The Right to Marry versus the Right to Bankruptcy Relief

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The Meaning of the Word "Spouse" for Means Testing Purposes: Some Considerations

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The word "spouse" appears repeatedly throughout the means test for Chapter 7 cases (Form B22A). It also appears numerous times in the statement of current monthly income and calculation of commitment period and disposable income for Chapter 13 cases (Form B22C). The word's meaning has serious implications for same-sex couples, whether they are legally married, in domestic partnerships or in state recognized civil unions.

The definition of the term spouse, according to the Defense of Marriage Act (hereinafter DOMA) is "a person of the opposite sex who is a husband or a wife." 1. U.S.C. sec. 7. Under this definition, legally married debtors of the same sex are not spouses of each other. Importing that to Forms B22A and B22C causes significant variance between the treatment of what otherwise would be identical debtors. Therefore, under DOMA, the bankruptcy code treats couples very differently depending on the sex of their spouses. Issues regarding what constitutes income, what deductions may be taken and who a dependant is complicate an already complicated formula.

Income.

Forms B22A and B22C only require the income from a debtor's *spouse* be listed. Under DOMA, same-sex marriages and domestic partnerships are not recognized though this is currently on appeal. See *In re Balas,* 449 B.R. 567 (C.D. Cal. Bankr. 2011). Therefore, the only income that would appear here is that of the debtor. It is required that income from all other

sources be listed but the most practical way of addressing this in a same sex marriage is to determine the amount that the same-sex spouse contributes to the household. This number could be very different from that person's stated income. Under this construct, it is possible that a debtor, who is in a same sex marriage, would be eligible for Chapter 7 treatment, where their legally recognized counterpart may not. In the Chapter 13 context, this might also lead to a shorter commitment period since current monthly income calculated these two ways may produce lower numbers.

In contrast, the same sex debtor who earns over the median income alone, but whom earns below the median income when his or her same sex spouse's income is considered and household size is increased, is placed is a drastically different position. This debtor may actually be required to file a Chapter 13 and remain committed in the case longer than he or she would have been required if he or she been able to file with his or her spouse.

In 2008, a Wisconsin bankruptcy court held that same sex couples who opt to both file Chapter 7 bankruptcies do not have to combine their incomes for purposes of Form B22A. In this case, the Court found that the Wisconsin state Constitution prohibited same sex couples from marrying, and that DOMA prohibited the courts of the United States from considering same sex couples as being married. *In re Roll,* 2008 WL 5605001 (Bky.W.D.Wis. Nov. 10, 2008). The court refused to honor the U.S. Trustee's demand that the same sex debtors' incomes be combined on Form B22A.

In *Roll,* the debtors, who filed Chapter 7, lived in the same household with the niece of one of the debtors. When both debtors filed their respective case, they each claimed a household size of three. Each debtor's annual income was less than Wisconsin's median income for a three

person household; however, added together as a married couple, their incomes would have exceeded the median annual income for a three person household.

The court quoted from *In re Ellringer,* 370 B.R. 905 (Bky.D.Minn.2007), and held that the incomes of same sex couples, or even unmarried opposite sex couples, were not to be added for purposes of the means test, unless the other party's income was used for the household expenses of the debtor or the debtor's dependents. In *Roll,* the U.S. Trustee had presented no evidence that this was the case. As a result, both debtors' incomes were below the median, and no means test analysis was required.

Marital adjustment.

Under DOMA, same-sex debtors are per se barred from the marital adjustment. This adjustment allows for a deduction of income that was "Note paid on a regular basis for the household expenses…" One consideration here is that of a spouse's tax liability or the support of persons other than the debtor or the debtor's dependants. Question: May a gay man or lesbian filer deduct his or her non-filing spouse's tax liability?

Dependants.

Forms B22A and B22C reference the exemptions claimed on federal income tax returns. DOMA applies to federal taxation laws. A same-sex married couple's federal income tax return looks markedly different than the heterosexual married couple's forms: for starters, there are two returns for the same-sex couple since same-sex married couples may not file a joint federal return. The following states allowed joint state returns however: Massachusetts, Vermont, Connecticut, Iowa, New Hampshire and New York. California, The District of Columbia, New

Jersey and Oregon allow civil unions to file jointly as well. Forms B22A and B22C do leave open the ability to add the numbers of any additional dependants who may be supported. Dependant, in this context, however, is a term of art. Because the dependant issue repeats itself through the forms, it is clear that a side by side comparison of married opposite sex debtors with married same-sex debtors will produce different results. Ponder this: Is the biological child of debtor who is in a same sex marriage but whose spouse has not adopted the child, a dependant for tax purposes and bankruptcy purposes?

Court ordered payments.

Because same-sex couples have not had traditional access to divorce courts, court ordered payments can also be tricky. Same-sex debtors still provide child support and separate support payments, some mandated by the courts, others the result of private negotiation. Are payments that arise out of private negotiation in the nature of court ordered payments? Should they be calculated?

In its current state, the bankruptcy code is impacted by definitions in DOMA. This federal law continues to produce a disparate impact that treats otherwise similarly situated persons with uniquely different outcomes.

CONFLICT OF LAWS: DOMA, STATE LAW and the BANKRUPCTY CODE

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Bankruptcy courts are often forced to address the messy intersection of family law and the Bankruptcy Code. In the past, if the debtor were married state law provided defined rights and obligations founded in the martial relationship. The Bankruptcy Code supplemented those state-based rules, making special accommodations for certain rights and responsibilities founded in marriage. As early as 1995, Judge Kahn, in *In re Allen*, acknowledged that a bankruptcy court's analysis would not alter if and when states chose to recognize marriages between individuals of the same-sex. While Judge Kahn refused to allow a same-sex couple to file a joint petition, he did opine "if a state recognizes a legal marriage between a same sex couple, they would qualify for relief under § 302 of the Bankruptcy Court. In other words, what is controlling is the fact that the parties are legally married. It is not limited to legally married husbands and wives."

A year after Judge Kahn made his pronouncement Congress promulgated the Defense of Marriage Act (DOMA), changing dramatically the legal landscape on which bankruptcy judges operated. DOMA prohibited federal courts from recognizing certain marriages and their attendant rights when applying federal law. DOMA also allowed states to refuse "to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." States responded to Congress' grant of authority in DOMA. Over 40 states have statutes or constitutional amendments (so-called mini-DOMAs) prohibiting marriages between same-sex couples and, in some instances, explicitly refusing to recognize marriages validly performed in other states as well as any right arising from those marriages.

Both the federal and state DOMAs can influence everything in bankruptcy from the creation of the estate to the distribution priority scheme to the availability of exemptions to the discharge of certain debts. This article is intended to alert practitioners to the complexities wrought by the intersection of the Bankruptcy Code, DOMA and the various state laws involving relationship recognition and prohibition. Unfortunately, at this point there are more questions than answers.

I. Setting the Stage: State Law Relationship Recognition

Bankruptcy courts often rely on state law to determine the debtors' and creditors' rights and responsibilities. An individual's interest in property as well as his or her legal obligation to creditors is dictated primarily by state law. At times these rights and obligations are acquired through marriage and then adjusted by divorce. States have taken different approaches to addressing legal unions between same-sex couples and the dissolution of those unions. Each approach brings with it a different array of rights and responsibilities as well as potential complications in the bankruptcy context.

