

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Adam Lawton Alpert, Esq., Bush Ross, P.A.

Winter 2009



PRESIDENT'S MESSAGE

by Donald R. Kirk, Esq.
Fowler White Boggs

A Time of Prosperity and Reflection

As 2009 begins, it appears that the flood of work we have all been waiting for has finally arrived. Filings of all kinds are up. Individual cases are rising. Real estate related filings continue to mount. Auto dealerships, restaurants, and retailers continue to fail. By all accounts, things will continue to pick up in 2009 and maybe even beyond. I have heard several practitioners say “these are good times for our practice” and that “these will be the times we will remember in 20 years.” Indeed, being busy is a reason to feel confident and secure in a troubled financial time.

We should not forget though that others are not as fortunate. By now everyone reading this article probably knows someone close to them that has significant financial issues, whether being over-leveraged with spec homes, seeing great reduction in the value of their retirement, losing a job, or otherwise. When I think about what others are going through, especially those with a real connection to

me or a family member, it makes me realize how lucky I am. More importantly, it makes me recognize the financial challenges others face. There is very real and warranted fear in our community. We should all keep that in mind next year by doing a few things.

First, be charitable. Donate your time or money to a worthy cause. There are a number of remarkable charities in town, and in these times they are all very desperate for your help. Cut a check. I promise you, a year from now, that money spent will not impact your life. Second, be aware of what you say and who you say it to. I was talking to a friend recently and told him how busy our group had become. He told me how hard his business was suffering. I know he was not offended by what I said, but he certainly could have been. We should make sure we do not rejoice in the misfortune of others. Third, do a good job for your clients. We have an important job. We restructure debts. We save jobs. We keep people from losing their homes. By working hard we can make a difference in a lot of peoples’ lives.

It’s been a great 2008 for our Bar. 2009 will be better. Just keep in mind why that is.

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Florida Personal Property Exemption Statute: Why Courts Should Agree to Disagree Over It's Interpretation

by Kathleen L. DiSanto'
Clerk, Hon. Caryl E. Delano

With bankruptcy filings at a record high, the Business Law Section of the Florida Bar ("BLS") intended to provide additional relief to the poorest debtors by encouraging the Florida legislature to amend Florida Statutes, section 222.25, as known as Florida's Personal Property Exemption Statute, by adding a fourth section.² Florida Statutes, section 222.25(4) ("Section 4" or the "super exemption") allows debtors to claim a \$4,000 personal property exemption if they do not claim or receive the benefits of the homestead exemption established by Article X, section 4 of the Florida Constitution. Despite its seemingly clear and straightforward language, the statute is plagued by a latent ambiguity, as courts have argued over what it means for a debtor to "receive the benefits of a homestead exemption." The confusion over the statute's meaning is amplified because courts have interpreted the statute differently, but struggled to define their interpretations in the context of existing caselaw.

This article will first summarize the history leading to the enactment of Section 4. Then, the article will examine one of the biggest challenges both practitioners and jurists have encountered in interpreting the statute's

somewhat unclear language: defining what it means for an individual to "receive the benefits of a homestead exemption."

Historical Background

Florida's Personal Property Exemption Statute was enacted in 1993, but Section 4, providing the super exemption, was not added until July 1, 2007. The BLS had the best of intentions when it proposed an amendment to the Personal Property Exemption Statute to the Florida legislature. After surveying other states' personal property exemptions, the BLS determined that debtors in Florida who are unable to take advantage of the homestead exemption are left with only \$1,000 personal property exemption and \$1,000 auto exemption, which is significantly less than the exemptions provided by other states.⁴

The BLS also relied on a case study conducted by the University of Florida Levin College of Law's Student Association of Law and Business in making its recommendation to the Florida legislature.⁵ The University of Florida law students analyzed data from 723 bankruptcy cases in the Middle District of Florida to determine how frequently unsecured creditors received assets recovered during the course of the bankruptcy.⁶ The study showed that 483 debtors claimed the homestead exemption, so 240 debtors, or roughly 33% of the test group, would actually be impacted by the proposed amendment.⁷ Further, the study suggested that if the 240 debtors were allowed an additional \$4,000 exemption, the average amount distributed to unsecured creditors fell from \$4,287 to \$2,915.⁸ The study did not consider the impact of whether the debtors were single, married and filing with their spouse, or married and not filing with their spouse. As a result, the study did not alert the BLS to any of the statute's interpretation and application problems.

