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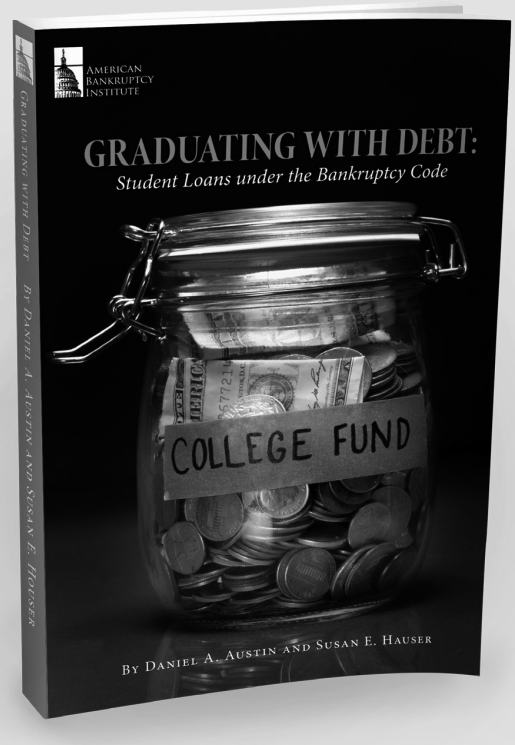

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Same-Sex Marriages in Bankruptcy: A Path Out of the Public Policy Quagmire

Jackie Gardina[1]

This article attempts to answer the choice of law question posed by Justice Scalia in his dissent in *United States v. Windsor*.[2] In *Windsor* the Supreme Court ruled that §3 of the Defense of Marriage Act (DOMA) was unconstitutional. The decision was intended to be a narrow one, allowing legally married same-sex couples to receive the myriad of federal rights and benefits tied to marital status.[3] In his dissent, however, Justice Scalia criticized the majority's decision for avoiding "difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage."[4] He posed the questions the majority left unanswered.

> Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of- state same-sex marriage is an unsettled question under local law? [5]

Attorney General Holder answered the first question when he instructed federal agencies, to the extent permitted by federal law, to recognize all same-sex marriages if valid in the state where celebrated.[6] Holder's announcement, however, was limited to the application of federal

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[1] 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.

[2] 133 S.Ct. 2675 (June 26, 2013).

[3] Id. at 2695.

[4] Id. at 2708.

[5] Id.

[6] *See* Memorandum from Attorney General Holder to All Department Employees, *Department Policy Ensuring the Equal Treatment of All Same-Sex Married Couples,* Feb. 11, 2014 ("It is the Department's policy, to the extent federal law permits, to recognize lawful same-sex marriages as broadly as possible, and to recognize all marriages valid in the jurisdiction where the marriage was celebrated.") *available at* http://www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf

law. He did not nor could he answer the question of how same-sex marriages should be treated under state law. Those questions remain unanswered.

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 *United States v. Butner*[7] 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.[8] Bankruptcy courts have ruled on the validity of marriages in a wide array of circumstances from determining the scope of the debtor's exemptions[9] to ruling on the existence of a fraudulent transfer[10] to establishing the propriety of a creditor's lien.[11] 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.[12]

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

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[7] *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).

[8] *See, e.g., In re Blankenship*, 133 B.R. 398, 400 (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*, No. 7-10-15616, 2012 WL 400715, at *1 & n.2 (Bankr.D.N.M 2012); *In re Bakkar*, No. 08-22105, 2009 WL 3068192, at *3 (Bankr.D.N.J. 2009).

[9] *See In re Cohen*, No. 7-10-15616, 2012 WL 400715, at *1 & n.2 (Bankr.D.N.M 2012).

[10] S*ee In re Blankenship*, 133 B.R. at 402.

[11] I*n re Nakamura*, No. 06-40685, 2008 WL 191811, * 3-4 (Bankr.D.Idaho).

[12] *See, e.g., In re Bakkar*, No. 08-22105, 2009 WL 3068192, at *4 (Bankr.D.N.J. 2009); *In re Veneziale*, 267 B.R. 695, 699-700 (Bankr.E.D.Penn. 2001).

recognized prohibited marriages if they were valid where performed.[13] 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 be 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 of state laws regarding same-sex relationships. This section 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 did it have the authority to allow states to impose a blanket non-recognition rule on all same-sex unions.

After reviewing state laws that recognize same-sex unions, it next places the marriage prohibition statutes in a 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

[13] *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*, No. 9-03-BK-15259, 2005 WL 41976, *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.").

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 will also allow the 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 is 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.[14]

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, over thirty states – although this number is constantly changing - have statutes or constitutional amendments prohibiting marriages between same-sex couples and in most instances also refusing to recognize

[14] 28 U.S.C. § 1738C.

marriages performed in other states.[15] 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."[16] 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."[17] 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 that 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,[18] 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 records, the effect of Section 2 is merely to authorize a sister State to decline to give effect to such orders; it does

[15] *See supra* note Part I.B.2.

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

[17] *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).

[18] *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.).

> 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.[19]

As of this writing, the lower courts have not found that DOMA § 2 raises constitutional concerns in the marriage context.[20] The cases challenging DOMA § 2, however, all involve plaintiffs seeking to have a marriage license – not court judgments - recognized in their home states.[21] 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, [22] although no state enforced a blanket non-recognition rule.[23] 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 the more nuanced questions regarding a couple who changes domiciles from a state that recognized their marriage to one that does not; a couple who is temporarily visiting a state that prohibits the marriage; or a couple who has no connection to the forum state other than a litigation currently in its courts.[24]

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[19]H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pages 28-29.

[20]*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 (N.D.OK 2006) *reversed on other grounds* No. 06-5188, 2009 WL 1566802 (10th Cir. 2009); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304 (2005).

[21]*Smelt v. County of Orange*, 447 F.3d 673, 684 (9th Cir. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239 (N.D.OK 2006); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304 (2005).

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

[23] *Infra* Part I.B.2.

[24] *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).

Answers to these questions cannot be found in the text of 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.[25] In describing its understanding of the existing legal landscape the Committee stated:

> 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."[26]

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

[25]H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

[26]H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8 (emphasis added).

marriage. This limitation is entirely consistent with pre-existing understanding of how state courts interpreted and implemented their previous state marriage prohibition statutes.[27]

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.[28] In 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."[29]

Congress does not have the authority, nor did it purport, to remove this basic due process limitation when it passed DOMA § 2.[30] 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.[31] Outside the marriage context, bankruptcy courts have been sensitive to the

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

[28] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)(*quoting Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (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.")

[29] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981)(plurality opinion)).

[30] H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8

[31] *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).

constitutional implications of the choice of law analysis. In *In re McCallister*,[32] 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.[33]

Most courts have successfully avoided the constitutional concerns raised in *McCallister* by identifying the state with the most significant interest in the underlying dispute.[34] 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.[35] Accordingly, while DOMA § 2 is written broadly, Congress' authority and intent call for a significantly more restricted interpretation of the § 2 and the state laws that were 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

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[32] 216 B.R. 957, 973-974, n. 14 (Bankr.N.D.Ala. 1998).

[33] *McCallister*, 216 B.R. at 973-974.

[34] *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930)(rejecting application of TX law because the state lacked any connection to the underlying transaction); *In re Metrocomm Corp.*, 274 B.R. 641, 659 (Bankr.D.Del. 2002); *In re Fineberg*, 202 B.R. 206, 219 (Bankr.E.D.Penn. 1996); *In re Revco D.S., Inc.* 118 B.R. 468, 501 (Bankr.N.D.Ohio 1990).

[35] *See, e.g., In re Zukerkorn*, 484 B.R. 182, 192-93 (9th Cir. BAP 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).

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 the dissolution of those unions. Each approach brings with it 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 this section 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 this writing, nineteen states along with the District of Columbia and three Native American tribes have legalized same-sex marriage.[36] But the landscape is quickly shifting. Relying on *Windsor*, several state and federal district courts have declared state marriage prohibition laws unconstitutional and several cases are pending.[37] Suits have been filed in several other states and states attorneys general have taken conflicting positions on their obligation to defend state laws.

2. Relationship Prohibition

But currently a majority of states still have statutes or constitutional amendments (or both) prohibiting marriages between same-sex couples and, in some instances, explicitly refusing

[36] Nineteen states - CA, CT, DE, HI, IA, IL, ME, MD, MA, MN, NH, NJ, NM, NY, OR, PA, RI, VT, and WA - plus Washington, D.C and three Indian tribes provide for marriage equality. 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.*

[37] In an additional eleven states, judges have issued rulings in favor of the freedom to marry, with many of these rulings now stayed as they proceed to appellate courts: In AR, ID, MI, OK, TX, UT, and VA judges have struck down marriage bans, and in IN, KY, OH, and TN, judges have issued more limited pro-marriage rulings.

to recognize marriages validly performed in other states as well as any rights arising from those marriages.[38] These prohibitions, the 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 marriages between couples validly performed in other states.[39] The second category encompasses the first and explicitly refuses to recognize rights arising from those marriages.[40] A

[38] 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); 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); 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).

[39] 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.").

