THE INEQUITABLE SITUATION: A LOOK AT THE BANKRUPTCY HOMESTEAD EXEMPTION AFTER FIVE YEARS OF JUDICIAL INTERPRETATION*

I. BANKRUPTCY AND THE BAPCPA

In 2005, Congress amended the Bankruptcy Code to prevent abuse by debtors and increase creditors' responsibilities.[1] Along with the new legislation came litigation based on ambiguities within the legislation. One of the greatest protections to debtors in bankruptcy is the homestead exemption. When Congress amended the Bankruptcy Code, it altered some of the provisions applying to the homestead exemption.[2] In the past, courts

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* The figures in the applicable statutes have changed since the writing of this comment. Nevertheless, the general principles remain the same.

1. *See generally* BAPCPA, Pub. L. No. 109-8, § 322, 119 Stat. 23 (2005) (codified as amended at 11 U.S.C.A. § 522 (West 2009)).

2. *See id.*

were split on how to interpret the part of the legislation that limits the value a debtor may protect in his homestead, but now courts uniformly interpret the legislation.[3] However, this interpretation fails to address current and future problems with the legislation.

This comment explains the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), demonstrates how courts currently interpret the new homestead exemption cap, and offers a solution to the problems created by the court's interpretations. Part I of this comment is a basic explanation of bankruptcy law, the BAPCPA, and includes a brief explanation of the bankruptcy exemptions along with the history and purpose of the BAPCPA. Part II explains and examines difficulties courts have interpreting the homestead exemption in the BAPCPA by introducing the two principal arguments the courts use to interpret the provision—"title" and "equity."[4] Part III walks through the relevant case law that demonstrates the strengths and weaknesses associated with each interpretation. Finally, Part IV of this comment proposes legislation that will solve the problems with interpreting the statute. Ultimately, this comment concludes that amending the statute is the best way to solve the problems encountered by courts and presented by scholars.

A. An Inequitable Situation

Consider two hypothetical debtors: Debtor A and Debtor B. Each debtor is in a state that does not limit the value of a debtor's homestead exemption and each has filed for bankruptcy. Debtor A purchased a house five years ago for $250,000. During the 1,215-day period before filing for bankruptcy, the house appreciated by $400,000. Debtor A claims the home, valued at $650,000, is property exempt from the bankruptcy estate, and creditors challenge the claim. Under current interpretation of the homestead exemption, most jurisdictions would limit the equity accumulated in the home to $136,875.[5] The debtor's homestead exemption would be limited to $386,875 ($250,000 + $136,875), rather than the $650,000 value of the home. Debtor A's home could be sold to satisfy his creditors.

Debtor B purchased a house five years ago for $400,000. His house also appreciated $400,000 during the 1,215 days prior to filing for bankruptcy. In addition, Debtor B remodeled his home, adding $200,000 of value to his home. However, Debtor B sold the house after the $400,000

3. *Compare In re* Blair, 334 B.R. 374 (Bankr. N.D. Tex. 2005) (holding that the homestead cap does not apply to equity acquired within the 1,215-day period), *and In re* Rogers, 354 B.R. 792 (Bankr. N.D. Tex. 2006) (holding that the homestead cap applies to equity acquired within the 1,215-day period), *with* Parks v. Anderson, 406 B.R. 79 (D. Kan. 2009) (holding that the homestead cap applies to equity acquired within the 1,215-day period), *and In re* Rasmussen, 349 B.R. 747 (M.D. Fla. 2006) (holding that the homestead cap applies to equity acquired within the 1,215-day period).

4. 11 U.S.C.A. § 522(p) (West 2009).

5. *Id.*

appreciation and rolled that equity over into another house in the same state. He purchased the new home for $1.5 million using $1 million in rolled over equity and financed the remaining $500,000. Debtor B claims the $1 million value of his home is exempt from the bankruptcy estate, and creditors challenge his claim. In most jurisdictions, the homestead would be protected from creditors. Debtor B would gain an advantage by selling his previous house and rolling the equity over into a new home.[6] His homestead exemption would be $1 million.[7]

The different outcomes presented above demonstrate the problems courts have when interpreting the bankruptcy homestead exemption statute. This comment will consider the above situation after some explanation of the current bankruptcy statutory and case law.

B. Bankruptcy Goals and Purposes

Bankruptcy law is an attempt to balance the desirability of a debtor to have a fresh start against a creditor's right to be paid.[8] Legislators have constantly tried to balance these two objectives throughout the history of modern bankruptcy law.[9]

C. The Homestead Exemption

A bankruptcy estate is created when a debtor files a petition for bankruptcy.[10] Essentially all of the property owned by the debtor at the time of filing the petition becomes property of the estate.[11] Depending on the debtor's situation, the property of the estate can play a major part in the bankruptcy proceedings.[12] The code also provides that some property may be exempt from the estate.[13] The code allows an individual to exempt his or her homestead from the property of the estate up to the value of $20,200.[14] The bankruptcy code also allows a debtor to elect state exemptions provided by state law, rather than the federal exemptions provided by the

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6. *See* 11 U.S.C.A. § 522(p)(2)(B).

7. The $500,000 that is financed is not included in the exemption because the debtor does not own this part of the value of the house.

8. U.S. Courts, BANKRUPTCY COURTS, (Sept. 22, 2010) http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/BankruptcyCourts.aspx.

9. *See In re* Morris, 12 B.R. 321, 333–34 (Bankr. Ill. 1981).

10. 11 U.S.C.A. § 541(a).

11. *See* 11 U.S.C.A. §§ 541, 1306.

12. *See* 11 U.S.C.A. § 704(a)(i). A chapter 7 debtor's estate will be liquidated. *Id.* The money from the property will then be distributed to the creditors according to each creditor's priority. *Id.* §§ 725–26.

13. 11 U.S.C.A. §§ 522 (b)(1)–(3), (d).

14. 11 U.S.C.A. § 522(d)(1). A homestead is usually defined as the debtor's primary residence. *See id.*; *see also* TEX. PROP. CODE ANN. § 41.002 (Vernon 2009).

bankruptcy code.[15] An individual can plan his or her bankruptcy by choosing the exemptions that allow the greatest advantage.[16] Several states allow debtors to claim exemptions far beyond the value of the federal exemptions.[17] Some states even allow homestead exemptions with unlimited dollar amounts.[18] Each state has the choice to opt-out of allowing its residents to use the federal exemptions.[19] A state that opts-out of the federal exemptions limits its residents to the law of the state.[20]

State exemptions may be very useful for debtors living in states with generous homestead exemption laws.[21] Consider a debtor living in Texas, which has an unlimited homestead exemption.[22] This debtor may elect the state exemptions when filing for bankruptcy and exempt all the value of his home from the property of the estate, even though the home and land are worth several million dollars.[23] A homestead exemption provides an opportunity for the debtor to ensure the homestead will not be included in the liquidation and distribution of the debtor's estate during bankruptcy proceedings; thus, limiting the money available to the debtor's creditors.[24] This avoidance situation is just one of the reasons Congress enacted the BAPCPA.[25]

D. BAPCPA

Congress enacted BAPCPA in 2005.[26] The purpose of the BAPCPA is to "improve bankruptcy law and practice by restoring personal

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15. 11 U.S.C.A. § 522(b)(1)–(3). The debtor may not mix state and federal exemptions. *Id.* § 522(b)(1).

16. *See* 11 U.S.C.A. § 522(b)(3)(A). This statute allows a debtor to choose between state or federal exemptions with no penalty. *Id.*

17. *See, e.g.*, ALASKA STAT. § 09.38.010 (2009) ($54,000); ARIZ. REV. STAT. ANN. § 33-1101 (2009) ($100,000); COLO. REV. STAT. § 38-41-201 (2009) ($45,000). *See infra* Table – 1.

18. *See* D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2009); FLA. STAT. ANN. § 222.01 (West 2009); IOWA CODE ANN. § 561.16 (West 2009); KAN. STAT. ANN. § 60-2301 (2009); OKLA. STAT. ANN. tit. 31, § 2 (West 2009); S.D. CODIFIED LAWS § 43-45-3 (2009); TEX. CONST. art. 16, § 50; TEX. PROP. CODE ANN. § 41.001 (Vernon 2009). *See infra* Table – 1.

