Bankruptcy Treatment of Same-Sex Marriage, Domestic Partnerships and Civil Unions in a Post-DOMA World

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Bankruptcy and the Unresolved DOMA Questions

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Introduction

For almost two decades, bankruptcy courts have grappled with the intersection of the Defense of Marriage Act (DOMA)[1] and the Bankruptcy Code. Finally, the courts might receive some guidance. This term the Supreme Court will consider whether § 3 of DOMA[2] violates the 5th Amendment guarantee to equal protection. Section 3 requires that in construing any federal law or regulation, the word "marriage" and the word "spouse" refer only to opposite-sex couples. This so-called federal definitions provision guarantees that any marital benefits provided by federal law--including those in the Bankruptcy Code--will not extend to legally married same-sex couples. While both the First and Second Circuit Courts of Appeal have declared § 3 unconstitutional, the Supreme Court only granted certiorari from the Second Circuit's decision in *U.S. v. Windsor*.[3]

A decision on the merits in *Windsor* will provide clarity for bankruptcy courts applying Code provisions that contain the word spouse or marriage,[4] but the case leaves a number of questions unasked and unanswered. *Windsor* will not address the federal rights of couples who have a legally recognized relationship other than marriage, such as civil unions and domestic partnerships. At this writing, 11 states provide legal recognition to same sex couples in a form other than marriage.[5] Nor will a decision in *Windsor* address § 2 of DOMA.[6] Section 2 allows states to prohibit marriages between same-sex couples, void marriages properly performed elsewhere and, perhaps more importantly, creates an exception to the Full Faith and Credit Clause that allows states to reject judgments from sister state courts if the claim or right arises from a same-sex marriage.[7] There are currently 38 states with 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 rights arising from those marriages.[8] Because bankruptcy courts often look to state law to define the parties' rights and obligations, DOMA § 2 and the relevant state laws could significantly affect the rights and obligations of the parties in bankruptcy.[9]

This article is intended to provide a brief introduction to these issues in the bankruptcy context. After summarizing the impact of § 3 on debtors' and creditors' rights and obligations in bankruptcy and outlining the questions presented to the Court in *Windsor*, the first part will introduce and briefly explore a question not addressed in *Windsor*: how should bankruptcy courts treat legally recognized relationships other than marriage? In the second part the article will provide an overview of DOMA § 2; describe the implications for bankruptcy; and focus on two questions. How should courts sitting in states with marriage prohibition laws treat couples legally married in other states for purposes of the application of federal law? How should courts sitting in states with marriage prohibition laws address the claims and rights arising from marriages that originate in state law? While these questions are certainly not exhaustive, they provide a glimpse into the complexities that bankruptcy practitioners and judges will need to navigate in the coming years.

I. DOMA § 3 in Bankruptcy

A. Overview

Section 3 of DOMA, the so-called 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.[10]

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 had a significant effect on the rights of creditors, debtors and their same-sex partners. The Code is replete with the words "spouse" and "marriage."[11] DOMA can affect everything from the composition of property of the estate[12] to the means test calculation[13] to the ability to discharge certain debts.[14] Joint filings are the most recognized and cited example of DOMA's effect in bankruptcy. In § 302, Congress gave an individual debtor and his or her spouse the ability to file a single petition for bankruptcy.[15] Until recently,[16] legally married same-sex couples were unable to do so, increasing the cost to the couple and forcing the courts to untangle often intertwined financial lives.

The Code also provides special protections to a "domestic support obligation" (DSO) defined as a debt owed to a "spouse" or "former spouse"[17] as well as special status to debts owed to "a spouse or former spouse" that are not deemed a "domestic support obligation" but that were "incurred by the debtor in the course of divorce or separation or in connection with a separation agreement, divorce decree, or other order of court record."[18] Because DOMA requires bankruptcy courts to interpret spouse to apply to opposite sex partners only, state court support orders are not recognized as DSOs.

While there aren't many reported cases addressing these issues, *In re Goodale*[19] provides an example of the application of DOMA in this context. There the court allowed a debtor to avoid a lien under § 522(f)(1), rejecting the debtor's former domestic partner's argument that the lien was to secure a debt for maintenance and support.[20] The former partner had been awarded a specified amount by a state court as part of the dissolution of the couple's domestic partnership. The state court order explicitly stated "the court hereby clarifies for any bankruptcy court, that the above award is also necessary for Respondent's [Foshay's] support and care."[21] Citing DOMA, the bankruptcy court reasoned that the lien could be avoided because the former partner was the same sex as the debtor and thus was not a "spouse" under federal law.[22]

In re Bardin provides another potent example of the insidious effects of DOMA on DSOs.[23] In 2011, Ellen Bardin and Janet Cote sought dissolution of their marriage in a Vermont state court. The court ordered Bardin to pay $900 spousal support for 10 years and to liquidate her Thrift Savings Plan and pay the proceeds to Cote.[24] Bardin eventually filed for bankruptcy and sought to discharge her debts, including the court ordered support obligation. Although § 523 provides that DSOs are not dischargeable, under DOMA the exception does not apply to support obligations due to same-sex former spouses. While Cote brought an adversary proceeding to challenge the discharge and the constitutionality of DOMA,[25] the parties settled before the court heard the merits of the argument. Because the settlement included transfers of property from the debtor to Cote that were not recognized as a DSO, the Trustee had to stipulate that he would not pursue a fraudulent conveyance under federal or state law.[26] The Trustee's stipulation reveals how same-sex couples are placed between a rock and hard place--if Bardin had paid Cote as required by the state court order, Cote could have been forced to return the payments to the estate as a fraudulent conveyance.[27]

Until recently, plaintiffs had repeatedly but unsuccessfully challenged the constitutionality of DOMA. Armed with recent Supreme Court cases,[28] however, plaintiffs have successfully renewed their efforts to declare § 3 unconstitutional. The plaintiffs' arguments were bolstered by Attorney General Holder's announcement in February 2011 that the Department of Justice would no longer defend DOMA.[29] In most cases the House Bi-partisan Legal Advisory Group (BLAG) intervened to

defend the law.[30]

Shortly after Attorney General Holder's announcement, three bankruptcy courts denied motions to dismiss joint petitions filed by legally married same-sex couples.[31] In *In re Somers*, 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."[32] 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."[33]

Citing *Somers* and *Ziviello-Howell*, the court in *In re Balas* also concluded that DOMA did not provide a valid basis for dismissing a Chapter 13 case.[34] 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 U.S. Constitution, either under heightened scrutiny or under rational basis review. Debtors also 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."[35] In an unprecedented move, 20 bankruptcy judges in the district signed the opinion. Although BLAG initially sought to intervene, it declined to appeal the decision.

Following the *Balas* decision, the First and Second Circuit Court of Appeals also declared DOMA § 3 unconstitutional albeit on slightly different reasoning.[36] In *Massachusetts v. U.S. Dept. of Health and Human Services*, the First Circuit declined to identify "sexual orientation" as a suspect classification and review DOMA under heightened scrutiny.[37] Nonetheless, the court concluded that the law failed even the more lenient rational basis test.[38] The Second Circuit also declared the law unconstitutional, but did so after concluding that sexual orientation was a quasi-suspect class and reviewing the law under intermediate scrutiny.[39] Although writs of certiorari were filed in both cases, the Supreme Court only accepted the *Windsor* case for review.[40]

***B.*U.S. v. Windsor**

In December the Supreme Court accepted review of *U.S. v Windsor* involving a challenge to § 3 of DOMA. The Court asked for briefing on whether BLAG, the defendant-intervenor has standing, leaving open the possibility that the Court may not address the merits of the case. But a decision on the merits in *Windsor* would have immediate implications in the bankruptcy context.

The facts in *Windsor* are straightforward.[41] In 2007, Edie Windsor and her lifetime partner Thea Spyer married in Canada. At the time of Ms. Spyer's death in 2009, New York recognized marriages validly performed in other jurisdictions.[42] But § 3 of DOMA prohibited the Internal Revenue Service (IRS) from recognizing her marriage and providing Ms. Windsor the unlimited marital tax deduction. As a result, Ms. Windsor paid over $363,000 in federal taxes on her inheritance.[43] She brought an action challenging the constitutionality of DOMA § 3 under an equal protection theory.

After Ms. Windsor filed her complaint, Attorney General Holder sent a letter to Congress stating that while the government would continue to enforce DOMA, it would no longer defend DOMA in court.[44] Mr. Holder informed Congress that after careful review, the Obama Administration believed DOMA unconstitutional. Pursuant to statute,[45] the House of Representative's BLAG voted to defend DOMA and it sought to intervene in the *Windsor* case.[46] The intervention was allowed and the case proceeded with BLAG as defendant-intervenor.

The district court held that DOMA § 3 violated the constitution by denying Ms. Windsor equal protection of the law.[47] The court declined to apply either heightened or intermediate scrutiny, finding that even under the permissive rational basis test the law failed to pass constitutional muster as applied to Ms. Windsor.[48] A three judge panel of the Second Circuit, with one judge dissenting, affirmed the district court decision albeit on slightly different reasoning.[49] The court concluded that sexual orientation was a quasi-suspect classification and review of § 3 required intermediate scrutiny. Under this approach, the panel concluded that § 3 violated equal protection. The dissenting judge disagreed, relying on the Supreme Court's 1972 summary

disposition of *Baker v. Nelson* as precedent and concluding that DOMA was constitutional under rational basis review.[50]

The Supreme Court's decision to grant certiorari in this case raises a number of uncertainties. If the Court were to decide that BLAG did not have standing, an unlikely result but possible given the Court's request for briefing, then it may not reach the merits and possibly throw into question the other DOMA decisions in which BLAG intervened. If the Court reaches the merits, it could determine the Second Circuit panel applied the wrong standard and remand it for further consideration, prolonging a decision on the merits but providing lower courts some guidance on how to review DOMA. The Court may decide § 3 is a legitimate use of congressional power, essentially making legislative repeal the only avenue of recourse. The Court could also declare DOMA § 3 unconstitutional, allowing legally married same-sex couples access to federal benefits currently only available to opposite-sex married couples.

Assuming the Court reaches the merits of the case, it will have an immediate impact in bankruptcy. If the Court declares DOMA § 3 constitutional, then the federal definitions provision remains intact and bankruptcy courts must continue to interpret "marriage" and "spouse" in the Code as applying only to opposite-sex couples. Presumably the U.S. Trustee's Office, the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases, will once again actively seek to enforce the law before the bankruptcy courts by, for example, seeking to dismiss joint filings by same-sex couples. If the Court declares § 3 unconstitutional, then bankruptcy courts will be free to recognize legally married same-sex couples as married when interpreting the Code. Either way, the Court's decision on the merits will affect how same-sex couples are treated in bankruptcy. Any decision, however, will also leave a number of questions unanswered.

C. What's In a Name?

Assuming the Supreme Court declares § 3 of DOMA unconstitutional, how should bankruptcy courts treat relationships other than marriage? 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? At least 11 states have chosen to recognize same-sex relationships in a form other than marriage and this number could rise as states respond to growing public acceptance of same-sex relationships.[51] Each state applies a different name--civil unions, domestic partnerships, reciprocal beneficiaries--and, in some cases, created different rights and obligations.

Nine states, California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island provide the equivalent of state-level spousal rights to same-sex couples.[52] 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. Two states 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 be identified as designated beneficiaries.[53] Wisconsin provides domestic partner registries but without all the rights and obligations afforded to spouses under state law.[54]

At this writing, only one bankruptcy court has addressed, albeit without discussion, the question whether civil unions or domestic partnerships are the equivalent of "marriage" under federal law. As discussed above, the bankruptcy court in *In re Goodale* cited DOMA to preclude a domestic partner from avoiding a lien for a domestic support obligation. The court assumed a "domestic partner" under Washington law was a "spouse" for purposes of federal law.[55] The court cited no support for this proposition other than DOMA nor did it provide any reasoning.

A California district court, however, did not assume that domestic partners and spouses were synonymous. In *Dragovich v. Dept. of Treasury*,[56] the plaintiffs, federal employees, brought a suit challenging the constitutionality of DOMA and the IRS Code to the extent they limited their same-sex spouses and domestic partners from seeking benefits under California's long term health care program. The Court declared DOMA unconstitutional, opening the door for spouses to access the health care program.[57] The court rejected the argument, however, that its conclusion regarding DOMA affected the status of domestic partners. The court opined that "§ 3 of DOMA does not expressly address registered domestic partners" and concluded that "plaintiffs have not demonstrated that § 3 of DOMA blocks [the state] from enrolling California registered domestic partners

from its long term care plan."[58]

The IRS has spoken to this issue, albeit in a limited context. When asked whether opposite-sex partners to an Illinois 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, they are considered 'husband and wife' for purposes of Section 6013 of the Internal Revenue Code."[59] 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.

At least one bankruptcy court has treated domestic partners as spouses 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*,[60] 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.[61] 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.[62] The bankruptcy court, district court, and Ninth Circuit BAP 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 BAP 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.[63]

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

Assuming § 3 is no longer applicable in bankruptcy and couples in a civil union or registered domestic partners were to file a joint petition, it is unlikely the U.S. Trustee would seek to dismiss. Although Attorney General Holder's letter to Congress explaining the Department's decision to no longer defend DOMA spoke only about the application of DOMA to legally married same-sex couples, the Executive Branch has issued numerous executive orders extending federal benefits to domestic partners.[64] Nonetheless, a creditor or other party in interest could raise a challenge and once raised, it could open the door for BLAG to intervene, assuming of course that the Court finds that BLAG has standing to do so. In *Dragovich*, BLAG resisted the plaintiffs' position that domestic partnerships and marriage were equivalent.[65] Nonetheless, the Ninth Circuit's reasoning in *Rabin* and the IRS's letter ruling provide solid support for interpreting the words marriage and spouse in the Bankruptcy Code to include domestic partnerships and civil unions.

II. DOMA § 2

Regardless of the outcome in *Windsor*, debtors will 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 provision that states:

> 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.[66]

The so-called choice of law provision does two things. It gives permission to states to reject marriages validly performed in other states. As noted earlier, 38 states have statutes or constitutional amendments prohibiting marriages and in some instances refusing to recognize marriages performed in other states.[67] Under these statutes, State B could refuse to recognize a marriage between two men validly performed in State A and arguably 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."[68] Congress arguably exercised its power under the so-called effects clause when it passed DOMA and granted states the power to reject "judicial proceedings of any other State."[69] Under this provision, State B could refuse to recognize a property distribution or domestic support order issued by a court in State A.

Because bankruptcy courts often look to state law to define the parties' rights and obligations, DOMA § 2 and the relevant state laws could significantly affect the rights and obligations of the parties. 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 interests of the parties in bankruptcy? Assume a couple validly marries in Iowa and then moves to Minnesota where they file for bankruptcy. Minnesota law explicitly prohibits marriage between same-sex couples and also declares that "a marriage entered into by persons of the same sex, either under common law or statute, is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state."[70]

The hypothetical raises two distinct choice of law issues. First, is the Minnesota bankruptcy court free to recognize the marriage 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 that married couples could file jointly, *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 recognizes marriages properly performed in other states.

