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Has Congress Slimmed Down The Hogs?: A Look at the BAPCA Approach to Pre-Bankruptcy Planning

Juliet M Moringiello

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I. INTRODUCTION

Congress debated bankruptcy reform for eight years.[1] Looming large in both the legislative debates and the ensuing media coverage was the idea of "bankruptcy abuse"; indeed, the name of the bill Congress passed in the spring of 2005 was called the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[2] According to the media coverage, individuals engaged in all sorts of bankruptcy abuse: well-heeled individuals filed Chapter 7 petitions to avoid debts that they had the ability to pay and debtors who owned homes in states with low or non-existent homestead exemptions moved to debtor havens, such as Florida, to take advantage of more generous exemptions.[3] Despite the fact that the average debtor in bankruptcy has a relatively small annual income,[4] too small to move to Florida and buy a big house, the stories of abuse ran unabated.

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[1] The first reform bill that Congress considered was the Consumer Bankruptcy Reform Act of 1997. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (discussing the various bills Congress considered).

[2] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

[3] For an excellent discussion of the media's influence on the debates about bankruptcy reform, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1107-17 (2004).

[4] *See, e.g.*, Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: The Class of 2000*, 20-8 AM. BANKR. INST. J. 20 (2001) (reporting that the median gross annual income of debtors in no-asset Chapter 7 cases in 2000 was $26,400); Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Credit*

Several provisions in the BAPCPA reflect Congress' attempts to end this well-publicized abuse. The best-publicized and probably most analyzed of these provisions is the means test, which aims to prevent debtors with the ability to pay from filing Chapter 7 petitions.[5] Only slightly less publicized are the provisions aimed at limiting the homestead exemptions, a controversial aim given the interest in the states in allowing their residents the benefit of state, rather than federal, exemptions.

This article will discuss pre-bankruptcy planning. For the purpose of this article, pre-bankruptcy planning is defined as any attempt by individuals to maximize their available exemptions before filing a bankruptcy petition. Debtors execute these attempts in a number of ways: they sell nonexempt property in order to acquire exempt personal property, they use the proceeds of their sales of nonexempt property to make large payments on the mortgages encumbering their exempt houses, and yes, there are some debtors who move from one state to another before filing for bankruptcy.[6] Some high-asset debtors have tried to remove assets from their bankruptcy estates by establishing self-settled trusts, often offshore.[7] This article's definition of pre-bankruptcy planning encompasses this behavior as well. Part II of this article will discuss how courts dealt with pre-bankruptcy planning before the enactment of the BAPCPA. Part III will explain the BAPCPA's attempts to curb pre-bankruptcy planning and discuss the few cases applying the new pre-bankruptcy planning provisions. Part IV will analyze the new provisions and discuss whether they significantly change the pre-BAPCPA law. This article will conclude by showing that, by relying primarily on fraudulent transfer concepts

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Card Debt in Chapter 7 Cases, 22-10 AM. BANKR. INST. J. 20 (Dec. 2003/Jan. 2004) (reporting that only 2.6% of debtors in a study of 5,203 no-asset Chapter 7 cases closed between 2000 and 2002 had a gross annual income of $72,000 or more).

[5] 11 U.S.C.A. § 707(b) (West Supp. 2005).

[6] *See, e.g.*, *In re* Coplan, 156 B.R. 88 (Bankr. M.D. Fla. 1993) (involving debtors who moved from Wisconsin to Florida a year and five days before filing for bankruptcy); Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001) (involving a debtor who moved from Tennessee to Florida after a $15,000,000 judgment was entered against him but before filing for bankruptcy).

[7] *See, e.g.*, Walker v. Weese, 286 B.R. 294 (D. Md. 2002); *In re* Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998).

to address pre-bankruptcy planning, the BAPCPA will likely have little impact on most pre-bankruptcy planning practices. This article will refer to the Bankruptcy Code of 1978 generally as the "Code" and to the BAPCPA provisions that amend the code as "BAPCPA."

II. PIGS GET FAT, HOGS GET SLAUGHTERED: PRE-BANKRUPTCY PLANNING PRE-BAPCPA

The judicial approach to pre-bankruptcy planning pre-BAPCPA was anything but uniform. There are three primary reasons for this lack of uniformity. The first is that bankruptcy law generally respects property rights as they are defined by state law.[8] As a result, bankruptcy law incorporates state exemptions and the Code allows states to opt-out of the federal scheme of exemptions.[9] Some of these state law exemptions are unlimited, and bankruptcy courts are reluctant to impose dollar limits on them when state legislatures have not done so.

The second reason for this lack of uniformity is an omission from the Code: pre-bankruptcy planning was not explicitly forbidden by the Bankruptcy Code of 1978. Not only was the Code silent on pre-bankruptcy planning, but the legislative history to the Code specifically provided that a debtor's conversion of nonexempt property to exempt property before filing her bankruptcy petition would *not* be fraudulent as to creditors.[10] As a result, courts engaged in a "pigs to hogs" analysis, finding pre-bankruptcy planning to be impermissible when a debtor sheltered too many assets. A third, and perhaps most important, reason for the confused nature of the pre-BAPCPA case law is the fact that

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[8] *E.g.*, Butner v. United States, 440 U.S. 48, 52 (1978).

[9] 11 U.S.C. § 522(b)(2) (2000). Most states have opted out of the federal exemptions. *See* 4 COLLIER BANKR. PRACTICE GUIDE ¶ 74.03[3] (LexisNexis 2005) (listing the states that have opted out of the federal exemptions).

[10] H.R. REP. NO. 95-595, at 361 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6317; S. REP. NO. 95-989, at 76 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5862. As a result, courts require "extrinsic evidence of fraudulent intent." Panuska v. Johnson (*In re* Johnson), 880 F.2d 78, 81 (8th Cir. 1989). *See also* Norwest Bank Neb. v. Tveten (*In re* Tveten), 848 F.2d 871, 873-74 (8th Cir. 1988).

pre-BAPCPA courts were required to engage in a fraudulent transfer analysis in deciding whether or not to punish pre-bankruptcy asset conversions.

