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Bankruptcy and Creditors' Rights

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BANKRUPTCY AND CREDITORS' RIGHTS

Roger S. Cox*
Marc W. Taubenfeld**

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I. INTRODUCTION: NEW BANKRUPTCY LEGISLATION	
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BECAUSE of the nature of this Texas Survey, this Article is limited to developments involving state law, enforcement of the debtor-creditor relationship in bankruptcy, or cases that might not otherwise be addressed in a conventional bankruptcy survey.¹

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1. For other surveys that focus exclusively on bankruptcy law developments, See J. Westbrook et al., *Recent Developments*, University of Texas School of Law Bankruptcy Conference (2005) (national survey, with supplement containing Texas and Fifth Circuit case summaries); L. Phillips et al., *A Whole New World: Current Events/New Case Update*, Farm, Ranch & Agri-Business Bankruptcy Inst. (2005); G. Pronske, *Recent Developments*.

Of course, the key story in 2005 was the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which brought sweeping changes to the Bankruptcy Code. This summary will address changes affecting Texas homestead claims and recent BAPCPA cases, but most other BAPCPA amendments are beyond the scope of this Survey.²

One thing is certain: In the coming year, courts are likely to publish conflicting opinions as they struggle to interpret and apply BAPCPA. As with any new legislation, it is impossible to predict how courts will deal with all of BAPCPA's unintended consequences. This is compounded by the unfortunate fact that many of BAPCPA's provisions are poorly drafted and do not fully contemplate all of the situations that courts will face.

II. BAPCPA: EFFECT ON TEXAS HOMESTEAD CLAIMS

The Texas homestead exemption has, to a large degree, survived BAPCPA; however, in order to claim the unlimited Texas homestead exemption in bankruptcy,³ debtors must meet two significant requirements. In short, the debtor must have been domiciled in Texas for at least 730 days, and he must have acquired the homestead more than 1,215 days pre-petition.

A. DOMICILE REQUIREMENT—SECTION 522(b)(3)

A debtor must meet the Code's amended domicile requirement in order to claim a state's exemption-law protection. Section 522 and section 101 of the Code do not define "domicile." In a diversity context, the Fifth Circuit identified "domicile" as "a matter of federal common law."⁴ To establish a new domicile under federal common law, the person must es-

State Bar of Texas Advanced Business Bankruptcy Course (2005). *See also*, T. Hancock, *Fifth Circuit Bankruptcy Survey*, 37 TEX. TECH L. REV. 575 (2005).

2. BAPCPA has been treated in numerous publications, including the American Bankruptcy Institute Journal (various issues throughout 2005), the American Bankruptcy Law Journal (Vol. 79, Issues 2 & 3, 2005), and the Texas Bar Journal (December 2005). *See* H. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under [BAPCPA]*, 79 AM. BANKR. L.J. 191 (2005); E. Wedoff, *Means Testing in the New §707(b)*, *id.* at 231; M. Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, *id.* at 397; W. Brown, *Taking Exception to a Debtor's Discharge: The 2005 Amendments Make it Easier*, *id.* at 419; T. Carlson & J. Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, *id.* at 645; and L. Napoli, *The Not-So Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, *id.* at 749. For a critical commentary on BAPCPA, *see* K. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. L. REV. 1 (Issue 7, Sept. 2005).

3. Chapter 41 of the Texas Property Code generally allows a homestead claim that is unlimited in amount. Likewise, when the homestead acquisition took place does not significantly limit the claim. *See* TEX. PROP. CODE ANN. § 41.001 *et seq.* (Vernon Supp. 2005). *See also* TEX. CONST. art. 16, § 50. But, BAPCPA now imposes additional requirements before the debtor may utilize the unlimited exemption.

4. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 448 (5th Cir. 2003).

tablish both (1) residence in the new state and (2) an intention to stay in that state indefinitely.⁵ Factors courts consider include where the person pays taxes, votes, owns property, maintains permanent business ties or employment, and belongs to clubs, churches, or the like. No single factor is determinative.