¹ Kathleen L. DiSanto is presently clerking for the Honorable Caryl E. Delano and formerly interned for the Honorable Alexander L. Paskay. Kathleen graduated from Stetson University College of Law in May 2008. She would like to express her gratitude and appreciation for Nicole Herther-Spiro's invaluable editorial assistance.

² Business Law Section of the Florida Bar, Proposed Amendment to Personal Property Exemption (2006), <http://www.flabuslaw.org/index.php?/list.committees=2/1> (follow "Proposed Amended to Personal Property Exemption - 08.06.2006" hyperlink). According to the economic impact statement accompanying Florida Statute 222.25(4), "The [bill] also increases the amount of personal property exempt from creditor claims, which is owned by persons without homestead property..." Fla. S. Prof'l Staff Analysis and Econ. Impact Statement CS/SB 2118 (2007).

³ Fla. Stat. § 222.25 (2007).

⁴ See Business Law Section of the Florida Bar, Comparison of State Exemptions (2006), <http://www.flabuslaw.org/index.php?/list.committees=2/1> (follow "Comparison of State Exemptions - 08.06.2006" hyperlink).

⁵ Business Law Section of the Florida Bar, Proposed Amendment to Personal Property Exemption (2006), <http://www.flabuslaw.org/index.php?/list.committees=2/1> (follow "Proposed Amended to Personal Property Exemption - 08.06.2006" hyperlink).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

continued on p. 16

Interview with Hon. Caryl E. Delano

Kelly Van Wey, Esq. of Fowler White Boggs recently interviewed the newest bankruptcy judge in the Middle District of Florida, Tampa Division, the Honorable Caryl E. Delano.

As a student, what area of law did you imagine practicing in? How did you come to be a bankruptcy attorney?

When I was in law school, I did not envision a trial practice. I took several estate planning and tax courses, and I anticipated practicing in those areas. When I finished law school, I moved with my husband to California and received a job offer for a position as a bankruptcy attorney. I guess you could say I “accidentally” fell into a bankruptcy practice, but I enjoyed it from the start – especially appearing in court – and quickly decided that I wished to continue to work in the bankruptcy field. I have also practiced in state and federal district court, both in Florida and in California, but always felt most at home in the bankruptcy court.

At what point in your career did you decide you wanted to become a bankruptcy judge?

I first started to think of becoming a judge after I had been practicing for about five years. I greatly admired the bankruptcy judges before whom I appeared. I appreciated their ability to hear both sides of an argument and to make the (usually) correct decision. I thought that I had the same ability and that I would enjoy being a judge.

Now that you have spent a significant amount of time practicing in California and here in the Middle District of Florida, are there any notable differences between bankruptcy practice in the two locations?

While the bankruptcy practice itself is very similar, as soon as I began practicing in Tampa, I noticed the collegiality of our bar and the helpfulness of our clerk’s office. We have a great working relationship among the bankruptcy bar members, the clerk’s office, and the Court.

Could you please tell us about the appointment process?

Sadly, Judge Proctor passed away in the fall of 2007. Chief Judge Glenn, who had been commuting to Tampa from Jacksonville for many years, decided that

he would move back to Jacksonville. This created an opening in Tampa. The opening was announced in December of 2007. I submitted my application in January and was selected for an interview with the selection committee. The selection committee consisted of the three Florida Chief District Judges and four Eleventh Circuit Judges. The selection committee narrowed the pool of candidates. On February 27, 2008, I interviewed in Atlanta with all of the Eleventh Circuit Judges. Two days later, Chief Judge Edmondson called to let me know that I had been selected, subject to successful clearance of the FBI background investigation. I received my clearance at the end of May and was sworn in on June 25, 2008.

How extensive was the FBI background check?

It was very extensive. There were several investigators assigned to interview me, my co-workers, neighbors, friends, and colleagues in Tampa, as well as in California.

Which aspects of your practice prepared you most for your current position?

Obviously, having a business bankruptcy background has been very helpful. In the early years of my practice, I worked for a firm with a large consumer debtor practice. Although most of my recent work has been business oriented, I always enjoyed the consumer practice. I have also handled many commercial litigation cases in state and federal court, and that background is very helpful.

What has surprised you most about being a judge?

I had no idea of the amount of work that takes place behind the scenes. I now realize how hard the clerks, case managers, and other court staff work to process motions and orders, and to ensure that the judges are well-prepared for their hearings. While it has been difficult to leave private practice, I am also surprised by how smooth my transition has been. I have felt a lot of support from the bankruptcy bar.

Do you have any advice for both new and more experienced members of the Bankruptcy Bar?

