



# The intersection of federal bankruptcy code with Texas homestead law

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While we are currently experiencing a booming real estate market in Texas, at some point it is probable a title company will experience a customer who is in bankruptcy. The purpose of this article is to provide some highlights of how the [United States Bankruptcy Code](#) & the [Federal Rules of Bankruptcy Procedure](#) intersect with Texas Homestead law.

**Exemption:** A debtor filing for bankruptcy protection in Texas can exclude from the bankruptcy proceedings either a monetary amount of equity or the Texas homestead acreage amount, through the Bankruptcy Schedule C ([Form 106C](#)).

[11 USC 522\(d\)](#) allows, per debtor, \$23,675 value in real property that is the primary residence of the debtor. For a married couple filing jointly, the exemption amount is doubled<sup>1</sup>. The exemption amount is based on available equity, determined by the value of the property minus the principle & interest amount due.

However, under [11 USC 522\(b\)\(3\)](#) a debtor can elect to take a state exemption instead of the 522(d) monetary amount. The debtor must have resided in the real property either: (a) 730 days immediately preceding the bankruptcy; or (b) if debtor resided in more than one state in the 730 days preceding the bankruptcy, the debtor can utilize the state exemptions where debtor resided 180 days immediately preceding the 730 day period.

If a debtor fulfills the time requirement for a Texas exemption, [Article XVI, Section 51, Texas Constitution](#) and [§41.002, Property Code](#) govern the exemption *instead* of 11 USC 522(d), and the exemption is by size and not monetary. Per Texas homestead laws, up to 10 acres urban homestead, or 100 acres rural homestead for a single adult without dependent/200 acres for married couple or family homestead (e.g., single adult with minor children), qualifies as exempted

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<sup>1</sup> Both spouses must elect the same exemption; one cannot elect a 522(d) federal exemption while the other spouse elects Texas homestead exemption.

property. Thus, a Texas debtor can exempt from bankruptcy proceedings – and thus unsecured creditors – based on acreage and not value. While much ado was made to change the bankruptcy code to not allow such unlimited exemption (see the bankruptcy of former Governor John Connally), the 2005 revision of the Bankruptcy Code did *not* limit the acreage exemption amount.

If dealing with a sale or loan of property exempted from the bankruptcy, whether the debtor elected the 11 USC 522(d) federal exemption or the Texas state exemption might factor whether the Bankruptcy Court or Bankruptcy Trustee must be involved, and/or whether the net proceeds pass directly to the bankruptcy debtor.

**Forced Sale of Cotenant:** In dealing with Texas homestead, [§5.001, Family Code](#), specifies homestead property cannot be conveyed or encumbered without both spouses signing. However, if one spouse is in bankruptcy proceedings, the Bankruptcy Trustee can force a sale of the non-debtor's spouse's interest per authority in [11 USC 363\(h\)](#).

If the subject property is the separate property of the debtor, the Bankruptcy Trustee can sell without joinder of the non-debtor spouse *even if the property is the marital homestead*. Since 11 USC 363(h) is federal law, the supremacy clause of the US Constitution ([Article VI, second paragraph](#)) causes federal bankruptcy law to trump Texas state homestead law.

If the subject property is community property and cannot be partitioned, the Bankruptcy Trustee can sell 100% of the property, without joinder of the non-debtor spouse. However, [11 USC 363\(i\)](#) gives the non-debtor spouse a right of first refusal to purchase the property. If the property is sold to a 3<sup>rd</sup> party, the Bankruptcy Trustee pays to the non-debtor spouse 50% of the net proceeds (an amount equal to the spouse's undivided interest in the community property).

**Abstract of Judgment:** While §52.0012, Property Code provides an avenue for lifting an abstract of judgment against homestead property, a bankruptcy might provide a quicker, more seamless route to lift the abstract of judgment.

[§52.041, et seq, Property Code](#), provides:

- For Abstract of Judgment filed on/after September 1, 1993;
- If the subject property is scheduled as exempt from the bankruptcy; and
- The judgment creditor is listed in the Creditor Matrix Form filed in the bankruptcy; and
- The judgment debtor has received a *discharge* (not dismissal); then
- The abstract of judgment is cancelled.

While one hopes the good-times keep rolling in Texas, if a title company encounters a customer in bankruptcy, these highlights will hopefully provide guidance. This article is not all encompassing, so please check with your Underwriting Counsel and/or legal counsel.

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