New section 522(b)(3)(A) requires that the debtor's domicile be located in the state for *730 days* (approximately two years) pre-petition.⁶

Alternatively, if the debtor's domicile has not been within a single state for that period, then the debtor's domicile for the *180 days before the start of the 730-day period* (that is, 731-910 days pre-petition) governs. If the debtor's domicile was in more than one place during the 180-day period, then the law of the debtor's domicile for the "longer portion of such 180 day period" will apply.⁷

Although not expressly stated, it appears that the domicile must be established continuously for this 730-day period. Under such a reading, any change in the domicile during the 730-day period moves the inquiry to the preceding 180 days. What may be left unresolved is the impact of a temporary relocation to another state during the 730 days. As mentioned above, "domicile" is not defined under the Code, and diversity cases indicate that temporary relocation does not change one's domicile.⁸

If the domicile requirements effectively render the debtor ineligible for any exemption, the debtor is still allowed to claim the so-called "Federal Exemptions" under section 522(d). Under the "Federal Exemptions," the debtor can claim an exemption of up to \$18,450 for real property that the debtor "uses as a residence."⁹

B. 1,215-DAY RULE—SECTION 522(p)

New section 522(p) generally prohibits the exemption of any homestead interest in excess of \$125,000 for property acquired within *1,215 days* (about three years, four months) of filing.¹⁰

There are two primary exceptions to this rule:

1. the debtor acquired the homestead with proceeds from his previous residence that he acquired outside the 1,215-day period, provided the two residences are *in the same state*; and
2. the homestead is the "principal residence" of a family farmer.¹¹

5. *Id.* (citing *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) ("[M]ere presence in a new location does not affect a change of domicile; it must be accompanied with the requisite intent.")).

6. 11 U.S.C. §§ 523(b)(4)(A), 522(b)(4)(A).

7. *Id.* § 522(b)(3).

8. *Acridge*, 334 F.3d at 448.

9. 11 U.S.C. § 522(d)(1).

10. *Id.* § 522(p).

11. *Id.* § 522(p)(2)(A). "Family farmer" means an individual and spouse engaged in a farming operation with aggregate debts under approximately \$3.2 million, of which at least fifty percent arise out of a farming operation. *See id.* § 101(18); *see also id.* § 101(20) (defining "farmer") and § 101(21) (defining "farming operation").

Presumably, those who establish a Texas homestead for this 1,215-day period, even if they sold their own home (acquired before the 1,215-day period) and rolled the proceeds into another, should be able to claim the full homestead exemption. Increases in equity from appreciation or payment of regularly scheduled mortgage payments should also remain protected.¹²

Thus, this provision is unlikely to affect Texas debtors who have lived in their homes for more than approximately 40 months before bankruptcy (along with family farmers), provided that they do not fall within any other limitations discussed below. Likewise, Texas debtors who have sold a home acquired outside the 1,215-day period and rolled the proceeds into a new home appear to be protected.¹³

On the other hand, the homestead exemption may be limited to \$125,000, if the homestead was acquired within the 1,215-day window and the debtor does not otherwise satisfy the rollover exception.¹⁴

C. EXCEPTIONS BASED ON WRONGDOING—SECTION 522(q)

Even if the debtor qualifies under the 1,215-day rule, his homestead exemption may be capped at \$125,000 if:

1. he has a felony conviction that demonstrates that the bankruptcy case was an abusive filing;
2. he owes a debt arising from securities fraud; or
3. he owes a debt arising from criminal, intentional, willful, or reckless conduct that caused serious physical injury or death to another in the preceding five years.¹⁵

Limits imposed under the above provisions may not apply to the extent that the interest is “reasonably necessary for the support of the debtor and any dependent of the debtor.”¹⁶

D. FRAUDULENT CONVERSION—NON-EXEMPT TO HOMESTEAD—SECTION 522(o)

An additional exclusion applies to any non-exempt property that a debtor disposed of in the *ten-year* pre-petition period with the intent to hinder, delay, or defraud a creditor.¹⁷

E. TEXAS CASE ADDRESSES EQUITY ENHANCEMENT

Judge Hale of the Northern District was the first to address the issue of equity increases during the 1,215-day pre-petition period in *In re Blair*.¹⁸

12. See COLLIER ON BANKRUPTCY § 522.13[2] (Matthew Bender 2005). See also *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005) (Hale, J.).

13. 11 U.S.C. § 522(p)(2)(B).

14. *Id.* § 522(p)(1).

15. As determined after notice and hearing. *Id.* § 522(q)(1)(A).

16. *Id.* § 522(q)(2).

17. *Id.* § 522(o).

18. 334 B.R. 374 (Bankr. N.D. Tex. 2005).

