$
(1) ²⁷	real or personal property used by debtor or debtor’s dependents	17,425.00

(2) ²⁸	Motor vehicle (only one per debtor)	2,775.00
(3) ²⁹	Household furnishings	9,300.00
(4) ³⁰	jewelry	1,150.00
(5) ³¹	any other property from balance after not using all of (1)	8,725.00
(5)	aggregate interest in any property	925.00
(6) ³²	Professional books, tools of the trade, trade items	1,750.00
(7) ³³	Unmatured life insurance contract	ALL
(8) ³⁴	dividend, unmaturred interest, loan value of insurance	9,300.00
(9) ³⁵	Prescribed Health Aids	ALL
(10) ³⁶	Social Security or other public benefit	ALL
(10)	Veteran's benefit	ALL
(10)	disability, illness	ALL
(10)	Alimony, support . . .	ALL
(10)	pension, bonus etc <i>reasonably necessary for the support of the debtor any dependants of debtor</i> NOT: - made by insider of debtor or debtor - requiring payment to be on account of age or length of service - disqualified under IRC 401,403,408	?reasonable?
(11) ³⁷	Property traceable to reparation (criminal) law	ALL
(11)	life insurance payable to Debtor when Debtor is dependent of deceased	ALL
(11)	Wrongful death payment to Debtor when Debtor is dependent of deceased	ALL
(11)	Personal injury (not including pain and suffering) for actual pecuniary loss of the debtor or of dependant of debtor	17,425.00
(11)	A payment to Debtor or dependants of Debtor for loss of future earnings	ALL

The exemptions provided by the above-described federal exemption scheme recited under 11 U.S.C. § 522(d) differ radically from those of the

Florida statutes. A list of the most commonly used Florida statutory exemptions is described in the box below.

Box 2

Item Florida Statute	Description	Amount Exempt \$
Fla. Const. art. X, § 4 (1998)	real property used by debtor or debtor's dependents	ALL
Fla. Stat. § 222.25(1)(1993) ³	Motor vehicle (only one per debtor)	1,000.00
Fla. Const. art. X, § 4	Household furnishings, jewelry, Professional books, tools of the trade, trade items, aggregate interest in any other personal property	1,000.00
Fla. Stat. § 222.13(1955) ³⁹	Unmatured life insurance contract	ALL
Fla. Stat. § 222.13	dividend, unmaturred interest, loan value of insurance	ALL
Fla. Stat. § 222.25(2)(1993) ⁴	Prescribed Health Aids	ALL
42 U.S.C. § 407(1998) or Fla. Stat. § 222.201(1987) ⁴¹	Social Security or other public benefit	ALL
Fla. Stat. § 744.626(1997) ⁴² or Fla. Stat. § 222.201(1987)	Veteran's benefit	ALL
Fla. Stat. § 222.18 ⁴³ or Fla. Stat. § 222.201	disability, illness	ALL
Fla. Stat. § 222.201	Alimony, support . . .	ALL

Fla. Stat. § 222.21(1999) ⁴⁴ Fla. Stat. § 222.201	pension, IRA, plans for retirement bonus etc <i>reasonably necessary for the support of the debtor any dependants of debtor</i> NOT: - made by insider of debtor or debtor - requiring payment to be on account of age or length of service - disqualified under IRC 401,403,408	ALL — no test for reasonable in Fla. Stat. 222.21
	life insurance payable to Debtor when Debtor is dependent of deceased	NONE
	Wrongful death payment to Debtor when Debtor is dependent of deceased	NONE
	Personal injury (not including pain and suffering) for actual pecuniary loss of the debtor or of dependant of debtor	NONE
	A payment to Debtor or dependants of Debtor for loss of future earnings	NONE
Fla. Stat. § 222.22(2002) ⁴⁵	Prepaid Tuition	ALL
Fla. Stat. § 222.11(1993) ⁴⁶	Wages of head of household in account less than 6 months	ALL