19. 11 U.S.C.A. § 522(b)(2). "Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize." *Id.*

20. 11 U.S.C.A. § 522(b)(1).

21. 151 CONG. REC. S2416 (2005).

22. TEX. CONST. art. 16, § 50; TEX. PROP. CODE ANN. § 41.001 (Vernon 2009). Although there is no limit on the value of the homestead, Texas limits the homestead by area according to the location of the property. *Id.* § 41.002.

23. *See* 11 U.S.C.A. § 522.

24. *See* 11 U.S.C.A. § 704(a)(1) and accompanying text *supra* note 12.

25. *See* discussion *infra* Part I.E—Legislative Intent.

26. BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended at 11 U.S.C.A. § 522 (West 2009)).

responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[27]

The BAPCPA includes provisions beneficial to both creditors and debtors.[28] In favor of creditors, Congress intended the BAPCPA to increase a debtor's personal financial accountability, reduce the abundance of serial filings, and reduce general abuse of the system by debtors.[29] One of the major changes brought about by the BAPCPA is the "means test."[30] The means test is a mathematical test the court may use to create a presumption that a debtor is abusing the bankruptcy system, and to ensure the debtor is paying the creditor as much as the debtor can afford.[31]

The BAPCPA also includes provisions in favor of the debtor, such as requiring creditors to be reasonable during negotiations with the debtor, and providing the debtor with more information about the debtor's obligations.[32] The BAPCPA also requires an individual debtor to receive credit counseling before filing for bankruptcy, which will hopefully prevent future bankruptcies.[33]

E. Legislative Intent

During the 2005 Senate debates about the BAPCPA amendments, Senator Carper of Delaware argued the reason for the legislation:

> There is a principle, whether you are for this bill or not, that I think we can all agree on. That principle is simply this: If a person or a family has the ability to repay a portion or all of their debts, if they have that financial wherewithal, they should repay a portion or all of their debts. If a family doesn't have that wherewithal to pay or begin repaying their debt, they should be accorded protection of the bankruptcy court. That is it; it is that simple.
>
> The legislation we have before us is an effort to try to codify that principle, and to improve on the system today where too many people, frankly, have abused that system.[34]

One of the examples of abuse that Senator Carper addressed was the millionaire's mansion loophole:

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27. H.R. REP. NO. 109-31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.
28. *See id.*
29. *Id.*
30. SHEILA WILLIAMS, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: LAW AND EXPLANATION 3 (Annete M. Wilk ed., Aspen Publishers 2005).
31. *See* 11 U.S.C.A. § 707(b)(2) (West 2009); *see also* WILLIAMS, *supra* note 30, at 3.
32. H.R. REP. NO. 109–31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.
33. *See* 11 U.S.C.A. § 109(h) (West 2009).
34. 151 CONG. REC. S2415 (2005).

> Today, under current law, a wealthy individual in a State such as Florida or Texas can go out, if they are a millionaire, and take those millions of dollars and invest that money in real estate, a huge house, property, and land in the State, file for bankruptcy, and basically protect all of their assets [sic] which they own because of a provision in Florida and Texas law.[35]

Senator Carper went on to argue that the BAPCPA would eliminate that loophole: "With the legislation we have before us, someone has to figure out that 2 1/2 years ahead of time people are going to want to file for bankruptcy and be smart enough to put the money into a home . . . ."[36] Courts often quote these passages from the *Congressional Record* and passages from the House Judiciary Committee Report to support their conclusions.[37] However, courts use legislative intent to arrive at differing conclusions.[38]

II. EXPLANATION AND INTERPRETATION OF SECTION 522(P)

One effective change implemented by the BAPCPA to combat the millionaire's mansion loophole is section 522(p)(1).[39] A debtor who, rather than electing federal exemptions, elects to use state exemptions "under subsection (b)(3)(A)," becomes subject to section 522(p) when making that election.[40] Section 522(p) limits the amount of interest acquired in a residence that a debtor may exempt from property of the estate.[41] Currently, the limit is $136,875 for the 1,215 days prior to filing for bankruptcy.[42] This means that a debtor who acquires any interest in a residence within 1,215 days prior to filing for bankruptcy may claim it as

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35. *Id.* S2415–16 (2005).

36. 151 CONG. REC. S2416 (2005).

37. *See, e.g., In re* Blair, 334 B.R. 374, 377–78 (Bankr. N.D. Tex. 2005).

38. *Compare Blair*, 334 B.R. at 378 ("The court determines that the increase in the value of the equity in the debtors' homestead, which was acquired over 1215 days prior to the Petition Date [sic], is not subject to the $125,000 cap in section 522(p)."), *with* Parks v. Anderson, 406 B.R. 79, 95 (Bankr. D. Kan. 2007) ("[T]his court finds that the term 'interest,' as used within § 522(p), refers to equity acquired by a debtor within the 1,215-day period prior to filing bankruptcy.").

39. *See* discussion *supra* Part I.E—Legislative Intent. "Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to 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 that exceeds in the aggregate $136,875* in value in . . . (D) a real or personal property that the debtor or a dependent of the debtor claims as a homestead." 11 U.S.C.A. § 522(p)(1)(d) (West 2009).

40. 11 U.S.C.A. § 522(p)(1)(A).

41. *Id.*

42. 11 U.S.C.A. § 522(p)(1). Current as of Dec. 2009. The limit is adjusted for inflation. 11 U.S.C.A. Table—Adjustment of Dollar Amounts. Congress adjusted the limit from $ 125,000 to $136,875 effective on April. 1, 2007. *Id.* Some of the cases discussed throughout the comment will use the former amount.

exempt property up to $136,875.[43] Anything beyond that monetary limit that is acquired within 1,215 days prior to filing for bankruptcy becomes property of the estate.[44] When applying this statute, courts often refer to the application as a "cap" on the homestead limit.[45]

Parties have heavily litigated how to interpret the terms of the section 522(p)(1).[46] The text of the statute provides:

> [A] debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of filing of the petition that exceeds in the aggregate $136,875* in value in— . . . (D) real or personal property that the debtor or a dependent of the debtor claims as a homestead.[47]

The phrases "amount of interest" and "acquired" create the most disagreement.[48] Basically, two schools of thought dominate the debate within the courts on this subject—the "title" argument and the "equity" argument.[49] Under the title argument, courts have held that "interest that was acquired" means the debtor must have acquired title to the property within 1,215 days prior to filing for bankruptcy for the cap to apply.[50] However, equity proponents claim that "amount" requires the interest to be quantifiable.[51] Therefore, the statute is not limited to acquisition of title, but also must reach any equity acquired in the property within the 1,215-day period prior to filing for bankruptcy.[52]

Imagine a debtor who secures financing to purchase a home 1,216 days before filing for bankruptcy. Under the title approach, the debtor is exempt from the cap because the debtor acquired title to the property—"interest that was acquired"—before the 1,215-day period.[53] If the debtor subsequently acquired equity in the home by making payments, the equity is also exempt from the cap.[54] Under the equity approach, the debtor is subject to the cap because the debtor acquired equity—"any amount of interest"—in the home by making regular payments.[55] Any equity acquired beyond the $136,875 cap becomes property of the estate distributable to

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43. 11 U.S.C.A. § 522(p).

44. 11 U.S.C.A. § 541(a)(1). Remember, in a Chapter 7 bankruptcy, property of the estate is liquidated and the proceeds are distributed among creditors.

45. *See, e.g.*, *In re* Blair, 334 B.R. 374, 378 (Bankr. N.D. Tex. 2005).

46. *See* discussion *infra* Part III.

47. 11 U.S.C.A. § 522(p)(1)(D).

48. *See* discussion *infra* Part III.

49. *See In re* Rogers, 513 F.3d 212, 222 (5th Cir. 2008).

50. *See Blair*, 334 B.R. at 377.