In *Blair*, the debtors bought their home 1,773 days before the petition date. At the time of their filing, the value of the home's equity was \$688,606. At least a portion of this equity resulted from the debtors making their regularly scheduled mortgage payments during the 1,215-day period. An unsecured creditor objected to the exemption on any interest acquired by the debtors during the 1,215-day period that exceeded the \$125,000 cap.

The court took a common-sense approach and noted that "one does not actually 'acquire' equity in a home. One acquires title to a home."¹⁹ The debtors bought their home about five years before BAPCPA and a year and a half before the start of the 1,215-day period. The debtors' actual purchase of their home, which was completed well outside the 1,215-day period, reflected the "interest" acquired.²⁰

The court noted the clear legislative intent of the section 522(p) revisions. Specifically, Congress clearly intended to prevent out-of-state residents from relocating solely to take advantage of that state's exemptions laws. The two-year domicile requirement and the 1,215-day period addressed the "mansion loophole," unlike the pre-BAPCPA requirement, which was as few as 91 days.²¹ Thus, the court allowed the debtors to maintain their homestead exemption. Allowing a homestead claim in equity that clearly resulted from regular mortgage payments or general value appreciation was clearly the correct result given the lack of unusual pre-payments or other actions.

III. BANKRUPTCY IN THE SUPREME COURT

A. INDIVIDUAL RETIREMENT ACCOUNTS

In *Rousey v. Jacoway*,²² a pre-BAPCPA case, the court sought to determine whether a debtor's right to receive IRA payments is due to, or "on account of," age within the meaning of the section 522(d)(1)(E) exemption provision. Also, the court examined whether IRAs qualify as "similar plans or contracts" within the meaning of the section 522(d)(10)(E) exemption provision.²³

In *Rousey*, the Chapter 7 debtors had accounts that qualified as IRAs under the Internal Revenue Code, which provides that withdrawals made before the account-holder turns 59 1/2 are, with limited exceptions, subject to a ten-percent tax penalty. In their schedules under section 522(d)(1)(E), which provided that debtors could reasonably exempt their right to receive a payment under a stock bonus, pension, profit-sharing,

19. *Id.* at 376.

20. *Id.* at 376-77. See *In re Virissimo*, 332 B.R. 201, 207 (Bankr. D. Nev. 2005) ("The monetary cap applies if the debtor acquired such property within the 1,215-day period preceding the filing of the petition.")

21. *Blair*, 334 B.R. at 378.

22. 544 U.S. 320 (2005).

23. Pre-BAPCPA, the Code was silent as to the exempt status of certain IRAs. As discussed below, by including IRAs in amended section 522, the BAPCPA may have rendered *Rousey* somewhat moot.

annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, the debtors exempted the IRAs. The Chapter 7 trustee objected to the exemption, and the bankruptcy court sustained it. On appeal, the Bankruptcy Appellate Panel affirmed, concluding that IRAs were not similar to any of the listed plans or contracts, because the debtors' unlimited access to their IRA funds meant that no factor in section 522(d)(10)(E) accounted for the payments. The Eighth Circuit affirmed. Noting a split among the circuits, the Supreme Court granted certiorari.²⁴

On appeal, the Supreme Court found that under section 522(d)(10)(E), a right to receive payment under an IRA must meet three requirements:

1. the right to receive payment must be from a stock bonus, pension, profit-sharing, annuity, or similar plan or contract;
2. the right to receive payment must be on account of illness, disability, death, age, or length of service; and
3. even then, the right to receive payment may be exempted only to the extent that it is reasonably necessary to support the account-holder or his dependents.²⁵

In analyzing the second requirement, the Court said that "on account of" means "because of." Thus, the right to receive payment must be because of illness, disability, death, age, or length of service. Further, the Court found that the statutes governing IRAs causally connected the debtors' right to payment to their age. The Court found the ten-percent tax penalty to be substantial. Thus, it concluded that the debtors' IRAs provided a right to payment on account of age.²⁶

Next, the Court determined that IRAs were "similar" to stock bonus, pension, profit-sharing, annuity plans or contracts. To be "similar," an IRA must be like, though not identical to, the specific plans or contracts listed in the statute. The Court ruled in the debtors' favor, agreeing that their IRAs were similar to the programs listed because they provided a substitute for wages and were not mere savings accounts.²⁷

Because the Supreme Court found that the debtors' IRAs fulfilled the section's requirements (conferred a right to receive payment on account of age and were similar to enumerated plans), it reversed the Eighth Circuit's decision.²⁸

B. EFFECT OF *ROUSEY* POST BAPCPA

BAPCPA now provides specific exemptions for IRAs and other retirement accounts for debtors who elect either state or federal exemption

24. *Rousey*, 544 U.S. at 324.

