Loyola University Chicago Law Journal

Volume 43
Issue 1 *Fall 2011*

Article 5

2011

Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption versus Accepting the New Job Out of State

Timothy R. Tarvin
University of Arkansas School of Law

Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job Out of State

*Timothy R. Tarvin**

Current unemployment levels have forced a significant portion of homeowners to contemplate bankruptcy. In an attempt to avoid the impending bankruptcy, those homeowners have sought new employment, even when that new employment would entail moving to a different state. Yet crossing state lines may be the worst strategy for a debtor considering bankruptcy. Most jurisdictions limit the homestead exemption in bankruptcy to residents; to exempt a home from creditor claims, a debtor must have lived in her current domicile for two years. Thus, the unemployed debtor who is trying to avoid bankruptcy by moving out of state to begin new employment sets herself up for a tremendous disadvantage should bankruptcy become necessary in the new state. Her move requires her to gamble her homestead protection in bankruptcy against the likelihood that new employment will keep her out of bankruptcy. Faced with this dilemma, the savvy debtor would do well to file for bankruptcy protection before moving. To be sure, bankruptcy laws create a perverse incentive for debtors to file bankruptcy prior to relocating out of state.

Bankruptcy laws were never intended to present debtors with this dilemma. For that matter, they were never intended to create an incentive to file for bankruptcy. This Article challenges the assumptions that underlie the present failing of bankruptcy law regarding homestead exemption requirements. It then proposes statutory changes that will eliminate this problem. Specifically, it suggests that bankruptcy statutes must: (1) adopt a standard for exemption eligibility that coincides with venue requirements; (2) examine the relative financial impact of the

* Associate Professor of Law, University of Arkansas School of Law. This Article was the subject of presentations at the 2008 Association of American Law Schools National Clinical Conference New Scholars Workshop in Tucson, Arizona, and the 2009 Southeastern Law Schools Conference New Scholars Workshop in West Palm Beach, Florida. The author recognizes the invaluable contribution of Professor Ned Snow to this work and gratefully acknowledges the research and assistance of Micah Guster, Emily Bridges, Remington Fang, Jonathan Udoka, and Anna Webb Hanson. This Article is dedicated to my children, Andrew and Katie.

relocation; and (3) repeal the dollar cap on homestead exemptions in the context of relocation. These simple changes will both promote overall re-employment that requires interstate relocation and prevent unnecessary bankruptcy filings.

TABLE OF CONTENTS

INTRODUCTION

In the midst of a recession in an increasingly mobile society in which millions of people relocate annually, there is a growing tension between a debtor's financial self-interest in moving to a new state to pursue employment and a debtor's desire to avoid the risk of losing her home because of the move.[1] Current law presents that dilemma for insolvent relocating debtors because relocation across state lines puts the debtor's homestead exemption at risk.[2]

The purpose of the homestead exemption is to protect a homeowner from general creditors who would otherwise take her home. The exemption prevents creditors who do not have a mortgage lien or other lien against a homestead from seizing and selling the home to apply the homeowner's equity towards satisfaction of creditors' claims. The homestead exemption exists under the laws of most states and is recognized under federal law, including bankruptcy law. The effect of homestead exemption laws is to protect home equity, preserve home ownership, avoid the eviction of families, and minimize the need for public welfare and housing assistance. In short, homestead exemption laws serve a legitimate state interest. It is only the apparent abuse of these laws that has created a problem for Congress and a dilemma for homeowners.

How did this dilemma for homeowners come to exist? The purpose of the bankruptcy exemptions is to ensure that a debtor is able to keep property necessary for a "fresh start." The homestead exemption protects part or all of a debtor's home equity from being liquidated in bankruptcy to pay creditors. However, "bad actors" who profited from the corporate scandals in the early 2000s[3] used bankruptcy laws to protect their unjust enrichment by sheltering millions of dollars using

1. The drama surrounding this dilemma is heightened by the prolonged economic downturn. March 2009 was the fourth straight month with job losses greater than 600,000. The loss of 741,000 jobs in January 2009 constitutes the biggest one-month decline since 1949. Justin Fox, *Unemployment Rise Shows Recession Far From Over*, TIMESBUSINESS (Apr. 3, 2009), http://www.time.com/time/business/article/0,8599,1889402,00.html. The national unemployment rate for 2009 was 9.3%. The unemployment rate for 2010 increased to 9.6% and represents 14,825,000 unemployed people seeking work. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES—EMPLOYMENT STATUS OF THE CIVILIAN NON-INSTITUTIONAL POPULATION, 1940 TO DATE 194 (2010), *available at* http://www.bls.gov/cps/cpsaat1.pdf.

2. Exempt assets are those the debtor is permitted to keep for her "fresh start" in recovering financially. The homestead exemption protects the debtor's home equity. *See infra* Parts I.C and I.D (discussing domiciliary requirements for exemption eligibility). The origin of the phrase is traceable to *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

3. *The Corporate Scandal Sheet*, FORBES.COM (Aug. 26, 2002, 5:30 PM), http://www.forbes.com/2002/07/25/accountingtracker.html.

the unlimited state homestead exemptions. For instance, a debtor living in a state with no homestead exemption could move to a state with an unlimited homestead exemption and purchase an expensive personal residence in that state. By moving to the new state and becoming eligible for the unlimited homestead exemption after a short time, the debtor could file bankruptcy and employ the state homestead exemption law to shield the ill-gotten corporate profits from deserving creditors. Thus, in states with an unlimited homestead exemption, the debtor could exploit a "mansion loophole" in bankruptcy law.

This conduct outraged creditors, the general public, and Congress.[4] The mounting public outcry and ensuing political pressure led Congress to pass the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which, among other goals, aimed to close the "mansion loophole" by preventing a debtor from acquiring a more favorable homestead exemption by moving to another state on the eve of filing bankruptcy.[5] The reforms implemented by BAPCPA included provisions substantially lengthening the time for exemption eligibility in the new state and limiting the debtor's ability to gain exemption eligibility in the previous state.[6] The intended result was to stop the windfalls that resulted from bad actors exploiting unlimited homestead exemptions across state lines.

Although BAPCPA appeared to accomplish its design of stopping the inequitable conduct of wealthy bad actors, it also resulted in unintended (and severely negative) effects on the general public. The typical American debtors—living on the edge of their income and struggling to make their monthly mortgage payments—frequently face bankruptcy

4. *See* Thomas Evans & Paul B. Lewis, *An Empirical Economic Analysis of the 2005 Bankruptcy Reforms*, 24 EMORY BANKR. DEV. J. 327, 327 (2008) (asserting that one of the stated goals of BAPCPA was to limit access to bankruptcy relief in order to find and limit abuse) (citing 151 CONG. REC. S1814 (daily ed. Mar. 1, 2005) (statement of Sen. Bill Frist)). The House also explained that

> [t]he bill . . . restricts the so-called "mansion loophole." Under current bankruptcy law, debtors living in certain states can shield from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocate to these states just to take advantage of their "mansion loophole" laws. S. 256 closes this loophole for abuse by requiring a debtor to be a domiciliary in the state for at least two years before he or she can claim that state's homestead exemption; the current requirement can be as little as 91 days. The bill further reduces the opportunity for abuse by requiring a debtor to own the homestead for at least 40 months before he or she can use state exemption law; current law imposes no such requirement.

H.R. REP. NO. 109–31, pt. 1, at 15–16 (2005) (internal citations omitted).

5. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 307–308, 119 Stat. 23, 81–82 (codified as 11 U.S.C. § 522(b)(3)(A), (o), (p) (2006)) (limiting homestead exemption eligibility).

6. *See infra* Parts I.B–C (discussing BAPCPA's domiciliary requirements for exemption eligibility).

when unemployment arrives and often must consider relocation.[7] Looking for a new job anywhere, debtors routinely contemplate moving across state lines.[8] Yet under BAPCPA, that move to another state will often both strip the debtors of their former state's homestead exemption and deprive them of the new state's homestead exemption.[9] Although BAPCPA purports to offer debtors a federal homestead exemption in this situation, there are obstacles that can bar eligibility for the federal homestead exemption, preventing debtors from ever being able to claim it.[10] Without a homestead exemption, the debtor's home equity will be liquidated in bankruptcy to satisfy creditor demands. Thus, BAPCPA places the debtor's home equity at risk when the debtor contemplates moving across state lines to accept new employment.

The far-reaching, unintended consequences of BAPCPA call for statutory reform. This Article argues for that reform by first examining the validity of the assumptions underlying current law.[11] It then considers the unintended consequences and related problems that have arisen under exemption abuse provisions.[12] Furthermore, it explores changes in the due diligence inquiry required under current law.[13] Finally, it offers ideas for a statutory solution designed to better accomplish the twin objectives of preventing abuse and ensuring fairness to debtors and creditors alike.[14]

7. *More People Willing to Relocate for New Jobs; Many Moving to Texas*, DALLAS BUS. J. (July 28, 2009), http://www.bizjournals.com/dallas/stories/2009/07/27/daily18.html. According to employment research firm Challenger, Gray & Christmas, rising unemployment rates coincide with relocation rates among workers who are willing to move across the United States for a new job. In the second quarter of 2009, the firm's data showed that an astonishing 18.2% of job seekers secured employment by moving for their new position. The Internet is making it easier for job seekers to find work outside the regions in which they reside, and the overwhelming desire to get back to work appears to outweigh the perceived risks of relocation. *Id.*

8. A Pew study reveals, by a plurality of 44%, that job and business opportunities are the primary reasons for a move. D'Vera Cohn & Rich Morin, *Who Moves? Who Stays Put? Where's Home?*, PEW RESEARCH CTR. 1, 2 (Dec. 17, 2008), http://www.pewsocialtrends.org/files/2011/04/American-Mobility-Report-updated-12-29-08.pdf.

9. *See, e.g.*, *In re* Katseanes, No. 07-40168-JDP, 2007 WL 2962637, at *3 (Bankr. D. Idaho 2007) (holding that the debtors were eligible to claim the Utah homestead exemption and were not therefore "ineligible for *any* exemption" under the savings clause, despite the fact that the Utah exemption applied exclusively to property located within Utah so that the debtors could not benefit from the exemption (emphasis added)).

10. *See infra* Part II.A.

11. *See infra* Parts I.C–D.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part III.

I. THE CURRENT STATE OF THE LAW

A. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

BAPCPA changed the bankruptcy code in many ways.[15] A key change altered the law on exemptions to curb a debtor's ability to avoid creditors through relocation to a jurisdiction with more favorable law.[16] This change in the law was implemented by a series of new provisions. One provision predicates the debtor's eligibility for exemptions on continuous domicile of two years preceding the filing.[17] Another provision imposes a dollar cap on the amount of the homestead exemption when a relocated debtor acquires a residence[18] in a new jurisdiction three years and four months preceding the filing.[19] A third provision reduces the value of a debtor's homestead exemption that is attributable to the conversion of nonexempt property to exempt property within ten years of filing whenever the debtor has the intent to hinder, delay, or defraud creditors.[20] The changes under BAPCPA have not gone unchallenged. The constitutional objections to its new provisions, however, have had no success.[21]

Under this new statutory scheme, the debtor may claim exemptions under the law of the place where she has been continuously domiciled for two years prior to the filing.[22] If the debtor's domicile has not been

15. 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.).

16. 11 U.S.C. § 522(b)(3)(A) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559; 11 U.S.C. (o), (p).

17. *Id.* § 522(b)(3)(A). The actual statutory time period is 730 days.

18. *Id.* § 522(p)(2)(A). This subsection excludes the primary residence of a family farmer.

19. *Id.* § 522(p)(1). The statutory time period is 1215 days. The dollar cap is $146,450, effective April 1, 2010, and is subject to adjustment pursuant to § 104 on April 1, 2013. This provision includes a residence, cooperative, burial plot, or homestead, but excludes any interest transferred from a previous principal residence (acquired prior to the 1215-day period) into the debtor's current residence, if the previous and current residences are located in the same state. *See id.* § 522(p)(2)(B) (stating that a debtor using state exemptions may use her homestead exemption without a cap if her previous and subsequent primary residences are in the same state, notwithstanding whether she acquired the subsequent residence within the 1215-day period preceding filing).

20. *Id.* § 522(o)(4).

21. *See In re* Urban, 361 B.R. 910 (Bankr. D. Mont. 2007), *aff'd* 375 B.R. 882 (B.A.P. 9th Cir. 2007) (finding that the right of states to opt out of federal exemptions under the Bankruptcy Code does not violate the constitutional uniformity requirement); *In re* Varanasi, 394 B.R. 430 (Bankr. S.D. Ohio 2008) (holding that the Code did not violate due process, equal protection, the Takings Clause of the Fifth Amendment, the uniformity requirement, or the Contracts Clause).

22. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559. The only discussion of § 522(b)(3)(A) in the House Committee Reports states:

> Sec. 307. Domiciliary Requirements for Exemptions. Section 307 of the Act amends

continuously located in a single state for the requisite two-year period ("two-year period"), the debtor may seek to claim exemptions under the applicable law where the debtor is domiciled during the longer portion of the six-month period prior to the two-year period ("six-month look-back period").[23] In other words, whenever a debtor has not lived in her current domicile for two full years continuously, she is not eligible for exemptions in her current domicile. Instead, she must "look back" in her domiciliary history to identify where she lived two and a half years prior to the filing for the longest portion of the initial six months (the "look-back state").[24] If the debtor is rendered ineligible to claim *any* exemption under the law of the look-back state or her current domicile because she does not meet the domiciliary requirements to claim exemptions in either state, the debtor may theoretically claim the federal bankruptcy exemptions.[25] While the option of claiming the federal exemptions exists in theory, in practice the debtor may discover this

---

> section 522(b)(3)(A) of the Bankruptcy Code to extend the time that a debtor must be domiciled in a state from 180 days to 730 days before he or she may claim that state's exemptions. If the debtor's domicile has not been located in a single state for the 730-day period, then the state where the debtor was domiciled in the 180-day period preceding the 730-day period (or the longer portion of such 180-day period) controls. If the effect of this provision is to render the debtor ineligible for any exemption, the debtor may elect to exempt property of the kind described in the Federal exemption notwithstanding the state has opted out of the Federal exemption allowances.

H.R. REP. NO. 109-31, pt. 1, at 72 (2005).

23. 11 U.S.C. § 522(b)(3)(A). The look-back period is the 180-day period of time that spans the 730 to 910 days preceding the filing of the bankruptcy. The look-back state is the state in which the debtor was domiciled the longer portion of that 180-day period. Identification of the look-back state begins the process of determining exemption eligibility. This period might as easily be called the two-and-one-half-year look-back period; however, the focus of the inquiry is on where the debtor lived during the longer portion of the succeeding six-month period.

24. For example, if the debtor lives in New York and files bankruptcy having resided there for less than two years, then the debtor is not eligible to claim state exemptions under New York law because the federal law prevents her from doing so. The debtor must look back in time to identify her domicile for the longer portion of the time during the six-month period between two years and two and one half years prior to the date of her bankruptcy filing. If the debtor lived in North Carolina during the six-month period preceding the two years prior to the bankruptcy filing, North Carolina would be identified as that state. Unfortunately, because North Carolina's exemptions are available only to its residents, the debtor may not be eligible for exemptions there. *See* N.C. GEN. STAT. § 1C-1601(a) (2011) (stating that the exemptions available to those filing bankruptcy in North Carolina are only applicable to residents), *preempted by In re* Garrett, 435 B.R. 434 (Bankr. S.D. Tex. 2010).

25. *Id.* "If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)." 11 U.S.C. § 522(b)(3). This option remains even when the forum state, the current domiciliary state, and the look-back state have opted out of the federal exemptions. *See* WILLIAM HOUSTON BROWN ET AL., BANKRUPTCY EXEMPTION MANUAL § 4:6 at 81 (West 2010) (stating that the savings clause may be invoked despite contradictory state domiciliary laws); *see also In re* Jewell, 347 B.R. 120, 123 (Bankr. W.D.N.Y. 2006) (holding that debtors were entitled to the federal exemptions pursuant to the savings clause, notwithstanding that their current and former states were both opt-out states).

option to be fraught with difficulties. Depending on the facts of the case and the jurisdiction where it is filed, the debtor may not be eligible for any homestead exemption.

Once the look-back jurisdiction is identified, there are at least four possibilities with regard to which set of exemptions the debtor may be eligible to claim, as discussed below.

1. State Exemptions

With regard to the first possibility, the state exemptions include the exemptions available under state and local law authorized by the look-back state.[26] Although counterintuitive, the state exemptions include both state exemptions and certain exemptions under federal law.[27] This distinguishes them from the exemptions under the Bankruptcy Reform Act of 1978[28] (the "Code") at § 522(d), which are known as the "federal" exemptions.[29]

Under the Code, federal bankruptcy law authorizes each state to limit debtors who attempt to claim its exemptions to the state exemptions only.[30] States that pursue this option effectively "opt out" of the federal exemptions. In other words, a state chooses whether or not to offer the federal exemptions. A state also decides to whom it will offer the federal exemptions as an alternative to its state exemptions. A majority of the states limit *resident* debtors to the state exemptions, while other states limit resident and nonresident debtors to state exemptions.[31]

2. Federal Exemptions

The second possibility is that the debtor may be eligible for the federal exemptions in one of three ways. First, in states that have not chosen to opt out of the federal exemptions, the resident debtor is free to

26. 11 U.S.C. § 522(b)(3)(A). The term "state exemptions" is a misnomer in that the state exemptions include not only state law exemptions, but exemptions found in federal non-bankruptcy law and exemptions found in the Code at 11 U.S.C. § 522(b)(3).

27. *See id.* § 522(b)(3)(A)–(C) (listing exemptions under non-Code federal law and Code law that may be included in the claim of exemptions under state law). Some common exemptions under federal non-bankruptcy law are Foreign Service Retirement and Disability payments at 22 U.S.C. § 1104, *repealed by* Pub. L. No. 96-465, 94 Stat. 2159 (1980), Social Security payments at 42 U.S.C. § 407 (2006), and veterans' benefits at 45 U.S.C. § 352(E) (2006).

28. Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 U.S.C.).

29. 11 U.S.C. § 522(d).

30. *See* Owen v. Owen, 500 U.S. 305, 306 (1991) (holding that the Bankruptcy Code allows states to define what property is exempt from the estate that will be distributed among the debtor's creditors); Storer v. French (*In re* Storer), 58 F.3d 1125, 1128 (6th Cir. 1995) (holding that states may create whatever exemptions they choose, whether more inclusive or more restrictive than the federal exemptions scheme).