A. Relationship Recognition

1. Marriage and Spousal Equivalent Rights

At this writing, six states, Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia recognize marriage between individuals of the same sex.[1] In addition, there are also 18,000 legally married same-sex couples in California.[2] Washington did pass a marriage equality bill that was signed by Governor Gregoire in February 2012, however opponents of the bill collected the necessary signatures to take the measure to a state-wide voter referendum in November. As a result the bill will not go into effect unless approved by the voters on the November 6, 2012 ballot.[3] Similarly, Maryland passed a marriage equality bill that is slated to go into effect in January 2013. But opponents of the bill are attempting to gather sufficient signatures to put the law up to a referendum vote that would appear on the ballot in the November 2012 election.[4]

In addition, another eight states, California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island provide the equivalent of state-level spousal rights to same sex couples.[5] Partners who enter into these relationships are generally entitled to the same legal obligations, responsibilities, protections, and benefits that state law provides to married spouses. In addition, Washington's domestic partnership law remains in effect until the results of the referendum vote are known.[6]

2. Recognition Only

Several states also provide some statewide spousal rights to same-sex couples. The title and scope of benefits and protections varies from state to state. In Colorado, same-sex partners can

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[1] CONN. GEN. STAT. §§ 46b–20–46b–38i (2010); IOWA CODE § 595.2 (defining marriage as between a man and a woman) overturned by *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); MASS. GEN. LAWS. ch. 207 § overruled by *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941 (Mass. 2003); N.H. REV. STAT. ANN. §§ 457:1–457:3 (2010); VT. STAT. ANN. Tit. 15 § 8 (2010); Council B. 18-0482, 18th Council Period (D.C. 2009); NEW YORK A-8529-2011 (amending domestic relations law to allow for marriage between persons of the same sex).

[2] *Strauss v. Horton,* 93 Cal.Rptr.3d 591, 207 P.3d 48 (2008)(upholding the validity of Proposition of 8 but also holding that marriages performed before vote remained valid marriages under state law).

[3] On February 13, 2011, Governor Christine Gregoire signed Washington SB 6239 into law. The bill amends RCW 26.04.010 to allow same-sex couples to marry and converts all domestic partnerships into marriage if not dissolved within 2 years. Referendum 74 asks the voters to approve the legislators decision.

[4] Civil Marriage Protection Act, HB 738, amends the current law to remove references to allow marriages between two people of the same sex. Maryland law requires the requisite number of signatures be presented to the Secretary of State by June 30, 2012.

[5] CAL. FAM. CODE § 297.5 (West 2006); 13 DEL. CODE § 201, *et seq*.; Hawaii Act 001 (2011); 750 ILL. COMP. STAT. 75/20 (2011); NEV. REV. STAT. § 122A.200 (2010); N.J. STAT. ANN. § 37:1–31 (West 2010); OR. REV. STAT. § 106.340 (2010); R.I. GEN. LAWS §15-3.1.

[6] RCW ch. 26.60 (West 2009).

be identified as designated beneficiaries.[7] Maine, Maryland and Wisconsin provide domestic partner registries but without all the rights and obligations afforded to spouses under state law.[8]

3. Interstate Relationship Recognition

To further complicate matters, some states will recognize the marriages, civil unions or domestic partnerships properly performed or registered in another state but not all states will honor all forms of relationship recognition.[9] And certain states with no relationship recognition or prohibition statutes will recognize marriages performed in other states. For example, in January 2011, the New Mexico Attorney General issued an opinion letter stating that out-of-state marriages would likely be recognized in New Mexico.[10]

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[7] COLO. REV. STAT. §§ 15–22–101–105 (2010).

[8] ME. REV. STAT. tit. 22, § 2710 (2010); MARYLAND, Pub. L. 590, 599; WIS. STAT. §§ 770.1–10 (2010).

[9]New York, Vermont, and the District of Columbia recognize out of jurisdiction marriages, civil unions or domestic partnerships between persons of the same-sex *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008); Martinez Decision on Same-Sex Marriages, Op. Governor Advisor David Nocenti 1 (2008) *available at* http://www.abcny.org/pdf/memo.pdf; Recognition of Out-of-State Same Sex Marriages in Vermont, Op. Gen. Council. 1 (2007) *available at* http://www.leg.state.vt.us/WorkGroups/FamilyCommission/Appendix%20J.pdf; VT. STAT. ANN. Tit. 15 § 8 (2010); D.C. CODE § **46-405.01** (2010). In contrast, Connecticut and New Hampshire will recognize just out of state marriages and civil unions, Recognition Of Out-Of-State Civil Union and Same-Sex Marriages, Op. Att'y Gen. (2005) available at http://www.ct.gov/ag/cwp/view.asp?A=1949&Q=303166; N.H. REV. STAT. ANN. § 457:3 (2010), H.B. 437, 2007 Sess. (N.H. 2007) *available at* http://www.gencourt.state.nh.us/legislation/2007/HB0437.html, H.B. 73, 2009 Sess. (N.H. 2009) *available at* http://www.gencourt.state.nh.us/legislation/2009/HB0073.html, and Iowa, Maryland, and Massachusetts, will recognize out of jurisdiction marriages but will not recognize other forms of relationship recognition. *Varnum v. Brien*, 763 N.W.2d 862, 906–907 (Iowa 2009); Drew A. Cumings-Peterson, Out-of-State Civil Unions in Iowa After Varnum v. Brien: Why the State Should Recognize Civil Unions as Marriage, 96 IOWA L. REV. 297, 314 (2010)(noting state recognition of out of state relationship recognition still an open question); Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration may be Recognized in Maryland, 95 Op. Att'y Gen. 4 (2010) *available at* http://www.oag.state.md.us/Opinions/2010/95oag3.pdf; *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941, 968–969 (Mass. 2003) (holding a failure to recognize same sex marriages violates the Massachusetts constitution). According to the Massachusetts Secretary of State Massachusetts will recognize out of state marriages and civil unions but not domestic partnerships although such partnerships are recognized in certain municipalities. While California, New Jersey, and Oregon will recognize out of jurisdiction marriages, civil unions, or domestic partnerships as valid civil unions or domestic partnerships only. CAL. FAMILY CODE §§ 299.2, 308 (West 2010); Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Law of Other States and Foreign Nations, 3–2007 Op. Att'y Gen 1 (2007) *available at* http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf; OR. REV. STAT. §§ 106.310, 106.340 (2010). Domestic partnerships are recognized in Oregon but the constitution states that "[i]t is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Or. Const. art. XV § 5(a). The question of cross border recognition is in flux. In both October 2004 and February 2007, the former Rhode Island Attorney General, Patrick Lynch, issued legal opinions recommending that governmental entities recognize the same-sex spouses of employees and retirees. In the latter opinion, the Attorney General said that, under established legal principles and a review of Rhode Island public policy, a marriage validly entered into by a same-sex couple in another jurisdiction remains valid in Rhode Island. Legal uncertainty remains in this area, however. *See* Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

[10] 11–01 Op. Att'y Gen. 1 (2011) *available at* http://www.democracyfornewmexico.com/files/4-jan-11-rep.-al-park-opinion-11-01.pdf

4. Relationship Prohibition

Thirty-one states have constitutional amendments restricting marriage to one man and one woman while ten states have statutes that restrict marriage to one man and one woman.[11] These prohibitions, the so-called "mini-DOMAs", prohibit the marriage of same-sex couples in the state. Some statutes also explicitly restrict the state's ability to recognize marriages between couples validly performed in other states.[12] For example, Maine law prohibits marriage between persons of the same-sex and also declares void any marriage performed in another state that violates its law.[13]

Yet others go even further by refusing to recognize contractual rights arising from those marriages.[14] For example, Minnesota law prohibits a marriage between partners of the same-sex,

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[11] States with constitutional amendments include: Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), California (2008),Colorado, Florida (2008), Georgia (2004), Kansas (2005), Idaho (2006), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004),Nebraska (2000), Nevada (2002), North Carolina (2012), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia(2006) and Wisconsin (2006). States with statutes include Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, North Carolina, Pennsylvania, West Virginia and Wyoming. A map is *available at* http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009%281%29.pdf.

[12] See La. Const. art. XII, § 15 ("No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman."); Fla. Stat. Ann. § 741.212(1) (West 2006) ("Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign ... are not recognized for any purpose in this state."); Ky. Rev. Stat. Ann. § 402.045(2) (LexisNexis 2006) ("Any rights granted by virtue of [a same-sex] marriage, or its termination, shall be unenforceable in Kentucky courts."); Ohio Rev. Code Ann. § 3101.01(C)(2) (West 2006) ("Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.").