25. *Id.* Previously, in *Patterson v. Shumate*, the Supreme Court implied that IRAs were exempt under section 522(d)(10)(E). 504 U.S. 753 (1992).

26. *Rousey*, 544 U.S. at 325-28.

27. *Id.* at 329-31.

28. *Id.* at 332.

treatment.²⁹ The BAPCPA caps IRA exemptions at \$1 million, excluding rollovers, and generally does not limit most other retirement plans. To say that BAPCPA rendered *Rousey* moot may be an overstatement; however, BAPCPA's more specific provisions limit *Rousey's* significance.³⁰

IV. HOMESTEADS & EXEMPTIONS

A. HOMESTEAD IS WHERE THE HOME IS

Two Survey-period cases reflect that courts will not protect a premature homestead claim in property that the debtor has not yet occupied. In *In re Gandy*,³¹ the debtor elected federal exemptions under section 522(d)(1), claiming approximately 6.6 acres as exempt. However, the debtor was not currently using (nor had he ever used) the property as his residence. The debtor testified that he intended to use the property and had done some preparatory work to that effect.

The precise language of section 522(d)(1) allows exemption of property that a debtor "uses as residence." While the court noted that it had to construe federal exemption claims liberally in favor of the debtor and refer to state law if necessary, even applying a liberal construction, the plain language of the federal statute negated any reason to resort to state law. Under the plain, present-tense language of the federal statute, the debtor could not claim the exemption in property he had not yet occupied.³²

Notably, the bankruptcy court mentioned in dicta that if it had resorted to Texas law, it would have allowed the exemption given what it perceived as the "liberal protections afforded by the Texas Property Code and the Texas Constitution" and, presumably, slightly different language in the state statute.

Gandy's dicta, however, was not necessarily in accord with at least one Texas court of appeals case issued during the Survey period. *McKee v. Wilson*³³ addressed a debtor's state-law homestead claim in a yet-to-be-occupied custom home. The McKees entered into a construction contract, and after a dispute arose, their builder ceased work. Some months after the McKees signed the new-home and mechanic's-lien contract, they sold their existing home and began living in their new one. Shortly there-

29. See 11 U.S.C. § 522(b)(3), (c), (d)(12).

30. See generally D. Osborn, J. Martinec, M. Johnson, *Asset Protection After the Bankruptcy Act*, 68 TEX. BAR J. 1006 (December 2005); see also M. Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 414-15 (*Rousey* is substantially mooted by BAPCPA). For additional commentary on *Rousey*, see Serena Green, *Recent Development*, 58 ARK. L. REV. 471 (2005).

31. 327 B.R. 807 (Bankr. S.D. Tex. 2005) (Isgur, J.).

32. *Id.* at 808-09. See also 11 U.S.C. § 522(d)(1) (allows an exemption to the extent of "the debtor's aggregate interest, not to exceed \$18,450.00 in value, in real property . . . that the debtor or a dependent of the debtor uses as a residence . . .") (emphasis added). The court found *In re DeMasi* unpersuasive given the statute's plain language. 227 B.R. 586 (Bankr. D.R.I. 1998). (relying on state-law precedent to allow an exemption based upon a contingent future interest).

33. 174 S.W.3d 842 (Tex. App.—Waco 2005, no pet.).

after, the builder filed a mechanic's lien. The trial court found it to be valid and ordered foreclosure. The McKees claimed that the property already constituted their homestead since they intended to move into the home from the contract's inception. They also argued that the builder's lien was invalid because he failed to comply with certain homestead construction-contract requirements.

The court disagreed because the McKees were still living in their established homestead at the time of the custom construction contract. An established homestead continues until abandoned.³⁴ Therefore, they had no homestead interest in the custom lot and home until they abandoned their old homestead—that is, until they left it and could show evidence of an intent not to return.³⁵ Additionally, a family can have only one homestead at a time.³⁶ The court concluded that because a homestead already existed, it could not be abandoned while still being used as the family home. The McKees could not acquire another homestead by mere intention to occupy it sometime in the future.³⁷

Finally, the McKees argued that the filing date of the lien affidavit should be central to determining the property's status as homestead. The contractor, on the other hand, asserted that the date of the construction agreement controlled. The court found as a matter of law that it was required to look to the original construction agreements's timing, rather than the subsequent recording of the lien affidavit.³⁸

Gandy and *McKee* reach similar results, but for different reasons. The court in *Gandy* construed an unambiguous federal statute, which used present tense to refer to a residence's actual use. *McKee*, on the other hand, was based on established Texas homestead-law concepts and the general principle that a person can only claim one homestead at a time. In dicta, the *Gandy* court indicated that it would have allowed a homestead claim under Texas law; however, *McKee* shows that under certain circumstances in what can often be a fact-intensive inquiry, Texas law may indeed be otherwise.