31. *See* BROWN ET AL., *supra* note 25, at app. C (listing which states' laws limit state exemptions to residents).

choose either the federal exemptions or the state exemptions.[32] Second, in some states, nonresident debtors are allowed to claim the federal exemptions even when the federal exemptions are not allowed for resident debtors.[33] Finally, the Code offers a savings clause to rescue a debtor whenever the domiciliary requirements render the debtor ineligible for *any* exemption in the look-back state.[34] This can occur when the debtor has not resided in her current domicile for the continuous two-year period required for exemption eligibility and does not meet the residency requirements of the look-back state for exemption eligibility at the time of the bankruptcy filing.

3. Either State or Federal Exemptions

The third possibility is that resident debtors in states that have not opted out of the federal exemptions may choose between exemptions under the state law of the look-back state or the exemptions under federal bankruptcy law.[35] The Code's only restriction is that married couples filing jointly must choose the same set of exemptions.[36]

4. Neither State nor Federal Exemptions

The fourth possibility is that the debtor may be ineligible to claim any exemptions. She may be ineligible for exemptions under the law of her current domicile because she has not been domiciled there continuously for the requisite two-year period, and she may be ineligible for exemptions under the law of the look-back state because she no longer meets the residency requirements for exemption eligibility. Finally, the debtor may not be eligible for the federal exemptions under the savings clause because she is theoretically eligible for an exemption in the look-back state that is impossible for her to claim.[37]

---

32. *Id.* Seventeen states, the District of Columbia, and each of the U.S. territories have chosen not to opt out and thus permit debtors the choice of either state exemptions or federal exemptions.

33. *Id.* A majority of jurisdictions—thirty-seven states, the District of Columbia, Puerto Rico, and the Virgin Islands—are included in this group.

34. 11 U.S.C. § 522(b)(3)(C) (2006). The hanging paragraph at the end of § 522(b)(3) states: "If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor *ineligible* for *any* exemption, the debtor may elect to exempt property that is specified under subsection (d)" (emphasis added).

35. *Id.* § 522(b)(2). This option is available in a minority of jurisdictions. *See supra* note 32 and accompanying text (listing states that have opted out of the federal exemptions).

36. *Id.* § 522(b)(1).

37. This situation hangs on how the state interprets the phrase "any exemption" in the savings clause. *See infra* Part III.B (discussing the savings clause); *see also In re* Katseanes, No. 07-40168-JDP, 2007 WL 2962637, at *3 (Bankr. D. Idaho 2007) (holding that the debtors were eligible to claim the Utah homestead exemption and were not therefore "ineligible for *any* exemption" under the savings clause, despite the fact that the Utah exemption applied exclusively to property located within Utah so that the debtors could not benefit from the exemption (emphasis added)).

The situation in which the debtor is only theoretically eligible is unusual but can occur under ordinary circumstances. In this scenario, the debtor may qualify for one exemption in her look-back state as a nonresident. For instance, she may be eligible to claim some particular category of personal property. Her qualification for the exemption renders her ineligible to utilize the savings clause regardless of whether she owns the type of property covered by the exemption. Thus, whether she owns the property covered by the exemption category or can benefit from it is immaterial. The mere fact that she is theoretically eligible to claim the exemption is sufficient to disqualify her from eligibility for the federal exemptions under the savings clause.[38]

One example would be that the debtor's look-back state may limit its homestead exemption to residents but allow an exemption for some personal property. Despite the fact that the debtor may neither have nor claim the personal property, eligibility for the personal property exemption could serve to disqualify the debtor from the use of the federal exemptions under the savings clause.[39] This occurs because under this circumstance the debtor is not deemed "ineligible for any exemption" whatsoever. In short, because the debtor is not ineligible for all exemptions in the look-back state, the debtor is denied access to the federal exemptions under the savings clause.

The same result may occur when the law of the look-back state provides a homestead exemption insofar as the homestead property is located within that look-back state.[40] The debtor who has moved across state lines no longer has a homestead in the look-back state, leaving her ineligible for its homestead exemption. Nevertheless, because the look-back state technically offers the homestead exemption to that debtor, that debtor is considered eligible for the exemption although she cannot benefit from it. In other words, the debtor is treated as eligible for an exemption that is impossible to claim. The result is a lost opportunity to claim the federal homestead exemption and the other federal exemptions available under the savings clause, due to the fact that the debtor is not ineligible for *any exemption*.[41] While a few states expressly restrict the extraterritorial application of their exemptions, the

38. *See In re* Brooks, 393 B.R. 80, 86 (Bankr. M.D. Pa. 2008) (holding that debtors were eligible for one exemption under Maryland law and were not therefore "ineligible for *any* exemption" for purposes of triggering the savings clause and allowing debtors to claim the federal exemptions (emphasis added)).

39. *Id.*

40. *See In re Katseanes*, 2007 WL 2962637, at *3 (holding that the debtors were eligible to claim the Utah homestead exemption and were not therefore "ineligible for *any* exemption" under the savings clause, despite the fact that the Utah exemption applied exclusively to property located within Utah so that the debtors could not benefit from the exemption (emphasis added)).

41. 11 U.S.C. § 522(b)(3)(C).

law in many other states is unknown.[42] This serves to further cloud the determination of exemption eligibility and shroud the process in ambiguity.

B. Exemption Eligibility Prior to BAPCPA

A brief review of prior law is helpful in understanding the evolution of the current law regarding eligibility for exemptions. Prior to BAPCPA, the law applicable to the debtor's claim of exemptions had been in place for over a quarter century,[43] and the domiciliary requirement for exemption eligibility was relatively clear and straightforward.[44] Eligibility for exemptions was determined by reference to the place in which the debtor was domiciled during the six months immediately preceding filing, or, if the debtor was domiciled in multiple states during the six-month period, the jurisdiction in which the debtor spent the longest portion of the six-month period preceding filing.[45]

This six-month period, which was the precursor to the new two-year look-back period, coincides with the federal law regarding venue based on domicile.[46] While other possible bases for venue exist, domicile is often a basis for venue.[47] Thus, the law relating to exemptions was normally the law of the forum.[48] Simply put, if the debtor was eligible to file in a particular jurisdiction based on domicile, the debtor was also eligible to claim the exemptions available in that jurisdiction. This was seen as a weakness in the law because a debtor could acquire venue and exemption eligibility in as little as ninety-one days.[49] The relatively short timeframe needed to acquire eligibility enabled debtors to move quickly to shelter large sums of money in states with large or unlimited homestead exemptions.[50]

The statutory provisions for attacking the acquisition of a homestead exemption or other exemption remain unchanged by BAPCPA. There

42. Texas, Utah, Kentucky, and Hawaii do not permit the extraterritorial application of the homestead exemption. BROWN ET AL., *supra* note 25, at app. C. Approximately fifteen states appear to be unknown at this time. *Id.*

43. *See* Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 U.S.C.).

44. 11 U.S.C. § 522(b)(2)(A) (2000 & Supp. 2004) (amended 2006). The law prior to BAPCPA provided that the debtor could claim "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition or for a longer portion of such 180-day period than in any other place." Subsection (d) refers to the federal bankruptcy exemptions. *See also In re* Stockburger, 192 B.R. 908, 910 (Bankr. E.D. Tenn. 1996) (holding that the domiciliary requirement of 522(b) was unambiguous).

45. 11 U.S.C. § 522(b)(2)(A) (2000 & Supp. 2004) (amended 2006). The actual statutory time period is listed as 180 days.

are three lines of attack: (1) as an objection on the grounds that the acquisition of the exemption amounted to a fraudulent transfer under § 548 and should be set aside;[51] (2) as a global objection to discharge under § 727 requesting denial of the discharge itself;[52] and (3) as an objection to the exemption under § 522 requesting denial of exempt status to the property acquired.[53]

It is important to note that none of these tools for fighting and preventing fraud and abuse have been lost. All are still in place. The reforms implemented by BAPCPA supplement those discussed above and were crafted to close loopholes in existing law, particularly the "mansion loophole."[54]

C. BAPCPA Domiciliary Requirements for Exemption Eligibility

There are two look-back periods created by BAPCPA that are tied to the domiciliary requirements for exemption eligibility.[55] It is important to review these and understand how each is connected to the other. Both of the look-back periods relate to the identification of the domiciliary state whose law controls exemption eligibility. One look-

46. 28 U.S.C. § 1408 (2006). The relevant portion provides:

> Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—(1) in which the *domicile*, residence, principal place of business in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2) in which there is a pending case under title 11 concerning such person's affiliate, general partner, or partnership.

28 U.S.C. § 1408 (emphasis added). The § 1410 exception deals with cases ancillary to foreign proceedings.

47. The voluntary petition requires designation of the basis for venue by category. Official Bankruptcy Form 1, 11 U.S.C. (2011). This statistical information is gathered and stored; however, it is not accessible through a searchable database. Personal observation and anecdotal evidence suggests that domicile and residence are most often the bases for venue in consumer bankruptcy cases.

48. *Compare* 28 U.S.C. § 1408(1) (2006) (venue based on domicile) *with* 11 U.S.C. § 522(b)(2)(A) (2000 & Supp. 2004) (amended 2006) (exemption eligibility based on domicile).

49. This is evident due to bad actors' usage of the law. *See supra* note 3 and accompanying text (discussing "bad actors" who used bankruptcy laws to protect their unjust enrichment).

50. *See supra* note 3 (discussing "bad actors" who used bankruptcy laws to protect their unjust enrichment).

51. 11 U.S.C. § 548(a)(1) (2006); FED. R. BANKR. P. 7001.

52. 11 U.S.C. § 727(a)(2); FED. R. BANKR. P. 4004.

53. 11 U.S.C. § 522(l); FED. R. BANKR. P. 4003(b).

54. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559; 11 U.S.C. § 522(o) and (p); *see also infra* notes 83–85 and accompanying text (discussing BAPCPA and the mansion loophole).

55. *See infra* Parts I.C.1 and I.C.2.

back period focuses on the debtor's domiciliary history over the two-year period prior to filing.[56] The second look-back period examines the six-month window of time that precedes the two-year period prior to the bankruptcy filing.[57] Both of these will be described in more detail below.

1. Eligibility Based on Two Years of Continuous Domicile: The Two-Year Look-Back Period

As mentioned above, the first and simplest is the two-year look-back period. A debtor who has lived continuously in her current domicile for at least two years becomes eligible to claim exemptions under the law of her domiciliary state.[58] In other words, a debtor's continuous domicile for two years is sufficient to make the debtor eligible for exemptions under the law of her domicile and ends the need for any further analysis. This provision lengthened the minimum look-back period needed to qualify for exemption eligibility in a new domicile from ninety-one days, under prior law, to a full two years.[59] The intention was to make it more difficult for a debtor to relocate and gain eligibility for more generous exemptions on the eve of filing.[60]

2. Eligibility Based on the Law of the Look-Back State: The Six-Month Look-Back Period (Preceding the Two-Year Look-Back Period)

There is no easy way to provide a succinct name that accurately describes the second look-back period. This look-back period is the six-month period preceding the two-year look-back period. Stated another way, it is the first six months of the period beginning precisely two and one-half years prior to the bankruptcy filing.[61] For that reason, it might as aptly be called the two and one-half year look-back period. Calling

---

56. *See infra* Part I.C.1.

57. *See infra* Part I.C.2.

58. 11 U.S.C. § 522(b)(3)(A).

59. *See* 11 U.S.C. § 522(b)(2)(A) (2000 & Supp. 2004), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 119-8, §§ 224(a)(1)(A)(i), 307, and 308(1), 119 Stat. 23, 61, 81 (stating the applicable "look-back" time period as the greater portion of the 180 day time period preceding filing). *But see* 11 U.S.C. § 522(b)(3)(A) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559 (stating that a debtor may claim the exemptions if she has been domiciled in the location for the 730 days preceding filing).

60. 151 CONG. REC. H1993-2048 (daily ed. Apr. 14, 2005). In support of the bill, Rep. Sensenbrenner stated that "[t]he bill closes the 'millionaire's mansion' loophole in the current bankruptcy code that permits corporate criminals to shield their multi-million dollar homesteads from deserving creditors." *Id.*

61. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559. The statutory time period is actually the 180-day period that is between the 730-to-910-day period that is prior to the date of the filing of the petition in bankruptcy. *Id.*

this period the six-month period is designed to focus attention on the debtor's domiciliary history within the six-month period that both precedes the two-year look-back period and follows the point in time two and one-half years prior to the date of the filing. The calculation of the six-month look-back is critical to the identification of the look-back state in the analysis to determine exemption eligibility.

Under current law, if the debtor has not lived in the forum state continuously for the two-year period preceding the filing, debtor's counsel must determine the location and duration of each domiciliary jurisdiction during the six-month look-back period.[62] A review of the debtor's domiciliary history during the look-back period is necessary in order to identify the look-back state,[63] which is the jurisdiction in which the debtor was domiciled during the longest portion of the look-back period.[64]

For example, if the debtor was domiciled in Kansas for more than three months during the look-back period, Kansas would be the debtor's look-back state.[65] This is because no other state could possibly have been the debtor's domicile for a "longer portion" of the six-month look-back period. In short, determining where the debtor lived the longest period of time during the six-month look-back period is the key to identifying the look-back state.[66]

To some extent, the calculus of identifying the look-back state is counterintuitive. One might think that the state designated for the debtor's exemption eligibility should be the debtor's domicile of longest duration over the entire two and one-half year period preceding the bankruptcy filing. However, this is not the case under BAPCPA.[67] By changing the earlier example again, it becomes clear that a debtor who has been domiciled in a number of places for relatively short periods of time may have been domiciled for the longer portion of the look-back period in a domicile of less than a few months' duration.

---

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Technically, the calculation would require that the debtor has lived more than 90 days of the 180-day look-back period in order that Kansas be identifiable as the look-back state. *Id.*

66. If the example is changed so that the debtor was domiciled in Kansas for less than three months during the look-back period, a comparison of the duration of the debtor's domiciliary periods in other states becomes necessary. Supposing that, for the remainder of the six-month period, the debtor was domiciled in Oklahoma for three months and Missouri for two weeks, Oklahoma would be the look-back state. Thus, the syllogism used to determine the debtor's look-back state requires identification of all previous domiciles and calculation of the length of the debtor's longest domiciliary stay.

67. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

D. *Other Look-Back Periods Affecting Homestead Exemption Value*

1. The Dollar Cap on a Recently Acquired Homestead: The Three-Year and Four-Month Look-Back Period

A third look-back period imposes a limit on the value of a homestead exemption based on the length of the debtor's current domiciliary period *and* the time the debtor has owned a home in her current domicile. In short, BAPCPA sets a dollar cap on the amount of home equity a debtor may claim under the homestead exemption, depending on how long the debtor has lived in the state and owned a home.[68] This look-back period supplements the first two look-back periods discussed above. It is designed to prevent the unscrupulous debtor from sheltering an excessive amount of nonexempt assets under the protection of a large homestead exemption.

The effect of the third look-back period is to cap the dollar amount of the relocating debtor's homestead exemption under certain circumstances.[69] The dollar cap on the homestead exemption applies to a debtor relocating within three years and four months of filing.[70] The dollar cap on the debtor's homestead exemption is designed to limit how much home equity is protected for a debtor who has been domiciled in a jurisdiction for more than two years, but for less than three years and four months. Thus, the cap prevents the use of the *full* homestead exemption otherwise allowable under the law of the domicile state for a one-year-and-four-month period beyond what is required for exemption eligibility.[71]

As a result, even when the debtor is domiciled in a state for three years and four months, the dollar cap restricts her homestead exemption unless she acquires and holds her homestead interest for that same amount of time.[72] In other words, if the debtor moves to a new domicile and rents a home while she looks for a home to buy, the clock does not begin to run on this look-back period. It is only after she has acquired an interest in her homestead through purchase that the look-back period begins to run. In sum, the relocating debtor must purchase and occupy her homestead in her new domicile for the three-year and four-month look-back period.

There are two exceptions to imposition of the dollar cap under this

68. 11 U.S.C. § 522(p)(1).

69. *Id.*

70. *Id.* The amount of the dollar cap is $146,450. The statutory time period is 1215 days, or approximately three years and four months. *Id.*

71. *Id.*

72. *Id.*

provision. The first is for the principal residence of a family farmer.[73] The second exception is when the debtor's home equity in her current domicile was transferred from a previous principal residence (acquired within the three-year and four-month period) within the same state.[74]

2. The Homestead Exemption Dollar Cap on Felons and Other Bad Actors: The Five-Year Look-Back Period for Felony Convictions and Other Wrongdoing

Congress adopted a fourth look-back provision unrelated to a debtor's domiciliary history. Through this provision, Congress sought to limit the dollar amount of the homestead exemption that convicted felons or other bad actors may claim.[75] The law imposes a look-back period of five years preceding the filing of the bankruptcy petition.[76]

This five-year look-back period, unlike the two-year look-back period examined above, does not consider the debtor's domiciliary history.[77] In contrast to the six-month look-back period preceding the two-year look-back period, the five-year look-back period plays no role in the identification of the debtor's look-back state for purposes of determining exemption eligibility. It differs from the three-year and four-month look-back period discussed above in that it does not focus on when the debtor acquired her homestead.[78] The sole purpose of this look-back period is to prevent convicted felons and other bad actors from sheltering an excessive amount of nonexempt property in a homestead exemption.[79]

If the debtor has been convicted of a felony, as defined by the Federal Criminal Code,[80] and circumstances demonstrate that the bankruptcy filing is an abuse of the Code, the court may limit the debtor's homestead exemption.[81] The court looks at a number of factors

73. *Id.* § 522(p)(1)(B). The Code definition of "family farmer" is at § 101(18).

74. *Id.* § 522(p)(2)(B).

75. *Id.* § 522(q)(1). This section authorizes the court to limit the homestead exemption, not only for felony convictions that are considered abuse, but also based on a debt the debtor owes arising from violations of federal securities law, fraud, and deceit in fiduciary capacity, "any civil remedy under section 1964 of title 18; or any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years." *Id.*

76. *Id.* § 522(q)(1).

77. *See supra* Part I.C.1.

78. *See supra* Part I.D.1.

79. 11 U.S.C. § 522(q)(1)(A).

80. 18 U.S.C. § 3156 (2006).