It is very helpful when the attorneys submit orders promptly after a hearing. Also, if at all possible, I recommend having clients present for important hearings. It can really make a difference in how a judge views their case. Overall, I am very impressed and appreciative of the hard work that the lawyers do to prepare for hearings. They have all been professional and well-prepared.

2008 Bankruptcy Statistics, United States Bankruptcy Court, Middle District of Florida

2008	CHAPTER 7	CHAPTER 11	CHAPTER 12	CHAPTER 13	CHAPTER 15	MONTH TOTAL	YTD TOTAL
January	1618	29	1	1016	0	2664	2664
February	1791	23	0	1084	0	2898	5562
March	2205	37	0	1087	0	3329	8891
April	2327	29	0	1201	0	3557	12448
May	2319	29	0	1096	1	3445	15893
June	2520	58	0	1051	0	3629	19522
July	2553	17	0	1101	0	3671	23193
August	2461	29	0	1040	0	3530	26723
September	2767	114	0	1150	0	4031	30754
October	2954	70	0	1278	0	4302	35056
November	2525	54	1	1030	0	3610	38666
December	2810	34	0	1047	0	3891	42557
Total	28850	523	2	13181	1	42557	

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October TBBBA Luncheon



The Association held a monthly CLE luncheon at the University Club of Tampa on October 14, 2008. During the luncheon, Steven Leslie, Esq. of Stichter, Riedel, Blain & Prosser, P.A. presented "Hands-On Bankruptcy - Real Problems and Real Solutions," an interactive, audience-friendly, open forum addressing current topics in bankruptcy practice.



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Deadline For Electronic Claim Filing in Orlando Division

Judge Arthur B. Briskman of the Orlando Division of the U.S. Bankruptcy Court for the Middle District of Florida, Orlando Division, recently entered the following administrative order regarding the deadline for participating in electronic claims filing in the Orlando Division.

ADMINISTRATIVE ORDER - ORL-2008-1
Order Establishing Deadline for Claimants to Electronically File Proofs of Claim and Related Documents

On February 18, 2003, this court implemented the Case Management/Electronic Case Filing system, and in Administrative Order ORL 2004-2 entered June 24, 2004, ordered that all attorneys, trustees, or examiners who file documents in the Orlando Division file all documents and pleadings electronically using the court's ECF system no later than September 1, 2004. The Court has determined that to further promote greater efficiency in the administration of bankruptcy cases in Orlando Division claimants should file claims and claim related documents through the ECF system.¹ Accordingly it is ordered:

1. Effective January 1, 2009, all claimants who file or expect to file 25 or more claims and/or related documents, such as transfers of claims and withdrawal of claims, within any one year period, must file these claims and documents electronically using the ECF system.

2. Exemptions to the mandatory filing of claims and claims related documents include:

a. Unanticipated inability to use the ECF system due to an internet failure by the filer. (Filers experiencing such a failure shall submit the claim or claim related document on diskette or CD in a PDF format with an "Affidavit and Request to File" attached. The clerk then will electronically file the pleading on behalf of the filer); and

b. Unanticipated inability to use ECF system due to internet failure by the court. (If ECF system is not accessible due to Court's failure, the filer shall print the notification that the ECF system is not accessible and submit it with the claim or claim related document to be filed on diskette or CD in PDF format).

3. After January 1, 2009, the Court may order claimants filing claims or claim related documents via paper to show cause why they cannot use the ECF system. Further, the Court may order claims or claim related documents be stricken if they are not filed using the ECF system.

¹ Information on registering to use the ECF system can be found on the Court's website at www.flmb.uscourts.gov.

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Bankruptcy Judge McEwen Receives Pro Bono Service Award

by Lee Ann Bennett,
Clerk of Court

The Honorable Catherine Peek McEwen, United States Bankruptcy Judge, Middle District of Florida, is the recipient of the 2008 Jimmy Kynes Pro Bono Service Award presented by the Hillsborough County Bar Association in recognition of her years of pro bono service. During her entire career as an attorney, from 1982 until her appointment to the bench in 2005, she actively participated in the Volunteer Lawyers Program handling pro bono cases, mentoring volunteers, and interviewing and advising legal aid applicants. More recently, Judge McEwen coordinated the efforts of the Tampa Bay Bankruptcy Bar Association and Bay Area Legal Services in the production of an educational DVD and brochures to assist bankruptcy litigants who

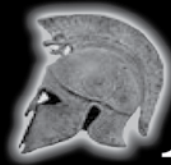


do not have attorneys. The project was funded by a grant from The Florida Bar Foundation.

