

# THE BAPCPA'S CHILLING EFFECT ON DEBTOR'S COUNSEL

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## INTRODUCTION

On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),<sup>1</sup> legislation that significantly revamps bankruptcy law, procedure, and practice. While most of the attention on BAPCPA has focused on restrictions on consumer bankruptcy filings, less time has been spent on its implications for attorneys who represent those consumers. BAPCPA holds attorneys responsible for the accuracy and truthfulness of the information contained in clients' bankruptcy schedules and statements,<sup>2</sup> and imposes sanctions and even civil penalties if a consumer bankruptcy case is dismissed by the court.<sup>3</sup> In

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1. Pub. L. No. 109-8, 119 Stat. 23 (2005).

2. See § 319, 119 Stat. at 94 (requiring bankruptcy attorneys to make a "reasonable inquiry" as to the truthfulness of the information contained in all documents submitted to bankruptcy courts on behalf of their clients).

3. See 11 U.S.C.S. § 707(b)(4)(B) (LexisNexis 2006) (allowing bankruptcy courts to award civil penalties against bankruptcy attorneys who violate Bankruptcy

addition, new rules governing which state exemption laws apply force debtors' counsel to learn exemption laws of jurisdictions where they are not licensed to practice, subjecting them to the risk of being charged with the unauthorized practice of law.<sup>4</sup> These provisions will likely increase the cost of consumer bankruptcy filings and drive qualified practitioners away from bankruptcy practice.

Proponents of BAPCPA (namely the consumer credit industry that lobbied ten years for its enactment) tend to refer to BAPCPA as "reform" legislation that curtails unspecified "abuse."<sup>5</sup> BAPCPA's supporters chose a brilliant name for the legislation, because the name gives the impression that BAPCPA somehow reforms abuse and protects consumers (although it is not clear whether the protected consumers are the individuals filing for bankruptcy or the rest of society). After all, who could oppose a law that purports to prevent bankruptcy abuse and protect consumers?

In fairness, BAPCPA likely prevents bankruptcy abuse if only because it limits the number of people eligible to file for bankruptcy protection. By reducing the number of overall bankruptcy filings, BAPCPA likely curbs abusive bankruptcy filings. Of course, on the other hand, BAPCPA also prohibits good faith filers from obtaining bankruptcy relief, leaving them at the mercy of their creditors and state exemption laws. Because BAPCPA so substantially overhauled existing bankruptcy law (and the bench and the bar needed time to digest its implications), most of its provisions did not become effective for 180 days after its enactment or until October 17, 2005.<sup>6</sup>

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Rule 9011).

4. The new statute provides that the debtor may exempt property under state law at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition." 11 U.S.C.S. § 522(b)(3)(A). However, if the debtor has not resided in one state for such a period of time, then he or she may exempt property under state law "[in] the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place." *Id.*

5. See Wanda Borges and Bruce S. Nathan, *Bankruptcy Abuse Prevention And Consumer Protection Act of 2005: Significant Business Bankruptcy Changes in Store for Trade Creditors*, BUSINESS CREDIT, May 2005, at 1, available at [http://www.nacm.org/resource/Bankruptcy\\_Act.apr15-05.html](http://www.nacm.org/resource/Bankruptcy_Act.apr15-05.html) (explaining that BAPCPA restricts a debtor's ability to file for bankruptcy under Chapter 7 and to obtain a bankruptcy discharge because it presumes a filing is an "abuse" of bankruptcy law where the debtor's income exceeds the median income of his or her state and where the debtor (based upon artificial Internal Revenue Service cost of living standards) is deemed to have "available net income . . . for repayment to creditors totaling at least \$10,000 over 5 years . . . [or where] available net income for repayment to creditors over 5 years is between \$6,000 and \$10,000, such available net income is more than 25% of nonpriority unsecured claims").