81. *See In re* Jacobs, 342 B.R. 114, 114–15 (Bankr. D.D.C. 2006) (explaining that the dollar cap applies when a felon elects to use the state exemptions). This dollar cap of $146,450 for a felon with a conviction within five years of filing is identical to the dollar cap for a debtor who has not owned her home in the state of her current domicile for three years and four months. *See*

enumerated in this provision to determine whether the dollar cap should apply.[82]

3. Reduction of the Homestead Exemption Due to Avoidance of Creditors: The Ten-Year Look-Back Period to Identify Conversion of Non-Exempt Property

A fifth look-back provision attempts to close the mansion loophole in a different way.[83] Congress utilized yet another look-back period in an effort to stop an unscrupulous debtor from sheltering assets in a large mansion. This look-back period examines whether the debtor hindered, delayed, or defrauded creditors by converting nonexempt assets to exempt assets within ten years of filing.[84] In other words, the question is whether the debtor transferred assets that were nonexempt in a way that changed the form of the asset in order to make it exempt. For example, a debtor in a state with a generous homestead exemption might choose to take a large sum of cash that could not be claimed as exempt and pay down her mortgage.[85] In so doing, she would increase the amount of her home equity that is exempt under the homestead exemption. This type of exemption gaming does not require relocation.

II. THE PROBLEMS WITH BAPCPA

A. The Debtor's Dilemma

The pre-filing selection of exemptions requires knowledge of the law that governs the choice of exemptions. The debtor must know which property can be protected from creditors and retained for her fresh start. Each debtor wants to know the risks attendant to claims of exemption in making the ultimate decision regarding filing. The Code requires that the debtor declare the property she intends to exempt from creditors'

---

supra note 70.

82. *See* 11 U.S.C. § 522(q)(1) (2006) (describing the factors the court considers); *see also, e.g.*, *In re* McNabb, 326 B.R. 785, 790–91 (Bankr. D. Ariz. 2005) (stating that the statutory language that the limits "may be applicable" implied that not all such bad actors are limited to this exemption, but that further reasoning is required).

83. *See supra* note 5 and accompanying text (citing federal statutory limitations to state homestead exemptions).

84. 11 U.S.C. § 522(o).

85. *See, e.g.*, *In re* Addison, 540 F.3d 805, 814 (8th Cir. 2008) (finding insufficient evidence to support a finding of fraud when the debtor merely paid a large sum of money on her mortgage prior to filing for bankruptcy when there was not adequate evidence that it was done with the intent to defraud her creditors).

claims.[86] Citations of legal authority must be provided for each item by category.[87]

The importance of knowing the law that governs the selection of exemptions is heightened for other reasons. Because the bankruptcy rules of procedure do not permit a voluntary nonsuit without a court order, unlike the Federal Rules of Civil Procedure, the debtor cannot dismiss voluntarily.[88] This means that the debtor may become trapped in the bankruptcy proceeding after discovering that the protection offered under exemption law is not as the debtor expected.

While each type of exemption may be important, the homestead exemption is of critical importance because it protects a homeowner's equity from general creditors. Except when a homeowner grants a mortgage or other consensual lien to a creditor, no lien can be placed on the homeowner's home equity because it is protected by the homestead exemption.[89] When the homeowner is deprived of her homestead exemption, she is exposed to the possible loss of her home equity and her home.

1. A Tale of Two Debtors

The plight of honest Americans who are the unintended victims of a well-intended plan to stop exemption abuse by closing the mansion loophole is best illustrated by comparing two debtors. These two debtors are similar in every way except that one debtor relocates within the same state, while the other debtor relocates to a new state with an unlimited homestead exemption law identical to her former domiciliary state. Each debtor owns a home with a value at the national median.[90] While one debtor retains all of her homestead equity, the other debtor may lose all of her homestead equity and her home.

---

86. 11 U.S.C. § 521(a)(2)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(16)(A)(i), 124 Stat. 3557, 3559.

87. *See* Official Form 6C, Schedule C—Property Claimed as Exempt, prescribed by the Judicial Conference of the United States pursuant to FED. R. BANKR. P. 9009, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_006C_04 10.pdf (including a column for the debtor to "SPECIFY LAW PROVIDING EACH EXEMPTION").

88. FED. R. BANKR. P. 7041.

89. 11 U.S.C. § 522(d)(1).

90. The current median home value in the United States is $173,200. The median sale price for single-family homes in the Northeast United States is $256,300, compared to the Midwest at $130,600, the South at $148,200, and the West at $210,200. *Median Sales Price of Existing Single-Family Homes for Metropolitan Areas*, NAT'L ASS'N REALTORS, http://www.realtor.org/ wps/wcm/connect/497de980426de7ccb96eff03cc9fa30a/REL10Q1T_rev.pdf?MOD=AJPERES &CACHEID=497de980426de7ccb96eff03cc9fa30a (last visited Feb. 26, 2011) (listing data gathered from 2007 to 2010). "Property values across the nation vary widely. The median resale price of a home in California is $215,000. In Nebraska it's $70,200." 151 CONG. REC. H2071 (daily ed. Apr. 4, 2005) (statement of Rep. Green of Texas speaking in opposition to BAPCPA).

Debra Debtor ("Debtor") is a single parent who has fallen on hard times. She is raising two children and struggled to buy a home in a good school district. Her mortgage was recently paid off, and the house is her principal asset. Because her retirement funds were decimated in the recession, a reverse home mortgage may be her only hope for retirement. Recently, she was laid off from her job.[91] Like most unemployed Americans, she lives on the edge of her income without much savings, using credit cards to stay afloat until she finds work.[92]

Because Debtor's medical insurance was through her former employer, she no longer has coverage for herself and her children. For the moment, her home is her only hedge against catastrophic illness. After several months, Debtor is offered a job in a different state ("New State"). The move will require that she sell her home, but she is eager to go because she will have an opportunity to regain her financial security and have medical insurance for her family. Debtor meets with her attorney to discuss the possible sale of her home in anticipation of her move to New State.[93] She wants to know whether there are any legal ramifications related to the move.[94]

---

91. Nearly nine out of ten families cite three reasons for their bankruptcies: job loss, family breakup, or medical problems. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 81 (2003) (quoting from the 2001 Consumer Bankruptcy Project); *see also, e.g.*, Chad Day, *Recession Piles on Single Moms: 49.5% are in State's Poverty Ranks*, ARK. DEMOCRAT GAZETTE, Oct. 1, 2010, at 1 ("More than 61 percent of single mothers with only 'related' children under 5 in the household were living in poverty in 2009, an increase of more than 4.5 percentage points from the year before and more than 15 percentage points higher than the same category of single mother households nationwide, according to the U.S. Census Bureau's American Community Survey. . . . In addition, nearly half (49.5%) of the 96,000 Arkansas families headed by a woman without a husband and with 'related' children under 18 were living in poverty, the figures show.").

92. *E.g.*, Edmund L. Andrews, *My Personal Credit Crisis*, N.Y. TIMES, May 17, 2009, at MM46.

93. Unfortunately, the more likely scenario is that Debtor will neither meet with an attorney nor learn the law until after she has moved and is considering bankruptcy. At that point, she will discover that the move has put her home at risk because she is not eligible for a homestead exemption under the law of Old State, New State, or federal bankruptcy law. The reason for this is revealed in the proceeding discussion. *See infra* Parts II.B–D.

94. The determination of a debtor's domicile has been the subject of litigation in a number of cases. *See In re* Morad, 323 B.R. 818, 826 (B.A.P. 1st Cir. 2005) (holding that the debtor's self-serving statements may not be controlling on the issue of intent); *In re* Owings, 140 F. 739, 740 (E.D.N.C. 1905) (stating that two things must exist or have existed in combination to establish a domicile: the fact of residence and the intention of remaining); *In re* Marisco, 278 B.R. 1, 6 (Bankr. D. N.H. 2002), *subsequent determination*, No. 01-12120-JMD, 2002 WL 31572686 (Bankr. D.N.H. 2002) (holding the state homestead law required the debtor to establish physical occupation for a "significant" time); *In re* Sparfyen, 265 B.R. 506, 518–19 (Bankr. D. Mass. 2001) (holding that when the debtor has a residence and domicile in different states, the court must determine the domiciliary state if the claimed exemptions are challenged); *In re* Koons, 225 B.R. 121, 123 (Bankr. E.D. Va. 1998) (holding that the burden of proving that the debtor intended to change domicile falls on the party alleging the change); *In re* Lordy, 214 B.R. 650 (Bankr. S.D. Fla. 1997) (holding that the debtor's domicile is established by her physical presence in a place

Debtor learns that because she is insolvent, her relocation to New State for the job is problematic and could put much of her home equity at risk. If she is unable to satisfy creditors' claims and is forced[95] to file bankruptcy during the next two years in New State, she will not be able to claim New State's homestead exemption because she will not have been domiciled there long enough.[96] Nor will she be able to claim the homestead exemption in her former domicile ("Old State") because eligibility for Old State's exemptions is limited to residents, and she will abandon her residency by moving from Old State to New State.[97] Without a homestead exemption, Debtor's home equity will be liquidated in the bankruptcy in order to pay her creditors.

Debtor is astonished to find that in attempting to move to better herself, hang onto her home, pay her bills, and support her children, she may have to choose between the proffered employment and protecting her home. In theory, there is a federal homestead exemption available to a debtor in this situation.[98] In practice, however, there are obstacles that can prevent debtors from using the federal exemptions, leaving Debtor with no homestead exemption under state or federal law.[99] Thus, by moving, she risks having no homestead exemption at all.

---

with an intent to remain there); *see also In re* Tanzi, 287 B.R. 557, 559 (Bankr. W.D. Wash. 2002), *aff'd*, 297 B.R. 607 (B.A.P. 9th Cir. 2003) (holding that the debtors' homestead exemption rights were determined, not by the law of the state in which this new home was located, but in which they were domiciled for the longer portion of 180 days immediately preceding their petition date).

95. Debtor may be forced into bankruptcy in at least two ways. One is through an action by her creditors through what is called involuntary bankruptcy pursuant to 11 U.S.C. § 303 (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(9), 124 Stat. 3557, 3558. The other, and more likely, way is through creditor action, such as seizure or threat of seizure of her assets and wages, which leaves Debtor with the only practical choice of filing a "voluntary" bankruptcy.

96. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559. The amount of the loss of the homestead exemption is likely to be most pronounced when the debtor moves from jurisdictions with either a large or unlimited homestead exemption. Unlimited homestead exemptions are available to residents of Florida, Arkansas, the District of Columbia, Guam, Iowa, Kansas, Oklahoma, South Dakota, and Texas. FLA. CONST. art. X, § 4; ARK. CODE ANN. § 16-66-210 (West 2011); D.C. CODE §15-501 (2011); 21 GUAM CODE ANN. § 43101 (West 2010); IOWA CODE ANN. §§ 561.20, 561.16 (West 2011); KAN. STAT. ANN. § 60-2301 (West 2005); OKLA. STAT. tit. 31, § 1, 2 (2011); S.D. CODIFIED LAWS § 43-31-1 (2011); TEX. PROP. CODE ANN. § 41.001 (West 2001).

97. Domicile rather than venue determines exemption eligibility. *E.g.*, *In re* Giffune, 343 B.R. 883, 895 (Bankr. N.D. Ill. 2006). *But cf. In re* Holland, 363 B.R. 825, 828 (Bankr. N.D. Ill. 2007) (stating that "applicable nonbankruptcy law does not mean exemption law of the debtor's domicile"). A majority of jurisdictions require residency as a prerequisite for exemption eligibility. BROWN ET AL., *supra* note 25, § 4:6, at 90–102.

98. 11 U.S.C. § 522(b)(3)(C), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

99. *See In re* Katseanes, No. 07-40168-JDP, 2007 WL 2962637, at *3 (Bankr. D. Idaho 2007)

2. Calculating the Cost

From the above illustration, it is clear that by leaving the state without first filing for bankruptcy, Debtor could be choosing the proffered employment while risking her home. Because the estimated value of her home is at the national median of $173,200 and the federal homestead exemption available under the savings clause is $21,625,[100] filing bankruptcy in New State within two years of the move could cause Debtor to lose $151,575 in home equity and likely result in the loss of her home.[101]

There is yet another possibility that is potentially even worse for Debtor. If she is not deemed "ineligible for any"[102] exemption because, as a nonresident, she remains eligible for even one exemption category, whether she owns property of that type or not, then Debtor could lose her homestead exemption entirely.[103] Thus, she would forfeit all of her home equity of $173,200. In other words, mere eligibility for one type of exemption, however small in value, may serve to disqualify Debtor from her homestead exemption and cause the loss of her home equity.

Contrast this result with a decision by Debtor to seek bankruptcy in Old State prior to relocating to accept the job in New State. Assuming the homestead exemption of her current domicile is sufficient to protect all of her home equity, filing in Old State before she moves could allow her to keep her home and preserve her home equity.[104]

Debtor learns that if she lands in bankruptcy court in New State within two years, she would have to pay the bankruptcy trustee enough to "buy back" her home equity to avoid losing her home.[105] This means

---

(holding that the debtors were eligible to claim the Utah homestead exemption and were not therefore "ineligible for *any* exemption" under the savings clause, despite the fact that the Utah exemption applied exclusively to property located within Utah so that the debtors could not benefit from the exemption (emphasis added)).

100. 11 U.S.C. § 522(b)(3), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559; 11 U.S.C. § 522(d)(1).

101. The loss of this much of the homestead exemption will normally cause the loss of the home because unless the debtor has the cash or the credit to "buy back" the non-exempt equity from the estate, the trustee will liquidate the home as part of the estate and distribute the proceeds to creditors. 11 U.S.C. § 363(b), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(13), 124 Stat. 3557, 3559.

102. Using the word "any" in the sense of any category of exemption, not merely the homestead exemption. *See supra* Part I.A.

103. *In re* Brooks, 393 B.R. 80, 86 (Bankr. M.D. Pa. 2008); *In re* Katseanes, 2007 WL 2962637, at *3.

104. *See infra* Part II.A.3.

105. The trustee has a duty to liquidate all non-exempt property for distribution to creditors, and thus, the trustee normally offers the debtor a chance to "buy back" the property prior to offering it to others. *See, e.g.*, Clark v. Flippin, No. 05-3066, 2006 WL 2850046, at *4 (W.D. Ark. 2006) (discussing a trustee's unsuccessful motion to order a debtor to buy back the non-exempt portion of her home equity).

she would have to pay the full amount of her equity ($151,575) to the bankruptcy trustee, who is obligated to sell the home for as much as possible to pay Debtor's creditors.[106] For the first time she realizes the harsh reality: accepting the job and moving means risking her home.

3. Mulling Over the Move

Debtor considers whether moving to a different state other than New State would change her plight. She learns that any move out of Old State could result in the same loss of all or part of her homestead exemption under these circumstances. This is because the law does not merely work a hardship on a debtor relocating between states that have an unlimited homestead exemption. The law also affects a debtor who is moving to a state with a limited state homestead exemption.

In short, if Debtor is unable to domicile for at least two years in *any* new jurisdiction before filing bankruptcy, she will be ineligible for the state exemptions in *either* the new jurisdiction or Old State. Debtor may or may not be eligible for the federal homestead exemption depending upon a number of factors. What can be said with certainty is that Debtor will lose most, if not all, of her home equity. This is because even if she is allowed to claim the federal homestead exemption, the dollar cap on the amount of her exemption will be far less than her home equity, which is at the national median home value.[107] The net result is that Debtor would put her home equity and her home at risk by moving to accept the new job.

Compare Debtor with Evelyn Equity ("Equity"), another insolvent debtor. In almost every respect she is like Debtor. However, unlike Debtor, she relocates *within* Old State. Should she file bankruptcy, Equity would suffer no loss of any portion of her homestead exemption due to the relocation. Her home equity is preserved for the purchase of a new home, retirement, or catastrophic medical expenses. The only significant difference between Debtor and Equity is that Debtor, while perhaps moving a much shorter distance than Equity, crosses a state line while Equity, though perhaps traveling hundreds of miles across the state, stays within the state's borders. Without adequate legal counsel,

106. The panel trustee is paid a commission on assets passing through the estate in addition to the flat fee. 11 U.S.C. § 326.

107. A minority of states has either no homestead exemption or a homestead exemption with a dollar cap less than the federal homestead exemption. The homestead exemption in most states is greater than the federal exemption but less than the national median home value. States with a homestead exemption limited by a dollar cap of $150,000 or more include Arizona, Massachusetts, Minnesota, Montana, Nevada, and Rhode Island. ARIZ. REV. STAT. § 33-1101 (2010); MASS. GEN. LAWS ch. 188, § 1 (2011); MINN. STAT. ANN. § 510.02 (West 2007); MONT. CODE ANN. § 70-32-101 (2010); NEV. REV. STAT. § 115.010 (2010); R.I. GEN. LAWS § 9-26-4.1 (2010); *see supra* note 90 (discussing median home prices by region).

there may be nothing to reveal to either Debtor or Equity that moving to a new state to accept employment could potentially place her homestead exemption in jeopardy.

Although neither Debtor nor Equity was trying to game the system, in the above example Debtor loses most, if not all, of her homestead exemption that would otherwise be allowed under the laws of Old State.[108] In contrast, Equity is permitted to retain her homestead exemption in Old State. This limitation on Debtor's homestead exemption creates a windfall for her creditors, who otherwise have no means of reaching her homestead equity. The fact that creditors benefited from Debtor's relocation through the additional income she received and the assets she acquired will be immaterial under current law. The fact that Debtor gained no improvement in her exemption eligibility status will be irrelevant. Likewise, it will not matter that Debtor had no intention of hindering, delaying, or defrauding her creditors in any way. In short, nothing matters except that she moved to New State less than two years prior to seeking bankruptcy relief.

Suppose Debtor braves the move to New State, risks her home, accepts the job in an attempt to avoid bankruptcy, and is thereafter forced into bankruptcy by creditors within two years.[109] Could Debtor argue that her move was not intended to avoid creditors' claims, but to pay them? Unfortunately not, because there is no requirement in the Code that Debtor's creditors or the bankruptcy trustee offer even a scintilla of proof that she relocated with the intent to hinder, delay, or defraud her creditors. Rather, it is sufficient to merely prove that Debtor moved to New State within two years of filing.[110] This formula, while ostensibly preventing abuse of bankruptcy, has the potential to punish Debtor and reward her creditors based *solely* on her relocation to another state.

As we have seen, the loss of the value of the homestead exemption may cause the loss of Debtor's existing home because she is unable to "buy back" the home equity she has lost. By definition, being bankrupt, she is unlikely to have the necessary cash. In addition, the damage her insolvency has done to her credit rating makes it unlikely she will be able to borrow a sufficient amount. If she cannot do so, her home is

---

108. This outcome also results when there are intermediary states in which the debtor was domiciled, each of which would allow the requisite homestead exemption needed for the protection of the debtor's homestead. 11 U.S.C. § 522(b)(3), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

109. The phrase "forced into bankruptcy" is used here to mean either through involuntary bankruptcy or through creditor action that makes seeking relief unavoidable.