A. The Judicial Approach to Unlimited Exemptions

Exemption laws allow individuals to shelter certain assets from creditor process. One theory behind exemption laws is that an individual should be able to keep certain items necessary for his future rehabilitation, such as his clothing and the tools of his trade.. Exemption laws are also designed to protect a debtor's family from destitution.[11] The Code provides a list of exempt property, and most of the exemptions provided in the Code are limited to stated dollar amounts.[12] Congress gave states the option of opting out of the federal exemptions; in states that have exercised the opt-out, debtors in bankruptcy are not permitted to choose the federal exemptions.

More than half of the states have opted out of the Bankruptcy Code's list of exemptions and the available exemptions in the opt-out states vary widely. For instance, Florida,[13] Iowa,[14] and Kansas[15] have unlimited homestead exemptions, while Maryland and Pennsylvania have no homestead exemption at all. Some states protect annuities from creditor process without regard to value,[16] while others protect only certain types of annuities or annuities up to a certain dollar value.[17] Of course, the pre-bankruptcy planning cases arise in the states that have generous exemptions.

Courts deciding whether to limit or deny exemptions prior to the BAPCPA were required to balance two important policies. The

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[11] 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).

[12] *See, e.g.*, 11 U.S.C.A. § 522(d)(2) (West Supp. 2005) (a debtor may exempt up to $2,950 of the value of one motor vehicle); 11 U.S.C. § 522(d)(1) (2000) (same, except value limited to $2,400).

[13] FLA. CONST. art. X, § 4(a).

[14] IOWA CODE ANN § 561.16 (West 1992).

[15] KAN. STAT. ANN. § 60-2301 (2005).

[16] *See, e.g.*, FLA. STAT. ANN. § 222.14 (West 1998); TEX. INS. CODE ANN. §1108.051 (Vernon Supp. 2005).

[17] S.D. CODIFIED LAWS §§ 58-12-6, 58-12-8 (2004).

first, referenced above, is that generally, property rights are defined by state law.[18] The second is that the right to a discharge in bankruptcy is a matter of federal law. This balancing led some courts to give great deference to state exemptions, particularly the homestead exemption. This deference to state exemptions was far from uniform, even with respect to the homestead exemption.

Complicating matters was the fact that the pre-BAPCPA Code contained no explicit mechanism for reducing or denying an exemption.[19] As a result, some creditors would argue that a debtor's conversion of non-exempt property to exempt property immediately before a bankruptcy filing constituted a fraudulent transfer that was avoidable under the Code's fraudulent transfer provision.[20] A court's decision as to whether or not the transfer was fraudulent would then depend on the amount of deference the court gave the state exemption laws.

One type of bankruptcy planning that was highly publicized in the media was the practice of moving to another state immediately before bankruptcy to take advantage of more generous exemptions.[21] The most sought-after exemption was the homestead exemption of course, and again, courts took differing approaches to the practice. Under the pre-BAPCPA Code, a debtor was required to live in a state for 180 days before she was entitled to take advantage of her new state's exemptions. In theory, therefore, an individual could sell a home in a low-exemption state, move to and purchase a home in a high exemption state, and file for bankruptcy six months and one day later, claiming the new home as exempt.

Despite the large amount of publicity condemning this practice, there are few cases in which a moving debtor was an issue. Some cases addressing the issue limited the debtor to the

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[18] *Butner*, 440 U.S. at 52.

[19] 11 U.S.C. § 522 (2000). Under the BAPCPA, a debtor can be denied at least part of a homestead exemption if that debtor made a fraudulent transfer to obtain the exemption. *See infra* Part III; *see also* 11 U.S.C.A. § 522 (West Supp. 2005).

[20] 11 U.S.C. § 548(a)(1) (2000).

[21] *See generally* Scott Hiaasen, *Justices: Debtors' Homes Protected*, PALM BEACH POST, June 22, 2001, at 1A (discussing homeowners moving to Florida to use the state's homestead exemption).

homestead exemption available in the original state.[22] Others gave tremendous deference to the state's legislative judgment regarding exemptions.[23]

The decisions of bankruptcy courts located in Florida shows the diversity of opinions regarding the appropriate extent of deference to be given to the homestead exemption. The court in *In re Coplan* limited the debtors' homestead exemption to $40,000 because the debtor had moved from Wisconsin to Florida a year and five days before filing for bankruptcy.[24] Because under the pre-BAPCPA Code, there was a one-year statute of limitations for fraudulent transfers, the debtors thought they were entitled to the unlimited Florida homestead exemption.[25] The homestead exemption in Wisconsin was $40,000, so the court limited the debtors to the homestead exemption to which they would have been entitled had they remained in Wisconsin.[26] In deciding to reduce the exemption, the court considered the fact that the debtors moved to Florida according to a careful plan that caused them to wait slightly more than a year before filing their bankruptcy petition.[27] In addition, the debtors moved to Florida without jobs; in fact, the husband had turned down several job offers in Wisconsin.[28] Several other bankruptcy courts in Florida also reduced or denied the debtor's claimed homestead exemption when the debtor acquired the homestead in fraud of creditors.[29]

On the other hand, a good number of bankruptcy courts in Florida upheld the homestead exemption despite obvious fraud on the part of the debtor in obtaining the exemption. The court in *In re*

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[22] *In re* Coplan, 156 B.R. 88, 91 (Bankr. M.D. Fla. 1993).
[23] Havoco of Am., Ltd. v. Hill, 197 F.3d 1135 (11th Cir. 1999).
[24] *In re Coplan*, 156 B.R. at 92.
[25] *Id.* at 91-92.
[26] *Id*. at 92.
[27] *Id.*
[28] *Id.*
[29] *See, e.g.*, *In re* Tabone, 247 B.R. 541, 545 (Bankr. M.D. Fla. 2000) (reducing the debtor's homestead exemption to the extent it was acquired with fraudulently transferred nonexempt funds); *In re* Thomas, 172 B.R. 673, 674-75 (Bankr. M.D. Fla. 1994) (disallowing homestead exemption to the extent of the amount of nonexempt assets converted into exempt assets). *See also Hill*, 197 F.3d at 1141-42 (listing cases where Florida bankruptcy courts either allowed or denied the homestead exemption).