Both opinions reflect that a debtor is limited in his ability to assert a homestead claim in property that is not yet occupied. Under state law, mere intent to occupy specific property as a homestead *combined with overt acts* to that end may suffice, *provided there is no existing homestead*.

34. See *Norman v. First Bank & Trust, Bryan*, 557 S.W.2d 797, 801 (Tex. App.—Houston [1st Dist.] 1997, writ ref'd n.r.e.).

35. *Rancho Oil Co. v. Powell*, 175 S.W.2d 960, 963 (Tex. 1943) (acquiring a new home is not necessarily a new homestead). *But see* *Coury v. Prot*, 85 F.3d 244, 254 (5th Cir. 1996) (stating that if a debtor acquires a new homestead, he abandons the old one); *Norman*, 557 S.W.2d at 801 (requiring evidence of homestead abandonment), and *Panhandle Constr. Co. v. Wiseman*, 110 S.W.2d 615 (Tex. Civ. App.—Amarillo 1937, writ ref'd w.o.j.) (acquiring a new, permanent home is the best evidence of abandonment).

36. *Silvers v. Welch*, 91 S.W.2d 687, 687 (Tex. 1936).

37. *McKee*, 174 S.W.3d at 844 (citing *Tawery v. Plainview Bldg. & Loan Ass'n*, 99 S.W.2d 1039 (Tex. Civ. App.—Amarillo 1936, writ ref'd)).

38. *Id.* at 845.

That may *not* be possible, however, if a homestead already exists or actual abandonment of the previous homestead has not occurred.

B. A HOUSE(BOAT) MAY STILL NOT BE A HOME(STEAD)

*In re Norris*³⁹ was reported in last year's Survey. In that case, the debtors claimed a sixty-eight foot Chris-Craft boat as a homestead. The bankruptcy court upheld the trustee's objection, and the district court affirmed.⁴⁰ The decision was appealed to the Fifth Circuit.⁴¹

Last year the Fifth Circuit issued a brief opinion noting the liberal construction of the Texas Constitution and Property Code regarding homestead claims, contrasted with Texas Supreme Court opinions referring to the homestead as an "estate in land."⁴² The court then certified the issue to the Texas Supreme Court as follows:

Does a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualify for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution?⁴³

It is likely that the supreme court will resolve this question by the time this Survey is published.

C. PAYROLL DEDUCTIONS

*Goebel v. Brandley*⁴⁴ involved a mother who had enrolled in her employer's payroll-deduction program, through which she purchased a \$200 savings bond each month for her minor son and daughter. About five years later, a judgment was entered against the Goebels and the mother became a judgment debtor.

Later, the judgment creditor sought to set aside the children's savings bonds, claiming that they were fraudulently transferred by the Goebels. The trial court granted summary judgment in favor of the creditor, but the court of appeals reversed.⁴⁵

The court of appeals found that the Goebels did not transfer a non-exempt asset. Rather, the payroll-deduction plan came out of the debtor's current wages, which are exempt from garnishment or execution.⁴⁶ Therefore, because the exempt property (the current wages) was already

39. *In re Norris*, 316 B.R. 246 (Bankr. W.D. Tex. 2004) (Rodriguez, J.).

40. See Roger Cox, *Bankruptcy & Creditors' Rights*, 58 SMU L. REV. 563, 578 (2005); see also Joseph M^cKnight, *Family Law: Husband & Wife*, *id.* at 917.

41. *In re Norris*, 413 F.3d 526 (5th Cir. 2005).

42. *Id.* at 530 (citing *Lassiter v. First Huntsville Props.*, 826 S.W.2d 125, 129 (Tex. 1991)).

43. *In re Norris*, 413 F.3d at 530 (inviting the Supreme Court to appropriately reform the issue to help resolve *Norris*).

44. 174 S.W.3d 359 (Tex. App.—Houston [14th Dist.] 2005, *pet. denied*).