110. 11 U.S.C. § 522(b)(3)(A).

sold by the trustee, like any other nonexempt asset, and applied towards the payment of creditors.[111]

If Debtor does in fact lose her home, the law provides that she receive the dollar value of her home equity that is protected by any applicable homestead exemption.[112] That means that she will be given whatever amount remains after it is sold in the bankruptcy proceeding. If there is any mortgage debt, it must first be paid before Debtor receives the amount of her home equity protected under the homestead exemption.

In theory, she may use the proceeds to attempt to purchase a new home. Unfortunately, as a practical matter, the loss of home equity caused by the dollar cap may preclude the purchase of another home because she no longer has cash or credit sufficient to successfully reenter the housing market.

Given the dismal housing market and the government's efforts to stem the tide of foreclosures, current law is counterproductive at best.[113] On one hand, the law creates a financial incentive for Debtor to decline the job offer she desperately needs to pay her bills in order to avoid placing her home equity at risk. On the other hand, the law encourages her to file bankruptcy prior to relocating to be assured that she can avoid the loss of her homestead exemption. Either choice is detrimental to her creditors and to her. Neither choice serves the interest of preventing bankruptcy abuse or protecting debtors to give them a fresh start in life.

---

111. 11 U.S.C. § 363, *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(13), 124 Stat. 3557, 3559.

112. 11 U.S.C. § 522(b)(1), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

113. Foreclosure sales accounted for 26% (831,574 properties) of all U.S. sales of residential property in 2010—slightly less than the 2009 figures, but still higher than in 2008. There are currently two million bank-owned houses and eleven million underwater mortgages in the United States. Paul Ausick, *US Foreclosure Sales Lower in 2010, But Still High*, 24/7 WALL ST. J. (Feb. 24, 2011, 9:29 AM), http://247wallst.com/2011/02/24/us-foreclosure-sales-lower-in-2010-but-still-high/.

The government has answered the rise in foreclosures with a number of federal and state programs to help homeowners stay in their homes. The Home Affordable Refinancing Program ("HARP"), the Home Affordable Modification Program ("HAMP"), the Second Lien Modification Program ("2MP"), and the Home Affordable Foreclosure Alternatives ("HAFA") programs are part of the Obama Administration's strategy to help homeowners avoid foreclosure. These programs provide eligible homeowners with lower payments or interest rates through refinancing, temporarily reducing, or suspending mortgage payments for the unemployed, offer second lien modification, and if home ownership has simply become unaffordable, provide relocation assistance. MAKING HOME AFFORDABLE.GOV, http://www.makinghomeaffordable.gov (last visited July 11, 2011). The HOPE for Homeowners ("H4H") program was created by Congress to help those at risk of default and foreclosure the opportunity to refinance into more affordable, sustainable loans. *HOPE for Homeowners*, U.S. DEP'T HOUS. & URB. DEV., http://www.hud.gov/offices/hsg/sfh/h4h/ (last visited Oct. 31, 2011).

4. Difficult Decisions: The Catch-22 of the Homestead Exemption Dollar Cap

Even if Debtor moves to New State and resides there for over two years without filing bankruptcy, she may encounter a problem in preserving her homestead exemption. If Debtor does not acquire her interest in the New State homestead three years and four months prior to filing bankruptcy, the federal dollar cap is imposed on her homestead exemption regardless of the law of New State.[114] As explained above, the dollar cap serves to divest Debtor of any portion of her homestead exemption in excess of the cap and make the funds available for creditors.[115]

In our earlier scenario, the home value was at the national median of \$173,200. Because the federal dollar cap is \$146,450, Debtor would lose \$26,750 of her homestead exemption due to the dollar cap. The resulting loss of protection for her home equity likely would force the loss of her home. This forced loss of her home equity could occur without proof of any detriment to creditors and without proof of any intent by Debtor to hinder, delay, or defraud creditors.[116]

It would seem there must be some exception to a rule that appears so harsh. In fact, there are two narrow exceptions to the dollar cap.[117] Both exceptions are tailored so that neither affords any help to Debtor. Under one exception, Debtor may find relief if her home is considered her primary residence and she is a family farmer.[118] The other

---

114. 11 U.S.C. § 522(p)(1). This provision preempts the dollar amount of the homestead exemption under the Supremacy Clause of the United States Constitution. The amount of the dollar cap is \$146,450 effective April 1, 2010, and is subject to adjustment pursuant to 11 U.S.C. § 104 on April 1, 2013.

115. Because a portion of the homestead exemption is lost, Debtor must either buy back her equity in the home that is unprotected due to loss of the exemption, or she must face loss of the home through liquidation by the trustee. By definition, Debtor is insolvent, making a refinance of the home a difficult option despite the fact that there is substantial equity remaining. If Debtor is currently unemployed, her creditworthiness is almost nil. *E.g.*, Paul Davidson, *Being Jobless for 6 Months or More 'Grinds on You,'* USA TODAY, Oct. 8, 2009, at 1B.

116. 11 U.S.C. § 522(p)(1). To say that the loss of home equity caused by the dollar cap would cause loss of Debtor's home is not hyperbole when one considers how difficult it would be for an insolvent debtor to raise such a large sum of money at a time when her credit score and financial situation are remarkably dismal. Consider also that the bankruptcy that follows relocation may be the result of a layoff resulting in prolonged unemployment. Finally, most conventional home loans require more than the home equity Debtor would have remaining after loss of the home equity that exceeds the dollar cap on her homestead exemption.

117. Even if Debtor is not subject to the dollar cap at § 522(p), she will not be able to avoid an identical dollar cap if she is a felon and her criminal offense falls with the parameters of 11 U.S.C. § 522(q). The only exception to the dollar cap for a felon is to the extent the interest in the homestead property is "reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(q)(2).

118. *Id.* § 522(p)(2)(A).

exception allows Debtor to keep her home if she acquired her interest in the home as a result of a transfer from an interest in another home[119] located in New State, provided that the previous home was itself acquired more than three years and four months[120] prior to the bankruptcy filing.[121]

Without the ability to bring herself within one of these two exceptions, Debtor is left with a difficult choice: she may file bankruptcy preemptively and preserve her homestead exemption in an effort to avoid risking the loss of her homestead exemption, or she may attempt to avoid bankruptcy, move to accept the new job, and put her homestead exemption and her home at risk. She is presented with a legal dilemma and a moral dilemma. She would like to move and take the job to get her finances in order, but to do so, she must gamble her most valuable asset and take a chance on losing everything. Should she be laid off again, have her hours reduced, or fail for any other reason to satisfy her creditors' claims, she would put herself and her children at serious financial risk, even after residing in New State for more than three years.[122]

There are many factors for Debtor to consider. It may be possible for her to move and protect her home equity without filing bankruptcy. This could occur if New State offers its residents an unlimited homestead exemption, or a homestead exemption that is sufficient to protect her home equity. By moving and establishing domicile in New State, she becomes eligible for the homestead exemption and brings herself within its protection.[123] On the surface, this seems to be the perfect plan. Protected by the New State homestead exemption, she waits out the three years and four months until all her home equity

119. The previous home and the current home each must be the debtor's principal residence. *Id.*

120. The actual period is 1215 days, which equates roughly to three years and four months. *Id.*

121. *Id.* § 522(p)(2)(B).

122. The higher the dollar cap on a given homestead exemption, the less negative impact the cap has on the preservation of home equity. The lower home equity values are, the less impact the cap is likely to have. During the housing boom from the late 1990s through the first half of the 2000s, the average ratio of homeowner equity to the value of the home was about 60%. Homeowners who had no mortgage debt had 100% equity. Others had much smaller equity shares in their homes based on the mortgage debt and the home value at any given time. The decline in home values caused by the collapse of the housing market pushed homeowners' average equity to about 38%. This phenomenon was the result of the collapsing housing market and falling home prices rather than escalating mortgage debt. *Ask Dr. Econ: Where Can I Find Statistics on Housing Net Worth and Mortgage Debt?*, FED. RES. BANK S.F. (Oct. 2009), http://www.frbsf.org/education/activities/drecon/answerxml.cfm?selectedurl=/2009/0910.html.

123. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

would be protected in or out of bankruptcy. This, in fact, would be an attractive plan, as long as she remains a resident and does not go into bankruptcy during the three-year and four-month time period.

One difficulty is that the Code may permit her creditors to force her into involuntary bankruptcy under certain circumstances.[124] If that happens, her homestead exemption is no longer determined by the law of New State but by the Code. Another difficulty is that the pressure of creditor action, including garnishment of her wages and seizure of her nonexempt property, may leave her unable to survive financially outside of bankruptcy. If this occurs, she may have no practical choice other than to file what is called a "voluntary" petition for bankruptcy relief. The petition is voluntary in name only. In point of fact, her financial situation leaves her no choice.

The financial impact on Debtor can be made to vary according to her mortgage indebtedness and the value of her home. The higher the mortgage debt and the less the home value, the less home equity Debtor would have, causing less need for homestead exemption protection of that equity. However, at any fixed home value, the more Debtor has paid on her mortgage, the greater the risk that she will be adversely affected. This is true because in a market with stable home values, as Debtor pays down her mortgage, she increases her home equity. As her home equity increases, so does her need for the protection afforded by a homestead exemption.[125]

Married couples filing jointly could also be affected in the same way. Because they normally share a home and pool their homestead exemptions, however, the effect may be somewhat less frequent and less dramatic.[126] A married couple's ability to claim the homestead exemption allowed to each of them means they may combine their homestead exemptions. This permits couples filing as joint debtors to double the amount of the homestead exemption applicable to their home.[127] The utilization of the combined homestead exemptions

124. 11 U.S.C. § 303(b)(1), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(9), 124 Stat. 3557, 3558 (explaining that a debtor may be forced into an involuntary bankruptcy if three or more creditors file a petition and their combined claims are more than a certain dollar amount).

125. Though residential real estate markets currently are down nationwide, in a time of rising home values, Debtor will experience increased home equity even when paying only the interest on her mortgage. This is because with a fixed amount of mortgage indebtedness, her rising home value will continue to increase her home equity. Thus, this situation presents another instance in which Debtor needs greater homestead exemption protection.

126. 11 U.S.C. § 522(b)(1), (p)(1).

127. *Id.* § 522(b)(1). Married couples filing jointly are required to elect the same set of exemptions, whether federal or state. When the couple is unable to agree, they are deemed to elect the federal exemptions whenever the federal exemptions are available under the laws of the applicable jurisdiction. *Id.*

affords a much higher level of protection for the couple's home equity and safeguards the home.

As the typical single head of household with dependents, it is Debtor who stands to suffer the greatest loss of homestead exemption and the greatest hardship. Understandably, Debtor needs—and may often have—a home comparable in value to her married counterpart because her total household may be the same size as a married couple's household. In fact, she may have more dependents than the prototypical married couple.[128] For that reason, her home value and home equity may conceivably be higher. Unfortunately, she has no spouse with whom to combine her homestead exemption. So, while Debtor may have the greater need for homestead exemption protection, she finds herself with less.

Debtor suffers the same dilemma whether she is moving between states with unlimited homestead exemptions, or from a state with a limited homestead exemption that has a dollar cap greater than her home equity. In each situation, Debtor has the protection of a homestead exemption that is sufficient to protect her entire home equity. As a result, a bankruptcy filing in her current domicile offers her the greatest possibility of complete protection of her home equity.

On a macro level, the magnitude of the dilemma for debtors and the concomitant societal problem are more clearly seen in light of the statistical data on insolvency in America. According to some economists, there are millions of families who would be better off financially if they sought bankruptcy relief.[129] By one estimate, approximately 17% of all households in the United States would benefit from a bankruptcy filing, compared to the 1.5 million that actually filed.[130] This suggests that at least 16.5 million families are struggling to pay their debts for some reason that has nothing to do with their eligibility to seek relief.[131] It appears that these families are attempting to avoid bankruptcy as best they can. Neither they, nor society, benefits from a rule that would push them closer toward bankruptcy.

B. Counsel's Conundrum

Although the purpose of the five BAPCPA look-back periods is to control exemption eligibility and stop bankruptcy abuse, the law has had other unintended consequences. One of these has been to make the job

128. Joe Frolick, *The Out-Of-Wedlock Baby Boom*, CLEV. PLAIN DEALER, Nov. 28, 1993, at A1.

129. WARREN & WARREN TYAGI, *supra* note 91, at 73.

130. *Id.*

131. *Id.*

of debtor's counsel more challenging. As noted above, the reforms alter the pre-filing analysis needed to ascertain exemption eligibility in many ways.[132]

Counsel's ability to assess the debtor's exemption eligibility status with confidence prior to seeking relief in bankruptcy is crucial. This is because without such assessment, the debtor may be unable to retain properties considered exempt at the time of filing.[133] This risk associated with counsel's inability to correctly determine exemption eligibility is heightened by the fact that the debtor may be unable to dismiss her bankruptcy filing and return to her pre-filing status.[134]

If counsel is unaware of the relevant look-back periods or unable to predict which exemptions may be claimed, then the debtor has no way of knowing what property she may keep. The reality is that she may become trapped in a bankruptcy that cannot be dismissed and learn only too late that she could lose most, if not all, of her property. In other words, the ability of counsel to gauge the debtor's exemption eligibility is key to the success of the bankruptcy filing and the debtor's fresh start.

Counsel's ability to provide reliable advice regarding exemptions poses special ethical problems to the extent that there is confusion about which law governs. An attorney can err in a number of ways. For instance, to the extent reasonably necessary, a lawyer must explain a matter so that the client can make informed decisions regarding the representation.[135] In addition, a lawyer is called on to abide by a

---

132. *See supra* Parts I.C–D.

133. At least one court has noted the unintended consequences that may result from the new provisions related to exemption eligibility. *See In re* Garrett, 435 B.R. 434, 447 (Bankr. S.D. Tex. 2010) ("The sponsors try to claim that they have closed the [millionaire's] loophole by placing certain restrictions on State homestead exemptions. While true, these restrictions still leave the unlimited homestead exemption largely intact for most wealthy debtors. To the extent that the restrictions may prevent some forms of abuse, they will also have unintended consequences that might harm innocent debtors who inadvertently run afoul of the complex new rules attached to exempt property. The bill does not place an absolute national dollar cap on homestead exemptions. People who, with the exceptions made in the bill as described below, would otherwise be entitled to an unlimited homestead exemption, would still be able to claim the exemption. The bill does not alter the opt-out rule in the Bankruptcy Code, so there is still no federal floor.").

134. Courts have recognized that prejudice to creditors would occur if debtors were allowed to dismiss and re-file in order to rectify a failure to properly secure a homestead exemption, and have denied motions for dismissal in this circumstance. Mendez v. Salven (*In re* Salven), 367 B.R. 109, 120 (B.A.P. 9th Cir. 2007); *In re* Hall, 15 B.R. 913, 917 (B.A.P. 9th Cir. 1981); *In re* Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987); *see also* 11 U.S.C. § 707 (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(25), 124 Stat. 3557, 3560 (discussing standards for dismissal); FED. R. BANKR. P. 1017(a) ("Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c) and (e), a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002.").

135. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2007).

client's decisions concerning the objectives of representation and consult with the client as to the means by which the objectives are to be pursued.[136] This means that the client is entitled to know what legal options are available in any given situation. It also means that it is the lawyer's responsibility to identify the possible courses of action and explain the advantages and disadvantages of each.

These ethical obligations go hand-in-hand with an attorney's obligation to act competently,[137] zealously,[138] and with due diligence.[139] In this context, it is the lawyer's ethical obligation to make sense of applicable state and federal law and relate it to the client in a way that enables the client to understand and respond.[140] Anything less places both the debtor and her counsel at risk.

1. Challenging Choices

Advising a client about her various options prior to the bankruptcy filing is often called "pre-bankruptcy planning" or "insolvency planning." Engaging in pre-bankruptcy planning raises questions about the propriety of an attorney and client discussing a debtor's potential transfer of assets or the debtor's plans to incur additional debt. Questions directed at counsel by the debtor, such as whether to transfer an asset, whether to incur more debt, whether to pay certain debts, and whether to relocate, are all typical and relevant.[141] It is important to note that the Code and case law permit a debtor to engage in pre-bankruptcy planning.[142] This may include changes in the form of assets

---

136. *Id.* R. 1.2(a).

137. *Id.* R. 1.1.

138. *Id.* pmbl. at para. 8.

139. *Id.* R. 1.3.

140. *Id.* R. 1.4(b).

141. This statement is anecdotal. These questions commonly arose during the author's thirty-five years in practice, which included representation of debtors, creditors, and service as a bankruptcy trustee.

142. *Compare* Hanson v. First Nat'l Bank in Brookings (*In re* First Nat'l Bank in Brookings), 848 F.2d 866, 868 (8th Cir. 1988) (holding that debtor's conversion of nonexempt property to exempt property on eve of bankruptcy for express purpose of placing that property beyond reach of creditors, without more, will not deprive debtor of exemption to which he otherwise would be entitled), *with* Norwest Bank Neb., N.A. v. Tveten (*In re* Tveten), 848 F.2d 871, 875 (8th Cir. 1988) (ruling that permitting debtor to convert all of his major non-exempt assets into sheltered property on the eve of bankruptcy with actual intent to defraud his creditors "would constitute a perversion of the purposes of the Bankruptcy Code" (citing First Tex. Sav. Ass'n, Inc. v. Reed (*In re* Reed), 700 F.2d 986, 992 (5th Cir. 1983))). *But see In re* Johnson, 880 F.2d 78, 84 (8th Cir. 1989) (holding debtor's conversion of property into homestead property did not in itself establish fraud). *See also In re* Addison, 540 F.3d 805, 813–14 (8th Cir. 2008) (explaining that indicia of fraud may include conveyances for less than adequate consideration, converting substantially all non-exempt property to exempt property, borrowing of funds in order to purchase exempt assets, or debtor's concealment of pre-bankruptcy attempts to reduce non-exempt property available for payment of creditor claims); *In re* Jennings, 533 F.3d 1333, 1338 (11th Cir. 2008) (discussing

from nonexempt to exempt. Because the law allows this conduct to occur under certain circumstances, it is the ethical obligation of counsel to assist the client in discerning the line between prudent and imprudent behavior and between lawful and unlawful conduct.[143] Counseling insolvent debtors about exemption eligibility falls under this same category.

Any advice by counsel must be governed not only by the rules of ethics, but by the Code and case law. This is because attorneys are specifically prohibited by the Code from advising the insolvent client to incur more debt.[144] However, incurring more debt may be in the client's best interest. Sometimes, the use of credit may be the client's only hope for avoiding or forestalling bankruptcy.

