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Ryan Malone

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WHEN OPTING OUT IS THE ONLY OPTION: PROTECTING SMALL BUSINESS DEBTORS IN BANKRUPTCY

ABSTRACT

This Note implores states that have not already done so to opt out of the provisions of the Federal Bankruptcy Code that place explicit limits on the amount a debtor is allowed to exempt from liquidation. By doing so, states will be able to provide debtors who operate their own small business a greater degree of protection from creditors, as those states are entitled to establish their own limit on the value of the tools of a debtor's trade the debtor may shield in bankruptcy. This Note contends that Congress has evinced an intent within the last decade to restrict the ability of small business debtors to exempt the value of their assets and that federal judges have shown unwillingness to allow states to provide debtors with a choice between federal exemption limits and state exemption limits. Consequently, it is incumbent upon states to expressly opt out of the relevant portions of the Bankruptcy Code to provide their small business debtors the more generous slate of exemption laws that the evidence suggests these states intended to provide in the first instance.

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INTRODUCTION

Federal law allows a bankrupt debtor to exempt much, and in many instances most, of the debtor's personal property from the bankruptcy estate.¹ These protections may aid the debtor significantly, as "[t]he concept, scope, and definition of 'property of the estate' are broadly construed and applied."² Many states afford debtors, bankrupt and non-bankrupt alike, the option to exempt property under state law.³ This means that the debtor may not be compelled to liquidate exempt property.⁴ The rationale behind this policy is straightforward. Lawmakers have concluded that retaining an interest in essential items will better provide the debtor with a "fresh start" after bankruptcy.⁵ States and the federal government reach different conclusions as to just how fresh that start should be.

This Note examines how the manner in which Congress, state legislatures, bankruptcy courts, and appellate courts address the friction between state and federal exemption laws may impact small business owners who seek bankruptcy protection. To illustrate this dynamic, this Note will consider debtors seeking to invoke the "tools-of-the-trade" exemptions available under the federal Bankruptcy Code and various state laws. That examination yields the conclusion that it is incumbent on states either to opt out of the federal exemption scheme or to provide their debtors with a more generous array of exemption laws. This is because the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005⁶ and a recent ruling by the Bankruptcy Appellate Panel of the Sixth Circuit⁷ are emblematic of a legal

¹ See 11 U.S.C. § 522 (2006) for the complete list of exemptions and their potential "value." Section 522(a)(2) defines "value" as "[the] fair market value as of the date of the filing of the petition [for bankruptcy] or with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate."

² 3A BANKRUPTCY SERVICE LAWYERS EDITION § 29:24 (Oct. 2011).

³ *In re Sainlar*, 344 B.R. 669, 672 (Bankr. M.D. Fla. 2006) (noting that most states provide their own exemptions); Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1916 (2007) ("Importantly, state exemption laws apply to *any* money judgment, in or outside the bankruptcy context. An individual uses the same exemptions when filing for bankruptcy as she would use to protect assets from a tort judgment or collection agency." (internal citation omitted)).

⁴ *In re Ruppel*, 368 B.R. 42, 43 (Bankr. D. Or. 2007).

⁵ Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235 (1995); see also *In re Willis*, 189 B.R. 203, 205 (Bankr. N.D. Okla. 1995), *rev'd*, 197 B.R. 912 (N.D. Okla. 1996) (citing H.R. REP. NO. 95-595 (1977)) (stating that "Congress has called the 'fresh start,' 'the essence of modern bankruptcy law.'").

⁶ Pub. L. No. 109-8, 119 Stat. 23 (2005).

⁷ *In re Schafer*, 455 B.R. 590 (B.A.P. 6th Cir. 2011).

environment that is increasingly hostile to debtors. Given that in 2009 a whopping 1.41 million Americans filed for personal bankruptcy,⁸ the implications of federal dominance over this issue are more expansive than they once were.

The ostensible rationale for offering debtors a choice between federal exemptions and state exemptions is to combat such hostility, but many states' exemption laws fail to advance that purpose meaningfully. What is more, because the Supreme Court is unlikely to ameliorate this trend in the foreseeable future, states should act on this proposition quickly and opt out of the Bankruptcy Code if they have not yet done so. This will better provide debtors with the "fresh start" that our bankruptcy framework is purported to promote.

The language of the Bankruptcy Code strongly suggests that a debtor is bound to rely on the federal exemptions outlined in the Code if that debtor's state has not expressly opted out of it.⁹ Under the federal Bankruptcy Code, a debtor may exempt up to \$146,450 of the value of his or her homestead.¹⁰ State homestead exemption laws, meanwhile, vary widely. Massachusetts, for example, offers its debtors a \$500,000 homestead exemption.¹¹ Minnesota's homestead exemption is \$300,000, but that amount rises to \$750,000 if the land is used for agricultural purposes.¹² Florida simply imposes no absolute dollar value limit on a homestead exemption.¹³ One may wonder how this can be, given that Congress has established a clear-cut figure.¹⁴ Congress has been equally clear in its deference, allowing states to establish their own exemption parameters as long as the state expressly opts out of the federal scheme.¹⁵

⁸ Sara Murray & Conor Dougherty, *Personal Bankruptcy Filings Rising Fast*, WALL ST. J. (Jan. 7, 2010, 12:14 PM), <http://online.wsj.com/article/SB126263231055415303.html>.

⁹ 11 U.S.C. § 522(b)(2) (2006) ("Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.").

¹⁰ 11 U.S.C. § 522(p)(1). The footnote to that provision states that the value of the exemption is to be "adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C. § 104." *Id.*

¹¹ MASS. GEN. LAWS ch. 188, § 1 (2011). If the homestead is owned by joint tenants or tenants by the entirety, however, "the declared homestead exemption shall remain whole and unallocated, provided that the owners together shall not be entitled to a declared homestead exemption in excess of \$500,000." *Id.*

¹² MINN. STAT. § 510.02 (2007).

¹³ FLA. CONST. art. X, § 4. Florida does limit the amount of land a debtor may exempt, however, in that only "a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon" may qualify for the unlimited monetary exemption. *Id.*

¹⁴ 11 U.S.C. § 522(p)(1).

¹⁵ 11 U.S.C. § 522(b)(2).

For at least one court recently, Michigan's homestead law did not opt out expressly enough. The Bankruptcy Appellate Panel (B.A.P.) for the Sixth Circuit, in the case of *In re Schafer*,¹⁶ held that Michigan could not enact exemption legislation that applied *only* to bankrupt Michigan debtors.¹⁷ The statute that the B.A.P. invalidated in that case stated that a "debtor in bankruptcy under the bankruptcy code, 11 U.S.C. §§ 101 to 1330, may exempt from property of the estate property that is exempt under federal law or, under 11 U.S.C. § 522(b)(2), the following property."¹⁸ In other words, Michigan debtors were given a choice between invoking Michigan exemption law or federal exemption law.¹⁹ Such a balancing act is not uncommon.