51. *See In re* Rogers, 354 B.R. 792, 797–98 (Bankr. N.D. Tex. 2006), aff'd by *In re* Rogers, 513 F.3d 212 (5th Cir. 2008).

52. *Id.*

53. *See Blair*, 334 B.R. at 377.

54. *See id.*

55. *See Rogers*, 354 B.R. at 797–98.

creditors regardless of whether the debtor acquired title before the 1,215-day period.

Proponents of each argument use the provision following section 522(p)(1) to support their respective interpretations.[56] Basically, section 522(p)(2)(B) allows a debtor to roll over the equity from an old home into a new home that he purchased within the 1,215-day period prior to filing for bankruptcy.[57] The provision allows a debtor to sell his home and purchase a new one—"acquire an interest"—in the same state without becoming subject to the homestead cap when he files for bankruptcy.[58] Title argument proponents view the provision as a whole to show that Congress intended to allow a debtor to acquire equity in a homestead because section 522(p)(2)(B) allows a debtor to roll over equity from a previous residence to the current residence without being subject to the cap.[59] Proponents of the equity argument claim that interest has the same meaning in both statutes and allowing an equity interest to be rolled over in section 522(p)(2)(B) requires the meaning of interest in section 522(p)(1) to include equity.[60] Section 522(p)(2)(B) provides:

> For purposes of paragraph (1), any amount of *such interest* does not include any interest transferred from a debtor's previous principal residence (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.[61]

(emphasis added). Equity proponents claim this statute indicates that the amount of "such interest" mentioned in section 522(p)(2)(B) has the same meaning as interest mentioned in section 522(p)(1).[62] Because equity is within the meaning of interest in section 522(p)(2)(B) and Congress would not assign two different meanings to the same word within a single section, interest in section 522(p)(1) must include equity within its meaning.[63] Therefore, equity acquired by a debtor during the 1,215-day period is subject to the cap.

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56. *See Blair*, 224 B.R. at 377; *see also Rogers*, 354 B.R. at 797.

57. 11 U.S.C.A. § 522(p)(2)(B) (West 2009).

58. Part of the millionaire's mansion loophole allowed debtors to take advantage of state exemptions by dumping their wealth into a homestead and filing for bankruptcy shortly thereafter. 151 CONG. REC. S2415–16 (daily ed. March 10, 2005) (statement of Senator Carper). Such a clear abuse is justifiably preventable. *Id.* However, Congress did not wish to punish a debtor who innocently sold his old house and bought a new house. *Id.*

59. *See Blair*, 224 B.R. at 377.

60. *See Rogers*, 354 B.R. at 797.

61. 11 U.S.C.A. § 522(p)(2)(B).

62. *See Rogers*, 354 B.R. at 797.

63. *Id.*

To illustrate, consider the hypothetical situations presented in Part I.[64] Under the title approach, both Debtor A and Debtor B would be treated the same. Debtor A acquired title to his home prior to the 1,215-day period and "amount of interest" as used in section 522(p)(1) does not include equity. Therefore, Debtor A could claim 100% of the value that he owns in his home exempt from the estate. Debtor B used section 522(p)(2)(B) to roll over equity from his previous home into his current home and could also claim 100% of the value that he owns in his home exempt from the estate.

Under the equity approach, Debtor A and Debtor B would be treated differently. The equity approach limits Debtor A's homestead exemption to $386,875 because his $400,000 appreciation is equity acquired during the 1,215-day period and is therefore subject to the cap. Debtor A's exemption is $386,875, or about 60% of the value he owns in his home.[65] On the other hand, the equity approach would not limit Debtor B's homestead exemption. The $1 million value that he owns in his home would roll over from his previous home into his new home. Debtor B would receive a $1 million homestead exemption, or 100% of the value he owns in his home.

Proponents of both arguments also use their respective interpretations of "acquire" to support their position.[66] Title proponents claim that equity is not an interest that may be acquired; rather, title is the only interest that may be acquired in a home.[67] Therefore, "interest that was acquired . . . during the 1215-day period" preceding filing for bankruptcy can only refer to title.[68] Equity proponents combine the definition of "amount" with the

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64. **Debtor A** purchased a house five years ago for $250,000. During the 1,215-day period preceding filing for bankruptcy the house appreciated by $400,000. Debtor A claims the home, valued at $650,000, is property exempt from the bankruptcy estate and creditors challenge the claim. Under current interpretation of the homestead exemption, in most jurisdictions, the debtor's homestead exemption would limit the equity accumulated in the home to $136,875. The debtor's homestead exemption would be limited to $386,875 rather than the $650,000 value of the home.

Debtor B purchased a house five years ago for $400,000. His house also appreciated $400,000 during the 1,215 days prior to filing for bankruptcy. In addition, Debtor B remodeled his home, adding $200,000 of value to his home. However, Debtor B sold the house after the $400,000 appreciation and rolled that equity over into another house in the same state. He purchased the new home for $1.5 million using $1 million in rolled over equity and financed the remaining $500,000. Debtor B claims the $1 million value of his home is exempt from the bankruptcy estate, and creditors challenge his claim. In most jurisdictions, the homestead would be protected from creditors. Debtor B would gain an advantage by selling his previous house and rolling the equity over into a new home.[64] His homestead exemption would be $1 million.

65. $400,000 (equity) – $136,875 (cap) = $263,125 (property of the estate). $250,000 (purchase price before 1,215-day period) + $136,875 (cap) = $386,875 (homestead exemption). $386,875/$650,000 = 0.595.

66. *See In re* Blair, 334 B.R. 374, 376 (Bankr. N.D. Tex. 2005); *In re* Greene, 583 F.3d 614, 623 (9th Cir. 2009); 11 U.S.C.A. § 522(p)(1)(A) ("[A] debtor may not exempt any *amount* of interest that was *acquired* by the debtor during the 1215-day period preceding the date of filing of the petition that exceeds in the aggregate $136,875* in value in—. . . (D) real or personal property that the debtor or a dependent of the debtor claims as a homestead") (emphasis added).

67. *See Blair*, 334 B.R. at 376.

68. *See id.*; *see also* 11 U.S.C.A. § 522(p)(1).

definition of acquire to show that "any amount of interest that was acquired" forces the interest to be quantifiable.[69] An individual may not acquire a quantity of title, but he may acquire a quantity of equity.[70] Therefore, the amount of interest referred to in section 522(p)(1) cannot refer to title, but must refer to equity.[71]

III. CASE HISTORY OF SECTION 522(P)

A. Opt-Out

Each state has the ability to allow its residents to choose between using the federal exemptions in the bankruptcy code or using state exemptions.[72] Each state also has the ability to prohibit its residents from using the federal exemptions.[73] Section 522(b) allows a debtor to "exempt from property of the estate the property listed in either paragraph (2) [federal exemptions] or, in the alternative, paragraph (3) [state exemptions] of this subsection."[74] A debtor my elect to use federal exemptions "unless the State [sic] law that is applicable to the debtor . . . specifically does not so authorize."[75] States that do not allow their residents to elect federal exemptions are referred to as "opt-out" states.[76] States that allow their residents to choose between federal and state exemptions are referred to as "non opt-out" states.[77]

B. In re McNabb*: A State's Right to Opt-Out of Federal Exemptions*

The Bankruptcy Court for the District of Arizona was one of the first bankruptcy courts to interpret the BAPCPA.[78] In the case of *In re* McNabb, the court pronounced the legislative history for section 522(p)(1) "virtually useless as an aid to understanding the language and intent of BAPCPA."[79] A quick look at the legislative history will confirm that the Report of the House Committee includes the statutory language, but provides little guidance in direct reference to BAPCPA section 322, which corresponds with 11 U.S.C. § 522.[80] The court determined that the section 522(p)