[40] 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."); 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

third category includes the first two categories and refuses to enforce *judgments* that involved a marriage between persons of the same sex.[41] 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.

a. The Full Faith and Credit Act

While the first two categories -- state laws that purport to void legal marriages and state laws that propose to invalidate rights arising from the 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 recognize 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 authorized states, through statute, to refuse to recognize judgments from sister states regarding same-sex marriages.[42] 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.[43] 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.[44] This is true even if the

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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.").

[41] 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).

[42] 28 U.S.C. § 1738C.

[43] 28 U.S.C. § 1738.

[44] *See Durfee v. Duke*, 375 U.S. 106, 109

(1963).

forum state would not entertain the suit.[45] 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.[46]

The Court emphasized 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.*"[47]

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.[48] In *In re Leroux*,[49] 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.[50] The debtor argued that the claim should be disallowed because such debts were unenforceable in Massachusetts as against public policy.[51] 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

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[45] *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

[46] *Milwaukee County v. M.E. White Co.*, 296 U.S. at 277.

[47] *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998)(emphasis in the original).

[48] *See In re Kaid*, 472 B.R. 1, 8 (Bankr.E.D.MI 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.MD 1996)(*citing Fauntleroy v. Lum,* 210 U.S. 230 (1908)).

[49] 216 B.R. 459 (Bankr.D.Mass. 1997).

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

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

this Court that New Jersey would provide."[52] 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.[53] 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.[54] 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.[55] 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 had admitted the couple was husband and wife.[56]

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 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.'"[57] 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

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

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

[54] *In re Johnson,* 473 B.R. at 455-457.

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

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

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

previous litigation.[58] While the court never explicitly cited to the Full Faith and Credit Act, it performed the relevant preclusion analysis. Finally, the court found that the debtor was judicially estopped from asserting a position contrary to the one that he had held throughout a previous litigation.[59]

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

But the Full Faith and Credit Act only applies in situations where there has been a previous court judgment, it does not address circumstances in which 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 has a statute denying it 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.[60] 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-

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

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

[60] *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.[61] 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.[62] 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 without the miscegenation context, courts showed flexibility in construing and applying relevant marriage prohibition statutes to achieve equitable results that were consistent with due process concerns and relevant conflict of law limitations.[63]

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.[64] The Restatement (Second) of Conflicts of Law § 283 provides a widely adopted exception to this rule that allows the state with the most

[61] Andrew Koppleman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2152 (June 2005) (hereinaftrer 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).

[62]Koppelman, *Handbook for Judges*, 153 U. PA. L. REV at 2152.

[63] *See, e.g. State v. Fenn*, 92 P. 417, 418 (Wash. 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)(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).

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

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.[65]

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 state seeking recognition of the marriage.[66] Because the forum state was the state with the most significant relationship with the couple at the time they were married the state could void the marriage.[67] As noted earlier, this same limited exception was articulated in the House Report supporting DOMA § 2.[68] Citing this limitation, courts consistently refused to recognize evasive marriages.

But 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.

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

[66] 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.

[67] *State v. Fenn*, 92 P. 417, 418 (Wash. 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)(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).

[68] H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), at 8.

> 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.[69]

Even the Supreme Court weighed in on the reach of a state's law that sought to prohibit marriages of non-domiciliaries. In *Loughran v. Loughran*,[70] 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 that "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."[71] Based on this narrow reading of the statute, the Court found the marriage was valid, even though prohibited by statute in the District, and the plaintiff was entitled, as an incident of that marriage, to dower in the property within the District.[72]

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

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

[70] 292 U.S. 216 (1934).

[71] *Loughran,* 292 U.S. at 266.

[72] *Loughran,* 292 U.S. at 225.

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*[73] 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."[74] 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.[75] In *State v. Ross*,[76] 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 the public policy of the state.[77] The court articulated the dominant view regarding the application of the "public policy exception" to the place of celebration rule:

> 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.[78]

State courts were also likely to recognize a prohibited marriage when the parties never lived in the forum but in which the marriage was relevant to litigation in the forum. In *Miller v. Lucks*,[79] the Mississippi Supreme Court had to determine whether it would recognize the

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[73] 61 So. 236 (Fla. 1913).

[74] *Whittington,* 61 So. at 236.

[75] *Whittington,* 61 So. at 236.

[76] 76 N.C. 242 (1877)

[77] *Ross,* 76 N.C. at 245.

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

[79] 36 So.2d 140 (Miss. 1948).

inheritance right of a widower whose wife owned property within the state but whose interracial marriage was deemed "unlawful and void" under the Mississippi constitution and statute.[80] 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.[81] The court acknowledged that Mississippi's laws did not have extra-territorial 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."[82]

Similarly, courts recognized that a forum's states laws couldn't inhibit a couple's right to temporarily visit the state. In *Ex Parte Kinney*, [83] an otherwise harsh opinion, a Virginia court acknowledged the state could not exclude interracial couples domiciled elsewhere nor enforce its prohibition laws on non-domiciliaries. "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 conceded because there are privileges following a citizen of the United States . . . ."[84]

Although there are not many examples, this same constrained approach to statutory interpretation can be seen in the same-sex union context as well. First, as noted earlier, Congress

[80] *Miller*, 36 So.2d at 141.

[81] *Miller,* 36 So.2d at 141.

[82] *Miller,* 36 So.2d at 142.

[83] 14 F.Cas. 602 (C.C.E.D. Va. 1879) (No. 7825).

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

seemed to only consider the prospect of evasive marriages when it promulgated § 2 of DOMA.[85] 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.[86] It did not purport to address the recognition issues raised by litigation effecting 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 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.[87] 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.[88] 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.[89]

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[85]H.R. REP. 104-664, H.R. Rep. No. 664, 104th Cong., 2d. Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg.Hist.), pages 6-10.

[86] 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.'")

[87]*See Port v. Cowan*, 426 Md. 435, 447 (Ct.App.Md. 2012)

[88]*Port v. Cowan,* 426 Md. at 448.

[89]*Port v. Cowan,* 426 Md. at 448-449.

Likewise, the Supreme Court of Wyoming granted a divorce between two women validly married in Canada even though the two women could not have been married in Wyoming.[90] 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."[91] In Texas, the 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."[92] 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."[93]

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

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[90] *Christiansen v. Christiansen*, 253 P.3d 153 (Wy. 2011).

[91] *Christiansen,* 253 P.3d at 156.

[92] *State v. Naylor,* 330 S.W.3d 434, 441 (TX Ct.ofApp. 2011).

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

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 recognition of same-sex relationships 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.[94] In the absence of that relationship, the forum state lacks a legitimate basis for applying its law and doing so implicates due process.[95]

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

[94] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)(*quoting Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (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.").
[95] *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981)(plurality opinion).

the underlying policies of the Bankruptcy Code and stays true to the Court's rationale in *United States v. Butner.*[96] 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 that the parties' rights and obligations were not unnecessarily altered by a bankruptcy filing.[97] *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 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.[98] There is a little question that Congress could mandate a particular choice of law rule in bankruptcy. Indeed it did just that in § 523(b)(3)(A) when it required bankruptcy courts to apply different state exemption laws in different circumstances.[99] While

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[96] 440 U.S. 48, 55 (1979).

[97] *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).

[98] *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).

[99] 11 U.S.C. § 523(b)(3)(A) (2006).

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.[100] Nor has any court or commentator seriously questioned the authority of the bankruptcy courts to supplant the forum state's choice of law rule with a federal rule when warranted.[101]

While the Supreme Court has yet to address directly the question regarding the appropriate choice of law rule in bankruptcy, it has implicitly endorsed a federal rule.[102] In the most oft-cited case, *Vanston Bondholder Protective Comm. v. Green*,[103] 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 on the choice of law rules of Kentucky, the forum state.[104] 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 dictum.

> 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.[105]

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[100] *See In re Jevne,* 387 B.R. 301, 303 (Bankr.S.D.Fla. 2008)(and cases cited therein).

[101] 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*, 243 F.3d 599, 607 (2d Cir. 2001). The Second Circuits subsequent decision in *In re Coudert Bros.*, LLP, 673 F.3d 180, 186 (2d Cir. 2012) does not undermine this position.

[102] *Atherton v. F.D.I.C.,* 519 U.S. 213 (1997); *Vanston Bondholder Protective Comm. v. Green,* 329 U.S 156 (1946).

[103] 329 U.S. 156 (1946).

[104] *Vanston,* 329 U.S. at 160.

[105] *Vanston,* 329 U.S at 161-162.

The circuit courts remain split on whether to apply the state choice of law rule or a distinct federal rule in bankruptcy.[106] 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.*[107] where it held that a federal court sitting in diversity must apply the forum state's choice of law rules.[108] Other courts have expressed an abundance of caution about creating federal common law in the absence of a compelling federal interest.[109] Still other courts that have adopted a federal choice of law rule in bankruptcy citing *Vanston* for support and emphasizing the federal nature of bankruptcy.[110]

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."[111] 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 non-existent – 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

[106] *Compare In re Coudert Bros.* LLP, 673 F.3d 180, 187-88 (2d Cir. 2012)(state choice of law rules applicable) *with In re Lindsay,* 59 F.3d 942, 948 (9th Cir.1995)(federal choice of law rules applicable).