In Minnesota, for example, "[d]ebtors filing a bankruptcy petition ... may elect between the federal homestead exemptions in the Bankruptcy Code, or elect the homestead exemptions provided by Minnesota law, plus any federal exemptions, other than the homestead exemptions."²⁰ Congress recently lent sanction to this arrangement, as the opt-out provision was unaffected by the sweeping Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).²¹

Holding that Michigan's strain of statutory inclusiveness violated the Constitution's Bankruptcy Clause, the Sixth Circuit B.A.P. struck it down.²² Its reasons and the soundness of those reasons are largely immaterial to this Note and, for all intents and purposes, to small business debtors. Far more germane to those debtors are the far-ranging effects of the legal environment that decision embodied, rather than its constitutional underpinnings, because many debtors may face disastrous consequences unless their state legislators take swift action.

I. TOOLS-OF-THE-TRADE

As is true with respect to a debtor's homestead, the Bankruptcy Code allows a debtor to exempt "\$2,175 in value, in any implements, professional

¹⁶ 455 B.R. 590 (B.A.P. 6th Cir. 2011).

¹⁷ *Id.* at 601 ("A state exemption statute which applies only to state residents who file for bankruptcy violates the Bankruptcy Clause.").

¹⁸ *Id.* at 598 (quoting MICH. COMP. LAWS § 600.5451 (2011)).

¹⁹ It should be noted that this choice seems to be an obvious one, as Michigan's homestead exemption stands at a relatively meager \$3500. MICH. COMP. LAWS § 600.6027 (2011).

²⁰ 2E BANKRUPTCY SERVICE, LAWYERS EDITION § 26:135 (Oct. 2011) (citing 11 U.S.C. § 522(d); MINN. STAT. § 510.02 (2007); *In re Ladd*, 450 F.3d 751 (8th Cir. 2006)).

²¹ David A. Samole & Lisa B. Keyfetz, *New Law, New Tools for Creditors A Fresh Look at the Involuntary Bankruptcy Petition*, BUS. L. TODAY, Nov.–Dec. 2006, at 17, 18 ("Debtors in bankruptcy can still choose their state's exemptions (again, if the state of residency makes such choice available).").

²² *In re Schafer*, 455 B.R. at 607.

books, or tools of the trade of the debtor.”²³ As is also true with respect to a debtor’s homestead, many states had a slightly different idea. Wyoming’s tools-of-the-trade exemption stands at \$4000.²⁴ Although bankrupt Rhode Islanders may expect to keep \$1500 worth of tools,²⁵ Louisiana places no monetary cap on the tools-of-the-trade exemption.²⁶ In most jurisdictions, a debtor may claim only one occupation for which to exempt his or her tools.²⁷

The significance of the variance between states, however, pales in comparison to the significance within those states. Michigan provides debtors in bankruptcy a \$2000 exemption for “tools, implements, materials, stock, apparatus, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged.”²⁸ For debtors who have not declared bankruptcy, however, that exemption amounts to \$1000.²⁹ Clearly, then, Michigan draws the same distinctions between its debtors claiming tools-of-the-trade exemptions that the Sixth Circuit B.A.P. found unconstitutional when it considered Michigan’s homestead exemption statute,³⁰ and indeed the very same statute codified each set of exemptions.³¹

So why is this a problem for debtors? After all, the federal exemption scheme, which Michigan allowed its debtors to invoke if they so chose,³² featured a higher claim limit for homesteads³³ and for tools-of-the-trade.³⁴ The

²³ 11 U.S.C. § 522(d)(6) (2006).

²⁴ WYO. STAT. ANN. § 1-20-106 (2011); *In re Bechtoldt*, 210 B.R. 599, 601 (B.A.P. 10th Cir. 1997).

²⁵ Rhode Island exempts \$1500. R.I. GEN. LAWS § 9-26-4 (2006).

²⁶ LA. REV. STAT. ANN. § 13:3881 (2010). Louisiana does require that the tools be “necessary to the exercise of a trade, calling, or profession by which [the debtor] earns his livelihood.” *Id.*

²⁷ *See, e.g., In re Meckfessel*, 67 B.R. 277, 278 (Bankr. D. Kan. 1986); *In re Cordova*, 394 B.R. 389 (Bankr. E.D. Va. 2008). In some instances, a debtor may invoke a tools-of-the-trade exemption even if his or her claimed trade is not his or her principal occupation. *See In re Thompson*, 311 B.R. 822, 826 (Bankr. D. Kan. 2004) (stating that “even if [raising game birds] were not the debtors’ principal trade or business, this Court would still be inclined to allow the exemption”).

²⁸ MICH. COMP. LAWS § 600.545(i) (2011).

²⁹ MICH. COMP. LAWS § 600.6023 allows a debtor to exempt “[t]he tools, implements materials, stock, apparatus, team, vehicle, motor vehicle, horses, harness, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged.”

³⁰ *See In re Schafer*, 455 B.R. 590, 601 (B.A.P. 6th Cir. 2011), noting that differentiation between debtors in bankruptcy and those debtors who have not filed for bankruptcy is unconstitutional.

³¹ *See* 11 U.S.C. § 522(b)(2) (2006); 11 U.S.C. § 522(d)(6)(2006).

³² *See* 11 U.S.C. § 522(b)(2).

³³ 11 U.S.C. § 522(p)(1) (2006); MICH. COMP. LAWS § 600.6027.

problem for a debtor is that if the debtor chooses one federal exemption, he or she must opt for them across the board.³⁵ Without the ability to mix and match exemption laws, a debtor would have to comprehensively assess which set of exemptions would net him, or her, the greatest degree of protection.

II. SMALL BUSINESS DEBTORS AFTER BAPCPA

Congress ostensibly enacted the BAPCPA “to discourage egregious pre-bankruptcy exemption planning, including closing that ‘mansion loophole’ that exists when debtors, in contemplation of filing bankruptcy, purchase homes with heavy price tags in states that have unlimited homestead exemption laws.”³⁶ One would be hard-pressed to take umbrage with this objective,³⁷ yet the effects of BAPCPA extend well beyond reducing crafty real estate transactions.