The award is named in honor of Jimmy Kynes who served as General Counsel to Jim Walters Corporation. Following the establishment of Bay Area Legal Services' Volunteer Lawyers Program in 1982, Mr. Kynes worked with the program to recruit members of the Hillsborough County Bar Association to provide pro bono assistance.

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November TBBBA Luncheon

On November 11, 2008, the Association held its monthly luncheon at the University Club of Tampa. During the luncheon, SunTrust Bank's Chief Economist, Mr. Gregory Miller discussed the state of the economy and his predictions of the economic landscape in 2009 in his presentation "Nationwide Economic Trends and Projections."



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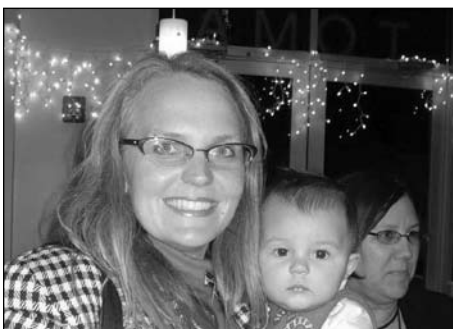
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The Tampa Bay Bankruptcy Bar Association's 2008 Holiday Party

On December 11, 2008, the Association held its annual Holiday Celebration. The event was well-attended by many of the Association's members and guests. With the party being held at Spain Restaurant in Downtown, Tampa, as it has been for the past several years, the food and drinks were a big hit, especially the sangria. Many of the attendees brought holiday gift donations benefiting the Children of Metropolitan Ministries



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33rd Annual Alexander L. Paskay Bankruptcy Law & Practice Seminar

The 33rd Annual Alexander L. Paskay Seminar on Bankruptcy Law and Practice was held December 5-6, 2008 at the Sheraton Tampa Riverwalk Hotel in Tampa, Florida. The event included numerous speakers, including top bankruptcy practitioners and judges, who gave spoke about some of the latest issues in consumer and business bankruptcies.



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Personal Property Exemption Statute

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Overlooking any of the study's shortcomings, the BLS used the results of the case study to garner additional support for the proposed amendment. In an effort to level the playing field between debtors who take advantage of Florida's generous unlimited homestead exemption and debtors who are less fortunate, the BLS endorsed the amendment, and the Florida legislature took action based on the BLS's recommendation.⁹ As a result, over the past year and half, bankruptcy courts across the state have grappled with unforeseen challenges in applying the statute, resulting from one unclear phrase.

Interpreting "Receive the Benefits" of the Homestead Exemption

Florida bankruptcy courts have disagreed over the correct interpretation of Florida Statutes, section 222.25(4). Section 4 dictates that a debtor is entitled to receive a personal property exemption of up to \$4,000, "if the debtor does not claim or receive the benefits of a homestead exemption under section 4, Article X of the State Constitution." Courts are in agreement that a debtor claims the homestead exemption by making an election on Schedule C. Greater disagreement has arisen among the courts in determining whether a debtor has received the benefits of a homestead exemption. Some courts have held that a debtor cannot receive the benefits of a homestead exemption without claiming it or indirectly benefiting from the homestead exemption,¹⁰ while other courts have required the debtor to express an intent to surrender the property.¹¹ The timeliness of the debtor's election to claim the homestead exemption or indicate an intention to surrender the property is another factor in some courts' analyses.

Judge Williamson was the first to attempt to clarify the ambiguity latent in the "receive benefits of a homestead

exemption" language in the case of *In re Gatto*.¹² Gatto was a consolidated opinion, consisting of three cases involving debtors who did not claim the homestead exemption and indicated an intent to surrender the property.¹³ The Gatto court began its analysis by looking to the plain meaning of the words "receive the benefits of a homestead exemption."¹⁴ Judge Williamson noted that "receive" is in the present tense, reflecting that a debtor's entitlement to exemptions is determined as of the date of the petition and emphasized that "benefits" must be linked to the homestead protection provided by the Florida Constitution.¹⁵ Essentially, to give meaning to every word in the statute, the language prevents a debtor who benefits indirectly from a homestead exemption from claiming the personal property super exemption.