[107] 313 U.S. 487 (1941).

[108] *See In re Merritt Dredging Co. Inc.,* 839 F.2d 203, 205 (4th Cir.1988).

[109] *See In re Gaston,* 243 F.3d 599, 607 (2d Cir. 2001).

[110] *In re Lindsay,* 59 F.3d 942, 948 (9th Cir.1995).

[111] *Klaxon,* 313 U.S. at 469.

court[112] 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.[113] 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 with its *Butner* opinion.

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.[114] The potentially liable party, however, files for bankruptcy in Florida, a state that prohibits recognition of the relationship and any right or

[112] 28 U.S.C. § 1334(a).

[113] 28 U.S.C. § 1408(a). To be sure, in the Ch. 11 context forum shopping between circuits remains a distinct possibility.

[114] VT. STAT. ANN. Tit. 15 § 8 (2010).

claim arising from that relationship.[115] If the bankruptcy court were to apply Florida law to determine the enforceability of the claim,[116] 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.[117] In *In In re Jafari*, the bankruptcy court disallowed a Nevada casino's claims against the debtor because they were unenforceable under Wisconsin law.[118] 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.[119]

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 to which Wisconsin had a limited connection.

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[115] Fla. Ann. § 741.212 (West 2006).

[116] 11 U.S.C. § 502(b)(2).

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

[118] 385 B.R. 262, 267-68 (W.D.Wisc. 2008).

[119] *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.[120] 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."[121] The rationale behind this rule echoes the concerns expressed by the Supreme Court in *Butner*.[122] 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."[123] 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.[124] 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

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[120] *See, e.g., In re Vortex Fishing Sys., Inc.,* 262 F.3d 985, 994 (9th Cir.2001) ("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).

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

[122] § 283, comment b.

[123] Restatement (Second) § 283, comment b; *see also In Re Ferraj,* 886 N.Y.S.2d 67 (2009)(protecting the justified expectations of the parties that their marriage was valid and that intestate inheritance rights applied).

[124] *See In re Jafari,* 569 F.3d 644, 650 (7th Cir. 2009)(finding Wisconsin lacked sufficient relationship withdispute and affirming the application of Nevada law despite Wisconsin's strong public policy); *In re Miller,* 292 B.R. 409, 413 (9th Cir. BAP 2003).

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 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 it 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."[125] 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.[126] This is in line with the Restatement (Second) approach as well. Under § 244, courts are directed to the local law of the state where the property is located.[127]

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 and who own a home there as tenants by the entirety are 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.

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[125] 11 U.S.C. § 522(b)(3)(B).

[126] *See, e.g., In re McNeilly,* 249 B.R. 576, 581 (1st Cir. BAP 2000); *In re Garrett,* 435 B.R. 434, 455 (Bankr.S.D. TX 2010); *In re Hayden,* 41 B.R. 21, 23 (Bankr.E.D.KY 1983).

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

Although Florida has expressly prohibited its courts from recognizing any right arising from the legal recognition of a same-sex union,[128] 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.

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 provides tenants by the entirety,[129] 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

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

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

unsupportable and contrary to how courts have approached conflict of law issues in the past.[130] 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.[131] 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.[132] In all other instances, the court must determine the "applicable law."[133] Like the exemption example, the bankruptcy court should use the Restatement (Second) as guidance and apply 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.[134] Under this analysis, Massachusetts law would be the "applicable law." Not only is

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[131] 11 U.S.C. § 502(b)(1).

[132] *See Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 277 (1935).

[133] *See In re Holliday,* No. 10-41617-JDP, 2011 WL 2518845, *2 (Bankr.D.Idaho 2011)(applying federal choice of law rules to determine "applicable law" under 502(b)(1)); *In re Guevera,* 409 B.R. 442, 449 (Bankr.S.DTX 2009).

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

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.[135] 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. Massachusetts 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

[135] *See Avis Rent-A-Car Sys., Inc. v. Abrahantes,* 559 So. 2d 1262 (Fla. Dist. Ct. App. 3d Dist. 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).

allow courts to place federal bankruptcy policies, constitutional limitations and the equities of the case[136] 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 relation 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 relation 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.

[136] *See Vanston Bondholder Protective Comm. v. Green,* 329 U.S 156, 161-162 (1946).

ARGUMENTS FOR AND AGAINST LIEN STRIPPING AFTER BAPCPA

Presented by Leonard C. Walczyk, Esq.,

Wasserman, Jurista & Stolz, PC

Millburn, New Jersey.

The U.S. Supreme Court case of *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) prohibits use of 11 U.S.C. Section 506(d) to strip off wholly unsecured junior liens in Chapter 7. The Fourth Circuit recently considered the Debtor's ability to work around *Dewsnup's* lien stripping prohibition by stripping off a wholly unsecured lien in the context of what is known as a "Chapter 20" case – a Chapter 7 case where a Debtor discharges unsecured debt, followed by a Chapter 13 petition where the same Debtor proposes a plan which seeks to strip off wholly unsecured junior liens while paying off nondischargable debt such as mortgage arrears or taxes through a plan.

In *In re Davis*, 716, F. 3d 331 (4th Cir. 2013), the Chapter 13 trustee appealed the District courts affirmance of the Bankruptcy Court's confirmation order of a Debtor's Chapter 13 plan, arguing that the Bankrutpcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") creates a per se rule barring lien stripping in Chapter 20 cases. The Fourth Circuit disagreed, affirming the District and Bankruptcy Courts. In so doing, the Fourth Circuit in *Davis* made the following observations and rulings:

- The threshold question is whether a bankruptcy court may strip off a valueless lien in a typical Chapter 13 proceeding. The answer, in the view of those circuits to have considered the question, is that a bankruptcy court may grant such relief. *See Zimmer v. PSB Lending Corp. (In re Zimmer),* 313 F.3d 1220 (9th Cir.2002); *Lane v. W. Interstate Bancorp (In re Lane),* 280 F.3d 663 (6th Cir.2002); *Pond v. Farm Specialist Realty (In re Pond),* 252 F.3d 122 (2d Cir.2001); *Tanner v. FirstPlus Fin. (In re Tanner),* 217 F.3d 1357 (11th Cir.2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee),* 212 F.3d 277 (5th Cir.2000); *McDonald v. Master Fin. (In re McDonald),* 205 F.3d 606 (3d Cir.2000); *First Mariner Bank v. Johnson (In re Johnson),* 407 Fed.Appx. 713 (4th Cir.2011); *Suntrust Bank v. Millard (In re Millard),* 404 Fed.Appx. 804 (4th Cir.2010).

- A completely valueless lien is classified as an unsecured claim under section 506(a). Only then does a bankruptcy court consider the rights of lienholders under section 1322, which affords protection to holders of secured claims against principal residences. Section 1322, however, expressly permits modification of the rights of unsecured creditors. The end result is that section 506(a), which classifies valueless liens as unsecured claims, operates with section 1322(b)(2) to permit a bankruptcy court, in a Chapter 13 case, to strip off a lien against a primary residence with no value. *See, e.g., Zimmer,* 313 F.3d at 1226–27; *Lane,* 280 F.3d at 668. *In re Davis*, 716 F.3d 331, 335 (4th Cir. 2013).

- The Supreme Court has interpreted section 1322(b)(2) as precluding a "strip down" of a partially secured lien against a principal residence in Chapter 13. That is, a debtor may not reduce an underwater mortgage to the value of the principal residence because partially secured lien-holders are "holders of secured claims" protected against lien modification. *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 331–32, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). *Nobelman* notwithstanding, however, courts have generally permitted a "strip off" of completely valueless liens in Chapter 13 cases because, unlike the lienholder in *Nobelman,* holders of such liens are not "holders of secured claims" and, therefore, are not entitled to the protection of section 1322(b)(2). *Davis*, at 335-336.

- The *Davis* court was thus left with the question raised in this appeal: whether the 2005 enactment of BAPCPA precludes the stripping off of valueless liens by Chapter 20 debtors. *Davis*, at 336. *Davis* cites to split in authority on whether a debtor may strip off liens in a Chapter 20 case. *Compare In re Fisette,* 455 B.R. 177 (8th Cir. BAP 2011) (concluding a Chapter 20 debtor may strip off liens), *and In re Dang,* 467 B.R. 227 (Bankr.M.D.Fla.2012) (same), *and In re Okosisi,* 451 B.R. 90 (Bankr.D.Nev.2011) (same), *and In re Tran,* 431 B.R. 230, 237

(Bankr.N.D.Cal.2010) (same) *with In re Gerardin,* 447 B.R. 342 (Bankr.S.D.Fla.2011) (holding that Chapter 20 debtors could not permanently strip off wholly unsecured junior liens), *and In re Victorio,* 454 B.R. 759 (Bankr.S.D.Cal.2011) (same), *and In re Fenn,* 428 B.R. 494 (Bankr.N.D.Ill.2010) (same), *and In re Jarvis,* 390 B.R. 600 (Bankr.C.D.Ill. 2008) (same).