When filing a bankruptcy on behalf of a nonresident alien debtor, counsel can actually increase the amount exempted and prohibit the trustee from gathering assets for the estate so long as the three most commonly gluttonous exemptions are not possessed by the debtor: the homestead, the pension/IRA and the life insurance policy. The homestead is impenetrable or nearly impenetrable in the state of Florida.⁴⁷ However, a nonresident alien's exemption for the same property is limited to \$16,150.00.⁴⁸ A life insurance contract with a loan value could often exceed \$100,000.00 for the affluent debtor. The Florida exemption for insurance is nearly infinite.⁴⁹ In Florida, the whole life insurance policy cannot be touched pursuant to a statutory interpretation by the Fifth Circuit Court of Appeals regarding the same. See

Cooper v. Taylor, 54 F.2d 1055 (5th Cir. 1939).⁵⁰ The nonresident alien debtor's life insurance policy's exemption is limited to \$9,300.00.

Not as common as a life insurance or homestead, but rapidly becoming the more utilized exemption in the state of Florida, is the IRA retirement fund or pension plan.⁵¹ Even though one Florida statute interestingly adopts the language of 11 U.S.C. § 522(d)(10)(E)⁵² (which states that the IRA or pension is only exempt to the "extent reasonably necessary for the support of the debtor and a dependant of the debtor. . ."), the Florida legislature allowed infinite exemption for IRAs and pension plans when it created Fla. Stat. § 222.21.⁵³ The purpose of Fla. Stat. § 222.201 is really to exempt those items listed in 11 U.S.C. § 522(d)(1)(A)-(D). See Box 1 above: (A) criminal reparation; (B) life insurance for death benefit; (C) wrongful death insurance/lawsuit; and (D) personal injury. Any Florida domiciliary who has an IRA or pension plan which exceeds what is "reasonably necessary for the support of the debtor or any dependant's of the debtor" must not worry. The nonresident alien debtor must worry. Moreover, because there is no quantitative number delivered for what is "reasonably necessary for the support" of the nonresident alien debtor, each case must review the facts to determine what is reasonable and what is necessary. The worry is difficult of gauge.

Discussions about pension plan exemptions for nonresident alien debtors

may be colloquy of the absurd. The realities of the nonresident alien debtors moot many of the above-described issues. Nonresident aliens tend not to be affluent. Because nonresident aliens typically do not own real property in the state of Florida, the deprivation of the homestead exemption is typically not a concern. Because of the asset-ownership character of the nonresident alien debtor usually includes only tangible personal property, the receipt of the federal exemptions will more often be a bonus as opposed to a penalty. The *Arispe* decision may aid the majority of nonresident alien debtors. The nonresident alien debtor who files bankruptcy can outbenefit his resident alien counterpart when exempting assets. For instance, the nonresident alien debtor can protect \$9,300.00 of household goods, \$2,775.00 of motor vehicles, \$1,150.00 of jewelry, \$1,750.00 of tools of trade for a total of \$14,975.00. The resident alien's exemption allowance for the same assets is merely \$2,000.00. This difference is dramatic, especially to a "typical debtor."

The exemptions provided by 11 U.S.C. § 522(d) can flourish when the nonresident alien debtor is involved with litigation described in 11 U.S.C. § 522(d)(11). As shown by Boxes 1 and 2, certain lawsuits are exempt under federal exemptions: wrongful death, personal injury or certain tort lawsuits. Those lawsuits are not exempt for Florida domiciles/residents. These lawsuits, potentially worth hundreds of thousands of dollars, may be entirely exempt for nonresident alien debtors.⁵⁴ This windfall could be greater than Florida's

homestead protection.

CONCLUSION

The *Arispe* decision does more than give nonresident alien debtors the right to exempt property. It provides benefits to most nonresident alien debtors which they would not be afforded had they received the appropriate residency status. In short, an indebted nonresident alien debtor can exempt more tangible personal property than his or her resident alien counterpart or Floridian when entering the bankruptcy forum. And, if the nonresident's personal property includes 11 U.S.C. § 522(d)(11) lawsuits, he or she can discharge all debts without having to forfeit his or her rights to the lawsuit's or lawsuits' proceeds. With the right facts, *Arispe* gives nonresident alien debtors greater exemption rights than those provided to resident alien debtors or Floridians. Florida is a debtor's haven — even for those who are “nonresident aliens” who are not “domiciliaries.”

