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Have you been injured and have a possible claim against someone? Has this put a financial burden on you and your family? There are some tricky issues ahead of you and you want to talk with a seasoned bankruptcy / personal injury attorney. Section 11 U.S.C. 522(d)(11)(D) allows a debtor to exempt up to \$21,625 of compensation for “personal bodily injury.” Excluded from the “personal bodily injury exemption” are payments attributed to “pain and suffering” and “actual pecuniary loss.” Because “pain and suffering” and “actual pecuniary loss” encompass most measures of damages awarded for personal injury, courts have struggled to determine exactly what Congress intended the exemption to cover. “If read literally it could be reasonably concluded from the plain language of the statute that there exists no meaningful exemption for personal injuries because of actual pecuniary loss and pain and suffering are excluded from exempt status, as the statute seems to say, there is really nothing left.” Legislative history sheds no light on the scope of the “personal bodily injury” exemption. The Judiciary Committee notes state that Section 522(d)(11)(D) is designed to cover compensation for “actual bodily injury,” but is not intended to include the attendant costs that accompany such loss, such as medical payment, pain and suffering, or loss of earnings: This provision in subparagraph (D)(11) is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such loss, such as medical payment, pain and suffering, or loss of earnings. Those items are handled separately by the bill.

H.R.Rep. No. 95-595, 95 Cong., 1st Sess. 361-362 (1977), U.S. Code Cong. & Admin.

~~News 1978, pp. 5693, 6318. Adding to the confusion is Congress’ failure to provide~~

for the excluded items. Convinced that Congress did not intend to create a useless exemption, Courts have relied on the statute's context-the Bankruptcy Code-and on the Code's underlying policies, purposes and goals, to "arrive at a proper interpretation." The Bankruptcy Code's policies, purposes and goals include: To provide the debtor with property necessary for survival;
To protect the dignity and the cultural and religious identity of the debtor;
To enable the debtor to rehabilitate himself [or herself] financially and earn income in the future;
To protect the debtor's family from the adverse consequences of impoverishment;
[and]
To shift the burden of providing the debtor and his family with minimal financial support from society to the debtor's creditors.

Alan N. Resnick, PRUDENT PLANNING OR FRAUDULENT TRANSFER? THE USE OF NONEXEMPT ASSETS TO PURCHASE OR IMPROVE EXEMPT PROPERTY ON THE EVE OF BANKRUPTCY, 31 Rutgers L.Rev 615, 621 (1978). As pertains specifically to the personal bodily injury exemption it has been said:
The purpose of an exemption for monies payable in the event of personal injury is two-fold. One purpose is to prevent debtors and their families from becoming financially dependent upon the state. However in the case of the personal injury exemption, an even more fundamental purpose is served. The personal injury exemption is a legislative attempt to restore human capital; to preserve money that makes an injured debtor whole in the eyes of the law. In re Butcher, 189 B.R.357, 365 (Bankr.D.Md. 1995)(citing American Service Corp of South Carolina v. Hickie, 435 S.E.2d 870, 871 (SC 1993). Given these public policies, Courts construe the exemption in favor of the debtor. Thus, Courts give the term "personal bodily injury" a broad and liberal construction. As long as it appears from the facts that the claimed personal injury award could reasonably fall within the exempt category the court may allow it. On the other hand, Courts construe the terms "pain and suffering" and "actual pecuniary loss" narrowly. Under the narrow construction accorded to "actual pecuniary loss," the objector must establish that the Settlement Agreement expressly designates a portion of the settlement proceeds to that category. And, under the narrow construction accorded to the term "pain and suffering," the majority of Courts hold that the exemption excludes "pain and suffering" only to the extent that "pain and suffering" are strictly for emotional

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trauma or mental distress. “It has been suggested that Congress, in drawing a clear distinction between recover for bodily injury and for pain and suffering intended only mental and emotional trauma, as opposed to physical discomfort and distress, to fall under the category of pain and suffering.” The “statute’s apparent purpose is to prevent exemptions based solely on pain and suffering unaccompanied by bodily injury.” (emphasis added) Mental or emotional trauma that can be categorized as excluded pain and suffering are “fright, shock, stress, aggravation, embarrassment, humiliation, depression, nervousness or anxiety. Any recovery received for physical manifestations of pain and suffering, such as physical discomfort or physical distress, is exempt.

These three concepts are the building blocks of the “personal bodily injury” analysis; and Rule 4003 provides the analytical framework. Rule 4003 places upon the objecting party both the initial burden of production and the ultimate burden of persuasion in any controversy regarding the legitimacy of claimed exemptions. Because the objecting party has had the initial burden of production, the debtor establishes the exemption’s prima facie validity merely by claiming it. “A debtor is not required to make an affirmative showing that a claimed exemption is appropriate.” As long as the debtor expressly or impliedly characterized the settlement as falling within an exempt category, the [objector] retains the burden of proof and must present evidence to the court if he wishes to prevail on his objection.” Once the debtor claims the exemption, the burden shifts to the objector to rebut the presumption of validity. “It is the consensus among the overwhelming majority of the courts having faced this issue that compensation designated purely for ‘personal bodily injury’ is exempt ‘so long as the money is specifically not intended as compensation for pain and suffering or actual pecuniary loss or that the damages are not way out of proportion to the injuries. “[J]ust because the Debtor ha[s] financial losses arising from the [an] incident, it does not necessarily follow that the payment made to the Debtor...w[ere] not on account of bodily injuries.” Likewise, just because the debtor experienced mental anguish and emotional distress, arising from the incident, it does not necessarily follow that the payment made to the debtor are excluded from the exemption for personal bodily injuries. In other words, the objector can overcome the presumption of validity by establishing

one or more of the following by a preponderance of the evidence: (1) that there has been no cognizable physical injury to the body; (2) that the Settlement Agreement expressly allocates portions of the award to the Section 522(d)(11)(D) exclusions; or (3) that the damages awarded are way out of proportion to the actual physical injury. If you have a personal injury and need to file bankruptcy or already have, give attorney Mark McClure a call at 253-631-6484 to ensure your rights are being protected.

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