BAPCPA impacts small business debtors in a litany of ways. The 2005 amendments to the Bankruptcy Code define a “small business debtor” as “a person engaged in commercial or business activities with total noncontingent, liquidated secured and unsecured debts of not more than \$2 million.”³⁸ Like the rest of BAPCPA, the provisions impacting small business debtors are particularly friendly to creditors and provide for “eight new grounds for dismissal or conversion.”³⁹ Not surprisingly, when considered in conjunction

³⁴ 11 U.S.C. § 522(d)(6); MICH. COMP. LAWS § 600.545(i).

³⁵ William L. Norton, Jr., *Debtors' Exemption Choices, Generally (Code § 522(b))*, 3 NORTON BANKRUPTCY LAW & PRACTICE § 56:3 (3d ed. Oct. 2011); 11 U.S.C. § 522(b)(2) (stating that “[p]roperty listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize”).

³⁶ American Bankruptcy Institute 15th Annual Northeast Bankruptcy Conference, *BAPCPA Three Years Later: Through the Looking Glass—How Is It Down the Rabbit Hole?*, 071008 ABI-CLE 967 (July 10, 2008) [hereinafter ABI Bankruptcy Conference Report].

³⁷ Closing the “mansion loophole” was likely not the only reason Congress decided to act. David M. Holliday, Annotation, *Construction and Application of Bankruptcy Abuse Prevention and Consumer Protection Act's (BAPCPA) Limitation of Homestead Exemption, 11 U.S.C. § 522(p)*, 52 A.L.R. FED. 2D 541 (2011). The Bankruptcy Court for the Southern District of Texas argues as much by looking to the language of 11 U.S.C. § 522 (p), which exempts “any amount of interest acquired by the debtor during the 1215-day period preceding the date of filing of the petition that exceeds in the aggregate \$146,450.” 11 U.S.C. § 522(p), *cited in In re Presto*, 376 B.R. 554, 585, 586 (Bankr. S.D. Tex. 2007).

³⁸ William L. Norton III & Randolph J. Haines, *Business Bankruptcy Aspects of the 2005 Amendments*, NORTON BANKR. L. ADVISER, Aug. 2005, at 2.

³⁹ *Id.* These grounds, according to the Amended Sections 1112(b) and 1104(a) of the Bankruptcy Code, include “failure to maintain appropriate insurance that poses a risk to the estate or the public[,] ... failure to attend § 341 meeting [which allows debtors to solicit votes for plan approval] or any Rule 2004 examination[, and] ... failure to pay any taxes due

with other substantive and procedural changes to the Code, a Chapter 11 debtor's need to convert his or her case into a Chapter 13 appears more likely than before.⁴⁰

Furthermore, the law potentially makes it more difficult for an individual Chapter 11 debtor to reorganize,⁴¹ which a debtor who owns a small business has been able to do for the last twenty years.⁴² BAPCPA also imposes limits on the extensions most debtors may obtain to file a plan.⁴³ In the wake of BAPCPA, bankruptcy courts have rigidly enforced the law's requirement that a debtor must submit all required paperwork within forty-five days.⁴⁴ Expedited deadlines appear to be somewhat of a recurring theme throughout the legislation. BAPCPA ballooned the former ten-day period in which a supplier could demand the reclaimed good from the debtor before the debtor filed for bankruptcy four-and-one-half fold to forty-five days.⁴⁵ To the extent that a debtor would be able to claim any of these items as tools-of-the-trade in the first instance, the debtor would now have to convert to a Chapter 13 and expend the exemption limit to retain them.⁴⁶ Moreover, under BAPCPA, income that a debtor earns after filing

postpetition." *Id.* Generally, in small business cases "[a] debtor's obligation is to confirm the reorganization plan in accordance with 11 U.S.C. §§ 1129(e) and 1121(e). If a debtor cannot comply, the case is then subject to a conversion." Gregory R. Schaaf, *Small Business Cases Develop Some Teeth*, AM. BANKR. INST. J., Dec.–Jan. 2011, at 46, 47.

⁴⁰ A debtor who owns a small business is entitled to file for Chapter 11 reorganization individually as well. *See, e.g., In re Steedley*, 09-50654, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010). An individual's right to file for Chapter 11 reorganization, even if the debtor's business is not ongoing, stems from *Toibb v. Radloff*, 501 U.S. 157 (1991). The Court's ruling in *Toibb* may lend considerable relief to a debtor who finds himself in a similar situation to the debtor in *In re Ferro*, 2010 WL 310857 (Bankr. S.D. Tex. 2010) (where debtor had not engaged in the business of manufacturing boat molds for a number of years).

⁴¹ *See, e.g.,* William L. Norton, Jr., *Additional Duties Imposed by the 2005 Amendments*, 5 NORTON BANKRUPTCY LAW & PRACTICE § 55:2 (3d ed. Oct. 2012) ("Code § 521(b) requires every debtor, who is an individual, to file, at the time that the case is commenced, a certificate issued by an approved budget and credit counseling agency ('credit counseling agency') stating the services rendered to the debtor.") (footnotes omitted).

⁴² *Toibb*, 501 U.S. at 161.

⁴³ *See* Shirley S. Cho, *Chapter 11 Bankruptcy After BAPCPA—A Closer Look at: Critical Trade; Exclusivity; and Dismissal/Conversion*, 63 CONSUMER FIN. L. Q. REP. 79, 80 (2009) (noting further that "different deadlines and rules apply if the debtor is a 'small business,' or one whose aggregate noncontingent liquidated secured and secured debts do not exceed \$2,000,000"). Such rules are spelled out in 11 U.S.C. § 1121(e) (2006) and do not include a twenty-month extension ceiling.

⁴⁴ *See* 11 U.S.C. § 521 (2006); *In re Ott*, 343 B.R. 264, 267 (Bankr. D. Colo. 2006); *In re Fawson*, 338 B.R. 505, 509 (Bankr. D. Utah 2006).

⁴⁵ Norton & Haines, *supra* note 38 (citing Amended Code Sections §§ 546(c), 503(b)).