1.

§ 222.20 NONAVAILABILITY OF FEDERAL BANKRUPTCY EXEMPTIONS.--In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

2. The term “nonresident alien” may be a term of art for immigration practitioners, but in this article it means an alien without a work visa or green card who enjoys the privileges of the United States but without the authority to work in the United States.

3.

This decision was incorporated by Judge A. Jay Cristol in January of 2003. *In re Goldsmith* Case 02-14039-BKC-AJC (Bankr. S.D. Fla. 2003)

4.

In *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992), the Florida Supreme Court, through then Chief Justice Barkett, wrote:

[M]ost significantly article X, section 4 expressly provides for three exceptions to the homestead exemption. Forfeiture is not one of them. According to the plain and unambiguous wording of article X, section 4, a homestead is only subject for sale for (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the realty. Under the rule 'expressio unius est exclusio alterius' – the expression of one thing is the exclusion of another -- forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly or by reasonable implication, in the three exceptions that are expressly stated.

_____ *Caggiano*. at 60.

5.

This is Florida's 21st Century version of "homesteading."

6.

Fla. Stat. § 222.30 (1993) was created to stop conversion with the following language:

FRAUDULENT ASSET CONVERSIONS.--

- (1) As used in this section, "conversion" means every mode, direct or indirect, absolute or conditional, of changing or disposing of an asset, such that the products or proceeds of the asset become immune or exempt by law from claims of creditors of the debtor and the products or proceeds of the asset remain property of the debtor. The definitions of chapter 726 apply to this section unless the application of a definition would be unreasonable.
- (2) Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor.
- (3) In an action for relief against a fraudulent asset conversion, a creditor may obtain:
 - (a) Avoidance of the fraudulent asset conversion to the extent necessary to satisfy the creditor's claim.
 - (b) An attachment or other provisional remedy against the asset converted in accordance with applicable law.
 - (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 1. An injunction against further conversion by the debtor of the asset or of other property.
 2. Any other relief the circumstances may require.
- (4) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset converted or its proceeds.
- (5) A cause of action with respect to a fraudulent asset conversion is extinguished unless an action is brought within 4 years after the fraudulent asset conversion was made.
- (6) If an asset is converted and the converted asset is subsequently transferred to a third party, the provisions of chapter 726 apply to the transfer to the third party.

7.

A pithy analysis was made by the Florida Supreme Court which devote:

Bank Leumi, 898 F. Supp. at 887 (refusing to create a non-textual exception to the homestead exemption based upon the fraudulent intent of the debtor); *In re Hendricks*, 237 B.R. at 825 (allowing the homestead exemption); *In re Young*, 235 B.R. 666 (Bankr.M.D.Fla.1999) (holding that the homestead exemption could not be disallowed because nonexempt assets were used to acquire homestead even if debtor fraudulently converted nonexempt assets with the intent to defeat creditor's claims); *In re Lazin*, 221 B.R. 982, 988 (Bankr.M.D.Fla.1998) (finding that conversion of non-exempt assets into homestead with the intent to hinder, delay, or defraud creditors is not an exception to the homestead exemption); *In re Lee*, 223 B.R. 594 (Bankr.M.D.Fla.1998) (finding debtor's intent to defraud creditors did not constitute a basis for disallowing Florida homestead exemption); *In re Statner*, 212 B.R. 164 (Bankr.S.D.Fla.1997) (allowing the homestead exemption); *In re Clements*, 194 B.R. 923 (Bankr.M.D.Fla.1996) (holding that a debtor is entitled to keep the homestead as exempt even if it was acquired in fraud of creditors); *In re Miller*, 188 B.R. 302 (Bankr.M.D.Fla.1995) (upholding a homestead exemption even though its purchase was a fraudulent transfer as to the creditors); *In re Popek*, 188 B.R. 701 (Bankr.S.D.Fla.1995) (allowing the homestead exemption); *In re Lane*, 190 B.R. 125 (Bankr.S.D.Fla.1995) (allowing the homestead exemption).