45. *Id.* at 361, 366. The judgment debtors filing for bankruptcy in 2003 did not appear to affect the issues in this case.

46. *Id.* at 364. See also TEX. CONST. art. XVI, § 28. Current wages are also exempt from attachment, execution, or other seizure. See TEX. PROP. CODE ANN. § 42.001(b)(1) (Vernon 2005).

beyond the reach of the creditor, conveyance of that property, whether fraudulent or not, did not deprive the creditor of any rights to it.⁴⁷

Further, because the mother's current wages were transferred directly to her children, the mother never actually received those funds and her estate was never deprived of anything. Accordingly, the payroll deductions directly from the mother's current wages to her children were upheld.

The Texas Supreme Court denied the petition for review.

D. HOMESTEAD PROCEEDS

*In re Jones*⁴⁸ involved unusual interplay between the Texas homestead statute section that protects sales proceeds for six months and Bankruptcy Code section 727 regarding debtor ineligibility for Chapter 7 discharge. In *Jones*, sale of the debtor's homestead resulted in cash proceeds of over \$77,000. For a limited time, the Property Code exempted the proceeds.⁴⁹

Two months before the temporary exemption ceased, Jones used a portion of that money on a down payment and some subsequent payments on a pickup purchased in his fiancée's name. Two months later, he filed for bankruptcy. The court had to decide whether the transfer rendered that portion of the proceeds non-exempt.

The court stressed that the proceeds exemption was not meant to protect the proceeds themselves, but rather to allow the claimant to invest the proceeds in another homestead.⁵⁰ Thus, Jones could hold the proceeds for six months to purchase another homestead, but the exemption did not permit him to purchase other assets. The court also noted Fifth Circuit authority that held that any remaining proceeds not used to purchase a new homestead are "instantly rendered non-exempt."⁵¹ The court concluded that any other assets purchased with remaining proceeds, even within the six-month period, are not covered by this narrow exemption and are rendered non-exempt. Because Jones purchased the pickup with those proceeds, that asset was not exempt, and it remained subject to the creditors' claims.⁵²

This left the court to determine whether Jones's transfer of proceeds to his fiancée violated section 727(a)(2)(A). Such a violation, transferring property within a year pre-petition with an intent to hinder, delay, or defraud a creditor, would deny Jones's discharge.⁵³ Intent in this context could be proven by circumstantial evidence including family, friendship,

47. *Goebel*, 174 S.W.3d at 364 (citing *Duran v. Henderson*, 71 S.W.3d 833, 842-43 (Tex. App.—Texarkana 2004, pet. denied)).

48. 327 B.R. 297 (Bankr. S.D. Tex. 2005) (Bohm, J.).

49. *Id.* at 301 (discussing TEX. PROP. CODE ANN. § 41.001(c) (Vernon 2005)).

50. *Id.* at 302 (stating that in spending the proceeds, Jones could not prejudice his creditors' interests).

51. *Id.* (citing *In re Davis*, 170 F.3d 475, 483 n.10 (5th Cir. 1999)).

52. *Id.*

53. 11 U.S.C. § 727(a)(2)(A). *See also In re Chastaint*, 873 F.2d 89, 90 (5th Cir. 1989).

or a close relationship to the transferee combined with retaining possession of the transferred property. In this case, Jones purchased the pickup in his fiancée's name but continued to use it. For this and other reasons, the court found that the debtor committed a fraudulent transfer and denied him a discharge under section 727(a)(2)(A).⁵⁴

The court also denied Jones's discharge based on his failure to keep and produce adequate records under section 727(a)(3).⁵⁵ The court noted that, among other things, Jones could not account for much of the \$77,000 in proceeds from the sale. Specifically, the court found that over \$55,000 was spent "without any form of receipt or substantiation."⁵⁶ For these reasons, the court denied the debtor's discharge.⁵⁷

V. SECURED CLAIMS: COSTS & ATTORNEY'S FEES

Section 506(b) of the Bankruptcy Code provides for interest and costs on certain secured claims. This typically involves a determination of a "reasonable" fee, and it may also involve the weighing of certain equities, including the impact on unsecured creditors and other constituencies. Generally, fees will be allowed to holders of oversecured claims, provided the fee is reasonable.⁵⁸

BAPCPA affected this issue during the Survey period. Specifically, the phrase "or state statute" was added to the section; thus, reasonable fees and costs may be awarded not only as provided for by contract, but also under the state statute under which a claim arose. The full effect of this insertion remains to be seen.⁵⁹

During the Survey period, Judge Isgur of the Southern District issued two opinions that provide some guidance on this issue. In *In re Valdez*,⁶⁰ an oversecured creditor sought relief from the automatic stay, apparently to foreclose on the debtors' homestead. The debtors' schedules reflected \$18,000 in equity, and no evidence was offered to dispute that assertion. The court found insufficient cause to lift the stay, and the motion was denied.

