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# Calling All Debtors, Want to Defraud Your Creditors? Here is How: The Tenancy by the Entirety Loophole and the Nullification of Section 522(o), (p), and (q) of the 2005 Bankruptcy Amendments

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**CALLING ALL DEBTORS, WANT TO DEFRAUD YOUR  
CREDITORS? HERE IS HOW: THE TENANCY BY THE  
ENTIRETY LOOPHOLE AND THE NULLIFICATION OF  
SECTION 522(O), (P), AND (Q) OF THE 2005 BANKRUPTCY  
AMENDMENTS**

LEIGH J. FRANCIS\*\*

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## I. INTRODUCTION

Attention debtors: if you want to prevent your creditors from seizing your assets and have not filed for bankruptcy, please read below to find out how you can do what millionaire debtors have been doing for years. Debtors, with the right advice, can keep their lavish lifestyles and discharge their debts. Just follow the steps listed in Part IV and you too can legally prevent creditors from collecting judgments even though you have the assets to pay the debts owed. While the above is an oversimplification, it does not diminish the fact that a significant loophole exists in the Bankruptcy Code (“Code”).<sup>1</sup> And, as explained below, any debtor with sufficient planning and who has available assets can prevent creditors from reaching those assets.<sup>2</sup>

In the past, wealthy debtors liquidated assets and purchased new, lavish homes in states with unlimited homestead exemptions.<sup>3</sup> Those debtors would then file for bankruptcy.<sup>4</sup> Because the debtor was insolvent, the assets the debtor liquidated should have gone to creditors before purchasing the home.<sup>5</sup> But, by purchasing the home the debtor took assets creditors could obtain, non-exempt assets, and placed those assets into the homestead, an exempt asset.<sup>6</sup> In states with unlimited

<sup>1</sup> 11 U.S.C. §§ 1-1532 (2007).

<sup>2</sup> See H.R. REP. NO. 109-31, at 592-93 (2005) (listing seven infamous debtors who prevented creditors from reaching millions of dollars of the debtor’s assets, when the debtor bought a lavish mansion prior to filing for bankruptcy). Any debtor may shield an unlimited amount of their assets from creditors in certain states with unlimited homestead exemptions. *Id.* What this article contends, and Congress has argued, is that a wealthy debtor should not get a head start by retaining lavish homes bought with assets that should be used to pay off creditors’ claims. See *id.* at 16 (arguing debtors should not be able to move to states with unlimited homestead exemption and shield equity and assets from creditors). It seems incongruous that Americans with higher incomes pay a higher percentage in income tax because they have the ability to pay, while higher income debtors with the proper planning pay far less back, percentage-wise, to creditors than the average debtor. Cf. Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 J.L. & RELIGION 51, 58 (2007) (examining progressive taxation from a religious perspective and quoting bishops as stating, “[t]he tax system should be structured according to the principle of progressivity, so that those with relatively greater financial resources pay a higher rate of taxation.”).

<sup>3</sup> See H.R. REP. NO. 109-31, at 591 (2005).

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., Juliet M. Moringiello, Symposium, *Has Congress Slimmed Down the Hogs? A Look at the BAPCPA Approach to Pre-Bankruptcy Planning*, 15 WIDENER L.J. 615, 620 (2006) (explaining how debtors plan for bankruptcy and discussing cases of homestead exemption abuse in Florida).

<sup>6</sup> The homestead is an asset that can be exempted by asserting that the property is exempt pursuant to either section 522(b)(3)(A) or section 522(b)(3)(B) of the Bankruptcy Code. See 11 U.S.C. § 522(b)(3)(A)-(B) (2007) (stating that debtors may exempt property of the bankruptcy estate

homestead exemptions, unsecured creditors in bankruptcy cannot obtain any value from the homestead.<sup>7</sup> Thus, through these actions a debtor could funnel non-exempt assets into an exempt homestead and prevent creditors from collecting on his claims.<sup>8</sup>

Legally, any debtor can take advantage of this form of “bankruptcy planning,” but some cases are more egregious than others. For example, actor Burt Reynolds used this form of bankruptcy planning, buying an opulent mansion and then discharging his debts.<sup>9</sup> He declared bankruptcy in 1996, claiming \$10 million in debt.<sup>10</sup> Yet, he kept his \$2.5 million home and only paid his creditors twenty cents on the dollar.<sup>11</sup> Paul Bilzerian, a corporate take-over artist, also planned wisely for his bankruptcy, buying a \$5 million home in Florida before filing.<sup>12</sup> Mr. Bilzerian retained this home and avoided approximately \$200 million in debt he owed to the IRS and other creditors.<sup>13</sup>

Congress sought to prevent such opportunistic and abusive behavior when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>14</sup> Congress felt preventing creditors from collecting on debts through bankruptcy planning was fundamentally unfair to those disadvantaged creditors and may have a negative effect upon the economy.<sup>15</sup> Indeed, Congress recognized that, included in the

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if listed in section 522(2) or 522(3)).

<sup>7</sup> See *infra* note 82 and accompanying text (listing as the only creditors in Florida who may foreclose on a resident’s homestead: 1) city, state, or municipal agencies collecting tax liens; 2) creditors who hold a mechanic’s lien against the real property; or 3) creditors who are purchase-money mortgagees). This article examines the unlimited homestead exemptions provided by: Arkansas, the District of Columbia, Florida, Iowa, Kansas, Oklahoma, and Texas. See *infra* Appendix A (providing a list of each state’s unlimited homestead exemption).

<sup>8</sup> As explained above, debtors will liquidate assets and place the proceeds in exempt assets to prevent creditors from collecting on claims. See Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1929-30 (2007) (noting how before BAPCPA, debtors in anticipation of bankruptcy might liquidate “personal property and transfer the proceeds into home equity.”) (citation omitted).

<sup>9</sup> H.R. REP. NO. 109-31, at 592 (2005).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 593.

<sup>13</sup> *Id.* For other egregious abuses of unlimited homestead exemptions see *id.* at 592-93.

<sup>14</sup> H.R. REP. NO. 109-31, at 15-16 (2005) (stating BAPCPA deters the use of the “mansion loophole,” where debtors move to a state with an unlimited homestead exemption and place millions of dollars out of reach of creditors, funneling assets into the new, exempt homestead).

<sup>15</sup> See *id.* at 2-3. Further, in a footnote, Congress agreed with Professor Todd Zywicki, finding “[b]ankruptcy is a moral as well as an economic act.” *Id.* at 2 n.1. A debtor who fails to keep his promise to repay is allowed to receive a benefit at the expense of the creditor. See *id.* Without

cost of every bill or loan Americans receive, exists a bankruptcy tax – an additional amount of money citizens must pay to offset the losses businesses incur when they cannot collect on debts.<sup>16</sup> For example, the current mortgage crisis has caused fewer companies to offer student loans, and the interest rates on available student loans have risen dramatically.<sup>17</sup> The economy can be greatly affected by defaulting debtors, and with the recent sub-prime mortgage crisis, this point has never been more abundantly clear.<sup>18</sup> Regardless of whether debtors default on credit card payments or on their home mortgage loans, when debtors become insolvent the effects spread exponentially, and they can have a disastrous impact on the nation's economy.<sup>19</sup>

Further, when debtors take advantage of homestead exemptions and prevent creditors from collecting on debts, credit may become unavailable to lower-income borrowers.<sup>20</sup> President Bush cited the lack of available credit as one of his reasons for signing BAPCPA into law on April 20, 2005, stating that debtors have “walked away from debts even when they had the ability to repay them,” making credit less available for blue-collar workers.<sup>21</sup>

Unfortunately, whether due to poor drafting or political compromise, this article demonstrates that Congress failed to stop debtors from abusing unlimited state homestead exemptions even after passing BAPCPA. Married debtors in many states can still funnel non-exempt assets into an exempt homestead by using the tenancy by the entirety exemption (“TBE Exemption”) located in section 522(b)(3)(B) of the Code. This article examines this loophole and argues that Congress should close the tenancy

payment, there is no reciprocity, and, “[p]romise-keeping and reciprocity are the foundation of an economy and a healthy civil society.” *Id.*

<sup>16</sup> *Id.* at 4.

<sup>17</sup> See Katy Marquardt, *Student Loans Feel the Pinch: Private Lenders Tighten Credit Standards and Raise Rates*, U.S. NEWS & WORLD REP., Mar. 10, 2008, at 45 (noting that because of so many debtors defaulting on sub-prime mortgages, other sectors of the economy, such as student loans, have been severely affected).

<sup>18</sup> *Cf. id.* (explaining how buyers on the secondary market for student loans have stopped purchasing “bundled loans”).

<sup>19</sup> *Cf. Reint Gropp et al., Personal Bankruptcy and Credit Supply and Demand*, 112 Q.J. ECON 217, 220 (1997), discussed *infra* note 100 and accompanying text (noting that credit may be less available for lower-income borrowers in states that have high homestead exemptions when compared to states without large homestead exemptions, and automobile interest rates in those states may also be higher than in other states).

<sup>20</sup> *Id.*

<sup>21</sup> Bankruptcy Abuse Prevention, Consumer Protection Act, P.L. 109-08, Statement by President George W. Bush upon Signing S. 256, Apr. 20, 2005, *reprinted in* 2005 U.S.C.C.A.N. S7.

by the entirety loophole (“TBE Loophole”) to achieve BAPCPA’s intended purpose: preventing debtors from abusing certain states’ unlimited homestead exemptions.<sup>22</sup>

Initially, this article will study two different Code exemptions debtors may use: 1) the homestead exemption that is located in section 522(b)(3)(A) (“Homestead Provision”) and 2) the TBE Exemption that is located in section 522(b)(3)(B). Then the article will provide legislative history and case law to demonstrate that Congress intended to prevent the abusive use of unlimited state homestead exemptions when it passed section 522(o), (p), and (q). A hypothetical will then showcase the TBE Loophole and demonstrate how the loophole renders section 522(o), (p), and (q) de facto nullified as applied to certain debtors. Finally, the article propounds a solution to close the TBE Loophole and prevent abuse of the Code, just as Congress intended but ultimately failed to accomplish. Specifically, this article seeks to compel Congress to re-write the Code and apply the homestead exemption-limiting provisions of section 522(o), (p), and (q) to the TBE Exemption, located in section 522(b)(3)(B).

## II. OVERVIEW OF CONSUMER BANKRUPTCY, HOMESTEAD EXEMPTIONS AND THE TENANCY BY THE ENTIRETY EXEMPTION

### A. *Relevant Consumer Bankruptcy Code Sections*

Understanding the exemptions and loopholes warrants a broad overview of consumer bankruptcy. Consumer debtors who intend to file for bankruptcy start by choosing which chapter of the Code they want to use when filing a petition.<sup>23</sup> Chapter 7 is generically called a liquidation because all of the debtor’s non-exempt assets are used to pay creditors.<sup>24</sup> In contrast, Chapter 13, which is generically an adjustment of the debts of “an individual with regular income,” forces the debtor to present to the bankruptcy court a plan for repaying certain debts according to the requirements in the Code.<sup>25</sup> Bankruptcy petitioners usually opt for Chapter 7 to protect property they will acquire after filing for

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<sup>22</sup> Many bankruptcy courts have interpreted Congressional intent as it pertains to BAPCPA’s changes to homestead exemptions. See *In re Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 2005). In *Wayrynen*, the Court understood that Congress, in passing BAPCPA, intended to limit the amount the debtor could exempt as his homestead to the amount set out in 11 U.S.C. § 522(p). *Id.* at 483.

<sup>23</sup> See WILLIAM D. WARREN & DANIEL J. BUSSEL, *BANKRUPTCY* 509 (7th ed. 2006).

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 20-21.

bankruptcy.<sup>26</sup> When a debtor files for Chapter 7 all the debtor's property goes into the bankruptcy estate.<sup>27</sup> The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."<sup>28</sup>

On the other hand, debtors who choose to file for Chapter 13 usually do so in an attempt to protect currently owned property.<sup>29</sup> Debtors then propose a plan to pay creditors a percentage of their claims.<sup>30</sup> Owning a home, in many cases, is the dispositive factor in deciding which chapter a debtor will file under because most debtors want to protect their home.<sup>31</sup> Debtors that own homes are 2,772 percent more likely to file for Chapter 13 rather than Chapter 7,<sup>32</sup> and prior to BAPCPA's passage, a debtor could file for Chapter 7 or Chapter 13 at his own discretion.<sup>33</sup> Pre-BAPCPA, about one-third of all debtors chose to file for Chapter 13.<sup>34</sup>

<sup>26</sup> Cf. *id.* at 541 (explaining that based on the differences between Chapter 7 and Chapter 13, "one might predict that those debtors with relatively large unsecured debts, few secured debts, and little non-exempt property would disproportionately choose Chapter 7"). Because these debtors do not possess a substantial amount of non-exempt assets, they are looking to the future, while debtors who file Chapter 13 are seeking to protect non-exempt assets they currently own. See *id.* at 539.

Bankruptcy law shorthand is used throughout the article. When the article mentions a debtor, "filing for Chapter 7" or "filing for Chapter 13," this means that the debtor is filing his bankruptcy petition pursuant to 11 U.S.C. §§ 701-27 or 11 U.S.C. §§ 1301-30.

<sup>27</sup> See 11 U.S.C. § 541(a)(1) (2007) (stating that at the beginning of a bankruptcy case, all interests the debtor has in property become property of the bankruptcy estate).

<sup>28</sup> U.S. v. *Whiting Pools, Inc.*, 462 U.S. 198, 198 (1983) (citing 11 U.S.C. § 541(a)(1)). In *Whiting Pools*, the Court held that property the IRS seized before the debtor filed for bankruptcy was still a part of the bankruptcy estate, and the IRS must turn the property over to the bankruptcy estate. *Id.* at 211-12.

<sup>29</sup> See WARREN & BUSSEL, *supra* note 23, at 541 (arguing that debtors with many non-exempt assets will choose Chapter 13 to keep and preserve those assets).

<sup>30</sup> See 11 U.S.C. § 1325 (2007) (allowing a debtor in Chapter 13 to file a plan and keep the assets already owned as long as the debtor complies with the requirements put forth in Chapter 13 of the Code). Generally speaking, in the plan the debtor must: 1) pay each secured creditor the present value equal to the amount of their claim; and 2) pay each unsecured creditor at least what that creditor would have received if the case was filed in Chapter 7. See WARREN & BUSSEL, *supra* note 23, at 539.

<sup>31</sup> See Ian Domowitz & Robert L. Sartin, *Incentives and Bankruptcy Chapter Choice: Evidence from the Reform Act of 1978*, 28 J. LEGAL STUD. 461, 481 (1999) (concluding that homeownership greatly enhances the likelihood a debtor will file for Chapter 13).

<sup>32</sup> *Id.* In addition, if a debtor has a high level of equity in his home he is eleven times more likely to file for a Chapter 13 reorganization. *Id.*

<sup>33</sup> WARREN & BUSSEL, *supra* note 23, at 509.

<sup>34</sup> See *id.* (according to the Annual Report of the Director of the Administrative Office of U.S. Courts in 2004, approximately 450,000 Chapter 13 cases were filed, but more than 1.1 million Chapter 7 cases were filed).

When a debtor files for bankruptcy, either under Chapter 7 or Chapter 13, he receives immediate protection.<sup>35</sup> All legal actions a creditor may take in state court are stopped pursuant to section 362 of the Code, also known as the “automatic stay,”<sup>36</sup> but some creditors may seek relief from the automatic stay to enforce, create, or perfect any lien<sup>37</sup> against property of the bankruptcy estate.<sup>38</sup> Just as debtors file bankruptcy petitions to protect themselves, creditors too must file claims in bankruptcy court to protect their interests.<sup>39</sup>

Under Chapter 7, if the bankruptcy court approves the creditor’s claim, fully secured creditors are usually paid in full.<sup>40</sup> On the other hand, unsecured creditors will only receive a pro-rata portion of their claims, or they may receive nothing at all.<sup>41</sup> In Chapter 7, the Code determines the

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<sup>35</sup> See Sarah Keith-Bolden, *Down and Out and Now Kicked Out: Residential Lease Evictions and the Automatic Stay*, 23 EMORY BANKR. DEV. J. 585, 591 (2007) (explaining that when a debtor files for bankruptcy all the debtor’s property is placed in the bankruptcy estate, and all property in the bankruptcy estate is protected from any action a creditor may bring to obtain possession of the debtor’s property) (citation omitted).

<sup>36</sup> See, e.g., 11 U.S.C. § 362(a)(4) (2007) (preventing “all entities” from performing “any act to create, perfect, or enforce any lien against property of the estate”).

<sup>37</sup> “The term ‘lien’ means charge against or interest in property to secure payment of a debt or performance of an obligation.” *Id.* § 101(37).

<sup>38</sup> Robert A. Izard, Jr. & Kathleen M. Porter, *Issues in Litigation: Proof of Relief From Stay*, 2 BANKR. L. & PRAC. 891, 893 (1993) (explaining in what circumstances a creditor may receive “relief from stay,” allowing that creditor to “pursue whatever remedies it has against the collateral and the debtor outside of bankruptcy”). A creditor may receive relief from stay if: 1) the creditor’s interest in the property is not adequately protected by the debtor; or 2) if the debtor has no equity in the property and the property is not necessary for the debtor to reorganize. *Id.*

<sup>39</sup> See 11 U.S.C. § 726(a)(2) (2007) (allowing property of the bankruptcy estate to be distributed only for “allowed unsecured claim[s]”). When a court “allows” a claim, this means it is recognized by the bankruptcy court as valid for the amount the creditor claimed. WARREN & BUSSEL, *supra* note 23, at 83.

<sup>40</sup> See Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386, 2395 (2001) (explaining that it is fundamental to the Bankruptcy Code that secured debtors are paid up to the value of the collateral, the amount the creditor is owed); see also 11 U.S.C. § 506(a)(1) (2007) (stating that the creditor is owed the amount secured and any amount the creditor is owed that is over the value of the collateral will be considered an unsecured claim).

<sup>41</sup> When a debtor files for Chapter 7, the Code pays secured creditors up to the extent they are secured; it then pays certain unsecured creditors based on “priority,” as set forth in section 507 of the Code. See 11 U.S.C. § 507 (2007) (listing ten priority claims that are paid before unsecured creditors’ claims are paid). Unsecured creditors usually receive no payment in Chapter 7 bankruptcies or are only paid a percentage of their claims. See WARREN & BUSSEL, *supra* note 23, at 349. In over ninety-five percent of all Chapter 7 cases, debtors have no assets, and thus, there is nothing to distribute to unsecured creditors. *Id.* at 509.



distribution of the debtor's assets;<sup>42</sup> in Chapter 13, the debtor's plan determines how creditors are paid.<sup>43</sup> However, the plan must satisfy certain criteria set forth in the Code.<sup>44</sup>

Another actor in bankruptcy court is the trustee. It is the trustee's job to preserve and protect the bankruptcy estate and facilitate the equitable distribution of the estate to creditors.<sup>45</sup> In many respects, the trustee's interests are aligned with unsecured creditors, and it is the trustee's responsibility to make sure no creditor is advantaged to the detriment of another.<sup>46</sup>

Whether a debtor files under Chapter 7 or Chapter 13, the Code provides opportunities to protect his property and assets.<sup>47</sup> Section 522 of the Code sets out exemptions debtors may use to prevent creditors from obtaining the value of certain assets.<sup>48</sup> Section 522 exempts certain property that is already in the bankruptcy estate, and thus, the property is protected from any process a creditor may bring.<sup>49</sup> Debtors may use the federal exemptions listed in section 522(d) unless the state in which they are domiciled is an "opt-out" state.<sup>50</sup> In opt-out states, debtors use exemptions provided by state law.<sup>51</sup> Thus, in opt-out states, the

<sup>42</sup> See generally *supra* note 41.