- In ruling for the Debtors, the Fourth Circuit held that a Chapter 13 debtor need not be eligible for a discharge in order to take advantage of the protections of Chapter 13. And, since the Bankruptcy Code provides a mechanism for stripping off worthless liens absent a discharge, then the Debtors could avail themselves of such relief.
- Fourth Circuit found that nothing in BAPCA changed the interplay of Section 506(a) with Section 1322(b), dealing with modification of unsecured claims.
- Fourth Circuit found Trustee's reliance on Section 1325(a)(5) to be inapplicable, as that Code section deals with modification of ***secured*** claims, and that if the lien is rendered fully unsecured by virtue of Section 506(a), then Section 1322(b) dealing with modification of unsecured claims applied, not Section 1325(a)(5).
- In dissent, Circuit Judge Keenan stated that lien stripping in Chapter 20 was prohibited because the term "allowed secured claim" in Section 1325(a)(5) is not defined by, or predicated on, an application of Section 506(a). *In re: Ballard,* 526 F.3d 634, 640–41 (10th Cir.2008) (discussing application of Section 1325(a)(5) in the context whether the surrender of a motor vehicle under Section 1325(a)(5)(C) fully satisfied the claim). Instead, Circuit Judge Keenan explained that Section 506(a) provides a method for the judicial valuation of an allowed secured claim, without altering the secured status of a creditor. *See In re Price,* 562 F.3d 618, 623 (4th Cir.2009); *see also Dewsnup v. Timm,* 502 U.S. 410, 417, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (holding that the valuation permitted by § 506(a) does not determine the meaning of "allowed secured claim" in § 506(d)). Therefore, the term "allowed secured claim" merely describes (1) a claim, which

is a "right to payment" or a "right to an equitable remedy" as defined in 11 U.S.C. § 101(5); (2) that is "allowed," meaning "not objected to by an interested party" under 11 U.S.C. § 502(a); and (3) that is "secured." *In re Davis*, 716 F.3d 331, 340 (4th Cir. 2013).

The debate rages on. In a recent article[i] Benjamin Ellison summarized the debate listing cases in support and against lien stripping and crystallized the five arguments made in support of the debtor's ability to strip off a wholly unsecured lien using the Chapter 20 process, and the creditor lienholder's counter-arguments to each:

I. Lien strips in Chapter 20 are permitted because nothing pre-BAPCPA or post-BAPCPA prohibits them.	I. Lien strips in Chapter 20 are improper because discharge is an essential lynchpin for any form of permanent bankruptcy relief. BAPCPA reinforces this notion: with the new § 1328(f)(1) provision, Congress has comprehensively filled in the express statutory gaps identified by the Supreme Court in *Johnson*. Therefore, now, lien strips in Chapter 20 should be viewed as foreclosed.
II. Lien strips in a no-discharge Chapter 13 case become permanent upon completion of plan payments, because § 1327 revests all property with the debtor free and clear, and no contingency such as conversion or dismissal can preclude this outcome.	II. While no-discharge Chapter 13 cases may be confirmed under § 1327,lien strips are only temporary because once the case fails to close with a discharge, there is impermissible "delay" and the contingency of dismissal under § 1307(c) unwinds any vesting of property with the debtor.
III. The inclusion of the new lien retention provision in BAPCPA, § 1325(a)(5)(B), shows that valueless liens can be stripped without discharge. By explicitly requiring liens *with value* to wait until discharge to be permanently stripped, BAPCPA implicitly mandates a different treatment for Chapter 20 *valueless* liens.	III. The limitation of § 1325(a)(5) to "allowed secured claims," and not all state-law security interests, is a drafting oversight by Congress. Deference to state law property rights requires § 506(a) apply to all state law liens, regardless of value. Conversion and dismissal apply to valueless liens, so consistency requires that discharge under § 1325(a)(5) should extend to such broader class of interests as well.
IV. Lien strips in no-discharge Chapter 13 cases do not constitute a "de facto" discharge, in violation of § 1328(f)(1). Discharge	IV. Lien strips when discharge is prohibited by BAPCPA's new § 1328(f)(1) constitute improper "de facto" discharges, based on the

and lien stripping are categorically distinct concepts, and this BAPCPA provision prohibits only the former type of debt relief.	order of priority. If unsecured *in personam* claims may not be discharged, then higher level claims entitled to constitutional protection, such as valueless *in rem* claims, likewise may not be discharged.
V. Finally, in case of doubt, the bankruptcy canon of construction favoring discharge compels the conclusion that the § 1328(f)(1) limitation on discharge should be construed narrowly, and not prohibit lien stripping in no-discharge cases.	V. Whereas individual debtors are entitled to discharge, the right to a lien strip is an exception, not the rule. Accordingly, canons of construction favoring discharge do not apply to issues of lien stripping.

But to lien strip in a Chapter 20 at least one court has stated that the debtor must still meet the eligibility requirements of Chapter 13, even after the Chapter 7 discharge. In *In re Scotto-DiClemente*, 459 B.R. 558 (Bankr. D.N.J. 2011), *reconsideration denied*, 463 B.R. 308 (Bankr. D.N.J. 2012), affirmed 2012 WL 3314840 (D.N.J. Aug. 13, 2012) Judge Michael Kaplan of the U.S. Bankruptcy Court for the District of New Jersey held that a debtor's attempt to lien strip in using the "Chapter 20" procedure was not per se bad faith. However, the court nevertheless dismissed the case on the basis that the stripped-off junior mortgages became unsecured debt that exceeded the debt limits for chapter 13 eligibility under § 109(e) of the Bankruptcy Code, even though the debtor had no personal liability because of the previous chapter 7 discharge. The District Court affirmed the Bankruptcy Court's holding by stating:

"…contrary to the Debtor's position the outstanding balance on the mortgage notes is enforceable. The earlier Chapter 7 proceeding discharged [the debtor's] personal liability only; the surviving mortgage interest has the same properties as a nonrecourse loan and is enforceable against debtor's property. …The continuing unsecured claims of [the] second and third mortgages are enforceable, unsecured debts within the meaning of Section 109(e) and should be

included within the Chapter 13 calculus." *In re DiClemente*, 2012 U.S. Dist. LEXIS 113799 *10, 2012 WL 3314840 (D.N.J. Aug. 13, 2012).

Could the debtors in *DeClemente* use Chapter 11 to strip the junior liens? Courts have determined that lien stripping is permitted in Chapter 11 bankruptcy proceedings. Section 1123(b)(5) of the Bankruptcy Code states that, "[s]ubject to subsection (a) of this section, a plan may ... modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1123(b)(5). "Therefore, to strip a lien in a Chapter 11 proceeding, a court must bifurcate the lien into secured and unsecured claims under § 506(a) and then, if a debtor's plan of reorganization meets the requirements of [11 U.S.C.] § 1123(a), a secured claim may be modified pursuant to § 1123(b)(5)." *I.R.S. Dept. of Treasury of U.S. v. Johnson,* 415 B.R. 159, 169 (W.D.Pa.2009).

The United States District Court for the Western District of Pennsylvania, in affirming the decision of the Bankruptcy Court in *Johnson,* has held that a debtor may "modify the rights of [an IRS] secured claim under [a] reorganization plan and the Bankruptcy Court [may] approve the same." 415 B.R. at 169. The court found that "the modification of the IRS' federal tax lien was properly authorized under §§ 506(a) and 1123(b)(5) of the Bankruptcy Code," *id.,* and that "the Bankruptcy Court did not err in ordering that the federal tax lien be removed from [the debtor's] real property under those statutory provisions." *Id.* at 170. In its opinion, the Bankruptcy Court explained that a federal tax lien arises from 26 U.S.C. § 6321 and that "[t]here is nothing apparent from [§ 6321's] statutory language which would protect an IRS lien from lien stripping treatment." *In re Johnson,* 386 B.R. at 178. *See also In re Russell,* 2009 Bankr.LEXIS 4353, *4 (Bankr.W.D.Pa.2009) ("[A] debtor may strip off the liens of the IRS to the extent that the value of the liens exceeds the value of the collateral subject to the liens"). In concluding that the federal tax lien could be stripped from the debtor's property, the Bankruptcy Court in *Johnson* determined that "[u]nless the Court remove[d] the IRS lien from [the debtor's]

residence, that lien will remain an anchor dragging him down from achieving the fresh start envisioned by the [Bankruptcy] Code." 386 B.R. at 181. Thus, the rationale in *Johnson* would allow the Debtor to avoid the federal tax lien under the bifurcation and modification processes established by §§ 506 and 1123 of the Bankruptcy Code. See *In re Berkebile*, 444 B.R. 326, 330-31 (Bankr. W.D. Pa. 2011). However, the problem with this "Chapter 18" approach is the potential for an election under Code Section 1111(b) by the secured creditor to have its claim treated as fully secured.