54. *Jones*, 327 B.R. at 302-03.

55. Section 727(a)(3) of the Bankruptcy Code also provides that unless such act or failure was justified under *all* circumstances of the case, then a discharge will be denied for failure to keep or preserve records. See 11 U.S.C. § 727(a)(3). It is not necessary to demonstrate a debtor's fraudulent intent under this provision; "mere negligence in failing to keep and produce records will suffice to bar his discharge." *Jones*, 327 B.R. at 302.

56. *Id.*

57. *Id.*

58. 11 U.S.C. § 506(b). See, e.g., *In re Cummins Util., L.P.*, 279 B.R. 195 (Bankr. N.D. Tex. 2002) (Lynn, J.).

59. 11 U.S.C. § 506(b). Presumably, this change may give rise to fee and cost recovery in situations in which those items are specifically included as part of a claim arising under statute. For example, Chapter 38 of the Texas Civil Practice and Remedies Code provides for recovery of attorney's fees in certain contract claims. The issue in this context is whether this is the kind of statute that Congress intended to be covered by the amendment. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997).

60. 324 B.R. 296 (Bankr. S.D. Tex. 2005) (Isgur, J.).

The movant sought recovery of its attorney's fees and expenses, specifically \$425 in legal fees and \$150 in filing fees incurred in filing and pursuing the motion. At the outset, the court acknowledged that the mere fact that the motion was unsuccessful would not be a reason to deny attorney's fees. The court narrowed the issue to determine whether the creditor acted reasonably in bringing the motion in the first place:

[T]here is considerable precedent for allowing attorney's fees incurred in seeking relief from the stay, even though the motion is unsuccessful or never ruled on. *The key criteria is whether the creditor acted reasonably in seeking relief from the stay.*⁶¹

The court noted that the Fifth Circuit had not directly addressed this factual context; however, the court was convinced by another circuit's simplified approach—that is, a simple determination of whether the action was “prudent.” If the action is not “prudent” or is otherwise unreasonable or unnecessary, fees would not be allowed.⁶²

In *Valdez*, the court, noting the substantial equity in the property and the lack of any independent cause for relief whatsoever under section 362(d)(1) (such as failure to maintain insurance, pay taxes, etc.), held that there was no real reason to seek relief from the stay. The court found that the lender's filing of a motion was not a commercially prudent decision. Therefore, the court did not award attorney's fees.⁶³ The contested matter's ultimate outcome was not determinative; however, taking action that a court perceives as wholly unnecessary, or even premature, may result in the denial of attorney's fees.

In 2004, Judge Isgur was also faced with determining whether an undersecured creditor may recover attorney's fees, even by agreement. In *In re Nair*,⁶⁴ the issue arose not so much in an adversarial context, but when a proposed agreed order was submitted.

In *Nair*, the secured lender moved for relief from the stay, and the parties apparently negotiated a proposed agreed order providing for certain adequate protection. Despite the fact that the motion alleged that the movant was undersecured, the proposed order provided that the debtor would pay \$550 in the movant's attorney's fees. Noting the lack of authority and section 506(b)'s language, the court refused to enter the agreed order and issued a show cause order regarding potential Rule 9011 sanctions.

The court first noted the lack of a general right of recovery for attorney's fees incurred in filing a motion for relief from the stay. Rather, the

61. *Id.* at 300-01 (emphasis added) (quoting *In re Brunel*, 54 B.R. 462, 465 (Bankr. D. Colo. 1985)). In other words, the court looked to whether the creditor took the kind of actions that “similarly situated creditors might reasonably conclude should be taken” *Id.* at 300 (quoting *In re Univ. Towers Owner's Corp.*, 278 B.R. 302, 305-06 (Bankr. D. Conn. 2002)).

62. *Id.* at 301.

63. “[T]he debtor . . . cannot be required to pay fees and costs pursuant to Section 506(b) for a motion [the movant] brought with no chance of success.” *Id.* at 302.