[13] ME. REV. STAT. ANN. tit. 19 § 701(1A)("Any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State".) & (5)("Persons of the same sex may not contract marriage.")

[14] Alaska Stat. § 25.05.013 (2004); ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.") Minn. Stat. Ann. § 517.03 (West 2006) ("A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state."); Va. Code. Ann. § 20-45.2 (West 2005) ("A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."). Arkansas has a modified version of the language that is a bit clearer, referring to "contractual or other rights" granted by virtue of the marriage license, but it remains obscure what the reference to contract is intended to accomplish. Ark. Code Ann. § 9-11-208(c) (2006) ("Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts."). But see Ark. Code Ann. § 9-11-208(d) (2006) ("[N]othing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.").

declares void a union valid under another state's laws and prevents recognition of even *contractual rights* that arise as a result of the marriage.

> A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.[15]

A third category of statutes refuse to enforce *judgments* that involved a marriage between persons of the same-sex.[16] For example, Florida states:

> The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.[17]

While it is readily accepted that states are not required to accept marriages validly performed elsewhere, whether provisions rejecting judgments are constitutional remains a hotly debated topic.[18] Moreover, the exact scope of these mini-DOMAs is uncertain. The statutes are often vague and ambiguous, leaving it to the state courts to establish their parameters.

The effect of these laws on the property interests of same-sex couples is very real. In *Hennefeld v. Township of Montclair*, the plaintiffs, a validly married same-sex couple, sought a 100% disabled veteran's property tax exemption with respect to their residential property.[19] The court conceded that the couple was married under Canadian law and that they had a valid civil union under Vermont law. Citing to the federal DOMA and New Jersey law, however, the court refused to recognize that the couple owned the property as tenants by the entirety.[20] Such a determination in the context of bankruptcy could have a devastating effect on the debtor's and nondebtor spouse's ability to protect the property from the claims of creditors. *Hennefeld* provides a potent example of how a state's prohibition on relationship recognition can undermine a debtor's property interests critical to the bankruptcy process.

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[15] MN STAT. ch. 517.03(a)(4) & (b) (2011).

[16] Ga. Const. art. 1, § 4, cl. 1(b); Fla. Stat. Ann. § 741.212(2) (West 2006); Ohio. Rev. Code Ann. § 3101.01(C)(4) (West 2006); Tex. Fam. Code Ann. § 6.204(c)(1) (Vernon 2006); W. Va. Code Ann. § 48-2-603 (LexisNexis 2006).

[17] FLA. STAT. § 741.212(2) (West 2008).

[18] *See* Wilson v. Ake, 354 F.Supp.2d 1298, 1303 (M.D.Fla. 2005)(refusing to recognize a marriage performed in Massachusetts); Cook v. Cook, 209 209 Arz. 487 ((Ct. of App. 2005); *see generally* Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59 (2007).

[19] 22 N.J. Tax 166 (N.J. 2005).

[20] Id. at 185-190.

B. Relationship Dissolution

In states that allow marriage, civil unions or domestic partnerships, it is likely that such state will grant a divorce or dissolution of such union. It is important, however, to be aware of the state's specific requirements for granting divorces. For example, most states have a residency requirement that a party must meet before filing for a divorce. Thus, it may be difficult for couples who travelled to another state to get married, but reside elsewhere, to obtain a divorce from that state. Moreover, even if the state has jurisdiction to grant the divorce, it may not have jurisdiction to divide the marital property.[21]

In states that prohibit marriage between same-sex individuals, a court is less likely to have the jurisdiction it needs to allow a divorce action to go forward. For example, a Texas court concluded that it lacked jurisdiction to entertain a divorce action because Texas law prohibits the state from recognizing a marriage between persons of the same-sex for any purpose.[22] The states refusal to provide relationship recognition to same-sex couples is not always predictive of court action, however. For example, Wyoming specifically defines marriage as a contract between a man and a woman, yet the Wyoming Supreme Court held that the state district court had subject-matter jurisdiction to hear a divorce action to dissolve a same-sex marriage lawfully performed in Canada.[23]

Even if the couple is validly divorced, however, a former spouse may not be able to enforce a valid domestic support order. As noted earlier, some state's mini-DOMA may include a provision that allows it to refuse to enforce judgments issued from another state. Such provisions leave open the possibility that a former spouse could avoid a valid judgment entered against it by moving to a state that prohibits recognition of such judgments.[24]

Whether bankruptcy courts will follow these state law provisions remains an open question. As will be discussed more fully below, a bankruptcy courts choice of law analysis will often dictate the answer. If a court follows the forum state's law, it may refuse to recognize the divorce and any attendant rights arising from it or its dissolution. Under this rubric, former spouses would be ineligible for the myriad of protections provided to domestic support obligations under the

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[21] *See generally*, Courtney G. Joslin, *Moderinizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 169 (Oct. 2011).

[22] *See* In re Marriage of J.B. and H.B., 326 S.W.3d 654, 659 (Tex.App. 2010); *see also* Kern v. Taney, No. 09-10739, 2010 WL 2510988 (Mar. 15, 2010, Pa.Com.Pl.); Jenkins v. Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006)); Chism v. Ranzy, No. 49D12-0903-DR-014654 (Ind. Super. Ct. Sept. 4, 2009), http://www.scribd.com/doc/20720679/Order-on-Petition-for-Dissolution-of-Marriage-in-Re-Marriage-of-Tara-Ranzy-and-Larissa-Chism; O'Darling v. O'Darling, 188 P.3d 137, 137 (Okla. 2008); Chambers v. Ormiston, 935 A.2d 956, 956 (R.I. 2007).

[23] Christiansen v. Christiansen, 253 P.3d 153, 157 (Wyo. 2011).

[24] Parents have attempted to use state relationship recognition prohibition laws to avoid child custody orders. *See, e.g.,* Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008); Prashad v. Copeland, 685 S.E.2d 199 (Va. 2009); Ex part N.B. (In re A.K. v. N.B.) 66 So.3d 249 (Ala. 2010).

Bankruptcy Code.[25] On the other hand, what constitutes a "domestic support order" is a question of federal law and may not be subject to the whims of a state's domestic agenda.[26]

II. The Intersection of State Laws, the Defense of Marriage Act and the Bankruptcy Code

Bankruptcy for same-sex couples is complicated by both the federal and state DOMAs. The federal DOMA contains two relevant provisions – the federal definitions provision and the so-called choice of law provision. Each provision influences how a bankruptcy case may evolve for married gay and lesbian debtors.

A. Federal Definitions Provisions

1. Current Status

The federal definitions provision states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[27] The federal definitions provision guarantees that any marital benefits provided by federal law will not extend to same-sex couples. Where previously the federal government had looked to state law to define "marriage," after DOMA, "marriage" -- at least as it related to the biological sex of the individuals -- was defined by federal law.

The application of the federal definitions provision has a significant effect on the rights of creditors, debtors and their same-sex partners. It has the potential to influence every aspect of the bankruptcy from the composition of the estate, to the calculation of the means test, to exemptions under state and federal law, to the ability to discharge particular debts.[28]

Until recently, plaintiffs had repeatedly but unsuccessfully challenged the constitutionality of DOMA. Armed with recent Supreme Court cases[29] and a growing number of legally married same-sex couples denied the over 1000 federal benefits associated with marriage, plaintiffs' have renewed their efforts to declare 1 U.S.C. § 7 – the federal definitions section – unconstitutional.

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[25] *See, e.g.,* 11 U.S.C. § 362(b)(2); § 507(a)(1)(A) & (B); § 522(f)(1)(A); § 547(c)(7); § 523(a)(5) & 1328(c)(2).