⁴⁶ 11 U.S.C. § 1325 (2010).

for bankruptcy is considered property of the estate, and this was not previously the case.⁴⁷ Also significant to debtors is BAPCPA's requirement that an individual seeking Chapter 11 reorganization must make all payments before having his or her case discharged.⁴⁸ After *In re Schafer*, this may present debtors with a problem. Chapter 11 debtors are within their rights to convert their cases to Chapter 7 if their plan proves to be infeasible.⁴⁹ This would suggest that, at least in the Sixth Circuit, *In re Schafer* would then control, as *In re Schafer* was also a Chapter 7 case.⁵⁰ Thus, pursuant to *In re Schafer*, many debtors formerly seeking Chapter 11 reorganization may likely find themselves beholden to a more rigid slate of exemption laws.⁵¹

A recent case before the Eastern Division of Bankruptcy Court for the Southern District of Ohio encapsulates some of the causes and the effects of the BAPCPA. In that case, Ohio debtors had "continuously transitioned between Ohio and Florida, and for the 180-day period preceding the 730-day period prior to the Petition Date, Debtors were domiciled in Florida."⁵² This factual scenario directly implicated the BAPCPA amendment that if a debtor had lived in multiple states throughout the two year period before filing, the state exemption law that controls is of the state "in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place."⁵³ Because the statutory language does not distinguish homestead exemptions from other exemptions, the court's reasoning would almost certainly apply to tools-of-the-trade exemptions. Incidentally, that ruling was

⁴⁷ Robert J. Landry III, *Individual Chapter 11 Cases After BAPCPA: Can You Still Close the Case Early?*, AM. BANKR. INST. J., July–Aug. 2006, at 10. This change seems to run counter to the automatic stay provisions of the Bankruptcy Code, which stipulates that most actions that could have been initiated against the debtor before he or she filed are no longer eligible for initiation. 11 U.S.C. § 362 (2006). Indeed, 11 U.S.C. § 541(a) states that a bankruptcy estate comprises all of a debtor's assets as of the filing date, and that exemptions are then subtracted. For more on how the BAPCPA impacted the Bankruptcy Code's automatic stay provisions, see Stuart Larsen, *New Semi-Automatic Stay One Year After BAPCPA*, AM. BANKR. INST. J., Feb. 2007.

⁴⁸ Landry, *supra* note 47, at 60.

⁴⁹ Erin J. Koffman, *What Is Bad Faith Conversion? The Need for a Uniform Method of Determination*, 18 BANKR. DEV. J. 425, 431 (2001) ("The Code provides a debtor with the right to convert a filing under chapter 7 to a filing under chapters 11, 12 or 13 if such debtor has not previously converted the case from one of those chapters to chapter 7.") (citing 11 U.S.C. § 706(a) (2006)).

⁵⁰ *In re Schafer*, 455 B.R. 590, 593 (B.A.P. 6th Cir. 2011) ("On August 7, 2009, Dorothy Ann Jones ('Jones') filed a voluntary petition under Chapter 7 of the Bankruptcy Code.")

⁵¹ *Id.* at 601.

⁵² *In re Beckwith*, 448 B.R. 757, 760 (Bankr. S.D. Ohio 2011).

⁵³ *Id.* at 761 (citing 11 U.S.C. § 522(b)(3)(A) (2006)).

that “a debtor who resides in Ohio but who is forced into using a Florida exemption pursuant to § 522(b)(3)(A) may elect federal exemptions listed in § 522(d). Debtors may not claim Florida exemptions because they were not Florida residents.”⁵⁴ Thus, small business debtors must pay particular attention to which state law will bind them, as BAPCPA has altered the process by which this is determined.

III. WHAT ARE TOOLS-OF-THE-TRADE TO SMALL BUSINESS DEBTORS?

Many statutes provide little, if any, explanation as to what a “tool-of-the-trade” actually is.⁵⁵ Recently, two approaches have emerged to define the term. The first of these can be deemed the “function” or “utilitarian purpose” test, which “permits exemption of items reasonably necessary, both in kind and quality, for a worker to perform the chosen occupation efficiently and competently.”⁵⁶ In one case adopting this particular approach, the Rhode Island Bankruptcy Court held that a piano was reasonably necessary for the debtor to conduct his trade, which was to provide “lyric lectures.”⁵⁷

The second method by which a court may assess the validity of an asserted tools-of-the-trade exemption is to determine whether the tool is an object that expands human capability.⁵⁸ As a general matter, it seems safe to conclude that a business debtor’s automobile will not qualify as a tool of the trade, though it presumably would indeed expand his or her capability.⁵⁹ To confuse matters somewhat, the Bankruptcy Court for the Central District of Illinois has held that a cargo trailer would qualify for the exemption,

⁵⁴ *Id.* at 766.

⁵⁵ 11 U.S.C. § 522, for example, provides guidance, but not a definition, merely stating that “[t]he debtor’s aggregate interest, not to exceed \$2,175 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.” Michigan also does not define the term, though it does list a number of examples. MICH. COMP. LAWS § 600.6023 (2011).

⁵⁶ William L. Norton, Jr., *Tools of the Trade (Code § 522(d)(6))*, 3 NORTON BANKR. L. & PRAC. § 56:18 (3d ed. Oct. 2011) [hereinafter Norton, *Tools of the Trade*] (citing *In re Frierson*, 15 B.R. 157 (Bankr. D. Kan. 1981)); *In re Quidley*, 39 B.R. 362, 367 (Bankr. E.D. Va. 1984); see *In re Page*, 131 B.R. 530, 531–32 (Bankr. D. R.I. 1991).

⁵⁷ *In re Page*, 131 B.R. at 532.

⁵⁸ See *In re Hintz*, 86 B.R. 571 (Bankr. E.D. Wis. 1988) (Code § 522(f)(2)(B) [now Code § 522(f)(1)(B)(ii)] does not apply to capital assets); *In re Eakes*, 69 B.R. 497 (Bankr. W.D. Mo. 1987); Norton, *Tools of the Trade*, *supra* note 56, § 56:18.

⁵⁹ See *Thorpe Elec. Supply, Inc. v. Deitz*, 429 N.Y.S.2d 386, 386 (Albany Cnty. Ct. 1980) (“Certainly an automobile is ‘useful’ in any trade, to get to and from a job, but unless there is a special relationship between the automobile and the intrinsic nature of the job (other than general usefulness or convenience), such as a taxi to a cab driver, it is not a ‘necessary working tool’ within the intent and framework.”).

where debtors used the trailer to “haul food and cooking equipment for their catering business.”⁶⁰ Not surprisingly, the Bankruptcy Court for the District of Colorado has held that a truck driver may claim his commercial truck under the rubric of that state’s tools-of-the-trade exemption.⁶¹ Among all the colorful litigation surrounding the exemption status of an automobile, one 2006 case in the Bankruptcy Court for the Eastern District of Pennsylvania stands alone. In *In re Giles*,⁶² the court allowed a debtor to exempt her 1995 Volvo 940 in order to travel from festival to festival to sell the hats she designed.⁶³ A security guard’s firearm has been found not to qualify for the exemption,⁶⁴ while the Bankruptcy Court for the Southern District of Ohio was not entirely receptive to the legally inventive argument that a liquor license should qualify for the exemption.⁶⁵ A computer, meanwhile, may qualify as a tool of the trade in a broader array of circumstances, such as when a lawyer who does not have clerks files for bankruptcy.⁶⁶

The litigation over what constitutes a tool of the trade seems to have no theoretical bounds. In one case, the Bankruptcy Court for the Western District of Kentucky (like Michigan, a Sixth Circuit jurisdiction) ruled that a table saw and a torch qualified for the exemptions, but that the debtor’s forklift and trailers did not.⁶⁷ There, the steel fabricator debtor relied on the forklift and trailers “to move the sheet metal to, from and at job sites. The welder, table saw and torch [were] used to work the metal into proper form.”⁶⁸ Another district within the Sixth Circuit refused to grant the exemption to a debtor employed as a truck driver who claimed a tractor trailer rig as

⁶⁰ *In re Hively*, 358 B.R. 752, 752 (Bankr. C.D. Ill. 2007).