As a general rule, courts apply the "place of celebration" rule to determine the validity of a marriage. The "place of celebration" rule states that the marriage is valid if it is valid in the place where it was celebrated.[71] But the "place of celebration" rule is not necessarily applicable when the marriage is between parties of the same sex. DOMA § 2 authorizes states to declare void any valid marriage between a same-sex couple. Is the bankruptcy court free to apply the "place of celebration" rule or is it required to apply the Minnesota domestic relations law voiding marriages performed elsewhere?

In short, because the bankruptcy court is interpreting and applying federal law not Minnesota state law, the court is not bound by the state law voiding marriages between same-sex couples.[72] The federal government has traditionally applied the "place of celebration rule" when determining whether a couple is validly married for purposes of federal law.[73] In the immigration context, both the agency charged with enforcing immigration laws and the federal courts have accepted marriages as valid if they were valid in the state or country in which they were performed.[74]

Because it is a question of federal law, bankruptcy courts are free to adopt the "place of celebration" rule when determining which state's law to apply to determine the validity of a marriage.[75] There are strong policy arguments to support such an approach. 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 a joint petition regardless of whether they file in Iowa or in Minnesota. This approach would be applicable, not just in the joint filing context, but whenever the Bankruptcy Code directly incorporates the word "spouse" or "marriage." 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.[76]

The second choice of law question asks if the Minnesota bankruptcy court is free to recognize the marriage for purposes of application 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 [emphasis added].[77]

Butner v. U.S.[78] 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.[79] Assuming that § 522(b)(3)(A) is inapplicable and the debtor has chosen the state exemptions, there is no question that Minnesota homestead exemption law is applicable. But what is the applicable domestic relations law? Should a same-sex couple legally married in Iowa obtain the benefits of the Minnesota homestead law even though Minnesota's domestic relations law treats the marriage as void?

Assuming the absence of a compelling federal interest,[80] the bankruptcy court needs to determine which state's domestic relations law to apply--Iowa's or Minnesta's. To do so, the court must pick the appropriate choice of law rule. The court must first decide, however, which choice of law rule to apply--the forum state's rule or a distinct federal choice of law rule untethered to the forum state's law. Because the courts are interpreting and applying state law, courts are less certain of their power to adopt a federal choice of law rule in this context. As a result, chaos reigns.

The Supreme Court has yet to address the appropriate choice of law rule in bankruptcy.[81] 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.[82] 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 choice of law rule distinct from the forum state's rule.[83] While courts acknowledge they are interpreting and applying state law, they also recognize that they must do so in the context of federal bankruptcy policy. And finally, a few courts have taken a hybrid approach, recognizing the delicacy of creating federal common law and applying the forum state's choice of law rules in the absence of an overriding federal interest.[84] Unlike courts applying *Klaxon*, the hybrid approach leaves the door open for the adoption of a federal choice of law rule distinct from the forum state's rule if circumstances dictate.

As a result of this uncertainty, the answer to the second set of questions is less clear. If the bankruptcy court applies *Klaxon*, Minnesota choice of law rules will likely require application of Minnesota domestic relations law.[85] As a result, debtors validly married in Iowa would not be considered married for purposes of Minnesota exemption laws. While the *Klaxon* rule provides the courts certainty, it allows Minnesota's domestic relations law to dictate the rights and obligations of the parties without reference to the federal policies animating bankruptcy.

If the court relies on *Vanston*, it could adopt a distinct federal choice of law rule. One option would be the "place of celebration" rule discussed above. Under this rule the debtors would be deemed married in bankruptcy regardless of whether the court was applying federal or state law. While this approach would avoid the problems identified above, it also arguably intrudes on Minnesota's sovereignty interests by overriding its domestic relations law in every instance and could upset the justified expectations of the parties to a particular transaction.

Bankruptcy courts should adopt a federal rule that is fact dependent and sensitive to the underlying federal interests, such as the "significant relationship" test. Under this analysis, courts would apply the state law with the most significant relation to the underlying transaction.[86] When applying this test, courts examine a number of factors, including the place of the injury or contract, the domicile of the parties, and relevant federal and state policies.[87] This approach lacks the clarity of the rules identified above, but provides courts the flexibility to address each debtor creditor relationship with the parties' understanding and expectations in the forefront of the analysis.[88] In this instance, the bankruptcy court could decide that the debtors are not "spouses" under the Minnesota exemption law because the couple is domiciled in Minnesota and had purchased a home in Minnesota with the knowledge that the state does not recognize their relationship or the rights

associated with marriage.

The analysis becomes potentially more complex when a bankruptcy court sits in a state that prohibits the recognition of any claims or right arising from a same-sex marriage, including judgments from sister state courts. While it is generally accepted that states are not required to accept marriages validly performed elsewhere, whether states are free to reject judgments from sister states remains a hotly debated topic.[89] For example, Florida refuses to recognize marriages performed in other states and further prohibits the recognition of a "judicial proceeding respecting either a marriage or relationship not recognized or a claim arising from such a marriage or relationship."[90] Putting to the side the question whether such refusal is constitutional, how should a bankruptcy court treat a claim in bankruptcy "arising from" marriage?

Assume that a same-sex couple validly marries and divorces in Massachusetts. The Massachusetts state court issues a divorce decree and divides the property between the couple (there is not an order for support or maintenance). After the divorce, one spouse moves to Florida and files for bankruptcy before fully complying with the state court property division order. The other spouse files a claim. The debtor objects, arguing that under Florida law the original court order is unenforceable.

Is the bankruptcy court bound to follow Florida law and disallow the claim under § 502(b)? The short answer is no. DOMA § 2 created an exception to the Full Faith and Credit Clause and allowed states, through statute, to refuse to recognize judgments from sister states.[91] But the provision applies only to states and does not speak to the authority of federal courts to do the same. Instead, federal courts remain bound by the Full Faith and Credit Act.[92] The Act requires that federal courts give preclusive effect to state court judgments if the state court in which it was rendered would give it preclusive effect.[93] This is true even if the forum state would not entertain the suit.[94] Assuming Massachusetts state courts would give the property settlement order preclusive effect then the bankruptcy court is required to do the same.[95]

Consistent with Supreme Court pronouncements, bankruptcy courts have enforced judgments from sister state courts even when sitting in a state that would not enforce the underlying obligation.[96] In *In re Leroux*,[97] a casino filed a claim to obtain payment on a gambling debt. The casino had obtained a default judgment in a New Jersey court before the debtor filed for bankruptcy in Massachusetts.[98] The debtor argued that the claim should be disallowed because such debts were unenforceable in Massachusetts as against public policy.[99] Although the court recognized that Massachusetts public policy precluded enforceability of the debt, the court disagreed that Massachusetts law was applicable. After quoting the Full Faith and Credit Act, it stated, "[u]nder the statute, I must give the New Jersey judgments the same preclusive effect in this Court that New Jersey would provide."[100] The court ignored Massachusetts law and focused solely on whether the New Jersey elements of res judicata were met.

The bankruptcy courts need not get tangled in the forum state's policy decisions regarding same-sex marriage and its attendant rights and obligations. Federal courts are bound by the Full Faith and Credit Act not the forum state's law. While Florida state courts may be bound by Florida law respecting the enforceability of a foreign judgment arising from a same-sex marriage, Florida bankruptcy courts are not.

The question becomes more difficult to answer if the claim "arising from" the marriage has not yet been reduced to judgment, however. For example, assume a same-sex spouse has a loss of consortium claim against a third party based on an injury to her spouse. Before litigation ensues, the third party files for bankruptcy in Florida and the uninjured spouse files a claim. The debtor objects, claiming that Florida law would not recognize the claim for loss of consortium.

Section 502(b) states that the claim should be disallowed if it is "unenforceable against the debtor and property of the debtor" under "applicable law."[101] Because no judgment has been rendered, the Full Faith and Credit Act is inapplicable. Bankruptcy courts would again be faced with a conflict of law problem discussed above. Certainly if the applicable law is Florida law, the claim is unenforceable. But if the applicable law is a state that recognizes same-sex marriages and attendant rights then it is enforceable.

A Florida bankruptcy court dealt with this scenario in the context of a gambling debt. In *In re Bill Hionas*,[102] Casino Palace filed an adversary complaint against the debtor seeking $84,000 on a gambling debt allegedly created in Nevada.[103] The

Debtor argued that the debt was unenforceable in Florida as against Florida's statutorily stated public policy. The Casino claimed Nevada law applied.

The court began its analysis by acknowledging that if it were a Florida state court or a federal court sitting in diversity "Florida law would apply and this Court would not enforce this debt."[104] After chronicling the split in the courts regarding the appropriate choice of law rule in bankruptcy, the Court determined that in the context of claim allowances--"which is clearly at the core of the court's bankruptcy jurisdiction"[105]- a federal choice of law rule was appropriate. According to the court, the Eleventh Circuit required application of the "significant relationship" test of the Restatement (Second) of Conflict of Laws.[106]

Another Florida bankruptcy court took a slightly different approach to the unenforceability of gambling contracts under Florida law.[107] In *In re Simpson*, a casino sought to enforce a contract on a gambling debt. The court acknowledged that Florida law makes gambling contracts "void and of no effect."[108] Nonetheless, the court allowed the claim, concluding that Congress' broad definition of "claim" in § 101(5) preempted Florida law.[109] The court reasoned that preemption was appropriate because application of Florida law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[110]

Under either the *Hionas* or *Simpson* analysis a Florida bankruptcy court could allow claim "arising from" a marriage despite Florida law that voids the marriage and prohibits recognition of any rights "arising from" that marriage. Both approaches recognize the federal nature of bankruptcy law and provide a mechanism for the underlying policies of the Code to be realized. In both cases, the courts implicitly recognized a federal interest that trumped the application of state law.

Conclusion

Regardless of the Supreme Court's decision in *Windsor*, bankruptcy courts will still need to address a number of complicated questions involving marriage equality. DOMA § 2 and the myriad of state laws prohibiting marriage and its attendant rights for same-sex couples will force bankruptcy courts to grapple with complex conflict of law issues, consider the limits of full faith and credit and weigh competing federal and state policies. The hypotheticals presented in this article can be spun in a number of directions and each new direction raises new questions, requires a different analysis, and involves a new balancing of federal and state interests. While there may be some areas where courts can develop bright line rules, there will be many more areas where courts will need to make difficult policy choices and weigh conflicting objectives.

Footnotes

1 Pub.L. 104-199, 110 Stat. 2419, enacted September 21, 1996.

2 See 1 U.S.C.A. § 7 (2010).

3 See U.S. v. Windsor, 133 S. Ct. 786 (2012).

4 See infra section I(A).

5 Cal. Fam. Code § 297.5 (West 2006); Colo. Rev. Stat. § § 15-22-101-105 (2010); 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; Wis. Stat. § § 770.1-10 (2010).

6 28 U.S.C.A. § 1738C (2010).

7 28 U.S.C.A. § 1738C (2010).

[8] Originally 41 states had laws and/or constitutional amendments prohibiting marriage between same-sex couples. Maine, Maryland and Washington recently repealed their prohibition laws and replaced them with marriage equality statutes. Consequently there are now 38 states with prohibition laws on the books. 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, Minnesota, North Carolina, Pennsylvania, West Virginia, and Wyoming.

[9] See infra section II.

[10] 1 U.S.C.A. § 7 (2010).

[11] See, e.g., 11 U.S.C.A. § 101(10A) (means test calculation); § 101(14)(A)(domestic support obligation (DSO)); § 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) and 1328(c)(2) (discharge of DSO).

[12] § 541(a)(2) (all interests of the debtor and the debtor's spouse).

[13] § 101(10A)(A) (including spouse's income).

[14] §§ 523(a)(5) and 1328(c)(2) (discharge of DSO).

[15] 11 U.S.C.A.§ 302.

[16] See In re Balas, 449 B.R. 567, 65 Collier Bankr. Cas. 2d (MB) 1307 (Bankr. C.D. Cal. 2011); In re Somers, 448 B.R. 677, 65 Collier Bankr. Cas. 2d (MB) 1256 (Bankr. S.D. N.Y. 2011); In re Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 Civil Minutes, Docket No. 44 (Bankr. E.D Cal. May 31, 2011) (McManus, J).

[17] 11 U.S.C.A. § 101(14A). The Code provides domestic support obligations special protections in a number of ways. See, e.g. § 362(b)(2)(iv); § 362(b)(2)(A)(ii); § 362(b)(2)(B); § 362(b)(2)(C); § 522(f)(1)(A); § 547(c)(7); § 507(a)(1)(A) & (B); § 507(a)(1)(A) & (B); 523(a)(5) ;§ 1328(c)(2);§ 1322(a)(2); § 1325(a)(8);§ 1129(a)(15); §§ 523(a); 523(a)(15); & 1328(c)(2). In Chapter 13, postmarital obligations that are not domestic support obligations can be discharged. In addition to the protections afforded the creditor-spouse, domestic support obligations appear in other Code provisions. § 707(b)(2)(A)(iv) (Under the means test calculation, the debtor may deduct "payment for all priority claims," which, as noted, includes domestic support obligations).

[18] § 523(a)(15).

[19] In re Goodale, 298 B.R. 886, 51 Collier Bankr. Cas. 2d (MB) 35 (Bankr. W.D. Wash. 2003) .

[20] Goodale, 298 B.R. at 893.

[21] Goodale, 298 B.R. at 893.

[22] Goodale, 298 B.R. at 893.

[23] Cote v. Bardin, No. 11-BK-10893 (July 6, 2012) (Dkt. No. 45).

[24] Cote v. Bardin, No. 11-BK-10893 at ¶ 13.

[25] Cote v. Bardin, No. 11-BK-10893 at ¶¶ 21-27.

[26] ORDER APPROVING TRUSTEE'S NOTICE OF INTENT TO ABANDON PROPERTY PURSUANT TO 11 U.S.C. SECTION 554 BEING ANY POSSIBLE CAUSE OF ACTION FOR FRAUDULENT CONVEYANCE OR PREFERENCE PURSUANT TO 11 U.S.C. § § 547 OR 548, AND FOR FRAUDULENT CONVEYANCE UNDER VERMONT STATE LAW PURSUANT TO 9 VSA § § 2285 to 2295 (January 2, 2013)(Dkt. 51).

27 See 11 U.S.C.A. §§ 547 and 548.

28 See Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 109 Ed. Law Rep. 539, 70 Fair Empl. Prac. Cas. (BNA) 1180, 68 Empl. Prac. Dec. (CCH) P 44013 (1996).