Any opportunity for clarity in this area requires the Supreme Court's revisiting its decision in *Dewsnup*. Indeed, the Supreme Court has recently denied certiorari (*Bank of America, N.A. v. Sinkfield*, Case No. 13-700 (U.S. Sup. Ct., pet. for cert. denied, March 31, 2014)), in a case that sought to challenge the Eleventh Circuit's decision in *In re McNeal*, 735 F.3d 1263 (11th Cir. May 11, 2012), which held that a Chapter 7 debtor may strip a junior lien wholly unsupported by value in the collateral. No other circuit allows lien strips by a Chapter 7 debtor. The Eleventh Circuit distinguished *Dewsnup* because it "disallowed only a 'strip down' of a partially secured mortgage lien and did not address a 'strip off' of a wholly unsecured lien." Unless *Dewsnup* is revisited, undersecured properties will continue to be abandoned with no upside to the junior unsecured lienholders, adding still more downward pressure to an already sluggish real estate market.

[i] Ellison, B., "Unable to Receive a Discharge under 11 U.S.C.A. Section 1328(f)(1): After BAPCPA, May "Chapter 20" Debtors Strip Off Valueless Home Mortgages?" 2013 No. 2 Norton Bankr. L. Adviser NL 1 (February, 2013).

APPENDIX

Cases against Chapter 20 lien stripping: In re Judd, 6:11-bk-04093-ABB, 2011 WL 6010025, at *3 (Bankr. M.D. Fla. Dec. 1, 2011); In re Pierre, 468 B.R. 419, 424 (Bankr. M.D. Fla. 2012); Grandstaff v. Casey (In re Casey), 428 B.R. 519, 523 (Bankr. S.D. Cal. 2010); In re Sadowski, 473 B.R. 12, 16 (Bankr. D. Conn. 2011); In re Trujillo, No. 6:10-bk-02615-ABB, 2010 WL 4669095, at *2 (Bankr. M.D. Fla. Nov. 10, 2010); In re Colbourne, 458 B.R. 598, 590 (Bankr. M.D. Fla.), amended and superseded by, 458 B.R. 598 (Bankr. M.D. Fla. 2010); In re Jazo, No. 09-16609-JM13, 2010 WL 3947303, at *2 (Bankr. S.D. Cal. Sept. 28, 2010); In re Woolsey, 438 B.R. 432, 438 (Bankr. D. Utah 2010), aff'd, Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266 (10th Cir. 2012); In re Quiros-Amy, 456 B.R. 140, 146 (Bankr. S.D. Fla. 2011); Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885, 890 (B.A.P. 10th Cir. 2010); In re Gerardin, 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011); In re Jarvis, 390 B.R. 600, 603 (Bankr. C.D. Ill. 2008); Orkwis v. MERS (In re Orkwis), 457 B.R. 243, 248 (Bankr. E.D.N.Y. 2011); Lindskog v. M&I Bank FSB (In re Lindskog), 451 B.R. 863, 866 (Bankr. E.D. Wis. 2011), aff'd, 480 B.R. 916, 919 (E.D. Wis. 2012); Erdmann v. Charter One Bank (In re Erdmann), 446 B.R. 861, 868 (Bankr. N.D. Ill. 2011); In re Fenn, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010); In re Mendoza, No. 09-22395 HRT, 2010 WL 736834, at *3 (Bankr. D. Colo. Jan. 21, 2010), abrogated by Zeman v. Waterman (In re Waterman), 469 B.R. 334 (D. Colo. 2012); Blosser v. KLC Fin., Inc. (In re Blosser), Bankr. No. 07-28223-svk, Adv. No. 08-2353, 2009 WL 1064455, at *1 (Bankr. E.D. Wis. Apr. 15, 2009); In re Collins, No. 10-32098-tmb13, 2010 WL 5173840, at *2 (Bankr. D. Or. Dec. 15, 2010); In re Lilly, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

Cases in favor of Chapter 20 lien stripping: Fisette v. Keller (In re Fisette), 455 B.R. 177, 184 (B.A.P. 8th Cir. 2011); In re Crone, No. 12-11257, 2012 WL 6212856, at *1 (Bankr. N.D. Cal. Dec. 13, 2012); In re Jennings, 454 B.R. at 255; In re Waterman, 447 B.R. 324, 329 (Bankr. D. Colo. 2011), aff'd, Zeman v. Waterman (In re Waterman), 469 B.R. 334, 338 (D. Colo. 2012); In re Tran, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), aff'd, 814 F. Supp. 2d 946 (N.D. Cal. 2011); In re Hill, 440 B.R. 176, 182 (Bankr. S.D. Cal. 2010); In re Scantling, 465 B.R. 671, 682 (Bankr. M.D. Fla. 2012); In re Miller, 462 B.R. 421, 431 (Bankr. E.D.N.Y. 2011); In re Scotto-DiClemente, 459 B.R. 558, 566 (Bankr. D.N.J. 2011); In re Gloster, 459 B.R. 200, 206 (Bankr. D.N.J. 2011); In re Dang, 467 B.R. 227, 237 (Bankr. M.D. Fla. 2012); In re Fair, 450 B.R. 853, 857 (E.D. Wis. 2011); In re Davis, 447 B.R. 738, 745 (Bankr. D. Md. 2011), aff'd, TD Bank, N.A. v. Davis, No. CIV. PJM 11-1270, CIV PJM 11-1718 & CIV. PJM 11-1940, 2012 WL 439701 (D. Md. Jan. 12, 2012); Pollard v. Suntrust Bank (In re Pollard), No. 10-17396PM, 2010 WL 3779096, at *1 (Bankr. D. Md. Sept. 15, 2010); In re Pollard, No. 11-17396PM, 2011 WL 576599, at *2 (Bankr. D. Md. Feb. 9, 2011); In re North, No. 11-72843, 2012 WL 4919788, *3 (Bankr. N.D. Cal. Oct. 15, 2012); In re Frazier, 448 B.R. 803, 807 (Bankr. E.D.Cal. 2011), aff'd, Frazier v. Real Time Resolutions, Inc., 469 B.R. 889, 895 (E.D. Cal. 2012); Hart v. San Diego Credit Union, 449 B.R. 783, 792 (S.D. Cal. 2010); In re Grignon, No. 10-34196-tmb13, 2010 WL 5067440, at *4 (Bankr. D. Or. Dec. 7, 2010); In re Pecho, No. 11-49052, 2012 WL 5180341, *3 (Bankr. N.D. Cal. 2012); In re Vo, No. 11-73404, 2012 WL 5180701, at *2 (Bankr. N.D. Cal. 2012); In re Blenheim, No. 09-10283-MLB, 2011 WL 6779709, at *6 (Bankr. W.D. Wash. Dec.

27, 2011).

Feature

By Jackie Gardina

The Questions that *United States v. Windsor* Didn't Answer

Jackie Gardina
Vermont Law School
South Royalton, Vt.

Jackie Gardina is a professor at Vermont Law School in South Royalton, Vt., and has written and spoken on the issues that arise when same-sex couples file for bankruptcy.

In *United States v. Windsor*,[1] the U.S. Supreme Court ruled that § 3 of the Defense of Marriage Act (DOMA) was unconstitutional. The decision was intended to be a narrow one, allowing legally married same-sex couples to receive the myriad federal rights and benefits that are tied to marital status.[2] In his dissent, however, Justice Antonin Scalia criticized the majority's decision for avoiding "difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage."[3] He posed the questions that the majority left unanswered:

> Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?[4]

Bankruptcy practitioners and judges will be forced to answer these questions and more in the coming years. Can a bankruptcy court treat as valid a marriage that the forum state's law declares invalid? Can the court recognize the incidences of marriage if the forum state's law either implicitly or explicitly prohibits that recognition? This article provides a framework for approaching these questions.

Section 2: The *Other* DOMA Provision

The questions that Justice Scalia identified exist, in part, because the *Windsor* decision only declared DOMA § 3 unconstitutional. Section 2 remains intact and contributes to the confusion surrounding interstate recognition of same-sex marriages. Section 2 provides that no state shall be required to give effect to "any public act, or judicial proceeding respecting a relationship between persons of the same sex."[5]

Congress purported to do two things in § 2. First, it gave permission to states to reject marriages validly performed in other states. Currently, 32 states, including Utah and Oklahoma (where recent decisions declaring marriage bans unconstitutional have been stayed), prohibit same-sex marriage.[6] Under these laws, state B could refuse to recognize a marriage between same-sex partners validly performed in state A and arguably deny the couple state benefits based on marital status. Second, Congress created an exception to the Full Faith and Credit Clause,[7] which granted states the power to reject "judicial proceedings of any other State." Under this provision, state B could refuse to recognize a property distribution issued by a court in state A.[8]

Section 2 is relevant in bankruptcy when a legally married same-sex couple has property interests, or files for bankruptcy in a state, that refuses to recognize that marriage. The validity of a debtor's marriage is critical in determining the scope of the debtor's exemptions,[9] ruling on the existence of fraudulent transfers,[10] and establishing the propriety of a creditor's lien.[11] Whether a debtor is or was married can be the difference between whether property is protected from a creditor's reach or whether a debt is dischargeable.[12]

The need to establish the validity of the debtor's marriage raises unsettled questions. Is a bankruptcy court sitting in a state that refuses to recognize same-sex marriages obligated to follow that state's law in determining the interests of the parties in bankruptcy? At its core, this is a choice-of-law question.