⁶¹ *In re Van Winkle*, 265 B.R. 247, 249 (Bankr. D. Colo. 2001). The United States Bankruptcy Court for the Northern District of Ohio has also recently adopted such a rule. See *In re Gaydos*, 441 B.R. 102, 106–107 (Bankr. N.D. Ohio 2010) (finding that “[t]he fact that there is an automobile exemption separate from the ‘tool of the trade’ exemption does not automatically preclude a motor vehicle from being a tool of the trade” (citing *In re Rule*, 38 B.R. 37, 41 (Bankr. D. Vt. 1983)) (internal quotation marks omitted)). Adopting a comparatively permissive interpretation of Colorado’s exemption statute, that state’s bankruptcy court has held that a nurse was entitled to exempt her 2004 Acura MDX, valued at \$17,415, because the vehicle was “used and kept for the purpose of carrying on any gainful occupation.” *In re Sackett*, 394 B.R. 544, 550 (Bankr. D. Colo. 2008).

⁶² *In re Giles*, 340 B.R. 543 (Bankr. E.D. Pa. 2006).

⁶³ *Id.* at 553.

⁶⁴ See *In re Gregory*, 246 F.3d 681 (10th Cir. 2000).

⁶⁵ *In re Johnson*, 255 B.R. 554, 555 (Bankr. S.D. Ohio 2000).

⁶⁶ See *In re Carson*, 184 B.R. 587, 589 (Bankr. N.D. Okla. 1995). It should be noted that the lawyer’s filing of that case predates today’s prevalence of the Internet. How that may impact computer exemptions remains to be seen.

⁶⁷ *In re Reed*, 18 B.R. 1009, 1011 (Bankr. W.D. Ky. 1982).

⁶⁸ *Id.* at 1009.

a tool of the trade,⁶⁹ noting that “[t]he purpose of the tools-of-the-trade exemption is to enable an artisan to retain tools of modest value so that he is not forced out of his trade.”⁷⁰ Of course, some debtors are more ambitious than others. An Illinois debtor, seeking Chapter 7 protection and employed as a commodities trader, attempted to claim his seat on the Mid-American Exchange.⁷¹ Denying his petition, the Bankruptcy Court for the Northern District of Illinois reasoned that the seat was an intangible item and that “[t]he purpose of the tools-of-the-trade exemption is to enable an artisan to retain tools of modest value so that he is not forced out of his trade.”⁷²

Two truisms perhaps account for the relative dearth of scholarly scrutiny devoted to tools-of-the-trade exemptions following the seismic pro-creditor shift in bankruptcy law embodied by BAPCPA and *In re Schafer*. First, in this area of law, “[t]he major disputes center on farm equipment and animals, and motor vehicles.”⁷³ Though critical and profitable for obvious reasons, for the purposes of this Note, tools-of-the-trade exemptions that fall under this rubric will not be exhaustively examined. This is primarily because such cases are generally filed under Chapter 12.⁷⁴ The second reason is that, as mentioned, the value of these exemptions pales in comparison to that of homestead exemptions.⁷⁵ This is not to say, however, that such exemptions are valueless, especially to a debtor facing liquidation. In one case, for example, a debtor was willing to litigate the classification of a piano dolly in order to exempt its value.⁷⁶ In another, a Texas bankruptcy court allowed a debtor to exempt boat molds, even though he had not been in the business of building boats for years.⁷⁷ In a sluggish economy, the court’s reasoning is instructive. “Debtor testified that he is presently unable to build and sell boats, because there is no market. He testified that, if the market turns, he will be able to build and sell boats,” wrote an ultimately sympathetic court.⁷⁸ Small business debtors should also

⁶⁹ *In re Nipper*, 243 B.R. 33, 39 (Bankr. E.D. Tenn. 1999).

⁷⁰ *Id.* at 38 (citing *In re Patterson*, 825 F.2d 1140, 1146 (7th Cir. 1987)). The court in *In re Nipper* again invokes the *In re Patterson* case when it writes, “to exempt a tractor, an expensive piece of machinery, was similar to exempting a debtor’s interest in an airplane used by an air charter service.” *Id.* (citing *In re Patterson*, 825 F.2d at 1147).

⁷¹ *In re Zais*, 202 B.R. 263, 264 (Bankr. N.D. Ill. 1996).

⁷² *Id.* at 266 (citing *In re Patterson*, 825 F.2d at 1146) (internal quotation marks omitted).

⁷³ Norton, *Tools of the Trade*, *supra* note 56, § 56:18.

⁷⁴ See 11 U.S.C. § 1222(a)(2)(A) (2006) (addressing the disposition of “farm assets used in the debtor’s farming operation”).

⁷⁵ See, e.g., 11 U.S.C. § 522 (2006).

⁷⁶ *In re Winchester*, 2007 WL 420391, at *1 (Bankr. D. Iowa 2007).

⁷⁷ *In re Ferro*, 2010 WL 310857, at *2 (Bankr. S.D. Tex. 2010).

⁷⁸ *Id.* at *1. The court ruled in favor of granting the debtor the exemption he sought. *Id.* at *2 (“Balancing the Debtor’s uncontroverted testimony as to his continued focus on

take note of Mississippi's recognition of restaurant equipment as tools-of-the-trade.⁷⁹ Given the financially volatile nature of the industry, this may make quite a difference to a debtor.⁸⁰

Though only an individual debtor may claim a tools-of-the-trade exemption,⁸¹ an individual who owns or operates a small business may invoke substantially similar exemption laws.⁸² This certainly makes sense, as conducting one's business is why the tools-of-the-trade exemption is available in the first place.⁸³ Of course, in order to qualify for the exemption, a debtor must prove he or she is still engaged in the business, the tools for which he or she claims the exemption.⁸⁴

IV. ANALYZING THE CIRCUIT SPLIT

In 2009, the Fourth Circuit considered the constitutionality of West Virginia's bankruptcy-only statute,⁸⁵ much the same way the Sixth Circuit Bankruptcy Appellate Panel had considered Michigan's bankruptcy-only statute.⁸⁶ West Virginia, unlike Michigan, has expressly opted out of the Bankruptcy Code.⁸⁷ Ultimately, the Fourth Circuit upheld West Virginia's

building boats, even though the market does not presently support such activity ... the court concludes that the exemption for the boat molds should be allowed.”)