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

30 See, e.g., Windsor v. U.S., 833 F. Supp. 2d 394, 2012-1 U.S. Tax Cas. (CCH) P 60647, 109 A.F.T.R.2d 2012-2475 (S.D. N.Y. 2012), judgment aff'd, 699 F.3d 169, 2012-2 U.S. Tax Cas. (CCH) P 60654, 110 A.F.T.R.2d 2012-6370 (2d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012) and petition for cert. filed, 81 U.S.L.W. 3373 (U.S. Dec. 28, 2012); Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 49 Employee Benefits Cas. (BNA) 2751, 109 Fair Empl. Prac. Cas. (BNA) 1333, 2010-2 U.S. Tax Cas. (CCH) P 50509, 106 A.F.T.R.2d 2010-5184 (D. Mass. 2010), judgment aff'd, 682 F.3d 1, 115 Fair Empl. Prac. Cas. (BNA) 65, 2012-1 U.S. Tax Cas. (CCH) P 50412, 109 A.F.T.R.2d 2012-2374 (1st Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3006 (U.S. June 29, 2012) and petition for cert. filed, 81 U.S.L.W. 3006 (U.S. July 3, 2012) and petition for cert. filed, 81 U.S.L.W. 3065 (U.S. July 20, 2012); Massachusetts v. U.S. Dept. of Health and Human Services, 698 F. Supp. 2d 234 (D. Mass. 2010), judgment aff'd, 682 F.3d 1, 115 Fair Empl. Prac. Cas. (BNA) 65, 2012-1 U.S. Tax Cas. (CCH) P 50412, 109 A.F.T.R.2d 2012-2374 (1st Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3006 (U.S. June 29, 2012) and petition for cert. filed, 81 U.S.L.W. 3006 (U.S. July 3, 2012) and petition for cert. filed, 81 U.S.L.W. 3065 (U.S. July 20, 2012); Dragovich v. U.S. Dept. of Treasury, 872 F. Supp. 2d 944, 115 Fair Empl. Prac. Cas. (BNA) 466, 2012-1 U.S. Tax Cas. (CCH) P 50369, 109 A.F.T.R.2d 2012-2286 (N.D. Cal. 2012); Golinski v. U.S. Office of Personnel Management, 824 F. Supp. 2d 968, 114 Fair Empl. Prac. Cas. (BNA) 819 (N.D. Cal. 2012), hearing in banc denied, 680 F.3d 1104 (9th Cir. 2012); Pederson v. OPM, Civil Action No. 3:10 CV 1750 (VLB) (July 31, 2012, D. Conn.); 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).

31 See Balas, 449 B.R. 567 (C.D. CA 2011); Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011); Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 Civil Minutes.

32 Somers, 448 B.R. at 682.

33 Ziviello-Howell, Ch. 7 Case No. 11-22706-A-7 Civil Minutes.

34 See Balas, 449 B.R. at 572.

35 See Balas, 449 B.R. at 579.

36 Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1, 115 Fair Empl. Prac. Cas. (BNA) 65, 2012-1 U.S. Tax Cas. (CCH) P 50412, 109 A.F.T.R.2d 2012-2374 (1st Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3006 (U.S. June 29, 2012) and petition for cert. filed, 81 U.S.L.W. 3006 (U.S. July 3, 2012) and petition for cert. filed, 81 U.S.L.W. 3065 (U.S. July 20, 2012); Windsor v. U.S., 699 F.3d 169, 2012-2 U.S. Tax Cas. (CCH) P 60654, 110 A.F.T.R.2d 2012-6370 (2d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012) and petition for cert. filed, 81 U.S.L.W. 3373 (U.S. Dec. 28, 2012).

37 Mass., 628 F.3d at 15.

38 Mass., 628 F.3d at 15.

39 Windsor, 699 F.3d at 181,185.

40 Windsor, 133 S. Ct. 786.

41 Windsor v. U.S., 833 F. Supp. 2d 394, 2012-1 U.S. Tax Cas. (CCH) P 60647, 109 A.F.T.R.2d 2012-2475 (S.D. N.Y. 2012), judgment aff'd, 699 F.3d 169, 2012-2 U.S. Tax Cas. (CCH) P 60654, 110 A.F.T.R.2d 2012-6370 (2d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012) and petition for cert. filed, 81 U.S.L.W. 3373 (U.S. Dec. 28, 2012).

42 Windsor, 833 F. Supp. 2d at 397.

[43] Windsor, 833 F. Supp. 2d at 397.

[44] Windsor, 833 F. Supp. 2d at 397.

[45] 28 U.S.C.A. § 2403.

[46] Windsor, 833 F.Supp at 397.

[47] Windsor, 833 F.Supp at 404.

[48] Windsor, 833 F.Supp at 402 & n.2.

[49] Windsor, 699 F.3d at 181.

[50] Windsor, 699 F.3d at 195 ("Since Baker holds that states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection.").

[51] See Cal. Fam. Code § 297.5 (West 2006); Colo. Rev. Stat. § § 15-22-101-105 (2010); 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; Wis. Stat. § § 770.1-10 (2010).

[52] 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.

[53] Colo. Rev. Stat. § § 15-22-101-105 (2010).

[54] Wis. Stat. §§ 770.1-10 (2010).

[55] Goodale, 298 B.R. at 893.

[56] Dragovich, 872 F. Supp. 2d 944.

[57] Dragovich, 872 F. Supp. 2d at 959.

[58] Dragovich, 872 F. Supp. 2d at 960.

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

[60] In re Rabin, 359 B.R. 242 (B.A.P. 9th Cir. 2007).

[61] Rabin, 359 B.R. at 244.

[62] Rabin, 359 B.R. at 246.

[63] Rabin, 359 B.R. at 248.

[64] See e.g., Presidential Memorandum, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 20, 2010)(directing the OPM to clarify that for purposes of employee assistance programs, same-sex domestic partners and their children qualify as "family members); Presidential Memorandum Regarding Federal Benefits and Non-Discrimination (June 17, 2009) (directing OPM to expand definition of "qualified relative" to include domestic partners).

[65] See Dragovich, 872 F.Supp.2d at 960.

66 28 U.S.C. § 1738C.

67 Originally 41 states had laws and/or constitutional amendments prohibiting marriage between same-sex couples. Maine, Maryland and Washington recently repealed their prohibition laws and replaced them with marriage equality statutes. Consequently there are now 38 states with prohibition laws on the books. 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, Minnesota, North Carolina, Pennsylvania, West Virginia, and Wyoming.

68 U.S. Const. art. IV.

69 See generally, Koppelman, DUMB and DOMA: Why the Defense of Marriage Act is Unconstitutional, 83 Iowa L. Rev. 1, 15-18 (1997)(discussing the constitutionality of this provision).

70 M.S.A. § 517.03(4)(b) (2009).

71 See Koppelman, 83 Iowa L. Rev. at 10.

72 Federal courts have acknowledged that when a federal court is addressing a question of federal law, the court is free to create a "federal choice of law" rule that responds to the unique federal interests at stake. See, e.g., In re Coudert Bros. LLP, 673 F.3d 180, 187-190, 56 Bankr. Ct. Dec. (CRR) 23 (2d Cir. 2012) (discussing the appropriate use of federal choice of law rules in bankruptcy).

73 See, e.g., 8 U.S.C.A. § 1186a(d)(1)(A)(i)(I) (2000) (identifying the place of celebration as the relevant for determining validity of marriage); 5 C.F.R. § 831.603 (2006) (defining "marriage," in the context of regulating survivor annuities for civil servants, by reference to the "law of the jurisdiction with the most significant interest in the marital status of the employee"); 20 C.F.R. § 404.345 (2005) (looking to state law to define marital relationship in the context of regulating social security benefits).

74 See Hassan v. Holder, 604 F.3d 915, 925 (6th Cir. 2010); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

75 There is little question that Congress can legislate federal choice of law rules in bankruptcy. Congress has the power under the Constitution to enact laws on the subject of bankruptcy. Indeed, Congress exercised this power when it identified the appropriate exemption law to be applied when a debtor moves within the specified time frame. See 11 U.S.C.A. § 523(b)(3)(A). When Congress has the power but has failed to speak, courts are free to fill the gaps. See Erie R. Co. v. Tompkins, 304 U.S. 64, 79-80, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

76 See Associates Commercial Corp. v. Rash, 520 U.S. 953, 965, 117 S. Ct. 1879, 138 L. Ed. 2d 148, 30 Bankr. Ct. Dec. (CRR) 1254, 37 Collier Bankr. Cas. 2d (MB) 744, Bankr. L. Rep. (CCH) P 77409 (1997).

77 Minn. Stat. Ann. § 510.04 (West. 2009).

78 Butner v. U.S., 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

79 Butner, 440 U.S. at 55. Certainly this assumption is subject to challenge. The Bankruptcy Code contains a number of federal policies, not the least of which is uniformity that may conflict with a particular states' domestic relations law.

80 Butner, 440 U.S. at 55.

81 D'Oench, Duhme & Co. v. Federal Deposit Ins. Corporation, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

82 See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, 49 U.S.P.Q. 515 (1941); In re Payless Cashways, 203 F.3d 1081, 1084, 35 Bankr. Ct. Dec. (CRR) 191 (8th Cir. 2000); Carter Enterprises, Inc. v. Ashland Specialty Co., Inc., 257 B.R. 797, 801-02 (S.D. W. Va. 2001).

[83] Vanhorn Bondholders Protective Committee v. Green, 329 U.S. 833, 67 S. Ct. 498, 91 L. Ed. 706 (1947). See also In re Lindsay, 59 F.3d 942, 948, 27 Bankr. Ct. Dec. (CRR) 646, 33 Collier Bankr. Cas. 2d (MB) 1574, Bankr. L. Rep. (CCH) P 76579 (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."); In re Miller, 292 B.R. 409, 413, 41 Bankr. Ct. Dec. (CRR) 57 (B.A.P. 9th Cir. 2003) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws."); In re Wright, 256 B.R. 626, 632 (Bankr. D. Mont. 2000).

[84] See, e.g., In re Gaston & Snow, 243 F.3d 599, 606, 37 Bankr. Ct. Dec. (CRR) 181 (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. F.D.I.C., 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997))); In re Merritt Dredging Co., Inc., 839 F.2d 203, 206, 1988 A.M.C. 2339, 5 U.C.C. Rep. Serv. 2d 900 (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."); Federal Deposit Ins. Corp. 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).

[85] See generally Gardina, The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage, B.U. L. Rev. 881, 905-906 (2006).

[86] See Gaston & Snow, 243 F.3d at 605 (2d Cir. 2001) (choosing the most significant relationship test as the federal choice of law rule); Medical Mut. of Ohio v. deSoto, 245 F.3d 561, 570, 2001 FED App. 0083A (6th Cir. 2001) (applying the significant relationship test as the federal choice of law rule).

[87] See generally, Restatement (Second) of Conflicts of Law, §§ 145 and 188.

[88] See BFP v. Resolution Trust Corp., 511 U.S. 531, 562, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994).

[89] See Wilson v. Ake, 354 F. Supp. 2d 1298, 1303, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005) (refusing to recognize a marriage performed in Massachusetts); Cook v. Cook, 209 Ariz. 487, 104 P.3d 857 (Ct. App. Div. 1 2005); see generally Strasser, State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations, 25 Law & Iieq. 59 (2007).

[90] Fla. Stat. § 741.212(2) (West 2008).

[91] 28 U.S.C.A. § 1738C.

[92] 28 U.S.C.A. § 1738.

[93] Durfee v. Duke, 375 U.S. 106, 109, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963).

[94] See Milwaukee County v. M.E. White Co., 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935) ("In numerous cases this court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.").

[95] Milwaukee, 296 U.S. at 277.

[96] See In re Kaid, 472 B.R. 1, 8, 67 Collier Bankr. Cas. 2d (MB) 1566 (Bankr. E.D. Mich. 2012); In re Leroux, 216 B.R. 459, 467-68 (Bankr. D. Mass. 1997). See also In re Smith, 66 B.R. 58, 59 (Bankr. D. Md. 1986), order aff'd, 77 B.R. 33 (D. Md. 1987) (citing Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908)).

[97] Leroux, 216 B.R. 459.

[98] Leroux, 216 B.R. at 466.

[99] Leroux, 216 B.R. at 466.

100 Leroux, 216 B.R. at 467.

101 11 U.S.C.A. § 502(b).

102 In re Bill Hionas, 361 B.R. 269 (Bankr. S.D. Fla. 2006.

103 Hionas, 361 B.R. at 272.

104 Hionas, 361 B.R. at 273.

105 Hionas, 361 B.R. 276.

106 Hoinas, 361 B.R. at 276.

107 In re Simpson, 319 B.R. 256, 265 (Bankr. M.D. Fla. 2003).

108 Simpson, 319 B.R. at 264.

109 Simpson, 319 B.R. at 265.

110 Simpson, 319 B.R. at 265 quoting In re World Auxiliary Power Co., 303 F.3d 1120, 1129, 40 Bankr. Ct. Dec. (CRR) 36, 49 Collier Bankr. Cas. 2d (MB) 518, 64 U.S.P.Q.2d 1433, 48 U.C.C. Rep. Serv. 2d 447 (9th Cir. 2002).

a1 **Jackie Gardina** is a Professor of Law at Vermont Law School. I want to thank Bill Woodward for his time and thoughtful comments.

Part II
CONSUMER BANKRUPTCY

SAME-SEX MARRIAGES IN BANKRUPTCY: A PATH OUT OF THE PUBLIC POLICY QUAGMIRE

*Jackie Gardina**

Can a bankruptcy court sitting in a state that voids a marriage between two individuals of the same-sex, recognize that marriage and more importantly, the incidences of marriage, in bankruptcy? Whatever decisions are rendered by the Supreme Court in *United States v. Windsor*[1] and *Perry v. Hollingsworth,*[2] the Court will not answer this question. While both cases involve the recognition of same-sex marriage, neither case directly addresses § 2 of the Defense of Marriage Act[3] — the provision that authorizes states to refuse to recognize valid same-sex marriages performed in other states as well as the claims, rights and judgments arising from those marriages. Nor will the cases speak directly to the 37 state laws that currently do so.[4] Until the Supreme Court examines DOMA § 2, the uncertainty surrounding the interstate recognition of marriages will continue to invade bankruptcy courts for the foreseeable future.

Up to this point the bankruptcy courts have had little difficulty balancing the interstitial nature of bankruptcy in the context of heterosexual unions. When it comes to the recognition of marriage and its attendant rights and obligations, bankruptcy courts have relied on the Supreme Court's command in *Butner v. United*

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*Jackie Gardina is a Professor of Law at Vermont Law School. She is indebted to a number of people who worked with her on this project, including Joseph Freun, Ray Obuchowski and Bill Woodward.

[1]See *U.S. v. Windsor*, 133 S. Ct. 786, 184 L. Ed. 2d 527 (2012) (granting certiorari).

[2]See *Hollingsworth v. Perry*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012) (granting certiorari).

[3]28 U.S.C.A. § 1738C.

[4]See infra Part I.B.2.