Young[30] held that there was no exception to the Florida homestead exemption "when real property is acquired *for the sole purpose* of defeating the claims of out-of-state creditors."[31] Finally, the United States Court of Appeals for the Eleventh Circuit, in *Havoco of America, Ltd. v. Hill*,[32] certified to the Florida Supreme Court the question of whether a Florida homestead was exempt, notwithstanding the fact that the debtor acquired the homestead with nonexempt funds with the intent to hinder, delay, or defraud his creditors.[33] Faced with a truly egregious example of pre-bankruptcy planning (the debtor moved from Tennessee to Florida and bought a $650,000 house after losing a $15,000,000 lawsuit), the Florida Supreme Court held that, indeed, there was no fraud exception to the Florida homestead exemption.[34]

The Florida homestead exemption is found in the Florida Constitution.[35] Courts reached similar conclusions in other states whose constitutions protect the homestead. For instance, the court in *In re McGinnis*[36] stressed that liberal construction of the constitutionally protected (and unlimited) Kansas homestead exemption was necessary to "safeguard its humanitarian, social, and economic purposes."[37] In *McGinnis*, the court upheld the claimed exemption despite the fact that the debtors sold non-exempt property in Missouri, received the proceeds in cash, and then took the $88,000 in cash in a paper bag and purchased a house in Kansas.[38] The deference to the homestead exemption is not limited to those homestead exemptions found in state constitutions; in *Murphey v. Crater (In re Crater)*[39] the court stressed that the Arizona exemption statute at issue contained no restrictions on the homestead exemption tied to fraud.[40] In Arizona, the legislature

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[30] 235 B.R. 666 (Bankr. M.D. Fla. 1999).
[31] *Id.* at 672 (emphasis added).
[32] 197 F.3d 1135 (11th Cir. 1999).
[33] *Hill*, 790 So. 2d at 1019.
[34] *Id.* at 1028.
[35] FLA. CONST. art. X, § 4(a) ("[A homestead] shall be exempt from forced sale under process of any court[.]").
[36] 306 B.R. 279 (Bankr. W.D. Mo. 2004).
[37] *Id.* at 286.
[38] *Id.* at 282.
[39] 286 B.R. 756 (Bankr. D. Ariz. 2002).
[40] *Id.* at 765.

itself made an important distinction between exempt homesteads and exempt personal property by placing no timing limitation on the acquisition of a homestead but exempting only life insurance policies continuously maintained by the debtor for at least two years.[41]

Homestead exemptions are not the only unlimited exemptions, however. As noted above, some states exempt annuities without limit,[42] and there are also unlimited exemptions for a variety of items of personal property, including firearms.[43] Here again, the judicial willingness to deny or limit the exemption varies from case to case. In a case involving Iowa's unlimited firearms exemption, a debtor purchased a rifle worth over $10,000 before filing for bankruptcy.[44] The debtor admitted that he did not use the rifle often and that he purchased it because he knew it would be exempt from his creditors in bankruptcy.[45] Nevertheless, the court respected the intent of the Iowa legislature to exempt guns and noted that it was the job of the legislature, not the courts, to place dollar limits on exemptions.[46] On the other hand, in *Staats v. Beckman (In re Beckman)*,[47] a bankruptcy court in Ohio denied an exemption for life insurance policies purchased three days before the debtor's bankruptcy filing because the total amount of the debtor's insurance was excessive.[48] Some courts, however, have made an explicit distinction between homestead and other exemptions, holding that when a debtor converts nonexempt property into exempt *personal* property, the amount of the property converted can be considered in determining fraudulent intent.[49]

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[41] *Id.*

[42] An unlimited exemption for annuities was at issue in *Tveten*, 848 F.2d at 871. While that case was making its way through the courts, the Minnesota Supreme Court invalidated that exemption. *In re* Tveten, 402 N.W.2d 551, 560 (Minn. 1987).

[43] *E.g.*, IOWA CODE ANN. § 627.6(2) (West Supp. 2006).

[44] *In re* McCabe, 280 B.R. 841, 844 (Bankr. N.D. Iowa 2002).

[45] *Id.*

[46] *Id.* at 845-46.

[47] 104 B.R. 866 (Bankr. S.D. Ohio 1989).

[48] *Id.* at 871-72.

[49] *Johnson*, 880 F.2d at 81-82.

B. The Principle of "Too Much"

The judicial approach to pre-bankruptcy planning has been summed up at least once by this memorable quote: "[W]hen a pig becomes a hog it is slaughtered."[50] Certainly that reasoning is apparent in the pair of cases decided by the United States Court of Appeals for the Eighth Circuit on the same day in 1988, *Norwest Bank Nebraska, N.A. v. Tveten*[51] and *Hanson v. First National Bank*.[52] The debtor in *Tveten* was a physician who sold almost all of his nonexempt property and used the proceeds to purchase $700,000 worth of exempt insurance and annuity contracts.[53] The applicable Minnesota law contained an unlimited exemption for annuity contracts payable by a fraternal benefit society.[54] The debtors in *Hanson* were farmers who sold nonexempt property worth roughly $34,000 to purchase exempt life insurance policies and prepay the mortgage loan secured by their exempt homestead.[55] The applicable South Dakota exemption statute provided an exemption for life insurance policies up to $20,000 in value and a homestead of unlimited value.[56]

The creditor in *Tveten* objected to the debtor's discharge, while the creditor in *Hanson* objected to the debtors' claimed exemptions.[57] To prevail on either objection, the creditor must prove that the debtor transferred property with the intent to hinder, delay, or defraud his creditors.[58] In both cases, the court applied a fraudulent transfer analysis, finding extrinsic evidence of fraud in *Tveten*,[59] but not in *Hanson*.[60] The court was guided in both cases by the principle that pre-bankruptcy conversion of assets, without more, does not constitute fraud.[61] In searching for badges of fraud,

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[50] *In re* Zouhar, 10 B.R. 154, 157 (Bankr. D.N.M. 1981).
[51] 848 F.2d 871 (8th Cir. 1988).
[52] 848 F.2d 866 (8th Cir. 1988).
[53] *Tveten*, 848 F.2d at 872.
[54] *Id*. at 873.
[55] *Hanson*, 848 F.2d at 867.
[56] *Id. See also* S.D. CODIFIED LAWS § 58-12-4 (1978).
[57] *Tveten*, 848 F.2d at 873; *Hanson*, 848 F.2d at 867-68.
[58] 11 U.S.C. §§ 548(a)(1), 727(a)(2) (1988).
[59] *Tveten*, 848 F.2d at 876.
[60] *Hanson*, 848 F.2d at 869.
[61] *Tveten*, 848 F.2d at 875; *Hanson*, 848 F.2d at 869.