6. § 1501, 119 Stat. at 216; see also Press Release, The White House, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>

## I. NEW DUTIES UNDER BAPCPA

In the good old days (i.e. before BAPCPA), only the client was held accountable for the truthfulness of the information contained in the bankruptcy petition, schedules, and statements.<sup>7</sup> Clients signed the bankruptcy petition, schedules of assets and liabilities, and the statement of financial affairs. Clients also attested under penalty of perjury<sup>8</sup> that information contained in those documents was truthful and accurate.<sup>9</sup> Attorneys did not guarantee the accuracy of this information, nor were they expected to do so.

It was not, and is not, unusual for a client to meet with a bankruptcy attorney on the eve of a foreclosure sale, repossession, or entry of judgment. The client knows that an automatic stay is created by a bankruptcy filing and will suspend these events and give the client a breathing spell.<sup>10</sup> Consequently, the client quickly assembles the information needed to file the bankruptcy petition to stay these unpleasant events. While the attorney had, and still has, an ethical duty to explain to the client the need to disclose all of his or her assets and liabilities and to refrain from filing a bankruptcy petition if the attorney knew or should have known that the client was perpetrating a fraud, the attorney was expected to take the client at his or her word. No due diligence was required.

Under § 707(b)(4)(C)(i) of BAPCPA, an attorney must now certify that the attorney has “performed a *reasonable investigation* into the circumstance that gave rise to the petition, pleading, or written motion.”<sup>11</sup> In addition, under § 707(b)(4)(D), “[t]he signature of

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(providing remarks made by President George W. Bush on the need for bankruptcy reform while he signed BAPCA into law).

7. Compare 11 U.S.C.S. § 707(b)(4)(B) (providing courts with the option of levying civil penalties against bankruptcy attorneys for Bankruptcy Rule 9011 violations), with 11 U.S.C. § 707 (2000) (providing only for dismissal of a debtor's case).

8. Some people signed these documents under “pain and penalty” of perjury. I understood the penalty part of perjury, but never grasped what the pain of perjury meant. Perhaps it's the anguish of lying under oath. In any event, clients swore that they were telling the truth.

9. See, e.g., FED. R. BANKR. PROC. Form 1 (2000) (amended 2005) (containing the text “I declare under penalty of perjury that the information provided in this petition is true and correct” and a space for the debtor to sign his or her name).

10. See 11 U.S.C. § 362 (granting an automatic stay that protects the client against the commencement or continuation of judicial, administrative, or other proceedings against the client, the enforcement of a judgment against the client, the creation or enforcement of liens against the client's property, the setoff of debts owing to the client arising before the commencement of the case, and proceedings against the client before the U.S. Tax Court).

11. 11 U.S.C.S. § 707(b)(4)(C)(i) (emphasis added). Furthermore, the attorney must certify that “the petition, pleading, or written motion . . . is well grounded in fact . . . [and] is warranted by existing law or a good faith argument for the

attorney on the petition shall constitute a *certification* that the attorney has no knowledge after an *inquiry* that the information in the schedules filed with such petition is incorrect.”<sup>12</sup>

Unfortunately, BAPCPA neither defines “reasonable investigation” nor “inquiry.” Consequently, it is unclear what type of investigation or inquiry an attorney must undertake to safely make such certifications. Does the attorney need to visit his or her client’s home? This would be costly and difficult on the eve of a foreclosure sale. Moreover, attorneys are not trained appraisers and could not be expected to accurately value assets. What is junk to some are antiques to others. Attorneys also could not be expected to find hidden assets, anyway. Should bankruptcy attorneys hook their clients up to polygraph machines?<sup>13</sup> While it would be nice to think that local rules could define “reasonable investigation” and “inquiry,” it is unlikely they could do so because the reasonableness of each investigation or inquiry will likely vary depending upon the unique facts and circumstances of each bankruptcy case.

Under BAPCPA, attorneys must now certify that they have undertaken an unspecified “reasonable investigation” and made an undefined “inquiry” into the circumstances giving rise to the bankruptcy filing.<sup>14</sup> It seems that relying on the client’s word and sworn statements are no longer sufficient and that something more (but what?) is required. If Congress were intent on imposing these new requirements, then it would have been helpful to define these terms or give attorneys guidance. Now, attorneys must bear the risk of having undertaken an unreasonable investigation or inquiry.