In dicta, Judge Williamson explained that the words "receive the benefits" are not without meaning under *Gatto's* interpretation of Section 4, as it applied to debtors who might receive the benefits of the homestead exemption while not claiming it on Schedule C.¹⁶ For example, in a joint filing, one spouse might claim the homestead exemption, while the other tries to claim the super exemption. Another possible situation would be in an individual case where a non-filing spouse holds homestead property as tenancy by the entirety with the debtor.¹⁷ After the dicta, Judge Williamson explained the importance of a debtor claiming the homestead exemption under Article X, section 4 of the Florida Constitution by describing the consequences of not claiming the exemption.¹⁸ The *Gatto* court noted that if a debtor fails to claim the homestead exemption on Schedule C, the property remains part of the bankruptcy estate.¹⁹ If equity exists, the property would likely be administered by the trustee as an asset of the estate; however, if the mortgages and liens on the property are greater than its value, the trustee would likely abandon the property.²⁰

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⁹ *Id.* The *Franzese* court noted, "the Florida legislature relied on a research proposal drafted by the Business Law Section of the Florida Bar..." and cites the document available on the Business Law Section's website. *In re Franzese*, 383 B.R. 197 (Bankr. M.D. Fla. 2008).

¹⁰ *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2007); *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 (Bankr. S.D. Fla. Mar. 25, 2008); *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 (Bankr. S.D. Apr. 3, 2008).

¹¹ *In re Morales*, 381 B.R. 917 (Bankr. S.D. Fla. 2008); *In re Franzese*, 383 B.R. at 197; *In re Magelitz*, 386 B.R. 879 (Bankr. N.D. Fla. 2008); *In re Guidadas*, No. 9:08-bk-01238-ALP, 2008 WL 3873823 (Bankr. M.D. Fla. Aug. 7, 2008); *In re Rogers*, No. 8:08-bk-01946-PMG, 2008 WL 4542907 (Bankr. M.D. Fla. Aug. 19, 2008).

¹² *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2008).

¹³ *Id.* at 90. ¹⁴ *Id.* at 91. ¹⁵ *Id.* ¹⁶ *Id.* at 92.

¹⁷ Judge Williamson's explanation in *Gatto* was cited by *Franzese*, 383 B.R. at 206, and *In re Hernandez*, No. 07-16379-BKC-RAM, 2008 WL 171152, at *4 (Bankr. S.D. Fla. Apr. 10, 2008). *Franzese* and *Hernandez* both involved cases with a non-filing spouse where the debtor did not claim the homestead exemption but claimed the property exempt under 11 U.S.C. § 522(b)(3)(B), as tenancy by the entirety property.

¹⁸ *In re Gatto*, 380 B.R. at 93. ¹⁹ *Id.* ²⁰ *Id.*

Personal Property Exemption Statute

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Gatto represents a restrictive view of Section 4, creating a two-prong analysis to determine whether a debtor is entitled to the super exemption: first, is the debtor claiming a home as exempt on Schedule C, and second, is the debtor indirectly benefitting from a homestead exemption. If the answer to both questions is “no,” then the debtor may claim the personal property exemption. However, the analysis did not remain this simple, as subsequent courts questioned whether *Gatto* required the debtor to express an intent to surrender the property in addition to claiming the homestead as exempt; in *Gatto*, all of the debtors had surrendered the property.

Morales, the first published opinion to address the super exemption post-*Gatto*, involved a debtor who did not claim the homestead exemption and initially intended to reaffirm both mortgages on the property, and later amended his Statement of Intentions to reaffirm only the smaller mortgage.²¹ The *Morales* court sustained the trustee’s objection to the debtor’s claim of the super exemption and subsequently denied the debtor’s motion for rehearing.²² In the Order Denying Motion for Rehearing, the *Morales* court cited *Gatto*, emphasizing that *Gatto* “specifically noted that the debtors had not claimed the property as exempt and ‘timely stated an intention to surrender their home pursuant to Bankruptcy Code section 521(a)(2)(A).’”²³ Judge Ray articulated a different two-prong test to determine whether a debtor could claim the super exemption: first, the debtor must not claim the property as exempt, and second, the debtor must timely state an intention to surrender.²⁴ Instead of recognizing *Gatto*’s holding and disagreeing with the *Gatto* court’s conclusions, the *Morales* court created the illusion that its holding was consistent with *Gatto* by citing specific language in the *Gatto* opinion, while glossing over the other portions of the opinion.²⁵ While the *Morales* court advanced a different interpretation of the “receive the benefits of a homestead language,”

it contributed to the legal community’s confusion in interpreting Section 4 by blurring *Gatto*’s position.