<sup>43</sup> See 11 U.S.C. §§ 1321-30 (2007).

<sup>44</sup> See *id.* § 1325 (listing the requirements a debtor must satisfy before a plan is confirmed); see also *supra* note 30 (explaining the general requirements a debtor in Chapter 13 must meet).

<sup>45</sup> Cf. 11 U.S.C. § 547 (2007) (allowing the trustee to avoid transfers that are contrary to the Code's method of assets distribution or contrary to the list of preferences provided by the Code); *id.* § 548 (allowing the trustee to avoid any transfer that was fraudulent as to creditors, thereby pulling the fraudulently transferred asset back into the bankruptcy estate for distribution to creditors).

<sup>46</sup> The trustee pulls assets into the estate so unsecured creditors may be paid a greater percentage of their claims. See *id.* § 548. Similarly, the Code is designed to allow for an "orderly liquidation procedure under which all creditors are treated equally." WARREN & BUSSEL, *supra* note 23, at 213 (citing from the House Report on the changes made to the Bankruptcy Code in 1978).

<sup>47</sup> See generally 11 U.S.C. § 522 (2007) (listing all the exemptions a debtor may take under federal law and allowing the debtor to take certain state law exemptions under specified conditions).

<sup>48</sup> See *id.* § 522(b)(1) (allowing debtors to exempt property listed in subsequent sections of the Code).

<sup>49</sup> See *id.* (stating "an individual debtor may exempt from property of the estate the property listed" in the subsequent paragraphs). Since the property is within the bankruptcy estate, creditors cannot bring legal claims against it in bankruptcy court. See *id.* § 362(a) (preventing creditors from creating, perfecting, or enforcing any lien against property of the bankruptcy estate).

<sup>50</sup> See *id.* § 522(b)(2) (stating that exempt property is property listed in section 522(d) "unless the State law that is applicable to the debtor under paragraph (3)(A)," the homestead exemption, specifically does not authorize the use of federal exemptions).

<sup>51</sup> See *In re McNabb*, 326 B.R. 785, 786 n.1 (Bankr. D. Ariz. 2005) (explaining that Arizona is one of those states that has opted-out of the federal exemptions located in section 522(d) of the Code,

substantive rights and protections a debtor receives when invoking these exemptions are based wholly on state law.<sup>52</sup> The Code in this situation functions more as a procedural body of law, giving the debtor the opportunity to invoke state exemptions.<sup>53</sup> At the same time, the Code can, pursuant to the Supremacy Clause,<sup>54</sup> substantively constrain these exemptions provided by state law.<sup>55</sup>

Just as debtors have many opportunities to exempt assets, trustees and creditors can look to the Code and state law to prevent debtors from concealing assets or committing fraud.<sup>56</sup> This article discusses, in detail, fraudulent transfers with respect to state homestead exemptions. For fraudulent transfers, the trustee may use either section 548 of the Code, which specifically deals with fraudulent transfers, or applicable state law.<sup>57</sup> The state law dealing with fraudulent transfers is primarily the state's version of the Uniform Fraudulent Transfer Act ("UFTA").<sup>58</sup>

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and thus, debtors in the state may only use state exemptions).

<sup>52</sup> See *In re Kaplan*, 331 B.R. 483, 484 (Bankr. S.D. Fla. 2005) (citing certain opt-out states such as Arizona and Florida, which force debtors to use state exemptions). There are thirty-seven states that have opted out of federal exemptions. See Richard M. Hynes et al., *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19, 25-26 (2004) (providing a table that lists all the states that have opted-out). There are currently only two non-opt-out states, Minnesota and Texas. In these states, a debtor may choose between using federal exemptions or state exemptions. Thus, there are eleven states where residents must use federal exemptions. Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 202 (2007).

<sup>53</sup> See *infra* note 68 (explaining how the Code is set up to preserve Federalism, giving the federal government the ability to set up the Bankruptcy Code, but reserving to the states the ability to define property rights when debtors file for bankruptcy).

<sup>54</sup> U.S. CONST. art. VI, cl. 2. The federal government has the power to make laws concerning bankruptcies. *Id.* art. I, § 8, cl. 4. Thus, in the area of bankruptcy law, Congress can abrogate state law.

<sup>55</sup> The most obvious example, and one this article discusses in detail, is Congress constraining the protections of state homestead exemptions by passing 11 U.S.C. § 522(o), (p), and (q). See 11 U.S.C. § 522(o), (p), (q) (2007).

<sup>56</sup> See *id.* § 548(a)(1)(A) (permitting the trustee to avoid a transfer made with the intent to "hinder, delay, or defraud" a creditor); *Id.* § 544(b)(1) (allowing the trustee to step into the shoes of an unsecured creditor and use any state law that would be available to an unsecured creditor seeking to obtain payment for a claim in state court).

<sup>57</sup> See *supra* note 46 and accompanying text (explaining the duties of the trustee to protect unsecured creditors and property belonging in the bankruptcy estate); 11 U.S.C. § 544(b)(1) (2007) (giving the trustee the power to avoid a transfer by the debtor if the transfer was voidable by any creditor holding an unsecured claim in state court).

<sup>58</sup> See UNIF. FRAUDULENT TRANSFER ACT, Refs. & Annots. (1984) (listing forty-four states that have adopted the UFTA).

Finally, if the trustee or creditors cannot prevail under section 548 or the UFTA, they still may seek the strictest sanction available, denying the debtor his discharge under section 727.<sup>59</sup> The trustee or creditors may ask the court to deny the debtor's discharge for many reasons.<sup>60</sup> For example, a court may deny a debtor his discharge if: 1) the debtor intentionally defrauded a creditor or an officer of the estate;<sup>61</sup> 2) the debtor "concealed, destroyed . . . falsified, or failed to . . . preserve" records unless such an act was justified under the circumstances;<sup>62</sup> 3) the debtor lied under oath;<sup>63</sup> or 4) the debtor failed to explain the disappearance of assets.<sup>64</sup> Denying the debtor discharge under section 727 is the harshest sanction a bankruptcy court can impose and most courts are reluctant to do so.<sup>65</sup>

B. *Code Sections a Debtor Must Use to Take Advantage of the "Tenancy by the Entirety Loophole"*

Now that the relevant Code provisions have been briefly explained, this article will discuss, in detail, the Code sections a debtor must use to take advantage of the TBE Loophole. As a threshold matter, a state must have an unlimited state homestead exemption and recognize the tenancy by the entirety estate for the TBE Loophole to function. This article will now discuss: 1) the Code's Homestead Provision, section 522(b)(3)(A); 2) unlimited state homestead exemptions; 3) the Code's TBE Exemption, section 522(b)(3)(B); and 4) state tenancy by the entirety laws. However before delving into the intricacies of these areas of law, analytical clarification is needed to explain how Code provisions and state laws interact for the purpose of explaining the TBE Loophole.

As will be explained in Part IV, the TBE Exemption and corresponding state tenancy by the entirety laws are important only because of the procedural opportunity these laws afford debtors. Simply put, when a debtor owns his home as a tenant by the entirety, this allows

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<sup>59</sup> Section 727 of the Code gives the bankruptcy court the power to deny a debtor his discharge if the debtor commits certain acts or fails to perform certain acts. See 11 U.S.C. § 727(a)(1)-(12) (2007).

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* § 727(a)(2).

<sup>62</sup> *Id.* § 727(a)(3).

<sup>63</sup> *Id.* § 727(a)(4)(A).

<sup>64</sup> 11 U.S.C. § 727(a)(5) (2007).

<sup>65</sup> *Cf. In re Booth*, 70 B.R. 391, 394 (Bankr. D. Colo. 1987) (holding that because denying a debtor his discharge is a much harsher sanction than excepting a debt from discharge, the burden of proof that must be satisfied by the party requesting the denial is clear and convincing evidence).

him to use the TBE Exemption located in section 522(b)(3)(B).<sup>66</sup> Then, by choosing the TBE Exemption, the debtor can take advantage of the substantive protections provided by certain states' unlimited homestead exemptions *without* any of the Code's homestead exemption-limiting provisions applying to the debtor's homestead.<sup>67</sup>

This article examines state tenancy by the entirety laws only because they allow debtors *in bankruptcy* to exploit unlimited state homestead exemptions.<sup>68</sup> State tenancy by the entirety laws also provide debtors with protections, such as the "TBE Shield," which applies concurrently with state homestead exemptions.<sup>69</sup> This article, however, is not concerned with the substantive protections state tenancy by the entirety laws provide, either in bankruptcy court or in state court. With that said, state homestead exemptions will now be examined.

### C. State Homestead Exemptions: History, Policy, and Abuse

Homestead exemptions, which protect the debtor's principal residence,<sup>70</sup> are a controversial and important exemption available to all

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<sup>66</sup> See *In re Hinton*, 378 B.R. 371, 376 (Bankr. M.D. Fla. 2007) (explaining that a debtor must own his home as a tenant by the entirety according to state law to claim property as exempt pursuant to section 522(b)(3)(B)).

<sup>67</sup> See *infra* note 209 and accompanying text (explaining how section 522(o), (p), and (q) of the Code does not apply to the TBE Exemption, allowing debtors to take advantage of a loophole in the Code).

<sup>68</sup> See *Butner v. United States*, 440 U.S. 48, 48-49 (1979) (holding that the Bankruptcy Code "generally leaves the determination of property rights in the assets of a bankrupt's estate to state law"). In this way, the Code allows Congress to control bankruptcies, in accordance with Article I, Section 8 of the Constitution, but at the same time does not usurp states' rights, preserving federalism. Compare *id.* (preserving states' rights in determining the assets of the debtor) with U.S. CONST. art. I, § 8 (stating "Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

<sup>69</sup> See Robert Laurence, *Attacking the Acquisition and Forcing the Sale of an Indivisible Arkansas Homestead*, 55 ARK. L. REV. 473, 477 (2002) (noting that the protections the tenancy by the entirety estate provides under state law apply in addition to the protections provided by the state homestead exemption). State homestead exemptions provide much more protection than the tenancy by the entirety estate does. See *id.* at 475-77 (using a hypothetical to demonstrate how the tenancy by the entirety estate will not protect the homestead in certain situations, while, in the same hypothetical, state homestead exemptions will apply to shield the property from creditors). For an in-depth explanation about the concurrent applications and respective protections provided by the tenancy by the entirety estate when compared to state homestead exemptions see *id.*

<sup>70</sup> The homestead in Oklahoma is defined as, "[t]he home of such person, provided that such home is the principal residence of such person." OKLA. STAT. ANN. tit. 31, § 1(A)(1) (West 2007); see also IOWA CODE ANN. § 561.16 (West 2008) (describing the homestead as where the resident

debtors.<sup>71</sup> Originally, the homestead exemption was created by state law; Texas first recognized and incorporated a homestead exemption into its Constitution in 1845.<sup>72</sup> Along with other exemption laws, the homestead exemption protected the debtor and his family from becoming wards of the state. The idea behind the exemption was that debtors should be given enough property and income to “keep going and to make a fresh start toward solvency.”<sup>73</sup> Texas cited three major public policy rationales for the homestead exemption: 1) the protection of debtors; 2) the protection of women; and 3) fostering the spirit of settler’s independence.<sup>74</sup> Other courts have commented that the “object of all homestead legislation is to protect the home, to furnish shelter for the family, and to promote the interest and welfare of society . . . .”<sup>75</sup> Most states provide citizens with homestead protection,<sup>76</sup> but do so in widely varying forms.<sup>77</sup>

Texas, Florida, Iowa, Oklahoma, Kansas, Arkansas, and the District of Columbia have adopted some form of unlimited homestead exemptions.<sup>78</sup>

“habitually reside[s]”).

<sup>71</sup> See Jeremy Berkowitz & Richard Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J.L. & ECON. 809, 810 (1999) (stating that many debtors file for bankruptcy for the sole purpose of retaining their home by discharging other debts). One must distinguish between state homestead exemptions, which are provided by state law and are substantive, and the Code’s Homestead Provision, section 522(b)(3)(A), which simply provides debtors with the opportunity to use their state’s homestead exemption in federal bankruptcy court, and thus is procedural in nature.

<sup>72</sup> James W. Paulsen, *Introduction: The Texas Home Equity Controversy in Context*, 26 ST. MARY’S L.J. 307, 310 (1995).

<sup>73</sup> WARREN & BUSSEL, *supra* note 23, at 61.

<sup>74</sup> Paulsen, *supra* note 72, at 310-12. Texas originally enacted the exemption to encourage immigration, providing settlers with a fresh start after the Panic of 1837. *Id.* at 310. Additionally, Texas wanted to prevent “forced sales” by the courts so that its residents retained a sense of freedom and independence necessary for the existence of democratic institutions. *Id.* at 312.

<sup>75</sup> *Gross v. Gross*, 491 N.W.2d 751, 753 (S.D. 1992) (quoting *Kingman v. O’Callaghan*, 57 N.W. 912, 915 (S.D. 1894)). Arkansas courts have held that “[t]he object of homestead laws is the protection of the family from dependence and want.” *Middleton v. Lockhart*, 43 S.W.3d 113, 119 (Ark. 2001) (citations omitted). “It is intended to preserve the family home.” *Id.* (citations omitted). “Further, the law is to be liberally construed in the interest of the family home.” *Id.*

<sup>76</sup> See Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 178 (2002).

<sup>77</sup> Virginia’s paltry homestead exemption is capped at \$5,000. VA. CODE ANN. § 34-4 (West 2007). While other states, such as Kansas, provide its citizens with an unlimited exemption. See KAN. STAT. ANN. § 60-2301 (West 2007). *But see* Hynes & Posner, *supra* note 76, at 178 (listing a majority of states that, as of 1996, had homestead exemptions of less than \$100,000).

<sup>78</sup> See FLA. CONST. art. X, § 4(a)(1) (providing Florida residents with a state constitutional right to hold their homestead, up to 160 acres, free from “forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon” except with respect to purchase money

For a simple overview of the details of these states' unlimited exemptions, please see the chart *infra* in Appendix A. This article focuses only on states with unlimited homestead exemptions because unlimited exemptions are the easiest to abuse.<sup>79</sup>

With this in mind, in 1845, Texas included in its Constitution a homestead exemption that denied judgment creditors the right to force judicial sale of the home and denied them the ability to attach judicial liens to homestead property.<sup>80</sup> Texas law currently sets out eight specific exceptions to this original constitutional homestead exemption, such as for reverse mortgages and second mortgages. But in general, these exceptions only apply when the debtor contracts for a consensual, secured lien on the homestead, giving a creditor the ability to foreclose on the property.<sup>81</sup> Florida's constitutional homestead exemption is similar to Texas's and protects the homestead from foreclosure brought by unsecured creditors and prevents the attachment of liens.<sup>82</sup> Iowa's unlimited homestead exemption also protects the homestead both from judicial sale and judicial liens but does so through statute.<sup>83</sup>

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mortgage liens, mechanic's liens and tax liens); ARK. CONST. art. IX, §§ 3-5 (providing residents with a state constitutional right to hold their homestead free of any liens, for up to one acre in the city and 160 acres outside of the city, with the exceptions of purchase money mortgages, tax liens, and mechanic's liens); D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2007) (providing D.C. residents with a statutory homestead exemption, which protects all interest in a residence from the attachment of liens, with exceptions only for deeds of trust, mortgages, mechanic's liens, or tax liens); *see also* Hynes & Posner, *supra* note 76, at 178 (listing Texas, Iowa, Oklahoma, and Kansas as states with unlimited homestead exemptions); *In re McDonald*, 279 B.R. 382, 383 n.1 (Bankr. D.D.C. 2002) (noting that the District of Columbia joined both Florida and Texas by providing its citizens with an unlimited homestead exemption). South Dakota's homestead exemption is also unlimited, but is only available to debtors seventy years and older. *See* Daniel Morman, *Judgment Liens, Homestead Exemptions and Involuntary Bankruptcies: Who Gets What After BAPCPA*, 24 AM. BANKR. INST. J., Aug. 2005, at 20.

<sup>79</sup> *See supra* notes 2-5 and accompanying text (presenting prior cases of abuse and explaining how debtors take advantage of unlimited homestead exemptions).

<sup>80</sup> TEX. CONST. art. XVI, § 50 (amended 2007); Paulsen, *supra* note 72, at 310.

<sup>81</sup> *See* TEX. CONST. art. XVI, § 50 (amended 2007) (listing the eight exceptions, which include, among others, consensual liens, mechanic's liens, reverse mortgages, and second mortgages). For a list of all eight exceptions, please see the chart listing relevant states' homestead exemptions in Appendix A.

<sup>82</sup> *See* FLA. CONST. art. X, § 4(a) (limiting a creditor to foreclosing only "for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty"); *see also, e.g.*, Morman, *supra* note 78, at 20 (cataloguing and examining various states' unlimited homestead exemptions).

<sup>83</sup> *See* IOWA CODE ANN. § 561.16 (West 2007) (exempting a resident's homestead from judicial sale); IOWA CODE ANN. § 624.23(2) (West 2007) (disallowing the attachment of liens to homestead property). The Iowa Supreme Court interpreted these two statutes to protect the

On the other hand, Oklahoma's unlimited homestead exemption generally protects the homestead constitutionally and then specifically reinforces this through statute.<sup>84</sup> Article XII, section 2 of Oklahoma's Constitution tracks Florida's, only allowing a forced sale for purchase money mortgages, state property tax liens, and mechanic's liens.<sup>85</sup> Then, through statute, the homestead is specifically limited in area to one acre in urban areas and 160 acres in rural areas.<sup>86</sup>

Oklahoma's unlimited homestead exemption is not as protective as Florida's exemption.<sup>87</sup> In Oklahoma, a judgment creditor may attach liens to a debtor's homestead, and the creditor is only prevented from enforcing those liens while the debtor holds the property as his homestead.<sup>88</sup> Thus, if the debtor seeks to alienate his homestead or severs the unities<sup>89</sup> in a tenancy by the entirety arrangement through divorce, the creditor may enforce its lien that previously attached to the homestead property.<sup>90</sup>

But uniquely, Kansas's constitutional homestead exemption only denies unsecured creditors or judgment creditors the remedy of a forced judicial sale.<sup>91</sup> Under state law, a creditor may attach judicial liens but

homestead from both judicial sales and judicial liens. *Baratta v. Polk County Health Servs. Inc.*, 588 N.W.2d 107, 110 (Iowa 1999). Thus, Iowa law only allows a judgment creditor to force a sale when the state's statutes explicitly allow the creditor to do so. IOWA CODE ANN. § 561.16 (West 2007).

<sup>84</sup> OKLA. CONST. art. XII, § 2.

<sup>85</sup> *Id.*

<sup>86</sup> OKLA. STAT. ANN. tit. 31, § 2(a), (c) (West 2007); see *In re Duncan*, 107 B.R. 754, 757 (Bankr. W.D. Okla. 1988) (interpreting Oklahoma's homestead statute, title 31, section 2, as placing no limit on the value a debtor may exempt for the allowable 160 acres of land in rural areas).