[26] *See, e.g.*, In re Young, 35 F.3d 499, 500 (10th Cir.1994); In re Boller, 393 B.R. 569, 574 (Bankr.E.D.Tenn.2008). *See also* Cook v. Bieluch (In re Bieluch), 219 B.R. 14, 20 (Bankr.D.Conn.1998) *aff'd,* 216 F.3d 1071 (2d Cir.2000) ("[A]lthough a bankruptcy judge may consult state law for guidance as to whether a debt is actually in the nature of alimony, maintenance or support, the determination is necessarily one premised upon federal bankruptcy law.").

[27] 1 U.S.C. § 7 (2010).

[28] *See, e.g.,* 11 U.S.C. § 101(14)(A)(domestic support obligation); § 302 (joint filing); § 362(b)(2)(A)(ii) & (iv) (automatic stay); § 507(a)(1)(A) & (B) (priority distribution for DSO); § 541(a)(2)(property of the estate); §§ 523(a)(5) & 1328(c)(2) (discharge of DSO).

[29] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

The plaintiffs' cases were further bolstered by the Attorney General Holder's announcement that the Department of Justice would no longer defend DOMA.[30] In most cases, the House Bipartisan Legal Advisory Group (BLAG) intervened to defend the law.[31]

Since Attorney General Holder's announcement in February 2011, three bankruptcy courts have denied the US Trustees' motions to dismiss joint petitions filed by legally married same-sex couples.[32] In *In re Somers*, the couple filed a joint petition on October 29, 2010 and, on February 11, 2011, sought to sever the case after the US Trustee indicated that it would seek to dismiss the case pursuant to DOMA. But on February 24, the debtors withdrew their motion to sever "because President Obama has ordered the Justice Department to stop defending the Defense of Marriage Act."[33]The US Trustee filed a motion to dismiss under § 707(a) arguing that DOMA required dismissal. The court concluded that the "mere existence of DOMA is not sufficient to remove the duty imposed on this Court by section 707(a) to find 'cause' prior to dismissing the case."[34] After reviewing the case, the court determined that there was not a statutory basis for dismissal nor was dismissal in the best interest of the creditors or the debtors.

Similarly, in *In re Ziviello-Howell*, the court denied the Trustee's motion to dismiss stating that "this court is not convinced that dismissal is in the best interests of all the parties or that § 707(a) requires dismissal even if DOMA is applicable and constitutional."[35]

Citing *Somers* and *Ziviello-Howell*, the court in *In re Balas* concluded that DOMA did not provide a valid basis for dismissing a chapter 13 case. According to the court, "cause does not exist under § 1307(c). No creditor has sought dismissal. The trustee has cited no failure by the Debtors in performing their obligations under § 1307(c). The trustee seeks dismissal solely because the Debtors are a same-sex married couple, in violation of DOMA's definition of "spouse" as the statute applies to Bankruptcy Code § 302(a)." [36] But the *Balas* court did not stop there. The court conducted a careful analysis and concluded that DOMA, as applied to the debtors, "violates their equal protection rights afforded under the Fifth Amendment of the United States Constitution, either under heightened scrutiny or under rational basis review. Debtors also

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[30] Letter from Attorney General to Congress on Litigation Involving Defense of Marriage Act (Feb. 23, 2011).

[31] *See, e.g.,* Gill v. OPM, 699 F.Supp2d 374 (D.Mass. 2010) ; Mass. v. HHS, 698 F.Supp2d 234 (D.Mass. 2010); Pederson v. OPM, Civil Action No. 3:10 CV 1750 (VLB) (D. Conn.); Windsor v. OPM, No.1:10-cv-08435-BSJ-JCF (S.D.N.Y.); Dragovich, et al. v. Department of the Treasury, et al No. 10-1564 (N.D. Cal.); Golinski v. Office of Personnel Management, No. 10-00257 (N.D. Cal.); Cooper-Harris v. Veteran's Administration, No. 2:12-cv-00887-CBM-AJW (C.D. Cal.) ; Cardona v. Veterans Administration No. 11-3083 (Ct. App. for Veterans' Claims); McLaughlin v. Panetta, Case 1:11-cv-11905 (D.Mass. Oct. 21, 2011).

[32] *See* In re Balas, 449 B.R. 567 (C.D. CA 2011); In re Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011); In re Ziviello-Howell, No. 11-22706-A-7 (May 31, 2011).

[33] In re Somers, 448 B.R. at 678.

[34] Id. at 680.

[35] In re Ziviello-Howell, No. 11-22706-A-7 (May 31, 2011).

[36] *See* In re Balas, 449 B.R. at 570.

have demonstrated that there is no valid governmental basis for DOMA. In the end, the court finds that DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment."[37] In an unprecedented move, twenty bankruptcy judges in the district signed the opinion. Although BLAG initially sought to intervene, it declined to appeal the decision. As a result, the UST is no longer enforcing DOMA's federal definitions provision in bankruptcy courts.

2. Is the Federal Definitions Provision Relevant in Bankruptcy?

Although the UST is no longer enforcing the federal definitions provision of DOMA, it is still valid law. But after *Balas*, only a creditor or other party in interest is likely to raise it.[38] For example, a creditor may have the incentive to challenge a former spouse's claim based on a domestic support order. The Code provides special protections to a "domestic support obligation" defined as debt owed to a "spouse" or "former spouse."[39] Courts recognize that whether a debt is a "domestic support obligation" is a question of federal law.[40] If applicable, DOMA prohibits the bankruptcy court from recognizing a debt owed to a same-sex spouse or former spouse as a "domestic support obligation" even if so identified by a state court and even if owed to a governmental unit and not the individual debtor. As result, a spouse or former spouse with a valid domestic support obligation would not have access to the myriad of protections provided to these debts if he or she was married to someone of the same-sex.

As of this writing, there are no reported cases after the *Balas* decision in which DOMA has been raised.

3. What's In a Name?

Assuming the federal definitions provision is now irrelevant, how should bankruptcy courts treat relationships other than marriage? As explained earlier, states have chosen a variety of methods to recognize same-sex relationships. Each approach brings with it a different name – marriage, civil unions, domestic partnerships, reciprocal beneficiaries – and, in some cases, different rights and obligations. Should parties to a civil union or domestic partnership be allowed to file joint petitions? Are they "spouses" or "married" for purposes of the Bankruptcy Code?

When asked whether spouses to a civil union could file joint tax returns, the IRS opined that "if Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife,

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[37] *See* In re Balas, 449 B.R. at 575.

[38] Outside the context of DOMA, creditors have challenged the validity of a debtor's marriage. *See* In re Nakamura, No. 06–40685–JDP, 2008 WL 191811 (Bankr.D.Idaho 2010)(lienholder questioned the validity of common law marriage when Trustee sought to avoid lien because wife did not sign mortgage as required under Idaho law).

[39] 11 U.S.C. § 101(14A).

[40] See, e.g., In re Young, 35 F.3d 499, 500 (10th Cir.1994); In re Boller, 393 B.R. 569, 574 (Bankr.E.D.Tenn.2008). See also Cook v. Bieluch (In re Bieluch), 219 B.R. 14, 20 (Bankr.D.Conn.1998) *aff'd,* 216 F.3d 1071 (2d Cir.2000) ("[A]lthough a bankruptcy judge may consult state law for guidance as to whether a debt is actually in the nature of alimony, maintenance or support, the determination is necessarily one premised upon federal bankruptcy law.").

they are considered 'husband and wife' for purposes of Section 6013 of the Internal Revenue Code." [41] This would seem to suggest the federal government, or at least the IRS, will look to the scope of the rights provided under state law rather than the name assigned to the relationship when applying federal law.