States[5] and looked to state law to determine both the legality of the marriage as well as the existence of rights that arise as a result of the union.[6] Bankruptcy courts have ruled on the validity of marriages in a wide array of circumstances from determining the scope of the debtor's exemptions[7] to ruling on the existence of a fraudulent transfer[8] to establishing the propriety of a creditor's lien.[9] Whether a debtor is or was married can be the difference between, among other things, whether property is protected from a creditor's reach or whether a debt is dischargeable.[10]

Rarely have the bankruptcy courts been asked or required to examine conflicting state domestic relations laws when ruling on the validity of a marriage. In those few reported cases where the parties' marriages were prohibited under the forum state law, the state law explicitly recognized prohibited marriages if they were valid where performed.[11] Nor has any bankruptcy court, as of yet, addressed the questions raised by DOMA § 2. Can a bankruptcy court treat as a valid a marriage that the forum state's law declares invalid? Can the court recognize the incidences of marriage if the forum state law either implicitly or explicitly prohibits such recognition? Is the court required to follow the public policy of the forum state or is the court free to ignore it?

This article attempts to answer these questions. Part I sets the stage for the discussion, describing DOMA § 2 and the myriad

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[5] *Butner v. U.S.*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

[6] See, e.g., *In re Blankenship*, 133 B.R. 398, 400 (Bankr. N.D. Ohio 1991) ("Because the power to regulate domestic relations belongs to the state, the Court must look to state law to determine the marital status of [the parties]."); *In re Cohen*, 2012 WL 400715, *1 n.2 (Bankr. D. N.M. 2012); *In re Bakkar*, 2009 WL 3068192, *3 (Bankr. D. N.J. 2009).

[7] See *In re Cohen*, 2012 WL 400715, *1 n.1 (Bankr. D. N.M. 2012).

[8] See In re Blankenship, 133 B.R. at 402.

[9] *In re Nakamura*, 2008 WL 191811, *3–4 (Bankr. D. Idaho 2008) (Bankr. D. Idaho).

[10] See, e.g., *In re Bakkar*, 2009 WL 3068192, *4 (Bankr. D. N.J. 2009); *In re Veneziale*, 267 B.R. 695, 699-700 (Bankr. E.D. Pa. 2001).

[11] Blakenship, 133 B.R. at 400 (acknowledging that while Ohio does not allow for proxy marriages it will recognize proxy marriages if performed in a state where such marriages are valid.). But see *In re Mercier*, 2005 WL 419716, *2 (Bankr. M.D. Fla. 2005) ("Even assuming, without conceding, that the monthly $800 paid by the State of Oregon was pursuant to an order of a court, it could not have been entered in connection with a separation agreement or divorce decrees for the simple reason that Ms. Foster was never the spouse of the Debtor, even if the laws of the State of Oregon recognized same sex marriages which, of course, are not recognized in the State of Florida.").

state laws regarding same-sex relationships. This part first describes Congress' limited intent when it promulgated § 2, as well as the potential due process implications of an overly broad interpretation of the statute. What becomes evident is that Congress never intended nor was it authorized to allow states to impose a blanket non-recognition rule on all same-sex unions.

After reviewing state laws that recognize same-sex unions, the article next places the marriage prohibition statutes in an historical context, describing the narrow construction state courts have traditionally given such statutes even during the miscegenation era. Significantly, state courts have never applied a blanket non-recognition rule, instead engaging in a fact dependent analysis that allows for the recognition of out-of-state marriages even if prohibited in the forum state. A state's narrow construction of its statute both avoided any conflict of law problems and sidestepped potential due process concerns. If the marriage and attendant rights can be recognized under both states' laws then there is not a true conflict.

In the event a true conflict exists, Part II describes the proper choice of law rule in bankruptcy and promotes a modified Restatement (Second) of Conflicts "most significant relationship" test as the appropriate test in marriage cases. The "most significant relationship" test allows courts to engage in a fact-dependent analysis that is sensitive to the due process concerns raised in any conflict analysis. The test would also allow courts to promote the federal policies underlying bankruptcy rather than any one state's policy regarding same-sex unions.

Finally, the article applies the test to several hypotheticals, demonstrating how it can best meet the policies underlying bankruptcy without impinging on a state's expressed public policy regarding same-sex relationships.

I. Setting the Stage

A. The *Other* DOMA Provision, § 2

Although it has not been widely discussed or litigated, the federal DOMA contains a provision that states:

> 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.[12]

The so-called choice of law provision does two things. First, it gives permission to states to reject marriages validly performed in other states. As will be discussed more fully below, thirty-eight states have statutes or constitutional amendments prohibiting marriages between same-sex couples and in most instances also refusing to recognize such marriages performed in other states.[13] Under these statutes, State B could refuse to recognize a marriage between two men validly performed in State A and arguably deny the couple state benefits based on marital status.

But perhaps more significantly, DOMA § 2 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."[14] Congress arguably exercised its power under the so-called "effects clause" when it passed DOMA and granted states the power to reject "judicial proceedings of any other State."[15] Under this provision, State B could, in theory, refuse to recognize a property distribution or domestic support order issued by a court in State A.

Although the Supreme Court has yet to rule on whether Article IV allows Congress to provide an exception to the Full Faith and Credit Clause which gives "no effect" to judicial proceedings of other states, or whether other constitutional provisions may prevent a state from rejecting a valid judgment from a sister state,[16] Congress appeared to recognize its limited authority in this area. In its Committee Report, the House of Representatives articulated the narrow purpose behind § 2 as it relates to the recognition of court judgments.

> But the Committee would emphasize two points regarding Section 2's application to judicial orders. First, as with public acts and re-

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[12]28 U.S.C.A. § 1738C.

[13]See infra note Part I.B.2.

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

[15]See generally, Andrew Koppelman, DUMB and DOMA: Why the Defense of Marriage Act is Unconstitutional, 83 Iowa L. Rev. 1, 15–18 (1997) (discussing the constitutionality of this provision).

[16]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 FFCC).

> cords, the effect of Section 2 is merely to authorize a sister State to decline to give effect to such orders; it does not mandate that outcome, and, indeed, given the special status of judicial proceedings, the Committee expects that States will honor judicial orders as long as it can do so without surrendering its public policy against same-sex marriages. Second, and relatedly, if-notwithstanding a sister State's policy objections to homosexual marriage-there is some constitutional compulsion (whether under the Due Process Clause or otherwise) to give effect to a judicial order, Section 2 obviously can present no obstacle to such recognition.[17]

As of this writing, the lower courts have not found that DOMA § 2 raises constitutional concerns in the marriage context.[18] The cases challenging DOMA § 2, however, all involve plaintiffs seeking to have a marriage license—not court judgments—recognized in their home states.[19] As will be discussed more fully below, states traditionally have had the authority to reject marriages that contradict a strong public policy of the forum state,[20] although no state has enforced a blanket non-recognition rule.[21] The cases do not purport to answer some of the more difficult questions regarding Congress' authority to create an exception to the Full Faith and Credit Clause for court judgments. Nor do the cases address the more nuanced question regarding a couple that changes domicile from a state that recognizes their marriage to a state that does not; a couple temporarily visiting a state that prohibits their marriage; or a couple that has no connection to the forum state other than litigation currently in its courts.[22]

Answers to these questions cannot be found in the text of

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[17]H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pp. 28–29.

[18]See *Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev'd on other grounds in part, 333 Fed. Appx. 361 (10th Cir. 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005).

[19]*Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev'd in part, 333 Fed. Appx. 361 (10th Cir. 2009); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304, 1 A.L.R. Fed. 2d 611 (M.D. Fla. 2005).

[20]Restatement (First) Conflict of Laws, §§ 121, 132 (1934); Restatement (Second) Conflict of Laws, § 283 (1971).

[21]Infra Part I.B.2.

[22]See generally Julia Halloran McLaughlin, DOMA and the Constitutional Coming Out of Same-Sex Marriages, 24 Wis. J. L. Gender & Soc'y 145, 185 (Spring 2009) (addressing constitutionalist of DOMA in a variety of constitutional context including FFCC).

DOMA § 2. Congress did not dictate what States should do but only identified what they could do. In doing so, Congress appeared to intend only to codify what it understood to be the State's pre-existing power—the authority to refuse to apply a foreign state's law when it contradicted the state's public policy in limited circumstances.[23] In describing its understanding of the existing legal landscape, the Committee Report states:

> The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated. States observing that rule would, of course, presumptively recognize as valid a same-sex "marriage" license from Hawaii.
>
> There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:
>
> "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state *which had the most significant relationship to the spouses and the marriage at the time of the marriage*."
>
> It is thus possible that a State, confronted with a resident same-sex couple possessing a "marriage" license from Hawaii, could decline to recognize that "marriage" on the grounds that to do so would offend that State's "strong public policy."[24]

The House Report identified an important temporal limitation on a State's ability to refuse to recognize an otherwise valid marriage. Specifically, the state seeking to invalidate a marriage must be the state with the most significant relationship with the couple at the time of the marriage. This limitation is entirely consistent with the pre-existing understanding of how state courts interpreted and implemented their previous state marriage prohibition statutes.[25]

By articulating such a narrow construction, Congress sought to avoid any potential constitutional violations. The Supreme Court has opined that for a state to apply its own laws, its contacts with the underlying transaction must be more than minimal.[26] In

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[23]H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

[24]H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

[25]See, e.g., *Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236 (1913); *State v. Fenn*, 47 Wash. 561, 92 P. 417, 419 (1907).

[26]*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 2 Fed. R. Serv. 3d 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion))

the absence of such contacts, the state has no legitimate interest in applying its laws. Even when a forum state's law embodies a strong public policy, the Court has required an interest analysis. As the Court opined, "The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy."[27]

Congress does not have the authority, nor did it purport to remove this basic due process limitation when it passed DOMA § 2.[28] Bankruptcy courts should approach any same-sex marriage question with this constitutional limitation in mind. A party may be forced to participate in a bankruptcy case filed in a forum far removed from and with little interest in the underlying dispute.[29] Outside the marriage context, bankruptcy courts have been sensitive to the constitutional implications of the choice of law analysis. In *In re McAllister*,[30] a bankruptcy court sitting in Alabama questioned the propriety of applying the Alabama garnishment law to a dispute centered primarily in North Carolina. The court noted the constitutional issues raised by the lack of connection between Alabama and the garnishment request.

> In this case, the only apparent contact that Alabama has with the debt owed by the North Carolina garnishee to the debtor/defendant is the fact that the debtor/defendant once lived in this state, and while living here, filed the bankruptcy case which underlies this adversary proceeding. The choice of Alabama law to determine whether or not that debt is subject to process of garnishment may not, therefore, be constitutionally proper.[31]

Most courts have successfully avoided the constitutional

(There must be "a significant contact, or significant aggregation of contacts, creating state interests, such that [a state's] choice of law is neither arbitrary nor fundamentally unfair.").

[27] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

[28] H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8.

[29] See Jackie Gardina, The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code, 16 Am. Bankr. Inst. L. Rev. 37, 58 (2008) (discussing the broad reach of bankruptcy court jurisdiction and venue provisions on interested parties).

[30] *In re McAllister*, 216 B.R. 957, 973–974 n.14 (Bankr. N.D. Ala. 1998).

[31] McAllister, 216 B.R. at 973–974.

concerns raised in *McAllister* by identifying the state with the most significant interest in the underlying dispute.[32] Even when courts are applying the forum state law based on an expressed public policy, there is an identifiable and significant connection between the forum state, the dispute and the public policy at issue.[33] Accordingly, while DOMA § 2 is written broadly, Congress' authority and intent call for a significantly more restricted interpretation of both § 2 and the state laws passed in its wake.

B. Overview of State Laws

As noted above, DOMA § 2 only purports to give states the authority to reject marriages validly performed elsewhere in limited circumstances; it does not mandate that states prohibit same-sex unions nor does it (or could it) prohibit States from recognizing such unions. States have taken different approaches to addressing legal unions between same-sex couples, the rights arising out of those unions and how they are dissolved. Each approach brings with it a number of potential complications, especially when it comes to the interstate recognition of the union and concomitant rights. But this is not a new problem. States have always had differing domestic relations law and courts have successfully navigated these conflicting laws and public policies in the past. As the below overview illustrates, states have always interpreted their statutes in the shadow of the Due Process Clause and with sensitivity to our interstate system of governance.

1. Relationship Recognition

As of May 2013, twelve states—Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington—as well as the District of Columbia and three Native American tribes—have legalized same-sex marriage, representing 15.7% of the U.S.

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[32]See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930) (rejecting application of TX law because the state lacked any connection to the underlying transaction); *In re American Metrocomm Corp.*, 274 B.R. 641, 659, 47 Collier Bankr. Cas. 2d (MB) 979 (Bankr. D. Del. 2002); *In re Fineberg*, 202 B.R. 206, 219 (Bankr. E.D. Pa. 1996); *In re Revco D.S., Inc.*, 118 B.R. 468, 501, 20 Bankr. Ct. Dec. (CRR) 1545, 24 Collier Bankr. Cas. 2d (MB) 91 (Bankr. N.D. Ohio 1990).

[33]See, e.g., *In re Zukerkorn*, 484 B.R. 182, 192–93 (B.A.P. 9th Cir. 2012); *In re Baum*, 386 B.R. 649, 658 (Bankr. N.D. Ohio 2008); *In re Portnoy*, 201 B.R. 685, 699–700 (Bankr. S.D. N.Y. 1996).

population.[34] In addition, there are 18,000 legally married same-sex couples in California.[35] And depending on the Supreme Court's decision in *Perry*, California could re-join these ranks as well.[36]

In addition, another eight states, California, Colorado, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island provide the equivalent of state-level spousal rights to same-sex couples.[37] 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, Wisconsin provides domestic partner registries but without all the rights and obligations afforded to spouses under state law.[38]

To further complicate matters, within the foregoing states where either marriage or spousal rights are recognized for same-sex couples, some states will recognize the marriages, civil unions

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[34]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. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); 19-A Me. Rev. Stat, § 650-A (2013); 2 Md. Code § 2-201 (2013); 26 Rev. Code Wa. § 26.04.010 (effective Dec. 6, 2012); N.H. Rev. Stat. Ann. §§ 457:1 to 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). The Coquille Tribe (Oregon), The Suquamish Tribe (Washington) and the Little Traverse Bands of Odawa Indians (Michigan) have all approved same-sex marriages. See John Flesher, Michigan Native American Tribal Chairman Signs Gay Marriage Bill, Huff. Post, Mar. 15, 2013 available at http://www.huffingtonpost.com/2013/03/15/michigan-native-american-tribe-gay-marriage-bill-__n__2884373.html.

In early May, both Delaware and Minnesota passed marriage equality laws that will go into effect into effect in summer 2013.See James Nash, Delaware Legislature Passes Bill to Allow Same-Sex Marriage, Bloomberg News, May 7, 2013 available at http://www.bloomberg.com/news/2013-05-07/delaware-legislature-passes-bill-to-allow-same-sex-marriages.html; Emma Margolin, Marriage Equality in Minnesota: A Gay Right's Victory in the Midwest, May 13, 2013, available at http://tv.msnbc.com/2013/05/13/marriage-equality-in-minnesota-a-gay-rights-victory-in-the-midwest/.

[35]*Strauss v. Horton*, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009), as modified, (June 17, 2009) (upholding the validity of Proposition of 8 but also holding that marriages performed before vote remained valid marriages under state law).

[36]See *Hollingsworth v. Perry*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012).