<sup>87</sup> See *Toma v. Toma*, 163 P.3d 540, 542 n.1 (Okla. 2007) (finding that chapter 12, section 706(b) of Oklahoma law, passed in 1997, allows judgment liens to attach to a debtor's homestead property, but the homestead is exempted from a forced judicial sale).

<sup>88</sup> *Id.* In *Toma*, the Supreme Court of Oklahoma held that a judgment lien attached to the debtor's homestead, but the creditor cannot recover due to the state's homestead exemption. The court further held that the creditor could have recovered if the joint tenancy with a right to survivorship was severed or if the debtor no longer used the property as his homestead. *Id.* at 546-47. Unfortunately for the creditor, the debtor died and the property immediately vested in his wife. As a joint tenant, she owned the undivided whole, and thus, the creditor never had a chance to extract the debtor's interest from the property. *Id.*

<sup>89</sup> See *infra* note 129 and accompanying text (explaining the unities required for property to be held as a tenancy by the entirety).

<sup>90</sup> See Laurence, *supra* note 69, at 476 (explaining that when the owners of a home divorce, creditors may then enforce liens against the homestead).

<sup>91</sup> Morman, *supra* note 78, at 20. Morman compares Article XV, Section 9 of the Kansas Constitution, which denies a creditor the ability to force a judicial sale, with Kansas Statute Section 60-2202(a), which allows a judgment lien to attach to the debtor's residence in the county where the property is located. *Id.*

may not collect, analogous to Oklahoma.<sup>92</sup> In Arkansas, a married debtor, or a debtor who is “head of a family,”<sup>93</sup> receives an unlimited exemption for property less than a one acre but greater than a quarter acre in the city and less than 160 acres but greater than 80 acres in the country.<sup>94</sup> Finally, the District of Columbia, through statute, changed its Homestead Exemption from \$16,150 to unlimited in 2001.<sup>95</sup> In D.C., unsecured creditors are denied the right to attach liens and to force sale of the homestead.<sup>96</sup>

The six states examined above have all opted out of the federal exemptions located in section 522(d); thus, debtors in those states must use state exemption laws.<sup>97</sup> The District of Columbia has not opted out, meaning its residents may use either federal or state exemptions.<sup>98</sup> It should also be noted that, based on the Supremacy Clause, federal tax liens can attach to homestead property and be enforced by foreclosure despite any state homestead exemption.<sup>99</sup> While homestead exemptions generally provide needed protection to many, unlimited homestead exemptions have several negative effects.<sup>100</sup> Residents of states with high

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<sup>92</sup> See *id.*

<sup>93</sup> “Head of family” implies one who cares for his or her children; that person may receive homestead exemption protection even without being married. See *Middleton v. Lockhart*, 43 S.W.3d 113, 120 (Ark. 2001) (holding that anyone who is either married or the head of a household may obtain a homestead exemption); see also Robert Laurence, *Mobile Homesteads, and in Particular the Exempt Status of Mobile Homes Located on Rented Lots: The Laws of Arkansas, Mississippi, Nebraska, and Utah Compared and the Principle of the Liberal Construction of Exemption Statutes Analyzed*, 57 ARK. L. REV. 221, 221 n.2 (2004) (explaining Arkansas’s unlimited homestead exemption, and its disparate applications as it relates to gender equality).

<sup>94</sup> ARK. CONST. art. IX, §§ 3-5.

<sup>95</sup> See *In re McDonald*, 279 B.R. 382, 384 (Bankr. D.D.C. 2002) (noting how the District of Columbia broke from the federal homestead exemption limit, listed in 11 U.S.C. § 522(d)). D.C. codified a statutory unlimited homestead exemption in 2001. See D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001).

<sup>96</sup> See D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001). Under the D.C. Code, homestead property, “is free and exempt from distraint, attachment, levy, or seizure and sale on execution or decree of any court in the District of Columbia . . .” *Id.* § 15-501(a) (emphasis added).

<sup>97</sup> See Hynes et al., *supra* note 52, at 25-26 (listing the thirty-seven states that have opted out of the federal exemptions located in section 522(d)).

<sup>98</sup> See *McDonald*, 279 B.R. at 384 (noting that D.C. residents may elect either the District’s exemptions or the federally provided exemptions).

<sup>99</sup> See *United States v. Rodgers*, 461 U.S. 677, 701 (1983).

<sup>100</sup> See, e.g., *supra* note 19 and accompanying text (explaining that credit may not be available to poorer residents because large state homestead exemptions shrink the credit supply, and explaining that anytime a debtor defaults, an implicit bankruptcy tax is placed on all consumer loans because the creditor must recoup lost revenue). *But see* Hynes & Posner, *supra* note 76, at 190 (citation omitted) (arguing that large state exemptions are actually beneficial to low-income households because they



homestead exemption caps whose incomes are in the upper fifty percent have been found to have a higher demand for credit,<sup>101</sup> while lower-income borrowers in high exemption states hold less debt.<sup>102</sup> Thus, “[h]ouseholds with large amounts of assets have the most to gain from generous bankruptcy exemptions.”<sup>103</sup> Large exemptions reduce the credit available to low-income households because there is an overall reduction in the credit supply.<sup>104</sup>

Additionally, infamous millionaires, such as O.J. Simpson<sup>105</sup> and former Enron CEO Kenneth Lay,<sup>106</sup> have taken advantage of unlimited state exemptions, even if they did not subsequently file for bankruptcy.<sup>107</sup> In the wake of the Enron scandal, Kenneth Lay sold his lavish homes in Colorado, but continued to hold onto a mansion in Texas.<sup>108</sup> In fact, Congress specifically wrote one section of BAPCPA, section 522(q), to prevent executives, like Lay, from abusing state homestead exemptions.<sup>109</sup>

The goal of the Bankruptcy Code is to give debtors a fresh start—not a head start—toward solvency.<sup>110</sup> The Code should give debtors exemptions to protect them from becoming destitute, but should not allow debtors to abuse state exemptions.<sup>111</sup> It should not protect acts done

shrink the amount of credit available, preventing low-income debtors from borrowing beyond their means and ending up in bankruptcy).

<sup>101</sup> Reint Gropp et al., *supra* note 19, at 220.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Todd Zywicki, *Bankrupt Criticisms*, NAT’L REV. ONLINE, Mar. 15, 2005, <http://www.nationalreview.com/comment/zywicki200503150744.asp> (citing O.J. Simpson as having moved to Florida to take advantage of the homestead exemption, and thus preventing the seizure of his property that would go to pay the multi-million dollar civil judgment against him).

<sup>106</sup> Lay, the former CEO of Enron, kept a \$7.1 million house in Texas, while selling off \$20 million in property located in Colorado. Philip Shenon, *Enron’s Many Strands: The Executives; Home as Shield from Creditors Under Fire*, N.Y. TIMES, Apr. 4, 2002, at C1. Colorado’s homestead exemption is limited to \$60,000. COLO. REV. STAT. ANN. § 38-41-201(1)(a) (West 2007).

<sup>107</sup> See Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 16 (2007) (citing Enron executives’ use of Florida’s and Texas’s generous homestead exemptions as part of the impetus for passing the homestead exemption-limiting provisions in BAPCPA).

<sup>108</sup> Shenon, *supra* note 106, at C1.

<sup>109</sup> See H.R. REP. NO. 109-31, at 595 (2005) (stating that the limitations relating to securities violations in section 522(q) were placed in BAPCPA as a response to Kenneth Lay’s actions in the wake of the Enron scandal).

<sup>110</sup> See *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988).

<sup>111</sup> See *id.* (finding that the debtor fraudulently used annuities to prevent creditors from recovering and denying the debtor his discharge).

to preserve a lifestyle a debtor could not afford, while creditors are paid pennies on the dollar.<sup>112</sup> Due to these, and many other egregious abuses by high profile debtors,<sup>113</sup> the homestead exemption has been under criticism for many years.<sup>114</sup>

Now that state homestead exemptions have been critically examined, the other exemption, the tenancy by the entirety exemption, must be discussed. This is a federal exemption based on the common law estate and is significant because debtors must move to a state that allows residents to hold property as tenants by the entirety if the debtor wants to take advantage of the TBE Loophole.<sup>115</sup> Furthermore, as discussed in detail below, the TBE Loophole allows a debtor to bypass BAPCPA's homestead-restricting provisions, section 522(o), (p), and (q).<sup>116</sup> Thus, the new provisions are completely ineffective at accomplishing their purpose: preventing the abusive use of certain states' unlimited homestead exemptions.<sup>117</sup> As a consequence, debtors remain free to take advantage of certain states' unlimited homestead exemptions.<sup>118</sup>

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<sup>112</sup> If the Code gave a debtor the ability to preserve the lifestyle that led the debtor to file for bankruptcy, it would be contrary to the Code's purpose and not a fresh start, but rather a head start. *See id.* at 876.

<sup>113</sup> *See supra* note 2 and accompanying text (listing debtors such as Bowie Kuhn, the former commissioner of Major League Baseball, who have abused state homestead exemptions).

<sup>114</sup> *See* NAT'L BANKR. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS § 1.2.2, at 125-26 (1997), available at <http://govinfo.library.unit.edu/nrbc/report/05cccons.pdf> (recommending that state laws should govern the amount of the exemption which should be "not less than \$20,000 and not more than \$100,000.").

<sup>115</sup> *See supra* note 66 and accompanying text (explaining that state law determines who may hold property as tenants by the entirety).

<sup>116</sup> *See infra* note 209 and accompanying text (explaining that since the debtor elected to exempt his home under the TBE Exemption in section 522(b)(3)(B), section 522 (o), (p), and (q) does not apply). The homestead exemption provision in the Code, section 522(b)(3)(A), specifically states, "subject to subsections (o) and (p)"; this language is missing from the TBE Exemption, and thus the new BAPCPA provisions do not apply. *See* 11 U.S.C. § 522(b)(3)(A)-(B) (2007). This loophole may extend to property held as joint tenants, but that is beyond the scope of this article. *See id.* § 522(b)(3)(B) (allowing the debtor to exempt any "interest [held] as a tenant by the entirety or joint tenant") (emphasis added).

<sup>117</sup> The TBE Exemption allows the debtor to exempt "any interest in property in which the debtor had . . . an interest as a tenant by the entirety . . .". *Id.* That, of course, includes the homestead. *See id.*

<sup>118</sup> The effect of the TBE Exemption and the TBE Loophole is that section 522(o), (p), and (q) does not apply. This places a debtor that is attempting to exempt a homestead held as tenants by the entirety in the exact same position he was in prior to the passage of BAPCPA. *See supra* note 116 and accompanying text (explaining that BAPCPA's homestead exemption-limiting restrictions do not apply to any interest held as a tenant by the entirety).

D. *Tenancy by the Entirety Estate and the Procedural Opportunity Provided by the Tenancy by the Entirety Exemption, Section 522(b)(3)(B)*

Another significant *federal* exemption, the TBE Exemption, is found in section 522(b)(3)(B) of the Code.<sup>119</sup> Any debtor residing in a jurisdiction recognizing the tenancy by the entirety estate may use the TBE Exemption.<sup>120</sup> The TBE Exemption is used frequently by debtors<sup>121</sup> and, as explained *infra*, may become more popular due to the restrictions BAPCPA placed on debtors wishing to claim state homestead exemptions in bankruptcy court through section 522(b)(3)(A), the Homestead Provision.<sup>122</sup> While the TBE Exemption is provided by the Code, its availability and protections are based on the law of the state in which the bankruptcy court sits.<sup>123</sup> Thus, the TBE Exemption merely provides the debtor with access to state law protections he would otherwise have if he were in state court. Because state law dictates the substantive parameters of the TBE Exemption, a brief examination of state tenancy by the entirety law is necessary.

Married persons may hold real or personal property as tenants by the entirety, which is a common law estate.<sup>124</sup> Thirty states and the District of Columbia have laws governing tenancies by the entirety; among these are Arkansas, Florida, and Oklahoma.<sup>125</sup> All three states and the District of

<sup>119</sup> See 11 U.S.C. § 522 (b)(3)(B) (2007).

<sup>120</sup> See *supra* note 66 and accompanying text (finding that as long as the homestead property is held as tenants by the entirety, it may be exempted pursuant to the TBE Exemption).

<sup>121</sup> See, e.g., *In re O'Lexa*, 476 F.3d 177, 178 (3d Cir. 2007) (interpreting Pennsylvania's tenancy by the entirety protections and allowing a debtor to exempt property pursuant to section 522(b)(3)(B)); *Mathews v. Cohen*, 382 B.R. 526, 528 (M.D. Fla. 2007) (deciding whether debtors could exempt a stock certificate pursuant to section 522(b)(3)(B)); *In re Hinton*, 378 B.R. 371, 375 n.4 (Bankr. M.D. Fla. 2007) (stating that the debtor exempted his Florida homestead pursuant to section 522 (b)(3)(B)).

<sup>122</sup> This article demonstrates how a debtor can evade the new homestead exemption-limiting provisions of BAPCPA. Once debtors realize they can evade the provisions, it obviously follows that debtors who want to protect assets before filing for bankruptcy will use the TBE Loophole to do so. See generally H.R. REP. NO. 109-31, at 592-93 (listing debtors who, in the past, have funneled assets into an exempt homestead).

<sup>123</sup> See *In re Brannon*, 476 F.3d 170, 174 (3d Cir. 2007) (examining and applying Pennsylvania's tenancy by the entirety law to a bankruptcy case up on appeal).

<sup>124</sup> 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 52.01[1] (Michael Allan Wolf ed., LexisNexis 2000); *id.* at § 52.03[4].

<sup>125</sup> *Id.* § 52.01; see also *Davies v. Johnson*, 187 S.W. 323, 324 (Ark. 1916) (allowing Arkansas residents to hold property as tenants by the entirety); *Beal Bank, SSB v. Almand & Assoc.*, 780 So. 2d 45, 52 (Fla. 2001) (allowing Florida residents to hold property as tenants by the entirety); OKLA. STAT. ANN. tit. 60, § 74 (West 2007) (allowing Oklahoma residents to hold property as tenants by the

Columbia have unlimited state homestead exemptions.<sup>126</sup> Thus, as explained in Part IV, a debtor in these four jurisdictions can take advantage of the TBE Loophole.

State attitudes toward recognizing the tenancy by the entirety estate vary widely.<sup>127</sup> Despite this fact, each state that does recognize it has generally adopted the same requirements and restrictions.<sup>128</sup> For real property to be held as tenants by the entirety, six attributes must be present: 1) the owners are married; 2) each takes possession of the property at the same time; 3) each has an equal interest; 4) each has equal possession; 5) each has equal title in the property; and 6) both have the right of survivorship.<sup>129</sup> Each spouse is considered vested with the entire title of the property held.<sup>130</sup> In many states, when a married couple purchases a home there is a presumption the couple purchased the home as tenants by the entirety.<sup>131</sup> Finally, holding property as tenants by the entirety prevents either spouse from conveying his or her interest.<sup>132</sup>

The policy rationale behind the tenancy by the entirety estate is similar to the policy rationale for homestead exemptions. Both seek to preserve and protect the family home.<sup>133</sup> On the other hand, the

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entirety); D.C. CODE ANN. § 19-501 (LexisNexis 2001) (recognizing the tenancy by the entirety estate).

<sup>126</sup> Hynes et al., *supra* note 52, at 25-26.

<sup>127</sup> See *supra* note 125 and accompanying text (explaining that only thirty states allow residents to hold property as tenants by the entirety); see also *Beal Bank*, 780 So. 2d at 48-49 (finding that when a bank account is held in both spouses' names, a presumption arises that the bank account is held as tenants by the entirety). Florida law allows personal property to be held as tenants by the entirety. *Id.* at 54.

<sup>128</sup> See, e.g., *Weir v. Brigham*, 236 S.W. 435, 437 (Ark. 1951) (stating that for property to be held as tenants by the entirety "the unities of time, title, interest, and possession" must be present).

<sup>129</sup> See, e.g., *Beal Bank*, 780 So. 2d at 52 (setting forth all the necessary elements for property to be held as TBE property); 41 AM. JUR. 2D *Husband and Wife* § 18 (stating the required elements for property to be held as TBE property).

<sup>130</sup> *Beal Bank*, 780 So. 2d at 53.

<sup>131</sup> See, e.g., *Branch v. Polk*, 33 S.W. 424, 424 (Ark. 1895) (holding that property jointly conveyed to a husband and wife vests in them an estate in entirety); *Morrison v. Potter*, 764 A.2d 234, 237 (D.C. 2000) (holding that the "jurisdiction essentially employs a presumption that property, including bank accounts, held by a husband and wife as joint tenants is held by the entireties, unless proof of a contrary intent leads to a different result"); *Beal Bank*, 780 So. 2d at 58 (holding that as with jointly held realty, jointly held bank accounts are entitled to a presumption in favor of the property being held in the form of tenancy by the entireties property).

<sup>132</sup> POWELL, *supra* note 124, at § 52.03[1].

<sup>133</sup> Compare *id.* at § 52.03[5] (noting that the purpose of the tenancy by the entirety estate is to protect the home and the family) with *supra* note 74 and accompanying text (explaining the purpose of the homestead exemption, among others, is to preserve freedom and independence for the family).

protections the tenancy by the entirety estate provides, which this article refers to as the “TBE Shield,” are more circumscribed than the protections offered by state homestead exemptions; and the protections provided by homestead exemptions are qualitatively different from those provided by the TBE Shield. First, the TBE Shield only protects the “marital home and the familial benefits of dependent children.”<sup>134</sup> Conversely, state homestead exemptions may protect: 1) a marital homestead; 2) a homestead owned by a single adult; 3) a homestead owned by a single parent with marital children; or 4) a single parent with non-marital children.<sup>135</sup>

Second, the TBE Shield not only protects against the actions of creditors, similar to the homestead exemption, but also protects against the actions of the co-tenant. Tenants holding property as tenants by the entirety may not convey or encumber the property “by the unilateral act . . . of either husband or wife.”<sup>136</sup> Third, depending upon the applicable state law, the TBE Shield applies to more property than just the homestead, such as joint bank accounts.<sup>137</sup>

Finally, the TBE Shield only protects property from creditors so long as only one of the spouses is liable to that creditor for that debt.<sup>138</sup> Put differently, if both spouses are liable to a creditor, there is a common debt; then the creditor may reach past the TBE Shield.<sup>139</sup> Due to this last distinction, debtors are less likely to use the TBE Shield to protect the home and would rather use the state unlimited homestead exemption, which provides an absolute bar to unsecured creditors, preventing them

<sup>134</sup> POWELL, *supra* note 124, at § 52.03[5].

<sup>135</sup> Florida, Oklahoma, and D.C. provide all residents with the benefits of the homestead exemption, whether single or married. FLA. CONST. art. X, § 4(a)(1); OKAL. CONST. art. XII, § 2; D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001).

<sup>136</sup> POWELL, *supra* note 124, at § 52.03[1]. However, New Jersey allows a spouse to convey or encumber his or her respective survivorship interests in property held as tenants by the entirety. See *id.* § 52.03[4] n.23 (referencing *Cherry v. Cherry*, 403 A.2d 45, 47-48 (N.J. Super. 1979)).

<sup>137</sup> See *In re Schwarz*, 362 B.R. 532, 534 n.2 (Bankr. S.D. Fla. 2007) (finding “[t]he range of property so exempt under Florida law is extremely broad and encompasses far more than homestead property alone”).