At least one bankruptcy court has taken the same approach for purposes of interpreting state law. A California bankruptcy court grappled with whether registered domestic partners were "married" for purposes of the state's single homestead exemption rule. In *In re Rabin*,[42] two women, registered as domestic partners under California law, each filed for Chapter 7 bankruptcy and each claimed a $75,000 exemption under state law. The trustee objected to the dual exemption, arguing that California law allowed spouses a single exemption. The debtors contended that because the California Code pertaining to exemptions stated that the single exemption was limited explicitly to *married* debtors it was inapplicable to them. The bankruptcy court, district court, and Ninth Circuit all rejected the debtors' contention, concluding that California's domestic partnership law provided domestic partners with all the rights and obligations of spouses including the exemption limitations. The Ninth Circuit reasoned:

> "[t]he issue at hand is an economic one: the degree of protection from creditors to be accorded to debtors. Wherever the line may be drawn by California's courts between marital status on one hand, and the economic rights and liabilities of couples on the other, we hold that application of the homestead exemption statute clearly falls in the latter category. In so holding, we follow the plain language of the DPRRA, and uphold a result more consonant with the Legislature's stated purpose of equalizing, for purposes of creditor/debtor relations, the status of registered domestic partners and married couples."[43]

While the Ninth Circuit was addressing state law, these same questions exist under the Code as well and, as indicated by the IRS letter, the court's reasoning seems equally applicable to the interpretation of federal law.

B. Choice of Law Provision

1. Generally

Even if the federal definitions provision is no longer applicable in bankruptcy, debtors may still face difficulty if they either file bankruptcy, own property or have other property interests in a state that does not recognize their marriage, contracts rights arising from the marriage or judgments related to the relationship. The federal DOMA contains a choice of law provision that states:

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[41] Letter from Pamela Wilson Fuller, Senior Technician Reviewer for IRS Branch 2 to Robert Shair, Senior Tax Advisor (August 30, 2011).

[42] 359 B.R. 242 (9th Cir. 2007).

[43] Id. at 248.

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[44]

The choice of law provision does two things. It gives permission to states to reject marriages validly performed in other states. As noted earlier, over 40 states have statutes or constitutional amendments prohibiting marriages and in some instances refusing to recognize marriages performed in other states. Under these statutes, State B could refuse to recognize a marriage between two men validly performed in State A and arguable deny the couple state benefits based on marital status.

But perhaps more significantly, it creates an exception to the Full Faith and Credit Clause. The Clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[45] Congress arguably exercised it power under the so-called exceptions clause when it passed DOMA and granted states the power to reject "judicial proceedings of any other State." Under this provision, State B could refuse to recognize a domestic support order issued by a court in State A.

The Supreme Court has yet to rule on whether Article IV allows Congress to provide an exception to the Full Faith and Credit Clause or whether other constitutional provisions may prevent a state from rejecting a valid judgment from a sister state.[46] In *Williams v. North Carolina*, the Supreme Court stated "[w]hether Congress can create exceptions [to the credit due judgments] is a question on which we express no view."[47] More recently, however, the Court has expressed doubt whether Congress has this authority. In *Thomas v. Washington Gas Light Co.*, the Court stated "there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."[48]

As of this writing, the constitutionality of DOMA's exception to full faith and credit remains an open question. The 5th and 10th Circuits have considered the question in the context of adoptions. In *Finstuen v. Crutcher*, the 10th Circuit held that an Oklahoma law that allowed the state to refuse to recognize an adoption by more than one individual of the same sex from any

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[44] 28 U.S.C. § 1738C.

[45] U.S. Const. art. IV.

[46] *See generally*, Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUST. 153 (Fall 2009)(discussing the potential issues raised by Congress' decision to create an exception to the FFC").

[47] Williams v. North Carolina, 317 U.S. 287, 303 (1942).

[48] 448 U.S. 261, 272 (1980).

other state or foreign jurisdiction was unconstitutional because it refused to recognize the judgment of a sister state.[49] In *Adar v. Smith*, the 5th Circuit rejected the 10th Circuit's conclusion, upholding a Louisiana law which did not permit unmarried couples to obtain revised birth certificates for child adopted out-of-state with both adoptive parents' names.[50] In *Adar*, a same-sex couple legally adopted an infant under New York law. The couple then sought to obtain a Louisiana birth certificate with both parents names listed and the Registrar refused. Quoting the Supreme Court case *Sun Oil Co. v. Wortman*, the court stated "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[51]

2. Choice of Law in Bankruptcy

Bankruptcy courts often look to state law to define the parties' rights and obligations. Is a bankruptcy court sitting in a state that refuses to recognize a marriage and its attendant rights between a same-sex couple obligated to follow that state's law in determining the property interests of the parties in bankruptcy? Consider the following examples:

- A couple validly marries in Iowa but files for bankruptcy in Minnesota.
- A couple obtains a divorce and the Iowa state court issues a domestic support order and former spouse files for bankruptcy in Florida.

The hypotheticals raise two distinct choice of law issues. First, are the Minnesota and Florida bankruptcy courts free to recognize the marriage or divorce judgment for purposes of *federal* law? For example, could the court allow the couple to file jointly even though the court sits in a state that doesn't recognize the relationship? The three bankruptcy courts that decided *Somers*, *Ziviello-Howell*, and *Balas* did not need to address this issue. The debtors in *Ziviello-Howell* and *Balas* were married in California and filed bankruptcy petitions there. Although the debtors in *Somers* were married in Vermont and filed their petition in New York, New York explicitly recognized marriages properly performed in other states.

The answer to the first question is arguably yes. The bankruptcy court is interpreting and applying federal law not Minnesota state law. Debtors should not lose the rights provided under the Bankruptcy Code simply because they move across state lines. A couple validly married under Iowa law should have the ability to file joint petitions regardless of whether they file in Iowa or in Minnesota. To hold otherwise, would result in federal law being held hostage to the domestic agendas of the individual states. Moreover, such an approach serves the bankruptcy system's interest in uniformity and predictability of outcome and will aid in the fair and efficient administration of the bankrupt's estate.[52]

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[49] 496 F.3d 1139, 1156 (10th Cir. 2005).

[50] 639 F.3d 146, 160 (5th Cir. 2011)

[51] Id.

[52] See Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 965 (1997).

Second, is the Minnesota bankruptcy court free to recognize the marriage or divorce judgment for purposes of *state* law? Is it possible for the court to recognize the relationship for purposes of joint filing but refuse to recognize the relationship for purposes of state exemption law? For example, Minnesota homestead exemption law provides:

> If the debtor be married the homestead title may be vested in either spouse, and the exemption shall extend to the debts of either or of both. Any interest in the land, whether legal or equitable, shall constitute ownership, within the meaning of this chapter, and the dwelling house so owned and occupied shall be exempt, though situated on the land of another.[53]

Can a Minnesota bankruptcy court considered a couple married under Iowa law "spouses" for purposes of the Minnesota homestead exemption? *Butner v. United States*[54] instructs bankruptcy courts to look to state law, in the absence of a compelling federal interest, to determine the existence and scope of the debtor's interest in property.[55] Assuming the absence of a compelling federal interest,[56] bankruptcy courts must determine *which* state's law to apply. To do so, bankruptcy courts must apply the appropriate choice of law rule. But courts must first decide *which* choice of law rules to apply - the forum state's rule or a distinct federal choice of law rule untethered to the forum state's law.

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[53] Minn. Stat. Ann. § 510.04 (West. 2009).

[54] 440 U.S. 48 (1979).

[55] Id. at 55.

[56] There are several provisions of the Bankruptcy Code that do not use the term "spouse" or "marriage" but where property rights are tied to relationship status. *Butner* instructs bankruptcy courts to look to state law, in the absence of a compelling federal interest, to determine the existence and scope of the debtor's interest in property. Butner, 440 U.S. at 55. The question then becomes whether DOMA evinces such a compelling federal interest that bankruptcy courts should ignore property rights based on same-sex relationship recognition. The simple answer is "no." First, DOMA was passed, in part, to provide states with the freedom to choose whether they would recognize same-sex marriages or civil unions. *See* H.R. Rep. No. 104-664, at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906. If a state chooses to offer marital benefits to same-sex couples, DOMA does not provide a federal court the power to override that decision. Second, even if DOMA were read differently, *Butner* does not incorporate just any federal interest. *Butner* explicitly instructs courts to ignore state law only if the state law conflicts with federal bankruptcy policy.