See *Havoco of Am., Ltd. v. Hill* (In re Hill), 197 F.3d 1135 at 1141 (11th Cir. 2002)

8.

In re Hill 163 B.R. 598 (Bankr.N.D.Fla.1994)

9.

Havoco of Am., Ltd. v. Hill (In re Hill), 197 F.3d 1135 (11th Cir. 2000)

10.

Havoco of America v. Hill, 790 So.2d 1018 (Fla 2001)

11.

This paper involves nonresident alien debtors (those who file bankruptcy) as opposed to nonresident aliens (those who do not file bankruptcy).

12.

Fla. Const., art. X, sec. 4 (1998)

SECTION 4. HOMESTEAD; EXEMPTIONS.--

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

13.

In re Eucario Bermudas and Luz Elena Bermudas, 6 FLW B 84 (Bankr. S.D. Fla. 1992); *In re Gilman* 68 B.R. 374 (Bankr. S.D. Fla. 1986); and *In re Boone*, 134 B.R. 979 (Bankr. M.D. Fla. 1980).

Judge Weaver wrote in *Bermudez*:

In order for a person to qualify for the homestead exemption in Florida, he must be a permanent resident and intend to make the house in question his permanent residence. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 452 (Fla. 1943); *Cooke v. Uransky*, 412 So. 2d 340, 342 (Fla. 1982); *In re McCarthy*, 13 Bankr. 389, 390 (Bankr. M.D. Fla. 1981). An alien can only satisfy the permanent residency requirement if he is granted a permanent visa or "green card." Unless he is issued such permanent status, he also cannot legally formulate the requisite intent to make the house his family's permanent residence, regardless of his subjective intention to remain indefinitely. *In re Gilman*, 68 Bankr. 374, 375-376 (Bankr. S.D. Fla. 1986); *Cooke v. Uransky*, 412 So. 2d at 342; *In re Boone*, 134 Bankr. 979, 981 (Bankr. M.D. Fla. 1991); *Matter of Cooke*, 1 Bankr. 537, 538-539 (Bankr. N.D. Fla. 1979).

14.

See note 13 above with *Bermudez* citation of reason to deny Florida homestead [Fla. Const., art. X, sec 4] to immigrant without green card.

15.

11 U.S.C. § 522(b)

16.

Fla. Stat. 222.20

17.

11 U.S.C. § 522(b) (1998)

18.

Fla. Stat. § 222.20 [Full text in note 1 above.]

19.

222.20 NONAVAILABILITY OF FEDERAL BANKRUPTCY EXEMPTIONS.--In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes. (Emphasis added)

20.

The reason the homestead was denied to nonresidents in the cases recited in note 13 above was because the residency requirement for a homestead could not occur for the nonresident alien — the legal permission to be in the United States did not include intent to reside. Hence, the courts concluded nonresident aliens were incapable of acquiring requisite

intent to create a Florida residency.

21.

Fla. Stat. ch. 222 and 11 U.S.C. §§ 522(b) and (d).

22. Opinions based upon mere statutory interpretation have resolved many bankruptcy issues.

23.

See *Holywell Corp. v. Smith*, , 503 U.S. 47, 117 L. Ed. 2d 196(1992)112 S.Ct. 1021; *Nobelman v. American Savings Bank*, 508 U.S. 324, 124 L. Ed. 2d 228, 113 S. Ct. 2106 (1993) or *Dewsnup v. Timm*, 502 U.S. 410, 116 L.Ed. 2d 903 112 S.Ct. 773 (1992).

24.

Collier 15th ed. on Bankruptcy, sec. 522.06

25. Reading a statute in the negative is how the court determined its conclusion. It read the domiciliary statute for exemptions (§ 522(b)) and concluded that because Arispe had no domiciliary, § 522(b)'s restrictions were not binding upon him.

26.

If no state's law is applicable due to the debtor's lack of domicile, the federal exemptions set forth in section 522(d) are still available.

27.

The debtor's aggregate interest, not to exceed \$ 17,425 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor

28.

The debtor's interest, not to exceed \$ 2,775 in value, in one motor vehicle.

29.

The debtor's interest, not to exceed \$ 450 in value in any particular item or \$ 9,300 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

30.