<sup>138</sup> See *In re Kearns*, 8 F.2d 437, 438 (4th Cir. 1925) (“[L]ands held by tenants by entirety cannot be sold to satisfy judgments rendered alone against either tenant upon their separate obligations . . .”); William G. Craig, Jr., *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 258 (1974) (stating that creditors cannot collect against either spouses’ right to survivorship or the spouses’ present interests). If a debtor holds joint debts with his spouse, creditors of those *joint* debts may attach liens or bring actions in bankruptcy court against tenancy by the entirety property. *Vasilion v. Vasilion*, 66 S.E.2d 599, 602 (Va. 1951).

<sup>139</sup> *Vasilion*, 66 S.E.2d at 602.

from reaching into the value of the home.<sup>140</sup> Now that the pertinent exemptions have been explained, Congress's attempt to deter the abusive use of certain states' unlimited homestead exemptions through the passage of BAPCPA will be examined.

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<sup>140</sup> The states examined in this article, which are listed and summarized in Appendix A, allow three types of creditors to collect against the homestead, despite homestead exemptions: 1) purchase money mortgagees; 2) state property tax creditors or federal tax creditors; and 3) creditors holding a mechanic's lien. See Appendix A. And, as explained above, if the debts are held against both spouses, creditors can reach past the TBE Shield, levying upon TBE property. See *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001) ("However, when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse."); see also *supra* note 136 and accompanying text (explaining that, with the exception of New Jersey, one spouse may not unilaterally encumber TBE property). Thus, the TBE Shield provides no greater protection than state homestead exemptions because it does not prevent the same three types of creditors from attaching liens to homestead property. Purchase money mortgagees, if they have any advice from legal counsel, will hold the mortgage against both spouses. State property tax debts apply to both spouses so long as both are listed on the lien, and recently, the U.S. Supreme Court ruled that a federal tax lien held against only one spouse reaches past the TBE Shield, attaching to TBE property. See *infra* notes 286-87 and accompanying text (discussing the Supreme Court's *Craft* decision); see generally *Robert E. Parker, Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, No. 93-C-111-E, 1994 U.S. Dist. LEXIS 4259, at \*2, \*9-10 (N.D. Okla. Mar. 9, 1994) (noting that an Oklahoma sales tax warrant listing both spouses names applied to the assets of both spouses). Finally, mechanic's liens apply to both spouses so long as both are listed on the lien, and in some states, even where only one spouse is listed. See *In re Kiser*, 344 B.R. 423, 426-32 (W.D. Va. 2003) (finding that in Virginia a mechanic's lien listing only one spouse is valid against TBE property and citing case law from Indiana and Missouri that supported the Court's holding). Thus, these three types of debts are typically joint debts, and hence creditors can collect on them despite the TBE Shield.

As just shown, the TBE Shield provides no *greater* protection than state homestead exemptions, and in fact, the TBE Shield provides less protection. The TBE Shield provides less protection than state homestead exemptions because state homestead exemptions prevent creditors from attaching liens to homesteads when the lien is predicated upon any jointly held debt *other* than the three listed above. *E.g.*, FLA. CONST. art. X, § 4(a)(1); *cf. Robert E. Parker*, 1994 U.S. Dist. LEXIS 4259, at \*8-9 (holding that the Oklahoma homestead exemption does not prevent attachment of liens to homestead property but does prevent enforcement of those liens by foreclosure unless the liens fall into one of the three categories listed above). The TBE Shield cannot protect homestead property from *other* jointly held debts.

### III. THE PURPOSE AND LEGISLATIVE HISTORY FOR THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

Congress, after eight years of trying, successfully passed revisions to the Bankruptcy Code in 2005.<sup>141</sup> In passing BAPCPA, Congress sought to curb the recent increases in bankruptcy filings, deter serial filings, and increase consumer accountability.<sup>142</sup> Specific provisions of BAPCPA sought to provide needed oversight to “eliminate abuse in the system.”<sup>143</sup> Congress was concerned about the current state of the bankruptcy system because when debtors receive discharges in bankruptcy, creditors pass along some of the losses they absorb on to responsible consumers.<sup>144</sup> “Every phone bill, electric bill, mortgage, furniture purchase, medical bill, and car loan contains an implicit bankruptcy ‘tax’ that the rest of us pay to subsidize those who do not pay their bills.”<sup>145</sup>

The heart of BAPCPA is the “means test,” which prevents certain debtors from filing Chapter 7, forcing them to file Chapter 13.<sup>146</sup> Another major reform to the Code deals with capping the amount of “homestead equity a debtor may shield from creditors . . . .”<sup>147</sup> Prior to BAPCPA, debtors used exemption planning, and only in rare cases did the use of exemptions rise to the level of an abuse and prevent the debtor from receiving his discharge of debts.<sup>148</sup> Congress felt there should be a more

<sup>141</sup> H.R. REP. NO. 109-31, at 6 (2005).

<sup>142</sup> *Id.* at 2.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 4 (citation omitted).

<sup>145</sup> *Id.* (quoting prepared statement of Prof. Todd Zywicki at hearing before Senate Committee on the Judiciary). No one knows exactly how the losses creditors absorb when debtors file for bankruptcy affect lenders and consumers, but the discharge of debt certainly has some impact on the economy. *Id.*

<sup>146</sup> See H.R. REP. NO. 109-31, at 2 (2005). Congress “presume[d] abuse” of the Bankruptcy Code if the debtor’s monthly income over the future five years, deducting certain expenses, was over \$10,950. 11 U.S.C. § 707(b)(2)(A)(i) (2007). If the amount, which was the debtor’s average monthly income for the prior sixty months minus certain mandated expenses, was less than \$6,575, the debtor could file Chapter 7 or Chapter 13. *Id.* However, if the debtor was in between the two numbers and the amount was greater than twenty-five percent of the debtor’s unsecured debts, abuse was presumed, and the debtor must file for Chapter 13. *Id.*

<sup>147</sup> H.R. REP. NO. 109-31, at 2 (2005).

<sup>148</sup> See *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988) (finding the debtor’s liquidation of his entire net worth, \$700,000, and his conversion of it into exempt property on the eve of bankruptcy constituted the fraudulent use of an unlimited exemption, which required the denial of the debtor’s discharge).

substantial check on debtors when they use exemptions because it is difficult for a creditor or trustee to persuade a bankruptcy court to deny a debtor his discharge.<sup>149</sup> Additionally, the level at which exemption use turns into abuse is fact-sensitive and difficult to determine with any degree of certainty.<sup>150</sup> Congress specifically wanted to close the “mansion loophole,” which allowed debtors living in certain states to use their homestead as a coffer for non-exempt funds, preventing creditors from collecting on their claims.<sup>151</sup> Certain debtors, in the past, actually moved to homestead-friendly states just to take advantage of the beneficial exemption,<sup>152</sup> and Congress wanted to prevent this abuse.<sup>153</sup>

Congress established a bright-line threshold for the state homestead exemptions.<sup>154</sup> Section 522(p), enacted into law by BAPCPA, prevents the

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<sup>149</sup> The burden of proof for denying a discharge is steep for three reasons: First, some courts require the party seeking a denial to provide clear and convincing evidence of fraud. *In re Cutignola*, 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988); *In re Wines*, 114 B.R. 794, 796 (Bankr. S.D. Fla. 1990) (citation omitted). Second, at least for section 727(a)(2), the party seeking the denial must prove fraudulent intent, a difficult task. See *infra* note 196 and accompanying text (explaining that direct evidence of fraud is rare, and thus fraud is usually shown through circumstantial evidence). Finally, a bankruptcy judge is likely to err on the side of the debtor in a close case because of the significant impact a denial of discharge will have on the debtor. See *In re Booth*, 70 B.R. 391, 394 (Bankr. D. Colo. 1987); but see *In re Keck*, 363 B.R. 193, 212 (Bankr. D. Kan. 2007) (denying the debtor a discharge, under section 727(a)(2)(A), where the debtor made false statements under oath and transferred property of the bankruptcy estate with the intent to defraud creditors).

<sup>150</sup> Cf. *Hanson v. First Nat'l Bank in Brookings*, 848 F.2d 866, 867-69 (8th Cir. 1988) (holding the bankruptcy court's findings not clearly erroneous in granting discharge, when the debtor, just prior to bankruptcy, sold approximately \$30,000 of non-exempt property and placed the revenue from the sale in exempt assets). But see *Tveten*, 848 F.2d at 876 (holding the debtor's actions of placing almost his entire net worth into an exempt asset, which was out of the reach of creditors, was a fraudulent use of exemptions and denying the debtor his discharge). Based on the foregoing cases, one can see how hard it is to know for certain when the use of exemptions will result in the denial of discharge.

For a discussion of bankruptcy planning under BAPCPA and the subsequent economic effects of such actions see Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 291-92 (2007).

<sup>151</sup> H.R. REP. NO. 109-31, at 15-16 (2005). One egregious example of abuse is when Marvin Warner, a former U.S. ambassador to Switzerland, paid very little of the \$4 billion in bankruptcy claims he owed but retained a multi-million dollar horse ranch in Florida. Larry Rohter, *Rich Debtors Finding Shelter Under a Populist Florida Law*, N.Y. TIMES, July 25, 1993, at A1.

<sup>152</sup> H.R. REP. NO. 109-31, at 16 (2005). According to the Republican Study Committee, “the bill discourages debtors from moving to a state with more favorable homestead laws in order to keep an expensive home after declaring bankruptcy.” Rep. Mike Pence, *Legislative Bulletin S. 256 BAPCPA*, REPUBLICAN STUDY COMM., Apr. 14, 2005, at 3.

<sup>153</sup> H.R. REP. NO. 109-31, at 16 (2005).

<sup>154</sup> See 11 U.S.C. § 522(p)(1)(A) (2007) (allowing an exemption of up to \$136,875 if the



abusive use of state homestead exemptions by strictly limiting the amount a creditor may exempt in his homestead.<sup>155</sup> Section 522(p) caps the value of homestead property a debtor may claim as exempt at \$136,875,<sup>156</sup> if that property was exempted under state law and was acquired in the preceding 1,215 day period before the debtor filed for bankruptcy.<sup>157</sup>

BAPCPA provided other provisions that limit the use and abuse of state homestead exemptions.<sup>158</sup> For example, section 522(o) allows a creditor or the trustee to seek a reduction in the amount that may be claimed as exempt to the extent the value is derived from fraudulently transferred non-exempt property.<sup>159</sup> Section 522(o) allows the trustee to seek a reduction in the value of the debtor's homestead if the debtor: 1) sold non-exempt assets; 2) with the intent to defraud creditors; 3) in the previous ten years before filing for bankruptcy; and 4) the debtor funneled those assets into the exempt homestead.<sup>160</sup> If all these elements are present, the value that a debtor may exempt through the homestead exemption can be reduced by up to the value of those non-exempt assets.<sup>161</sup> This reduction will enlarge the portion of the debtor's bankruptcy estate that is not exempt, allowing unsecured creditors to obtain a larger percentage of their claims.<sup>162</sup>

Finally, section 522(q) prevents, among other things, a debtor from exempting any amount over \$136,875 if the debtor: 1) "has been convicted of a felony . . . which under the circumstances, demonstrates that the filing of the case was an abuse of the [Code]";<sup>163</sup> 2) owes a debt

debtor purchased the house within the 1,215 days prior to filing for bankruptcy). This amount reflects "the change in the Consumer Price Index for All Urban Consumers." *Id.* § 104(b)(1).

<sup>155</sup> *Id.* § 522(p)(1)(A).

<sup>156</sup> See sources cited *infra* note 203 (explaining how \$136,875 became section 522(p)'s threshold limit).

<sup>157</sup> 11 U.S.C. § 522(p)(1) (2007).

<sup>158</sup> See *id.* § 522(o)-(q).

<sup>159</sup> See *id.* § 522(o). For example, if a home was worth \$3 million and the debtor purchased the home with non-exempt funds amounting to \$450,000, then the house would be sold if the trustee could prove the debtor bought the home with the intent to defraud creditors. If the court approved a sale, the proceeds of the sale, \$3 million minus \$450,000, go into the bankruptcy estate, leaving the debtor with \$2,550,000 in exempt assets and providing the creditors with \$450,000 for distribution.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> The proceeds would be considered non-exempt assets and would go to paying unsecured creditors after all the priority claims were paid out. *Cf.* WARREN & BUSSEL, *supra* note 23, at 509 (explaining that the proceeds from the liquidation of non-exempt assets go to unsecured creditors, but in most Chapter 7 cases, there are no non-exempt assets available).

<sup>163</sup> 11 U.S.C. § 522(q)(1)(A) (2007).

because of a violation of the Federal Securities laws; 3) owes a debt because the debtor perpetrated a fraud while acting as fiduciary; or 4) owes a debt because the debtor committed a criminal act or intentional tort that caused serious injury in the previous five years.<sup>164</sup> A short overview of the pertinent BAPCPA provisions is found in Appendix B.

Congress passed section 522(o), (p), and (q) to prevent debtors from moving to states with larger homestead exemptions and abusing the Code.<sup>165</sup> Despite this intent, some members of Congress, at the time of BAPCPA's passage, felt the new homestead exemption-limiting provisions were ineffective in achieving their goal of preventing homestead exemption abuse.<sup>166</sup> Others complained in the House Report on BAPCPA that it does not prevent states from opting out of the federal exemptions, and the law did not place an absolute dollar amount on state homestead exemptions claimed in bankruptcy court.<sup>167</sup>

Finally, seven dissenting members of Congress observed that “[w]ealthy debtors who are able to afford skillful legal advice, and are sophisticated enough to engage in complex pre-bankruptcy planning, will, in many cases, will [sic] be able to evade the paltry restriction in this bill.”<sup>168</sup> Elaborating, they stated that

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<sup>164</sup> *Id.* § 522(q)(1).

<sup>165</sup> *See, e.g., In re Reinhard*, 377 B.R. 315, 321 (Bankr. N.D. Fla. 2007) (finding that Congress intended to prevent debtors from fleeing, on the eve of bankruptcy, to a state with a more “generous” homestead exemption); *In re Sissom*, 366 B.R. 677, 678 (Bankr. S.D. Tex. 2007) (explaining how, prior to BAPCPA, Texas courts allowed debtors to funnel non-exempt assets into their exempt homestead, paying down their mortgages, but through BAPCPA, Congress “put the brakes” on this practice) (quoting *In re Maronde*, 332 B.R. 593, 598 (Bankr. D. Minn. 2005)); *In re Kaplan*, 331 B.R. 483, 487 (Bankr. S.D. Fla. 2005) (stating, in the heading of an opinion, “[t]he Legislative History is Clear—Congress Intended to Limit the Homestead Exemption in Florida”).

<sup>166</sup> *See* H.R. REP. NO. 109-31, at 375 (2005) (dissenting views of Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Lee, Waters, Meehan, Delahunt, Weiner, Sanchez, and Van Hollen). These members of Congress asserted that BAPCPA would not, “repeal or even cap homestead . . . exemption.” *Id.*

<sup>167</sup> *Id.* at 593. In addition, the Congressmen noted that BAPCPA allows debtors to roll over equity from one house to another in the same state; section 522(p)(1)(B) allows an unlimited rollover within the same state. Tabb, *supra* note 107, at 16. For example, if a debtor has lived in Texas for twelve years and owns, outright, a \$400,000 home, the debtor may then sell the \$400,000 home and use that money to purchase a \$2 million home. The new home will not be subject to section 522(p)(1)(A), which strictly limits the homestead exemption to \$136,875 or less. *See* 11 U.S.C. § 522(p)(1)(B) (2007) (allowing a debtor to exclude any interest transferred from the debtor's previous residence into the debtor's current residence as long as the debtor lived in the same state for more than 1,215 days).

<sup>168</sup> H.R. REP. NO. 109-31, at 595 (2005).

[t]here are provisions [in BAPCPA] that will make Chapter 13 impossible for many of the debtors who would file today, provisions that make it easier than ever to abuse the unlimited homestead provisions in some states and yet at the same time hurt people with more modest homesteads in those same states.<sup>169</sup>

With section 522(o), (p), and (q) of BAPCPA sufficiently examined, this article will demonstrate how debtors evade BAPCPA's homestead exemption-limiting provisions, just as these seven Congressmen presciently predicted.

#### IV. ANALYSIS OF THE CURRENT "TENANCY BY THE ENTIRETY LOOPHOLE"

Just as many members of Congress feared, there exists a large loophole that renders section 522(o), (p), and (q) null and void in exactly those states where Congress intended to prevent debtor abuses.<sup>170</sup> As explained below, if the debtor possesses certain characteristics, he or she will be able to evade the purview of section 522(o), (p) and (q). The next part will present a hypothetical situation explaining how a debtor can take advantage of the TBE Loophole if the debtor moved to Florida. Following the hypothetical, the loophole's applicability in other jurisdictions will be examined.

##### A. *An Explanation and Application of the "Tenancy by the Entirety Loophole"*

Simply stated, so long as the debtor does not elect the Code's Homestead Provision, section 522(b)(3)(A), when he exempts his homestead in bankruptcy, but instead uses the TBE Exemption, section 522(b)(3)(B), none of BAPCPA's homestead exemption-limiting provisions apply.<sup>171</sup> The following hypothetical makes it easy for the debtor to claim the homestead as exempt under state law; Florida has the

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<sup>169</sup> *Background on Bankruptcy Revisions: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 230 (2005)* (statement of Prof. Elizabeth Warren, Harvard Law School).

<sup>170</sup> See H.R. REP. NO. 109-31, at 595 (2005) (asserting that it was just a matter of time before wealthy debtors began taking advantage of Congress's poor drafting of the homestead provisions in BAPCPA).

<sup>171</sup> See 11 U.S.C. § 522(b)(3)(A) (2007) (allowing a debtor to exempt homestead property "subject to subsections (o) and (p)"). However, in the very next exemption the debtor may use the TBE Exemption, and there is no mention of subsections (o) or (p) applying. *Id.* § 522(b)(3)(B).

most liberal unlimited homestead exemption.<sup>172</sup> Additionally, the hypothetical makes it difficult for a court to deny the debtor a discharge pursuant to section 727(a) because, in the end, section 727(a) is the only true hurdle left that the debtor must overcome to retain his lavish homestead while simultaneously discharging his debts.<sup>173</sup>

In 2004, John C. Caro realizes his hardware stores are not faring well, and the corporation he operates, which owns twenty hardware stores, is insolvent as of February 2005.<sup>174</sup> Mr. Caro lives in Virginia and married in 1995.<sup>175</sup> Mr. Caro's wife is a school teacher who receives her own salary.

After speaking with a bankruptcy attorney, Mr. Caro decides to shut down the corporation's five least profitable stores, selling the land, fixtures, and inventory associated with those stores.<sup>176</sup> This sale nets the corporation \$2.5 million. Mr. Caro uses \$1 million to reinvest in the other fifteen stores, which are still struggling. Then, in October 2005, he sells his Virginia home for \$450,000. Two months later, he buys a \$2 million home in Boca Raton, Florida. This new home is titled in both his and his wife's name. Mr. Caro pays for this home by spending \$50,000 of his savings, borrowing \$1.5 million from the hardware corporation, and providing the \$450,000 he received from the sale of his previous home. Thus, Mr. Caro paid for the home up front. All creditors of the corporation were aware of the liquidation of the five stores, along with the funds the sale generated. Additionally, Mr. Caro does not provide the corporation with any collateral for the loan, and he subsequently fails to make any of the scheduled monthly payments to the corporation for the loan. In December 2005, Mr. Caro relocates his family to Florida.