For these reasons, professional ethics is at the intersection of the lawyer's obligation to advise the client and the Code's prohibition regarding what kind of advice the lawyer may give. This difficult issue was confronted by the U.S. Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*.[145] The Court held that the Code only prohibits an attorney from advising a debtor to manipulate the protections of the bankruptcy system by "loading up" on debt with the expectation of obtaining its discharge, conduct that is abusive per se.[146] This issue relates to counsel's obligation to advise her client regarding exemption eligibility and is important because it highlights that lawyers are merely restricted from counseling a debtor to *engage* in abusive conduct.[147] There is no restraint on an attorney's obligation to advise the debtor on other matters, including exemption eligibility.

2. The Certainty of Uncertainty

There is a threshold problem for counsel seeking a firm grasp of exemption eligibility issues. State exemption laws were generally designed to protect residents, rather than nonresidents, from creditors' claims.[148] There is often no clear statement in state law regarding the

---

that conversion of non-exempt to exempt assets is acceptable unless it is motivated by actual intent to hinder, delay, or defraud creditors); *In re* Wilmoth, 397 B.R. 915, 919 (B.A.P. 8th Cir. 2008) (discussing that there is no bright-line rule as to when conversion of non-exempt property to exempt property is fraudulent, and that courts have considerable discretion in making that determination).

143. *E.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1331 (2010).

144. 11 U.S.C. § 526(a)(4) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(20)(B), 124 Stat. 3557, 3560.

145. 130 S. Ct. at 1329.

146. *Id.* at 1336.

147. *Id.*

148. *See In re* Morrell, 394 B.R. 405, 415 (N.D.W.V. 2008) (stating that the legislative history supports a State interest in restricting its exemptions to its residents (citing William J. Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 OHIO ST. L.J. 335, 364 (1982))).

extraterritorial application of state exemption laws.[149] A debtor who has not resided in a particular jurisdiction for two years is unlikely to have sufficient ties to the state to have domicile for exemption eligibility purposes. In other words, state law is often silent concerning whether its exemption laws protect a debtor's property beyond its borders.

A debtor may find herself in a number of different scenarios depending on the interpretation of the extraterritorial effect of a state's exemption laws. For example, a state constitution may not address whether the state's exemptions are given extraterritorial effect.[150] In this situation, some bankruptcy courts have interpreted state exemption laws to have no extraterritorial effect, causing a debtor whose homestead property is located out of state to be ineligible for the exemption, and, instead, forcing the debtor to elect to use the federal homestead exemption under the savings clause.[151] In contrast, other jurisdictions have interpreted state exemption laws to have extraterritorial effect.[152] These courts allow the debtor to claim the state homestead exemption for property located outside of the look-back state when its exemption law applies.

Even when state law is clear as to its extraterritorial application, outcomes may be difficult to predict. North Carolina law contains a provision that says exemptions are not given extraterritorial effect.[153]

149. BROWN ET AL., *supra* note 25, at app. C.

150. *E.g.*, FLA. CONST. art. X, § 4 (amended 1968), *preempted by In re* Osejo, 447 B.R. 352 (Bankr. S.D. Fla. 2011).

151. *In re* Adams, 375 B.R. 532, 535 (Bankr. W.D. Mo. 2007) (discussing that at the time of filing, the debtors had resided in a home in Missouri for 440 days. Debtors had resided in Florida for the majority of the 180-day period immediately preceding the 730-day period before filing, so Florida exemption law applied. Because Florida exemption law is not given extraterritorial effect, the debtors' only option was to use the federal homestead exemption.); *see also In re* Nickerson, 375 B.R. 869, 872 (Bankr. W.D. Mo. 2007) (stating that a party who was not domiciled in Missouri when she filed her petition was not eligible for the state's exemptions); *In re* West, 352 B.R. 905, 906 (Bankr. M.D. Fla. 2006) (stating that Florida's exemptions are not extraterritorial).

152. *Accord In re* Stratton, 269 B.R. 716, 718–19 (Bankr. D. Or. 2001); *see In re* Jevne, 387 B.R. 301, 302, 304–05 (Bankr. S.D. Fla. 2008) (ruling that the Rhode Island homestead exemption statute could be given extraterritorial effect to cover a Florida home); *In re* Smith, No. 07-20614, 2009 WL 1109831, at *1–2 (Bankr. S.D. Tex. 2009) (holding that Louisiana exemptions applied to debtors who were domiciled in Texas property for 230 days prior to filing and had been domiciled in Louisiana for the 500 preceding days because Louisiana was an opt-out state), *withdrawn in part*, Aug. 26, 2010; *see also In re* Drenttel, 403 F.3d 611, 614–15 (8th Cir. 2005) (explaining that although the Minnesota homestead statute does not address its extraterritorial application, the court considered the purpose of the statute and the protection of the debtor's homestead and family, and construed the exemption statute in favor of the debtor's residence in Arizona).

153. N.C. GEN. STAT. § 1C-1601(a) (1981) ("[E]ach individual, *resident* of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors." (emphasis added));

However, a Texas bankruptcy court held that the BAPCPA provision that required debtors to look to North Carolina exemption law preempted the North Carolina provision denying extraterritorial effect.[154] Bankruptcy court decisions interpreting state exemption law may even conflict within judicial districts and create problems in predicting exemption eligibility.[155] This uncertainty makes it difficult for an attorney to advise a client with confidence, and the cost and time necessitated by an appeal makes resolution of the issues through appellate review difficult for an insolvent debtor.

For instance, consider the host of possibilities created by BAPCPA as its reforms relate to the relocating debtor's eligibility for exemptions.[156] The look-back period may reveal that a particular debtor was previously domiciled in any of the fifty states, the District of Columbia, a U.S. territory, or a foreign country. Whether a debtor is eligible to claim the exemptions in the look-back state at the time of filing is a question answered by reference to local law.[157] The forum court in the state where the bankruptcy is filed interprets state law in making that determination. As a result, bankruptcy judges may reach different conclusions when resolving this issue.[158] This has the potential to be

---

see also In re Owings, 140 F. 739, 741 (E.D.N.C. 1905) (stating that the exemption law of North Carolina has no extraterritorial force (citing Balk v. Harris, 30 S.E. 318, 318 (N.C. 1898))).

154. *See In re* Garrett, 435 B.R. 434, 437, 454 (Bankr. S.D. Tex. 2010) (explaining that debtor filed bankruptcy in Texas within the 730-day look-back period. North Carolina was the look-back state, and its exemption law applied. Although North Carolina exemption law is not applied extraterritorially, the bankruptcy court ruled that § 522(b)(3)(a) pre-empted the North Carolina exemptions statute and the North Carolina exemption was available to the debtor regardless of the residency requirement.).

155. *See In re* Katseanes, No. 07-40168-JDP, 2007 WL 2962637, at *3 (Bankr. D. Id. 2007) (discussing the fact that court decisions as to extraterritorial application may also vary within circuits); *see also In re* Capps, 438 B.R. 668, 672–73 (Bankr. D. Id. 2010) (finding that although the Ninth Circuit had ruled that the California homestead exemption statute should be given extraterritorial effect, this decision did not control and that the Idaho homestead exemption law did not have extraterritorial effect, as Idaho's state goals underlying exemptions differed from those of California).

156. For example, the number of potential combinations of jurisdictions (current domiciliary state and former domiciliary state) is the square of the sum of the fifty states, the District of Columbia, the four U.S. territories, and the possible foreign domiciliary, totaling 3136 (56 x 56). What makes the determination of exemption eligibility challenging is identifying each jurisdiction's domiciliary requirements, determining its opt-out status, and interpreting the extraterritorial application of its law. Bankruptcy law looks to state law to decide whether and when the debtor's domicile was abandoned in one state and established in another. Because this is largely a matter of physical presence and intent, the debtor may be found to have abandoned a domicile in one state without having established a domicile in another state, or vice versa. For exemption eligibility, the debtor may have only one domicile at a time. *See supra* note 94 and accompanying text (describing cases related to the determination of the debtor's domicile).

157. 11 U.S.C. § 522(b)(3)(A) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

158. *Compare In re* Battle, 366 B.R. 635, 636 (Bankr. W.D. Tex. 2006) (holding that the

particularly troublesome when different holdings on the same facts occur within the same judicial district.[159] In short, this area of the law can be a minefield for counsel and client.

C. Conflicting Case Law and Commentary

Sometimes complexity of analysis is necessary to achieve justice or other important social goals. In this instance, the confusion that exists regarding exemption eligibility does not serve the ends of justice or any other meaningful purpose. The law lacks clarity, and its unpredictability fails to serve the debtor or the creditors, working a needless hardship on the bar and bench.

A relocating homeowner on the brink of insolvency, who is seeking employment in another state with no ulterior motive, should not be required to put her home equity at risk. This is a no-win situation for the debtor. If the debtor resides in a state with a more favorable homestead exemption, the law creates a financial incentive to file bankruptcy preemptively rather than risk the loss of the homestead exemption or forego the employment. This serves neither the debtor's interest nor the creditors' interest. In this situation, the bankruptcy system forces the debtor, who is striving to avoid bankruptcy, to succumb to filing to prevent the loss of her homestead exemption or the loss of an employment opportunity.

Professor Laura B. Bartell offered one approach to the interpretation of § 522(b)(3)(A) and the savings clause in an article on this subject.[160] The thesis of the article suggests that the doctrine of federal preemption permits the imposition of exemption eligibility in the look-back state under the Supremacy Clause without reference to exemption eligibility under the domiciliary requirements of state law.[161] This approach has been embraced by more than one court.[162] However, this particular

---

Florida residency restriction was not pre-empted by § 522(b)(3)(a)'s choice of law provision that Florida exemption laws applied to the debtor, and that because the Florida opt-out law is limited to residents, the nonresident debtor was able to elect federal exemptions under the savings clause), *with In re* Camp, 396 B.R. 194, 202–03 (Bankr. W.D. Tex. 2008) (holding that the Florida residency restriction was pre-empted by the choice of law provision in § 522(b)(3)(a) and that Florida exemption laws applied to the debtor and precluded the nonresident debtor from choosing exemptions under the savings clause), *rev'd*, 631 F.3d 757 (5th Cir. 2011).

159. *See supra* note 158 and accompanying text.

160. *See generally* Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEV. J. 401 (2006) (suggesting an interpretation of the look-back provision).

161. *Id.*

162. *See In re* Camp, 396 B.R. at 202–03 (holding that the federal choice of law provision in § 522(b)(3)(A) preempted Florida's limitation to "residents" in the opt-out statute and in the substantive exemption law). The *Camp* decision was reversed by the Fifth Circuit, though on different grounds. *See* Camp v. Ingalls (*In re* Camp), 631 F.3d 757, 761 (5th Cir. 2011)

interpretation of the savings clause has not gained widespread acceptance. Other courts have ruled that the approach fails to recognize the significance of the savings clause in the interpretation of the provision.[163]

The operative phrase in the savings clause has a condition precedent: if the domiciliary requirement renders the debtor "ineligible for any exemption," the debtor may elect to exempt property under the federal exemptions.[164] This phrase in the savings clause can have no meaning unless the domiciliary requirement can render the debtor "ineligible for any exemption." Simply put, the debtor would never need the benefit of the savings clause if the debtor could never be disqualified from exemption eligibility by the effect of the domiciliary requirement. The notion that Congress intended to superimpose the exemptions of the look-back state on the debtor through preemption without regard to a domiciliary requirement for eligibility under state law at the time of filing has not gained traction in the courts.[165]

Conflicting provisions of a statute must be harmonized whenever possible through a statutory construction that reconciles the provisions.[166] In the present context, it is only by acknowledging that a debtor may be "ineligible for any exemption" that the savings clause and the look-back provision can be construed in a way that gives meaning to both. Courts, however, have not adopted this approach, and the conflicting decisions work a financial hardship on those in our society who can least afford it.

(reversing *Camp*'s ruling that Florida's "opt-out" ruling applied to persons not residents of Florida, despite the language in the statute expressly stating that it applied to residents of Florida, on plain meaning grounds). The Fifth Circuit stated that, because of its ruling on this issue, it did not reach the corollary issues regarding whether § 522(b)(3)(A) preempted state law restrictions on extraterritorial application of a state's exemption law and whether the savings clause at the conclusion of § 522(b)(3) permitted debtors to claim federal exemptions when the applicable state both enacted an opt-out law and prohibited the extraterritorial application of the state's exemptions. *Id.* at 761 n.3. Thus, the Fifth Circuit did not resolve these issues in *Camp*. *See also In re* Smith, No. 07-20614, 2009 WL 1109831, at *2 (Bankr. S.D. Tex. 2009) (following *Camp* without analysis); *In re* Battle, 366 B.R. 635, 636 (Bankr. W.D. Tex. 2006) (following a different approach, with which the *Camp* court disagreed).

163. *See, e.g., In re Battle*, 366 B.R. at 636 (holding Florida opt-out law limited to "residents" and thus non-resident who had moved from Florida within 730 days was governed by Florida law and able to elect federal exemptions); *accord In re* Crandall, 346 B.R. 220, 221–22 (Bankr. M.D. Fla. 2006); *In re* Underwood, 342 B.R. 358, 362 (Bankr. N.D. Fla. 2006); *In re* Chandler, 362 B.R. 723, 726–27 (Bankr. N.D. W. Va. 2007) (stating that Georgia's opt-out law is limited to debtors "whose domicile is in Georgia" and thus not applicable to a nonresident who had relocated to West Virginia).

164. 11 U.S.C. § 522(b)(3)(A) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559.

165. *In re* Fernandez, 445 B.R. 790, 809 (Bankr. W.D. Tex. 2011); BROWN ET AL., *supra* note 25, § 4:5 at 82.

166. Watt v. Alaska, 451 U.S. 259, 267 (1981).

D. The Dollars and Cents of Domiciliary Happenstance

1. The Creditors' Calamity

The case may be made that the exemption eligibility reforms of BAPCPA are inequitable to debtors and create an unnecessarily arcane analysis paradigm for the bar and bench. But creditors also stand to suffer from the reforms as well. The unfairness of the reforms to creditors is both discernible and dramatic.

There is no obvious reason to explain why a debtor should benefit disproportionately and at creditors' expense from having fortuitously domiciled in states that grant bountiful exemptions merely because the debtor domiciled there for a few months during the past two and one-half years. Current law creates the possibility of such a random result caused by the identification of a coincidental look-back state that allows a nonresident debtor to claim its homestead exemption.[167]

In other words, the six-month look-back period is so short that even a residency of a few months within that narrow window of time can allow a debtor to control where a debtor lived during the longest portion of the look-back period. This control may enable the debtor to alter the identity of the look-back state through the timing of the bankruptcy filing.

The purpose of the look-back period in determining domiciliary eligibility for exemptions is to combat bankruptcy abuse by preventing a debtor from gaining financial advantage over creditors. For example, the debtor may relocate to a domiciliary jurisdiction with more favorable exemption laws during the two-year period prior to filing.[168] It makes sense that a debtor should not be able to relocate to another state and shelter assets that would otherwise be available to pay creditors' claims. To allow this type of conduct would create a financial incentive for debtors to avoid creditors in this fashion.

By the same token, debtors should not gain financial advantage

167. An example would be a debtor who domiciled in Minnesota longer than any other state during the six-month look-back period two years preceding the bankruptcy filing. Because Minnesota state law allows a nonresident debtor to claim its homestead exemption, a debtor could use Minnesota's homestead exemption to protect up to $360,000 of the debtor's home equity. MINN. STAT. §§ 510.01–.02 (2010); *see also In re* Drenttel, 403 F.3d 611, 614–15 (8th Cir. 2005) (holding that a homestead exemption may be claimed to exempt an out-of-state property when the state homestead exemption statute itself does not preclude use of the homestead exemption for an out-of-state property).

168. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327; § 11 U.S.C. § 522(p)(1)–(2); *see also* 147 Cong. Rec. H517 (daily ed. Mar. 1, 2001) (statement of Rep. Sensenbrenner) ("The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both the debtors and creditors.").

through exemption eligibility at the creditors' expense due to the fortuity of having lived for a brief period of time in a state with favorable exemptions. To allow debtors to control the identity of the look-back state by timing the filing of the bankruptcy merely encourages gaming of a different sort. The debtor is in control of the decision to move or to file in order to interrupt a domiciliary period, and the debtor may either delay filing or prolong a stay to lengthen a domiciliary period. Either way, under current law, the debtor may affect the length of a former domiciliary period in a way that is financially advantageous.

Perhaps the most insidious threat to creditors is the financial incentive to file bankruptcy that the reforms offer to a relocating homeowner. As discussed earlier, the BAPCPA reforms encourage preemptive filing by relocating homeowners to avoid the risk of losing an existing homestead exemption. Regardless of the amount of the debtor's existing homestead exemption protection, if the amount is sufficient to protect most, if not all, of the debtor's home equity, the debtor gambles that equity by moving out of state without first filing bankruptcy.

By filing preemptively, the debtor has the opportunity to both preserve her home equity *and* accept the new job in another state. This is because the estate of the debtor is viewed as of the date of filing. Assuming the debtor has lived in her home in her current domicile for three years and four months, she may claim the full homestead exemption of her domicile at the time of filing. She may then confidently leave the state, having fixed her entitlement to the homestead protection under the exemption on the filing date of her petition.

Because there is no statistical information compiled regarding the post-filing interstate migration of debtors, there is no way to determine whether and with what frequency preemptive filing may occur. For all intents and purposes, a preemptive filing would appear on the docket of the bankruptcy court as a case like any other. Only the debtor and debtor's counsel would have reason to know the motivating factors behind the debtor's decision to file. Even so, for every preemptive filing that occurs because a relocating debtor is unwilling to risk her home equity, creditors suffer the loss.

The unsecured creditors, who have no collateral, lose the entire amount owed.[169] The secured creditors, whose collateral may be worth less than the amount owed, also lose the under-secured portion of their

169. 11 U.S.C. § 726, *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(28), 124 Stat. 3557, 3560.

debt.[170] And, finally, even the secured creditors, whose collateral is valued at the amount that is owed, may suffer because the relocating debtor chooses to surrender the property as a way of reducing her debt load.[171] The debtor can more easily surrender the property when there is no potential threat of personal liability. In sum, to the extent that the BAPCPA reforms encourage eligibility gaming and preemptive filing, creditors have little to gain and much to lose.

2. Residential Roulette

While creditors' interests are not well served by the reforms, it is the relocating debtor who stands to lose the most. The debtor with the misfortune of domiciling for a few months in a look-back state with exemptions of limited value may suffer accordingly.[172] This is true despite the fact that the debtor domiciled in states with generous exemptions for most of the entire two-and-a-half-year period prior to filing. Conceivably, the debtor may have owned her home and domiciled most of her life in a state with an unlimited homestead exemption except for one brief domiciliary foray into another state during the look-back period. Based on this brief domiciliary excursion, the law could require her to forfeit the unlimited homestead exemption to which she was entitled for all but a few months of her domiciliary history. Once the look-back state is established, the debtor's eligibility to claim exemptions under the law of the look-back state is ascertained as of the "date of the filing of the petition."[173] The consequences, good or bad, flow from the determination of the look-back state's identity and its residency requirements for exemption eligibility.