⁷⁹ *In re Aurelio*, 252 B.R. 102, 102 (Bankr. N.D. Miss. 2000).

⁸⁰ A security guard's gun has been held not to qualify as tools of the trade. *See In re Gregory*, 246 F.3d 681, 681 (10th Cir. 2000). The same was held for a liquor license. *In re Johnson*, 255 B.R. 554, 554 (Bankr. S.D. Ohio 2000).

⁸¹ 11 U.S.C. § 522(b)(1) (2006).

⁸² *See* Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 38 (1999) (“[M]ost small-business debtors are not terribly dissimilar by dint of their financial circumstances from the prototypical consumer debtor. This fuzzy line of demarcation corresponds with the similarly blurry distinction between consumer goods and tools of a debtor's trade or profession, particularly in the case of self-employed individuals.”).

⁸³ *See generally* Craig Kendall, *Bankruptcy: Debtor's Tools of the Trade Are Defined by the "Use" Test*, 30 WASHBURN L.J. 127 (1990).

⁸⁴ *In re Ferro*, 2010 WL 310857, at *1 (Bankr. S.D. Tex. 2010) (“An item is an exempt tool of trade in Texas if the item is fairly belonging to or usable in the debtor's trade, and used with sufficient regularity to indicate an actual use by the debtor.”) (citations omitted).

⁸⁵ *Sheehan v. Peveich*, 574 F.3d 248, 251 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1066 (2010); W. VA. CODE § 38-10-4 (2011) (“Pursuant to the provisions of 11 U.S.C. § 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d).”). West Virginia's tools-of-the-trade exemption under that statute is \$1500. *Id.*

⁸⁶ *In re Schafer*, 455 B.R. 590, 601 (B.A.P. 6th Cir. 2011).

⁸⁷ W. VA. CODE § 38-10-4 (2011) (“Pursuant to the provisions of 11 U.S.C. § 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d).”). This language neatly

exemption law.⁸⁸ As outlined in footnote 2 of the Fourth Circuit opinion, many jurisdictions have also upheld states' bankruptcy-only approaches,⁸⁹ though several others have invalidated such distinctions.⁹⁰ The pivotal difference in these cases appears to be whether a state had expressly opted out of the Bankruptcy Code, as West Virginia had.⁹¹ Though a correlation seems clear, it is no guarantee that opting out will automatically substantiate a state's exemption scheme, at least in the eyes of the courts.⁹² Not surprisingly, though, jurisprudence on state exemptions does suggest that treating bankrupt debtors differently than debtors not in bankruptcy may lead to invalidation.⁹³ Because states routinely distinguish between debtors, this approach does not seem entirely consistent.

As pointed out by an appellate amicus brief for the Sixth Circuit in *In re Schafer*, state exemption law habitually treats debtors with different characteristics in different fashions.⁹⁴ For example, Hawaii and Michigan provide a larger homestead exemption to debtors older than sixty-five than those states provide to younger debtors.⁹⁵ Moreover, the amount of a homestead exemption may vary, depending on why the debtor declared

complies with 11 U.S.C. § 522(b)(2) (2006), which states, “[p]roperty listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.” The Michigan exemption statute, conversely, contained no such language. MICH. COMP. LAWS § 600.5451 (2011).

⁸⁸ *Sheehan*, 574 F.3d at 252, cert. denied, 130 S. Ct. 1066 (2010).

⁸⁹ See *id.* at 252; *In re Kulp*, 949 F.2d 1106, 1106 (10th Cir. 1991); *In re Brown*, 2007 WL 2120380 (Bankr. N.D. N.Y. 2007); *In re Shumaker*, 124 B.R. 820, 820 (Bankr. D. Mont. 1991); *In re Vasko*, 6 B.R. 317, 317 (Bankr. N.D. Ohio 1980).

⁹⁰ See *In re Kanter*, 505 F.2d 228, 228 (9th Cir. 1974); *In re Regevig*, 389 B.R. 736, 736 (Bankr. D. Ariz. 2008); *In re Wallace*, 347 B.R. 626, 626 (Bankr. W.D. Mich. 2006); *In re Cross*, 255 B.R. 25, 25–26 (Bankr. N.D. Ind. 2000); *In re Mata*, 115 B.R. 288, 289 (Bankr. D. Colo. 1990); *In re Lennen*, 71 B.R. 80, 80 (Bankr. N.D. Cal. 1987); *In re Reynolds*, 24 B.R. 344, 344 (Bankr. S.D. Ohio 1982).

⁹¹ Colorado has opted out of the federal exemption list. See COLO. REV. STAT. § 13-54-107 (1987); *In re Kulp*, 949 F.2d at 1107; *In re Brown*, 2007 WL 2120380 (“New York State has opted out of the exemptions available in Code § 522(d.)”); *In re Shumaker*, 124 B.R. at 824 (“Montana has opted-out of the federal exemptions allowed under 11 U.S.C. § 522(d.)”); *In re Vasko*, 6 B.R. at 318 (“The Ohio Legislature has ‘opted out’ of the federal exemption scheme set forth in 11 U.S.C. § 522(d.)”).

⁹² See *In re Regevig*, 389 B.R. at 736 (where California had opted out of exemption scheme but bankruptcy-only framework was still held unconstitutional).

⁹³ See, e.g., *In re Wallace*, 347 B.R. at 626 (dealing further with Michigan law).

⁹⁴ Brief Amici Curiae of the National Assoc. of Consumer Bankruptcy Attorneys, et al. in Support of Debtor’s Position at 28, *Michigan v. Richardson (In re Steven M. Schafer)*, 2011 WL 2602908 (6th Cir. June 27, 2011) (Nos. 11-1340, 11-1387) [hereinafter *Amicus Brief Supporting Debtor’s Position*].