69. *See In re* Greene, 583 F.3d at 622–23.
70. *See id.*
71. *See In re* Rogers, 354 B.R. 792, 796–98 (Bankr. N.D. Tex. 2006).
72. *In re* McNabb, 326 B.R. 785, 788 (Bankr. D. Ariz. 2005).
73. *See id.* at 788–89.
74. 11 U.S.C.A. § 522(b)(1) (West 2009).
75. *Id.* § 522(b)(2).
76. *See McNabb*, 326 B.R. at 788.
77. *See id.*
78. *Id.* at 789. This case was decided on June 23, 2005, merely two months after the BAPCPA went into effect on April 17, 2005. *Id.* at 788 n.7.
79. *Id.* at 789.
80. 151 CONG. REC. S2415 (2005). Section 322 is the section in the BAPCPA that corresponds with changes to 11 U.S.C.A. § 522. *See* BAPCPA, Pub L. No. 109–8, 119 Stat. 23 (2005) (codified as

homestead cap applies only to states that have not opted out of the federal exemptions.[81] The homestead cap in section 522(p) applies "as a result of electing under subsection (b)(3)(A) to exempt property under State [sic] or local law."[82] The court reasoned that Arizona, by opting out of federal exemptions, precluded the debtor from *electing* state exemptions because state exemptions were the only exemptions available to the debtor; accordingly, the homestead cap does not apply.[83] The residents of an opt-out state are *forced* to use state exemptions rather than *electing* to use them.[84] Therefore, in an opt-out state, the homestead exemption will not apply because it only applies "as a result of *electing* . . . to exempt property under state or local law."[85] Generally, courts have rejected the rationale behind the *McNabb* view.[86]

C. In re Kaplan*: A Broader View of Section 522 and Opt-Out*

A short time later, the Bankruptcy Court of the Southern District of Florida directly opposed the *McNabb* court.[87] In *In re* Kaplan, the court held that section 522(p) applies to all states regardless of whether the state has opted out of the federal exemptions.[88] The *Kaplan* court reasoned that Congress did not prefer an emphasis on "electing" but rather on "522(b)(3)(A)," which refers to state exemptions that are subject to subsection (p)—the new limitation.[89] Congress intended that the homestead cap would apply to debtors "as a result of electing under *(b)(3)(A)*" rather than only to debtors who have the ability of "*electing* under (b)(3)(A)."[90] The *Kaplan* court even found support for its interpretation in the legislative history.[91] Representative Sensenbrenner stated that the new homestead exemptions closed the millionaire's mansion loophole that permits debtors to protect their homestead.[92] Representative Sensenbrenner's statement clarifies that the homestead exemption was meant to close the millionaire's mansion loophole by applying to all states that allow an exemption in

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amended at 11 U.S.C.A. § 522). However, many courts have found the legislative intent very helpful. *See, e.g.*, *In re* Rasmussen, 349 B.R. 747, 758 (Bankr. M.D. Fla. 2006).

81. *McNabb*, 326 B.R. at 788.
82. 11 U.S.C.A. § 522(p)(1) (West 2009).
83. *McNabb*, 326 B.R. at 788, 791.
84. *Id.* at 788.
85. *Id.* (emphasis added); 11 U.S.C.A. § 522(p)(1).
86. *See generally In re* Rasmussen, 349 B.R. 747, 752 (Bankr. M.D. Fla. 2006).
87. *See In re* Kaplan, 331 B.R. 483, 486–87 (Bankr. S.D. Fla. 2005). *Kaplan* was decided on Oct. 6, 2005. *Id.* at 483.
88. *Id.* at 487.
89. *Id.*
90. *Id.* at 486 (emphasis added) (*quoting* 11 U.S.C.A. § 522(p)(1)).
91. *Id.* at 487–88 n.1.
92. 151 CONG. REC. H1993–01, 2048 (2005).

excess of the $125,000 cap rather than only applying to the states that allow residents to elect federal or state exemptions.[93]

D. In re Blair*: The First Title Argument*

Fewer than two months after *Kaplan*, the Northern District of Texas decided *In re* Blair.[94] The creditor in this case argued that the language in section 522(p)(1), "any amount of interest," included equity acquired in the residence within the 1,215-day period.[95] The *Blair* court held that the language "any amount of interest that was acquired" contained in section 522(p) does not limit the equity in the debtor's homestead even when the debtor acquired such equity during the 1,215 days preceding filing for bankruptcy.[96] The court relies heavily on its own statement that "one does not actually 'acquire' equity in a home. One acquires title to a home."[97] The court then reasoned that because equity is not acquired in a home and the debtors acquired title before 1,215 days preceding filing for bankruptcy, the equity in the home is not subject to the $125,000 cap.[98]

The court attempted to support its position by using text from section 522(p)(2)(B), claiming that the companion provision's language referring to "such interest" in section 522(p)(1) has identical meaning.[99] Section 522(p)(1) provides that a debtor "may not exempt any amount of interest that was acquired by the debtor," while section 522(p)(2)(B) provides that "any amount of such interest does not include any interest transferred from a debtor's previous principal residence."[100] Section 522(p)(2)(B) allows a debtor to transfer any amount of such interest from a previous principal residence (acquired before the 1,215-day period) to another residence without being subject to the section 522(p)(1) cap if the second residence is in the same state as the first.[101] The *Blair* court reasoned that the debtor would not be subject to the cap if the debtor had sold his home and reinvested the proceeds in another home during the 1,215-day period.[102] The court sought to treat debtors who changed their principal residence the same as those who did not change their principal residence.[103] Thus, a debtor who sold his principal residence could roll over his acquired equity into a new home, and a debtor who did not roll his equity over to a new

93. *See Kaplan*, 331 B.R. at 487.
94. *In re* Blair, 334 B.R. 374, 374 (Bankr. N.D. Tex. 2005).
95. *Id.* at 376.
96. *Id.*
97. *Id.*
98. *Id.* at 376–78; *see* 11 U.S.C.A. § 522(p)(1) (West 2009).
99. *Blair*, 334 B.R. at 377.
100. 11 U.S.C.A. § 522(p)(1), (2)(B).
101. *Id.* § 522(p)(2)(B).
102. *Blair*, 334 B.R. at 377.
103. *Id.*

home could also retain his acquired equity. Ultimately, the court concluded that the law should not penalize a debtor for not rolling over equity into a new home.[104]

The *Blair* court's method of reaching its conclusion actually tends to weaken its own argument. The court argued that because the homestead cap does not apply to any amount of "such interest" transferred from a debtor's previous principal residence, the legislature allows a transfer of equity.[105] Under this interpretation it seems that the legislature intended two different meanings for "interest" within the same section.[106] The first meaning would apply in section 522(p)(1) where interest is limited to only meaning "title."[107] A second meaning would apply in section 522(p)(2)(B) where "interest" is limited by only meaning "equity."[108]

E. In re Anderson*: Building on Blair*

In *In re Anderson*, the court built on *Blair* and added more support to the title argument.[109] The court claimed that because the purpose of section 522(p)(1) is to close the millionaire's mansion loophole, the statute should be interpreted to favor the title argument.[110] Disallowing a debtor from exempting more than $125,000 rolled over to a new homestead in a new state would effectively prevent an ill-intended debtor from sheltering millions by purchasing a homestead in a new state.[111] Using the legislative history to its advantage, the court declared:

> [It] understands that many debtors prepay principal on their mortgages, some on a regular basis. This Court cannot conclude that prepayment of a mortgage debt, especially routine prepayment, is the moral equivalent of a maverick capitalist fleeing with his ill-got gains to establish a mansion homestead in Florida, Texas [sic] or Kansas.[112]

The court used the provision that immediately precedes section 522(p) to buttress its argument.[113] Section 522(o) is an anti-abuse provision that provides a ten-year look-back period to determine whether the debtor disposed of property "with the intent to hinder, delay, or defraud a