## II. ATTORNEY LIABILITY UNDER BAPCPA

In addition to attorneys being held accountable for the truthfulness of their clients’ bankruptcy filings, attorneys can be sanctioned for the dismissal of a consumer Chapter 7 bankruptcy case for “abuse.”<sup>15</sup> Section 707(b)(4)(A) of BAPCPA expressly allows the court, on its own initiative or upon the motion of a party in interest, to sanction a debtor’s counsel if a trustee or other party in interest

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extension, modification, or reversal of existing law and does not constitute . . . abuse.” *Id.* § 707(b)(4)(C)(ii).

12. *Id.* § 707(b)(4)(D) (emphasis added).

13. Maybe clients could be electrically shocked for lying on a polygraph test. Perhaps that is where the “pain” of perjury might come into play.

14. See *supra* note 11 and accompanying text (explaining the certification requirements for attorneys).

15. See *supra* note 3 and accompanying text (discussing the new possibility of sanctions against bankruptcy attorneys).

succeeds in dismissing or converting the debtor's bankruptcy case.<sup>16</sup> Under BAPCPA, it is automatic grounds for dismissal if the debtor fails to rebut a presumed ability to repay creditors under the new means test, based upon Internal Revenue Service adjusted income standards and allowable living expenses.<sup>17</sup> As ninety professors of bankruptcy and commercial law noted, consumer debtors are now being equated and measured by the same standards as tax cheats.<sup>18</sup> The debtor's counsel bears the burden of ensuring that his or her client satisfies the new means test.<sup>19</sup> Presumably, this should be done by reviewing the client's tax returns and pay stubs. However, it is unclear whether the attorney should verify information with other sources, such as employers, spouses, or even ex-spouses.

The court can also assess a civil penalty against an attorney if a client's Chapter 7 case is dismissed. Section 707(b)(4)(B) states that upon a violation of Rule 9011 of the Federal Rules of Bankruptcy Procedure,<sup>20</sup> the court can order the debtor's attorney to pay civil

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16. 11 U.S.C.S. § 707(b)(4)(A). The court may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under § 707(b), including reasonable attorneys' fees, if "a trustee files a motion for dismissal . . . [and] finds that the action of the attorney for the debtor in filing a case under this chapter violated Rule 9011 of the Federal Rules of Bankruptcy Procedure." *Id.*

17. *See id.* § 707(b)(2)(A)(i) (establishing that the bankruptcy court will "presume abuse exists if the debtor's current monthly income reduced by the [debtor's allowable expenses] . . . and multiplied by 60 is not less than the lesser of . . . 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, which is greater . . . [or] \$10,000").

18. Letter from Richard I. Aaron et al. to Senators Spector and Leahy 2 (Feb. 16, 2005) (on file with the American University Law Review), [http://www.claa.org/press\\_releases.cfm?release=8](http://www.claa.org/press_releases.cfm?release=8) (last visited June 5, 2006).

19. The attorney bears the burden of ensuring that the client satisfies the new means test because he or she must certify that the bankruptcy petition does not constitute "abuse" pursuant to § 707(b)(4)(C)(ii). *See supra* note 11 and accompanying text (explaining the technical requirements of an attorney's certification).

20. In pertinent part, Rule 9011 states:

(b) Representations to the court.

By presenting to the *court* (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, *an attorney* or unrepresented party *is certifying* that to the best of the person's knowledge, information, and belief, formed *after an inquiry reasonable under the circumstances*,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

penalties to the trustee.<sup>21</sup>

Before BAPCPA, it was bad enough when a client's case was dismissed because the automatic stay was terminated.<sup>22</sup> The client did not receive a bankruptcy discharge, and the client might not be able to re-file another bankruptcy case for 180 days.<sup>23</sup> Now, the court can punish the attorney as well by assessing attorneys' fees, costs, and even a civil penalty against the attorney if a case gets dismissed.<sup>24</sup> Thus, BAPCPA not only dissuades consumers from seeking Chapter 7 relief, but also it has a chilling effect on debtors' counsel.