[37]Cal. Fam. Code § 297.5 (West 2006); Co Rev. Stat. § 14-15-101 (Effective May, 1 2013); 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.

[38]Wis. Stat. §§ 770.1 to 10 (2010).

or domestic partnerships properly performed or registered in another state, but not all states will honor all forms of relationship recognition.[39] States may change the status of a relationship — a couple who is legally married in one state may be deemed domestic partners in a state with that designation. For example, in California, the Marriage Recognition and Family Protection Act[40] currently creates a two-tier recognition of out of state marriages. The Act explicitly recognizes marriages of same-sex couples performed out-of-state prior to November 5, 2008. The bill also explicitly recognizes marriages of same-sex couples performed out-of-state after that date as carrying all the same rights and responsibilities of spouses although without the designation of

[39]For example, 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*, 50 A.D.3d 189, 850 N.Y.S.2d 740, 42 Employee Benefits Cas. (BNA) 2692, 102 Fair Empl. Prac. Cas. (BNA) 1146 (4th Dep't 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). 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. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 968–969 (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).

[40]Cal. Fam. Code § 378 (West 2009).

marriage.[41] Some states do not provide automatic recognition. Instead, a couple with a legally recognized union in one state will need to take affirmative steps to be legally recognized in another state.[42] In addition, states with no relationship recognition or prohibition statutes may recognize marriages performed in other states.[43] Finally, some states explicitly prohibit same-sex marriage but the underlying statutes do not address other forms of relationship recognition, leaving open the possibility that while marriages will not be recognized civil unions or domestic partnerships may.[44]

The various labels assigned to same-sex unions create confusion at the federal level as well.[45] It remains an open question how relationships other than marriage will be treated under federal law or how the pending Supreme Court decision on both DOMA and California's Proposition 8 might influence their validity. Even if the Supreme Court declares DOMA § 3 unconstitutional, it is unclear whether couples who have legally recognized unions other than marriage will be treated as married for purposes of federal law. Few federal courts have spoken directly to the question at issue and the Executive Branch has given mixed signals.[46]

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[41]Cal. Fam. Code § 378 (West 2009).

[42]For example, 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). A couple will need to register as domestic partners under Oregon law, there marriage, civil union or domestic partnership from another state will not be automatically recognized.

[43]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.

[44]See, e.g., Ariz. Rev. Stat. Ann. § 25-112 (West 2000) (language addresses only marriage); Ga. Code. Ann. § 19-3-3.1 (2004) (same); Idaho Code § 32-209 (Michie 1996) (same); Kan. Stat. Ann. § 23-115 (2003) (same); Mich. Comp. Laws Ann. § 551.272 (West 2004) (same).

[45]See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 871 (C.D. Cal. 2005), aff'd in part, vacated in part, remanded, 447 F.3d 673 (9th Cir. 2006) (concluding domestic partnership is not marriage for purposes of DOMA); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 65 Fed. R. Serv. 3d 1206 (N.D. Okla. 2006), rev'd on other grounds in part, 333 Fed. Appx. 361 (10th Cir. 2009) (couple to a civil union not married for purposes of DOMA).

[46]See generally Jackie Gardina, Bankruptcy and the Unresolved DOMA Questions, 22 J. Bankr. L. & Prac. 2 Art. 1 (Feb. 2013). Perhaps more significantly, how the Supreme Court treats laws that discriminate based on sexual orientation could have a significant effect on the sustainability of state laws that offer an alternative to marriage as well as those that prohibit it. If the

2. Relationship Prohibition

There are currently thirty-seven states with statutes or constitutional amendments (or both) prohibiting marriages between same-sex couples and, in some instances, explicitly refusing to recognize marriages validly performed in other states as well as any rights arising from those marriages.[47] These prohibitions, so-called "mini-DOMAs," prohibit or void the marriage of same-sex couples in the state or affirmatively identify a marriage between one man and one woman as the only marriage with legal validity within the state. The laws can be broken into three categories. The first category involves states that restrict the state's ability to recognize same-sex marriages between couples

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Court were to declare § 3 unconstitutional on equal protection grounds regardless of the level of scrutiny, then every state law that purports to exclude same-sex couples from marriage is vulnerable, including those that offer a "separate but equal" status. The Court could also declare § 3 unconstitutional but split on the reasoning with some Justices signing onto an equal protection rationale and others adopting a federalism approach. The latter scenario would arguably strengthen the State's authority to provide a different legally recognized relationship status for same-sex couples.

[47]See Ala. Const. art. 1, § 36.03, Ala. Code 1975, § 30-1-19 (2004); Alaska Const. Art. 1, § 25 (amended 1999); Alaska Stat. Ann. § 25.05.013 (2004), Ariz. Const. art. XXX, § 1; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Const. amend. LXXXI (amended 2004); Ark Code. Ann. § 9-11-109 (Michie 2002); Fla. Const. art. 1, § 27, Fla. Stat. Ann. § 741.212 (West 2004); Ga. Const. art. 1, § 4, ¶ 1(amended 2004); Ga. Code Ann. § 19-3-3.1 (2004); Idaho Const. art. III, § 28; Idaho Code Ann. § 32-209 (Michie 1996); Ind. Code Ann. § 31-11-1-1 (West 1999); Kan. Const. art. XV, § 16 (amended 2005) Kan. Stat. Ann. § 23-101 (2003); Ky.Const. § 233A (amended 2004); Ky.Rev. Stat. Ann. § 402.045 (Michie 1999); La. Const. art. XII, § 15 (amended 2004); La. Civ. Code Ann. art. 3520 (1999); Mich. Const. art.1, § 25 (amended 2004); Mich. Comp. Laws. Ann § 551.272 (West 2006); Miss. Const art. XIV, § 263A (amended 2004); Miss. Code Ann. § 93-1-1 (1999); Mo. Const. art. 1, § 33 (amended 2004); Mo. Ann. Stat. § 451.022 (West 2003); Mont. Const. art. XIII, § 7 (amended 2004); Mont. Code Ann. § 40-1-401 (West 2009); Neb. Const. art. 1, § 29 (amended 2000); Neb. Rev. Stat. § 42-117 (2009); Nev. Const. art. 1, § 21 (amended 2002); N.C. Const. art. XIV, § 6 (amended 2012); N.C. Gen. Stat. Ann. § 51-1.2 (2009); N.D. Const. art. XI, § 28 (amended 2004); N.D. Cent. Code Ann. § 14-03-01 (2009); Ohio Const. art. XV, § 11 (amended 2004); Ohio Rev. Code Ann. § 3101.01 (West 2005); Okla. Const. art. II, § 35 (amended 2005); Okla. Stat. Ann. tit. 43, § 3.1 (West 2009); Or. Const. art. XV, § 5a (amended 2004); 23 Pa. Cons. Stat. Ann. § 1704 (West 2009); S.C. Const. art. XVII, § 15, S.C. Code Ann. § 20-1-15 (West 2009); S.D. Const. art. XXI, § 9; S.D. Code Ann. § 25-1-38 (Michie 1999); Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113 (2001); Tex. Const. art. I, § 32, Tex. Fam. Code Ann. §§ 1.101 & 6.204 (2003); Utah Const. art. 1, § 29; Utah Code Ann. §§ 30-1-2, 30-1-4 & 30-1-4.1 (2005); Va. Const. art. I, § 15-A; Va. Code Ann. § 20-45.2 (Michie 2004); Wisc. Const. art. XIII, § 13; Wisc. Stat. Ann. § 765.21; W.Va. Code Ann. §§ 48-2-602, 48-2-603 & 48-7-111 (Michie 2004); Wyo. Stat.Ann. § 20-1-101 (Michie 2003).

validly performed in other states.[48] The second category encompasses the first and explicitly refuses to recognize rights arising from those marriages.[49] A third category includes the first two categories and also refuses to enforce *judgments* that involve a same-sex married couple.[50] The statutory language varies from state to state, however, making generalizations about the statutes difficult. Nonetheless, marriage prohibition statutes are not new and insight can be gleaned from cases interpreting these older statutes.

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[48]See, e.g., 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."); 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.").

[49]See, e.g. 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."); 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."); 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.").

[50]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).

a. The Full Faith and Credit Act

The first two categories—state laws that purport to void legal marriages and state laws that propose to invalidate rights arising from these marriages—will be troublesome in bankruptcy proceedings. The third category—state laws purporting to reject judgments—should not. Bankruptcy courts will not only be free to uphold valid state court judgments recognizing a same-sex union and any rights or obligations associated with it, they are in fact required to do so.

DOMA § 2 appears to create an exception to the Full Faith and Credit Clause and authorizes states, through statute, to refuse to recognize judgments from sister states regarding same-sex marriages.[51] But the provision applies only to states and does not speak to the authority of federal courts to do the same. Instead, federal courts remain bound by the Full Faith and Credit Act.[52] The Act requires that federal courts give preclusive effect to state court judgments if the state court in which it was rendered would give it preclusive effect.[53] This is true even if the forum state would not entertain the suit.[54] The Supreme Court has been refreshingly clear on the matter.

> In numerous cases this court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.[55]

The Court stressed this point again more recently when it emphatically stated "But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments.*"[56]

Consistent with Supreme Court pronouncements, bankruptcy courts have enforced judgments from sister state courts even when sitting in a state that would not enforce the underlying

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[51]28 U.S.C.A. § 1738C.

[52]28 U.S.C.A. § 1738.

[53]See *Durfee v. Duke*, 375 U.S. 106, 109, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963).

[54]See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935).

[55]Milwaukee County, 296 U.S. at 277.

[56]*Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (emphasis in the original).

obligation.[57] In *In re Leroux*,[58] a casino filed a claim to obtain payment on a gambling debt. The casino had obtained a default judgment in a New Jersey court before the debtor filed for bankruptcy in Massachusetts.[59] The debtor argued that the claim should be disallowed because such debts were unenforceable in Massachusetts as against public policy.[60] Although the court recognized that Massachusetts public policy precluded enforceability of the debt, the court disagreed that Massachusetts law was applicable. After quoting the Full Faith and Credit Act, it stated, "[u]nder the statute, I must give the New Jersey judgments the same preclusive effect in this Court that New Jersey would provide."[61] The court ignored Massachusetts law and focused solely on whether the New Jersey elements of *res judicata* were met.

In the context of marriage, a Utah bankruptcy court came to the same conclusion when it considered a judgment that assumed the validity of a marriage.[62] Relying on the *Rooker-Feldman* doctrine as well as collateral and judicial estoppel, the court prevented a debtor from attempting to discharge a state court ordered support payment.[63] The debtor argued that his former partner was not legally his "spouse" under Utah law and therefore any debt he owed her pursuant to a state court divorce decree was dischargeable.[64] Although the couple had never obtained a valid marriage license, in the underlying divorce proceedings the debtor did not challenge the state court's jurisdiction to issue a divorce decree and in his answer to the divorce complaint he admitted the couple was husband and wife.[65]

With this background, the court first determined that under the *Rooker-Feldman* doctrine it was precluded from revisiting the question of whether the debtor was legally married. "Because

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[57]See *In re Kaid*, 472 B.R. 1, 8, 67 Collier Bankr. Cas. 2d (MB) 1566 (Bankr. E.D. Mich. 2012); *In re Leroux*, 216 B.R. 459, 467–68 (Bankr. D. Mass. 1997). See, also, *In re Smith*, 66 B.R. 58, 59 (Bankr. D. Md. 1986), order aff'd, 77 B.R. 33 (D. Md. 1987) (citing *Fauntleroy v. Lum*, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908)).

[58]*In re Leroux*, 216 B.R. 459 (Bankr. D. Mass. 1997).

[59]In re Leroux, 216 B.R. at 466.

[60]In re Leroux, 216 B.R at 466.

[61]In re Leroux, 216 B.R at 467.

[62]*In re Johnson*, 473 B.R. 447, 455 (Bankr. D. Utah 2012).

[63]In re Johnson, 473 B.R. at 455–457.

[64]In re Johnson, 473 B.R. at 453.

[65]In re Johnson, 473 B.R. at 455.

there is a final state court decision in which an essential element of the judgment was implicit that the parties were former spouses, this Court cannot now determine that the parties are not 'former spouses.' "[66] Second, the court concluded that the debtor was collaterally estopped from arguing that his former partner was not his spouse because that issue had been decided in a previous litigation.[67] While the court never explicitly cited to the Full Faith and Credit Act, it performed the relevant preclusion analysis. Finally, the court held that the debtor was judicially estopped from asserting a position contrary to the one he held throughout a previous litigation.[68]

When addressing the recognition of judgments, the bankruptcy courts need not get tangled in the forum state's policy decisions regarding same-sex marriage and its attendant rights and obligations. Federal courts are bound by the Full Faith and Credit Act *not* the forum state's law. In those situations where the Act applicability is uncertain, courts may look to the *Rooker-Feldman* doctrine or judicial estoppel principles to hold parties to the positions they maintained in previous proceedings and to prevent them from asserting a different position simply because their interests have changed.

b. Validity of Marriage and Attendant Rights

The Full Faith and Credit Act only applies in situations where there has been a previous court judgment. It does not address circumstances where the party is legally married in one state but is seeking recognition of that marriage and the rights that arise from it in a bankruptcy court that is sitting in a state that denies such recognition. The analysis of this second question is complicated by the fact that the current state statutes regarding same-sex unions are vague and ambiguous.[69] Few states have had the opportunity to define the scope of their statutes.

Bankruptcy courts should not assume, however, that a state would interpret its statute to void same-sex unions regardless of the circumstances. It bears emphasizing that a blanket non-

[66]In re Johnson, 473 B.R. at 455.

[67]In re Johnson, 473 B.R. at 455.

[68]In re Johnson, 473 B.R. at 455.

[69]See Andrew Koppelman, The Difference the Mini-DOMAs Make, 16 Loyola U. Chi. L.J. 265 (Winter 2007) (discussing the variations and overly broad language in state laws).

recognition rule is unprecedented.[70] Courts have traditionally construed marriage statutes and the public policy they embody narrowly. Even in the highly charged miscegenation era, when state statutes went so far as to criminalize interracial unions, the courts did not impose an all or nothing approach.[71] Although the same public policy concerns were expressed about interracial marriages that are now voiced about same-sex marriages, southern states were willing to limit the scope of their statutes in particular circumstances. Both within and outside the miscegenation context, courts have shown flexibility in construing and applying relevant marriage prohibition statutes to achieve equitable results that are consistent with due process concerns and relevant conflict of law limitations.[72]

At their core, these state statutes are simply codified choice of law rules expressing the strong public policy of the forum state. When determining the validity of a marriage courts have traditionally applied the "place of celebration rule" which holds that a marriage is valid everywhere if it is valid in the place of celebration.[73] The Restatement (Second) of Conflicts of Law § 283 provides a widely adopted exception to this rule that allows the state with the most significant relationship to the spouses and the marriage at the time of the marriage to invalidate the marriage if it violates a strong public policy of the forum state.[74]

The exception to the rule addresses so-called evasive marriages where parties domiciled in a state that prohibits their union travel to another state to get married and return to their home

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[70]Andrew Koppleman, Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges, 153 U. Pa. L. Rev. 2143, 2152 (June 2005) (hereinafter *Handbook for Judges*); Andrew Koppelman, Same Sex Different States, p. 70–71 (arguing that a blanket non-recognition rule has four fatal flaws: produces absurd results; is inconsistent with the rights of citizens within a federal system; violates the rights to equal protection; and cannot be justified under even the most conservative public policy).