104. *Id.*
105. *Id.*
106. *See In re* Rogers, 354 B.R. 792, 797 (Bankr. N.D. Tex. 2006).
107. *See* 11 U.S.C.A. § 522(p)(1).
108. *Id.* § 522(p)(2)(B).
109. *See In re* Anderson, 374 B.R. 848, 858–60 (Bankr. D. Kan. 2007).
110. *See id.* at 858.
111. *Id.* at 859 (quoting MARK I. BANE ET AL., COLLIER ON BANKRUPTCY 522-102.5 (Alan N. Resnick & Henry J Sommer eds., LexisNexis 2009) (1970)).
112. *Id.* at 858.
113. *Id.*

creditor."[114] The statute prevents a debtor from converting non-exempt property to exempt property by disallowing an exemption to the extent of the value of the conversion.[115] Thus, a debtor who intended to defraud his creditors by paying down his mortgage by $100,000 could lose the homestead exemption for that $100,000.[116] The court reasoned that because section 522(o) does not prevent a debtor from building equity in his homestead by making regular mortgage payments, neither should section 522(p).[117] Furthermore, if section 522(p) prevented a debtor from building equity by making regular payments, then the language in section 522(o) applying to such a situation would be superfluous because both provisions would catch the accumulation of equity in the debtor's homestead.[118] Finally, the court concluded that by including section 522(o), Congress indicated that it intended to treat the accumulation of equity differently than acquisition of title because section 522(o) contains an intent element while section 522(p)(1) does not.[119] Section 522(o) allows a debtor to acquire equity in a homestead as long as the debtor does not have "intent to hinder, delay [sic] or defraud a creditor."[120] Accordingly, section 522(o) does not allow a debtor to acquire equity with intent to "hinder, delay [sic] or defraud.[121] While section 522(o) deals with acquisition of equity prior to filing for bankruptcy, section 522(p) deals with acquisition of title prior to filing for bankruptcy.[122]

The *Anderson* court strengthens the title argument by differentiating the "intent to hinder, delay [sic] or defraud" accumulation of equity from the "making regular mortgage payments" accumulation of equity.[123] The weakness in this argument is that it does not address the fact that Congress used interest in section 522(p)(2)(B) in addition to using it in section 522(p)(1).[124] If courts were to use the *Anderson* court's definition of interest—meaning title in section 522(p)(2)(B)—the statute would allow a

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114. 11 U.S.C.A. § 522(o) (West 2009). "For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—**(1)** real or personal property that the debtor or a dependent of the debtor uses as a residence; **(2)** a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence; **(3)** a burial plot for the debtor or a dependent of the debtor; or **(4)** real or personal property that the debtor or a dependent of the debtor claims as 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." *Id.*

115. *Anderson*, 374 B.R. at 860.

116. *See, e.g.*, *In re* Presto, 376 B.R. 554, 565–74 (Bankr. S.D. Tex. 2007).

117. *Anderson*, 374 B.R. at 860.

118. *Id.* at 859.

119. *Id.* at 860.

120. *Id.*; *see* 11 U.S.C.A. § 522(o) (West 2009).

121. *Anderson*, 374 B.R. at 860; *see* 11 U.S.C.A. § 522(o).

122. *Anderson*, 374 B.R. at 860.

123. *See id.*

124. *See* 11 U.S.C.A. § 522(p)(1), (2)(B).

debtor to roll over the title from a homestead he purchased before the 1,215-day period into a new homestead purchased after the 1,215-day period. But, titles are not transferable from one residence to another. The *Anderson* interpretation would render section 522(p)(2)(B) meaningless.

On the other hand, *Anderson* raises some good questions that require answers if the interest referred to in section 522(p)(1) embraces equity.[125] First, how will courts distinguish between equity acquired from regular or irregular payments and equity acquired through appreciation?[126] Second, what if the debtor actually makes extra payments, but the property appreciates sporadically during the 1,215-day period and depreciates at other times during the 1,215-day period?[127] Third, what if the debtor seeks to pay down the mortgage quickly by making larger payments than are required?[128]

F. In re Rogers*: The Basic Equity Argument*

Less than one year after deciding *Blair*, the Northern District of Texas engaged in the title-equity debate again.[129] This time the court interpreted the statute by determining the scope of the term interest.[130] The court defined interest as "some legal or equitable interest that can be quantified by a monetary figure."[131] Three indicia from within the statute support this definition.[132] First, the statute mentions an "amount of interest."[133] The term "amount" is commonly used to mean "total number or quantity."[134] Second, the statute requires the "amount of interest" to not exceed a specified dollar amount.[135] The court reasoned that because the interest must be quantifiable, it does not apply only to title.[136] Third, the court determined that interest within section 522(p)(2)(B) indicated that equity can roll over from a previous residence to a current one.[137]

The *Rogers* court directly opposes the title proponents by offering a new interpretation that "interest" includes equity.[138] This interpretation also has its weaknesses. The greatest weakness is the unjust situation, identified

125. *See Anderson*, 374 B.R. at 859.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See In re* Rogers, 354 B.R. 792, 792 (Bankr. N.D. Tex. 2006). This case was decided on October 16, 2006. *Id.*
130. *See id.* at 796.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 39 (10th ed. 1998)).
135. *Id.* at 796.
136. *Id.* at 796–97.
137. *Id.* at 797.
138. *Id.*

by the *Blair* court, in which one debtor is penalized for not buying a new residence and another benefits from rolling over equity from a previous residence.[139] The penalized debtor acquires equity in his home by making regular payments and allowing his home to appreciate. Then, when that debtor files for bankruptcy the court aggregates all the equity acquired through payments and appreciation. Only equity below the $136,875 cap is exempt. The debtor who benefits from the equity interpretation also acquires equity through making regular payments and appreciation. However, this debtor purchases a new home two months before filing for bankruptcy. The court allows the debtor to roll over the previously acquired equity into the new home. The court aggregates the equity gained from two months of payments and appreciation. The increase in equity is, of course, well below the $136,875 limit. Thus, the debtor who purchased a new home within 1,215 days prior to filing for bankruptcy benefits while the debtor who remains in his old home receives a penalty.

G. The Second Greene *Case: Support for Equity*[140]

On appeal, the Ninth Circuit Court of Appeals interpreted some of the language in section 522(p)(1) in such a way that may support including in property of the estate, equity acquired in exempt property beyond $136,875 within 1,215 days prior to filing for bankruptcy.[141] Although this court was not dealing with a question of whether an equitable interest acquired within the 1,215 day limit and exceeding $136,875 cap was exempt, the court did define some of the key terms in the statute.[142] The court used Black's Law Dictionary to determine that interest means "a legal share in something; all or part of a legal or equitable claim to or right in property."[143] The court then determined that the "use of the term 'amount' to qualify 'interest' indicates that the requisite 'interest' must be one capable of quantification."[144] The court turned to the dictionary again to define "acquired" as "[t]o gain possession or control of; to get or obtain."[145]

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139. *See In re* Blair 334 B.R. 374, 377 (Bankr. N.D. Tex. 2005).

140. Although this case is used to support the equity argument, the court holds that "'any amount of interest that was acquired' . . . means the acquisition of ownership of real property" and the cap in section 522(p) "does not apply to property to which a debtor acquired title more than 1215 days before she or he filed a bankruptcy petition." *In re* Greene, 583 F.3d 614, 624 (9th Cir. 2009). However, the court's interpretation of the statutory terms such as "interest" and "acquire" align with the equity argument so convincingly that using the definitions from the Greene court could lead to an interpretation of section 522(p) consistent with the equity argument. This is especially true because the Greene case deals with the question of whether claiming property as a homestead is an "interest that was acquired by the debtor." *Id.* at 618. Admittedly, that issue differs from the specific title-equity issues in other cases.

141. *Greene*, 583 F.3d at 622–23.

142. *Id.*

143. *Id.* at 622 (citing BLACK'S LAW DICTIONARY 885 (9th ed. 2009)).

144. *Id.* at 623.

145. *Id.* (citing BLACK'S LAW DICTIONARY 26 (9th ed. 2009)).

The court used section 522(p)(2)(B) to support its interpretation claiming, "Congress intended 'acquire' to mean 'gaining possession or control' by purchasing or gaining an ownership interest, either legal or equitable."[146]

Such an interpretation of interest indicates that equity obtained in a homestead exceeding the $136,875 limit within 1,215 days prior to filing for bankruptcy would be exempt from the homestead protection.[147] Including "part" and "equitable interest" in the definition seems to indicate that the interest is not strictly limited to obtaining title but may include all the equity accrued over the 1,215 days prior to the debtor filing for bankruptcy. The requirement that the interest be capable of quantification simply refutes the idea that interest obtained is limited to acquiring title.