> "The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress."

Butner, 440 U.S. at 54, n. 9. DOMA was not enacted under Congress' constitutional authority to create uniform laws on the subject of bankruptcies nor do state laws that provide relationship recognition conflict with the federal bankruptcy system. DOMA simply provides no "compelling federal interest" that would allow bankruptcy courts to ignore valid state relationship recognition laws and attendant property interest.

The Supreme Court has yet to address the appropriate choice of law rule in bankruptcy.[57] In the absence of guidance, lower courts have followed various paths when determining choice of law rules in bankruptcy cases. These approaches can be distilled to three methodologies. In some instances, the courts apply the Supreme Court's decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.* which held that a federal court sitting in diversity must apply the forum's choice of law rules.[58] In other instances, the courts assume that *Klaxon* does not apply when the court's jurisdiction is based on the presence of a federal question and thus look to the dictum in *Vanston Bondholder Protective Comm. v. Green*, which seems to suggest that courts are free to adopt federal rule choice of law rule distinct from the forum state's rule.[59] And finally, a few courts take a less categorical approach, in general applying the forum state's choice of law rules in the absence of an overriding federal interest.[60] Unlike courts applying *Klaxon*, this approach leaves the door open for the adoption of a federal choice of law rule distinct from the forum state's rule.

As a result, the answer to the second hypothetical is less clear. If the bankruptcy court applies *Klaxon*, Minnesota choice of law rules will likely require application of Minnesota domestic relations law. As a result, debtors validly married in Iowa would not be considered married for purposes of Minnesota exemption laws. Bankruptcy courts could adopt a federal rule that allows a less categorical approach. In creating the federal choice of law rule, the courts could choose a rule that best promotes the federal policies underlying bankruptcy. These policies include aiding a debtor's fresh start upon emergence from bankruptcy and the ratable distribution of available assets among creditors.[61] In addition, the courts should strive to maintain the justified expectations of the parties to a transaction so that their rights are not unnecessarily undermined by the "happenstance of bankruptcy." Unless congressionally mandated, a party should not receive more or less than what could have been obtained outside of bankruptcy.[62] Allowing

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[57] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Vanston Bondholder Protective Committee v. Green, 329 U.S. 156 (1946).

[58] *See* Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941); Amtech Lighting Servs. v. Payless Cashways, Inc. (In re Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000); Carter Enters., Inc. v. Ashland Specialty Co., 257 B.R. 797, 801-02 (S.D.W.Va. 2001).

[59] *See, e.g.,* Lindsay v. Beneficial Reinsurance Co. (In re Lindsay), 59 F.3d 942, 948 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules."); Mandalay Resort Group v. Miller (In re Miller), 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws...."); Olympic Coast Inv., Inc. v. Wright (In re Wright), 256 B.R. 626, 632 (Bankr. D. Mont. 2000).

[60] *See, e.g.*, Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 606 (2d Cir. 2001) ("Before federal courts create federal common law, 'a significant conflict between some federal policy or interest and the use of state law must first be specifically shown."' (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997))); Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co.), 839 F.2d 203, 206 (4th Cir. 1988) ("We believe, however, that in the absence of a compelling federal interest which dictates otherwise, the Klaxon rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."); FDIC v. Lattimore Land Corp., 656 F.2d 139, 150 n.16 (5th Cir. 1981) (applying the forum's choice of law rule in the absence of an overriding federal policy).

[61] BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994).

[62] Butner, 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)). In Butner the Court surmised that the "[u]niform treatment of property interests by both state and federal courts within a State serves to

bankruptcy courts to adopt a flexible choice of law rule that is sensitive to underlying bankruptcy policies rather than a state's domestic relations agenda is the more prudent and equitable alternative.

The second hypothetical is arguably easier. Under Florida law, a state court may not give effect to any claim arising from a prohibited relationship.[63] Thus, if the bankruptcy court were to apply Florida domestic relations law then it would appear the domestic support obligation would be void. But what constitutes a "domestic support obligation" in bankruptcy is a question of federal law.[64] While bankruptcy courts may look to state court for guidance, the court is not obliged to follow a state law pronouncement regarding the nature of the obligation.[65] Whether the Florida state court may refuse to recognize a valid domestic support order from Iowa has no bearing on whether the bankruptcy court will treat the order as a domestic support obligation under federal law.

3. The § 522(b)(3) Choice of Law Dilemma

The Bankruptcy Code actually does contain an explicit choice of law rule in at least one instance. Section 522(b)(3) instructs courts to apply the state law exemptions of the state where the debtor was domiciled 730 days before the petition filing. Consider the following scenario:

- A couple moves from North Carolina to Vermont and is validly married. The couple files for bankruptcy five months after moving.

Under § 522(b)(3), the debtor spouses will be required to use North Carolina's state exemption laws. Under North Carolina law debtor-spouses can double their exemptions. But North Carolina does not recognize marriages "between individuals of the same gender."[66] While federal law requires the Vermont bankruptcy court to apply North Carolina's exemption laws, is the court also required to apply the state's laws regarding marriage? Or can the Vermont bankruptcy court apply Vermont law for purposes of marriage recognition and North Carolina law for purposes of the couple's exemptions?

In drafting this provision, Congress intended that North Carolina exemption law be applied but did it intend that North Carolina domestic relations law be applied as well? Bankruptcy courts

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reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"

[63] *See* note 17.

[64] *See* In re Boller, 393 B.R. 569, 574 (Bankr.E.D.Tenn.2008). See also Cook v. Bieluch (In re Bieluch*),* 219 B.R. 14, 20 (Bankr.D.Conn.1998) (Dabrowski, J), *aff'd,* 216 F.3d 1071 (2d Cir.2000) ("[A]lthough a bankruptcy judge may consult state law for guidance as to whether a debt is actually in the nature of alimony, maintenance or support, the determination is necessarily one premised upon federal bankruptcy law."); Tatge v. Tatge (In re Tatge), 212 B.R. 604, 608 (8th Cir. BAP 1997).

[65] *See* In re Goodale, 298 B.R. 886 (Bankr. W.D. Wash. 2003).

[66] N.C. GEN. STAT. §51-1.2.

have been struggling with the extra-territorial reach of state exemption laws under § 522(b)(3) since the provision was adopted in 2005.[67] Courts have struggled to determine whether § 522(b)(3) preempts relevant state law provisions that limit the availability of exemptions to residents.[68] While Congress arguably intended to export state exemption laws in certain instances, it is not clear that it intended to export state domestic relation laws as well.

Bankruptcy courts could side the step the issue by applying Vermont's domestic relations law and North Carolina's exemption laws. Nothing in § 522(b)(3) language or legislative history requires a different approach. Or courts could avoid the result by relying on the subsection's concluding paragraph: "If the effect of the domiciliary requirement . . . is to render the debtor ineligible for any exemption, the debtor may elect to exempt property under subsection (d)." In the hypothetical presented, however, the debtor is not so much ineligible for the exemption as ineligible to double the exemption. Moreover, under this scenario at least, North Carolina has a more generous homestead exemption than the Code so debtors may not always benefit from such an approach.

III. Conclusion

The intersection of bankruptcy and domestic relations law is incredibly complex and bankruptcy practitioners and courts are at the forefront of the fast moving changes occurring in this area. But at this point in time there are more questions than answers. Practitioners must challenge long-held assumptions about the intersection of the Code and state domestic relations law. What is true in the context of marriages between opposite-sex partners is not necessarily applicable in the context of unions between same-sex partners. Practitioners need to think strategically about the application of state law in bankruptcy when the debtors are same-sex spouses.

[67] *See* In re Garrett, 435 B.R. 434 (Bankr. S.D.TX 2010)(describing current debate and citing relevant cases).

[68] Id. at 448-449.