The debtor's aggregate interest, not to exceed \$ 1,150 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor

31.

The debtor's aggregate interest in any property, not to exceed in value \$ 925 plus up to \$ 8,725 of any unused amount of the exemption provided under paragraph (1) of this subsection.

32.

The debtor's aggregate interest, not to exceed \$ 1,750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor

33.

Any unmaturred life insurance contract owned by the debtor, other than a credit life insurance contract.

34.

The debtor's aggregate interest, not to exceed in value \$ 9,300 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmaturred life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

35.

Professionally prescribed health aids for the debtor or a dependent of the debtor.

36.

The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

37.

The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed \$ 17,425, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

38.

222.25 OTHER INDIVIDUAL PROPERTY EXEMPT FROM LEGAL PROCESS.--The following property is exempt from attachment, garnishment, or other legal process:

(1) A debtor's interest, not to exceed \$1,000 in value, in a single motor vehicle as defined in s. 320.01.

39.

222.13 LIFE INSURANCE POLICIES; DISPOSITION OF PROCEEDS.--

(1) Whenever any person residing in the state shall die leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise. Notwithstanding the foregoing, whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate.

(2) Payments as herein directed shall, in every such case, discharge the insurer from any further liability under the policy, and the insurer shall in no event be responsible for, or be required to see to, the application of such payments.

40.

222.25 OTHER INDIVIDUAL PROPERTY EXEMPT FROM LEGAL PROCESS.--The following property is exempt from attachment, garnishment, or other legal process:

(2) A debtor's interest in any professionally prescribed health aids for the debtor or a dependent of the debtor.

41.

222.201 AVAILABILITY OF FEDERAL BANKRUPTCY EXEMPTIONS.--

(1) Notwithstanding s. 222.20, an individual debtor under the federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection (d)(10) of s. 522 of that act.

(2) The provisions of this section apply to any bankruptcy action that is filed on or after October 1, 1987.

42.

744.626 EXEMPTION OF BENEFITS FROM CLAIMS OF CREDITORS.--Except as provided by federal law, payments of benefits from the United States Department of Veterans Affairs or the Social Security Administration to or for the benefit of a disabled veteran or the veteran's surviving spouse or dependents are exempt from the claims of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after the receipt of the payments by the guardian or the beneficiary.

43.

222.18 EXEMPTING DISABILITY INCOME BENEFITS FROM LEGAL PROCESSES.--Disability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, shall not in any case be liable to attachment, garnishment, or legal process in the state, in favor of any creditor or creditors of the recipient of such disability income benefits, unless such policy or contract of insurance was effected for the benefit of such creditor or creditors.

44.

222.21 EXEMPTION OF PENSION MONEY AND RETIREMENT OR PROFIT-SHARING BENEFITS FROM LEGAL PROCESSES.--

(1) Money received by any debtor as pensioner of the United States within 3 months next preceding the issuing of an execution, attachment, or garnishment process may not be applied to the payment of the debts of the pensioner when it is made to appear by the affidavit of the debtor or otherwise that the pension money is necessary for the maintenance of the debtor's support or a family supported wholly or in part by the pension money. The filing of the affidavit by the debtor, or the making of such proof by the debtor, is prima facie evidence; and it is the duty of the court in which the proceeding is pending to release all pension moneys held by such attachment or garnishment process, immediately, upon the filing of such affidavit or the making of such proof.

(2)(a) Except as provided in paragraph (b), any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant.

(b) Any plan or arrangement described in paragraph (a) is not exempt from the claims of an alternate payee under a qualified domestic relations order. However, the interest of any alternate payee under a qualified domestic relations order is exempt from all claims of any creditor, other than the Department of Children and Family Services, of the alternate payee. As used in this paragraph, the terms "alternate payee" and "qualified domestic relations order" have the meanings ascribed to them in s. 414(p) of the Internal Revenue Code of 1986.

(c) The provisions of paragraphs (a) and (b) apply to any proceeding that is filed on or after October 1, 1987.

45.