the court found that both debtors sold their nonexempt property for fair market value and that title to the property was transferred openly and properly.[62] The ultimate difference between the cases was the amount of property transferred, a point noted by the concurring judge in *Hanson*.[63]

The amount of property transferred in *Tveten* was dispositive; according to the court, the debtor, by shielding over $700,000 in assets from his creditors, sought a "head start" rather than the "fresh start" that is at the core of bankruptcy relief.[64] Also relevant, however, were the facts that the claimed exemption was not a homestead exemption and that it was an unlimited exemption.[65] In *Tveten*, the court refused to defer to unlimited personal property exemptions, stating only state laws that include limits on the value of personal property exemptions are consistent with bankruptcy's fresh start policy.[66]

The pig-to-hog reasoning did not always hold sway before the BAPCPA, however: in Florida, a state often cast in the press as a debtor haven, a bankruptcy court denied a discharge to an elderly couple who attempted to shield $14,000 in an exempt retirement account.[67] On the other hand, the United States Court of Appeals for the Ninth Circuit held that a California debtor could shelter 1.4 million dollars in an exempt retirement account before filing for bankruptcy.[68]

Sometimes, courts faced with an unlimited state exemption attempt to give effect to the state's policies behind the exemption by considering whether the debtor's pre-bankruptcy acquisition of the exempt property was necessary for the debtor's maintenance and support. Courts that take this approach consider the amount of the exemption claimed. As a result, a bankruptcy court in New York allowed the exemption when the debtors acquired $5,000

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[62] *Tveten*, 848 F.2d. at 872-73 n.1; *Hanson*, 848 F.2d at 869.

[63] *Hanson*, 848 F.2d at 870 (Arnold, J., concurring).

[64] *Tveten*, 848 F.2d at 876.

[65] *See Johnson*, 880 F.2d at 82.

[66] *Tveten*, 848 F.2d at 875.

[67] Crews v. First Colony Life Ins. (*In re* Barker), 168 B.R. 773, 775, 780 (Bankr. M.D. Fla. 1994).

[68] *See* Gill v. Stern (*In re* Stern), 345 F.3d 1036, 1045 (9th Cir. 2003); *id.* at 1045-46 (Alarcon, J., concurring in part and dissenting in part).

worth of exempt annuities seven months before filing for bankruptcy.[69] Using similar reasoning, the court in *Panuska v. Johnson (In re Johnson)*[70] denied the debtor's discharge when he claimed exemptions for a $4,000 life insurance policy and musical instruments worth $8,000, all purchased in anticipation of filing for bankruptcy.[71] The debtor's discharge was denied despite the fact that the state law at issue limited the exempt amount of life insurance policies.[72] The court found that the debtor had acted fraudulently in acquiring the exempt property because none of the claimed items were in fact necessary to the debtor; the debtor had no immediate family members to protect, and he had never used the musical instruments.[73] In *Johnson*, the court found that the debtor pig became a debtor hog despite the fact that he had attempted to shield assets of a much lower value than did his investment partner, Dr. Tveten.

C. Defining Fraud

Because the pre-BAPCPA Code did not specifically prohibit pre-bankruptcy planning, creditors seeking to punish a debtor for engaging in such planning were forced to rely primarily on two Code provisions to do so. Under the pre-BAPCPA Code, a creditor could object to a debtor's discharge if a debtor made a transfer of his property within one year of the bankruptcy filing with the intent to hinder, delay, or defraud creditors.[74] A creditor could also look to set aside a debtor's transfer of property as fraudulent under the Code's fraudulent transfer provision.[75] Courts used the latter

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[69] *In re* Robinson, 271 B.R. 437, 442 (Bankr. N.D.N.Y. 2001).

[70] *Johnson*, 124 B.R. 290 (Bankr. D. Minn. 1991).

[71] *Id.* at 292 nn.3-4. The value of the musical instruments (a harpsichord and a baby grand piano) is found in the Eighth Circuit decision remanding the case. *See Johnson*, 880 F.2d at 79.

[72] *Johnson*, 124 B.R. at 292, 297.

[73] *Id.* at 297.

[74] 11 U.S.C. § 727(a)(2)(A) (2000). The BAPCPA did not change this provision.

[75] *See* 11 U.S.C. § 548(a)(1) (2000). Under the pre-BAPCPA Code, the trustee could avoid transfers made within one year before the bankruptcy petition. The BAPCPA extends this period to two years. *See* 11 U.S.C.A. § 548(a)(1) (West Supp. 2005).

provision to justify the denial of exemptions. The application of both of these provisions was somewhat inconsistent because to either deny a discharge or avoid a transfer, courts were forced to rely on the badges of fraud contained in the Uniform Fraudulent Transfer Act (UFTA).[76] Courts have struggled with these badges of fraud, in part because the legislative history to the Code[77] and the case law applying the Code negate at least one of the badges.

The UFTA provides several grounds on which a creditor can base its objection to a transfer of a debtor's property.[78] Because courts in pre-bankruptcy planning cases tend to base their holdings on the UFTA's actual fraud provision, this section will focus on actual fraud. Under the UFTA, a transfer of the debtor's property can be avoided by a creditor if the debtor transferred property with the actual intent to defraud her creditors.[79] Actual intent being difficult to prove, the UFTA allows a creditor to rely on a list of "badges of fraud" to prove the debtor's fraudulent intent. The Bankruptcy Code does not include the badges of fraud in its various fraudulent transfer provisions, but bankruptcy courts have long recognized their applicability in determining a fraudulent transfer for the purpose of the bankruptcy laws.[80]

Numerous badges of fraud tend to be found in pre-bankruptcy exemption planning. Often, the debtor transfers assets after a lawsuit has been threatened or a judgment entered,[81] sometimes selling them for less than their reasonably equivalent value, sometimes to a family member.[82] In a number of cases, the assets transferred represent all or most of the debtor's nonexempt

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[76] UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A-II U.L.A. 302 (1999).

[77] *See supra* note 10 and accompanying text.

[78] UNIF. FRAUDULENT TRANSFER ACT §§ 4, 5, 7A-II U.L.A. 301-02 (1999).

[79] *Id.* § 4(a)(1), 7A U.L.A. 301.