ABI Fifth Amendment Article

I. The Basics of the Fifth Amendment Privilege

In the wake of the Great Recession, counsel for a trustee or creditors' committee may find defendants in adversary proceedings and contested matters refusing to: answer questions in a deposition; provide interrogatory responses; produce requested documents; or even provide an answer to allegations in a complaint, basing such refusals upon his constitutional right against self-incrimination as provided by the Fifth Amendment of the U.S. Constitution. A well-known weapon in a criminal defense attorney's arsenal, the Fifth Amendment's privilege against self-incrimination can surface in civil litigation—including bankruptcy litigation—as former officers, directors and even employees refuse to provide evidence which might possibly give rise to their own criminal prosecution. This article will review the basics of the Fifth Amendment privilege, the ramifications when a party asserts his Fifth Amendment, and the litigations traps which might spring when the privilege is asserted.

A. What is the Fifth Amendment privilege?

The Fifth Amendment provides that "no person … should be compelled in any criminal case to be a witness against himself … ." U.S. CONST. amendment V. The basic function of the Fifth Amendment privilege to remain silent "is to avoid confronting the witness with the 'cruel trilemma' of self-accusation, perjury or contempt." Martin-Trigona v. Belford (In re Martin-Trigona), 732 F.2d 170, 174 (2d Cir. 1984), *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also* Grunewald v. U.S., 353 U.S. 391, 421, 77 S.Ct. 963, 982 L.Ed.2d 931, 952 (1957)(basic function of Fifth Amendment's privilege is to "protect the innocent"). However, the right of an individual to invoke the Fifth Amendment's privilege to remain silent does not apply solely in criminal cases. The U.S. Supreme Court has recognized that the

privilege, "applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it." McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924). In particular, the privilege can be asserted, "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. U.S., 406 U.S. 441, 445, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972).

B. Who is entitled to invoke the Fifth Amendment privilege?

While the Fifth Amendment privilege clearly protects an individual from being required to give testimony that might tend to incriminate him, the Supreme Court has recognized that the privilege does not extend to a corporation. Hale v. Henkel, 201 U.S. 43, 50 L.Ed. 652, 26 S.Ct. 370 (1906). The Fifth Amendment not only protects an individual from giving testimony, but it may also preclude the individual from having to produce his own personal papers and documents if the production would be considered: (1) compelled; (2) testimonial; and (3) incriminating. U.S. v. Doe, 465 U.S. 605, 613-14, 79 L.Ed.2d 552, 104 S.Ct. 1237 (1984); Couch v. U.S., 409 U.S. 322, 327-28, 34 L.Ed.2d 548, 93 S.Ct. 611 (1973). However, because the Fifth Amendment's privilege does not extend to corporations, the privilege does not attach to corporate documents which are held in the possession of an individual. Wilson v. U.S., 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). Thus, individuals who hold corporate documents cannot successfully assert the Fifth Amendment and prevent the production of the company's documents. Id. This is true even if the production of the corporate records would tend to incriminate the individual himself. Braswell v. U.S., 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988).

C. When can the Fifth Amendment privilege be invoked?

Because of the importance of the Fifth Amendment, courts have typically liberally construed when the individual can successfully invoke the privilege. Hoffman v. U.S., 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)(recognizing that the Fifth Amendment privilege should be liberally construed). Courts will recognize an individual's right to invoke the Fifth Amendment when there is only the mere *possibility* that the individual will be criminally prosecuted. *See* In re Folding Carton Litigation, Appeal of R. Harper Brown, 609 F.2d 867, 872 (7th Cir. 1979) (rejecting lower court's finding that there must be a *likelihood* of criminal prosecution, and instead recognizing there need be only a *possibility* of prosecution). Moreover, the individual need not prove the possibility of criminal prosecution in the traditional sense of carrying a "burden of proof," but instead need only show that "a possibility of criminal prosecution is more than mere 'fanciful.'" In re Corrugated Container Antitrust Litigation, Appeal of John Conboy, 655 F.2d 748, 752 (7th Cir. 1981), *quoting* Brown, 609 F.2d at 871.

However, there are certain situations where courts will not permit an individual to invoke the Fifth Amendment privilege in a civil matter. Known as the "absolute bar" scenarios, an individual may not assert the Fifth Amendment privilege where the individual's testimony would lead to a crime that cannot be prosecuted because the statute of limitations has run, because immunity over the subject matter has been given, or because the protection of "double jeopardy" has triggered. In re Corrugated Container, 655 F. 2d at 752.

D. How is the Fifth Amendment privilege invoked?

There are no magical words or incantations necessary to invoke the Fifth Amendment's privilege. Quinn v. U.S., 349 U.S. 155, 162, 75 S.Ct. 668, 673, 99 L.Ed. 964 (1955)("[A] claim of the privilege [against self-incrimination] does not require any special combination of words.").

An assertion by the individual that he will not respond or provide information based upon his right against self-incrimination is sufficient to invoke and preserve the privilege. Id, 349 U.S. at 164.

However, an individual cannot make a pre-emptive strike when asserting the privilege; instead, he must usually wait until the information is sought, either through a discovery request or from a specific question in a deposition. *See* Court-Appointed Receiver of Lancer Management Group v. Lauer, 2009 U.S. Dist. LEXIS 23790 (S.D. Fla., 2009)(finding defendant must first assert Fifth Amendment privilege in response to discovery before court can determine whether privilege is appropriate); In re Phillips, 2011 U.S. Dist. LEXIS 63892 (S.D.Tx.)(where defendant sought to quash notice of deposition on the basis that he would be asserting his Fifth Amendment privilege throughout the deposition, court denied motion to quash on basis that motion was premature). Moreover, the individual cannot make blanket assertions of the Fifth Amendment privilege to all questions asked in the deposition. Instead, the assertion must be specific to questions which invoke information that might be incriminating. Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45, 50 (S.D.N.Y., 1982) (finding blanket assertions of Fifth Amendment inappropriate where many questions did not seek information which could lead to incriminating information).

E. Where, during the course of the litigation, is the Fifth Amendment invoked?

An individual can waive his Fifth Amendment privilege to remain silent. *See* Rogers v. U.S., 340 U.S. 367, 373, 95 L.Ed. 344, 71 S.Ct. 438 (1951)(recognizing a witness who fails to invoke the Fifth Amendment in response to questions where he could have claimed it is deemed to have waived it with regard to all questions on the subject). As such, individuals who might have the Fifth Amendment privilege would do well to consistently assert the privilege

throughout the litigation, and courts have recognized that an individual may invoke the Fifth Amendment's privilege to remain silent as early as the pleading stage in civil litigation. National Acceptance Co. of America v. Bathalter, 705 F.2d 924 (7th Cir. 1983)(recognizing an individual's right to assert the Fifth Amendment in his answer to the allegations of a complaint). Typically, however, an individual will invoke his Fifth Amendment right in depositions, interrogatory responses, and in request for production of documents. *See* SEC v. Zimmerman, 854 F. Supp. 896, 898 (N.D. GA, 1993)(recognizing that, "[T]he act of producing documents whose content might not be privileged would likely be sufficiently testimonial and incriminating in nature to trigger the Fifth Amendment privilege.").

II. Results From Invoking the Fifth Amendment

Because an individual's invocation of the Fifth Amendment permits him to keep evidence out of the hands of his opposing party, courts have recognized that the privilege, "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994). Because of this deprivation, courts have recognized that the Fifth Amendment privilege can upset the otherwise "fair play" which parties expect from civil litigation. *See* Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996)(recognizing that, in a civil proceeding, "one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding"). Mindful of this handicap, courts have created solutions in an effort to level the litigation playing field.

A. Obtaining a negative inference

Although the Supreme Court has recognized that the Fifth Amendment privilege protects a criminal defendant from any repercussions arising from the refusal to testify, *see* Carter v.