H. In re Rasmussen*: Equity; Passive Versus Active*

The debtors in *Rasmussen*, a husband and wife, acquired their homestead for approximately $350,000 only 1,210 days before filing for bankruptcy.[148] The petitioners financed their purchase with $35,000 rolling over from a previous home, additional cash, and a $320,000 loan.[149] At the time of filing, the house was valued at $750,000 with mortgage debts of about $575,000.[150] The parties did not dispute that the debtors had approximately $175,000 of equity in the home.[151] The debtors claimed that all of this equity was exempt from property of the estate.[152] The trustee objected to the homestead exemption claiming that section 522(p) limited the value a debtor could exempt to $125,000.[153] The debtors argued that the $125,000 limitation could be stacked, thus allowing joint debtors a $250,000 exemption, and that the homestead cap in section 522(p) did not apply to appreciation of equity.[154]

Rasmussen adopted the equity view and held in favor of the debtors.[155] This may seem contradictory at first, but the court distinguished these facts from facts in other equity-view cases.[156] The court accepted the debtors

146. *Id.* Although the court defined the term acquire so broadly it went on to hold that "any amount of interest that was acquired" as used in section 522(p)(1) means to acquire ownership of real property. *Id.* at 623–24.

147. *See* 11 U.S.C.A. § 522(p)(1) (West 2009).

148. *In re* Rasmussen, 349 B.R. 747, 750 (Bankr. M.D. Fla. 2006). On page 750 of the court reporter, the court indicates that the debtors bought their home on June 7, 2002 and filed for bankruptcy on September 28, 2006. *Id.* However, these dates do not fall within 1,215 days of each other. Later in the opinion the judge indicates that the petition was filed on September 28, 2005. *Id.* at 751. This correction places the dates within 1,215 days of each other.

149. *Id.* at 750.

150. *Id.*

151. *Id.* at 750–51.

152. *Id.* at 751.

153. *Id.*

154. *Id.*

155. *Id.* at 751, 758.

156. *Id.* at 755–57.

argument that the limitation could be stacked, thus, the debtors limitation was increased to $250,000.[157] This settled the matter. The court could have been done with the case, but it continued on to address the debtors alternative argument.[158] While agreeing with the *Blair* court's final decision, the *Rasmussen* court disagreed with the *Blair* court's definition of interest.[159] The *Rasmussen* court concluded that interest means equity for the common reasons agreed to by the equity proponents.[160] However, the *Rasmussen* court took it one step further than other courts and analyzed the meaning of "acquired by the debtor."[161] The statute provides that "a debtor may not exempt any amount of interest that was acquired by the debtor . . . ."[162] Defining "acquire" as "obtained as one's own," the court stated that a debtor may acquire or obtain interest in three ways: 1) "by making a down payment," 2) "by paying down the mortgage, or" 3) "by appreciation due to market conditions."[163] The court stated that the first two methods of acquiring equity require the debtor to actively participate in the acquisition.[164] However, the third method does not require any activity by the debtor.[165] The phrase "acquired by the debtor" must mean that the debtor is required to actively acquire the interest.[166] If Congress had not intended such a result, it would have written the statute as "any amount of interest that was acquired during the 1215-day period . . . ."[167]

Although the *Rasmussen* court was not required to determine the title-equity issue to decide the case, the court seemed anxious to engage in the debate.[168] The *Rasmussen* court pointed out yet another way that the statute could be interpreted, thus validating the *McNabb* court's request for guidance from legislators.[169]

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157. *Id.* at 755. Section 522(m) provides that "this section shall apply separately with respect to each debtor in a joint case." 11 U.S.C.A. § 522(m) (West 2009).

158. *Rasmussen*, 349 B.R. at 755–58.

159. *Id.* at 756.

160. *Id.*

161. *Id.* at 757.

162. 11 U.S.C.A. § 522(p)(1).

163. *Rasmussen*, 349 B.R. at 757 (quoting *In re* Sainlar, 344 B.R. 669, 672–73 (Bankr. M.D. Fla. 2006).

164. *Rasmussen*, 349 B.R. at 757.

165. *Id.*

166. *Id.*

167. *Id.* (referring to 11 U.S.C.A. § 522(p)(1)(A)).

168. *See id.* at 755–58.

169. *See id.*; *see also*, *In re* McNabb, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005) ("It has been reported that a 'technical amendments' bill is in the works to fix various glitches in BAPCPA . . . . Perhaps this is one of those glitches. If so, Congress can easily fix it. Frankly, this Court believes it should . . . .").

1. Passive v. Active

The *Rasmussen* court created another way to consider the statute.[170] A team of scholars latched onto this idea of passive versus active acquisition and proposed even more specific situations that should be considered.[171] The authors asserted that appreciation due to natural market conditions, rezoning, recharacterization of a property as a homestead, and contractual payments on a mortgage are passively acquired and should not be included in "an interest acquired by the debtor."[172] The scholars reasoned that Congress did not intend for a debtor to lose his home as a result of a passive acquisition of interest that was incidental to the debtor's ownership of his home.[173] Some active interests that should be considered as "an interest acquired by the debtor," included paying down a mortgage with prepayments and remodeling.[174]

A court required to differentiate between active and passive interests would be bogged down in collateral issues. Differentiating between active and passive interests would require a court to determine whether equity is attributable to a remodeling job as opposed to market fluctuation.[175] Courts would also be required to determine whether prepayments on the mortgage were simply a way to perform a contractual duty early or an active acquisition of an additional interest.[176] Instead of wasting time determining whether an interest is active or passive, the court should spend time assisting creditors in recovering debts and helping debtors obtain a fresh start. A debtor or creditor with thousands or hundreds of thousands of dollars at stake is likely to spend time in court fighting for that money; thus, requiring judges to decide between active and passive interests would curtail judicial efficiency. Even after the interests acquired by a debtor are determined to be either passive or active, a judge must then determine how much equity is attributable to passive interest and how much equity is attributable to active interest. Consider the hypothetical Debtor B for example.[177] In the hypothetical, the author determined the values

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170. *See Rasmussen*, 349 B.R. at 757.

171. *See* Gloria J. Liddell & Pearson Liddell, Jr., *So He Huffed and He Puffed . . . But Will the Home(stead) Fall Down?: The Applicability of Section 522(p)(1) of the United States Bankruptcy Code to Varying Interest Accumulations of the Debtor in Homestead Property*, 57 DRAKE L. REV. 729, 738–56 (2009).

172. *Id.* at 738–49.

173. *Id.* at 744.

174. *Id.* at 749–56.

175. *Id.* at 749.

176. The authors of the Liddell article argued that debtors should not be penalized for making regular payments on their mortgage because they are contractually bound to do so. *Id.* at 745.

177. Debtor B purchased a house five years ago for $400,000. His house appreciated $400,000 during the 1,215-day period prior to filing for bankruptcy. In addition, Debtor B remodeled his home, which added $200,000 of value to his home. However, Debtor B sold the house after the $400,000 appreciation. Debtor B then rolled that equity over into another house in the same state that he

attributable to remodeling and market conditions. But, in the real world of fluctuating markets and prices of materials, determining how much equity to attribute to each active or passive interest would be too cumbersome to be realistic. Too much time and energy would be wasted trying to determine how much of the $600,000 increase in value is attributable to remodeling and how much is attributable to market conditions.