Even if the debtors' counsel escapes sanctions and a civil penalty upon dismissal of a Chapter 7 consumer case, he or she may face complaints from the client whose rights in a future bankruptcy filing may be impaired. Under BAPCPA, if a debtor re-files a new bankruptcy case within one year of a prior bankruptcy case, the automatic stay terminates thirty days after the new bankruptcy filing, unless the debtor (within thirty days of the new filing) obtains an extension of the stay.<sup>25</sup> Seeking an extension of the automatic stay certainly increases the cost of a subsequent bankruptcy filing and there is no certainty that the court will grant the requested extension. No case law has developed on whether the failure of the debtor's counsel to apply the new means test in a prior case warrants an extension of the automatic stay. While a discharge is the ultimate

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(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. BANKR. PROC. 9011 (2000) (emphasis added).

21. 11 U.S.C.S. § 707(b)(4)(B).

22. 11 U.S.C. § 362(c)(2)(B) (2000).

23. *Id.* § 109(g).

24. *See supra* notes 16-21 and accompanying text (describing the sanctions an attorney may face if a case is dismissed).

25. BAPCPA added to the text of Section 362(c) of the United States Code as follows:

(3) if a single or joint case is filed by or against [a] debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors . . . after notice and hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing in the later case is in good faith as to the creditors to be stayed . . . .

Pub. L. No. 109-8, § 302, 119 Stat. 75-76 (2005).

goal of a bankruptcy filing, many filers rely on the automatic stay to stave off foreclosure or repossession of assets and the entry of a judgment or imposition of a lien. If the stay is not extended, then a client's rights may be permanently impaired. A home sold at a properly conducted foreclosure sale cannot later be reclaimed<sup>26</sup> and a federal tax lien that attaches to otherwise exempt assets may not be subsequently avoided.<sup>27</sup>

### III. AUTOMATIC DISMISSAL OF BANKRUPTCY CASES

Failing the new means test is not the only way to get a bankruptcy case dismissed. BAPCPA contains several new provisions that mandate dismissal of a consumer bankruptcy case if the debtor fails to: (1) request credit counseling before filing a consumer bankruptcy case<sup>28</sup> and (2) timely file pay stubs, a statement of net monthly income, and a statement disclosing reasonably anticipated increases in income or expenditures in the next twelve months.<sup>29</sup>

#### A. *Failure to Request Credit Counseling*

Except in districts in which the U.S. trustee certifies that there are insufficient credit counseling providers<sup>30</sup> or in cases in which the debtor cannot complete credit counseling due to incapacity, disability, or active military duty in a combat zone,<sup>31</sup> consumer debtors must at least *request* credit counseling before filing voluntary cases.<sup>32</sup> The debtor need not actually obtain credit counseling, but it is clear that the debtor must have requested it before filing the bankruptcy petition:

[I]f a debtor does not request the required credit counseling . . . before the petition is filed, that person is ineligible to be a debtor no matter how dire the

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26. See, e.g., *Fed. Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1442 (6th Cir. 1985) (holding that the cutoff point for reclaiming land or relying on an automatic stay is at the moment of the sale of property).

27. 11 U.S.C. § 522(c)(2)(B).

28. See § 106(a), 119 Stat. at 37 (mandating that an individual may not be considered a "debtor" unless he or she has received a briefing by an approved budget and credit counseling agency, which "outlined the opportunities for available credit counseling and assisted [him or her] in performing a related budget analysis" within 180 days preceding the filing of the bankruptcy petition).

29. See *infra* notes 44-46 (listing the new filing requirements under BAPCPA).

30. See § 106(e)(1), 119 Stat. at 39 (outlining the applicable procedures by which the U.S. trustee establishes and reviews the quality of credit counseling providers in each jurisdiction).

31. § 106(a), 119 Stat. at 37.