Kentucky, 450 U.S. 288, 305, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981)(precluding a trier of fact from drawing negative inference where criminal defendant does not testify), the Supreme Court has also recognized this protection does not extent to civil litigants. *See* Baxter v. Palmigiano, 425 U.S. 308, 318-20, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976) ("The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."). As a result, when a defendant invokes his Fifth Amendment, the plaintiff should seek a jury instruction that permits a negative inference. *See* Brink's, Inc. v. New York, 717 F.2d 700, 710 (2d Cir. 1983)("Refusal to answer questions upon asserting the Fifth Amendment privilege is relevant evidence from which the trier of fact in a civil action may draw whatever inference is reasonable under the circumstances."); Epuls Tech, Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002)(in civil proceeding, fact finder entitled to draw adverse inference from defendant's invocation of Fifth Amendment). Such negative inference can even address an essential element of a claim. *See* Powers v. Caremark, Inc. (In re Powers), 261 Fed. Appx 719, 2008 U.S. App. LEXIS 412 (5th Cir. 2008)(recognizing debtor's invocation of Fifth Amendment permitted negative inference of embezzlement, which precluded discharge under 11 U.S.C. §523).

B. Preventing the invoking party from providing evidence

In addition, courts have recognized that where an individual invokes the Fifth Amendment privilege during the discovery, it would be unfair to permit the individual to later testify or produce evidence which he had previously refused to provide. *See* Zimmerman, 854 F. Supp. at 899 (prohibiting individual from introducing evidence he earlier refused to provide based upon Fifth Amendment assertion); In re Monument Gun Shop, Inc. 1999 U.S. Dist. LEXIS 23590, *aff'd* Gefreh v. Shupper (In re Monument Gun Shop, Inc.), 229 F.3d 1164, 2000 U.S.

App. LEXIS 29996 (10th Cir., 2000) (affirming bankruptcy court's decision to preclude president from testifying in fraudulent transfer action on subjects where he previously invoked the Fifth Amendment). Courts have even gone so far as to strike both proffered testimony and testimony that was already-admitted when the Fifth Amendment is asserted. *See* In re Edmonds, 934 F.2d 1304 (4th Cir., 1991)(striking defendant's submitted affidavit where affidavit contained information defendant previously refused to provide on Fifth Amendment grounds); Lawson v. Murray, 837 F.2d 653 (4th Cir., 1988)(striking individual's testimony where individual, on direct examination, testified in support of defendant, but invoked Fifth Amendment privilege in response to substantive questions on cross-examination).

III. Fifth Amendment Practice Pointers & Possible Traps

Given the availability of the Fifth Amendment privilege, lawyers on both sides should be aware of the impact and possible traps when invoking the privilege. The following are some practice pointers to keep in mind when the Fifth Amendment privilege surfaces in civil litigation.

A. "Negative inference" is discretionary

Although the trier of fact is permitted to draw a negative inference, it is not required to do so, and where the court is the trier of fact, its decision on whether to draw the inference is an issue of discretion. *See* Gannett v. Carp (In re Joan Carp), 340 F.3d 15 (1st Cir. 2003)(recognizing debtor's invocation of the Fifth Amendment could have permitted a negative inference, but refusing to find bankruptcy court abused its discretion in refusing to draw the negative inference when permitting debtor's 11 U.S.C. §727 discharge).

B. "Negative inference" alone is insufficient to obtain judgment

Although courts may apply the negative inference, the negative inference alone is insufficient to obtain judgment at any stage. *See* Hollan v. Cho (In re John Dawson & Assoc),

2006 U.S. Dist. LEXIS 76054, *15 (N.D. Ill, 2006)("[A] judgment may not be based directly, automatically, or solely on Fifth Amendment silence," *citing* LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391-92 (7th Cir. 1995)). As explained above, the assertion of the Fifth Amendment privilege in an answer is an insufficient basis to enter default judgment. National Acceptance, 704 F.2d at 924 (reversing trial court's default judgment entered solely because defendant asserted Fifth Amendment privilege rather than specifically respond to complaint's allegations). The negative inference alone is insufficient to obtain summary judgment. *See* United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979)(" "[A] grant of summary judgment merely because of the invocation of the Fifth Amendment would unduly penalize the employment of the privilege"). Moreover, the negative inference is insufficient to preclude entry of summary judgment. State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116 (5th Cir., 1990)(finding negative inference from defendant's assertion of Fifth Amendment insufficient to create genuine issue of material fact to preclude summary judgment); Fontenote v. Cage, 2008 U.S. Dist. LEXIS 59354 (W.D. La., 2008)(recognizing that debtor's invocation of Fifth Amendment did not create genuine issue of material fact to preclude judgment in debtor's favor and allowance of discharge under 11 U.S.C. §523(a)(6),(9)).

C. Negative inference may not be permitted at summary judgment stage

Because the invocation of the Fifth Amendment merely permits the trier of fact to make a negative inference, some courts have recognized a conundrum exists when determining whether the negative inference against a non-moving party is appropriate at the summary judgment stage. Because established case-law recognizes that, at summary judgment, all inferences must be taken in the light most favorable to the non-moving party, some courts will not draw any negative inference against the defendant at the summary judgment stage, but instead look to the other

evidence in the case. *See* In re Marrama, 445 F.3d 518, 523 (1st Cir., 2006)(collecting cases for proposition that negative inference not permitted at summary judgment stage, but still finding sufficient, undisputed evidence to support judgment for fraudulent transfer).

D. Motion to compel may be necessary to preclude later testimony

As explained above, where an individual invokes his Fifth Amendment right to silence, the trial court may later preclude the individual from testifying about the same matters. *See* Zimmerman, *supra*; In re Monument Gun Shop, Inc, *supra*; In re Edmonds, *supra*; Lawson, *supra*. However, some courts have required a party to file a motion to compel to address the Fifth Amendment issue, while other courts do not require such a motion. Gannett, 340 F.3d at 23 (finding trustee failed to preserve issue for appeal in absence of motion to compel to resolve defendant's questionable assertion of Fifth Amendment); *cf*. In re Monument Gun Shop, 1999 U.S. Dist. LEXIS 23590, *24—25(recognizing trustee was not required to file motion to compel defendant's testimony before court decided to preclude defendant from testifying).

E. Motion to stay civil proceeding requires certain findings

In light of the Hobson's choice some defendants may face when deciding how to respond in a civil matter if a criminal investigation is pending, some defendants have moved to stay the civil litigation until the criminal matter has completed. There are a number of factors which courts will look when addressing such a motion to stay, and courts are not typically inclined to grant such a motion. *See* Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-35 (9th Cir. 1995)(identifying six factors used to determine whether to grant a motion to stay).

F. Waiver might occur from other proceeding

The federal courts generally hold that the waiver of the Fifth Amendment privilege in one proceeding does not affect the right to invoke the privilege in another

proceeding, as any waiver is typically limited to the proceeding in which the waiver occurs. *See* In re Vitamins Antitrust Litigation, 120 F.Supp. 2d 58, 66 (D.D.C., 2000)(holding defendant's earlier guilty plea did not constitute a waiver of his Fifth Amendment privilege against self-incrimination in the subsequent civil litigation); U.S. v. James, 609 F.2d 36 (2nd Cir. 1979). However, some courts have found that a witness can waive the privilege if she testifies in a related proceeding and answers the same questions she previously refused to answer. *See* Interim Investors v. Jacoby, 90 B.R. 777 (W.D.N.C. 1988), *aff'd* 914 F.2d 1491 (4th Cir 1990)(recognizing defendant waived her Fifth Amendment privilege when, at a related bankruptcy hearing with plaintiff's counsel present, she answered same questions that she had previously refused to answer in her deposition).

Conclusion

The invocation of the Fifth Amendment creates a host of issues for both the party invoking the privilege and for the party that cannot get the information. Once a party invokes the Fifth Amendment privilege, the opposing party must not only continue to gather evidence to prosecute its claim, but must also take steps to prevent undue surprise at trial. Extensive case law exists to guide counsel on what can be a rather tricky journey.