[80] *In re Crater*, 286 B.R. at 764.

[81] UNIF. FRAUDULENT TRANSFER ACT § 4(b)(4), 7A U.L.A. 302 (1999); *Stern*, 345 F.3d at 1039 (debtor transferred assets from a nonexempt Individual Retirement Account to an exempt Profit Sharing Pension Plan after the entry of a $4.5 million arbitration award against him); *In re Crater*, 286 B.R. at 758 (debtor sold $40,000 of Krispy Kreme stock after being sued for $600,000 and used the proceeds of sale to pay down their mortgage debt).

[82] UNIF. FRAUDULENT TRANSFER ACT § 4(b)(1), 7A U.L.A. 302 (1999); *Hanson*, 848 F.2d at 867 (debtors sold nonexempt property to their son).

property[83] and as a result of the transfer, the debtor is rendered insolvent.[84] Given the proliferation of these badges in many bankruptcy cases, one might think that courts would disapprove of pre-bankruptcy planning somewhat regularly, but the analysis is complicated by many courts' reliance on the above-noted legislative history. As a result, courts have tended to rule while the conversion of nonexempt assets into exempt assets on the eve of bankruptcy is not fraudulent *per se*, such a transfer might be considered fraudulent if some additional evidence of fraud is present.[85]

The opinion in *In re Crater* provides an excellent example of the length to which some courts went under the pre-BAPCPA Code to ignore the existence of fraudulent intent when several badges of fraud were present. After being sued for $600,000, the Craters sold $40,000 in Krispy Kreme stock and used the proceeds to pay down the mortgage debt secured by their exempt homestead.[86] Seventeen days after making their large mortgage payment, the Craters filed for Chapter 7.[87] The trustee objected to the debtor's discharge, claiming that the debtors sold the Krispy Kreme stock with the "intent to hinder, delay, or defraud a creditor."[88]

The court recognized that the trustee could rely on the UFTA badges of fraud to prove the debtors' fraudulent intent in selling the Krispy Kreme stock.[89] Interestingly, however, the court found that some badges are more fraudulent than others, dividing the badges of fraud into three categories.[90] The first category was composed of badges that were deceptive or fraudulent in themselves.[91] The debtor's retention of possession or control of property after transfer

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[83] UNIF. FRAUDULENT TRANSFER ACT § 4(b)(5), 7A U.L.A. 302 (1999); *Tveten II*, 848 F.2d at 872 (debtor sold almost all of his non-exempt property and purchased $700,000 worth of exempt property).

[84] UNIF. FRAUDULENT TRANSFER ACT § 4(b)(9), 7A U.L.A. 302 (1999).

[85] *In re Crater*, 286 B.R. at 765.

[86] *Id*. at 758-59.

[87] *Id.*

[88] *Id*. at 759. *See also* 11 U.S.C. § 727 (a)(2) (2000).

[89] *In re Crater*, 286 B.R. at 764-65.

[90] *Id.*

[91] *Id*. at 764.

is an action that would fall into this category.[92] The court characterized the second category as being made up of economically irrational transfers, such as transfers to an insider or transfers for less than reasonably equivalent value.[93] The court curiously described the third category as being comprised of badges that "may be innocent in themselves" or "merely timing factors" that are suspicious only when combined with badges in the other two categories.[94] Into this third category fall transfers made after the debtor was sued, transfers of all or substantially all of the debtor's assets, transfers made shortly before or after a substantial debt was incurred, and transfers that render the debtor insolvent.[95]

Relying on the policy implied by the legislative history, the court in *In re Crater* held that transfers marked by badges in the second and third categories are not fraudulent for the purpose of discharge denial unless they are combined with badges in the first category.[96] The court looked at exemption planning as a right, and noted that to deny a discharge to a debtor who converts nonexempt assets to exempt assets after being sued or incurring a large debt would be to deny a debtor the right to engage in pre-bankruptcy exemption planning at precisely the time that he needs it most.[97]

The *Crater* court's approach to the badges of fraud was far from universally accepted. Again, the Eighth Circuit's opinions in *Tveten*, *Hanson*, and *Johnson* are important. As summarized in *Johnson I*, the Eighth Circuit recognized pre-BAPCPA that the fraudulent intent necessary to defeat a discharge required something more than "mere use of the exemptions."[98] The Eighth Circuit, however, found that badges of fraud from all of the above-described *In re Crater* categories could provide sufficient extrinsic evidence of fraud, including conveyances for less than fair value and conveyances of substantially all of the debtor's nonexempt property.[99]

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[92] *Id.*
[93] *Id.*
[94] *In re Crater*, 286 B.R. at 764-65.
[95] *Id.*
[96] *Id*. at 766.
[97] *Id*. at 765.
[98] *Johnson*, 880 F.2d at 82.
[99] *Id.*

Pre-BAPCPA, the courts had a tremendous amount of discretion in deciding whether or not to punish debtors who engaged in pre-bankruptcy exemption planning. This discretion led to some inconsistency in identifying impermissible pre-bankruptcy planning. As the next section will discuss, Congress limited this discretion, but for only one type of exemption planning: homestead exemption planning.

III. "DOWN WITH BANKRUPTCY ABUSE!" PRE-BANKRUPTCY PLANNING POST-BAPCPA

As a result of the BAPCPA, the Bankruptcy Code today contains several provisions specifically aimed at preventing one type of pre-bankruptcy planning, the conversion of assets into an exempt homestead. While some courts placed this type of exemption planning into a specially protected category pre-BAPCPA, the new legislation targets only this type of exemption planning and leaves the other types of planning untouched. Importantly, the BAPCPA targets only the acquisition of certain exemptions and not the unlimited exemptions themselves.[100]

Unlike the Code pre-BAPCPA, the Code now contains provisions that allow the court to deny exemptions in the event of certain types of pre-bankruptcy planning. Clearly bothered by the specter of individuals moving from one state to another in anticipation of bankruptcy, Congress extended the period of time that a debtor must live in a state in order to take advantage of that state's exemptions from 180 days to 730 days.[101] The exemption provisions also include three mechanisms for reducing a debtor's homestead exemption. The first, contained in § 522(o), allows the court to reduce a homestead exemption to the extent that the value of the homestead can be attributed to fraudulent transfers of non-exempt property within ten years before the date the bankruptcy

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[100] There were several proposals to provide a federal cap on the homestead exemption in bankruptcy, but these proposals proved unpopular with the congressional delegations of high-exemption states. *See generally* Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397 (2005), for a discussion of BAPCPA's exemption provisions and their history.