32. See *supra* note 28 and accompanying text (explaining the credit counseling requirement).

circumstances the person finds themselves in at that moment. . . . This Court views this requirement as inane. However, it is a clear and unambiguous provision obviously designed by Congress to protect consumers.<sup>33</sup>

The bankruptcy court can defer the mandatory pre-petition credit counseling session if the debtor submits a certification pursuant to new § 109(h)(3)(A), which requires that the debtor submit a certification that describes the exigent circumstances that necessitate a deferment, states that counseling services were requested but could not be obtained within five days, and “is satisfactory to the court.”<sup>34</sup> If the court grants a deferment, the debtor must complete credit counseling no later than thirty days after filing the bankruptcy petition, unless the court grants an additional fifteen day extension.<sup>35</sup>

As noted by the U.S. Bankruptcy Court for the District of Maryland in *In re Childs*,<sup>36</sup> “[t]he standard for exigent circumstances set forth in the statute is minimal. It requires only that the debtor state the existence of some looming event that renders prepetition credit counseling infeasible.”<sup>37</sup> If the debtor requests credit counseling less than five days before his or her bankruptcy filing, then it is unclear, at least in some jurisdictions, whether the debtor is eligible for a deferment since the plain language of the statute can be read to require the debtor to request counseling five days or more before the filing.

In Maryland, the court only requires a certification that the debtor requested credit counseling services, but that such services were unavailable within five days of the request:

[The debtor must state] that he requested credit counseling and that it was not made available to him within five days of the request. This Court will not require that the debtor state the date the credit counseling services were requested, merely the fact that they were requested and that they could not be obtained within five days of the request.<sup>38</sup>

Thus, the Maryland bankruptcy court appears to adopt a “don’t ask, don’t tell” approach in an effort to avoid the sticky issue of eligibility.

In *Dixon v. LaBarge*,<sup>39</sup> the Bankruptcy Appellate Panel for the

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33. *In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005).

34. § 106(a), 119 Stat. at 37.

35. *Id.*

36. 335 B.R. 623 (Bankr. D. Md. 2005).

37. *Id.* at 630.

38. *Id.* at 631.

39. 338 B.R. 383 (B.A.P. 8th Cir. 2006).

Eighth Circuit (“BAP”) affirmed the dismissal of a debtor’s Chapter 13 case because the debtor had failed to demonstrate grounds for a deferment of credit counseling.<sup>40</sup> In *Dixon*, the debtor met with his attorney the day before a scheduled foreclosure sale and could not obtain credit counseling before filing the bankruptcy petition the next day.<sup>41</sup> The debtor could not obtain credit counseling by telephone for two weeks and had no computer or Internet access with which to obtain credit counseling before the foreclosure sale.<sup>42</sup> The bankruptcy court and the BAP agreed that the debtor was not entitled to a deferment because under Missouri law he had been given a twenty day statutory notice period before the foreclosure sale.<sup>43</sup> Presumably, the debtor could have obtained credit counseling had he sought bankruptcy advice right after receiving the foreclosure notice.

#### B. Failure to File Documents

In addition to the traditional bankruptcy petition, the schedules of assets and liabilities, and the statement of financial affairs, BAPCPA now requires debtors to file: (1) pay stubs received within sixty days of the bankruptcy filing,<sup>44</sup> (2) a statement of net monthly income,<sup>45</sup> and (3) a statement disclosing reasonably anticipated increases in income or expenditures in the next twelve months.<sup>46</sup>

If an individual in Chapter 7 or 13 fails to file all of these documents within forty-five days after the initial bankruptcy filing, “the case shall automatically be dismissed on the 46th day after the filing of the petition.”<sup>47</sup> The court may grant the debtor up to an additional forty-five days to file these documents if the debtor asks for

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40. *Id.* at 388.

41. *Id.* at 385.

42. *Id.*

43. *Id.* at 388.

44. See 11 U.S.C.S. § 521(a)(1)(B)(iv) (LexisNexis 2006) (requiring the debtor to also disclose any “other evidence of payment received within 60 days before . . . the filing of the petition”).