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<sup>172</sup> Florida's homestead exemption is the most liberal because it is the only exemption that explicitly allows debtors to use the exemption as a means to defraud their creditors. See *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1030 (Fla. 2001) (holding that Florida's unlimited constitutional homestead exemption prevents creditors from attaching liens to homestead property even if the homestead was "acquired by a debtor with the specific intent to hinder, delay, or defraud creditors").

<sup>173</sup> While the debtor may be able to evade BAPCPA's new homestead exemption-limiting provisions, a bankruptcy court can still deny him his discharge if the debtor defrauded his creditors. 11 U.S.C. § 727(a)(2) (2007).

<sup>174</sup> This hypothetical is based on a Middle District of Florida Bankruptcy case, *In re Hinton*. See generally *In re Hinton*, 378 B.R. 371 (Bankr. M.D. Fla. 2007).

<sup>175</sup> Virginia is used as the initial place of residence because Virginia's homestead exemption is the Nation's lowest, only \$5,000, with an additional \$500 exemption for each member of the household. VA. CODE ANN. § 34-4 (LexisNexis 2005).

<sup>176</sup> The Debtor could make only two sales and funnel the money from the first sale directly into the new homestead. But the hypothetical has three distinct sales so the transactions look less fraudulent, making it harder for the trustee or a creditor to argue to the bankruptcy court that it should, pursuant to section 727(a), deny the debtor his discharge.

While the initial influx of \$1 million helped the remaining 15 stores, the corporation still operates at a loss; and in October 2005, Mr. Caro shuts down another five stores, selling the assets off for \$2 million and reinvesting all the money in the remaining hardware stores. Despite Mr. Caro's efforts, the corporation's debts balloon, and the final ten stores continue to perform at a loss. This forces Mr. Caro to sell off five more stores in June 2006. With the five remaining stores making a profit in June 2006, Mr. Caro begins to pay down the corporation's large debts, which are approximately \$14 million. Notwithstanding these efforts, in January 2007, creditors bring suit against the corporation and Mr. Caro personally. The creditors allege that the corporation is a sham and seek to pierce the corporate veil, holding Mr. Caro personally liable for the corporation's debts.

As of February 2007 the hardware corporation is insolvent, but the five remaining stores return a profit until July 2007. In the winter of 2007, the corporation is unable to operate. The housing market collapses and the hardware stores feel the effects. The creditors have won their lawsuits and hold judgments against Mr. Caro. As the sole stockholder, Mr. Caro was heavily invested in the corporation that owns the stores. And in December 2007, he becomes insolvent. Then in January 2008, both the corporation and Mr. Caro file for bankruptcy. Mr. Caro has no joint debts with his wife; the Florida home does not have any outstanding mortgages, and in his bankruptcy petition, he claims the house in Boca Raton exempt pursuant to section 522(b)(3)(B), the TBE Exemption. The bankruptcy court then orders a liquidation of the corporation. This sale produces \$4 million, but the corporation's unsecured debts total \$16 million.

In this hypothetical the trustee, or a creditor, would attempt to obtain the \$1.5 million Mr. Caro "borrowed" from the corporation.<sup>177</sup> Using Code provisions, the trustee would argue the "loan" was fraudulent as to the corporation, and Mr. Caro never intended to pay the corporation back.<sup>178</sup> The trustee for the corporation, or creditors of the corporation,

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<sup>177</sup> The transfer of \$1.5 million represents the trustee's or the creditors' best chance to recover money from the exempt homestead. The money belongs to the corporation and was misappropriated by the CEO. Further, as explained below, more badges of fraud are present in this transfer than in any other.

<sup>178</sup> *Hinton*, 378 B.R. at 375. In *Hinton*, the trustee brought a suit against the debtor under section 522(o). *Id.* The trustee sought to extract money from the debtor's \$1.6 million homestead based on allegations that the debtor fraudulently transferred non-exempt assets into the exempt homestead. *Id.* at 374-75; see also *In re Sholdan*, 217 F.3d 1006, 1010-11 (8th Cir. 2000) (affirming the lower court's finding that the debtor fraudulently funneled non-exempt assets into his exempt

will first look to the Code for relief, specifically section 548, which covers “fraudulent transfers and obligations.”<sup>179</sup> Section 548 allows the trustee to, “avoid any transfer . . . of an interest of the debtor in property . . . .”<sup>180</sup> If the trustee satisfies any subsection of section 548, the trustee may “avoid” the transfer. This means the transfer is voided, and the asset or assets fraudulently transferred are pulled back into the bankruptcy estate for distribution to creditors.<sup>181</sup>

The trustee would prevail under section 548(a)(1)(B)(i),<sup>182</sup> which prevents constructively fraudulent transfers, and then the trustee would extract \$1.5 million from Mr. Caro’s bankruptcy estate and place that money into the corporation’s bankruptcy estate, assuming Mr. Caro possesses \$1.5 million in non-exempt assets. However, section 548 only provides a two year look-back period, or statute of limitations, and thus is inapplicable.<sup>183</sup> Next, the trustee will look to state law for help in reaching the \$1.5 million, using section 544(b), a strong-arm provision.<sup>184</sup> Section

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homestead in an action brought by the trustee to recover \$162,000 in liquidated assets).

<sup>179</sup> 11 U.S.C. § 548 (2007).

<sup>180</sup> *Id.* § 548(a)(1).

<sup>181</sup> See WARREN & BUSSEL, *supra* note 23, at 406 (explaining that a properly avoided transfer is returned to the bankruptcy estate for distribution).

<sup>182</sup> See 11 U.S.C. § 548(a)(1)(B) (2007) (allowing the trustee to avoid transfers if: 1) the debtor voluntarily or involuntarily “received less than a reasonably equivalent value in exchange” for the transfer; and 2) the debtor was insolvent at the time of the transfer). In the hypothetical, the corporation was insolvent when Mr. Caro received the \$1.5 million “loan.” Mr. Caro did not give the corporation a reasonably equivalent exchange. In fact, he did not give the debtor anything in consideration for the loan and made no scheduled payments on the loan.

One can also argue, if the look-back period was longer than two years, that the trustee would prevail under section 548(a)(1)(A) as well. Section 548(a)(1)(A) allows the trustee to recover a transfer made with the, “actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted.” *Id.* § 548(a)(1)(A). Courts determine intent by looking to the badges of fraud, and if any badges are present, they go to prove fraudulent intent. WARREN & BUSSEL, *supra* note 23, at 407. Of the recognized badges of fraud, three are present in this hypothetical: “1) insider relationships between the parties; 2) the lack or inadequacy of consideration for the transfer; and 3) the financial condition of the party sought to be charged both before and after the transaction at issue.” See *id.* (citing *Twyne’s Case*, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601) and listing a total of seven badges of fraud). First, Mr. Caro, the CEO, took the debtor’s money; second, he did not give any consideration for the \$1.5 million transfer; and third, the corporation was insolvent before the transfer. The trustee would prevail but for the short two year look-back period.

<sup>183</sup> See 11 U.S.C. § 548(a)(1) (2007) (giving the trustee the right to avoid a transfer that “was made or incurred on or within 2 years before the date of the filing of the petition . . .”). Technically, in the hypothetical, there are two transfers: 1) the transfer from the corporation to Mr. Caro; and 2) Mr. Caro taking the proceeds of the transfer and using those funds to purchase the Florida homestead.

<sup>184</sup> See *id.* § 544(b).

544(b) is called a strong-arm provision because it gives the trustee the opportunity to step into the shoes of any actual unsecured creditor and use any state law an unsecured creditor could use.<sup>185</sup> In this hypothetical situation, pursuant to section 544(b), the trustee would bring an action under the applicable state law, Florida's Uniform Fraudulent Transfer Act ("FUFTA"), Florida Statute Section 726.105.<sup>186</sup>

If the trustee uses FUFTA, it will provide the trustee with a four-year look-back period, or if the fraudulent transfer could not have been discovered during those four years, a one-year look-back period after the transfer was or could reasonably have been discovered by the creditor.<sup>187</sup> Unfortunately for the trustee, FUFTA, which extends the look-back period another two years, is superseded by Florida's constitutional homestead exemption and cannot assist the trustee.<sup>188</sup> Florida law denies recovery because of the state's expansive and liberal constitutional homestead exemption.<sup>189</sup> Interpreting that provision, the Florida Supreme Court, in *Havoco of America, Ltd. v. Hill*, ruled that unsecured creditors are absolutely barred from bringing suit against the homestead.<sup>190</sup> Florida is the only state that explicitly protects debtors when they fraudulently transfer non-exempt assets into the exempt homestead, and Florida law does so regardless of how the debtor acquired the non-exempt assets.<sup>191</sup>

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<sup>185</sup> See *In re Image Worldwide, Ltd.*, 139 F.3d 574, 576-77 (7th Cir. 1998) (noting that the trustee may use the strong-arm provision, 11 U.S.C. § 544(b) of the Code, to avoid any transaction that an actual unsecured creditor could avoid under applicable state law).

<sup>186</sup> FLA. STAT. ANN. § 726.105 (West 2007). Section 726.105 provides that a transfer is fraudulent if it is made with the

(a) actual intent to hinder, delay, or defraud any creditor of the debtor; or (b) [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

*Id.* § 726.105(1). A creditor may attach a lien upon property or funds that were fraudulently transferred. And if the creditor has obtained judgment on a claim, he may seek execution; that is, he may have a court avoid the transfer. *Id.* § 726.108.

<sup>187</sup> *Id.* § 726.110.

<sup>188</sup> See *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1029 (Fla. 2001) (holding that Florida's constitutional homestead exemption trumps any statutory law).

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See generally Laurence, *supra* note 69, at 504 (discussing *Havoco* and whether the Arkansas Supreme Court would hold similarly).

Because of yet another dead end, the trustee will look to the newly passed BAPCPA homestead exemption-limiting provisions in section 522(o), (p), and (q), which are applied below to the hypothetical situation, beginning with section 522(o)(4), followed by a detailed explanation of why these provisions are inapplicable, and thus de facto nullified.

First, section 522(o) voids the fraudulent transfer of assets into the homestead and has a *ten-year* look-back period.<sup>192</sup> Section 522(o)(4) will assist the trustee in this hypothetical situation, and in fact, this situation is one Congress had in mind when it passed BAPCPA.<sup>193</sup> For the trustee to satisfy section 522(o)(4), he will have to prove, by a preponderance of the evidence, four elements:

- (1) the debtor disposed of property within 10 years preceding the bankruptcy filing;
- (2) the property that the debtor disposed of was non-exempt;
- (3) some of the proceeds from the sale of the nonexempt property were used to buy a new homestead . . . ;
- (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud a creditor.<sup>194</sup>

Here, in Mr. Caro's case, all four elements are satisfied.

First, the corporation loaned Mr. Caro \$1.5 million a little over two years prior to the corporation filing for bankruptcy, which is well within the ten-year look-back period. Second, Mr. Caro received the money through the liquidation of corporate assets, which belonged to the corporation also in bankruptcy and, thus, were not exempt. These assets belonged in the corporation's bankruptcy estate; consequently, the money is not exempt. Third, Mr. Caro used the \$1.5 million to buy his home in

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<sup>192</sup> See 11 U.S.C. § 522(o) (2007).

<sup>193</sup> H.R. REP. NO. 109-31, at 16 (2005) (explaining how Congress intended to prevent debtors from placing assets beyond the reach of creditors through the purchase of large homesteads).

For example, section 522(o) would have provided the trustee in this situation with a ten-year look-back period. See 11 U.S.C. § 522(o) (2007). And if within this ten-year period the debtor funneled non-exempt funds into his homestead with the "intent to hinder, delay, or defraud a creditor," the trustee can reduce the value of the homestead to the extent that the homestead's value was attributable to those non-exempt funds. *Id.*; see also *In re Sissom*, 366 B.R. 677, 693-701 (Bankr. S.D. Tex. 2007) (holding that the trustee could recover \$50,000 of non-exempt money the debtor used to purchase his homestead because eleven of the thirteen badges of fraud were present, signaling the debtor's intent to defraud his creditors); *In re Keck*, 363 B.R. 193, 212 (Bankr. D. Kan. 2007) (finding that the debtor's homestead shall be reduced by \$15,972.79 because the debtor funneled non-exempt assets into his exempt homestead within one-year of filing for bankruptcy).

<sup>194</sup> *Sissom*, 366 B.R. at 688-89.



Florida. Fourth, because “direct evidence of [fraudulent intent] is rare,”<sup>195</sup> the trustee would look to the “badges of fraud” as recognized in the state where the court sits.<sup>196</sup> “Badges of fraud represent nothing more than a list of circumstantial factors that a court may use to infer fraudulent intent.”<sup>197</sup> Florida law recognizes that the presence of one badge of fraud presents only a suspicious circumstance, but several of them together present the circumstances from which one can infer fraudulent intent.<sup>198</sup>

The hypothetical presents three badges of fraud. First, the \$1.5 million transfer was to a corporate insider because Mr. Caro was the CEO of the bankrupt corporation. Second, Mr. Caro, the transferee, provided no consideration to the corporation for the transfer. And third, the transferor, the bankrupt corporation, was insolvent prior to the \$1.5 million loan.<sup>199</sup> Because Mr. Caro then transferred the \$1.5 million into his exempt homestead, the bankruptcy court would reduce Mr. Caro’s homestead pursuant to section 522(o)(4), selling the home through a

<sup>195</sup> See *In re Sholdan*, 217 F.3d 1006, 1009-10 (8th Cir. 2000) (“It is elementary that showing the presence of ‘badges of fraud’ continues to be a means of establishing intent to delay, hinder or defraud creditors.”) (citation omitted).

<sup>196</sup> See, e.g., *Sissom*, 366 B.R. at 692 n.3 (finding that “actual intent to hinder, delay, or defraud” is not usually proven through direct testimony but rather established through badges of fraud recognized by the respective state in which the bankruptcy court sits); *In re Maronde*, 332 B.R. 593, 600 (Bankr. D. Minn. 2005) (holding that the “presence of several or more ‘badges of fraud’ gives rise to a presumption of fraudulent intent”) (citation omitted).

<sup>197</sup> *Sholdan*, 217 F.3d at 1009.

<sup>198</sup> *Johnson v. Dowell*, 592 So. 2d 1194, 1197 (Fla. 2d DCA 1992). Florida’s badges of fraud are listed below:

In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all the debtor’s assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) 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.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

FLA. STAT. ANN. § 726.105(2) (West 2007).

<sup>199</sup> As stated in the hypothetical, the corporation’s debts were greater than its assets.

foreclosure sale and the corporation's bankruptcy estate would receive \$1.5 million of the proceeds from the sale.<sup>200</sup>

If, for some reason, the trustee did not prevail under section 522(o), perhaps due to difficulty in proving fraudulent intent, another homestead exemption-limiting provision would be available to the trustee. As previously explained, section 522(p)(1)(A) strictly caps the amount a debtor may exempt, as his homestead, within 1,215 days before the debtor files for bankruptcy.<sup>201</sup> Mr. Caro purchased the new home less than 800 days before filing for bankruptcy, well within in the 1,215 day period.<sup>202</sup> Mr. Caro's home is worth \$2 million, which far exceeds the strict limit of \$136,875 provided by section 522(p)(1).<sup>203</sup> Thus, the homestead would be sold and only \$136,875 of the proceeds would be exempt within Mr. Caro's bankruptcy estate.

Finally, the trustee can look to section 522(q)(1)(B)(ii). Section 522(q)(1)(B)(ii) prevents a debtor from exempting non-exempt assets that were funneled *at any time*<sup>204</sup> into the exempt homestead if: 1) the

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<sup>200</sup> See *Sissom*, 366 B.R. at 714 (holding that creditors or trustees who satisfy the elements of section 522(o) may force debtors to lose their homes through foreclosure sales). The trustee in *Sissom* satisfied the elements of section 522(o), and the court provided the trustee with an order allowing the trustee to foreclose on the debtor's property. *Id.* at 714-15.

<sup>201</sup> See *infra* note 204 and accompanying text (arguing that section 522(p)'s look-back period of 1,215 days does not apply to section 522(q)).

<sup>202</sup> See 11 U.S.C. § 522(p)(1)(A) (2007). Mr. Caro bought the Florida home in December 2005 and filed for bankruptcy less than 800 days later, in January 2008.

<sup>203</sup> *Id.* This amount was initially set at \$125,000, and according to section 104(b)(1), the Judicial Conference of the United States shall set a new threshold amount, "to reflect the change in the Consumer Price Index for All Urban Consumers." *Id.* § 104(a)(1); see *In re Larson*, 513 F.3d 325, 328 n.2 (1st Cir. 2008) (finding that the prior threshold amount of \$125,000 applies because the case was filed before the adjusted amount took effect). The value changed again in March 2010. ELIZABETH WARREN, *BANKRUPTCY AND ARTICLE 9: STATUTORY SUPPLEMENT*, 309 n.1 (2007).

<sup>204</sup> See *In re Cleaver*, 407 B.R. 354, 357 (B.A.P. 8th Cir. 2009) ("Section 522(p) places a ceiling on debtors' state law homestead exemptions, where the debtor acquired the homestead within 1,215 days of the petition, and section 522(q) limits the homestead exemption based on certain illegal or unlawful conduct."); *In re Presto*, 376 B.R. 554, 591-93 (Bankr. S.D. Tex. 2007) (interpreting section 522(q)(1)(B)(ii) as requiring the trustee or a creditor to prove *only* two elements in order to exclude an interest from homestead exemption protection: 1) the debtor owed someone or something a fiduciary duty; and 2) the debtor "committed fraud, deceit, or manipulation while acting in this fiduciary capacity"); Lawrence R. Ahern, III, *Homestead and Other Exemptions Under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on 'Asset Protection' After 2005*, 13 AM. BANKR. INST. L. REV. 585, 597 (2005) (explaining that section 522(q) applies "regardless of when the property was acquired"). *But see In re Burns*, 395 B.R. 756, 762-63 (Bank. M.D. Fla. 2008) (reading section 522(q) as incorporating section 522(p)'s threshold requirements, specifically section 522(p)'s 1,215 day look-back period). The Court in *Burns* held that, in addition to section 522(q)'s \$136,875 floor and the two elements listed in *Presto*, the homestead interest at issue could be found non-exempt under section

homestead is worth over \$136,875;<sup>205</sup> 2) the debtor owes someone, or something, a fiduciary obligation; and 3) the debtor, “commit[s] fraud, deceit, or manipulation while acting in that fiduciary capacity.”<sup>206</sup> Again, Mr. Caro’s home is worth more than \$136,875. Further, Mr. Caro, as a corporate director, owes the corporation he worked for a fiduciary duty.<sup>207</sup>

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522(q) only if the interest was acquired within the 1,215 day period prior to the debtor filing for bankruptcy. *Id.*

Congress’s poor drafting of section 522(p) and (q) creates an ambiguity and allows for the two competing interpretations explained above. The ambiguity exists because section 522(q) states that as a result of electing the Code’s Homestead Provision, section 522(b)(3)(A), “a debtor may not exempt any amount of interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1)” that exceeds, in the aggregate, \$136,875. 11 U.S.C. § 522(q) (2007) (emphasis added). The author, based on legislative history and the cases cited above, reads the quoted language as meaning that section 522(q) applies to the *property* described in subparagraphs (A), (B), (C), and (D)—that is, the reference to the language of section 522(p)(1) is merely definitional and does *not* incorporate the 1,215 day look-back period of section 522(p)(1). See H.R. REP. NO. 109-31, at 595 (explaining the mechanics and deficiencies of section 522 (o), (p), and (q) and stating that section 522(p) applies to the 1,215 days prior to the debtor filing for bankruptcy but leaving out any mention of the 1,215 day period applying to section 522(q)). Additionally, if Congress meant to incorporate the 1,215 day look-back period of section 522(p)(1) to section 522(q), it could have written, “property described in subsection 522(p)(1),” in place of the cumbersome language it used—“any amount of interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1).” 11 U.S.C. § 522(q) (2007). This would have been far simpler and more concise than section 522(q)’s current language. *Id.* However, Congress did not use this simpler language, and this tends to prove that Congress referenced *only* the subparagraphs of section 522(p)(1) and did not want to incorporate the look-back restriction. Indeed, the courts in *Cleaver* and *Presto* do not incorporate the 1,215 day look-back period of section 522(p)(1), for the look-back period is not mentioned anywhere in the courts’ analysis of section 522(q). See *Presto*, 376 B.R. at 591-93; *Cleaver*, 407 B.R. at 357. That said, in *Presto*, the transfer of interest sought to be held non-exempt under section 522(q) took place within 1,215 days before the bankruptcy petition was filed, and thus *Presto* is consistent with the Middle District of Florida’s interpretation in *Burns*. *Presto*, 376 B.R. at 574. Finally, from a logical standpoint, if Congress intended to incorporate the 1,215 day look-back period of section 522(p)(1) to section 522(q), section 522(q) would have almost no effect or restrictive power over a debtor’s activities. Section 522(q) would be surplusage because section 522(p)(1) disallows the exempting of *any* interest over \$136,875 in the homestead that is acquired during the 1,215 day period before the filing of the petition for bankruptcy. 11 U.S.C. § 522(p)(1) (2007). Creditors would not take it upon themselves to prove the additional elements section 522(q)(1)(A) or (B) require when section 522(p)(1) *does not* require the showing of any additional elements. Section 522(q), as read by the court in *Burns*, is rendered superfluous, and, “statutes should be construed ‘so as to avoid rendering superfluous’ any statutory language.” YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, CRS REP. 97-589, at 12 (2008) available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

<sup>205</sup> See 11 U.S.C. § 522(q)(1) (2007) (stating that the debtor can keep up to \$136,875 of the homestead and the subsequent provisions only apply to an amount greater than \$136,875).