[101] 11 U.S.C.A. § 522(b)(3)(A) (West Supp. 2005).

petition is filed.[102] In order for this provision to apply, the court must find that the debtor had the "intent to hinder, delay, or defraud her creditors."[103] Those peripatetic home-owning debtors are again targeted in § 522(p), which prohibits these debtors from exempting more than $125,000 of equity in a house that was acquired within 1,215 days before a bankruptcy filing.[104] This exemption reduction does not apply to debtors who move within a state.[105]

Debtors convicted of certain corporate crimes and those who have killed or seriously injured others are also singled out in the BAPCPA. To catch corporate miscreants, the BAPCPA prohibits those convicted of securities fraud from exempting any more than $125,000 of equity in a homestead.[106] This limitation also applies to persons who owe debts arising from certain acts resulting in death or serious physical injury to another individual.[107] These wrongdoers stand to lose more than just their exemptions under the BAPCPA; they can also lose their right to a discharge.[108]

The other type of pre-bankruptcy planning specifically addressed by the BAPCPA is the transfer of nonexempt assets to a self-settled trust. Under the new fraudulent transfer provision, the trustee may set aside transfers to a self-settled trust made within ten years before a bankruptcy filing *provided that* the transfer was made with the actual intent to hinder, delay, or defraud creditors.[109]

Because several provisions of the BAPCPA became effective immediately on April 20, 2005, courts have had the opportunity to consider some of the amendments directed at pre-bankruptcy planning. The court in the first of these cases, *In re McNabb*,[110] focused on the poor drafting of § 522(p), the section limiting the homestead exemption when the debtor purchases a home within

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[102] *Id.* § 522(o) (West Supp. 2005).
[103] *Id.*
[104] *Id.* § 522 (p)(1) (West Supp. 2005).
[105] *Id.* § 522(p)(2)(B); *see also In re* Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005).
[106] 11 U.S.C.A. § 522(q)(1)(B)(i)-(ii) (West Supp. 2005).
[107] *Id.* § 522(q)(1)(B)(iv).
[108] *Id.* § 727(a)(12) (West Supp. 2005).
[109] *Id.* § 548(e)(1) (West Supp. 2005).
[110] 326 B.R. 785 (Bankr. D. Ariz. 2005).

1,215 days before bankruptcy, in ruling that the debtor was entitled to the full amount of his homestead exemption.[111] By its terms, § 522(p) applies when the debtor "elects" state exemptions.[112] In that case, the debtor had sold a house in California and moved to Arizona, an "opt-out" state.[113] In an opt-out state, a debtor in bankruptcy is not free to choose between state and federal exemptions.[114] As a result, when the debtor filed for bankruptcy a little more than a year after purchasing a home in Arizona, he was *required* to choose the Arizona homestead exemption.[115] The court held that because the debtor did not *elect* the Arizona exemption, his exemption was not capped at $125,000.[116] In finding that the statute clearly expressed Congress' intent, the court stated that if Congress had wanted the exemption limitation to apply to all debtors, it could have simply deleted the phrase "as a result of electing," which appears in several places in the BAPCPA.[117]

The statutory construction adopted by the court in *In re McNabb* was immediately rejected in several cases.[118] In two of these cases, the courts strained to find the true meaning of the phrase "as a result of electing." The court in *In re Virissimo* stressed that even debtors in opt-out states elect their exemptions because debtors must take some affirmative act to claim property as exempt.[119] The debtor's choice to live in Florida, purchase a house there, and file for bankruptcy was considered the necessary election by the court in *In re Wayrynen*.[120]

The absurdity of giving the phrase "as a result of electing" its commonly accepted meaning was illustrated in several cases.[121]

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[111] *Id.* at 788-91.

[112] 11 U.S.C.A. § 522(p)(1) (West Supp. 2005).

[113] *In re McNabb*, 326 B.R. at 786.

[114] 11 U.S.C.A. § 522(b)(1)-(2) (West Supp. 2005).

[115] *In re McNabb*, 326 B.R. at 788.

[116] *Id.* at 791.

[117] *Id*. at 789-90.

[118] *See, e.g.*, *In re* Kane, 336 B.R. 477, 481 (Bankr. D. Nev. 2006); *In re Wayrynen*, 332 B.R. at 484; *In re* Virissimo, 332 B.R. 201, 205 (Bankr. D. Nev. 2005); *In re* Kaplan, 331 B.R. 483, 486 (Bankr. S.D. Fla. 2005).

[119] *In re Virissimo*, 332 B.R. at 205-06.

[120] *In re Wayrynen*, 332 B.R. at 484.

[121] *In re Kane*, 336 B.R. at 488; *In re Virissimo*, 332 B.R. at 205-07; *In re Kaplan*, 331 B.R. at 487-88.

These courts noted that such an interpretation of the phrase would render the exemption cap applicable in only a few of the states with large or unlimited homestead exemptions. According to the court in *In re Kane*, giving the phrase "as a result of electing" its commonly understood meaning would make the cap effective in only the five jurisdictions that allow their debtors to choose between state and federal exemptions in bankruptcy and have homestead exemptions greater than $125,000: the District of Columbia, Massachusetts, Minnesota, Rhode Island, and Texas.[122] The wording of § 522(p) was, in the mind of the court, the result of a scrivener's error, so the court felt justified in giving the provision its intended meaning.[123]

All of the courts rejecting *In re McNabb* gave great weight to the legislative history of the BAPCPA. After criticizing the BAPCPA as "not a model of clarity," the court in *In re Kaplan* held that the $125,000 homestead cap was applicable in Florida, in part because "it is common knowledge that Florida's unlimited homestead was at the heart of the legislative debate."[124] Other courts pointed to specific language in the legislative history to the BAPCPA, which expresses Congress' intent to close the "mansion loophole."[125] Given the clarity of the legislative intent, most of the courts interpreting § 522(p) have found that it applies in all states with large homestead exemptions, whether those states allow their debtors to choose federal exemptions or not.