45. *Id.* § 521(a)(1)(B)(v). The statement of net monthly income must be “itemized to show how the amount is calculated.” *Id.*

46. *Id.* § 521(a)(1)(B)(vi). Additionally, debtors are required to file a certificate from an approved credit counseling agency and a debt repayment plan, if any, prepared by that agency. *Id.* § 521(b)(1)-(2). Finally, debtors are required to file a record of their interest in any education individual retirement account. *Id.* § 521(c). However, the debtor’s case is not subject to automatic dismissal if the debtor fails to timely file these documents. *But see infra* notes 47-49 and accompanying text (dealing with automatic dismissal if the debtor fails to timely file pay stubs received within sixty days of the bankruptcy filing, a statement of monthly net income, and a statement disclosing reasonable anticipated increases in income or expenditures in the next twelve months).

47. 11 U.S.C.S. § 521(i)(1).

an extension within the original forty-five day period and the court finds “justification” for the request.<sup>48</sup> In addition, upon a motion made by the trustee within the original forty-five day period, the court may decline to dismiss the case if the court concludes that the debtor made a good faith effort to file the information and creditors would best be served by the administration of the bankruptcy case.<sup>49</sup>

As noted previously, if a debtor’s bankruptcy case is dismissed and the debtor re-files within one year, then the automatic stay is terminated thirty days after the bankruptcy filing, unless the debtor persuades the court to extend the stay.<sup>50</sup> If a case gets dismissed due to the debtor’s failure to request credit counseling or to file required documents, then the debtor’s future interests can be severely harmed.<sup>51</sup>

#### IV. LEARNING OTHER STATES’ EXEMPTION LAWS

Although the public may like to believe that federal bankruptcy law is uniform, it is not. The protection a debtor receives in bankruptcy varies greatly depending upon the exemption laws in the jurisdiction where the debtor resides and (under BAPCPA) the exemption laws in any jurisdictions where the debtor resided in the three years before the bankruptcy filing. Federal bankruptcy law allows states, the District of Columbia, and territories to “opt out” of the federal exemptions provided in § 522(d) and to instead rely on local exemptions.<sup>52</sup> In many instances, the local exemptions are far more generous than the federal ones.<sup>53</sup>

In an effort to thwart people from moving to jurisdictions that offer unlimited homestead exemptions that protect the full value of principal residences from creditors (such as Florida, Texas, and the District of Columbia), BAPCPA alters the rules on applying exemptions. If a debtor has been domiciled in the same state for the 730 days immediately preceding the bankruptcy filing, then that

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48. *Id.* § 521(i)(3).

49. *See id.* § 521(i)(4) (adding that the court may decline to dismiss the case in this instance only after notice and hearing).

50. *See supra* note 25 and accompanying text (describing the rules for re-filed cases and how a debtor can extend the automatic stay).

51. *See supra* note 26-27 and accompanying text (describing how a debtor risks losing property in a foreclosure sale and facing additional federal tax liens if a stay is not extended).

52. *See* 11 U.S.C.S. § 522(b) (“[A]n individual debtor may exempt from property of the estate the property listed in either paragraph (2) [state law exemptions] or, in the alternative, paragraph (3) [federal law exemptions] of this subsection.”).

53. *See, e.g.*, D.C. CODE § 15-501(a) (2005); FLA. CONST. art. X, § 4(a)(1); TEX. PROP. CODE ANN. § 41.001(a) (Vernon 2006) (creating broad “homestead exemptions” for individuals filing bankruptcy).

state's exemption law applies.<sup>54</sup>

However, if the debtor has been domiciled in two states during the 730 days immediately preceding the bankruptcy filing, then the exemption law of the jurisdiction where the debtor was domiciled for the 180 days immediately preceding the 730 day period applies.<sup>55</sup> If the debtor has resided in more than one state during that 180 day period, then the exemption law of the jurisdiction where the debtor has resided for the majority of the 180 day period applies.<sup>56</sup> If the debtor is ineligible for any exemptions, then federal exemptions apply.<sup>57</sup>