3. The Hapless, Hopeless Homeowner

It seems fair that the look-back period for a debtor who is a felon should be longer than for an ordinary homeowner. What seems odd is that the dollar cap for each is the same. Moreover, there is an exception for the debtor who is a felon that does not exist for the honest homeowner. If the debtor who is a convicted felon needs the homestead interest for the support of herself or her family, the dollar cap may be lifted.[174] There is no similar exception for the non-felon homeowner

---

170. *Id.*

171. *Id.*

172. An example would be a debtor who domiciled in Maryland longer than any other state during the look-back period. Maryland allows a nonresident debtor some exemptions that are limited in amount. S.B. 169, 2011 Gen. Assemb., Reg. Sess. (Md. 2011).

173. 11 U.S.C. § 522(b)(3), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559. *But see supra* note 21 and accompanying text (discussing constitutional challenges to BAPCPA).

174. 11 U.S.C. § 522(q)(2).

who has not owned and lived in her home the requisite three-year and four-month period.[175] The law grants the court no authority to consider whether the home equity that the non-felon homeowner loses may be essential to the support of her family. Neither does the law consider whether the loss of that equity may cause the loss of her home through a sale in bankruptcy if she cannot raise the money to buy back her lost home equity.[176]

In contrast, the homeowner with a felony conviction within five years of filing bankruptcy, who has lived in her home for three years and four months, is not subject to the dollar cap under that provision.[177] The reason is that her domiciliary period suffices to avoid the dollar cap under the three-year and four-month look-back period. The felon is still subject to a dollar cap in the same amount based on the conviction within the five-year period preceding the filing.[178] In short, the felon is subject to the same dollar cap, but for a different reason. It is based on the conviction rather than the duration of the period of domicile and home ownership.[179] Thus, assuming the home equity of each is the same, it would seem that both would lose the same amount of home equity because of the dollar cap. However, under BAPCPA, that may not be the case.

The difference in the predicament of the honest homeowner and the felon homeowner is that one of them may apply to the court for relief from the dollar cap to the extent the property is needed for her support or the support of her family. Sadly, the debtor who may seek the court's assistance is not the honest homeowner—rather, it is the felon.

175. For example, suppose an honest homeowner buys a home and domiciles in a state for three years and three months. She is eligible for the homestead exemption under the law of the domicile because she has lived there for the required two-year period. Yet, should she be forced to seek bankruptcy relief, she would be subject to the dollar cap on her home equity because she falls within the three-year and four-month look-back period. In short, her lack of one additional month of continued domicile costs her the loss of any home equity that exceeds the dollar cap.

176. It may be argued that the value of the homestead exemption that is lost is not "home equity" in that it no longer belongs to the debtor but to her estate in bankruptcy. This view disregards the fact that the amount she lost was counted as her home equity until the moment of her bankruptcy filing. As a practical matter, what was her home equity prior to the bankruptcy filing was not lost through depreciation of the home's value or through incurring additional debt. Rather, the protection the debtor enjoyed under the state homestead exemption is lost because the federal dollar cap overrides the state law exemption when the debtor files. It is the preemption of state law by federal bankruptcy law that precipitates the loss of the incremental portion of home equity that exceeds the dollar cap. *See* U.S. CONST. art. VI, cl. 2 (stating that federal law preempts conflicting state law); 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559 (stating that debtors may utilize state-law exemptions).

177. 11 U.S.C. § 522(q)(2).

178. *Id.*

179. *Id.*

While the hyperbole in the example may be unnecessary, there is a fundamental inequity that should not exist. The larger issue is not whether a convicted felon should be allowed to keep that portion of a homestead exemption that is reasonably necessary for the support of her family. She should. The critical question is why the same concern cannot be shown to a homeowner with no record of wrongdoing.

III. THE NEED FOR REFORM

A. The Current Assumptions Underlying Abuse Prevention

An amendment to the Code is needed to provide clarity in the law, minimize the potential for conflicting court decisions, and restore fairness to all parties. This can be done in a way that accomplishes the original goals of BAPCPA—closing the mansion loophole and preventing relocation intended to hinder, delay, or defraud creditors, while avoiding the negative consequences to honest relocating debtors.[180]

Implicit in Congress' decision to combat fraud through the look-back provisions are three basic assumptions. The first assumption is that there is a period of time beyond which it is improbable that individuals will relocate to a new domiciliary jurisdiction to avoid creditors' claims. This assumption is driven by the idea that a debtor generally will not be able to plan ahead for some period of years in order to take advantage of creditors and abuse the bankruptcy system. This notion is seen in the number and type of look-back periods designed to prevent the relocation of debtors at creditors' expense.[181] It is important to note that all but one of the look-back periods ignore whether the move affects the debtor's relative financial position under the exemption laws of the look-back state versus the current domiciliary state outside of bankruptcy. Likewise, all but one of the look-back periods disregards the effect of the debtor's relocation on creditors. The six-month look-back period merely serves to identify the law of the jurisdiction that begins the exemption eligibility analysis.[182]

The second assumption is that there must be a limit on the value of an exempt homestead property that may be claimed by a relocating debtor. In other words, there must be a dollar cap that will restrict the amount that the debtor may shield from creditors through the homestead exemption of a new jurisdiction.[183] This seems an obvious way to stop

180. Evans & Lewis, *supra* note 4, at 334.

181. 11 U.S.C. § 522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17)(A), 124 Stat. 3557, 3559; 11 U.S.C. § (p)(1).

182. *Id.* § 522(b)(3)(A).

183. *Id.* § 522(p)(1). The limit on the value of exempt homestead property includes real or

the sheltering of assets in a large homestead exemption. The imposition of a federal dollar cap on the amount of any state homestead exemption preempts state law and controls the amount of any sheltered assets.[184]

This assumption is given effect through the imposition of a dollar cap imposed on the amount of any homestead exemption when the debtor has not lived in the current domiciliary state for the three-year and four-month look-back period.[185] This provision applies regardless of the law of the current domiciliary state, the look-back state (including the debtor's immediate former domiciliary state), or any intermediate former domiciliary state within the three-year and four-month period prior to filing.[186] In other words, the federal dollar cap preempts the law of any other state with regard to the relocated debtor, who is in bankruptcy.

The three-year and four-month look-back provision is similar to the two-year look-back provision in that it disregards whether the debtor would otherwise be eligible for exemptions under the law of the current domiciliary state. Neither provision considers whether or to what extent the debtor's relative financial position vis-à-vis creditors would change.[187]

The third assumption is that the statutory controls in the first two assumptions will prevent relocating debtors from engaging in exemption gaming to hinder, delay, and defraud creditors. The idea is that the look-back periods, coupled with the dollar caps, will prevent the sheltering of assets in a state homestead exemption. In short, the final assumption is that the provisions predicated on these assumptions will close the mansion loophole and minimize or eliminate exemption abuse.[188]

---

personal property that the debtor or a dependent uses as a residence, a cooperative that owns property that the debtor or a dependent uses as a residence, a burial plot for the debtor or a dependent of the debtor, and real or personal property that the debtor or a dependent claims as a homestead. *Id.*

184. *See* U.S. CONST. art. VI., cl. 2 (containing the Supremacy Clause, which dictates that federal law controls over opposing state law).

185. Note that there are exceptions to this limitation. Pursuant to § 522(p)(2)(A), the dollar cap is made inapplicable to a family farmer claiming an exemption for a principal residence under § 522(b)(3)(A). In addition, pursuant to § 522(p)(2)(B), for purposes of § 522(p)(1), the debtor's interest does not include an interest transferred from a debtor's previous principal residence, cooperative, burial plot, or homestead (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same state. The original dollar caps in the Code are adjusted every three years to reflect the change in the Consumer Price Index rounded to the nearest $25 pursuant to § 104(a)–(b). The next scheduled adjustment will be on April 1, 2013.

186. 11 U.S.C. § 522(p)(1).

187. *Id.*

188. *See supra* Parts I.C–D.

B. The Multiple Meanings of "Any"

One reason for statutory change is the confusion that now exists in the courts and among legal experts with regard to the meaning of the current provisions.[189] A prime example is the construction of the word "any" in the savings clause.[190] According to the interpretation given the word, it is alternatively argued that its significance markedly changes the syllogism in the savings clause in one of the following two ways:

> (1) If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for *any* [one] exemption [singular], the debtor may elect to exempt property that is specified under subsection (d);[191] or
>
> (2) If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for *any* exemption [whatsoever] [meaning ineligible for *all* exemptions], the debtor may elect to exempt property that is specified under subsection (d).[192]

Under the first interpretation, if the debtor discovers that she is not eligible for her homestead exemption or any other exemption in the look-back state, she may elect to claim the federal bankruptcy exemptions. Even if she is only ineligible for *one* exemption, she is brought within the savings clause. This reading aligns with the view that the debtor should have a full complement of exemptions, whether state or federal. Without a complete set of exemptions, the debtor may be left with merely one exemption that may be claimed in theory, but that has no practical value. That is to say, the debtor would have no exemptions at all.[193]

The second reading of the savings clause is radically different from the first interpretation. That is because eligibility for the federal exemptions under the savings clause is made to hinge not merely on the loss of *one* exemption, but on the loss of *every* exemption. Under this

---

189. *Compare, e.g.*, Bierbach v. Brooks (*In re* Brooks), 393 B.R. 80, 86 (Bankr. M.D. Pa. 2008) (interpreting the phrase "ineligible for any exemption" to mean ineligible for *all* exemptions, thereby denying the debtor eligibility for federal exemptions under the savings clause), *with, e.g.*, *In re* Williams, 369 B.R. 470, 472–73 (Bankr. W.D. Ark. 2007) (suggesting in dictum that the court would not look favorably on an interpretation of the phrase that would deprive a debtor of all homestead exemptions).

190. 11 U.S.C. § 522(b)(3), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17), 124 Stat. 3557, 3559.

191. *Id.* (emphasis added).

192. *Id.* (emphasis added).

193. For example, this could be the plight of a Pennsylvania debtor, who is deemed eligible to claim the homestead exemption in Utah, but who is unable to utilize the exemption because of Utah's requirement that the homestead property be situated in Utah. *See e.g.*, Stephens v. Win Holbrook (*In re* Stephens), 402 B.R. 1, 8 (B.A.P. 10th Cir. 2009) (holding that the savings clause applied where state law precluded the debtor from claiming the homestead exemption under state law).

view, unless the debtor is rendered ineligible for any and all exemptions, the debtor remains eligible for one. Thus, because the debtor would not be deemed "ineligible for any exemption," the debtor would be denied access to the federal exemptions under the savings clause.

Normally, statutory interpretation is only needed when the plain meaning of a word or provision is not self-evident.[194] Traditionally, words are given their ordinary or plain meaning in common usage.[195] Assuming the savings clause is ambiguous, the most reasonable construction would be to read the word "any" as synonymous with "one" rather than "all" in that it modifies the singular "exemption" in the sentence structure.

Nevertheless, courts have had difficulty determining what is meant by the word "any" in the context of the savings clause. As discussed above, the interpretations given the word "any" in the phrase "ineligible for any exemption" are strikingly different. Not surprisingly, the differing interpretations of the word, the phrase, and the savings clause have led to radically different outcomes for similarly-situated litigants.

Some courts have held that the phrase "ineligible for any exemption" means that if the debtor is eligible for even one exemption, the debtor is precluded from electing the federal exemptions pursuant to the savings clause. These decisions, which construe the word "any" in this context to mean "all," either ignore the fact that "any" modifies the singular noun "exemption," or supply the word "whatsoever," making the phrase read "ineligible for any exemption *whatsoever*."[196] In effect, these courts read the passage as though it were written "ineligible for *every* exemption."

However, longstanding case law holds that exemption laws are to be liberally construed in favor of the debtor to enable the debtor to receive a fresh start.[197] Courts that rely on this case law read "ineligible for any

194. Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899))).

195. *Id.* at 485–86 ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.").

196. Bierbach v. Brooks (*In re* Brooks), 393 B.R. 80, 86 (Bankr. M.D. Pa. 2008); *In re* Katseanes, No. 07-40168-JDP, 2007 WL 2962637, at *3 (Bankr. D. Idaho 2007).

197. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244–45 (1934) ("One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'. . . The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. Local rules subversive of that result cannot be accepted as controlling the action of a federal court." (quoting Williams v. U.S. Fid. & Guar.

exemption" to mean ineligible for any *one* exemption or, in other words, not eligible for the identical exemptions as residents of the look-back state.[198]

The need to supply the word "one" following "any" or to supply the word "whatsoever" following "exemption" should not be necessary. The meaning is plain, and the phrase easily makes sense when the words in the phrase are construed together according to their common usage. The definition of the word "any" permits the meaning to encompass numerical values from one to some to all, according to context.[199] The context in the savings clause places the word "any" within the initial dependent phrase of the syllogism modifying the singular "exemption."[200]

Moreover, the only rational purpose of a savings clause is to "save" the beneficiary of the clause from the loss of exemptions to which the beneficiary is otherwise entitled. An interpretation that deprives the debtor of the federal exemptions and all but one state law exemption based on the debtor's mere eligibility for only one state exemption hardly "saves" the debtor's exemptions.

Such a harsh result does not serve the legislative goal of bankruptcy abuse prevention. This provision of the Code should be construed to give effect to the important purposes of (1) stopping blatant relocation by the debtor to hinder, delay, or defraud the collection of creditors' claims, and (2) treating the debtor with fairness and compassion when there is no evidence that the debtor gamed the system to the detriment of creditors.

A savings clause should do more than merely guarantee eligibility for one exemption: it should provide parity among debtors. Historically, debtors have fallen into two groups. Debtors in the opt-out states received the state exemptions, including the non-bankruptcy federal

---

Co., 236 U.S. 549, 554–55 (1915))).

198. *In re* Battle, 366 B.R. 635, 636 (Bankr. W.D. Tex. 2006) (holding Florida opt-out law is limited to "residents" and thus nonresident who had moved from Florida within 730 days was governed by Florida law and able to elect federal exemptions); *accord In re* Stephens, 402 B.R. 1, 5–6 (B.A.P. 10th Cir. 2009); *In re* Wood, No. 5:07-bk-70696 (Bankr. W.D. Ark. June 28, 2007), http://www.arb.uscourts.gov/orders-rules-opinions/opinions/barry/wood.pdf; *In re* Crandall, 346 B.R. 220, 221–22 (Bankr. M.D. Fla. 2006); *In re* Underwood, 342 B.R. 358, 362 (Bankr. N.D. Fla. 2006); *In re* Chandler, 362 B.R. 723, 726–27 (Bankr. N.D. W. Va. 2007) (holding that the Georgia opt-out law is limited to debtors "whose domicile is in Georgia" and thus not applicable to a non-resident who had relocated to West Virginia); *see also In re* Williams, 369 B.R. 470, 474 n. 2 (Bankr. W.D. Ark. 2007) ("Many state's opt-out provisions apply only to residents of the particular state.").

199. THE OXFORD AMERICAN DICTIONARY AND THESAURUS 59 (2003 ed.).

200. 11 U.S.C. § 522(b)(3) (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17), 124 Stat. 3557, 3559.

exemptions.[201] Debtors in the states that chose not to opt out were offered a choice between state law exemptions or the federal exemptions,[202] which meant that all debtors received a complete set of exemptions, whether under the law of a state or under the Code. To construe the word "any" in a way that denies a relocated debtor a complete set of exemptions under either state law or federal law creates a new underclass of debtors who receive less than their non-transient counterparts in every jurisdiction. This result is unfair and works an unnecessary hardship on a relocating debtor without any allegation of ulterior motive, financial gain, or creditor hardship.

C. *The Ineffectiveness and Inequity of Current Law*

One test of the fairness of the current provision is whether it considers the exemptions allowed by the debtor's look-back state relative to the debtor's new domiciliary state. If there is no increase in the value of the exemptions, the debtor has not benefited from relocation, and the value of property available to satisfy creditors' claims has not been diminished. In that situation, the debtor should be allowed to claim exemptions under the laws of the new domiciliary state because the relocation does not hinder, delay, or defraud creditors. Otherwise, the debtor may suffer merely for relocating while the creditors reap the windfall of the debtor's lost homestead equity. This oppressive result is exemplified when the relocation is employment-related or for other legitimate reasons that have nothing to do with avoiding creditors.

Even when there would be an increase in the value of the debtor's claimed exemptions under the law of the current domiciliary state, detriment to creditors and abuse of the system cannot be assumed. If the relocation allows the debtor to find employment, obtain medical coverage, receive better pay, achieve greater job security, start a business, acquire assets, secure employment for a spouse, or cut living expenses, the debtor's financial standing is improved and creditors are benefited. Relocating to a new state for employment may be necessary to gain or maintain employment, for career advancement, to assist aging parents, to have more time with grandchildren, to be closer to essential health care facilities, or for other reasons that have nothing to do with avoiding creditors or hindering the collection of creditors' claims. The creation of financial disincentives to relocation, on the other hand, may

201. *Id.*; *see also In re* Jewell, 347 B.R. 120, 123 (Bankr. W.D. N.Y. 2006) (holding that debtors were entitled to the federal exemptions pursuant to the savings clause, notwithstanding that their current and former states were both opt-out states).

202. 11 U.S.C. § 522(b)(1); *see also id.* § 522(d) (listing available exemptions).

harm creditors. Thus, the arbitrary nature of the present rule is potentially harsh to creditor and debtor alike because it fails to consider whether the debtor has benefited from the relocation or whether the creditor has been harmed.[203] Bankruptcy abuse prevention in this context operates as though relocation is a zero-sum game in which it is unnecessary to identify the financial impact on the parties. Nothing could be further from the truth.

Debtors, creditors, trustees, and the courts should have a clear regime that points to the applicable law. The law should provide a system that is reliable and predictable enough to permit all parties to discern which property the debtor will retain for her fresh start and which property will remain subject to creditors' claims.

D. Gaming the System or Gamed by the System?

The present convoluted system is ineffective and unnecessary. Congress rightfully acknowledges that exemption gaming may occur in two principal ways.[204] The first way is the outright conversion of nonexempt assets to exempt assets prior to the filing. The debtor may accomplish this conversion by disposing of a nonexempt asset and reinvesting the proceeds in an exempt asset, or by using the proceeds to pay down secured obligations on exempt assets.[205] Historically, this form of protecting assets has been permissible under certain circumstances, and, to a point, courts have allowed it.