222.22 EXEMPTION OF MONEYS IN THE PREPAID COLLEGE TRUST FUND OR IN A MEDICAL SAVINGS ACCOUNT FROM LEGAL PROCESS.--

(1)(a) Moneys paid into or out of the Florida Prepaid College Trust Fund by or on behalf of a purchaser or qualified beneficiary pursuant to an advance payment contract made under part IV of chapter 1009, which contract has not been terminated, are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of the purchaser or beneficiary of such advance payment contract.

(b) Moneys paid into or out of the Prepaid College Trust Fund by or on behalf of a benefactor or designated beneficiary pursuant to a participation agreement made under s. 1009.981, which agreement has not been terminated, are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of the purchaser or beneficiary of such participation agreement.

(2) Moneys paid into or out of a Medical Savings Account by or on behalf of a person depositing money into such account or a qualified beneficiary are not liable to attachment, garnishment, or legal process in the state in favor of any creditor of such person or beneficiary of such Medical Savings Account.

46.

222.11 EXEMPTION OF WAGES FROM GARNISHMENT.--

(1) As used in this section, the term:

(a) "Earnings" includes compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus.

(b) "Disposable earnings" means that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) "Head of family" includes any natural person who is providing more than one-half of the support for a child or other dependent.

(2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to \$500 a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than \$500 a week, may not be attached or garnished unless such person has agreed otherwise in writing. In no event shall the amount attached or garnished exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(c) Disposable earnings of a person other than a head of family may not be attached or garnished in excess of the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

47.

Havoco of America v. Hill, 790 So.2d 1018 (Fla 2001)

48.

11 U.S.C. § 522(d)(1)

49.

222.14 EXEMPTION OF CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES AND ANNUITY CONTRACTS FROM LEGAL PROCESS.--
The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be

liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.

50.

The insurance exemption was allowed although it was personal property beyond the \$1,000.00 — as limited by the Florida Constitution — as the court concluded:

First, that the constitutional exemption is not exclusive, or a limitation upon legislative power; and, secondly, that life insurance is personal property of such peculiar nature that the constitutional exemption was not intended to apply to it.

Cooper v. Taylor at 1057

51.

The plan must be “qualified” in order to be exempt. See *Dzikowski v. Blais*, 220 B.R. 485 (S.D.Fla. 1997)

52.

222.201 AVAILABILITY OF FEDERAL BANKRUPTCY EXEMPTIONS.--

(1) Notwithstanding s. 222.20, an individual debtor under the federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection (d)(10) of s. 522 of that act.

11 U.S.C. § 522(d)(10) exempts:

The debtor's right to receive--

- (A) a social security benefit, unemployment compensation, or a local public assistance benefit;
- (B) a veterans' benefit;
- (C) a disability, illness, or unemployment benefit;
- (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
- (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
 - (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
 - (ii) such payment is on account of age or length of service; and
 - (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

53.

222.21 EXEMPTION OF PENSION MONEY AND RETIREMENT OR PROFIT-SHARING BENEFITS FROM LEGAL PROCESSES.-- (1) Money received by any debtor as pensioner of the United States within 3 months next preceding the issuing of an execution, attachment, or garnishment process may not be applied to the payment of the debts of the pensioner when it is made to appear by the affidavit of the debtor or otherwise that the pension money is necessary for the maintenance of the debtor's support or a family supported wholly or in part by the pension money. The filing of the affidavit by the debtor, or the making of such proof by the debtor, is prima facie evidence; and it is the duty of the court in which the proceeding is pending to release all pension moneys held by such attachment or garnishment process, immediately, upon the filing of such affidavit or the making of such proof.

(2)(a) Except as provided in paragraph (b), any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant.

54.

Not all lawsuits of resident aliens are touchable. Resident alien debtor's worker's compensation lawsuits are exempt under Florida law. The exemption for worker's compensation is provided under FLA. STAT. 440.22(2001) which states:

ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS.--No assignment, release, or commutation of compensation or benefits due or payable under this chapter except as provided by this chapter shall be valid, and such compensation and benefits shall be exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery or collection of a debt, which exemption may not be waived. However, the exemption of workers' compensation claims from creditors does not extend to claims based on an award of child support or alimony.