64. 320 B.R. 119 (Bankr. S.D. Tex. 2004).

award of attorney's fees is specifically governed by section 506(b). More specifically, a motion for relief from the stay is not an "action on a contract" to which state law would apply, but rather, a creature of federal law.⁶⁵

The court articulated two concepts crucial to its finding. First, the awarding of attorney's fees arises from the very same statutory phrase (in section 506(b)) as the allowance of post-petition interest. In effect, the undersecured creditor was no more entitled to attorney's fees than to post-petition interest. The Supreme Court previously held that section 506(b) had the "substantive effect of denying undersecured creditors post-petition interest on their claims."⁶⁶ Likewise, an award of attorney's fees is not authorized under the statute's plain wording.

Second, the award of dollar-for-dollar attorney's fees to an undersecured creditor essentially sets that component of its claim apart as the equivalent of a priority administrative expense. The court said that this goes against not only specific section 506(b) limitations, but also the Bankruptcy Code's basic distribution scheme. Unlike the *oversecured* creditor, who is entitled to full payment, even with interest and attorney's fees, "[a]n *undersecured* creditor's deficiency claim is merely entitled to a *pro rata* distribution of the estate's residual."⁶⁷ In conclusion, the court found that given the sheer volume of stay motions, a court must ensure that proposed orders (even agreed orders) pass muster under Rule 9011—that the proposed relief has some statutory basis in the Code. Accordingly, the court entered non-monetary sanctions against movant's counsel.

Other opinions addressing section 506(b) were also published during the Survey period. Among those were *In re 900 Corp.*,⁶⁸ which addressed the subtle distinctions between assessing pre- and post-confirmation fees and the applicability of section 506(b) to fees incurred post-confirmation. Of significance in that opinion was the court's application of the "reasonableness" concept under state law in a situation that also involved reasonable fees under section 506(b).⁶⁹ The eight factors to consider in determining the reasonableness of an attorneys' fees request are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship

65. *Id.* at 125 (citing *In re Johnson*, 756 F.2d 738, 741 (9th Cir. 1985), *cert. denied*, 474 U.S. 828, 106 S. Ct. 88 (1985)).

66. *Id.* at 126 (quoting *United Sav. Ass'ns of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988)).

67. *Id.* at 128. "This is an issue of great substance." *Id.*

68. 327 B.R. 585 (Bankr. N.D. Tex. 2005) (Houser, J.).

69. *Id.* at 592.

with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.⁷⁰

A common theme among these and other cases is that fees need to be not only reasonable, but also necessary in the context of a particular case. As one court has stated in the past, "Section 506(b) is not intended as a *carte blanche* for secured creditors to dun the estate."⁷¹

VI. OTHER BAPCPA CASES

Most of the new BAPCPA provisions took effect near the end of the Survey period. Since then, a number of cases have been published that provide some insight into how courts will apply these newer provisions. Many of those cases should be treated in next year's survey; however, here is a glimpse of what courts are dealing with:

At least three cases arising in the Southern District address the changes to section 362, which limits bankruptcy stay protection available to so-called serial filers.⁷²

At least three Texas cases address the credit-counseling requirement, which for most individual debtors is now a prerequisite to filing.⁷³

Post-BAPCPA opinions are now being published on a regular basis. As mentioned, it is impossible to predict how courts will address BAPCPA's unintended (and intended) consequences.

70. *Id.* (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). See also *Fluorine on Call, Ltd. v. Fluorogas, Ltd.*, 380 F.3d 849 (5th Cir. 2004); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.).

71. *In re Cummins Util., L.P.*, 279 B.R. 195 (Bankr. N.D. Tex. 2002). See also *In re Delaney Family, L.P.*, No. 02-46631-DML-11, 2003 WL 23957146 (Bankr. N.D. Tex. 2003) (Lynn, J.) ("One purpose of Section 506(b) is to protect estate assets from excessive fees by oversecured creditors' attorneys exhibiting excessive caution, overzealous advocacy, and hyperactive legal efforts.") (internal quotations omitted).

72. See *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (Isgur, J.); *In re Collins*, 335 B.R. 646 (Bankr. S.D. Tex. 2005) (Isgur, J.); *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005) (Isgur, J.). The amended Code section in question is found at 11 U.S.C. § 362(c)(3)(A). When *Charles* was decided, it was apparently an issue of first impression.

73. See *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005) (Monroe, J.); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Isgur, J.). See also *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005) (addressing the "exigent circumstances" exception arising out of imminent foreclosure sale or imminent eviction proceedings).