The rationale behind the case law is that the debtor may need to pay down a home mortgage or an auto loan as part of a plan to begin a fresh

---

203. Creditors may be hurt by the rule in several ways. For example, a creditor is less likely to receive payment when a debtor avoids moving to accept new employment that would enable her to pay her bills. Creditors are further damaged when a debtor files preemptively to protect her homestead exemption and the creditors' debts are discharged. Finally, creditors are damaged when a debtor's look-back state is determined by a brief but significant period in her domiciliary history that lets her claim an unlimited homestead exemption or other generous exemptions, even though the domiciliary period was merely ninety-one days during the past two to two-and-a-half years.

204. Not all exemption gaming involves the Code. One non-Code form of gaming that further reveals the failure of current law to close the mansion loophole is when a bad actor relocates to a state with favorable exemption laws and disputes or litigates claims until the passage of the applicable look-back periods. Nationally, the median time interval from case filing to disposition by trial of federal civil cases terminated during the twelve-month period ending March 31, 2010, was 23.3 months or nearly two years. *Federal Judicial Caseload Statistics: Caseload Statistics 2010*, U.S. COURTS, tbl. C-5, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf (last visited June 1, 2011). In state courts, the goal for disposition of civil cases through jury trial is 18–24 months. *Trial Court Performance Standards*, NAT'L CTR. FOR STATE COURTS, fig.1, http://www.ncsconline.org/d_research/TCPS/Standards/stan_2.1.htm (last modified Jan. 23, 2005).

205. *But cf.* 11 U.S.C. § 522(o) (disallowing such a transfer if it is fraudulently done).

start.[206] It is only when this conduct is in the extreme that courts and Congress have intervened—stripping the debtor of any advantage that would otherwise be derived from the conversion of nonexempt assets to the creditors' detriment within ten years of filing.[207] It is difficult to imagine someone planning to file bankruptcy ten years in advance; however, the provision protects against that contingency.[208]

The second form of gaming behavior does not involve a change in the form of the debtor's assets, but rather the relocation of the debtor to a new jurisdiction with more favorable exemption laws. The debtor's assets become exempt by virtue of the relocation without the necessity of conversion. Congress has attempted to stop this type of conduct through use of the look-back periods—denying the debtor access to the exemption laws of her current domiciliary state, but not always the forum state.

In contrast, all of the look-back provisions associated with relocation ascribe much shorter periods of risk. For instance, if the debtor has resided in the domiciliary state for at least two years, the debtor is eligible to claim the exemptions available under the laws of the current domiciliary state, regardless of how favorable the law may be to the debtor or how detrimental the law may be to creditors. If the debtor has resided in the current domiciliary state for at least three years and four months, § 522(p) imposes no dollar cap on the amount of homestead equity the debtor may claim as exempt.[209] For states that have

206. *See supra* note 142 (citing cases that indicate that a debtor may have a legitimate purpose for converting non-exempt asset into exempt assets).

207. 11 U.S.C. § 522(o) ("For purposes of § 522(b)(3)(A), and notwithstanding subsection (a), the value ['value'] meaning fair market value as of the date of the filing] of an interest in . . . [a homestead] shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.").

208. *Id.*

209. 11 U.S.C. § 522(p) ("[T]o exempt property under State or local law, a debtor may not exempt any amount of *interest* that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition . . . ." (emphasis added)). There has been some dispute over the language of § 522(p) as to whether an interest referred to a legal or economic interest and whether a homestead must be occupied during the entire 1215-day period to qualify as an interest. *See* Wallace v. Rogers (*In re* Rogers), 513 F.3d 212, 227 (5th Cir. 2008) ("The statutory text and legislative history indicate that the term "interest" refers to vested economic interests in the property that were acquired by the debtor within the 1215-day period preceding the filing of the petition."); *In re* Presto, 376 B.R. 554, 581 (Bankr. S.D. Tex. 2007) (finding that even if a court were to interpret "interest" as referring to legal, as opposed to monetary, interest; the title to a former marital residence changed following the parties' divorce). There has also been a dispute as to whether the increase in equity during the 1215-day period prior to filing of a homestead acquired more than 1215 days before the filing of the petition is an "interest" of the kind sufficient to trigger the cap imposed by BAPCPA on debtors' homestead exemptions.

unlimited homestead exemptions, this means the entire value of the debtor's home equity is shielded from creditors' claims. The state exemption laws may be found in the state's constitution, its statutes, or its case law. Because of federal preemption,[210] the Code's time limitations or look-back periods control, as do the dollar caps imposed on the homestead exemption.[211]

Given Congress' acknowledgement of the principal gaming techniques and its various objectives for prevention of these techniques, it is clear that Congress felt a multi-faceted approach was needed. While the legislative objective is noble, the unintended consequences of both the two-year look-back period under § 522(b)(3)(A) and the federal dollar cap under § 522(p) must be examined in light of over five years of experience under BAPCPA. A close review of the effect of these provisions reveals that each fails to serve its intended purpose, and each is ineffective in preventing abuse. In addition, each provision, whether viewed separately or taken together, denies the honest debtor her fresh start, fails to close the mansion loophole, and inadequately protects creditors.

The reason for this failure is that, unlike the Code's provision on conversion of assets under § 522(o), the look-back provisions in § 522(b)(3)(A) and § 522(p) do not consider whether the debtor's relocation has a net effect on the debtor's ability to increase the value of her claimed exemptions and thereby shelter additional assets from creditors' claims. The failure to address the fundamental question of

---

Compare In re Blair, 334 B.R. 374, 376–78 (Bankr. N.D. Tex. 2005) (stating that increased equity was not an "interest"), *and In re* Sainlar, 344 B.R. 669, 671–74 (Bankr. M.D. Fla. 2006) (noting that an "interest" was real property acquired and not increased equity), *with* Parks v. Anderson, 406 B.R. 79, 88–95 (Bankr. D. Kan. 2009) (holding increased equity is an "interest"). It has been well established that the homestead cap for those who, according to 11 U.S.C. § 522(p), "elect[ed]" to claim state law exemptions does not make the homestead cap applicable solely to debtors in states that have not opted out of federal bankruptcy exemptions, and who accordingly had a choice between state and federal exemptions. *See In re* Kane, 336 B.R. 477, 484–89 (Bankr. D. Nev. 2006) (explaining that despite its plain and unambiguous language, BAPCPA's homestead cap was not intended to apply only to debtors in states that have opted out of federal bankruptcy exemptions).

210. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

211. The Constitution's grant of authority to Congress to legislate bankruptcy law, coupled with the Supremacy Clause, allows Congress to preempt and thus override state law as Congress did in other provisions of BAPCPA, such as 11 U.S.C. § 522(b)(3)(B)–(C) and in the hanging paragraph following §522(b)(3)(C). *See* U.S. CONST. art. I, § 8, cl. 4; United States v. Kras, 409 U.S. 434, 446 (1973) (holding that a constitutional grant of power to Congress to legislate in this area does not create a constitutional right to obtain a discharge).

fairness to debtors and creditors alike serves to merely alter the strategy and methodology of the gaming itself, not to prevent its occurrence.

The six-month look-back period is by definition a moving target. Under prior law, the debtor influenced the applicable exemption eligibility law by relocating and waiting the requisite time to establish domicile and exemption eligibility in the new domiciliary jurisdiction.[212] This required that the debtor become a domiciliary ninety-one days prior to the filing of the petition. Under existing law, the debtor may also influence the applicable exemption law by relocating and waiting the requisite time to establish domicile in a former domiciliary jurisdiction preferred to be the look-back state. The debtor always has the ability to some degree to influence the applicable look-back state, whether by filing bankruptcy to interrupt and shorten the duration of a domiciliary period or by waiting in order to lengthen it.

Just as the debtor's relocation to a new state interrupts and stops the running of the debtor's current domiciliary period, the debtor's bankruptcy filing freezes the relative length of each domiciliary within the look-back period. Thus, by choosing the date of the filing of the bankruptcy, the debtor may control the relative length of the former domiciliary period. Each debtor's ability to manipulate the number, identity, and duration of domiciles within the look-back period will hinge on the debtor's particular circumstances.

When the debtor has had multiple domiciles within any six-month window of time during the two and a half years preceding the contemplation of filing, however, the debtor may be able to alter the identity of the look-back state. The debtor's motto becomes: "file, if it's worthwhile, or wait to create" (a more favorable look-back period). Simply put, not only has the debtor created domiciliary history, the debtor is presently creating domiciliary history.

In this manner, the debtor may alter the identity of the look-back state, and thus affect whether she is eligible or ineligible for exemptions based on the domiciliary requirements of the look-back state. While relocation to alter the look-back state is made more difficult according to the circumstances and migration patterns of the debtor, the haphazardness of the look-back period may increase the value of the debtor's exemptions at the creditors' expense. Likewise, the honest debtor may be subjected to the laws of the least favorable jurisdiction for reasons entirely beyond her control (e.g., a job transfer, medical necessity, or caregiving).[213]

---

212. 11 U.S.C. §522(b)(2)(A) (2000 & Supp. 2004) (amended 2006).

213. *See* Catherine Arnst, *Study Links Medical Costs and Personal Bankruptcy*, BUS. WK. (June 4, 2009), http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009064_

For the debtor who is anticipating relocation from a state with more favorable exemption laws, the look-back period may precipitate a bankruptcy filing that could otherwise be avoided. This is because bankruptcy may be the only way the debtor can prevent loss of her homestead exemption and thus, her home equity and her home. Further, if Debtor plans to move from Old State, and Old State has a homestead exemption that is, on its face, less favorable than the homestead exemption of New State, Debtor may still prefer to file bankruptcy in Old State prior to the move. This is because Debtor will be denied eligibility for her homestead exemption in New State for two years and because Debtor will be denied her homestead exemption in Old State for lack of residence once she moves. Assuming the less favorable homestead exemption of Old State is still better than the federal homestead exemption (as in the majority of jurisdictions), Debtor will prefer the certainty of the Old State homestead exemption to the risk of either losing her homestead exemption, or being compelled to "elect" the federal homestead exemption under the savings clause. The result is that Debtor will file preemptively in Old State before she moves.

This dilemma may cause Debtor to file preemptively because she knows her exemption will be lost or limited to the amount of the federal homestead exemption if she is forced to file during the two-year look-back period after moving to the new domiciliary state. This is because Debtor will not have met the requisite two-year look-back period, and thus she will not be eligible for the homestead exemption in the former domiciliary state at the time of filing because of the residency requirement for exemption eligibility.

If look-back periods alone are an effective tool to combat abuse, why must the periods vary so much in length? One explanation might be that it is usually more difficult for a debtor to relocate than to simply convert assets in attempting to gain financial advantage,[214] which may explain the disparities in the look-back periods themselves. However, it does not explain why the formula Congress selected to control the abuse of conversion of non-exempt assets to exempt assets under § 522(o) was abandoned as a tool in combating abuse through relocation to acquire exemption eligibility. There is a better approach.

E. A Plan to Protect the "O-Zone"

In contrast to the abuse prevention mechanisms of § 522(b)(3)(A), § 522(o) creates a zone of protection, or "o-zone," around creditors. This

---

666715.htm (stating that there is a correlation between medical costs and personal bankruptcy).

214. This assumes that in relative terms, the debtor's assets are liquid and can be disposed of, while relocation is burdensome or impossible.

provision is designed to prevent a debtor's conversion of non-exempt assets to exempt assets.[215] The provision permits the bankruptcy trustee and creditors to reduce the debtor's homestead exemption to the extent that the assets disposed of would not have been exempt at the time of filing had the debtor held those assets at filing.[216] This strategy deprives the debtor of any advantage from the conversion and makes an equivalent amount of home equity available to satisfy creditors' claims to compensate for the conversion.

Is there a way to protect the interests of creditors while at the same time providing fair treatment to the honest debtor, who moves to find or maintain employment, act as caregiver, seek medical treatment, or retire? For the debtor who relocates with no ulterior motive or intention to hinder, delay, or defraud creditors, there should be no arbitrary financial penalty based solely on relocation to a new state. By the same token, there should be no windfall to creditors merely because of the honest debtor's relocation. So how do we devise a formula for determining whether a particular debtor's relocation is bankruptcy abuse?

Congress agrees that it is possible to examine the debtor's history for the ten-year period preceding the filing and ascertain whether nonexempt assets have been converted to exempt assets with the intention to hinder, delay, or defraud creditors.[217] This same determination could be made regarding whether a debtor relocated to exempt assets with the intention to hinder, delay, or defraud creditors. A simple inquiry would reveal property held at the time of relocation that would not have been exempt in the immediate former domiciliary state (not necessarily the look-back state) and any intermediate former domiciliary states at the time of filing, had it been held by the debtor. As under the provision on conversion, this inquiry would be made concerning whether the relocation was with the intent to hinder, delay, or defraud creditors. This rule serves to address abuse no matter when the relocation takes place within the ten-year look-back period prior to filing.[218]

215. 11 U.S.C. § 522(o) (2006).

216. *Id.*

217. *Id.*

218. The Code provisions at 11 U.S.C. §§ 548(a)(1), 727(a)(2), and 522(l) each provide a means of addressing abuse, though none include a look-back period of ten years.

IV. A MODEST PROPOSAL FOR STATUTORY REFORM

A. The Realities of Relocation

High-profile cases in the media about CEOs and celebrities who abuse the bankruptcy system generated the political pressure to close the mansion loophole.[219] However, most relocation occurs for reasons other than avoiding creditors. The relocation to another state may be related to employment, family, or other reasons.[220] Legislative action is necessary to protect both innocent debtors and creditors.

Millions of people move to a new state each year, and of the top ten states for inflow migration, nine are in the top ten for outflow migration.[221] The common denominator is that these states are populous and attractive for employment and retirement.[222] Among those states are Texas and Florida, which both offer an unlimited homestead exemption to their residents but not to nonresidents.[223] This means that the unlimited homestead exemption of a relocating homeowner from these states could be put at risk if the debtor files bankruptcy within two years of the relocation. As discussed above, the amount of home equity that is lost may vary.[224] For a debtor whose home equity is in excess of $21,625, the loss in value of the debtor's homestead exemption would be the remaining balance of the debtor's home equity.

---

219. The BAPCPA reforms followed the corporate scandals of Enron and other large corporations, coupled with the bankruptcy filings of principal players, in which large amounts of money were sheltered from creditors' claims through the unlimited homestead exemptions available in Florida and Texas. For example, the $4.7 million home of former CEO Jeffrey Skilling and the $950,000 residence of ex-top accountant Richard Causey were among many forfeiture actions pending against defendants in Enron-related criminal cases. Kristen Hays, *Prosecutors Seeking Lavish Homes of Former Enron Executives*, ASSOCIATED PRESS, Feb. 28, 2004, *available at* http://jacksonville.com/tu-online/stories/022804/bus_14943456.shtml.

220. *More People Willing to Relocate for New Jobs; Many Moving to Texas*, DALL. BUS. J. (July 28, 2009), http://www.bizjournals.com/dallas/stories/2009/07/27/daily18.html. According to employment research firm Challenger, Gray & Christmas, rising unemployment rates coincide with relocation rates among workers who are willing to move across the United States for a new job. *Id.* In the second quarter of 2009, the firm's data showed that an astonishing 18.2% of job seekers secured employment by moving for their new position. *Id.* The Internet is making it easier for job seekers to find work out of the regions they reside in, and the overwhelming desire to get back to work appears to be outweighing the perceived risks of relocation. *Id.*

221. Pew Social Trends Staff, *Map: U.S. Migration Flows*, PEW RESEARCH CTR. (Dec. 17, 2008), http://pewsocialtrends.org/2008/12/17/u-s-migration-flows/ (listing the top ten inflow migration states as California, Texas, Georgia, Florida, Illinois, Arizona, North Carolina, Virginia, Pennsylvania, and New York with Ohio replacing Arizona on the list of the top ten outflow migration states).

222. *Id.*

223. BROWN ET AL., *supra* note 25, at app. C.

224. *See supra* Part II.A.2.

The migration statistics from these two states provide an idea of the number of people who may be asked to choose between a new job in another state that puts their homestead exemption at risk and an unwanted bankruptcy to guard the homestead exemption they have. In outflow migration, Florida ranks second and Texas ranks fourth.[225] In inflow migration, Florida ranks first, and Texas ranks second.[226] Between 2005 and 2007, hundreds of thousands of people migrated by and between these two states alone.[227] The total outflow migration for the two states during that period was over one million.[228] In other words, even on a state-to-state basis, large numbers of people may be affected.

B. Crafting an Amendment to the Code

Neither the two-month look-back period under § 522(b)(3)(A) nor the dollar cap under § 522(p) consider the debtor-creditor relationship to determine whether the debtor gains or the creditor suffers from the relocation.[229] The look-back period for eligibility rewards or punishes the debtor based on an arbitrary point in the debtor's domiciliary history and the debtor's domiciliary eligibility in the look-back state at the time of filing.[230] The homestead equity cap unfairly punishes a debtor solely for relocating to a new jurisdiction.

An amendment addressing the weaknesses of the look-back provision under current law at § 522(b)(3)(A) and the federal dollar cap at § 522(p) could be accomplished in a number of ways: (1) by adapting the language of § 522(o) to prevent the shielding of nonexempt assets to hinder, delay or defraud creditors through relocation, (2) by restoring the original § 522(b)(3)(A) look-back period language to coincide with the domiciliary requirement for venue as it existed for over twenty-five years, (3) by repealing the federal dollar cap on state homestead exemptions as inequitable, and (4) by repealing the savings clause as unnecessary.

1. A Formula for Fairness

The language in § 522(o) takes into account the value of any nonexempt property disposed of by the debtor and converted to exempt

225. PEW RESEARCH CTR., *supra* note 221.

226. *Id.*

227. *Id.*

228. *Id.*

229. Unlike other provisions of the Code, such as 11 U.S.C. § 522(o) (2006) and § 548, no proof of intent to hinder, delay, or defraud creditors is required in § 522(b)(3)(A) or § 522(p).

230. 11 U.S.C. §522(b)(3)(A), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(17), 124 Stat. 3557, 3559.

property and offsets the value against the debtor's homestead exemption.[231] This makes what would otherwise be the debtor's interest in exempt property claimed as a residence, homestead, or burial plot available to the trustee for distribution to creditors.[232] The formula for ascertaining the amount of any necessary reduction is simple and straightforward. The value of the debtor's interest that is protected under the homestead exemption is reduced to the extent that such value is attributable to any property that the debtor disposed of during the ten years prior to filing with the intent to hinder, delay, or defraud creditors, if the property disposed of would not have been exempt at the time of filing, had it been held by the debtor.

