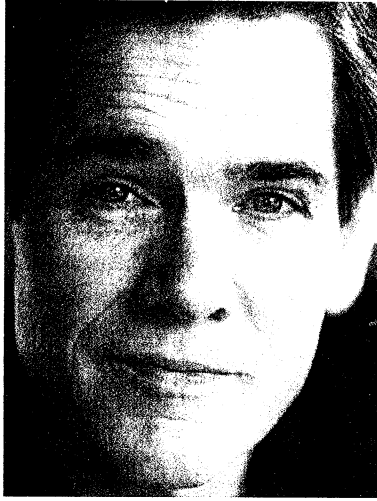


Bankruptcy

The Impact of BAPCPA—An Overview

By Lawrence A. Young and Heather Heath McIntyre



Lawrence A. Young is a partner in the firm of Hughes Watters Askanase in Houston, Texas and is Chair Ex-Officio of the Governing Committee of the Conference on Consumer Finance Law. He is a fellow of both the American College of Consumer Financial Services Lawyers and the American College of Commercial Finance Lawyers. Larry is the Texas State Editor for both *CarLaw* and *HouseLaw* and is on the Advisory Board of the *Consumer Financial Services Law Report*. He is also the Texas Chair for the American Collectors Association's Members' Attorney Program (MAP). He is the former Editor of the *Consumer Finance Law Quarterly Report* and has authored or co-authored over 100 articles and seminar papers, a book, two plays and a screenplay on a variety of legal subjects in the consumer finance, commercial finance and bankruptcy fields.

Larry served on the Committee established by the Texas Consumer Credit Commissioner to draft plain language consumer contracts. He currently serves on the Manufactured Housing Institute Finance Lawyers Committee, the American Bar Association (ABA) Business Law Section Task Force on Insolvency and the Federal Court Structure, and the ABA Business Law Section Planning Committee. Larry is a past Chairman of the ABA Consumer Bankruptcy Committee, the ABA Consumer Financial Services Debt Collection Practices and Bankruptcy Subcommittee and the ABA Commercial Financial Services Interest and Usury Subcommittee.

Larry attended the University of Michigan Law School and is a former Marine officer.



Heather Heath McIntyre is an associate with Hughes Watters Askanase. Her practice focuses mainly on reorganizations and workouts for corporations and individuals, representation of secured creditors in and out of bankruptcy, and representation of bankruptcy trustees. She graduated from the University of Houston Law Center in 2003 and obtained a bachelor's degree from the University of Texas at Austin.

I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or the 2005 amendments) constituted the most dramatic revision of the United States Bankruptcy Code (the Bankruptcy Code)¹ in twenty-seven

years.² Most of the 2005 amendments have been in effect since October 17, 2005. Cases under the revised Bankruptcy Code continue to wind their way through the courts. This article addresses selected developments under the 2005 amendments.

II. Homestead Exemptions

A. Increase of "Interest" in Homestead Due to Appreciation During 1215 Days Before Filing Does Not Trigger Section 522(p)

Section 522 of the Bankruptcy Code has long provided for the exemption of homestead interests from unsecured claims in bankruptcy. With the 2005 enactment of section 522(p), however, a debtor may no longer exempt a homestead interest acquired during the 1,215-day (approximately three and a half years) period before the bankruptcy petition date, if the aggregate value of the property exceeds \$125,000; however, this valuation limit does not include equity rolled over from a previous residence in the same state.³

Generally, courts appear to agree that the equity acquired normally by a debtor within the 1,215 days before bankruptcy does not trigger section 522(p). In *In re Blair*,⁴ the court determined that the debtors' increased equity in their homestead

1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256), Pub. L. No. 109-8 (April 20, 2005), amending the U.S. Code Title 11 (Bankruptcy Code), title 18 and Title 28. Section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

2. See, e.g., *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006) (noting that "the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), majde [sweeping changes to Title 11 of the United States Code]").

3. 11 U.S.C. § 522(p).

4. *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005).

acquired during the 1,215 days preceding the bankruptcy petition by way of their monthly mortgage payments did not trigger section 522(p). Thus, the debtor's equity in the house was exempt.

In *Blair*, the debtors purchased their home 1,773 days before filing bankruptcy, and scheduled equity in their homestead in the amount of \$688,606. The court stated that one does not "acquire" equity in a homestead. Rather, one acquires ownership of a home.⁵ The debtors acquired their "interest" in the home as of the actual purchase, before the 1,215 day period. Thus, the exemption cap did not apply.

B. When Exemption Planning is Fraud Reducing the Homestead Exemption

Section 522(o) provides that, to the extent that a portion of the debtor's interest in the homestead is attributable to fraud, the debtor's homestead exemption is reduced by that amount. Fraud occurs if the debtor disposes of non-exempt property and re-invests in an exempt homestead in the ten-year period before the petition filing date with the intent to hinder, delay, or defraud a creditor.⁶ According to one court:

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005 reflected a change in Congressional attitude toward exemption planning. As one court has noted: "Congress began to put the brakes on the freedom with which states could protect their state residents by providing generous homestead protection laws." *In re Maronde*, 332 B.R. 593, 598 (Bankr.D.Minn.). Specifically, BAPCPA added § 522(o). This subsection reduces the value of the debtor's exempt interest in a homestead to the extent attributable to any nonexempt property

that the debtor disposed of for the purpose of increasing the debtor's equity in the homestead. The look-back period for this subsection is ten years, and the objecting party has to show that the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud one or more creditors.⁷

Thus, to prevail under section 522(o), the movant must show that:

(1) the debtor disposed of property within 10 years preceding the bankruptcy filing; (2) the property that the debtor disposed of was nonexempt; (3) some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt associated with an existing homestead, or, alternatively, to buy a new principal residence used by dependents of the debtor, improve an existing principal residence used by dependents of the debtor, or reduce the debt associated with a principal residence used by dependents of the debtor; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud a creditor.⁸

In *Sissom*, the court found the first three elements easily met--shortly before bankruptcy, the debtor sold non-exempt stock and used some of the proceeds to buy a new house. In determining whether the debtor had the intent to hinder, delay or defraud a creditor, the court considered the traditional indicia of fraud, namely whether:

- the transfer or obligation was to an insider;

- the debtor retained possession or control of the property after the transfer;
- the transfer or obligation was concealed;
- before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;
- the transfer was of substantially all of the debtor's assets;
- the debtor absconded—*i.e.*, avoided service of process and/or concealed himself;
- the debtor removed or concealed assets;
- the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- the transfer occurred shortly before or shortly after a substantial debt was incurred;
- the transfer was done just prior to the filing of the debtor's bankruptcy petition;
- the debtor is unable to explain the disappearance of assets; and
- the debtor has engaged in a pattern of "sharp dealing" prior to bankruptcy.⁹

5. *Id.* at 376.

6. 11 U.S.C. § 522(o).

7. *In re Sissom*, 366 B.R. 677, 678 (Bankr. S.D. Tex. 2007) (footnote omitted).

8. *Id.* at 688.

9. *Id.* at 692-93 (citing Tex. Bus. & Com. Code Ann. § 24.005(b); see also *In re Maronde*, 332 B.R. 593 (Bankr. D. Minn. 2005); *In re Agnew*, 355 B.R. 276, 283 (Bankr.D.Kan.2006); and *In re Lacounte*, 342 B.R. 809, 813 (Bankr.D.Mont.2005).