IV. A PROPOSED STATUTE

Thus far, this comment has identified several problems with the statute: 1) the apparent different meanings of interest within the same statute; 2) a debtor who rolls equity over into a new home in the same state is treated differently than a debtor who does not purchase a new home; 3) passive versus active interests; and 4) the uncertainty when property appreciates at some time during the 1,215-day period and depreciates at other times.[178]

Now that Congress has had time to see the results of the current statute, any revisions should consider the many problems identified by the courts and various scholars. With respect to the homestead exemption, the statute should be worded similar to this:

> (p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under state or local law, a debtor may not exempt any amount of interest *if the title to such interest* was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition *to the extent that the amount* exceeds in the aggregate $136,875 in value in:
>
> (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.
>
> (p)(2)(B). For purposes of paragraph (1), any amount of such interest does not include any *equity* transferred from a debtor's previous principal residence (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.[179]

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purchased for $1.5 million, using $1 million in rolled over equity and financing $500,000. Debtor B claims the $1 million value of his home is exempt from the bankruptcy estate, and creditors challenge his claim. In most jurisdictions, the homestead would be protected from creditors. Debtor B would gain an advantage by selling his previous house and rolling the equity over into a new home. His homestead exemption would be $1 million.

178. *See supra* Part III.

179. This revision deals specifically with the homestead exemption. Application to section 522(p)(1)(A)–(C) has not been thoroughly contemplated. Although on the surface it seems that the provision would work for section 522(p)(1)(A) dealing with "real or personal property that the debtor or a dependent of the debtor uses as a residence" and section 522(p)(1)(C) dealing with "a burial plot for

A. Solutions

This proposed statute solves all of the problems pointed out by the various courts that have considered the interpretation of the statute. This proposed statute is also consistent with the legislative intent of the original statute.

Much of the reason for instituting the BAPCPA was to prevent debtors from abusing the bankruptcy system.[180] During the congressional hearing concerning the BAPCPA, Senator Carper stated that the BAPCPA is an opportunity to codify the principle that "[i]f a person or a family has the ability to repay a portion or all of their debts . . . they should repay a portion or all of their debts."[181] He stated further, "If a family doesn't have the wherewithal to pay or begin repaying their debt, they should be accorded protection of the bankruptcy court. That is it; it is that simple."[182] Although it may not be as simple as Senator Carpenter claims it to be, the principle is correct. If the homestead exemption did not exist, then the debtor's ability to partially repay a debt by selling the debtor's home could be determined simply by inquiring as to whether the debtor has *any* equity in the home. However, the purpose of the homestead exemption is to protect the debtor's property from seizure by creditors so that the debtor will have a home in which to begin his fresh start.[183] Thus, even though the statute has been reworded, the statute continues to fulfill the purposes of the homestead exemption. The legislative intent is fulfilled by using phrases such as, "[A] debtor may not exempt any amount of interest if the title to such interest was acquired during the 1,215-day period preceding the date of the filing of the petition." In this manner, the proposed statute still closes the millionaire's mansion loophole, which allows a debtor to protect his assets from creditors by purchasing a homestead and then filing for bankruptcy shortly after the purchase.[184] Under the proposed amendment, a

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the debtor or a dependent of the debtor." 11 U.S.C.A. § 522 (p)(1)(A), (C) (West 2009). However, it does not seem like this revision would work well for section 522(p)(1)(B) dealing with "a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence." *Id.* § 522 (p)(1)(B). The original statute seems to be better suited for dealing with an amount of interest in a cooperative.

180. *See supra* Part I.E.

181. 151 CONG. REC. S2415 (2005).

182. *Id.*

183. *See In re* Kent, 411 B.R. 743, 749 (Bankr. M.D. Fla. 2009) (stating that "the purpose of the homestead exemption 'is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors'") (quoting Snyder v. Davis, 699 So.2d 999, 1002 (Fla. 1997)); CFCU Cmty. Credit Union v. Hayward, 552 F.3d 253, 260 (2d Cir. 2009) ("[T]he purpose of the homestead exemption is 'to protect a homeowner against seizure of his or her dwelling to satisfy a money judgment'") (quoting Bus. Asset Funding Corp. v. Hakakian, 751 N.Y.S.2d 570, 571 (N.Y. App. Div. 2002)) and *In re* Hall, 1994 WL 681025, *2 (9th Cir. 1994) (citing Edgley v. Edgley, 644 P.2d 1208, 1210 (Wash. Ct. App. 1982)).

184. *See* 151 CONG. REC. S2415–16 (2005).

debtor who purchased property within the 1,215-day period previous to filing for bankruptcy would be subject to the $136,875 cap.

This proposed amendment resolves the problem that the statute may be perceived as having two different meanings for the phrase amount of interest. Leaving the phrase amount of interest in the statute is necessary because the amount must be quantifiable by assigning a dollar figure to the amount of interest. By specifying that the "title to such interest" must be acquired within the 1,215-day period preceding filing for bankruptcy, the statute becomes clear that merely acquiring equity is not sufficient to trigger the statute. Additionally, specifying that "any amount of such interest does not include any equity transferred from a debtor's previous principal residence," clarifies that equity may be rolled over into a new homestead.

This proposed amendment also treats debtors the same; whether they purchase a new home and roll their equity over or simply remain in their original residence during the whole 1,215-day period prior to filing for bankruptcy. The original hypothetical easily demonstrated this idea.[185] Under the proposed statute, Debtor A would have a different outcome. Proposed statute section 522(p)(1) applies only to interest in property "if the title to such interest was acquired by the debtor during the 1,215-day period preceding the date of the filing of the petition."[186] Because Debtor A acquired title to the home five years before filing for bankruptcy, he could keep all of the equity in his home without being subject to the $136,875 cap.[187] Debtor A's exemption would be $650,000, rather than $386,875.

The proposed amendment would not affect Debtor B. Proposed statute section 522(p)(2)(B) provides that the cap shall not apply to "equity

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185. **Debtor A** purchased a house five years ago for $250,000. During the 1,215 day period preceding filing for bankruptcy the house appreciated by $400,000. Debtor A claims the home, valued at $650,000, is property exempt from the bankruptcy estate and the creditors challenge the claim. Under current interpretation of the homestead exemption, most jurisdictions would limit the equity of the debtor's homestead exemption accumulated in the home to $136,875. The debtor's homestead exemption would be limited to $386,875 rather than the $650,000 value of the home.

Debtor B purchased a house five years ago for $400,000. His house also appreciated $400,000 during the 1,215 days prior to filing for bankruptcy. In addition, Debtor B remodeled his home, adding $200,000 of value to his home. However, Debtor B sold the house after the $400,000 appreciation and rolled that equity over into another house in the same state. He purchased the new home for $1.5 million using $1 million in rolled over equity and financed the remaining $500,000. Debtor B claims the $1 million value of his home is exempt from the bankruptcy estate, and creditors challenge his claim. In most jurisdictions, the homestead would be protected from creditors. Debtor B would gain an advantage by selling his previous house and rolling the equity over into a new home.[185] His homestead exemption would be $1 million.

186. *See supra* Part IV.

187. One may question whether this is fair in a situation in which a debtor purchases a house five years prior to filing for petition but then makes very large prepayments on the mortgage during the 1,215-day period prior to filing for bankruptcy, thereby converting nonexempt property into property exempt from the bankruptcy estate and out of a creditor's reach. Such an outcome would be unfair and would be the result only if section 522(p) were being used. However, sections 522(o), 544, and 548 all deal with fraudulent transfers including the debtor's intent to hinder, delay, or defraud his creditors. 11 U.S.C.A. §§ 522(o), 544, 548 (West 2009).

transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1,215-day period) into the debtor's current principal residence" if both residences are located in the same state.[188] Debtor B's exemption would remain at $1 million. Thus, the proposed statute would treat debtors who purchased a new home within the 1,215-day period and rolled their equity from the old home into the new home the same as debtors who had not purchased a new home.

The proposed amendment also does not require a court to decide whether an interest is passive or active. Using the words title and equity in the proposed statute eliminates this chore. Proposed statute section 522(p)(1) exempts all equity in property if the title to the property was acquired before the 1,215-day period preceding the date of filing the petition. By using the proposed statute, a court would not have to decide whether Debtor B's equity attributed to remodeling should be treated the same as the equity attributed to market conditions. Nor would the court have to determine how much equity to attribute to each of the interests; thus, the proposed statute would preserve the current judicial efficiency.