In other words, to the extent that the debtor has converted nonexempt assets to exempt assets within ten years of filing in order to avoid creditors, the value of the debtor's interest that is protected under the homestead exemption is reduced precisely and proportionately to restore an equivalent asset value to the debtor's estate for the benefit of creditors. For example, suppose a debtor with a large amount of nonexempt cash uses the cash to pay down the mortgage on a home protected by an unlimited homestead exemption. Further, suppose that the debtor files bankruptcy within ten years of the disposition of the cash. In that event, the total dollar amount of the funds disposed of by the debtor to reduce the mortgage debt would be deducted from her homestead exemption.

In the context of the proposed reform, the amended language would adopt the wording from § 522(o) to create a similar formula. For example, the amendment could provide that

> the value of the debtor's interest in exempt property will be reduced to the extent that such value is *attributable to* any portion of any property

---

231. 11 U.S.C. § 522(o).

232. While this phraseology is not used in § 522(o), the import of the provision generally is to have this effect. The phrase used in § 522(o) is

> value of an interest in . . . real or personal property used as a residence by the debtor or a dependent, a cooperative used as a residence by the debtor or a dependent, a burial plot for the debtor or a dependent, or a homestead claimed by the debtor or a dependent.

11 U.S.C. § 522(o). All of these interests qualify for the federal homestead exemption and some qualify for exemption under state law. The reality is that unless the debtor is able to claim one or more of these properties as exempt, the "value" of the debtor's interest would be subject to creditors' claims. If that were the case, it would not be possible to "reduce" the debtor's interest because the creditors' claims would consume the debtor's interest subject to the satisfaction of all claims or exhaustion of the value of the interest, whichever comes first. For that reason, the only practical value of the provision to creditors is to reduce the value of the debtor's interest in property of this type that is exempt. Only then can the value of the debtor's interest in the property be used so that creditors recoup the value lost in the original transfer of assets. To the extent any of the property interests listed may be exempted other than as homestead property, the result remains the same.

> owned by the debtor at the time of *relocation* that *would not have been exempt*, during the *three-year* period preceding the filing in the debtor's former domiciliary states, if relocation was done with the intent to hinder, delay or defraud creditors.

Softening the ten-year look-back period to a three-year look-back period is the only significant change. There are good reasons to provide for a ten-year look-back period in § 522(o). There are equally good reasons to limit the look-back period to three years with regard to an amendment encompassing relocation.

One reason to limit the look-back period is that it is more difficult to relocate than to convert nonexempt assets to exempt assets through a change in form. In other words, a debtor may effect a change in the form of assets over the course of ten years without the difficulty of relocating. For example, over a ten-year period a debtor might gradually begin the transfer of cash into a number of types of exempt property, from jewelry to retirement funds, without much fanfare or hardship.

In contrast, relocating is not easily accomplished and requires more planning and foresight when it involves a homeowner. It is more taxing on the debtor and the debtor's dependents. It is more visible, and thus, less concealable. A move is likely to be more costly than transfers of personal property. In short, as a means of acquiring and enhancing homestead exemption value, relocation is cumbersome and ineffective.

A second reason to limit the look-back period is that the evidentiary trail simply becomes too long. Statutes of limitation are common throughout the law. Except for murder, almost every cause of action has a statute that limits the timeframe within which an action must be brought. The underlying principle that supports the rationale for these statutes is that beyond a certain point in time, the parties will be unable to discover and produce the evidence relevant to the court's inquiry. That is no less true in this context. As a practical matter, the more distant the conduct, the more difficult it becomes to prove or disprove what occurred. As the look-back period extends back in time, it becomes increasingly likely that even an honest debtor may not be able to secure the evidence needed to rebut allegations regarding intent, motive, and circumstances. The ready availability of evidence to all interested parties is essential not only to the search for the truth but also to the public perception of the fairness of the judicial process.

Finally, a third reason is that the exemption laws of a particular state may change over time. The longer the look-back period, the more likely the applicable exemption law may vary between states and within a state. This means that the exempt nature or status of property could change over time, independent of any action by the debtor.

2. Moving Forward Without Looking Back

This statutory solution minimizes the need for look-back periods. It dispenses with the need for the savings clause because the debtor's eligibility or ineligibility for exemptions in the current domiciliary state will no longer necessarily determine the value of those exemptions. This is because even if the debtor is otherwise eligible for a particular homestead exemption, the value of that exemption will vary according to whether the debtor converted nonexempt assets to exempt assets. In other words, if assets are converted from nonexempt status to exempt status, whether through a change in the form of the assets or through relocation, the value of the homestead exemption is reduced accordingly. Thus, there is no net financial gain to the debtor, and no net financial loss to the creditors.

A key consideration should be whether the debtor sought to hinder, delay, or defraud creditors by relocating to acquire exemption eligibility. If the debtor did not profit from the move at creditors' expense, then a presumption should arise that the move was not to hinder, delay, or defraud them. Thus, the value of the homestead exemption will be controlled by an inquiry into the circumstances surrounding the relocation. The total value will be unaffected if the assets at the time of the relocation would have been exempt in the debtor's immediate former domiciliary state and intermediate former domiciliary states at the time of the filing. In other words, if every state the debtor has lived in for the past ten years has a homestead exemption sufficiently large to protect the debtor's home equity, the debtor should not lose her homestead exemption merely because she moves to another state.

Conversely, to the extent that a portion of the assets of the debtor would not have been exempt under the laws of the debtor's former domiciliary states at the time of filing, the value of the debtor's exemptions should be reduced if the relocation was made with the intent to hinder, delay, or defraud creditors. Thus, creditors are protected when relocation is tantamount to the conversion of nonexempt assets to exempt assets. When relocation alone serves neither to add nor subtract value regarding the debtor's exemptions, the wisdom and utility of identifying a random jurisdiction in the domiciliary history of the debtor has no value. Whether the exemption laws of the debtor's current domiciliary state or the look-back state add or subtract value to the debtor's interest only has relevance in the context of a particular debtor's eligibility to claim them.

Under these circumstances, the unscrupulous debtor will be prevented from gaining financial advantage through relocation to acquire exemption eligibility when the intent is to hinder, delay, or defraud creditors. At the same time, the honest debtor, moving for motives unrelated to avoiding creditors' claims and seeking employment to better pay her bills, will not unfairly lose her home equity because she neglected to consult bankruptcy counsel and file bankruptcy prior to moving.

While this proposal for statutory reform suggests change, it is not unfamiliar change. Restoration of the original domiciliary period for exemption eligibility to coincide with the venue requirement restores an appropriate and reasonable period that served the bankruptcy system well for over a quarter of a century.[233] Nor does this proposal change the existing—and necessary—inquiry to identify the current domiciliary state and former domiciliary states. It does bring fundamental fairness to the exemption process, however. The proposed amendment would look to the financial implications for the interested parties rather than the mere fact of relocation. It would consider whether the debtor's interstate relocation increased the value of exemptions and, if so, whether the relocation was intended to hinder, delay, or defraud creditors.

3. Eliminating the Dollar Cap that Contributes to Home Loss

The proposed statutory solution affects only the homestead exemption, leaving the dollar caps on all other categories of state and federal exemptions in place. The present dollar cap on homestead equity for a relocating debtor is problematic in a highly mobile society in which relocation may be essential to finding or continuing employment and in which median home prices vary so much by region. The job-hunting homeowner's dilemma comes into sharper focus when one considers that homestead equity remains a family's principal asset and primary protection against unexpected expenses or loss of income.[234]

Adapting the language of § 522(o) would result in an amended statute that makes more sense. A new provision should provide that the value of the debtor's interest in exempt homestead property will be reduced by the amount attributable to any portion of the debtor's property owned at the time of relocation to the debtor's current domicile that would not have been exempt prior to relocation during the three-year period preceding the date of filing, if the relocation was with the intent to hinder, delay, or defraud creditors.

233. 28 U.S.C. § 1408(1) (stating the requirements for venue in district courts). This would be tantamount to a return to prior law.

234. *E.g.*, Justin Lahart & Kelly Evans, *Trapped in the Middle*, WALL. ST. J., Apr. 19, 2008, at A1.

The unfairness and inequity of the federal dollar cap on the state homestead exemption is striking when it is understood that the unlimited state homestead exemption still exists in several states and can be utilized by any homeowner domiciled there for over three years and four months.[235] The true victim of the dollar cap in § 522(p) is the debtor relocating from that same state for a job. She is the debtor who, while once under the protection of that same unlimited homestead exemption, stands to lose it by taking the job out of state. She is the one who, having left her domicile, cannot turn back and recover it. She is the one who, though she works and domiciles in her new state for more than three years and qualifies for its unlimited homestead exemption, may not receive it. She may not receive it because as she struggles toward solvency, she faces the prospect of landing in bankruptcy in less than three years and four months. That magical time period, likely unknown to her, could mean the difference in her ability to keep her home. It may be the difference in her inability to save her home and the ability of her counterpart who relocates within the same state to keep hers.

This scenario should not occur merely because she moves from a state with an unlimited homestead exemption to a state with a limited homestead exemption. What did she do that was so egregious that her home equity should be placed at risk? In all probability, it is a risk she assumed without any knowledge or warning. Is the loss of her home equity the price she must pay for moving to another state and failing to become solvent prior to the passage of three years and four months? If so, this seems unnecessarily random and disproportionately punitive. It is difficult to imagine that anyone involved in the passage of the current law could have possibly intended such a result.

4. Rescuing Debtors from the Savings Clause

Repeal of the savings clause would eliminate the need to determine the effect of the domiciliary requirement on the debtor's eligibility to claim exemptions in the look-back state. If the savings clause were repealed, the inquiry would focus on whether the debtor's relocation increased the value of exempt property, and whether the debtor intended to hinder, delay, or defraud creditors by relocating.

As discussed above, courts cannot agree on the meaning of the savings clause. The differing interpretations of the operative passage "ineligible for any" have resulted in radically different outcomes.[236] In

235. *See supra* note 96 (noting that Texas, Kansas, Iowa, Florida, Arkansas, South Dakota, Oklahoma, Guam, and the District of Columbia have homestead exemptions).

236. *See supra* Part II.B.

some cases, the debtor has not received a full complement of either the federal exemptions or the state exemptions. In other words, the debtor was awarded only one exemption from the look-back state, and not a complete set of exemptions. Because no court of appeals has had the opportunity to clarify the law, debtors and counsel are left to speculate on what may happen when the savings clause is implicated. As a result, the savings clause as presently construed has sufficient ambiguity to create a chilling effect on its use and inhibit those who might otherwise seek and trust its protection.

A judicial resolution could solve the preemption issue and define the word "any" for purposes of the savings clause. However, courts cannot alter the fundamental inequity inherent in forcing relocating debtors to risk their homestead exemption and home equity in a choice between reemployment across state lines and preemptive bankruptcy. Ideally, the law should encourage migration to gain or maintain employment and discourage the need for preemptive filing to preserve home equity by taking away the arbitrary penalty for interstate relocation when there is no intent to hinder, delay, or defraud creditors. Only a statutory amendment can do that.

To be fair, there are other statutory options for reform. Current law could be reformed to provide for identification of the look-back state and to make the state exemptions of the look-back state available to the debtor through preemption, without regard to state domiciliary requirements. Essentially, this would be achieved by statutory amendment, the result espoused by Professor Bartell and adopted in the reasoning of *In re Camp*.[237] This reform would be simple and straightforward but, by itself, would not rectify these problems. The problem of tying the debtor's exemption eligibility to a random point in her domiciliary history would remain. There would still be the fundamental insensitivity to the financial impact of the debtor's relocation on the debtor, her dependents, her creditors, and our society. This avenue has the potential for clarity at the expense of fundamental fairness and justice. It would offer up the debtor's home equity in the interest of simplicity.

Another option would be to amend the law so that a debtor who is ineligible for the full complement of exemptions in the look-back state would be entitled to claim the federal exemptions. This idea could operate in much the same way the savings clause was intended to

237. 396 B.R. 194, 202–03 (Bankr. W.D. Tex. 2008), *rev'd*, 631 F.3d 757 (5th Cir. 2011) (holding that the Florida residency restriction was pre-empted by the choice of law provision in § 522(b)(3)(A), and that Florida exemption laws applied to the debtor and precluded the nonresident debtor from choosing exemptions under the savings clause).

function. A debtor who is ineligible for any portion of the state law exemptions of either the current domicile or the look-back state would be granted the federal exemptions rather than being denied any exemptions. The amendment would be implemented through federal preemption as in our first option; however, the preemption of state law would allow the debtor the federal exemptions rather than the exemptions of the look-back state.

This second alternative also offers clarity and simplicity. But, as with the first alternative, it fails to address the critical issues. As explained above, under either alternative, the job-seeking, relocating debtor could still put her homestead exemption at risk.[238] This is because she has acquired the homestead exemption in her current domicile. She is protected and remains protected unless and until she abandons her domicile. At that point, having abandoned her domicile, she is put at risk if she files bankruptcy because under either alternative she may not receive a homestead exemption equivalent to what she originally had.

Why would a debtor purposely abandon a homestead exemption in an amount sufficient to cover her equity, and thus put her home equity at risk? The likely answer is that she would only do so because she is struggling to avoid bankruptcy. Otherwise, she would utilize the protection of the homestead exemption in her current domicile prior to the move by filing bankruptcy first and then moving to accept the new job out of state.[239]

Thus, the only alternative that deals with the fundamental inequity of denying a relocating debtor access to the value of a homestead exemption previously acquired is one that considers her plight and looks at the circumstances. It is an alternative that offers her hope that she and her dependents may be protected. It offers a way out of her dilemma.

Equally important, creditors are more likely to receive fair treatment under this alternative. The idea that creditors are presumptively

---

238. *See supra* Part II.A.

239. Under the venue provisions, the debtor may be able to move to the new state to accept employment and later file a voluntary petition in her former domicile if she does so before the window of opportunity expires. However, her homestead property would be determined as of the date of filing. 11 U.S.C. § 541 (2006), *amended by* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(22), 124 Stat. 3557, 3560. Thus, if she files in the former domicile *after* moving, she risks losing the homestead exemption because, by definition, she will have moved from the former domicile. And, though she retains ownership, she will likely have abandoned her homestead because the domiciliary requirements of physical possession and domiciliary intent will be absent. *See* 2 BANKRUPTCY DESK GUIDE §§ 13:58, 13:60, 13:61 (2011) (explaining that typical homestead requirements under various state constitutions require debtors to both own an interest in the property and use it as a residence).

"hindered" merely because a debtor moves to a state with a generous homestead exemption is a red herring. That is both because creditors may benefit from the debtor's relocation and because the debtor may have had an equally generous homestead prior to the move. The only homestead exemption that matters to the debtor is the one for which she is eligible. Otherwise, the homestead cannot be utilized to protect her home equity. To prevent the acquisition of a more generous homestead exemption by some debtors and call it "reform," while disregarding the loss of homestead protection for struggling American homeowners, is unfair and unnecessary.

5. An Appeal for Mercy and Understanding

The urgency of statutory reform to job-seeking homeowners cannot be overstated. It is a risk that affects an enormous number of Americans—and the number is growing. The national unemployment rate for 2009 was 9.3%. The unemployment rate for 2010 increased to 9.6% and represents 14,825,000 unemployed people seeking work.[240] These statistics take on added significance when coupled with studies related to why people move. A job or business opportunity is the most popular reason why individuals move to a new community.[241] In simple terms, with nearly 15 million people out of work, it makes sense that most of those who are unemployed would not hesitate to move to accept a job in a new state. The insolvent debtor would likely see it as the right thing to do and the best course of action, even if it means separation from family and friends. Most Americans would consider the move a wise choice.

That is because accepting a new job to escape unemployment normally would be the key to preserving home ownership. That would be considered a wise choice because a home has always been part of the American dream, just as a job has always been part of the American work ethic. For many Americans, a home and a job have always gone hand-in-hand. Now, for the first time, the unemployed homeowner may be forced to accept a Hobson's choice: choosing between accepting employment that may put her home at risk and filing a bankruptcy she thought new employment would help her avoid.[242]

240. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES—EMPLOYMENT STATUS OF THE CIVILIAN NON-INSTITUTIONAL POPULATION, 1940 TO DATE (2009), *available at* ftp://ftp.bls.gov/pub/special.requests/lf/aat1.txt.

241. A Pew study shows that job and business opportunities are the primary reason for a move by a plurality of 44%. Cohn & Morin, *supra* note 8, at 2.

242. "Hobson's choice" is an apparently free choice when there is no real alternative or the necessity of choosing one of two equally objectionable choices. MERRIAM-WEBSTER DICTIONARY 372 (2011).

V. CONCLUSION

A statutory change is needed to provide clarity, promote fairness to all parties, and minimize the possibility of conflicting decisions. Implicit in Congress' decision to combat fraud are three basic assumptions: (1) there is a period of time beyond which it is improbable that a debtor will relocate to a new jurisdiction to hinder, delay, or defraud creditors; (2) there should be a limit on the value of exempt homestead property a relocating debtor may shield from creditors' claims through relocation; (3) the imposition of statutory controls based on the first two assumptions will prevent debtors from "gaming the system" to hinder, delay, or defraud creditors.

Present law fails to accomplish the goals of preventing abuse and protecting creditors. Instead, it exacerbates the problem through its arbitrary imposition of a look-back period, which disregards the financial impact on the parties. Fairness to all parties can be restored and gaming can be minimized through an amendment that: (1) restores the domiciliary period required for exemption eligibility to coincide with the provisions on venue;[243] (2) adopts a formula to prevent conversion of non-exempt assets to exempt assets by interstate relocation by examining the debtor's intent and the impact of the relocation on the relative financial positions of interested parties; (3) repeals the dollar cap on the state homestead exemption of a relocating debtor to prevent an unwarranted loss of her home equity based solely on the debtor's relocation to a new state; and (4) repeals the existing savings clause as unnecessary once clarity is restored to the process of exemption eligibility analysis.

The proposed amendment deals with relocation gaming in a straightforward and meaningful manner. Under the proposed reform, a bankruptcy trustee bears a burden of proof similar to when it is alleged that nonexempt property has been converted to exempt property through a change in the form of the asset. The trustee would need to prove that the debtor (1) increased the value of her exemption at the expense of creditors through relocation from a former domicile within three years of filing, and (2) intended by relocating to hinder, delay, or defraud creditors. Once this is proven, the court will be able to reduce the value of the exemptions precisely and proportionately. Together, these modest changes will eliminate much of the confusion that exists under present law and simplify the resolution of this issue for debtors, creditors, trustees, counsel, and the courts.

---

243. 28 U.S.C. § 1408(1).