Choice of Law in Bankruptcy

Assume that a couple validly marries in Iowa where same-sex marriages are legal, and then moves to Wisconsin, a prohibition state, and files for bankruptcy. This hypothetical raises two distinct choice-of-law issues. First, is the Wisconsin bankruptcy court free to recognize the marriage for purposes of *federal* law? For example, could the court allow the couple to jointly file even though the court sits in a state that does not recognize the relationship? Second, is the Wisconsin bankruptcy court free to recognize the marriage for purposes of *state* law rights and obligations?

Courts addressing the first question have two possible tests that they can use when applying federal law. The first is the "place-of-domicile" rule, which asks

1 133 S. Ct. 2675 (June 26, 2013).
2 *Id.* at 2695.
3 *Id.* at 2708 (Scalia, J., dissent).
4 *Id.*
5 28 U.S.C. § 1738C.
6 Information on state marriage laws are *available at* www.hrc.org/campaigns/marriage-center.
7 U.S. Const. art. IV.
8 For a more complete discussion of congressional intent and the constitutionality of this provision, *see* Jackie Gardina, "Same-Sex Marriage in Bankruptcy: A Path Out of the Public Policy Quagmire," *Norton Ann. Surv. of Bankr. L.* (2013 Ed.).
9 *See In re Cohen*, No. 7-10-15616, 2012 WL 400715, at *1 n.2 (Bankr. D.N.M. 2012).
10 *See, e.g., In re Blankenship*, 133 B.R. 398, 402 (N.D. Ohio 1991).
11 *In re Nakamura*, No. 06-40685, 2008 WL 191811 at *3-4 (Bankr. D. Idaho).
12 *See, e.g., In re Bakkar*, No. 08-22105, 2009 WL 3068192, at *4 (Bankr. D.N.J. 2009); *In re Veneziale*, 267 B.R. 695, 699-700 (Bankr. E.D. Pa. 2001).

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whether the couple is considered to be married in the state in which they are currently domiciled. In some federal laws, such as parts of the Social Security Act, Congress has mandated the application of this rule.

The second is the "place-of-celebration" rule. This test — by far the dominant test when determining the validity of a marriage — asks whether the marriage is valid in the place where it was celebrated. The Internal Revenue Service, Immigration and Citizenship Service, Department of Defense and Office of Personnel Management have all adopted the "place-of-celebration" rule when applying federal law to legally married same-sex couples. These agencies all have one thing in common: The federal laws under which they operate are silent as to which state law to apply when determining the validity of an underlying marriage.

The U.S. Trustee's Office recently issued guidance on this question, instructing U.S. Trustees to rely on the "place-of-celebration" rule and recognize legally married same-sex couples as spouses when federal law is at issue. At least one bankruptcy has adopted this approach. A Kentucky bankruptcy judge, citing *Windsor*, allowed a legally married same-sex couple to file jointly even though the state of Kentucky refuses to recognize same-sex relationships in any form.[13]

The answer to the second question, however, is less clear. *Butner v. United States*[14] instructs bankruptcy courts to look to state law in determining the existence and scope of the debtor's interest in property.[15] Should a Wisconsin bankruptcy court recognize the union of a same-sex couple that was legally married in Iowa when determining state law rights and obligations? Which domestic-relations law applies to the validity of the marriage: Iowa, the place of celebration, or Wisconsin, the place of domicile? Where should the court look for the appropriate choice-of-law rule: the forum state or a distinct federal common-law rule?

The Supreme Court has yet to address the appropriate choice-of-law rule in bankruptcy.[16] In the absence of guidance, lower courts have followed various paths. These approaches can be distilled into 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.[17] In other instances, the courts assume that *Klaxon* does not apply because the court's jurisdiction is based on federal law, and so they look to the *dictum* in *Vanston Bondholder Protective Comm. v. Green*, which seems to suggest that courts are free to adopt a federal choice-of-law rule that is distinct from the forum state's rule.[18] 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.[19]

The question is whether a bankruptcy court sitting in a state that prohibits the recognition 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." Even if the court were to apply the forum state's choice-of-law rule, a marriage prohibition statute in the forum state does not automatically mean that the bankruptcy court cannot recognize the marriage. At its 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."[20] 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.[21]

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 state seeking recognition of the marriage.[22] 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.[23] The House Report supporting DOMA § 2 has endorsed this limited exception.[24]

Outside this context, the courts have been more constrained in their approach, recognizing the narrowness of the exception, as well as the limitations of their own powers. 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 might 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.

In the end, a careful choice-of-law analysis will ensure that courts look beyond the forum state's public policy and promote the underlying policies of the Bankruptcy Code and the Court's rationale in *Butner*.[25] The *Butner* Court 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 bank-

13 *In re Joles*, Case No. 12-32639 (3) 13 (Bank. W.D. Ky. Oct. 22, 2013).
14 440 U.S. 48 (1979).
15 *Id.* at 55.
16 *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942); *Vanston Bondholder Protective Comm. v. Green*, 329 U.S. 156 (1946).
17 *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Amtech Lighting Servs. v. Payless Cashways Inc. (In re Payless Cashways)*, 203 F.3d 1081, 1084 (8th Cir. 2000); *Carter Enters. Inc. v. Ashland Specialty Co.*, 257 B.R. 797, 801-02 (S.D. W.Va. 2001).
18 329 U.S. 833 (1947); *see also Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995); *Mandalay Resort Group v. Miller (In re Miller)*, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003); *Olympic Coast Inv. Inc. v. Wright (In re Wright)*, 256 B.R. 626, 632 (Bankr. D. Mont. 2000).
19 *See, e.g., Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 606 (2d Cir. 2001); *Compliance Marine Inc. v. Campbell (In re Merritt Dredging Co.)*, 839 F.2d 203, 206 (4th Cir. 1988); *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 150 n.16 (5th Cir. 1981).
20 *Restatement (Second) Conflict of Laws* § 283 (1971).
21 *Restatement (Second) Conflict of Laws* § 283(2).
22 *Restatement (Second) Conflict of Laws* § 283, comment c.
23 *State v. Fenn*, 92 P. 417, 418 (Wash. 1907); *State v. Kennedy*, 76 N.C. 251, 251 (1877).
24 H.R. Rep. 104-664, H.R. Rep. No. 664, 104th Cong., 2nd Sess. 1996, 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (Leg. Hist.), at 8.
25 440 U.S. 48, 55 (1979).

ruptcy filing.[26] If the forum state lacks a significant relationship with the parties or the transaction, then its law is inapplicable.

What About Court Orders?

A different — and much more straightforward — analysis applies when the bankruptcy court is asked to enforce a court judgment that arises from a same-sex marriage. For example, 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. After the divorce, one spouse moves to Florida and files for bankruptcy before fully complying with the state court property-division order. The former spouse files an adversary proceeding seeking a determination of nondischargeability. The debtor objects, arguing that under Florida law, the original court order is unenforceable.

Is the bankruptcy court bound to follow Florida law? The Supreme Court has been refreshingly clear on this question, and the answer is "no." While 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,[27] the provision does not apply to the federal courts. Federal courts remain bound by the Full Faith and Credit Act,[28] which 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.[29] This is true even if the forum state would not entertain the suit.[30] Assuming that Massachusetts state courts would give the property settlement order preclusive effect, then the bankruptcy court is required to do the same.[31]

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.[32] When it comes to the enforcement of judgments, bankruptcy courts need not get tangled up in the forum state's policy decisions regarding same-sex marriage. Federal courts are bound by the Full Faith and Credit Act, *not* the forum state's law. While Florida state courts might be bound by Florida law respecting the enforceability of a foreign judgment arising from a same-sex marriage, Florida bankruptcy courts are not.

Conclusion

As Justice Scalia opined in his dissent, choice-of-law questions will take center stage after *Windsor*. Bankruptcy courts sitting in prohibition states can recognize same-sex marriages in certain circumstances. Even in the highly charged miscegenation era, courts did not apply a blanket non-recognition rule. Understanding the nuances of the relevant choice-of-law analysis will be key to ensuring that the Bankruptcy Code and its underlying policies are consistently applied. abi

26 *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).
27 28 U.S.C. § 1738C.
28 28 U.S.C. § 1738.
29 *Durfee v. Duke*, 375 U.S. 106, 109 (1963).
30 *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).
31 *Id.*
32 *See In re Kaid*, 472 B.R. 1, 8 (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. 1996) (citing *Fauntleroy v. Lum*, 210 U.S. 230 (1908)).

STUDENT LOAN DEBT & EMERGING TRENDS IN BANKRUPTCY: DISCHARGE, CLASSIFICATION & MORE

2014 ANNUAL MID-ATLANTIC BANKRUPTCY WORKSHOP

By: Michael B. Joseph
Wilmington, DE
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Introduction:

The following is an overview of current student loan treatment in bankruptcy including discharge, partial discharge, and classification. Included are several recent cases, proposed legislation, and comments. Federal courts have labored over treatment of student loans in bankruptcy for many years. The results have been inconsistent. Judicially created tests have emerged as a framework to apply "undue hardship" in 11 USC § 523(a)(8) when considering student loan discharge. Some courts allow partial discharge using 105(a) where a full discharge may not be available. In Chapter 13 cases some courts permit plans that separately classify and prefer student loans over other unsecured creditors. Most often the determination of discharge or treatment of student loans is fact intensive and on a case by case basis. While there are many ideas on how to address the treatment of student loans in bankruptcy, there is no quick legislative fix on the horizon. It appears courts will continue to fashion solutions to the burden of meeting the undue hardship standard.