[71]Koppelman, *Handbook for Judges*, 153 U. Pa. L. Rev. at 2152.

[72]See, e.g. *State v. Fenn*, 47 Wash. 561, 92 P. 417, 418 (1907) ("The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, cannot be denied."); *State v. Kennedy*, 76 N.C. 251, 1877 WL 2697 (1877) (finding marriage between a black man and a white woman domiciled in North Carolina, but contracted in South Carolina, in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina).

[73]Restatement (Second) Conflict of Laws § 283 (1971).

[74]Restatement (Second) Conflict of Laws § 283(2).

state seeking recognition of the marriage.[75] Because the forum state was the state with the most significant relationship with the couple at the time they were married, that state could void the marriage.[76] As noted earlier, this same limited exception was articulated in the House Report supporting DOMA § 2.[77] Citing this limitation, courts consistently refused to recognize evasive marriages.

Outside the evasive marriage context, the courts have been more constrained in their approach, recognizing the narrowness of the exception as well as the limitations of their own power. In *State v. Fenn*, the Washington Supreme Court considered whether a woman could be charged with bigamy under the forum state's law. In rejecting the application of Washington law, the court opined:

> If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. As we have shown, the general rule is that the validity of a marriage is determined by reference to the law of the place where contracted. An exception to the general rule is sometimes made in favor of the law of the domicile of the parties. But a statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.[78]

Even the Supreme Court weighed in on the reach of a state's law that sought to prohibit marriages of non-domiciliaries. In

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[75]Restatement (Second) Conflict of Laws § 283, comment c (So the state where the spouses were domiciled before the marriage and where they make their home immediately thereafter has an obvious interest in the application of a rule forbidding the marriage of persons within certain degrees of relationship). Many state statutes explicitly codify this exception, declaring void any marriage where the parties traveled to another state to avoid the marriage prohibition in the forum state.

[76]*State v. Fenn*, 47 Wash. 561, 92 P. 417, 418 (1907) ("The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, cannot be denied."); *State v. Kennedy*, 76 N.C. 251, 1877 WL 2697 (1877) (finding marriage between a black man and a white woman domiciled in North Carolina, but contracted in South Carolina, in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina).

[77]H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8.

[78]*State v. Fenn*, 47 Wash. 561, 92 P. 417, 419 (1907).

Loughran v. Loughran,[79] the Court addressed the question whether the District of Columbia's prohibition of the remarriage of a divorced person could invalidate a valid second marriage under Florida law and deny a woman dower in the District. Examining the language of the District's statute, the Court concluded "Section 966 is not extraterritorial in its operation. It does not purport to prohibit remarriage outside the District; and no other statute denies dower to a widow because by remarrying elsewhere she had disregarded the prohibition contained in section 966 . . . Nor does it in terms declare the remarriage void."[80] Based on this narrow reading of the statute, the Court determined the marriage was valid, even though prohibited by statute in the District. Thus, the plaintiff was entitled, as an incident of that marriage, to dower in the property within the District.[81]

Even those statutes that explicitly void marriages performed in other states may not void them in all situations. Miscegenation cases are the most helpful precedent for assessing how states with laws that purport to "void" marriages may treat same-sex unions properly performed in other states. Southern state courts were willing to apply a foreign state's law to validate an interracial marriage that contravened the forum state's law when the couple had married elsewhere and then migrated to the forum state. For example, in *Whittington v. McCaskill*[82] the Florida Supreme Court recognized the validity of a marriage between a white man and a black woman even though Florida had both a state statute and constitutional amendment declaring such marriages "null and void."[83] The court noted that the parties had not resided in Florida at the time of the marriage nor had they left Florida with the intent of evading the marriage prohibition statute.[84] In *State v. Ross*,[85] the Supreme Court of North Carolina recognized a marriage between a black man and a white woman despite a North Carolina law declaring such marriages void as against public policy.[86] The court articulated the dominant view regarding the application of the "public policy exception" to the place of celebration rule:

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[79] *Loughran v. Loughran*, 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934).

[80] Loughran, 292 U.S. at 266.

[81] Loughran, 292 U.S. at 225.

[82] *Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236 (1913).

[83] Whittington, 61 So. at 236.

[84] Whittington, 61 So. at 236.

[85] *State v. Ross*, 76 N.C. 242, 1877 WL 2696 (1877)

[86] Ross, 76 N.C. at 245.

> If we are right in our conception of the question presented, to-wit; whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterwards migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.[87]

State courts were also likely to recognize a prohibited marriage when the parties never lived in the forum but where the marriage was relevant to litigation in the forum. In *Miller v. Lucks*,[88] the Mississippi Supreme Court decided whether to recognize the inheritance right of a widower whose wife owned property within the state but whose interracial marriage was "unlawful and void" under the Mississippi constitution and statute.[89] The couple, Pearl and Alex Miller, were married and domiciled in Illinois when Pearl died. At the time of her death, Pearl owned property in Mississippi and Alex asserted a right to the property.[90] The court acknowledged that Mississippi's laws did not have extraterritorial effect nor would recognition of the marriage implicate the stated purpose behind the statute—to prevent cohabitation of black and white couples. Accordingly the court held "[w]hat we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized."[91]

Similarly, courts recognized that a forum's states laws could not inhibit a couple's right to temporarily visit the state. In *Ex parte Kinney*,[92] an otherwise harsh opinion, a Virginia court acknowledged the state could not exclude interracial couples domiciled elsewhere nor enforce its prohibition laws on nondomiciliaries. "That such a citizen would have the right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be

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[87]Ross, 76 N.C. at 245; see also *Garcia v. Garcia*, 25 S.D. 645, 127 N.W. 586 (1910) (validating a marriage between first cousins although it would have been void if contracted within the state of South Dakota).

[88]*Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140, 3 A.L.R.2d 236 (1948).

[89]Miller, 36 So. 2d at 141.

[90]Miller, 36 So. 2d at 141.

[91]Miller, 36 So. 2d at 142.

[92]*Ex parte Kinney*, 14 F. Cas. 602, No. 7825 (C.C.E.D. Va. 1879).

conceded because there are privileges following a citizen of the United States . . ."[93]

Although there are not many examples, this same constrained approach to statutory interpretation can also be seen in the same-sex union context. First, as noted earlier, Congress seemed to only consider the prospect of evasive marriages when it promulgated § 2 of DOMA.[94] Section 2 was intended to confirm that states were not required to recognize evasive marriages; a power that the Committee acknowledged existed at common law before Congress passed DOMA.[95] It did not purport to address the recognition issues raised by litigation affecting non-domiciliary couples, couples who change their domicile, or couples temporarily visiting the state. Moreover, Congress was careful to recognize the limits of its authority, acknowledging that there may be constitutional constraints on a blanket non-recognition rule.

Second, the few state courts that have interpreted their domestic relations law outside the evasive marriage context have done so narrowly. Before Maryland authorized marriages between same-sex couples, the Maryland Court of Appeals held that valid out of state same-sex marriages were cognizable in the state for purposes of the state's divorce law.[96] Although Maryland law at the time provided that "only a marriage between a man and a woman is valid in this State," the court held that it did not preclude the recognition of marriages validly performed in another jurisdiction.[97] The court reasoned that if the Legislature had intended to prevent recognition of foreign same-sex marriages it would have done so expressly and clearly as other states had done in their domestic relations law.[98]

Likewise, the Supreme Court of Wyoming granted a divorce between two women validly married in Canada even though the

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[93]Ex Parte Kinney, 14 F. Cas. at 602.

[94]H.R. Rep. 104-664, 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pages 6–10.

[95]House Report at 9 ("It is thus possible that a State, confronted with a resident same-sex couple possessing a 'marriage' license from Hawaii, could decline to recognize that 'marriage' on the grounds that to do so would offend that State's 'strong public policy.' ").

[96]See *Port v. Cowan*, 426 Md. 435, 447, 44 A.3d 970 (2012).

[97]Port, 426 Md. at 448.

[98]Port, 426 Md. at 448–449.

two women could not have been married in Wyoming.[99] The court reasoned that granting a divorce would not "lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship."[100] The Texas Court of Appeals affirmed the jurisdiction of the family court to grant a divorce between a same-sex couple despite a state law that prohibited any state agency from giving "effect to right or claim to any legal protection, benefit, or responsibility asserted as result of same-sex marriage."[101] The court recognized that the law could be interpreted narrowly:

> One could argue, for example, that section 6.204 did not prohibit the trial court's actions because divorce is a "benefit" of state residency, rather than a "legal protection, benefit, or responsibility" resulting from marriage. One could also argue that under the plain language of section 6.204 the trial court is only prohibited from taking actions that create, recognize, or give effect to same-sex marriages on a "going-forward" basis, so that the granting of a divorce would be permissible.[102]

As the preceding discussion illustrates, bankruptcy courts sitting in a forum with marriage prohibition laws should not assume that the forum state would impose a blanket non-recognition rule. State courts have traditionally adopted a narrow interpretation of such laws, evidencing both implicit and explicit awareness of constitutional limitations and issues of comity. Before a bankruptcy court assumes a conflict of law problem exists, it should carefully examine the statute to determine if it can harmonize the recognition of the marriage and attendant rights with the underlying statute and policies.

II. Choice of Law in Bankruptcy

A. The Case for a Federal Choice of Law Rule

To the extent a bankruptcy court cannot avoid a conflict of two states' domestic relations law—one that recognizes the marriage as valid and one that treats the marriage as void—the court will need to determine which state's law to apply. The question is whether a bankruptcy court sitting in a state that prohibits rec-

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[99] *Christiansen v. Christiansen*, 2011 WY 90, 253 P.3d 153, 76 A.L.R.6th 703 (Wyo. 2011).

[100] Christiansen, 253 P.3d at 156.

[101] *State v. Naylor*, 330 S.W.3d 434, 441 (Tex. App. Austin 2011), petition for review filed, (Mar. 21, 2011).

[102] Naylor, 330 S.W.3d at 441.

ognition of same-sex marriage is required to apply the forum state's domestic relations statute to void the marriage and the rights and obligations inherent in the relationship. The short answer is no.

As noted earlier, the question whether a marriage is valid is a choice of law question. When a state court ignores the traditional "place of celebration rule" and applies a contrary state law to void the marriage, the court is relying on an exception to the rule that authorizes the forum state to refuse to apply foreign law that violates an expressed public policy. But a state's public policy exception should only come into play in limited circumstances—when the state has a significant relationship with the parties or the underlying transaction.[103] In the absence of that relationship, the forum state lacks a legitimate basis for applying its law and doing so implicates due process.[104]

To avoid an inappropriately broad application of state's public policy exception in bankruptcy, bankruptcy courts can and should adopt a federal choice of law rule that promotes the underlying policies of the Bankruptcy Code and stays true to the Court's rationale in *United States v. Butner*.[105] The Court in *Butner* did not command blind adherence to or application of the forum state's law but rather mandated application of state law generally to protect the justified expectations of the parties and to ensure that the parties' rights and obligations were not unnecessarily altered by a bankruptcy filing.[106] *Butner* never purported to address which state law should be applied only that state law should be applied.

A federal choice of law rule will allow a bankruptcy court to balance the broad range of policies at stake in any bankruptcy filing—from Congress' expressed and implied intent in the Code, to the Supreme Court's rationale in *Butner*, to the various state

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[103]*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 2 Fed. R. Serv. 3d 797 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion)) (There must be "a significant contact, or significant aggregation of contacts, creating state interests, such that [a state's] choice of law is neither arbitrary nor fundamentally unfair.").

[104]See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

[105]*Butner v. U.S.*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

[106]Butner, 440 U.S. at 55. See also, Jackie Gardina, The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage, 86 B.U. L. Rev. 881, 929 (2005).

policies at issue, to the equities of the case. Unlike application of the forum state's choice of law rule, which would invariably require application of the forum state law in cases involving an expressed public policy prohibiting the recognition of marriage and its rights and obligations, a federal choice of law rule provides the court with the authority to look beyond the forum state's public policy.

Bankruptcy courts have the authority to create a federal choice of law rule. In areas where Congress can prescribe laws, the federal courts have a concomitant, albeit more limited, power to create federal common law.[107] There is a little question that Congress could mandate a particular choice of law rule in bankruptcy. Indeed it did just that in section 523(b)(3)(A) when it required bankruptcy courts to apply different state exemption laws in different circumstances.[108] While courts have questioned whether certain exemption laws have extra-territorial application, no court or commentator has questioned Congress' authority to insert a choice of law rule in the Code.[109] Nor has any court or commentator seriously questioned the authority of bankruptcy courts to supplant the forum state's choice of law rule with a federal rule when warranted.[110]

While the Supreme Court has yet to directly address the question regarding the appropriate choice of law rule in bankruptcy, it has implicitly endorsed a federal rule.[111] In the oft-cited case,

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[107]See William Baude, Beyond DOMA: Choice of Law in the Federal Statutes, 64 Stan. L. Rev. 1371, 1396 (June 2012); Jackie Gardina, The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage, 86 B.U. L. Rev. 881, 924–25 (2005).

[108]11 U.S.C.A. § 523(b)(3)(A) (2006).

[109]See *In re Jevne*, 387 B.R. 301, 303, 59 Collier Bankr. Cas. 2d (MB) 838 (Bankr. S.D. Fla. 2008) (and cases cited therein).

[110]Even the Second Circuit jurisprudence, which directs bankruptcy courts to apply the forum state's choice of law rule, does not hold that the bankruptcy courts lack the authority to adopt a federal choice of law rule rather that bankruptcy courts should only do so if there is a strong federal policy at stake. See *In re Gaston & Snow*, 243 F.3d 599, 607, 37 Bankr. Ct. Dec. (CRR) 181 (2d Cir. 2001). The Second Circuits subsequent decision in *In re Coudert Bros. LLP*, 673 F.3d 180, 186, 56 Bankr. Ct. Dec. (CRR) 23 (2d Cir. 2012) does not undermine this position.

[111]*Atherton v. F.D.I.C.*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

Vanston Bondholder Protective Comm. v. Green,[112] the appellate court raised the question whether the bankruptcy court was to apply New York law based on a federal choice of law rule or the choice of law rules of Kentucky, the forum state.[113] The Court never answered the question because it concluded the underlying substantive issue was a question of federal law, but it did insert some helpful dicta:

> But obligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.[114]

The circuit courts remain split on whether to apply the state choice of law rule or a distinct federal rule in bankruptcy.[115] Courts that have applied the forum state's choice of law rule have cited the Supreme Court's decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.*[116] where the Court held that a federal court sitting in diversity must apply the forum state's choice of law rules.[117] Other courts have expressed an abundance of caution about creating federal common law in the absence of a compelling federal interest.[118] Still other courts have adopted a federal choice of law

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[112]*Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

[113]Vanston, 329 U.S. at 160.