<sup>206</sup> *Presto*, 376 B.R. at 592-93.

<sup>207</sup> See *id.* at 593 n.42 (noting that not only do corporate directors “have fiduciary obligations” but spousal relationships may also qualify for protection under section 522(q)(1)(B)(ii)).

And by borrowing corporate funds and using those funds to purchase a home, Mr. Caro—at the very least—manipulated the corporation for his benefit while acting as its sole director.<sup>208</sup> Thus, under section 522(q)(1)(B)(ii), the trustee could reduce the homestead's value by \$1.5 million.

Unfortunately, the trustee will not be able to use sections 522(o)(4), 522(p)(1)(A), or 522(q)(1)(B)(ii) because Mr. Caro elected to claim his house pursuant to the TBE Exemption. Therefore, section 522(o), (p), and (q) simply does not apply. The U.S. Bankruptcy Court for the Middle District of Florida in *In re Hinton* stated that “[s]ection 522(o), however, only applies to subsection (A) of [s]ection 522(b)(3), and not to subsection (B).”<sup>209</sup> Put differently, section 522(b)(3)(A) specifically states that “[p]roperty listed in this paragraph is . . . subject to subsections (o) and (p),”<sup>210</sup> but section 522(b)(3)(B) does not so state.<sup>211</sup> The clause, “subject to subsections (o) and (p),” is strikingly absent from section 522(b)(3)(B).<sup>212</sup> Indeed, each newly enacted homestead exemption-limiting provision of BAPCPA reinforces the court's interpretation that section 522(o), (p), and (q) only applies to property exempted under section 522(b)(3)(A), the Code's Homestead Provision. Section 522(o) states “[f]or the purposes of subsection (b)(3)(A)”; section 522(p) states, “as a result of electing under subsection (b)(3)(A) to exempt property under State or local law”; and section 522(q) states, “[a]s a result of

<sup>208</sup> Cf. *Golden Pacific Bancorp v. FDIC*, 273 F.3d 509, 518 (2d Cir. 2001) (noting that unjust enrichment constitutes a breach of a fiduciary obligation).

<sup>209</sup> *In re Hinton*, 378 B.R. 371, 380 (Bankr. M.D. Fla. 2007) (emphasis added); e.g., *In re Buonopane*, 359 B.R. 346, 347 (Bankr. M.D. Fla. 2007) (concluding from the plain language of section 522(p)(1) that it does not apply to the tenancy by the entirety exemption of section 522(b)(3)(B)); *In re Schwarz*, 362 B.R. 532, 534 n.2 (Bankr. S.D. Fla. 2007) (explaining in dicta that although Congress, in BAPCPA, significantly reformed the Homestead Provision in section 522(b)(3)(A) by adding section 522(o), (p), and (q), “Congress determined to leave wholly intact the preexisting blanket exemption available to debtors who own property in a tenancy by the entireties form if applicable nonbankruptcy law would exempt that property from process”); Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA's Impact on Family Law Matters*, 31 S. ILL. U. L.J. 563, 580 (2007) (surveying BAPCPA's changes to the exemption provisions of the Code and noting how the new homestead provisions “could affect the allowable exemptions” and then noting no change for property exempted if held as tenants by the entirety); Paul M. Hoffmann & Jerald S. Enslin, *Overview of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 62 MO. BAR 300, 303 (Oct. 2006) (finding that “BAPCPA does not change the exemption available in Missouri for real and personal property held by a husband and wife as tenants by the entireties”).

<sup>210</sup> 11 U.S.C. § 522(b)(3)(A) (2007).

<sup>211</sup> Compare *id.* with *id.* § 522(b)(3)(B).

<sup>212</sup> See *id.* § 522(b)(3)(B).

electing under subsection (b)(3)(A) to exempt property under State or local law.<sup>213</sup> Finally, as stated above in section 522(p)(1), a debtor may elect either exemption.<sup>214</sup>

The trustee can look, in vain, to the Code's TBE Exemption to attempt to recover the \$1.5 million Mr. Caro invested in his homestead. The TBE Exemption allows a debtor to exempt property held as tenancy by the entirety prior to filing for bankruptcy "to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law . . ." <sup>215</sup> "Nonbankruptcy law" is a term of art within the Code, meaning the applicable state law.<sup>216</sup> In Florida, a home purchased in both spouses' names is presumptively held as a tenancy by the entirety.<sup>217</sup> Thus, it would be hard for the trustee to argue that Mr. Caro does not own the home as a tenant by the entirety, in an attempt to prevent him from claiming the TBE Exemption because Mr. Caro has been married for over ten years, and both spouses' names appear on the title. Thus, the home is presumptively held as tenants by the entirety.

The trustee and unsecured creditors can look to local law for a cause of action to bring against the homestead.<sup>218</sup> But as explained above, Florida's constitutional homestead exemption denies the trustee and creditors any opportunity to bring claims against the homestead pursuant to the FUFTA or any other state statute<sup>219</sup> because the Florida Supreme Court in *Havoco of America, Ltd. v. Hill*, interpreted the Florida Constitution to mean that no creditor, unless within one of the constitutionally prescribed exceptions, can reach into the homestead, even if the debtor intended to defraud those creditors.<sup>220</sup>

The trustee's last option would be to ask the court to deny the debtor his discharge pursuant to section 727(a)(2) of the Code. Section 727(a)(2) gives the bankruptcy court the power to deny a debtor his discharge of

<sup>213</sup> *Id.* § 522 (o)-(q).

<sup>214</sup> *See id.* § 522(p)(1).

<sup>215</sup> 11 U.S.C. § 522(b)(3)(B) (2007).

<sup>216</sup> While "nonbankruptcy law" usually refers to state law, it is not limited to state law. *Patterson v. Shumate*, 504 U.S. 753, 759 (1992).

<sup>217</sup> *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 58 (Fla. 2001).

<sup>218</sup> *See* 11 U.S.C. § 544(b)(1) (2007).

<sup>219</sup> *See Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1029 (Fla. 2001) (stating that even if a debtor actually intended to defraud a creditor, the absolute bar provided by the Florida Constitution prevents any creditor from reaching into the homestead's value whether the creditor uses FUFTA, section 726.105, or any other state statute).

<sup>220</sup> *See id.*

indebtedness if the court finds the debtor defrauded his creditors.<sup>221</sup> But, proving fraudulent intent is difficult and bankruptcy judges are reluctant to deny discharges based on the use of state exemptions.<sup>222</sup> The Eighth Circuit held that, before dismissing a bankruptcy case, and thus denying discharge, the court must find “a pattern of concealment, evasion, and direct violations of the Code or court order which clearly establishes an improper motive . . . .”<sup>223</sup> Courts have also held that “there is nothing fraudulent per se about making even significant use of legal exemptions.”<sup>224</sup> Indeed, the Eighth Circuit reasoned that it should be left up to states to set exemption limits, and courts should “err in favor of the debtor” due to the danger that courts may inconsistently or arbitrarily set limits on state exemptions.<sup>225</sup>

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<sup>221</sup> See *In re Rudolph*, 233 Fed. App'x 885, 888 (11th Cir. 2007).

<sup>222</sup> Cf. *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986) (holding objections to discharge are to be strictly construed against the creditor and liberally in favor of the debtor); *In re Miller*, 39 F.3d 301, 306 (11th Cir. 1994) (holding “[a] creditor alleging intent to defraud under section 727(a)(2)(A) bears the considerable burden of demonstrating actual fraudulent intent”).

Creditors have the burden of proving debtors are not entitled to discharge and depending upon the jurisdiction must do so either by a preponderance of the evidence or by clear and convincing evidence. See *In re Pettigrew*, No. 91-6245, 1992 WL 26804, at \*3 (10th Cir. Feb. 13, 1992) (applying a preponderance of the evidence standard to determine whether a denial of discharge was appropriate); *In re Cutignola*, 87 B.R. 702, 706 (Bankr. M.D. Fla. 1988) (applying the clear and convincing evidence standard to determine whether a denial of discharge was appropriate). To deny a discharge under section 727(a)(2)(A), the creditor must show that the debtor transferred or concealed property within one year of the filing for bankruptcy, and that the transfer was made with the intent to defraud creditors. *Pettigrew*, 1992 WL 26804, at \*3.

Proving fraudulent intent is very difficult and fact-specific. See, e.g., *In re Burzee*, 402 B.R. 8, 13, 15-17 (Bankr. M.D. Fla. 2008) (allowing discharge where debtor, within one year of filing for bankruptcy, transferred her interest in the marital home to her husband and failed to claim over \$6,000 in an exempt retirement account); *In re Moore*, 375 B.R. 696, 700 (Bankr. S.D. Fla. 2007) (granting discharge even though the college-educated debtor sold her car for \$4,000, sold her engagement ring for \$12,000, sold a watch for \$500 and failed to list any of these transfers on her statement of financial affairs, though the debtor subsequently amended her SOFA after a Rule 2004 examination was made that forced the debtor to include all those assets, except the car); *Hanson v. First Nat'l Bank in Brookings*, 848 F.2d 866, 869 (8th Cir. 1988) (granting a discharge to a debtor who transformed \$30,000 in non-exempt assets to exempt assets on the eve of filing for bankruptcy); *In re Johnson*, 880 F.2d 78, 84 (8th Cir. 1989) (holding that the power to deny discharge “should be reserved for exceptional cases”). But see *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 872 (8th Cir. 1988) (holding the debtor, a doctor who liquidated almost all his non-exempt assets and placed the money in exempt life-insurance and annuity policies, was not entitled to a discharge of his indebtedness).

<sup>223</sup> *In re Kerr*, 908 F.2d 400, 404 (8th Cir. 1990).

<sup>224</sup> *Johnson*, 880 F.2d at 83.

<sup>225</sup> *Id.* at 83-84.

A bankruptcy court could decide this fact-intensive and highly discretionary decision either way. Certain facts militate in favor of granting discharge. In the hypothetical, Mr. Caro tried to avoid bankruptcy by restructuring his corporation, selling off the failing stores. He then reinvested most of the funds from the sales of the stores back into the corporation. Other facts can be used to argue that Mr. Caro's discharge should be denied. For example, the \$1.5 million transfer could be deemed fraudulent because the transfer was to an insider while the corporation was insolvent, and the corporation received no consideration for the transfer. Under FUFTA's badges of fraud analysis,<sup>226</sup> a bankruptcy court could decide to deny discharge based on this transfer, which occurred just over two years prior to bankruptcy. That said, due to the presumption in favor of the debtor and the lack of any other concealment of assets or fraudulent activity, in a close case like this one, the court is more likely to err on the side of the debtor and grant Mr. Caro his discharge.<sup>227</sup>

In the end, this hypothetical demonstrates that BAPCPA's homestead exemption-limiting provisions will not apply to debtors in states that recognize the tenancy by the entirety estate and have unlimited homestead exemptions so long as the debtor: 1) is married and bought the homestead as tenants by the entirety; 2) exempts the homestead under the Code's TBE Exemption; and 3) does not file for bankruptcy within two years of receiving the non-exempt asset or assets used to pay for the homestead.<sup>228</sup> Currently then, the Code provides only *married* debtors with the opportunity to abuse unlimited state homestead exemptions. Congress's careless drafting allows for married debtors to escape BAPCPA's homestead exemption-limiting provisions merely by knowing which bankruptcy provision to choose at the time of filing.

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<sup>226</sup> See *supra* note 198 (listing the badges of fraud as recognized by Florida law).

<sup>227</sup> While this decision could go either way, the burden is on the party seeking the denial of discharge. Further, there are few acts amounting to fraud that occurred after the initial transfer; for these reasons, the Court should err on the side of the debtor. See *supra* note 222 (explaining the difficulty a party in interest faces when seeking to deny a debtor his discharge pursuant to section 727(a)(2)).

<sup>228</sup> See *supra* Part IV.A (explaining how the TBE Loophole nullifies section 522(o)-(q)).

B. *The “Tenancy by the Entirety Loophole” in Other Jurisdictions: Arkansas, Oklahoma, and the District of Columbia*

In addition to Florida, the TBE Loophole is available to debtors in Arkansas, Oklahoma, and the District of Columbia.<sup>229</sup> All three jurisdictions recognize the tenancy by the entirety estate,<sup>230</sup> and all three provide residents with an unlimited state homestead exemption.<sup>231</sup> First, it should be remembered that all three states have specific exceptions to their respective unlimited homestead exemptions.<sup>232</sup> All three states and the District of Columbia allow three specific creditors to foreclose on the homestead: 1) a creditor who is a purchase money mortgagee; 2) a creditor holding a city, state, or federal tax lien; or 3) a creditor who holds

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<sup>229</sup> See *infra* notes 230-231 (showing that Arkansas, Oklahoma, and D.C.: 1) recognize the tenancy by the entirety law; and 2) have unlimited homestead exemptions). Thus, in these states, debtors can employ the TBE Loophole. See *id.*

<sup>230</sup> E.g., ARK. CODE ANN. § 18-12-608(a)(2)(B) (West 2007) (allowing grantees, under Arkansas law, to receive real property conveyed through a beneficiary deed as tenants by the entirety); OKLA. STAT. ANN. tit. 60, § 74 (West 2007) (recognizing that property may be held as a joint tenancy or tenancy by the entirety); *Travis v. Benson*, 360 A.2d 506, 509 (D.C. 1976) (describing the concurrent estate of tenancy by the entirety and finding that neither spouse may partition or convey an interest in the TBE property).

For a discussion about the history of Oklahoma’s tenancy by the entirety law and issues courts in the state have had interpreting Oklahoma Statute title 60, section 74, see Tom R. Russell, *Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety*, 58 OKLA. L. REV. 317 (2005). The article interprets Oklahoma’s tenancy by the entirety estate as allowing certain creditors, the IRS for example, to attach and execute liens against tenancy by the entirety property, even though this was not allowed at common law. *Id.* at 318-19.

A debtor in Oklahoma can use the Code’s TBE Exemption, which he would qualify for based on Oklahoma law, and he would retain his homestead because, while a creditor may attach a lien to the homestead based on the above-mentioned Oklahoma statute, the creditor may not, due to Oklahoma’s *Constitutional* homestead exemption, execute on that lien through a judicially forced sale. See OKLA. CONST. art. XII, § 2 (protecting debtors from *any* judicially forced sale); see also *Toma v. Toma*, 163 P.3d 540, 542 (Okla. 2007) (interpreting the Oklahoma Constitution and a statute passed in 1997 as allowing creditors to attach liens to homestead property but absolutely barring, due to the state’s constitution, a forced sale to execute the lien). Put more simply, the debtor at the bankruptcy court level would use Oklahoma’s TBE law to evade the restrictions of section 522(o), (p), and (q). Then if a creditor argued, in bankruptcy court, that the debtor would not be exempt from process under Oklahoma state law, the debtor would successfully argue that the state’s constitutional homestead exemption protects the residence from forced sale.

<sup>231</sup> See ARK. CONST. art. IX, §§ 3-5; FLA. CONST. art. X, § 4; OKLA. CONST. art. XII, § 2; D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001).

<sup>232</sup> See *infra* chart in Appendix A (listing details of certain states unlimited homestead exemptions).



a mechanic's lien on the homestead.<sup>233</sup> These exceptions will not be discussed because the article merely applies the hypothetical situation to these four jurisdictions, and in the hypothetical, Mr. Caro paid for the home in full, and no tax or mechanic's lien was attached to the homestead.

First, when Mr. Caro used the TBE Loophole in Florida he received the greatest protection because Florida provides an exemption that absolutely prevents the forced sale or attachment of liens to the homestead.<sup>234</sup> In Florida, it does not matter how the debtor obtains the funds to purchase the homestead. Indeed, even if the debtor obtains the funds through criminal or immoral acts, the homestead is absolutely protected from unsecured creditors.<sup>235</sup>

Arkansas is the next most protective jurisdiction where debtors can use the TBE Loophole. Arkansas has stated that purchasing a homestead can never be a fraud upon creditors.<sup>236</sup> Arkansas is the second most protective jurisdiction because its constitutional homestead exemption: 1) is only available to married debtors and residents who live with children; and 2) it prevents forced sale and the attachment of liens, but does not provide absolute protection to residents.<sup>237</sup> In certain situations, the Arkansas Supreme Court stripped homestead protections when a gross injustice would result if homestead protections were left in place. For example, when a debtor obtained the homestead by defrauding the seller, the Arkansas Supreme Court abrogated the constitutional homestead exemption and impressed an equitable lien upon the homestead.<sup>238</sup> In another case, the Arkansas Supreme Court completely denied homestead

<sup>233</sup> *Id.*

<sup>234</sup> See *Havoco Am., Ltd. v. Hill*, 790 So. 2d 1018, 1029 (Fla. 2001) (explaining that the Florida Supreme Court interpreted the state constitution as forbidding the attachment of judgment liens to the homestead property).