I. Section 523(a)(8) Student Loan Dischargeability: Defining "Undue Hardship"

Bankruptcy courts have struggled with statutory interpretation of "undue hardship" in Section 523(a)(8) of the Code. There is no specific definition of "undue hardship in the Code and courts have resorted to creating "tests" to determine dischargeability of the claims. The specific section states:

> **Section 523(a)** A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
>
> **(8)** unless excepting such debt from discharge under this paragraph would impose an **undue hardship** on the debtor and the debtor's dependents, for—
> **(A) (i)** an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
> **(ii)** an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> **(B)** any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.

Two tests have emerged as the leading method for determining undue hardship: The Brunner Test and the Totality of Circumstances Test. Nevertheless, one commentator notes, "the nebulous determination of undue hardship for the 'honest but unfortunate debtor' however, remains problematic"[1]

A. The Brunner Test- The Second Circuit in *Brunner v. New York Higher Education Services Corp.,* 831 F.2d 395 (2d Cir. 1987) (hereinafter "the Brunner Test") adopted a three-prong test:

1. The debtor must establish that based on current income and expenses, the debtor cannot maintain a "minimal standard" of living if forced to pay the loan. The standard is whether it would be "unconscionable" to require the debtor to take steps to earn more income or reduce expenses.
2. The debtor must show additional circumstances indicating that this state of affairs is likely to persist for a significant portion of the repayment period. The circumstances must be "exceptional" in that they demonstrate "hopelessness" and insurmountable barriers to the debtor's financial recovery.
3. The debtor must have made a good faith effort to repay the loans.

The Brunner Test has been adopted by nine other federal circuits, including the Third and Fourth Circuits, as well as the Fifth, Sixth, Seventh, Ninth, Tenth, & Eleventh Circuits. The First Circuit does not have controlling authority on either test although the BAP has adopted the totality of circumstances test.[2]

Cases:

Lepre v United States Dept. of Ed. (In re Lepre), 530 F. App'x 121 (3d Cir. 2013) Third Circuit affirms lower court's ruling that debtor did not satisfy the first, second & third prongs of the Brunner Test and therefore not entitled to discharge his educational loans under Sec. 523(8)

Jones v Ed. Credit Mgt Corp (In re Jones), 495 B.R. 674 (Bankr. ED Pa. 2013) Court extensively reviewed the Brunner Tests as applied to the specific debtor in the case and found that each prong was met. In addition, under the circumstances in the case, citing the 3d Circuit case *In re Coco* (below), the good faith inquiry was met by evidence of debtor's "dire financial stress."

Coco v. New Jersey Higher Ed. Student Assistance Authority (*In re Coco)*, 335 F. App'x. 224 (3d Cir. 2009) Chapter 7 debtor brought adversary against student loan creditor seeking determination of discharge. Lower court held debtor failed to establish undue hardship under Brunner. Third Circuit reversed holding that although the debtor was largely unsuccessful in efforts to repay, the lack of

[1] Kerry Brian Melear, The Devil's Undue: Student Loan Discharge in Bankruptcy, the Undue Hardship Standard, and the Supreme Court's Decision in United Student Aid Funds v. Espinosa, 264 Ed. Law Rep. 1 (2011)

[2] *See Nash v. Connecticut Student Loan Foundation* (*In Re Nash)*, 446 F.3d 188 (1st Cir. 2006) : "We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship.' p 190 ; but *see Bronsdon v. Educational Credit Management Corp. (In re Bronsdon)*, 435 B.R. 791 (B.A.P. 1st Cir. 2010)

success was beyond her control, and enough evidence shown of good faith to survive summary judgment.

Magsino v US Dept of Ed (In re Magsino), Adversary No. 12-3247, 2014 WL 1341932 (Bankr W.D.N.C. April 4, 2014) 61year old debtor cannot discharge student loan under the Fourth Circuit three-part test established in Breunner…a debtor seeking to discharge student loans bears the burden of proving all three factors by a preponderance of evidence.

Stitt v. US Dept of Ed. (In re Stitt), Adversary No. 13-0178PM, 2014 WL 555220 (Bankr. D. Md. February 12, 2014) Debtor denied discharge of student loans as she failed to establish the good faith prong. The basis for seeking the discharge is to apply for additional student loans, and not exploring other ways to address the debt.

Greene v. US Dept of Ed, Civil No. 4:13cv79, 2013 WL 5503086 (E.D. Va. October 2, 2013) District Court affirms bankruptcy court decision denying student loan discharge holding debtor failed to meet the three-prong Brunner Test for undue hardship where she had consolidated the loans under the Income Contingent Plan and her monthly payment was set at $0.00.

Erbschloe v. US Dept of Ed (In re Erbschloe), *502 B.R. 470* (Bankr. W.D. Va 2013 Although not granting debtor's request to discharge her student loans as not currently meeting the Brunner Test, the Court fashioned a partial discharge holding: If the debtor enrolls in the Income Based Repayment Plan and fulfills her obligations under that plan, and still has an amount due at the end of the repayment period, that amount will be discharged as an undue burden. The IBRP term can be up to 25 years.

B. The Totality of Circumstances Test-The Eighth Circuit looks at the totality of the debtor's circumstances in its determination of undue circumstances, *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549 (8th Cir. 2003) (hereinafter "the Totality of Circumstances Test"). In *Long* the Eighth Circuit reaffirmed its Totality of Circumstances Test set forth years earlier in *Andrews v South Dakota Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702 (8th Cir. 1981):

"In evaluating the totality-of-the-circumstances… courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."

"Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt--while still allowing for a minimal standard of living-- then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation—including assets, expenses, and earnings--along with the prospect of future changes--positive or adverse--in the debtor's financial position."

Cases:

ECMC v Jesperson, 571 F.3d 775 (8th Cir. 2009) reversing the Bankruptcy Court and District Court finding of undue hardship, the Eighth Circuit held the debtor failed to establish undue hardship under the totality of circumstances test where there was evidence of surplus income and the debtor was eligible for an alternative repayment program. Although the Eighth Circuit seems to retain the "flexible" totality of circumstance test, this case clearly tightens its focus on ability to pay and alternative income based repayments options.[3]

In re Bronsdon, 435 B.R. 791, supra
Having considered the various tests used to determine undue hardship, the plain text of § 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declines to adopt the *Brunner* test as requested by ECMC. The Panel is persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8).

II. The Partial Discharge Solution

As mentioned in *Erbschloe* above, the courts have permitted a partial discharge of student loans in certain cases even though the Code does not specifically provide such remedy. This approach has steadily gained acceptance in the federal circuit courts under the theory that Section 105(a) grants bankruptcy courts authority to partially discharge a student loan.[4]

Cases:

Miller v. Pennsylvania Higher Ed. Assistance Agency (In re Miller), 377 F.3d 616 (6th Cir. 2004) The Sixth Circuit case most often cited for sanctioning a partial discharge of student loan debt pursuant to Sec. 105(a) of the Code as long as that portion discharged satisfies the requirements under Sec. 523(a) (8).

Fecek v. Sallie Mae, Inc. (In re Fecek), Adversary No. 13-50089, 2014 WL 1329414 (Bankr. S.D. Ind. March 31, 2014) While the Seventh Circuit has not

[3] See Julie Swedback & Kelly Prettner, Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases, 36 Wm Mitchell L. Rev. 1679 (2010)
[4] See G. Michael Bedinger, *Time to Take a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors,* 99 Iowa L. Rev. 1817 (2014)

specifically addressed the issue of partial discharge of student loan debts, many courts have adopted the position that partial discharge is consistent with the language of Sec. 523(a)(8)…partial discharge allows a bankruptcy court to reach a more equitable result, tailored to a debtor's specific financial situation.

Conway v. National Collegiate Trust (In re Conway), 495 B.R. 416 (B.A.P. 8th Cir. 2013) Partial discharge of student loans is not available in the Eighth Circuit but each of the 15 loans had to be considered under the totality of circumstances standard and may be considered on an individual loan basis for discharge.

III. Section 1322 and Unfair Discrimination – Classification of Student Loans in Chapter 13 plans[5]

The relevant provisions of the Code to separately classify a claim are Sections 1322(b)(1) and (5). Section 1322(b)(1) allows a plan to "designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated…" Section 1322(b) (5) allows for the debtor to cure defaults on long term debt while the case is pending. Since most student loans are long term and will be due after plan completion, section 1322(b) (5) seems to apply. Typically debtors provide in a plan to pay student loans directly while making a reduced pro rata payment under the plan to other unsecured creditors. The issue raised is whether under the circumstances this is allowed preferential treatment.