The *Franzese* court was the first to address whether a debtor who has a non-filing spouse and has claimed the property as an exempt tenancy by the entireties property is receiving the benefits of the homestead protection.²⁶ The court followed *Gatto*’s dicta, but the holding in *Franzese* went beyond the tenancy by the entireties issue.²⁷ Like *Morales*, *Franzese* adopted a broader interpretation of “receive the benefits of a homestead.” According to the *Franzese* court, a debtor must state an intent to surrender the property on the date the petition is filed to lose the benefit of the homestead exemption.²⁸

Chief Judge Hyman’s opinion in *Shoopman* followed, and was the first case to reject *Morales*’ interpretation of Section 4.²⁹ In *Shoopman*, the debtor did not originally claim the homestead exemption but intended to reaffirm two mortgages and a homeowner’s association lien; later, the debtor amended his Statement of Intention to indicate a surrender the property.³⁰ In allowing the debtor to claim the super exemption, the *Shoopman* court reached the same conclusions as Judge Williamson, but perpetuated the confusion over the proper interpretation of *Gatto*.³¹ Instead of adopting *Gatto*’s holding, the *Shoopman* court contributed to *Morales*’ manipulation, stating, “This Court respectfully disagrees with *Morales*, and with *Gatto* to the extent that Judge Williamson’s holding can be construed as requiring a debtor to timely state his intention to surrender his residence in order to claim the Statutory Personal Property Exemption.”³²

Chief Judge Hyman adopted *Shoopman*’s holding in *Martias*, which was decided just a few weeks after *Shoopman*, and also addressed the timeliness issue.³³ The facts of *Martias* were similar to those in *Shoopman*, except that the debtor in *Martias* originally claimed his homestead as exempt on Schedule C and intended to reaffirm the mortgage, later amending his schedules

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²¹ *In re Morales*, 381 B.R. 917, 919 (Bankr. S.D. Fla. 2008).

²² *Id.* at 921, 923. ²³ *Id.* at 922. ²⁴ *Id.*

²⁵ *Id.* *Morales* states, “In *Gatto* the court specifically noted that the debtors had not claimed the property as exempt and ‘timely stated an intention to surrender their home pursuant to Bankruptcy Code section 521(a)(2)(A).’” *In re Morales*, 381 at 922.

²⁶ *In re Franzese*, 383 B.R. 197 (Bankr. M.D. Fla. 2008).

²⁷ *Id.* at 203. ²⁸ *Id.* at 206.

²⁹ *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109, at *3 (Bankr. S.D. Fla. Mar. 25, 2008).

³⁰ *Id.* at *1. ³¹ *Id.* at *3. ³² *Id.*

³³ *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776, at *2 (Bankr. S.D. Apr. 3, 2008).

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when he decided to surrender the property.³⁴ Like *Shoopman*, the debtor was permitted to claim the super exemption because the court determined that he did not receive the benefits of the homestead exemption.

Like *Franzese*, *Hernandez* involved a debtor who had a non-filing spouse and did not claim the homestead exemption, while instead relying on Section 522(b)(3) (B) of the Bankruptcy Code to exempt the property.³⁶ However, *Hernandez* agreed with *Gatto*, rejecting *Franzese*'s conclusion that mere entitlement to the homestead exemption did not mean that the debtor was "receiving the benefits of a homestead exemption."³⁷ Focusing on the issues before the court, *Hernandez* did not indicate whether expressing an intent to surrender of the property was necessary to claim the super exemption.

Magelitz also adopted *Morales*' position.³⁸ *Magelitz* involved a debtor who did not claim the homestead exemption and made no declaration on his Statement of Intention, but stated in court that he would continue to make payments on the mortgage.³⁹ On the basis of the debtor's statement, the court determined that the debtor did not intend to surrender the property, and consequently was not eligible for the super exemption.⁴⁰ The *Magelitz* court failed to recognize the potential tension between the *Gatto* and *Morales* cases, and instead remarked that "Agreeing with *Gatto*, the *Morales* court held that a debtor may claim the \$4,000 wildcard personal property exemption when the debtor (1) does not claim a homestead as exempt and (2) properly and timely files statement of intention showing a clear and unambiguous intent to surrender the property."⁴¹

While noting that none of the existing caselaw was directly on point, the *Guidadas* court essentially applied the two-prong approach of *Morales*. In *Guidadas*, Judge Paskay declined to allow a debtor to claim the super exemption

who claimed the homestead exemption and indicated an intent to reaffirm the debt on his initial schedules, but later filed amended schedules abandoning the claim to homestead and calling for surrender of the property.⁴³ *Guidadas* highlighted *Gatto*'s language purportedly requiring the debtor to indicate an intent to surrender the property to be eligible for the super exemption.⁴⁴ *Guidadas* also identified the petition date as the relevant date for determining whether the debtor has claimed the homestead exemption and has manifested an intent to surrender the property, based on the information provided in the schedules filed with the petition.⁴⁵