⁹⁵ *Id.* (citing HAW. REV. STAT. § 651-92; MICH. COMP. LAWS § 6000.5451(1)).

bankruptcy. Consider Louisiana, wherein a resident is entitled to an unlimited homestead exemption “in the case of obligations arising directly as a result of a catastrophic or terminal illness or injury.”⁹⁶ Normally, a Louisianan may only claim a \$35,000 homestead exemption.⁹⁷ Because states are able to distinguish between different types of debtors, it stands to reason that states may have the authority to distinguish between bankrupt debtors and debtors who have not filed for bankruptcy. The *In re Schafer* appellants took further issue with the distinction, drawn *among* bankrupt debtors, made by Florida, Texas, and Kansas, which “set acreage limitations to their homestead exemptions that vary depending on the property location, differing by county or based upon urban versus rural distinctions.”⁹⁸ So argued the appellants, and in fact they did so successfully.⁹⁹

V. WHAT STATES MUST DO

Whether bankruptcy-only statutes are constitutional is beyond the scope of this Note,¹⁰⁰ but how states must respond to courts’ interpretations of such statutes is very much within it. Clearly, opting out of the Bankruptcy Code has long been indispensable to validation in some jurisdictions, even prior to BAPCPA.¹⁰¹ In a decade fraught with seismic change in this area of law, the approach rooted in longstanding bankruptcy principals emerges as the soundest option for states aiming to protect their debtors. It would greatly behoove small business debtors for the states simply to opt out of the Bankruptcy Code, if they have not done so already. The sooner states fall in line, the better off those debtors will be.

⁹⁶ LA. REV. STAT. ANN. § 20:1 (2011). The statute goes on to define, “catastrophic or terminal illness or injury” as an “illness or injury which creates uninsured obligations to health care providers of more than ten thousand dollars and which are greater than fifty percent of the annual adjusted gross income of the debtor, as established by an average of federal income tax returns for the three preceding years.” *Id.*

⁹⁷ *Id.*

⁹⁸ Amicus Brief Supporting Debtor’s Position, *supra* note 94, at 11 (citing FLA. CONST. art. X, § 4; TEX. CONST. art. 16, § 51; KAN. STAT. ANN. § 60-2301).

⁹⁹ The Sixth Circuit made specific mention of the Texas and Florida approach on appeal. See *In re Schafer*, 689 F.3d 601, 615 (6th Cir. 2012).

¹⁰⁰ For commentary on the constitutionality of bankruptcy-only statutes, see, e.g., Rebecca B. Connelly, *A Look at the Constitutionality of State “Bankruptcy-Only” Exemptions*, AM. BANKR. INST. J., Nov. 2010; Peter Spero, *Exemptions in Bankruptcy—Validity of State Bankruptcy-Only Exemptions*, FRAUDULENT TRANSFERS, PREBANKRUPTCY PLANNING AND EXEMPTIONS § 12:32 (Database Updated August 2011); Geeta Dharmappa, *Exemptions and the Bankruptcy Code: Can States Opt Out of the Constitution?*, J. BANKR. L. 2010, at 11–12.

¹⁰¹ *In re Lennen*, 71 B.R. 80, 83 (Bankr. N.D. Cal. 1987) (striking down as unconstitutional California’s bankruptcy-only scheme).

Why did Michigan extend more generous protection to bankrupt debtors, and why has Michigan not opted out by now? The self-evident answer is to provide a choice to its debtors. Considering the values of federal exemptions and those of state exemptions, however, this choice seems rather illusory. It is virtually inarguable that Michigan's commitment to upholding a debtor's right to exempt his tools-of-the-trade is a remarkably longstanding one, spanning over a century and a half.¹⁰² At the very least, Michigan should probably be able to account for the discrepancy in its exemption laws when its lawmakers were likely aware of their suspect constitutionality, given the extensive case law on this relatively narrow issue.¹⁰³ As it stands, Michigan allows bankrupt debtors to exempt "\$3,000.00 in household goods, furniture, utensils, books, appliances, and jewelry."¹⁰⁴ Should a bankrupt small business debtor in Michigan need to exempt an automobile, yet find that the automobile does not qualify for a tools-of-the-trade exemption, the value of that exemption would be \$2775.¹⁰⁵ If the same debtor sought his or her relief from the Bankruptcy Code, the value of his or her household good exemption would be \$11,525 and the motor vehicle exemption would be \$3450.¹⁰⁶ Of course, the federal tools-of-the-trade protection is also more generous.¹⁰⁷ When viewed in light of the similar disparity in the value of their relative homestead exemptions,¹⁰⁸ why a Michigan debtor in bankruptcy would choose to invoke state exemption law is somewhat unclear. Certainly, there are some benefits that Michiganders may claim thanks to their state legislators. Somehow, though, a \$500 exemption for a "seat, pew, or slip occupied by the judgment debtor or the judgment debtor's family in a house or place of public worship"¹⁰⁹ does not seem sufficiently compensatory.

¹⁰² See, e.g., *Smalley v. Masten*, 8 Mich. 529, 529 (1860) (noting that "[t]he tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation or business, in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars' (Comp. L., § 4465), are exempt from levy and sale on execution"); *Hutchinson v. Whitmore*, 90 Mich. 255 (1892); *Morrill v. Seymour*, 3 Mich. 64 (1853).

¹⁰³ See *In re Hintz*, 86 B.R. 571, 571 (Bankr. E.D. Wis. 1988) (Code § 522(f)(2)(B) [now Code § 522(f)(1)(B)(ii)] does not apply to capital assets); *In re Eakes*, 69 B.R. 497 (Bankr. W.D. Mo. 1987); Norton, *Tools of the Trade*, *supra* note 56.

¹⁰⁴ MICH. COMP. LAWS § 600.5451 (2011).

¹⁰⁵ *Id.* Many debtors may prefer this exemption limit to that assigned to tools-of-the-trade in Michigan, which is lower. *Id.*

¹⁰⁶ 11 U.S.C. § 522 (2006).

¹⁰⁷ See 11 U.S.C. § 522(d)(6) (granting a \$2175 tools-of-the-trade exemption); MICH. COMP. LAWS § 600.5451 (establishing a \$2000 tools-of-the-trade exemption).

¹⁰⁸ 11 U.S.C. § 522(p)(1); MICH. COMP. LAWS § 600.6027 (limiting Michigan's homestead exemption to \$3500).

¹⁰⁹ MICH. COMP. LAWS § 600.5451.