One may criticize the proposed statute because it allows a debtor who acquired title to his home before the 1,215-day period to make large pre-payments on his mortgage during the 1,215-day period without being subject to the cap. Although this is true, there has to be a cutoff somewhere. The current statute only allows a 1,215-day look back period and the proposed statute preserves this same time period.[189] In addition, sections 522(o), 544, and 548 disallow fraudulent transfers, including transfers that a debtor makes with intent to hinder, delay, or defraud a creditor.[190] Also, it is not likely that a debtor would exceed the cap by making regular mortgage payments. Payment at the beginning of a mortgage is attributed more to principal and less to interest than a payment at the end of an amortized mortgage. This allows the buyer to acquire more equity per payment at the end of the mortgage than at the beginning. Thus, a debtor making regular payments on a home would acquire more equity during the last 1,215 days of his mortgage than at any other time during the term of the mortgage. Even if a debtor made regular prepayments on the mortgage, the monthly payments would need to be about $3,660 to reach the $136,875 cap in 1,215 days at the end of a thirty-year mortgage on a $766,500 home at 4% interest.[191]

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188. *See supra* Part IV.

189. 11 U.S.C.A. § 522(p)(1) (West 2009).

190. *Id.* §§ 522(o), 544, 548. Section 522(o) allows creditors to look back ten years for transfers that were intended to hinder, delay, or defraud a creditor. *Id.* § 522(o).

191. This calculation is based on an amortization schedule calculator located at http://www.amortization-calc.com/. According to the Bureau of Labor Statistics website inflation calculator, $766,500 in 1979 has the same buying power as $2,283,979.96 in 2009. Http://data.bls.gov/cgi-bin/cpicalc.pl. This 4% interest rate is a very generous figure because the interest rate 30 years ago in 1979 was between 11% and 16%. http://mortgage-x.com/general/indexes/prime.asp. However, it seems

Another criticism may be that a debtor who purchases his home on the 1,214th day prior to filing for bankruptcy would be subject to the $136,875 cap. This is also true, but very few people in such a situation would be subject to this statute because very few people mortgage property to the extent that a regular mortgage payment would exceed $136,875 in 1,215 days. In order to exceed the cap, the debtor would have to pay over $10,340 per month at the beginning of a thirty-year mortgage on a $2,166,000 home at 4% interest.[192] A debtor who spends over $10,340 on a home each month is, perhaps, one who Senator Carper contemplated when he said, "If a person or a family has the ability to repay a portion or all of their debts . . . they should repay a portion or all of their debts."[193]

A third criticism deals with a debtor who, during the 1,215-day period, inherits title to property that is subject to a mortgage. If this debtor later declares the property as his homestead, he may be subject to the cap even though he is only making regular payments, which he is bound to do by the mortgage contract. In such a case, a debtor may be finishing paying off the mortgage that had previously been paid by the decedent.[194] However, similar to a debtor who makes prepayments, in order for a debtor who makes regular payments to achieve the task of exceeding the $136,875 cap at the end of a thirty-year mortgage; he must pay over $3,660 per month on a $766,500 home at 4% interest.[195]

V. CONCLUSION

The proposed statute solves many of the problems with 11 U.S.C. § 522(p) that have arisen in the four years since it was enacted. The proposed statute rectifies the two different meanings of the word interest in the same statute by indicating that title is referred to in one subsection and equity is referred to in another subsection. It also treats debtors who roll their equity into a new home the same as a debtor who did not purchase a new home during the 1,215-day period, thus avoiding punishing the debtor who did not purchase a new home. This problem is solved by limiting the

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logical that most homeowners would refinance their mortgage rather than ride out the mortgage at 11%. For that reason it is appropriate here to use a low figure that gives the debtor the benefit of the doubt.

192. This calculation is based on an amortization schedule calculator located at http://www.amortization-calc.com/; *see supra* note 178 and accompanying text.

193. 151 CONG. REC. S2416 (2005).

194. Each payment at the end of an amortized mortgage is attributed more to principal and less to interest than a payment at the beginning of a mortgage. Such an amortization system sets up the buyer to acquire more equity per payment at the end of the mortgage than at the beginning. Thus, a debtor making regular payments on a home would acquire more equity during the last 1,215 days of his mortgage than any other time during the term of the mortgage.

195. This calculation is based on an amortization schedule calculator located at http://www.amortization-calc.com/. According to the Bureau of Labor Statistics website inflation calculator, $766,500 in 1979 had the same buying power as $2,283,979.96 in 2009; http://data.bls.gov/cgi-bin/cpicalc.pl; *see supra* note 178 and accompanying text.

cap to debtors who have acquired title to their home within the 1,215-day period, while also retaining the statutory exception for debtors who acquire title but roll over equity from a previous residence in the same state. The proposed statute also eliminates the need for courts to spend time and resources determining whether an interest is passive or active by including all equity in the $136,875 cap, regardless of whether the debtor acquired it actively or passively.

The proposed statute is supported and reinforced by the purpose of the homestead exemption, which is intended to protect the debtor's property from seizure by creditors so that the debtor will have a home in which to begin his fresh start.[196] The current statute allows a creditor to reach equity in a debtor's homestead regardless of when the debtor acquired title.[197] The proposed statute only allows a creditor to reach equity in a debtor's homestead if the debtor acquired title during the 1,215-day period prior to the debtor filing for bankruptcy. Thus, it preserves the purpose of the homestead protection.

The proposed statute also remains within the bounds of the legislative intent of the BAPCPA. The current statute's purpose was to close the millionaire's mansion loophole. The proposed statute preserves that closure. In summation, the proposed statute is a comprehensive alternative to the current statute and solves many of its problems while preserving the purposes of the exemption and Congress's intent for enacting the current statute.

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196. *See In re* Kent, 411 B.R. 743, 749 (Bankr. M.D. Fla. 2009) (stating that "the purpose of the homestead exemption 'is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors'") (quoting Snyder v. Davis, 699 So.2d 999, 1002 (Fla. 1997)); CFCU Cmty. Credit Union v. Hayward, 552 F.3d 253, 260 (2d Cir. 2009) ("[T]he purpose of the homestead exemption is 'to protect a homeowner against seizure of his or her dwelling to satisfy a money judgment.'") (quoting GE Capital Bus. Asset Funding Corp. v. Hakakian, 751 N.Y.S.2d 570, 571 (N.Y. App. Div. 2002)); and *In re* Hall, 1994 WL 681025, *2 (9th Cir. 1994) ("The purpose of the homestead exemption is to prevent a forced sale of residential real property and to secure the claimants in the possession of their property.") (citing Edgley v. Edgley, 644 P.2d 1208, 1210 (Wash. Ct. App. 1982)).

197. *See generally* 11 U.S.C.A. § 522(p) (West 2009).

TABLE 1: STATES WITH HOMESTEAD EXEMPTIONS GREATER THAN $136,875

State	Homestead Limit	Statute
Arizona	150,000	ARIZ. REV. STAT. ANN. § 33-1101 (2007).
D.C.	Unlimited	D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2008).
Florida	Unlimited	FLA. CONST. ART. 10, § 4; FLA. STAT. ANN. § 222.01 (West 1998 & Supp. 2009).
Iowa	Unlimited	IOWA CODE ANN. § 561.16 (West 1992 & Supp. 2008).
Kansas	Unlimited	KAN. STAT. ANN. § 60-2301 (2005 & Supp. 2007).
Massachusetts	500,000	MASS. GEN. LAWS ANN. ch. 188, §§ 1, 1A (West 2003 & Supp. 2008).
Minnesota	300,000	MINN. STAT. ANN. § 510.02 (West 2002 & Supp. 2008).
Nevada	550,000	NEV. REV. STAT. § 115.010.2 (2007).
Oklahoma	Unlimited	OKLA. STAT. ANN. tit. 31, § 2 (West 2009).
Rhode Island	300,000	R.I. GEN. LAWS § 9-26-4.1(a) (Supp. 2008).
South Dakota	Unlimited	S.D. CODIFIED LAWS § 43-45-3 (2004 & Supp. 2008).
Texas	Unlimited	TEX. CONST. art. 16, §§ 50-51.