Another issue that has arisen in the interpretation of § 522(p) is whether the section applies when a debtor makes payments on a mortgage loan, thus building equity in the homestead. This issue was addressed in *In re Blair*.[126] In *In re Blair*, one of the debtors' unsecured creditors objected to the debtors' claimed homestead exemption because the debtors' mortgage loan payments increased the equity in their home above the $125,000 cap.[127]

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[122] *In re Kane*, 336 B.R. at 484.

[123] *Id.* at 485-86.

[124] *In re Kaplan*, 331 B.R. at 488.

[125] *In re Kane*, 336 B.R. at 482; *In re Wayrynen*, 332 B.R. at 483; *In re Virissimo*, 332 B.R. at 206-07.

[126] 334 B.R. 374 (Bankr. N.D. Tex. 2005).

[127] *Id.* at 375.

The court held that mortgage payments did not lead to the acquisition of exempt equity that was limited by § 522(p).[128] The statute limits the exemption a debtor can claim for "any amount of interest that was *acquired by the debtor*" during the 1,215-day period preceding the debtor's bankruptcy petition.[129] Part of the court's reasoning is curious, as the court noted that "one does not actually 'acquire' equity in a home. One acquires title to a home."[130] In a less curious example of the court's reasoning, it pointed out that the BAPCPA allows a debtor to transfer equity from one home to another in the same state without being limited by the $125,000 cap.[131] That being the case, the debtor should also be permitted to make payments on his mortgage loan and build home equity within the 1,215-day period.[132] Left open by the court's opinion, however, is the question of whether the debtor is permitted to make large payments on his mortgage loan in contemplation of bankruptcy and escape the $125,000 cap.

Courts have also had the opportunity to apply new § 522(o), which reduces the homestead exemption to the extent that it was acquired as the result of fraudulent transfers made within ten years before the debtor's bankruptcy petition.[133] In the first reported case to apply § 522(o), *In re Maronde*,[134] the court reduced the debtor's homestead exemption. Because the BAPCPA, like the pre-BAPCPA Code, does not define fraud for the purpose of its fraudulent transfer provisions, the court in *In re Maronde* applied the UFTA badges of fraud.[135]

The *In re Maronde* opinion is significant for two reasons. The first is that it reinforces the pre-BAPCPA approach to pre-bankruptcy planning by holding that more than a mere pre-bankruptcy conversion of nonexempt assets to exempt assets is necessary to show fraudulent intent.[136] The other is that it analyzed

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[128] *Id*. at 376-78.
[129] 11 U.S.C. § 522(p)(1) (2005) (emphasis added).
[130] *In re Blair*, 334 B.R. at 376.
[131] *Id*. at 376-77.
[132] *Id.* at 377.
[133] 11 U.S.C.A. § 522(o) (West Supp. 2005).
[134] 332 B.R. 593 (Bankr. D. Minn. 2005).
[135] *Id.* at 600-01.
[136] *Id.* at 599.

the badges of fraud under the pre-BAPCPA Eighth Circuit standard set forth in *Tveten*, *Hanson*, and *Johnson*.[137] In *In re Maronde*, the court found that the debtor attempted to "thwart his creditors rather than making an honest attempt to repay them," and denied the exemption to the extent of the fraudulent transfers.[138]

The debtor in *In re Maronde* tried to maximize his exemptions by paying down a mortgage loan on his exempt homestead.[139] He attempted to raise the money to do so by opening new credit card accounts while insolvent[140] but when the credit card companies started rejecting his balance transfers, he consulted a lawyer who explained to him the concept of exempt property. After this meeting with an attorney, the debtor sold almost all of his nonexempt assets, worth about $20,000, and used the proceeds to pay down the mortgage loan.[141]

The court found several of the classic badges of fraud in *In re Maronde*. It found that the debtor had transferred substantially all of his nonexempt assets to himself at a time when he was insolvent.[142] Stressing that, even under the BAPCPA, a debtor may convert non-exempt assets to exempt assets on the eve of bankruptcy, the court found the debtor's transfers were part of an "overall scheme to defraud his creditors which he hatched at the time he was insolvent."[143]

Given the BAPCPA's young age, there are not many cases interpreting the pre-bankruptcy planning provisions. The few decided cases, combined with the language of the statute and the large body of pre-BAPCPA cases, give some clues as to whether the BAPCPA provisions will put an end to the pre-bankruptcy planning that Congress so wanted to prevent. In the next section, this article analyzes the likely effectiveness of the BAPCPA's pre-bankruptcy planning provisions.

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[137] *Id*. at 599-600. *See also Johnson*, 880 F.2d at 81; *Tveten*, 848 F.2d at 873-74; *Hanson*, 848 F.2d at 868.

[138] *In re Maronde*, 332 B.R. at 600.

[139] *Id*. at 596-97.

[140] *Id.*

[141] *Id*. at 597.

[142] *Id*. at 596-97.

[143] *Id*. at 600.

IV. CONCLUSION: WILL THE BAPCPA SLIM DOWN THE HOGS?

Undoubtedly, the BAPCPA will slim down some hogs, those who choose to move to a high exemption state and purchase a new home before filing for bankruptcy. It may also put an end to the practice of sheltering assets in self-settled trusts. While the latter seems worth stopping, the provisions attacking homesteads, while addressing the media concerns about debtors moving to high-exemption states, do both too much and too little. The provision capping the homestead exemption when a debtor buys a new home may limit judicial discretion in an undesirable way, while the provisions limiting exemptions that result from fraudulent transfers preserve the same judicial discretion that existed pre-BAPCPA. In addition, while it seems clear from the BAPCPA's legislative history that Congress wanted to close the mansion loophole,[144] Congress in fact left a large part of the loophole open, allowing debtors who are longtime residents of high exemption states to keep the same large homestead exemptions that they were entitled to pre-BAPCPA.[145]

Notwithstanding the fact that unlimited homestead exemptions received most of the press during the bankruptcy reform debates, it is unfortunate that Congress chose to limit homestead exemptions without limiting other unlimited exemptions, such as the exemption for annuities that exists in some states. Congress did attempt to penalize debtors who shelter their assets in self-settled trusts, but this asset protection device is relatively new and also the subject of some press coverage. Perhaps this approach was justified by the pre-BAPCPA case law, which tended to allow conversions into exempt homesteads but sometimes not into exempt personal property. If Congress truly wanted to limit judicial discretion in determining when debtor behavior crosses the line between permissible pre-bankruptcy planning and fraud, however, it could have placed a cap on *all* unlimited exemptions. A court faced today with a debtor taking advantage of a large personal property exemption will still be forced to apply pre-BAPCPA reasoning. It seems, however, that Congress was swayed

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[144] H.R. Rep. No. 109-31, at 15-16 (2005).
[145] *See generally* Howard, *supra* note 100.

by the press coverage ; the stories about debtors taking advantage of large homestead exemptions or sheltering their assets in the Cook Islands are certainly more interesting and easier to understand than stories about debtors who take advantage of more obscure loopholes.