Chief Judge Glenn also joined the growing majority with his decision in *Rogers*.⁴⁶ The *Rogers* debtors did not claim the homestead exemption on Schedule C but intended to reaffirm the mortgages.⁴⁷ Like the other courts that embraced the majority position, the *Rogers* court held that indicating an intent to surrender the property was necessary to be eligible for the super exemption and cited *Gatto* for the proposition that surrender is a pre-requisite to receiving the super exemption.⁴⁸

Despite multiple interpretations of *Gatto*, courts seem to be in agreement that a debtor is entitled to the super exemption if the debtor has not claimed the homestead exemption, expresses an intent to surrender the property at the time the petition is filed, and is not indirectly benefiting from homestead property. Courts also seem unwilling to extend the broadest interpretation of the "receive the benefits of a homestead" language. For example, Judge Delano recently overruled a trustee's objection to the debtors' claim of the super exemption where the debtors had not claimed the homestead exemption and had indicated an intent to surrender, but still lived in the property on the day the petition was filed.⁴⁹ The trustee's sole basis for objecting to the debtors' claim of exemption was that the debtors were still living in the home when they filed bankruptcy. Accordingly, the court declined to extend the majority rule.

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³⁴ *Id.* at *1. ³⁵ *Id.* at *3.

³⁶ *In re Hernandez*, No. 07-16379-BKC-RAM, 2008 WL 171152, at *3, 5 (Bankr. S.D. Fla. Apr. 10, 2008).

³⁷ *Id.* ³⁸ *In re Magelitz*, 386 B.R. 879, 884 (Bankr. N.D. Fla. 2008). ³⁹ *Id.* at 881. ⁴⁰ *Id.* at 883. ⁴¹ *Id.* at 881-82, (citing *Morales*, 381 B.R. at 921, 923).

⁴² *In re Guidadas*, No. 9:08-bk-01238-ALP, 2008 WL 3873823, at *5 (Bankr. M.D. Fla. Aug. 7, 2008).

⁴³ *Id.* ⁴⁴ *Id.* ⁴⁵ *Id.* ⁴⁶ *In re Rogers*, No. 8:08-bk-01946-PMG, 2008 WL 4542907 (Bankr. M.D. Fla. Aug. 19, 2008).

⁴⁷ *Id.* at *1. ⁴⁸ *Id.* at *2.

⁴⁹ *In re Haselton*, No. 8:08-bk-04391-CED (Bankr. M.D. Fla. Oct. 10, 2008) (order on motion for reconsideration of order sustaining trustee's objection to property claimed as exempt).

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Less than a year after *Gatto* was decided, courts have recognized two interpretations of Section 4, but every case adopting the majority position has positively cited *Gatto*, the case representing what has become the minority position.⁵⁰ While the debate over the meaning of Section 4 continues to rage, the arguments for each interpretation have been clarified, as Judge Williamson responded to other Florida bankruptcy courts' interpretations of *Gatto* in his recent opinion in *Bennett*. *Bennett* is a consolidated opinion involving three cases, including two joint cases.⁵¹ In one of the joint cases, the debtors did not claim the homestead exemption and intended to reaffirm the debt.⁵² The other joint debtors did not claim the homestead exemption on Schedule C and originally intended to reaffirm the liens, but later amended their Statement of Intention to surrender the property.⁵³ The debtor filing individually originally filed under Chapter 13 but later converted her case to Chapter 7.⁵⁴ In the Chapter 13 case, the debtor claimed the homestead exemption, but no longer claimed the exemption and indicated an intent to surrender the property on her amended schedules filed post-conversion.⁵⁵ Under *Bennett*, a debtor is entitled to the super exemption as long as the homestead exemption is not claimed on the current schedules, and the debtor does not indirectly benefit from homestead exemption.⁵⁶ *Bennett* does not place any emphasis on the Statement of Intentions, suggesting that *Gatto* did not intend to either.⁵⁷

With the addition of *Bennett* to the growing line of cases addressing Section 4, judges and practitioners may not have the luxury of relying on a bright line rule or uniform judicial interpretation, but the arguments that can be made in support of the two competing interpretations of the statute are now clearer, as *Bennett* more clearly defines the minority position, which was originally stated in *Gatto*.