[114]Vanston, 329 U.S at 161–162.

[115]Compare *In re Coudert Bros. LLP*, 673 F.3d 180, 187–88, 56 Bankr. Ct. Dec. (CRR) 23 (2d Cir. 2012) (state choice of law rules applicable) with *In re Lindsay*, 59 F.3d 942, 948, 27 Bankr. Ct. Dec. (CRR) 646, 33 Collier Bankr. Cas. 2d (MB) 1574, Bankr. L. Rep. (CCH) P 76579 (9th Cir. 1995) (federal choice of law rules applicable).

[116]*Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, 49 U.S.P.Q. 515 (1941).

[117]See *In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 205, 1988 A.M.C. 2339, 5 U.C.C. Rep. Serv. 2d 900 (4th Cir. 1988).

[118]See *In re Gaston & Snow*, 243 F.3d 599, 607, 37 Bankr. Ct. Dec. (CRR) 181 (2d Cir. 2001).

rule in bankruptcy, citing *Vanston* for support and emphasizing the federal nature of bankruptcy.[119]

Upon close examination, reliance on *Klaxon* is misplaced. First, bankruptcy court jurisdiction is not based on diversity. Even when the courts are applying state law, they are doing so in the shadow of federal law and policies. Second, the policies animating the Court's decision in *Klaxon* are not necessarily relevant in bankruptcy. In *Klaxon* the Court sought to prevent the "accident of diversity" from disturbing the "equal administration of justice in coordinate state and federal courts sitting side by side."[120] The bankruptcy courts, however, are not "coordinate" state courts. Indeed, bankruptcy upends state law in many respects, preventing creditors from pursing state law remedies and altering certain state law rights. Finally, the threat of forum shopping is nonexistent—at least as it was meant in *Klaxon*. Unlike parties to a diversity suit, debtors cannot choose between state or federal court. A debtor is required to file in federal court[121] and, in the vast majority of consumer cases proper venue is likely to be limited to the state in which the person was domiciled for at least 180 days preceding the petition.[122] To the extent forum shopping is a reality in consumer cases, a bankruptcy court's decision to use the forum state choice of law rule rather than a distinct federal rule would, ironically, trigger the concerns animating *Klaxon*. A spouse or former spouse intent on shedding the rights and obligations associated with marriage need only move to a state that refuses to recognize that marriage to avoid them.

And whatever benefits there may be to a cautious approach to developing a federal choice of law rule, they are absent here. In the same sex marriage context, a federal choice of law rule is both appropriate and indeed the best way to protect the unique federal policies underlying bankruptcy and to promote *Butner*'s rationale. If courts were to blindly apply a forum state's law regarding same-sex relationships it would, in some instances, undermine the justified expectations of the parties and allow debtors or creditors to avoid rights and obligations that in the absence of bankruptcy could not be avoided. An outcome directly counter to what the Court sought to achieve through *Butner*.

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[119] *In re Lindsay*, 59 F.3d 942, 948, 27 Bankr. Ct. Dec. (CRR) 646, 33 Collier Bankr. Cas. 2d (MB) 1574, Bankr. L. Rep. (CCH) P 76579 (9th Cir. 1995).

[120] Klaxon, 313 U.S. at 469.

[121] 28 U.S.C.A. § 1334(a).

[122] 28 U.S.C.A. § 1408(a). To be sure, in the Chapter 11 context forum shopping between circuits remains a distinct possibility.

A federal rule avoids the potentially unconstitutional, inequitable and bizarre results that could emerge if a bankruptcy court were to apply the forum state law. Imagine a scenario where a same-sex spouse files a loss of consortium claim for an accident that occurred in Vermont, a state that recognizes the marriage and the claim.[123] The potentially liable party, however, files for bankruptcy in Florida, a state that prohibits recognition of the relationship and any right or claim arising from that relationship.[124] If the bankruptcy court were to apply Florida law to determine the enforceability of the claim,[125] it would bump against the limits of due process. Florida has no legitimate interest in applying its law to the underlying litigation.

Such an approach is not without precedent. A number of courts have allowed claims for gambling debts incurred in other states even though the forum state refuses to recognize such debts.[126] In *In re Jafari*, the bankruptcy court disallowed a Nevada casino's claims against the debtor because they were unenforceable under Wisconsin law.[127] The district court reversed. Despite Wisconsin's strong public policy regarding gambling debts, the court concluded that Nevada, not Wisconsin, law applied.

> The undisputed facts show that Jafari was in Las Vegas when he requested and received the credit-line increases that gave rise to the casinos' claims against him. Thus, the contracts were negotiated and executed in the state of Nevada. Moreover, the casinos do business in Nevada, which was precisely the reason that Jafari traveled there on numerous occasions. Nevada has an interest in insuring that entities that do business and enter into contracts within its borders are able to rely on the bargains they strike. In contrast, Wisconsin's only contact with the contracts was that Jafari happened to live in Wisconsin at the time he entered into the agreements.[128]

As the brief excerpt suggests, the court was sensitive to both the justified expectations of the parties to the transaction at the time it was made and the potential constitutional implications of applying Wisconsin law to a controversy in which Wisconsin had a limited connection.

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[123]Vt. Stat. Ann. Tit. 15 § 8 (2010).

[124]Fla. Ann. § 741.212 (West 2006).

[125]11 U.S.C.A. § 502(b)(2).

[126]See *In re Bill Hionas*, 361 B.R. 269, 275 (Bankr. S.D. Fla. 2006) (and cases cited therein); *In re Simpson*, 319 B.R. 256 (Bankr. M.D. Fla. 2003).

[127]*In re Jafari*, 385 B.R. 262, 267–68 (W.D. Wis. 2008).

[128]In re Jafari, 385 B.R. at 267–68.

Courts have primarily relied on the Restatement (Second) of Conflicts of Law as the federal common law choice of law rule.[129] The relevant Restatement provision regarding marriage provides that "the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage."[130] The rationale behind this rule echoes the concerns expressed by the Supreme Court in *Butner*.[131] The comments place primary importance on "protecting the justified expectations of the parties" which "gives importance in turn to the values of certainty, predictability and uniformity of result."[132] The analysis requires courts to look beyond the forum state law and ask whether the forum state has an interest in the underlying issue sufficient to warrant application of its own law—or more specifically its public policy regarding same-sex relationships.[133] If the connection is attenuated or another state has a greater interest in the underlying dispute or transaction, then the court should not apply the forum state law.

B. Illustrations

The following examples involving an "incident" of marriage illustrate how courts might navigate a potential conflict of law situation using the "significant relationship" test. The conflict will arise most frequently when a party's marital status defines the rights and obligations that she owes or that are owed to her. The analysis is unaffected by whether the bankruptcy court is sitting in a state that recognizes the union or a state that voids the union. The analysis is untethered to any particular state's public

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[129]See, e.g., *In re Vortex Fishing Systems, Inc.*, 262 F.3d 985, 994, 38 Bankr. Ct. Dec. (CRR) 96, 46 Collier Bankr. Cas. 2d (MB) 1415, Bankr. L. Rep. (CCH) P 78496 (9th Cir. 2001), opinion amended and superseded, 277 F.3d 1057 (9th Cir. 2002) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws."); *In re Symons Frozen Foods Inc.*, 432 B.R. 290, 297 (Bankr. W.D. Wash. 2010).

[130]Restatement (Second) Conflict of Laws § 283.

[131]Restatement (Second) Conflict of Laws § 283, comment b.

[132]Restatement (Second) Conflict of Laws § 283, comment b; see also *In re Farraj*, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 67 (Sur. Ct. 2009), order aff'd, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2d Dep't 2010) (protecting the justified expectations of the parties that their marriage was valid and that intestate inheritance rights applied).

[133]See *In re Jafari*, 569 F.3d 644, 650 (7th Cir. 2009) (finding Wisconsin lacked sufficient relationship with dispute and affirming the application of Nevada law despite Wisconsin's strong public policy); *In re Miller*, 292 B.R. 409, 413, 41 Bankr. Ct. Dec. (CRR) 57 (B.A.P. 9th Cir. 2003).

policy allowing the courts to be guided by broader policies and concerns.

1. Tenants by the Entirety

Section 522(b)(3)(B) states that a debtor can claim as exempt any property that the debtor had an interest in as "tenants by the entirety"—an interest that assumes the existence of a valid marriage—if it is exempt from process "under applicable law."[134] The Code does not specify "the applicable law" and bankruptcy courts have been faced with scenarios where a debtor is domiciled in a state that does not recognize the entirety interest, yet the property is located in a state that does. Courts have consistently held that the "applicable law" in such a scenario is the law of the state where the property is located, not the debtor's domicile.[135] This is in line with the Restatement (Second) approach as well. Under section 244, courts are directed to the local law of the state where the property is located.[136]

There is no reason why the outcome should differ because the exemption arises as a result of a same-sex marriage and the debtor has filed for bankruptcy in a state that prohibits the marriage and attendant rights. For example, assume a same-sex couple legally married in Vermont that owns a Vermont home as tenants by the entirety, but is forced to relocate to Florida for employment purposes. One spouse files for bankruptcy in Florida and lists the Vermont property as exempt. A creditor objects to the exemption, correctly arguing that Florida prohibits recognition of the marriage and any rights arising from it.

Although Florida has expressly prohibited its courts from recognizing any right arising from the legal recognition of a same-sex union,[137] application of Florida in this scenario would be inappropriate. Florida has neither a connection to nor an interest in the property. Perhaps more importantly, its expressed public policy is not impeded by the recognition of the debtor's exemption. The debtor and the nondebtor spouse have a justified expectation that the property is exempt and the creditor would not have been able to access the property outside of bankruptcy to satisfy the debtor's individual debts.

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[134] 11 U.S.C.A. § 522(b)(3)(B).

[135] See, e.g., *In re McNeilly*, 249 B.R. 576, 581 (B.A.P. 1st Cir. 2000); *In re Garrett*, 435 B.R. 434, 455 (Bankr. S.D. Tex. 2010); *In re Hayden*, 41 B.R. 21, 23, 12 Bankr. Ct. Dec. (CRR) 272 (Bankr. E.D. Ky. 1983).

[136] Restatement (Second) Conflicts of Law § 244 (1971).

[137] Fla. Stat. Ann. § 741.212(1) (West 2006).

The analysis would be the same if the couple owned a home in Florida but filed for bankruptcy in Vermont. If the debtor claimed an exemption to the property, the Restatement (Second) would point to Florida law. Although Florida has a tenancy by the entireties statute,[138] Florida law does not recognize the couple as married and as a result the exemption would not apply. While the Vermont bankruptcy court is free to recognize the marriage and rights and obligations associated with it in other circumstances within the bankruptcy case, Florida law is applicable to the exemption issue. In the absence of the bankruptcy filing, creditors could access the property to satisfy the debts of either spouse and the couple had no expectation that the Florida exemption law would apply to them.

What is significant to note is that the choice of law analysis did not rest on Florida's public policy prohibiting recognition of same-sex marriages. The analysis rightly focused on which state had the most significant relationship with the underlying issue—in this case the exemption of property. To allow a state's public policy to trump all other considerations is simply unsupportable and contrary to how courts have approached conflict of law issues in the past.[139] It also ignores the constitutional limits to any choice of law analysis.

2. Claim Allowance

Section 502(b) directs bankruptcy courts to disallow any claim if it is "unenforceable against the debtor" under applicable law.[140] As noted earlier, if a creditor's claim has already been reduced to judgment the bankruptcy court is bound by the Full Faith and Credit Act.[141] In all other instances, the court must determine the "applicable law."[142] Like the exemption example, the bankruptcy court should use the Restatement (Second) as guidance and apply

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[138]See *In re Daniels*, 309 B.R. 54, 56 (Bankr. M.D. Fla. 2004).

[139]See, e.g., *In re Bill Hionas*, 361 B.R. 269, 275 (Bankr. S.D. Fla. 2006) (and cases cited therein); *In re Simpson*, 319 B.R. 256 (Bankr. M.D. Fla. 2003). Accord, *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S. Ct. 338, 74 L. Ed. 926, 1930 A.M.C. 981, 74 A.L.R. 701 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

[140]11 U.S.C.A. § 502(b)(1).

[141]See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S. Ct. 229, 80 L. Ed. 220 (1935).

[142]See *In re Holliday*, 2011 WL 2518845, *2 (Bankr. D. Idaho 2011) (applying federal choice of law rules to determine "applicable law" under 502(b)(1)); *In re Guevara*, 409 B.R. 442, 449, 62 Collier Bankr. Cas. 2d (MB) 1027 (Bankr. S.D. Tex. 2009).

the law with the most significant relationship to the underlying dispute.

If the forum state has only a tangential connection to the underlying claim then it has no legitimate basis for applying its law. For example, assume a same-sex spouse were to file a loss of consortium claim in a bankruptcy case filed in Florida based on an accident that occurred in Massachusetts where the couple is domiciled. A loss of consortium claim, like tenants by the entirety, assumes a spousal relationship. The debtor could object and point to Florida's expressed prohibition against recognizing any rights or claims arising from a same-sex relationship.

The Restatement (Second) instructs courts to look to the local law of the state with the most significant relationship to the tort, paying close attention to the place where the injury occurred, the place where the conduct giving rise to the injury occurred and the domicile of the parties.[143] Under this analysis, Massachusetts law would be the "applicable law." Not only is Massachusetts the state where the tort occurred, but it is also the state in which the "marriage is domiciled" and thus has the greatest interest in the marital relationship.[144] In this scenario, the fact that the debtor filed the petition in a Florida bankruptcy court should have little influence in the analysis. If it did, the forum shopping concerns raised in *Klaxon* would be implicated and courts would be allowing the forum state tail to wag the federal bankruptcy dog.

The outcome could be quite different, however, if the spouse filed a loss of consortium claim in a bankruptcy case filed in Massachusetts based on an accident that occurred in Florida where the couple was domiciled. In this scenario, it would appear Florida has the most significant relationship with the underlying tort and subsequent injury to the spousal relationship. While Florida recognizes loss of consortium for injury to a spousal relationship, it does not recognize the same-sex couple as spouses. Mas-

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[143]See Restatement (Second) Conflicts of Law § 145.

[144]See *Avis Rent-A-Car Systems, Inc. v. Abrahantes*, 559 So. 2d 1262 (Fla. 3d DCA 1990) (holding that the trial court erred by denying the loss of consortium claims of wives whose husbands were injured on the Cayman Islands, based on a finding that Cayman law did not permit the cause of action); see also, e.g., *Hartley v. Dombrowski*, 744 F. Supp. 2d 328, 77 Fed. R. Serv. 3d 1014 (D.D.C. 2010) (for loss of consortium claims, the District of Columbia applies the law of the state where the marriage is domiciled; thus, in a case involving a Pennsylvania married couple, a claim resulting from surgery in Maryland, and a surgeon who was licensed and whose professional corporation did business in the District of Columbia, the court held that the law of Pennsylvania, the couple's domicile, governed the loss of consortium claim).

sachusetts would be no more free to ignore Florida law than Florida is free to ignore Massachusetts law in the previous scenario.

