Statement of the Commission
*FTC v. Creaghan Harry et al.*, File Number X040063
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and Homestead Exemptions

Defendant Creaghan Harry has settled charges that he defrauded consumers by selling bogus "human growth hormone" products and violating the CAN-SPAM Act. He will pay $485,000 to the Commission. The consent order acknowledges that these funds will come in part from refinancing his Florida home, and he further grants a voluntary lien on and security interest in his Florida home as collateral for some of this debt. As is too often the case, however, the funds available for consumers fall far short of the financial injury that the Commission believes he caused. The significant equity remaining in Mr. Harry's home would help make up this gap.

For reasons unique to this case, Mr. Harry granted a voluntary lien on his real property despite the Florida homestead exemption. This homestead exemption protects a primary residence from most involuntary liens regardless of circumstances, even if, for example, the property was purchased with the proceeds of illegal activity. Many other states also provide homestead protection from involuntary liens – but, unlike many of these, Florida's exemption is virtually unlimited, so that any amount of equity in the primary residence can be shielded from creditors. The Commission's ability to obtain maximum recovery for consumers is often frustrated by the exemptions.

In April 2005, the United States Congress passed, and the President signed, the

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Bankruptcy Law")[1], a revision of the bankruptcy laws that, among other things, places certain limits on state homestead exemptions.[2] The Bankruptcy Law gives the bankruptcy court jurisdiction over some or all of the real property – notwithstanding a homestead exemption – when a real property purchase was executed within ten years of the bankruptcy with the intent to defraud a creditor, or when otherwise non-exempt assets were used to purchase the real property within approximately 40 months of the bankruptcy filing.

The Bankruptcy Law, on its face, suggests a potential mechanism by which the Commission could obtain more assets for consumer relief, particularly in cases where defendants who live in states with unlimited homestead exemptions attempt to shield significant equity that otherwise could be returned to consumers who were defrauded. When individuals who have committed fraud continue to live in visibly high affluence, even after the Commission has sued them successfully, it short-changes consumers and undercuts the deterrent effect of an enforcement program.

Unfortunately, the timing of this case made it difficult for the Commission to apply the new Bankruptcy Law provisions. The proposed order was negotiated by staff in January, well before the Bankruptcy Law was enacted. In addition, based on the date that Mr. Harry purchased

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[1] Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 101 et seq. (2005)).

[2] Bankruptcy Law, secs. 308, 322, 11 U.S.C. § 522.

his Florida home, the 40-month look-back provision will expire later this year, leaving little time for the Commission to litigate the case to a successful conclusion and then take the additional steps necessary to take advantage of the new Bankruptcy Law provisions.

Despite the timing issues in this case, the Commission is committed to exploring ways to employ the new limitations on homestead exemptions in future cases. The Commission is aware that there are legal and practical issues that could limit the effectiveness of the new Bankruptcy Law in particular cases. It is likely, for example, that there will be other creditors who compete for available funds in a bankrupt estate, and it may be difficult or costly to satisfy the "intent" requirement if the 40-month look-back provision has expired. If the defendant in an FTC action does not file for bankruptcy voluntarily, there may be legal or practical impediments to an involuntary bankruptcy petition.

Commission attorneys will use the Bankruptcy Law provisions to the best effect. Homestead exemptions have too often frustrated the Commission's ability to redress consumer injury suffered at the hands of malefactors and the Commission will act aggressively to ensure that these people will no longer live high at the expense of their victims.