Notwithstanding a more generous homestead exemption in a particular state, a debtor may only exempt up to \$125,000 of the value of a residence if it was acquired during the 1215 day period prior to the bankruptcy filing.<sup>58</sup> This cap does not apply if the debtor is a family farmer<sup>59</sup> or if the debtor acquired a new residence within the same state during the 1215 day period.<sup>60</sup>

Furthermore, § 522(q) limits an otherwise valid homestead exemption to \$125,000 where the debtor has been convicted of a felony that demonstrates the filing of the bankruptcy case was "an abuse of the provisions of" the Bankruptcy Code<sup>61</sup> or the debtor owes a debt arising from the violation of federal securities law.<sup>62</sup> This odd provision seems aimed exclusively at former Enron officials who reside in Texas.<sup>63</sup>

Leaving aside the confusing math for the moment, the new exemption scheme requires attorneys to learn exemption laws in jurisdictions where they are not licensed to practice. Why would a Maryland attorney be expected to know Idaho exemption law? Under BAPCPA, if the client now residing in Maryland lived in Idaho

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54. 11 U.S.C.S. § 522(b)(3)(A).

55. *Id.*

56. *Id.*

57. *Id.* § 522(b)(3).

58. *Id.* § 522(p)(1). This limit is also applicable to a cooperative owning property that the debtor or dependent of the debtor uses as residence and to a burial plot to be used by the debtor or dependent of the debtor. *Id.*

59. *Id.* § 522(p)(2)(A).

60. *Id.* § 522(p)(2)(B).

61. *Id.* § 522(q)(1)(A).

62. *Id.* § 522(q)(1)(B).

63. See Charles J. Tabb, *Consumer Bankruptcy after the Fall: United States Law Under S. 256 32* (University of Illinois College of Law, Law and Economics Working Papers Series, Working Paper No. LE05-031, 2005, available at [http://www.law.uiuc.edu/academics/iple/papers/2005/2005\\_consumer\\_bankruptcy\\_after\\_fall.pdf](http://www.law.uiuc.edu/academics/iple/papers/2005/2005_consumer_bankruptcy_after_fall.pdf) (explaining how this provision is "sometimes called the 'Enron rule' because of the notorious actions of senior Enron executives who allegedly committed such crimes but were able to purchase fabulous, and fully exempt, homesteads in Texas and Florida").

in the two years before the bankruptcy filing, then the Maryland attorney would be expected to know and assert Idaho's exemptions in a bankruptcy filing. Does that constitute the unauthorized practice of law?

BAPCPA also leaves open the question of how to perfect exemptions. In Virginia, in order to perfect most exemptions, a Chapter 7 debtor is required to file a homestead deed in the land records of the county or city in which he or she is domiciled.<sup>64</sup> If a debtor moves from Fairfax County, Virginia to Montgomery County, Maryland (where the debtor does not need to file a homestead deed) within 730 days of filing for bankruptcy and Virginia exemptions are deemed to apply, it becomes unclear if and where the debtor (now residing in Maryland) is required to file a homestead deed. To be sure that all bases are covered, the attorney may well opt to file homestead deeds in both Fairfax County, Virginia and Montgomery County, Maryland. Naturally, this increases the cost of the bankruptcy filing.

#### CONCLUSION

BAPCPA does more than restrict consumers' ability to file for bankruptcy. It forces attorneys to undertake undefined investigations and inquiries and unfairly forces them to be the arbiters of their client's veracity. BAPCPA also subjects debtors' counsel to sanctions and even civil penalties if bankruptcy cases are dismissed. Furthermore, attorneys face uncertainty over their clients' eligibility to file for bankruptcy if credit counseling cannot be obtained within five days of filing. Finally, debtors' counsel must also apply exemption laws of foreign jurisdictions, subjecting them to the risk of being charged with the unauthorized practice of law. Rather than reforming bankruptcy practice, BAPCPA may well dissuade otherwise qualified attorneys from representing consumer debtors. Maybe that is the so-called reform Congress had in mind.

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64. VA. CODE ANN. § 34-6 (2005).