⁵⁰ *In re Morales*, 381 B.R. at 922; *In re Franzese*, 383 B.R. at 206; *In re Magelitz*, 386 B.R. at 881; *In re Guidadas*, 2008 WL 3873823, at *2; *In re Rogers*, 2008 WL 4542907, at *2.

⁵¹ *In re Bennett*, Nos. 8:07-bk-11881-MGW, 8:08-bk-03071-MGW, 8:07-bk-10637-MGW, 2008 WL 4490714, at *1 (Bankr. M.D. Fla. Oct. 8, 2008).

⁵² *Id.*

⁵³ *Id.* at *2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at *9.

⁵⁷ *Id.* at *8, 9.

Investiture of the Honorable Caryl E. Delano

On December 4, 2008, Caryl E. Delano was sworn in as the newest bankruptcy judge on the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. The investiture ceremony was held at the Sam Gibbons United States Courthouse and nearly all of the bankruptcy judges from the Middle District were in attendance. Following the ceremony, a reception was held for the newly-sworn in judge at the Hyatt Regency in Downtown Tampa.



Chart of Cases in Personal Property Exemption Statute Article

by Kathleen DiSanto, Esq

Case	Schedule A: Equity	Schedule C: Claim Homestead Exemption?	Statement of Fin. Affairs: Foreclosed	Statement of Intention	Abandoned	Additional Notes	Debtor allowed Pers. Prop. Exemption?
Bennett, 2008 WL 4490714 (Williamson)	no	no	no	reaffirm	no		YES
Browning, 2008 WL 4490714 08-03071 (Williamson)	no	no	no	reaffirm, amended to surrender	no		YES
Roesler, 2008 WL 4490714 07-10637 (Williamson)	yes	yes, amended to no after voluntary conversion from Chapter 13 to 7	no	surrender	no	spouse not a co-debtor	YES
Oliver, 2008 WL 4547516 (Olson)	no	no	no	reaffirm	no		NO
Haselton, 08-04391 (Delano)	no	no	no	surrender	lived in residence on petition date, subsequently abandoned		YES
Rogers, 2008 WL 4542907 (Glenn)	no	no	no	reaffirm	no		NO
Guidadas, 2008 WL 3873823 (Paskay)	no	yes, but amended to no	no	reaffirm, amended to surrender	yes		NO

Chart of Cases in Personal Property Exemption Statute Article

by Kathleen DiSanto, Esq

Magelitz, 386 B.R. 879 (Killian)	no	no		no declaration, but stated would continue to make pmts	no		NO
Hernandez, 2008 WL 1711528 (Mark)		no, but exempted as TBE under 522(b)(3)(B)			no	spouse not a co- debtor	NO
Martias, 2008 WL 906776 (Hyman)	no	yes, but amended to no		reaffirm, amended to surrender	lived in residence on petition date, still occupied on date of hearing		YES
Shoopman, 2008 WL 817109 (Hyman)		no	foreclosure pending, debtor consented to relief from stay	reaffirm, amended to surrender	yes		YES
Franzese, 383 B.R. 197 (Jennemann)	no	no, amended as exempt as TBE under 522(b)(3)(B)		reaffirm	no	spouse not a co- debtor	NO
Morales, 381 B.R. 197 (Ray)	no	no		reaffirm, amended to reaffirm only smaller of 2 mortgages	no		NO
Gatto, 380 B.R. 88 (Williamson)	no	no	no	surrender	lived in residence on petition date		YES
DiCesare, 380 B.R. 88 07-06536 (Williamson)	no	no		surrender	lived in residence on petition date		YES
Dickinson, 380 B.R. 88 07-07029 (Williamson)	yes	no		surrender	lived in residence on petition date		YES

2008 View from the Bench Seminar

On November 6, 2008, The Florida Bar Continuing Legal Education Committee and the The Business Law Section of The Florida Bar presented the annual Bankruptcy Law and Practice "View from the Bench" seminar. This year's event was attended by a large crowd, both in the main mock courtroom and in an overflow room where attendees could watch the judges' remarks via simulcast. The judges participating in this year's Tampa panel for the program, which was also held in Miami on November 7, 2008, included Chief Judge Glenn and Judges Briskman, Delano, Funk, Jennemann, May, McEwen, Williamson, and Paskay from the Middle District of Florida, Chief Judge Killian from the Northern District of Florida, and Chief Judge Ray and Judge Cristol from the Southern District of Florida.



2008 View from the Bench Seminar cont.



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