<sup>235</sup> See Laurence, *supra* note 69, at 504-05 (quoting *Havoco*, 790 So. 2d at 1022). The homestead exemption is guaranteed to every resident no matter the moral character of that person; criminal punishment may be doled to residents according to Florida's criminal statutes but losing one's homestead is not, "part of the punishment." *Id.*

<sup>236</sup> See *id.* at 499 (quoting *Chastain v. Ark. Bank & Trust Co.*, 249 S.W. 1, 2 (Ark. 1923)). The Supreme Court of Arkansas stated that "[t]here can be no such thing as the fraudulent acquisition of a homestead, for law permits it, regardless of the rights of creditors." *Id.*

<sup>237</sup> See *supra* note 93 and accompanying text (explaining that Arkansas's homestead exemption is available only to parents and married couples). Also, Arkansas's homestead is not as protective as Florida's because Arkansas Courts have applied equitable liens to homesteads in the past. See *id.*

<sup>238</sup> See Laurence, *supra* note 69, at 524-25 (discussing *Mack v. Marvin*, 202 S.W.2d 590 (Ark. 1947), where the Arkansas Supreme Court placed an equitable lien on a homestead when the debtor purchased the homestead by defrauding the seller).

protections to a spouse who murdered his wife.<sup>239</sup> The court held that no protections were available to the debtor because the property was no longer held by a married couple and thus lost its homestead designation. In dicta, however, the court stated:

This conclusion is reached based upon public policy underlying the homestead exemption, the cases cited, and on the general principles that a court of equity is a court of conscience wherein justice is done sometimes stripped of technicalities and red tape, and because a court of equity should consider the relative positions of the various parties and render a decree that does substantial justice to all.<sup>240</sup>

This dicta indicates that the Arkansas Supreme Court will strip property of its homestead exemption if protecting the property would create substantial injustice.<sup>241</sup>

By comparison, the District of Columbia is the third most protective jurisdiction where debtors can employ the TBE Loophole to prevent the attachment of liens or foreclosure. But D.C. is not as protective as Florida or Arkansas because the homestead exemption is supplied through statute. While D.C. Courts have not addressed the issue, one can argue that D.C.'s UFTA would not apply to the homestead exemption since both are statutes and should be read so as not to conflict with one another.<sup>242</sup>

Finally, Oklahoma's unlimited homestead exemption provides the least protection because the state constitution only prevents foreclosure.<sup>243</sup> The Oklahoma State Legislature passed a statute that allows creditors to attach liens to the homestead.<sup>244</sup> Creditors in Oklahoma can then execute

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<sup>239</sup> *Middleton v. Lockhart*, 43 S.W.3d 113, 121 (Ark. 2001) (holding that a spouse who murders his wife loses the homestead exemption since the owner of the house is no longer the "head of a family" or married, and thus Arkansas law does not provide him any protection).

<sup>240</sup> *Id.* at 583.

<sup>241</sup> See *Laurence*, *supra* note 69, at 502 (arguing that while the Arkansas Supreme Court held that the use of the state homestead exemption could never be a fraud upon creditors, the dicta in *Middleton* seems to imply that the court may deny a debtor the homestead exemption if it is necessary to balance the equities).

<sup>242</sup> See generally D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001) (providing D.C. residents with an unlimited homestead exemption); D.C. CODE ANN. §§ 28-3101-3111 (LexisNexis 1996) (enacting the UFTA in the District of Columbia).

<sup>243</sup> See OKLA. CONST. art. XII, § 2.

<sup>244</sup> See OKLA. STAT. tit. 12, § 706(B) (2007).

on those attached liens if and when the property loses its homestead designation.<sup>245</sup>

This article will now quickly apply the hypothetical situation in each available jurisdiction, examining whether each state's version of the UFTA would trump that jurisdiction's homestead exemption because, as explained above, when a creditor or trustee looks to state law as mandated by the Code's TBE Exemption,<sup>246</sup> he will use the state's UFTA to reach the funds that were fraudulently transferred.

As of publication, only Florida has specifically held that the state's UFTA, FUFTA, is absolutely inapplicable to the homestead because of Florida's constitutional homestead exemption.<sup>247</sup> However, none of the four jurisdictions has allowed an unsecured creditor to foreclose on any property claimed as a homestead; thus, the trustee and unsecured creditors cannot use the UFTA, or any other statute, to conduct a forced sale.

First, applying Arkansas law to the hypothetical will not change the result. While the Arkansas Supreme Court abrogated the homestead exemption when gross injustice may result, the situations in which the Arkansas Supreme Court did so are distinguishable from the hypothetical situation. Mr. Caro did not defraud the seller, as the buyer did in *Mack v. Marvin*.<sup>248</sup> Instead, he paid the seller in full. Also, granting Mr. Caro the homestead exemption would not create a gross injustice similar to the Arkansas case where the state supreme court stripped the homestead of its exemption when one spouse murdered the other.<sup>249</sup> Here, the only injustice is that creditors are not able to collect on claims from the homestead, just as the state constitution intended.

Moving on to the District of Columbia, as stated previously, D.C. has not decided any cases pitting its UFTA against its statutory homestead exemption. On the other hand, due to the fact that the D.C. Council recently passed the expansive homestead exemption, and the exemption prevents both liens and foreclosures, it is possible that D.C. courts would either hold the UFTA inapplicable to homesteads within the district or hold that the homestead statute supersedes the UFTA in accordance with

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<sup>245</sup> *Toma v. Toma*, 163 P.3d 540, 547 (Okla. 2007) (explaining that lien on a homestead is only enforceable when the property loses its homestead designation).

<sup>246</sup> See 11 U.S.C. § 522(b)(3)(B) (2007).

<sup>247</sup> See *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1029 (Fla. 2001).

<sup>248</sup> See *Mack v. Marvin*, 202 S.W.2d 590 (Ark. 1947).

<sup>249</sup> See *Middleton v. Lockhart*, 43 S.W. 3d 113, 121 (Ark. 2001).

the canon of construction *leges posteriores priores contrarias abrogant*, “subsequent laws repeal those before enacted to the contrary.”<sup>250</sup>

Finally, in Oklahoma, the constitutional homestead exemption absolutely bars unsecured creditors from foreclosing on a debtor’s homestead.<sup>251</sup> That said, in 1997 the State Legislature passed a law giving unsecured creditors the ability to attach liens to the homestead.<sup>252</sup> This law appears to occupy the field. Hence, unsecured creditors currently can bring a cause of action pursuant to Oklahoma’s UFTA, and if an unsecured creditor, or creditors, succeeds, it has as an available remedy the attachment of judicial liens to the homestead.<sup>253</sup> Creditors still have to wait until the homestead property loses its homestead designation to execute the lien, but at the end of the day—that is, at some point in the future—creditors can extract value from the homestead.

Thus, it appears a debtor who funnels non-exempt assets into an exempt homestead can keep his homestead free and clear of liens in Florida, Arkansas, and possibly D.C. On the other hand, in Oklahoma, a creditor cannot foreclose on the homestead, but can attach liens to the homestead. All a debtor must do in bankruptcy to abuse these states’ unlimited state homestead exemptions is fulfill three requirements: 1) the debtor is married and bought the homestead as tenants by the entirety; 2) the debtor exempts his home under the Code’s TBE Exemption; and 3) the debtor did not file for bankruptcy within two years of funneling the non-exempt assets into the exempt homestead.<sup>254</sup> The next section

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<sup>250</sup> See *Watt v. Alaska*, 451 U.S. 259, 285 (1981) (“Rather than join the Court in its speculative efforts to deal with the doctrine of implied repeal, I would rest decision of these cases upon an established rule of statutory construction: *leges posteriores, priores contrarias abrogant*. Sedgwick describes this rule with approval as follows: ‘If two inconsistent acts be passed at different times, the last,’ said the Master of the Rolls, ‘is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.’”) (Stewart, J., dissenting) (citations omitted). The District of Columbia passed its unlimited homestead exemption in 2001. See D.C. CODE ANN. § 15-501(a)(14) (LexisNexis 2001). If a D.C. Court were to examine the relative merits of the two statutes, one could argue the last statute in time more clearly evidences the intent of the legislature, and thus the homestead exemption would trump the UFTA, which was passed in 1995. See D.C. CODE ANN. § 28-3101-3111 (LexisNexis 1996).

<sup>251</sup> OKLA. CONST. art. XII, § 2; see also OKLA. STAT. tit. 31 § 2(A)-(C) (defining the scope, in acres, of the state homestead exemption).

<sup>252</sup> OKLA. STAT. tit. 12, § 706(B) (2007).

<sup>253</sup> See *id.*

<sup>254</sup> See generally *In re Hinton*, 378 B.R. 371 (Bankr. M.D. Fla. 2007) (holding that section 522(o), (p), and (q) does not apply when debtors exempt their homestead pursuant to section 522(b)(3)(B)); but cf. 11 U.S.C. § 548(a)(1) (2007) (preventing a debtor from fraudulently transferring assets for the two year period preceding the bankruptcy petition).

examines each requirement to determine whether a debtor can realistically satisfy all three prongs.

C. *The Practicality of the "Tenancy by the Entirety Loophole"*

Now that it is established where a debtor may move so that he may use the Tenancy by the Entirety Loophole, one must ask: how realistic is the hypothetical posed? Obviously, the toughest requirement for a debtor to satisfy is to put off filing for bankruptcy for two years. BAPCPA increased section 548's look-back period from one to two years for this purpose.<sup>255</sup> But in many cases, such as *In re Leach*, *In re Hinton*, and *In re Spatz*, debtors made fraudulent transfers two years prior to filing for bankruptcy.<sup>256</sup>

In *Leach*, the trustee sought to set aside a transfer that occurred three years and ten months prior to the filing of the bankruptcy petition.<sup>257</sup> The bankruptcy court held the pre-BAPCPA one year statute of limitation ran for section 548 of the Code, but the trustee used New Mexico's UFTA, which had a four year look-back period.<sup>258</sup> In *Hinton*, the debtor moved to Florida after buying a \$1.6 million house six years before filing for bankruptcy.<sup>259</sup> The debtor staved off bankruptcy for six years despite one creditor holding a \$2.4 million judgment against him for almost four years.<sup>260</sup> The debtor then fully exempted his homestead though the home was likely bought with non-exempt funds.<sup>261</sup> Finally, in *Spatz*, the debtor made a fraudulent transfer in January 1989, but the debtor's involuntary bankruptcy petition was not brought until June 14, 1991. Based on these facts, the debtor was likely engaged in bankruptcy planning.<sup>262</sup>

<sup>255</sup> See *In re Leach*, 380 B.R. 25, 28 n.2 (Bankr. D.N.M. 2007).

<sup>256</sup> See *id.* at 25; see *Hinton*, 378 B.R. at 374; see *In re Spatz*, 222 B.R. 157, 157-60 (N.D. Ill. 1998).

<sup>257</sup> See *Leach*, 380 B.R. at 29-30.

<sup>258</sup> See *id.* It should also be noted that if this transfer had occurred in Arkansas the UFTA would not be available because the statute of limitations in Arkansas is only three years. See ARK. CODE ANN. § 4-59-209 (West 2007).

<sup>259</sup> *Hinton*, 378 B.R. at 374.

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *In re Spatz*, 222 B.R. 157, 159-61, 165 (N.D. Ill. 1998). Thus, under the previous look-back period of one year, section 548 did not reach the debtor's initial fraudulent transfer, but even under BAPCPA's new two year look-back period, section 548 would not have helped the trustee. Evaluating this fact pattern under Florida law, if Spatz took the proceeds of the fraudulent transfer and placed them in his homestead, the trustee could not reach those funds either through section 548 or, as explained previously, through FUFTA.

The other two prongs are much easier to satisfy. First, in most jurisdictions when a married couple purchases a home, there is a presumption that the couple purchased it as tenants by the entirety.<sup>263</sup> Thus, as long as the debtor and the non-debtor spouse do not explicitly purchase the home pursuant to a different common law estate, this requirement is satisfied. Further, all a debtor must do to fulfill the third requirement is fill out his bankruptcy petition and claim the homestead exempt pursuant to the Code's TBE Exemption rather than the Code's Homestead Provision. Simple counseling by any competent attorney will accomplish this requirement.

Though planning two years before bankruptcy is no easy feat, debtors with sufficient available assets can stave off bankruptcy for two years. Furthermore, approximately seventy-five percent of bankruptcy petitioners are married.<sup>264</sup> Thus, there are many debtors who, with the right advice, can evade the restrictions imposed by section 522(o), (p), and (q). Now that the potential for abuse is apparent, and the homestead exemption-limiting provisions have been shown to be de facto nullified, the next question that must be asked is how can Congress fix the problem?

#### V. THE SOLUTION TO THE "TENANCY BY THE ENTIRETY LOOPHOLE"

Some courts and commentators have recently observed that debtors can use the TBE Exemption to evade BAPCPA's new homestead exemption-limiting provisions.<sup>265</sup> With this problem now fully examined, the easiest way to close this loophole is for Congress to pass a law that places at the end of the TBE Exemption, section 522(b)(3)(B), the following language: "but if a debtor elects to exempt a homestead under this subsection, then the homestead property is subject to section 522 subsections (o), (p), and (q) of the Bankruptcy Code." Thus, the reformed section 522(b)(3)(B) would read:

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<sup>263</sup> See, e.g., *Ramsey v. Ramsey*, 531 S.W.2d 28, 30 (Ark. 1975) (citations omitted); *Roberts & Lloyd, Inc. v. Zyblut*, 691 A.2d 635, 637 (D.C. 1997); *Beal Bank, SSB v. Almand & Assocs.*, 780 So.2d 45, 49 (Fla. 2001).

<sup>264</sup> TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 34 (2000).

<sup>265</sup> See *supra* note 209 and accompanying text (listing cases and law review articles citing the availability of the TBE Loophole).

Property listed in this paragraph is — . . . any interest in property which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law, *but if a debtor elects to exempt a homestead under this subsection, then the homestead property is subject to section 522 subsections (o), (p), and (q) of the Bankruptcy Code . . .*

Congress must accept the solution proposed, and to further demonstrate why this solution should be immediately enacted, three arguments will be presented to dispel any lingering objections members of Congress might have about passing the proposed legislation.

Indeed, one can counter the solution proposed by arguing that the government should protect the family and the innocent spouse from the bad acts of the debtor. While this may be true, it is equally true that Congress intended to prevent debtors from receiving windfalls procured through abusive use of unlimited state homestead exemptions, and to effectively prevent that windfall, the innocent spouse may have to suffer for the bad acts of the debtor.<sup>266</sup> Congress sought to cap the amount a debtor may exempt in order to prevent the abusive use of state homestead exemptions,<sup>267</sup> and if Congress does not accept the suggested solution, no de facto cap will exist; *married* debtors will continue to abuse certain states' unlimited homestead exemptions.

Many arguments can be formulated that draw into question the wisdom of closing the TBE Loophole. With them in mind, this article

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<sup>266</sup> See *infra* Part V (presenting three arguments why Congress could reach past the TBE Shield and arguing Congress must do so to prevent the abusive use of unlimited state homestead exemptions).

<sup>267</sup> The House Report on BAPCPA stated section 522(p), “amends section 522 of the Bankruptcy Code to impose an aggregate monetary limitation . . . . The monetary cap applies if the debtor acquired such property within the 1,215-day period preceding the filing of the petition . . . .” H.R. REP. NO. 109-31, at 81 (2005). See also *In re Wayrynen*, 332 B.R. 479, 483 (Bankr. S.D. Fla. 2005) (interpreting section 522(p) as limiting all debtors to the amount set out therein).

Many critics may argue that a cap is unfair because lower-income debtors can retain the full benefit of their homestead if it is below the \$136,875 limit. Yet, the cap forces debtors who were wealthy to give up their million dollar mansions. The first response to this argument against a cap is that Congress decided that it wanted to curb the abusive use of homestead exemptions and set a limit. Second, federal tax law taxes wealthier individuals at a high rate and does not tax citizens in the lowest tax bracket at all. The cap is in accord with the ability to pay theory. Wealthy debtors have lavish houses and thus the ability to pay back more of their debts in real numbers, proportion should not matter.

presents three major arguments that further demonstrate why married debtors should not be allowed to use the TBE Exemption to abuse state homestead exemptions. These arguments seek to persuade Congress that the solution proposed must be accepted, and Congress must close the TBE Loophole in order to close the “mansion loophole”—the latter being the sole impetus for enacting section 522(o), (p), and (q) of BAPCPA.<sup>268</sup>

First, there is a strictly textual argument. Section 522(o)(4) states the homestead shall be reduced to the extent non-exempt funds were fraudulently transferred into “real or personal property that the debtor *or a dependent of the debtor* claims as a homestead.”<sup>269</sup> It then follows that Congress accepted the possible negative effects the new statute would have on dependents of the debtor through the loss of the homestead through foreclosure to obtain the fraudulently transferred interest.<sup>270</sup> Nevertheless, Congress decided the benefit—preventing debtors from abusing state homestead exemptions—outweighed the cost to those dependents.<sup>271</sup> Similarly written, section 522(p)(1)(A) states that the debtor may not exempt property that exceeds \$136,875 in “real or personal property that the debtor *or a dependent of the debtor* uses as a residence.”<sup>272</sup> Again, the extension of this provision to dependents indicates Congress’s implicit acceptance of the harm to those dependents that would flow from enforcing the Code section.

Congress determined the benefits of section 522(o) and (p) outweighed the negative effects those provisions would have on dependents, such as the loss of the family home.<sup>273</sup> Thus, one can easily argue Congress should also apply section 522(o) and (p) to the TBE Exemption. Married debtors with children should not receive special treatment that unmarried debtors with children do not.

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<sup>268</sup> See H.R. REP. NO. 109-31, at 15-16 (2005).

<sup>269</sup> 11 U.S.C. § 522(o)(4) (2007) (emphasis added).

<sup>270</sup> Congress must have realized that if the trustee was successful in proving fraud under section 522(o) the house would be foreclosed on, and a dependent child would be out of a home.

<sup>271</sup> See 11 U.S.C. § 522(o)(4) (2007). One could argue that it did not matter to Congress that the debtor lived with a dependent.

<sup>272</sup> *Id.* § 522(p)(1)(A) (emphasis added). See also *id.* § 522(p)(1)(D) (stating the same information as section 522(p)(1)(A), but substituting the word “homestead” for “residence”).

<sup>273</sup> See H.R. REP. NO. 109-31, at 15-16 (2005) (citing the need to curb the abusive use of certain states’ unlimited homestead exemptions). Congress realized that a dependent may claim the property as a homestead and attempt to exempt it from process in bankruptcy court. Congress wanted to prevent this, and thus it included in section 522, “real or personal property that the debtor or a dependent of the debtor uses as a residence.” 11 U.S.C. § 522(p)(1)(A) (2007). See also *id.* § 522(o)(4), (p)(1)(D).