To be sure, these examples identify the "easy" cases where the relationship between the forum state and the underlying issue is attenuated at best. They are intended to illustrate only that the bankruptcy courts should not alter the traditional conflict of law analysis to accommodate a particular state's public policy regarding same-sex unions. A federal choice of law rule that focuses first on determining which state has the most significant relationship with the issue will allow courts to place federal bankruptcy policies, constitutional limitations and the equities of the case[145] before any one state's policies.

Conclusion

Bankruptcy courts are not writing on a clean slate as they grapple with the recognition of same-sex unions and attendant rights. States have always had differing domestic relations statutes, including statutes that declared void or even criminalized certain marriages. Bankruptcy courts need not break new ground. While the interstate recognition of same-sex marriage will continue to be troubling, especially for bankruptcy courts sitting in states that disfavor such marriages, the courts can be guided by well-established precedent. Bankruptcy courts should take the same cautious approach that courts have always taken when voiding marriages valid in the place of celebration. A blanket non-recognition rule has never been accepted and indeed would raise serious constitutional concerns. When conflicts are unavoidable, courts should not allow a forum state's domestic relations public policy to dictate the recognition of rights and obligations in bankruptcy. By adopting a federal choice of law rule, courts can sidestep the public policy debate regarding same-sex unions and consider the full range of policies present in bankruptcy.

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[145]See *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161–162, 67 S. Ct. 237, 91 L. Ed. 162 (1946).

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Feature

BY JOSEPH C. BARSALONA II[1]

The Fall of DOMA and the Code

State Domestic-Relations Laws May Determine Whether a Debtor Wins or Loses

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On June 26, 2013, the U.S. Supreme Court handed down its opinions in *United States v. Windsor*[2] and *Hollingsworth v. Perry*,[3] both of which are praised as historic decisions for gay rights.[4] While their impact on civil rights is clear, their effect on debtor and creditor rights is quite muddled. This confusion stems from the opinions' creation of a new state law vs. federal law dichotomy: While *Windsor* allows legally married same-sex couples to receive benefits under federal law by striking down section 3 of the Defense of Marriage Act (DOMA), both *Windsor* and *Hollingsworth* leave sole authority for legalizing same-sex marriage in the hands of state legislatures. How should a legally married same-sex couple residing in a nonrecognition[5] state proceed with their bankruptcy filing? This article provides a glimpse into a few topics that practitioners and bankruptcy courts will need to consider during this exciting time in American civil rights history.

The Current State of Same-Sex Marriage in America

At present, only the District of Columbia and 12 states permit same-sex couples to marry: Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington.[6] However, the Supreme Court's ruling has sparked new action,[7] and further change is expected across all states.

Even before *Windsor* and *Hollingsworth* were argued before the Supreme Court, bankruptcy courts were faced with the question of whether to allow legally married same-sex couples to file joint petitions.[8] Unfortunately, with DOMA in place, these couples routinely ended up on the losing side.[9] However, it is only a matter of time before the "state law shoe" falls[10] and all state laws illegalizing gay marriage are forced to pass constitutional muster. During this interim period, homosexual debtors will rely on counsel's knowledge of state domestic-relations law in order to receive the fresh start that the Bankruptcy Code provides. Therefore, in order to efficiently advise their same-sex clients of their rights, it would be prudent for consumer bankruptcy practitioners to learn the similarities and differences of the domestic-relations laws among states.

Means Testing and Marital Deduction

As a way to facilitate the discussion, here is a set of hypothetical facts with which we can create different scenarios. A same-sex couple, Y and Z, are legally married in New York but relocate to Florida, a nonrecognition state. Because *Windsor* permits both same- and opposite-sex couples to be "mar-

1 The views expressed herein are solely those of the author.
2 133 S. Ct. 2675.
3 133 S. Ct. 2652.
4 *See, e.g.*, Erica Goode, "Ruling on Same-Sex Marriage May Help Status of Divorce," *N.Y. Times*, July 3, 2013, at A15 (*Windsor* "has been hailed as a victory for gay couples who wish to marry"); Tom Warnke, "In Historic Rulings, Court Rejects Discrimination Against Same-Sex Couples," LambaLegal.org (June 26, 2013), available at www.lambdalegal.org/news/us_20130626_scotus-rejects-discrimination-against-same-sex-couples.
5 In this article, states that have legalized same-sex marriage are hereinafter called "recognition states" while those that have not legalized same-sex marriage are labeled "non-recognition states."
6 *See Windsor*, 133 S. Ct. at 2690 (listing all 12 state laws and the District of Columbia).
7 Challenges to laws illegalizing gay marriage have already been filed in Pennsylvania and Virginia. *See* Saranac Hale Spencer, "Pa. Same-Sex Marriage Suit Picks Up Where Perry Left Off," *The Legal Intelligencer* (July 10, 2013) (describing Pennsylvania suit); Markus Schmidt, "ACLU to Challenge Va. Gay Marriage Ban in Court," *Richmond Times-Dispatch* (July 9, 2013) (describing Virginia suit).
8 *See In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (U.S. Trustee moved to dismiss chapter 13 case of legally married same-sex couple); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (question of legality of joint petition by same-sex couple brought on by order to show cause by court); *Bone v. Allen (In re Allen)*, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (chapter 13 trustee objected to joint petition by same-sex couple).
9 *Kandu*, 315 B.R. at 148; *Allen*, 186 B.R. at 774.
10 *See Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) ("[T]he majority ... needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state law shoe to be dropped later, maybe next Term).").

ried" and be labeled as "spouses,"[11] same-sex couples now have the choice to file a joint petition[12] or to file independently. Below are some considerations under both scenarios.

Joint Petition

There are many advantages to a couple filing a joint petition. First, the debtors would only need to pay one filing fee, saving the couple upwards of $245.[13] Second, when counsel represents the couple rather than each individual separately, attorneys' fees and costs should decline. Most importantly, the couple has myriad options regarding the exemptions they take pursuant to § 522. Indeed, an entire article can be devoted to this subtopic alone, but nevertheless, the fundamental advantage for married debtors is that they may take double the amount of the federal exemptions in order to account for their individual property rights.[14] For example, a married couple can take a combined exemption of $45,950 toward their homestead if they own the property jointly,[15] allowing them much more financial flexibility to ensure their fresh start.

One Spouse Files

When consumer debtors file their petitions under chapters 7, 11 or 13, they are required to complete Official Form B22A (*i.e.*, a Statement of Current Monthly Income and Means Test Calculation).[16] Column A provides for the debtor's income, while column B allows for the spouse's income. Where in the past a legally married same-sex nondebtor spouse would only be able to submit his or her income on line 8 of the form,[17] the abrogation of § 3 of DOMA allows that spouse to submit all of his or her financial information into column B.

The benefit of this change is enormous: Y is now eligible for the marital deduction on her Form B22A. The marital deduction represents the portion of the nondebtor spouse's income that does not go toward household expenses, *i.e.*, the portion of the nondebtor's income that should be excluded from the debtor's current monthly income (CMI).[18] While CMI is a defined term under the Bankruptcy Code,[19] there has still been ample litigation over how much of a nonfiling spouse's income should be included.[20] Nevertheless, providing same-sex couples with the option of utilizing the marital deduction is a far better alternative than the fact-intensive inquiry that a trustee would make into the figure on the "household expenses" line.[21] Just having that option could make the difference in whether a debtor's case will succeed or result in dismissal.

11 *Windsor*'s holding abrogates the portion of DOMA that amends the Dictionary Act in 1 U.S.C. § 7 restricting the term "marriage" and "spouse" to apply to opposite-sex spouses. *Windsor*, 133 S. Ct. at 2683; 1 U.S.C. § 7.
12 11 U.S.C. § 302(a).
13 28 U.S.C. § 1930(a)(1)(A)-(B).
14 *See* 11 U.S.C. § 522(m) ("[T]his section shall apply separately with respect to each debtor in a joint case.").
15 11 U.S.C. § 522(d)(1) (current homestead exemption amount is $22,975).
16 11 U.S.C. §§ 707(b)(2)(C), 1129(a)(15) and 1325(b)(2).
17 Line 8 requires listing "[a]ny amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents." *See* Form B22A. This amount derives from and is necessitated by the "current monthly income" section within the Bankruptcy Code. 11 U.S.C. § 101(10A)(B).
18 *In re Hammock*, 436 B.R. 343, 349 (Bankr. E.D.N.C. 2010); *In re Vollen*, 426 B.R. 359, 366 (Bankr. D. Kan. 2010).
19 11 U.S.C. § 101(10A).
20 *See, e.g., Stapleton v. Baldino (In re Baldino)*, 369 B.R. 858 (Bankr. M.D. Pa. 2007) (nonfiling spouse's income could be included in debtor's CMI only in amount regularly contributed to household expenses); *In re Travis*, 353 B.R. 520 (Bankr. E.D. Mich. 2006) (disputing how much of nonfiling spouse's contribution to food and utilities should be included in household expenses).
21 *See In re Trimarchi*, 421 B.R. 914, 918 (Bankr. N.D. Ill. 2010) ("[D]etermination of the amount paid by a non-filing spouse on a regular basis for household expenses of the debtor ... is ... fact-specific and subject to interpretation.").

Divorce Issues

An area in which *Windsor* will play an important role in how bankruptcy courts treat the state and federal law disparity is in the context of divorce. Indeed, the only provisions of the Bankruptcy Code mentioned in Justice Anthony Kennedy's opinion relate to domestic-support obligations and marital-settlement agreements (*i.e.*, creatures of divorce).[22] The question then becomes, how might such an issue arise?

Say Y and Z adopt a child in Massachusetts during the pendency of their marriage and later divorce. As part of that divorce, their respective counsel draft a document (divorce settlement) dividing up the spouses' marital property. Y then moves to a nonrecognition state, resides there for the requisite 180 days and then files a petition under chapter 13.

Now assume that Z brings an adversary proceeding under § 523(a)(5) to find nondischargeable the payments by the debtor in regards to the divorce settlement.[23] The debtor defends that claim by asserting that the claim falls under § 523(a)(15).[24]

At the heart of this dispute will be a fact-intensive inquiry into whether the divorce settlement is in "the nature of alimony, maintenance or support."[25] While this analysis is a matter of federal and not state law, the bankruptcy court may turn to the underlying state law to determine the intent of the parties at the time of the drafting of the agreement.[26] Parties may also have to resort to state court in the forum state to modify the divorce settlement to conform to the bankruptcy court's order.[27] In essence, the determination at the federal level is perpetually intertwined with state domestic-relations law.

At this juncture, and even before the claim is litigated, the creditor spouse has a choice to make: keep the case in the nonrecognition court, or transfer it to a same-sex marriage forum. This is where the issue of venue comes in.

Venue

The applicable venue provision for bankruptcy cases, including all consumer filings, is § 1408(1) of title 28, which permits cases to be filed in the district "in which the domicile, residence ... or principal assets ... of the person ... that is the subject of such case"[28] are located. Using the hypothetical set of facts, the easiest choice of venue for Y individually, or the couple jointly, is to file for bankruptcy in Florida, as that state may be deemed their residence or domicile.

This location is not set in stone, however. Under Federal Rule of Bankruptcy Procedure 1014(a), any creditor or other party in interest may move to transfer venue to a "district court for another district."[29] It is then at the judge's discretion to either keep the case or to transfer venue "in the interest of justice or for the convenience of the parties."[30] There are

22 *See Windsor*, 133 S. Ct. at 2694 ("[DOMA] deprives [same-sex married couples] of the Bankruptcy Code's special protections for domestic-support obligations.") (citing 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5) and 523(a)(15)).
23 Domestic-support obligations, defined in 11 U.S.C. § 101(14A), are nondischargeable in any case pursuant to 11 U.S.C. § 523(a)(5).
24 11 U.S.C. § 1328(a)(2). In a chapter 13, § 523(a)(15) claims are prone to discharge, while § 523(a)(5) claims are not.
25 *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762 (3d Cir. 1990).
26 *Id.* at 762-63.
27 *Id.* at 763.
28 28 U.S.C. § 1408(1).
29 Fed. R. Bankr. P. 1014(a)(1).
30 28 U.S.C. § 1412.

two strong arguments as to why a bankruptcy judge should transfer the venue to a court in the state in which the couple was married: (1) unfamiliarity with that state's law and (2) treatment of the case if the couple gets divorced.

Chief Judge Thomas Twardowski of the Eastern District of Pennsylvania faced a similar dilemma in *In re Uslar*.[31] In that case, the ex-wife of the debtor moved to transfer the venue of her § 523(a)(5) dischargeability adversary proceeding against the debtor from Pennsylvania, where the debtor resides, to New Jersey, where the majority of his creditors and his marital residence remained.[32] During the hearing, the ex-wife argued that the transfer of venue was necessary because her claim would depend on an interpretation of New Jersey domestic-relations law, and thus a New Jersey bankruptcy judge would be more learned in such matters.[33] Using a test balancing six different factors, the court found that the evidence weighed in favor of retaining venue in the Eastern District of Pennsylvania.[34] Furthermore, the court stated that the "interpretation of state law" question would be better suited in a motion to abstain pursuant to 28 U.S.C. § 1334(c)(1).[35]

In theory, the opposite result could have occurred based on a different judge's discretion. The possibility of abstention and transfer of venue escalates when the facts involve a highly controversial issue (same-sex marriage/divorce) and a better forum is available (the same-sex-marriage state).

Conclusion

Never has state domestic-relations law been more important to consumer bankruptcy practitioners than in the post-*Windsor* world. Same-sex couples are now able to receive more favorable treatment on means testing and less-invasive exams by trustees. Divorcing couples should be prepared to litigate in the state in which they now reside or the state in which they were married, per the judge's discretion. Most importantly, those ever-changing state laws may lead to a judge's abstention altogether. As same-sex debtors' rights continue to grow in number, it is counsel's responsibility to be aware of state law changes as they come about. Now, about those tax implications.… abi

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31 131 B.R. 22 (Bankr. E.D. Pa. 1991).

32 *Id.* at 23.

33 *Id.* at 24 n.4.

34 Those factors are: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate to the court; (4) the location of the assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if liquidation results. *Id.* These same factors have remained mostly the same across districts in consumer cases. *See, e.g., Donald v. Curry (In re Donald)*, 328 B.R. 192, 204 (B.A.P. 9th Cir. 2005); *Bavelis v. Doukas (In re Bavelis)*, 453 B.R. 832, 869 (Bankr. S.D. Ohio 2011).

35 *Uslar*, 131 at 24 n.4. There are 18 different factors that a judge may consider when deciding whether to permissively abstain. *In re Kessler*, 430 B.R. 155, 165 (Bankr. M.D. Pa. 2010). That laundry list includes: (1) the extent to which state law issues predominate over bankruptcy issues; (2) the difficulty or unsettled nature of the applicable state law; and (3) the likelihood that the commencement of the proceeding in bankruptcy court involves forum-shopping by one of the parties. *Id.*