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In analyzing the likely effectiveness of the BAPCPA, it is important to keep in mind the fact that a creditor under the pre-BAPCPA Code could ask a court to penalize a debtor for exemption planning in two ways. A creditor could ask the court to limit or deny the debtor's exemption, which was not explicitly permitted by the pre-BAPCPA Code, or the creditor could request that the court deny the debtor's discharge. As a result, a bankruptcy court's deference to state exemptions did not always result in bankruptcy relief for the debtor. Under the pre-BAPCPA Code, a court that upheld an exemption could penalize a debtor who fraudulently transferred property to maximize exemptions by denying the debtor's discharge, as the United States Court of Appeals for the Fifth Circuit did in *First Texas Savings Ass'n v. Reed (In re Reed)*.[146]

The BAPCPA explicitly allows a court to reduce a claimed exemption in certain circumstances. It is not clear, however, whether the reduction of the homestead is the only penalty that a debtor who fraudulently transfers assets in contemplation of bankruptcy will suffer. The BAPCPA leaves § 727, the section allowing a court to deny a debtor's discharge, substantially unchanged, with one exception that is relevant to this article. A debtor owing money as a result of securities fraud or as the result of causing the injury to or death of another person can face both the loss of her homestead exemption and the denial of a discharge.[147] A debtor who faces the reduction of her homestead exemption because she moved to another state or made fraudulent transfers that resulted in a higher homestead exemption, however, is not explicitly denied a discharge. It is possible that under the principle of *expressio unius est exclusio alterius* (all omissions

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[146] 700 F.2d 986, 991-92 (5th Cir. 1983).

[147] 11 U.S.C.A. §§ 522(q)(1)(B), 727(a)(12) (West Supp. 2005).

should be understood as exclusions),[148] courts might find that Congress decided to limit the penalty for those debtors to an exemption cap. Such a conclusion would be bolstered by the fact that Congress chose to both limit the homestead exemption and deny a discharge to persons who engage in securities fraud and the other bad acts listed in § 522(q). While this statutory construction principle can be overcome by a showing of contrary legislative intent,[149] it seems that by 2005, Congress was primarily concerned with punishing "greedy corporate culprits."[150]

In its various provisions limiting exemptions that were acquired as a result of transfers that the debtor made with the "intent to hinder, delay, or defraud a creditor,"[151] the BAPCPA preserves the pre-BAPCPA case law on pre-bankruptcy planning. The court in *In re Maronde* recognized this and applied the Eighth Circuit's analysis of the badges of fraud.[152] As discussed earlier in this article, courts struggled with the definition of fraud before the BAPCPA, leading to a non-uniform approach to pre-bankruptcy planning, one often guided by a pigs-to-hogs analysis. Therefore, while the BAPCPA provision allowing courts to limit a homestead exemption acquired by fraudulent transfers made within *ten years* before the debtor's bankruptcy petition might seem to be a significant change from the old law, fraud will likely be just as hard to prove under the new law as it was pre-BAPCPA.

While Congress was concerned about debtors sheltering large amounts of money in exempt homesteads, the BAPCPA provisions penalize two categories of debtors while leaving a third untouched. If a debtor moves from one state to another within 1,215 days before filing for bankruptcy and buys a house in the new state, that debtor is limited to a $125,000 homestead exemption, *regardless* of the reason for her move. Pre-BAPCPA, judges could and did look into the reasons for a debtor's move, and in at least one case, *In re Coplan*, the court penalized the debtor because it was clear

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[148] *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:23 (6th ed. 2000).

[149] *Id.*

[150] *In re Kane*, 336 B.R. at 484 n.12 (quoting 151 CONG. REC. H2049 (daily ed. Apr. 14, 2005) (Statement of Rep. Sensenbrenner)).

[151] 11 U.S.C.A. §§ 522(o), 548(e)(1) (West Supp. 2005).

[152] *See supra* notes 136-143 and accompanying text.

that the debtor had not relocated for professional reasons.[153] On its face, the BAPCPA does not appear to allow a debtor who moves to a high exemption state for legitimate professional reasons three years before filing for bankruptcy to exempt more than $125,000 of a homestead.

A debtor who buys his first house 1,215 days before bankruptcy is likewise penalized, because the $125,000 cap is applied to all purchases of a home within 1,215 days before bankruptcy *unless* the debtor transfers equity from one house to another in the same state. The debtor who is not penalized is the one who already lives in a high-exemption state who buys a larger house in anticipation of bankruptcy.

The BAPCPA does nothing to punish the debtor who plans for bankruptcy by selling all of his nonexempt assets to pay down mortgage debt on an exempt homestead, a point made clear in *In re Blair*.[154] Although the debtor in *In re Blair* made only regular mortgage payments which increased the amount of equity in his home, the court in that case made it clear that the BAPCPA homestead cap for acquiring a home within 1,215 days before bankruptcy applied to home purchases, not loan payments.[155] *In re Blair* thus preserves the pre-BAPCPA line of cases that did not penalize debtors who sold nonexempt property to pay down debt secured by their exempt homesteads.

It will be years before we learn whether or not the BAPCPA results in higher payments to the creditors who pushed for bankruptcy reform. Certainly, the law appears to punish debtors who shelter assets by purchasing large homes in anticipation of bankruptcy. The new law does nothing to close the mansion loophole for debtors who are longtime residents of high exemption states and it may result in fewer bankruptcy filings by those few very high asset, high debt individuals who can afford to move to another state to escape their creditors. Those individuals can always move, purchase exempt homesteads, and not file for bankruptcy, leaving their creditors to years of collection actions under state law.

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[153] *See supra* notes 24-28 and accompanying text.
[154] *See supra* notes 127-132 and accompanying text.
[155] *Id.*