Second, these subsections should apply even though their application would infringe upon the TBE Shield. To elaborate, similar policy arguments provide support for both state homestead protections and the protections the TBE Shield provides property owners. State homestead exemption law and the tenancy by the entirety estate protect similar interests and are based upon similar public policy.<sup>274</sup> Both protect the marital unit “because of [the] high regard for family life[] and the public values derived from the institution of marriage.”<sup>275</sup> Given that Congress felt the need to prevent the abusive use of state homestead exemptions outweighed the protectionist benefits those exemptions provided to families then, similarly, the need to prevent the use of the TBE Loophole—which allows for the exact same abuse—outweighs the protectionist benefits of the tenancy by the entirety estate.<sup>276</sup>

This is not to say that state homestead exemptions and state tenancy by the entirety laws protect the same debtors<sup>277</sup>—or even the same property.<sup>278</sup> Nevertheless, both *are* intended to protect the same interest, the preservation of the home.<sup>279</sup> As such, Congress should treat property claimed under the TBE Exemption similarly to property exempted under the Code’s Homestead Provision. Congress must pass a law applying section 522(o), (p), and (q) to the TBE Exemption. If Congress fails to adopt the solution suggested, BAPCPA will prevent *only* single debtors and gay and lesbian debtors from abusing certain states’ unlimited homestead exemptions.<sup>280</sup> This leaves married debtors free to use the

<sup>274</sup> Compare Kathryn M. Kelley, *Enforcing the Federal Tax Lien Against Jointly-Owned Property: The Rodgers Equitable Discretion Test*, 35 SYRACUSE L. REV. 1321, 1326-27 (1984) (“The primary objective of homestead laws is generally regarded as the security of the family”) with *Sterrett v. Sterrett*, 166 A.2d 1, 2 (Pa. 1960) (“Husband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade and fruit as much as the other”).

<sup>275</sup> Robert D. Null, Note, *Tenancy by the Entirety As An Asset Shield: An Unjustified Safe Haven For Delinquent Child Support Obligors*, 29 VAL. U.L. REV. 1057, 1083 (1995).

<sup>276</sup> See *id.* (noting that homestead exemptions and the tenancy by the entireties estate protect the same values).

<sup>277</sup> Compare FLA. CONST. art. X, § 4 (protecting homesteads from the attachment of liens and judicial foreclosure) with *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 52 (Fla. 2001) (listing marriage as one of the necessary elements for property to be held as TBE property).

<sup>278</sup> See *Beal Bank*, 780 So. 2d at 54 (holding that both real and personal property may be held as tenants by the entirety).

<sup>279</sup> See *supra* Part II.D (explaining that both protect the home to protect the family).

<sup>280</sup> See Donna Litman Seiden, *There’s No Place Like Home (Stead) in Florida—Should it Stay that Way?* 18 NOVA L. REV. 801, 835 (1994) (arguing that the homestead exemption is *more important* to the individual than to married couples because it is the individual’s *only* protection covering the

TBE Exemption and evade the restrictions imposed by section 522(o), (p), and (q). Thus, the Bankruptcy Code, similar to the tax code, presents an example of federal law providing married couples a benefit, while simultaneously penalizing single and gay debtors.<sup>281</sup>

Finally, in other areas of both state and federal law, creditors have been given the opportunity to reach past the TBE Shield to extract value from property held as tenants by the entirety.<sup>282</sup> In nine states and the District of Columbia, despite the fact that property is held as tenants by the entirety, a non-debtor spouse's interest is, "subject to levy and execution."<sup>283</sup> In the District of Columbia, New York, and New Jersey, the purchaser of the interest at an execution sale becomes "a tenant in common with the other spouse, but with no right to force partition."<sup>284</sup> In Oklahoma and Tennessee, a creditor may execute on tenancy by the entirety property, severing the unities and destroying the non-debtor spouse's right to survivorship.<sup>285</sup> Congress *should* do the same in order to close the TBE Loophole.

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residence). Married couples get the added protection of the TBE Shield, which usually prevents creditors from placing a lien on TBE property if only one spouse is liable for the debt. *Id.* It is easy to see that the homestead exemption is very different from the TBE Shield. The TBE Shield may protect far more property than just the homestead; while the homestead exemption only protects the home. Additionally, the homestead exemption is usually available to any debtor, not just those who are married. In effect, Congress only restricted state homestead exemptions for single debtors and debtors who are gay. It follows then, that married couples are currently able to exempt more property under the TBE Exemption than single debtors can under the Homestead Provision because married debtors evade all the new restrictions BAPCPA put in place.

<sup>281</sup> Cf. Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 885-86 (2006) (providing a hypothetical situation to explain how same-sex couples are disadvantaged in bankruptcy court). If a Florida bankruptcy court applies Vermont law, the debtor, who entered a civil union, can exempt jointly held real property and jointly held personal property. *Id.* However, if the Florida bankruptcy court applies Florida law, the debtor will receive no such protection. *Id.* Arkansas is the only jurisdiction reviewed that does not provide a single debtor with a constitutional homestead exemption. See *supra* note 93 and accompanying text (delineating who may claim Arkansas's homestead exemption).

<sup>282</sup> See POWELL, *supra* note 124, at § 52.03.

<sup>283</sup> *Id.* Alaska, Arkansas, Hawaii, Maryland, New Jersey, New York, Oregon, Pennsylvania, and West Virginia allow a creditor to levy on one spouse's interest in TBE property, thus piercing the TBE Shield. See *id.* at n.8.

<sup>284</sup> *Id.* § 52.03; see *id.* at n.9 (listing the states where a buyer of an interest in TBE property will become a tenant in common with the other spouse). Specifically, in Florida, a judgment against one spouse is not enforceable against TBE property. *In re Buonopane*, 359 B.R. 346, 347 (Bankr. M.D. Fla. 2007) (citing *Vaughn v. Mandis*, 53 So. 2d 704 (Fla. 1951)).

<sup>285</sup> See POWELL, *supra* note 124, at § 52.03 n.10.

Indeed the Supreme Court, in a landmark tax decision, has done just that. In *United States v. Craft*,<sup>286</sup> the Court held that despite Michigan state law barring lien attachment to tenancy by the entirety property where only one spouse owed a tax debt, Congress, when writing the tax code, intended to allow tax liens to attach to property held as tenants by the entirety.<sup>287</sup> Obviously, allowing the government to attach tax liens to TBE property is distinguishable from allowing private creditors to attach liens to TBE property in bankruptcy court.<sup>288</sup> But *Craft* still stands strongly for one proposition: if Congress sees a compelling problem and the only way to solve that problem is by reaching past the TBE Shield, then the federal government can, and should, reach past the TBE Shield.<sup>289</sup>

Congress, when drafting BAPCPA, felt strongly about preventing debtors from abusing unlimited state homestead exemptions.<sup>290</sup> Thus, based on the Supreme Court's decision in *Craft*, Congress can—and should—apply section 522(o), (p), and (q) to the TBE Exemption in section 522(b)(3)(B).<sup>291</sup> Congress has the power to subjugate state law

<sup>286</sup> 535 U.S. 274 (2002).

<sup>287</sup> *Id.* at 274. The Court held that “[l]egislative history does not support respondent’s position that Congress did not intend that a federal tax lien attach to an entireties property interest.” *Id.* at 275.

<sup>288</sup> IRS tax claims based on the debtor’s failure to pay income taxes are different from private unsecured creditors’ claims in three important respects: 1) IRS income tax claims for the three years prior to the debtor filing for bankruptcy hold the eighth priority and must be paid in full before any money will be paid to unsecured creditors; 2) income tax liens are non-dischargeable in bankruptcy, while general unsecured claims are dischargeable; and 3) in Chapter 13, a debtor must pay tax liens in full to receive a discharge. See 11 U.S.C. § 1322(a)(2) (2007); *Young v. United States*, 535 U.S. 43, 46 (2002); see also Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-By-The-Entireties Interests*, 75 IND. L.J. 1163, 1170 (2000) (arguing that the general tax lien is expansive and Congress “meant [for it] to reach every interest in property a taxpayer might have”). “[T]axes are the life blood of government, and their prompt and certain availability an imperious need.” *Id.* (citation omitted). The author concedes that private creditors do not have as persuasive a need to collect on commercial debts as the federal government has to collect on tax debts, and in fact, courts have held *Craft* inapplicable to the Bankruptcy Code. See, e.g., Harris Ominsky, *Bankruptcy: Tenancy by the Entireties Protected*, 35 REAL EST. L. REP. 3 (2005) (“[The District Court for the Western District of Michigan] held that [TBE property] is fully excludable from a spouse’s bankruptcy estate, except against joint claims made against both spouses.”).

<sup>289</sup> See *Craft*, 535 U.S. at 274 (holding that the general tax lien allows the IRS to encumber TBE property despite state law barring such attachment). When the federal government wants to levy upon a tax debtor’s TBE property, it may do so pursuant to the Supremacy Clause by direct Congressional enactment. See *id.*

<sup>290</sup> See H.R. REP. NO. 109-31, at 15-16 (2005).

<sup>291</sup> See *supra* note 289 and accompanying text (arguing that since the government has the power to reach past the TBE Shield to recover payment for unpaid taxes, Congress can and should do the same to prevent debtors from abusing state homestead exemptions).

when a debtor files for bankruptcy,<sup>292</sup> and to effectively close the “mansion loophole,” Congress must reach past states’ TBE Shields to prevent debtors from abusing the Code.

## VI. CONCLUSION

Congress set out to reform the Bankruptcy Code and prevent the abusive use of state homestead exemptions through skillful bankruptcy planning.<sup>293</sup> Congress was understandably unhappy with wealthy debtors, such as Burt Reynolds, evading their creditors by purchasing lavish mansions that were untouchable under certain states’ generous homestead exemptions.<sup>294</sup> Nevertheless, a debtor can evade BAPCPA’s homestead exemption-limiting provisions by satisfying three elements: 1) the debtor is married and buys the homestead as tenants by the entirety; 2) the debtor exempts his homestead under the Code’s TBE Exemption, section 522(b)(3)(B); and 3) the debtor does not file for bankruptcy within two years of funneling the non-exempt asset or assets into the exempt homestead. Allowing wealthy debtors to commit abuse of the Code by taking advantage of unlimited state homestead exemptions is not only fundamentally unfair to creditors,<sup>295</sup> it also decreases the credit available to lower-income residents in those states with unlimited exemptions,<sup>296</sup> and it may raise interest rates in other economic sectors.<sup>297</sup>

All Americans pay an implicit bankruptcy tax in the form of higher interest rates when debtors discharge their debts in bankruptcy, and thus it is in everyone’s interest to prevent abuse of the Bankruptcy Code.<sup>298</sup> The economy is greatly affected whenever debtors go into default, as

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<sup>292</sup> See U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States . . .”). Based upon both the delegation in Article I and the Supremacy Clause, Congress can abrogate state law when a debtor files for bankruptcy. See *id.*; U.S. CONST. art. VI, cl. 2.

<sup>293</sup> See H.R. REP. NO. 109-31, at 2 (2005) (asserting that BAPCPA “caps the amount of homestead equity a debtor may shield from creditors . . .”).

<sup>294</sup> See *id.* at 592.

<sup>295</sup> See *id.* at 2 n.1 (explaining that “bankruptcy is also a moral act . . . [and] [t]here is a conscious decision not to keep one’s promises. It is a decision not to reciprocate a benefit received, a good deed done on the promise that you will reciprocate. Promise-keeping and reciprocity are the foundation of an economy and healthy civil society.”).

<sup>296</sup> See Reint Gropp et al., *supra* note 19, at 220 (finding that car interest rates may be higher in states with larger homestead exemptions).

<sup>297</sup> See Marquardt, *supra* note 17, at 45 (explaining that the sub-prime mortgage crisis has caused the interests rates on student loans to rise).

<sup>298</sup> See H.R. REP. NO. 109-31, at 4 (2005) (citation omitted).

clearly shown by the sub-prime mortgage crisis.<sup>299</sup> Thus, any abuse of the Code that gives debtors an incentive to divert cash and assets from creditors should be eliminated.

BAPCPA has been criticized many times as being poorly drafted.<sup>300</sup> This article has attempted to more fully expose a major loophole in BAPCPA so that Congress may correct the mistake. Understandably, both state homestead exemptions and state tenancy by the entirety laws have great social value because they protect debtors who otherwise might be left homeless and penniless.<sup>301</sup> At the same time, Congress determined it would curb the abusive use of state homestead exemptions when it passed BAPCPA.<sup>302</sup> Congress has not satisfactorily done so.

In other areas of law, many states and the U.S. government have reached past the TBE Shield, and thus Congress should not hesitate to do so in order to prevent abuse of the Code.<sup>303</sup> Rich, married debtors should not be allowed to plan and retain multi-million dollar mansions, while creditors hold millions in unpaid judgment liens and unpaid claims. As some members of Congress complained when BAPCPA passed, only the “truly needy unsophisticated debtor” will experience the effects of the new provisions.<sup>304</sup>

These Congressmen, dissenting from the passage of BAPCPA, asked “[w]hat message does it send when Congress subjects middle-class debtors to a means test and other onerous changes to the Code, while permitting the wealthy to continue to place their millions out of reach of their creditors?”<sup>305</sup> This article only seeks to show Congress how it must change the law to accomplish what it originally set out to do. Congress set out to prevent the abusive use of certain states unlimited homestead

<sup>299</sup> Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1. For instance, the article cites the increase in the number of troubled auto loans. *Id.*

<sup>300</sup> See, e.g., Alan Eisler, *The BAPCPA Chilling Effect on Debtor's Counsel*, 55 AM. U. L. REV. 1333, 1343 (2006) (citing deficiencies in BAPCPA such as BAPCPA not explaining how a debtor should perfect a homestead exemption in another state).

<sup>301</sup> See *supra* Part II.C (explaining the public policy rationales behind the homestead exemption).

<sup>302</sup> See H.R. REP. NO. 109-31, at 2 (2005).

<sup>303</sup> See *supra* Part V (explaining that the Federal Tax Code allows the IRS to reach past the TBE shield and arguing Congress should change the Bankruptcy Code to allow trustees and creditors to do the same).

<sup>304</sup> H.R. REP. NO. 109-31, at 595 (2005).

<sup>305</sup> *Id.*; see also *supra* note 146 and accompanying text (explaining the mechanics of BAPCPA's “means test,” which determines whether a debtor may file for bankruptcy under Chapter 7 of the Code).

exemptions and stop the negative effects that follow from this abuse.<sup>306</sup> To achieve this goal, Congress must change the law and close the TBE Loophole.

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<sup>306</sup> See generally *supra* notes 296-299 (examining the many negative effects that follow from debtors failing to pay their debts).

## APPENDIX A

STATE	HOMESTEAD EXEMPTION PROVISIONS	SCOPE OF UNLIMITED HOMESTEAD EXEMPTION PROTECTION	EXCEPTIONS <sup>307</sup>
Texas	CONST. art. XVI, §§ 50-51.	Single adult or family homes; up to ten acres in a city/town; 200 acres in any other area; against liens and foreclosure	May Attach and Foreclose for: 1) purchase money mortgages; 2) mechanic's liens; 3) non-payment of state taxes due on the property or non-payment of federal taxes; 4) an owelty of partition imposed against the entirety of the property by a court order or written agreement of the parties to the partition; 5) the refinance of a lien against a homestead; 6) consensual mortgages; 7) a reverse mortgage; 8) conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property
Florida	CONST. art. X, § 4(a)(1).	Single adult or family homes; one-half acre in town/city; 160 acres any other area; against liens and foreclosure	May Attach and Foreclose for: 1) non-payment of state taxes due on the property or non-payment of federal taxes; 2) purchase money mortgages or any loan made for the improvement of the homestead; 3) mechanic's liens
Iowa	IOWA CODE ANN. §§ 561.2; 561.16; 561.21; 624.23(2)	Single adult or family homes; one-half acre in town/city; 40 acres any other area; against judicial liens	May Attach and Foreclose for: 1) for a lien that attached prior to acquiring the homestead and the debtor (former owner) has no other assets available for execution; 2) for a mechanic's

<sup>307</sup> These exceptions are meant to be illustrative and not necessarily exhaustive.

STATE	HOMESTEAD EXEMPTION PROVISIONS	SCOPE OF UNLIMITED HOMESTEAD EXEMPTION PROTECTION	EXCEPTIONS <sup>307</sup>
			lien; 3) if owner puts the home as collateral; 4) if no survivors and prior debts; 5) for non-payment of federal taxes
Oklahoma	CONST. art. XII, § 2; OKLA. STAT. 31, § 2(A)-(C); OKLA. STAT. tit. 12, § 706(B)	Single Adult or family home; one acre in city/town; 160 acres in any other area; against foreclosure	May Attach <i>and Foreclose</i> for:* 1) non-payment of purchase money mortgages; 2) non-payment of state taxes due on property or non-payment of federal taxes; 3) mechanic's liens;  * Other liens may be attached to the homestead, but no execution allowed unless homestead designation lost
Kansas	CONST. art. XV, § 9; KAN. STAT. § 60-2202(a).	Family home only; one acre in city/town; 160 acres in any other area; against foreclosure	May Attach <i>and Foreclose</i> for:* 1) non-payment of purchase money mortgages; 2) non-payment of state taxes due on property or non-payment of federal taxes; 3) mechanic's liens  * Other liens may be attached to the homestead, but no execution allowed unless homestead designation lost
Arkansas	CONST. art. IX, §§ 3-5; ARK. CODE ANN. § 16-66-218(b)(3), (4)	Family home only; no smaller than 1/4 acre and no greater than one acre in city/town; no smaller than 80 acres and no greater than 160 acres in any other area; against attachment	May Attach <i>and Foreclose</i> for:* 1) mechanic's liens; 2) non-payment of state taxes due on property or non-payment of federal taxes; 3) purchase money mortgages; 4) executors, administrators, guardians, receivers, attorneys for money collected by them and other trustees of an express trust for



STATE	HOMESTEAD EXEMPTION PROVISIONS	SCOPE OF UNLIMITED HOMESTEAD EXEMPTION PROTECTION	EXCEPTIONS <sup>307</sup>
		of judgment liens and foreclosure	money due from them in their fiduciary capacity.  * Other liens may be attached to the homestead, but no execution allowed unless: A. homestead designation lost; or B. the TBE unities are severed
District of Columbia	D.C. CODE ANN. § 15-501(a)(14).	Single adult or family home; unlimited in area; against attachment of liens and foreclosure	May Attach and Foreclose for: 1) purchase money mortgages; 2) non-payment of state property taxes or non-payment of federal taxes; 3) mechanic's liens; 4) deeds of trust

## APPENDIX B

BAPCPA HOMESTEAD EXEMPTION- LIMITING CODE PROVISIONS	EXPLANATION OF HOW THE CODE PROVISIONS PREVENT ABUSE
11 U.S.C. § 522(o)(4)	Allows a creditor or the trustee to reduce the value of the homestead if the debtor in the prior ten years used non-exempt funds to purchase the home. The homestead is reduced according to the value of non-exempt funds funneled into the homestead.
11 U.S.C. § 522(p)(1)(A)	Debtor may only exempt the value of his homestead up to \$136,875 if the homestead was purchased 1,215 days before filing for bankruptcy; creditors may go after any value over this amount if purchased within that time period, but this section does not apply to a family farmer's principal residence, which was acquired before the 1,215 day period, and it does not apply to any interest transferred from an old residence purchased before the 1,215 day period and transferred into a new residence, so long as both residences are within the same state.
11 U.S.C. § 522(q)(1)(A)-(B)	Regardless of the amount of time elapsed, <sup>308</sup> a debtor cannot exempt any interest of the home if the interest is a) derived from 1) a violation of Federal securities laws; 2) fraud perpetrated while the debtor was acting as a fiduciary; 3) any civil remedy under 18 U.S.C. § 1964; or 4) any criminal act, intentional tort or reckless misconduct that caused injury or death in the previous 5 years; and b) the aggregate value of the home is over \$136,875.

<sup>308</sup> See *supra* note 204 and accompanying text (explaining the ambiguity present in § 522(q) and arguing that the 1,215 day look-back period does not apply to § 522(q)).