A. Sections 1322(b)(1) and (b)(5) long term debt classification in a Chapter 13 Plan:

(1) Cases that allow classification: Minority of courts hold that Section 1322(b)(5) trumps (b)(1) and excepts long-term unsecured debts from the unfair discrimination analysis:

In re Johnson, 446 B.R. 921 (Bankr. E.D. Wis. 2011) "If the provides for the cure and maintenance of payments on a debt, the terms of which extend beyond the terms of the plan, it is not for the court to determine whether this is fair to the other creditors or not."

In re Natesan, No. 12-26952PM, 2013 WL 3930567 (Bankr. D. Md. July 29, 2013) Trustee's unfair discrimination objection overruled when student loan creditor failed to object to separate classification that would pay student loan debt "outside" the plan while other unsecured claims were paid in full by trustee. "Given that the DOE has refrained from objecting to the treatment of its claim as proposed in the Plan, the court

[5] See also Fed. R. Bankr. P. 3013 Classification of Claims and Interests

does not have before it the genuine case or controversy that is reflected in the diametrically conflicting decisions on the issue of unfair discrimination." (citations omitted)

In re Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) Separate classification of student loans is allowed when payment of student loans did not significantly affect percentage to be received by unsecured creditors. Classification unfair when treating student loan on same basis as other unsecured creditors would increase to 80% the percentage going to non-student loan creditors. Debtors proposed to treat student loans as long-term debts. Automatic stay prevented student loan creditors from assessing penalties for payment shortfalls during Chapter 13 cases.

In re Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009)
Debtor's license to practice Optometry contingent on being current on student loans and justified favorable classification of student loan creditors; discrimination benefited unsecured creditors who would not benefit if debtor's license was revoked.

In re Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) Acknowledging a split of authority the court applied the four factors from *Mickelson v. Leser (In re Leser)*, 939 F.2d 669 (8th Cir.1991) for debtors to separately classify student loan creditors for curing default and maintenance of payments. Balancing the interests in the instant case supports confirmation of the plan. Debtors' student loan debt is a long term debt, and accounts for approximately $10,000 of the $31,131.00 in unsecured debt. If Debtors are not allowed to continue their direct payments to the Student Loan Creditors, they may face the consequences of default upon completion of their Chapter 13 plan payments, and such a result conflicts with the purpose of a fresh start

In re Abaunza, 452 B.R. 866 (Bankr S.D. Fla. 2011) Even post-BAPCPA there are many different tests that courts use to determine whether a chapter 13 bankruptcy plan unfairly discriminates against a class of unsecured creditors. There is no clear "majority" approach, although under each test the justification for differentiated treatment is viewed against the backdrop of the purpose of chapter 13 bankruptcies, including fairness to creditors and a fresh start to honest debtors. For purposes of this decision, I do not need to choose between the various tests, whether the appropriate test is *Leser/Wolff, Bentley,* or *Machado.*[15] I hold that where the sole allegation for unfair discrimination is payment of a separately classified creditor from an above-median debtor's "discretionary funds," the plan does not discriminate unfairly

(2) Cases that require Section (b)(5) to be read in conjunction with (b)(1) for unfair discrimination: Majority of courts follow this analysis:

Gorman v. Birts (*In re Birts)*, No. 1:12cv427 (LMB/TCB), 2012 WL 3150384, (E.D. Va. August 1, 2012) (unpublished) Plan unfairly discriminated by treating student loan as long-term debt, paying full monthly payment with interest, while paying other unsecured creditors a reduced percentage. It is inherently unfair to discriminate against a class of unsecured creditors, satisfying only a small portion of their claims, when the debtor still retains a significant portion of her disposable income. The unfairness is especially apparent in this case, where the amount of disposable income retained by the debtor represents half of the amount she has dedicated to the Plan for these creditors

In re Knecht, 410 B.R. 650 (Bankr. D. Mont. 2009) Paying student loan with no distribution to other unsecured creditors is unfair discrimination under *Amfac Distribution Corp. v. Wolff (In re Wolff),* 22 B.R. 510 (B.A.P. 9th Cir. 1982) The court stated that this case boils down to a desire to pay non-dischargeable debt, under the protection of bankruptcy, and discharge other unsecured, dischargeable debt

In re Knowles, 501 B.R. 409 (Bankr. D. Kan. Nov. 4, 2013) Direct payment to student loan creditor is separate classification for purposes of § 1322(b) (1) and is permissible for under median debtors. Form B22C showed no disposable income and the other unsecured creditors would be receiving no distribution anyway.

B. Non-dischargeable nature of debt as a classification basis and Section 1322(b)(10)

Regarding contents of plans, section 1322(b) (10) states:

"Provide for the payment of interest accruing after the date of filing of the petition on unsecured claims that are non-dischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims.

Case:

In re Brown, 500 B.R. 255 (Bankr. S.D. Ga. 2013) Sections 1322(b) (1), (b) (5), and (b) (10) are not irreconcilable and the plan does not unfairly discriminate to pay interest on student loan debt.

See also: Prof. M. White, *A Modest Proposal for Student Loan Treatment in Chapter 13*, NACTT Academy for Consumer Bankruptcy Ed (February 18, 2013) suggesting that Chapter 13 Trustees refrain from objecting to plans with more favorable treatment of student loans :"Why are we penalizing debtors who try to repay non-dischargeable student loans in chapter 13? Doesn't this frustrate the goal of the 1978 code (a fresh start for the 'honest but unfortunate debtor')."

IV. Special Circumstances under Means Test: Reduction of CMI

Section 707(b) and Section 1325(b) "current monthly income"

Cases:

In re Haman, 366 B.R. 307 (Bankr D. Del. 2007). Payment of a student loan determined to be a special circumstance under Sec. 707(b) and deductible from CMI in a Chapter 7 case. Debtor could not demonstrate undue hardship for debt to be dischargeable. However, she had co-signed on son's student loan, and son was unable to repay it due to medical reasons.

In re Howell, 477 B.R. 314 (Bankr. W.D.N.Y. 2012) The non-dischargeable character of the debtor's student loans will necessitate expenses for which the debtors' have no reasonable alternative and constitute special circumstances within the meaning of Sec. 707(b)(2)(B)

In re Harmon, 446 B.R. 721 (Bankr. E.D. Pa. 2011) Chapter 7 case where debtor included student loan payments as a deduction on Form B22 A as a special circumstance. Court rejects non-dischargeability of student loan as a special circumstance.

In re Maura, 491 BR 493 (Bankr. E.D. Mich. 2013) Chapter 7 case and court agrees with the cases holding that a debtor's obligation to make student loan payments is not a 'special circumstance' of the type that qualifies under Sec. 707(b)(2)(B)..Nor does the fact that student loans are generally non-dischargeable.

V. Pending Legislation & Commentary

A. HR 532:
Private Student Loan Bankruptcy Fairness Act of 2013 - Amends the federal bankruptcy code to limit the non-dischargeability, except in cases of undue hardship, of educational loans to those made, insured, or guaranteed by a governmental unit, or made under any program funded by a governmental unit or any program for which substantially all of the funds are provided by a nonprofit institution (thus allowing the discharge of private educational loan indebtedness without the need to show an undue hardship) (House Judiciary)

B. HR 3892 Student Borrower Bill of Rights Act-Returns standard bankruptcy protections and statutes of limitations to ALL student loans, does away with social security and wage garnishment, and greatly improves the public service forgiveness program. Status:- Subcommittee on Regulatory Reform, Commercial And Antitrust Law.

C. S 114: Fairness for Struggling Students Act of 2013

Fairness for Struggling Students Act of 2013 - Revises federal bankruptcy law with respect to the exemption from the exception to discharge in bankruptcy for certain educational loans if excepting such debt from discharge would impose an undue hardship on the debtor and debtor's dependents.

Limits such exemption to the existing ones for: (1) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit; and (2) an obligation to repay funds received from a governmental unit as an educational benefit, scholarship, or stipend.

Repeals the current exemption for (1) any loan made under any program funded in whole or in part by a governmental unit or nonprofit institution; and (2) any other qualified education loan incurred by an individual debtor on behalf of the taxpayer, the taxpayer's spouse, or any dependent, including indebtedness used to refinance a qualified education loan. (Thus makes both kinds of loans non-dischargeable in bankruptcy.) (Senate Judiciary)

D. Commentary & the Student Loan Crisis

"For years, commentators have derided the undue hardship requirement as too burdensome and have attacked the courts for applying the standard in an inconsistent manner. There are many different suggestions for how to change the treatment of student loans in bankruptcy. For example, critics have advocated for: repealing section 523(a)(8) so that student loan debt is treated as any other general unsecured debt; excluding private student loans from the exception (thereby making private student loans dischargeable); reinstating the time-lapse discharge; defining undue hardship with a clear national standard; creating a new claims process for educational loan creditors; encouragingstudent-loan debtors to pursue federal loan repayment programs; and, finally, risk-based student loans."[6]

[6] See Hon .C. Ray Mullins & Dr. Daniel A. Austin, *How Hard is the 'Hard" in "Hardship"? The Current State of Sec. 523(a)(8)*, ABI Student Loan Debt Crisis Symposium , May 30, 2014, at 178