Because it is one of the relatively few states that has declined to expressly opt out of the bankruptcy code, Michigan became the battleground for this fundamental disagreement. Shortly before *In re Schafer*, the Bankruptcy Court for the Western District of Michigan, striking down Michigan's bankruptcy-specific exemptions as unconstitutional, observed, "[i]f § 600.5451 is constitutional, one obvious result is that creditors would be penalized for exercising their specific right granted by Congress to file an individual's involuntary case. Bankruptcy specific exemptions might be an extreme disincentive which would effectively hinder creditors' rights."¹¹⁰ Mere months later, the bankruptcy court reversed course by pointing out that

any disparity between state exemptions and federal exemptions would create an incentive or disincentive for either creditors or debtors to seek relief under the Bankruptcy Code. This possibility is inherent in any legislative scheme, such as 11 U.S.C. § 522(b), that envisions a role for the states to play in enacting alternative exemptions, whether generally applicable or bankruptcy-specific.¹¹¹

The near chaotic discord this question has invited throughout Michigan bankruptcy courts alone should send an unmistakable signal to lawmakers in Lansing and elsewhere.

The *In re Schafer* line of cases did not represent the only way in which Michigan stands at the forefront of emerging exemption issues. In *In re Sassak*,¹¹² a Michigan debtor sought to invoke Michigan's slate of state exemptions¹¹³ because the debtor sought to exempt a particular set of life insurance policies. The question before the court, however, was "whether a debtor who elects the state exemption scheme option set forth in 11 U.S.C. § 522(b)(3) can be limited to the exemptions specifically enumerated in MCL § 600.5451,

¹¹⁰ *In re Pontius*, 421 B.R. 814, 823 (Bankr. W.D. Mich. 2009). In essence, *In re Pontius* serves as a companion case to *In re Schafer*. In *In re Pontius*, as was the case in *In re Schafer*, a Chapter 7 debtor attempted to exempt her homestead by drawing on the provisions of MICH. COMP. LAWS § 600.5451(1)(n). *Id.* at 815. Unique to *In re Pontius*, however, is the bankruptcy court's analysis of delegation. *Id.* at 819. The *In re Pontius* court held that in enacting § 600.5451, the Michigan Legislature attempted to write a portion of the Bankruptcy Code. Congress is constitutionally prohibited from delegating its "Bankruptcy Power" to any state, including Michigan. *Id.* at 820–21. The principle of non-delegation seemed to inform the court's ruling in *In re Schafer* as well, wherein the court wrote, "[t]he Bankruptcy Clause exists to restrict the power of the states to legislate in the area of bankruptcy. A state law which applies only to debtors in bankruptcy must be analyzed under the uniformity requirement of the Bankruptcy Clause." *In re Schafer*, 455 B.R. 590, 601 (B.A.P. 6th Cir. 2011).

¹¹¹ *In re Jones*, 428 B.R. 720, 728 (Bankr. W.D. Mich. 2010).

¹¹² *In re Sassak*, 426 B.R. 680 (E.D. Mich. 2010).

¹¹³ *Id.* at 681.

which are available only to Michigan debtors in bankruptcy.”¹¹⁴ In *In re Sassak*, the debtor additionally aimed to receive “entitlement to other Michigan exemptions historically available to both bankrupt and non-bankrupt debtors.”¹¹⁵

“[T]he Michigan exemption scheme historically has included as allowable exemptions those available under other Michigan statutes, not a part of the general exemption statute, some of which specifically reference bankruptcy proceedings and others which reference only creditors in general,” the court in *In re Sassak* explained.¹¹⁶ Because the court ultimately upheld this scheme,¹¹⁷ pro-debtor bankruptcy advocates may do well to consider incorporating tools-of-the-trade exemptions, among others more traditionally associated with bankruptcy, into the set of exemptions that the debtor in *In re Sassak* was able to access.

As it stands, the prospects of success on this front appear bleak. Unlike the specifically designated tools-of-the-trade exemption in MCL 600.5451(f), the life insurance policy at issue in *In re Sassak* was not identified by Michigan’s list of exemptions that make specific mention of the bankruptcy code.¹¹⁸ Thus, it appears Michigan lawmakers would need to draft an entirely distinct law exempting tools-of-the-trade from the reach of creditors, independent of MCL 600.5451, or argue that M.C.I.A. 600.6023¹¹⁹ serves an identical function.

States that have not opted out would be wise to enact reform quickly, as judicial intervention, let alone comprehensive correction, appears unlikely. As the First Circuit once proclaimed, “[t]he state’s ability to define its exemptions is not absolute and must yield to conflicting policies in the Bankruptcy Code.”¹²⁰ Evidently, many courts share this view.¹²¹ Though opting out

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 683.

¹¹⁷ *In re Sassak*, 426 B.R. at 695 (“Given the absence of express limiting language in the opening paragraph of MCL 600.5451 and the conflict which a finding of exclusivity would present with the broader mandate of 11 U.S.C. § 522(b)(3) ... this Court concludes that Appellee, who claims exemption pursuant to 11 U.S.C. § 522(b)(3), is also entitled to claim an exemption under MCL 500.2207 for the value of his whole life policy.”).

¹¹⁸ *Id.* at 687.

¹¹⁹ This provision exempts up to \$1000 from “levy and sale under any execution” for “the tools, materials, stock, apparatus, team, vehicle, motor vehicle, horses, harness, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged.” The provision need not apply to bankrupt debtors.

¹²⁰ *In re Weinstein*, 164 F.3d 677, 683 (1st Cir. 1999) (citing *Owen v. Owen*, 500 U.S. 305, 313 (1991)); see also *In re Cunningham*, 513 F.3d 318, 323 (1st Cir. 2008); *In re Garcia*, 2010 WL 2697020, at *1 (Bankr. S.D. Fla. 2010).

¹²¹ See *In re Kanter*, 505 F.2d 228, 228 (9th Cir. 1974); *In re Regevig*, 389 B.R. 736, 736 (Bankr. D. Ariz. 2008); *In re Wallace*, 347 B.R. 626, 626 (Bankr. W.D. Mich. 2006); *In re Cross*, 255 B.R. 25, 25 (Bankr. N.D. Ind. 2000); *In re Mata*, 115 B.R. 288, 288 (Bankr. D.

of the Bankruptcy Code may not entirely ensure judicial approval,¹²² it unquestionably bolsters its likelihood.¹²³

Waiting for any strain of judicial action, approval or otherwise, will accomplish little for states that presently offer their debtors a choice of laws. It may be true that “[a]ny case involving a circuit split is a potential target for Supreme Court review, even if it involves a mundane matter, because the inconsistency can be a problem in itself.”¹²⁴ Still, the prospects of certiorari appear dim.

Since *In re Schafer*, another Michigan court has weighed in on the same legal issues that the case presents for bankrupt debtors. In *In re Reinhart*,¹²⁵ the Bankruptcy Court for the Eastern District of Michigan, Southern Division, faced a factual scenario in which a Chapter 7 debtor sought to exempt property under MCL § 600.5451.¹²⁶ The court in *In re Reinhart* ruled against this proposal, but declined to do so on constitutional grounds.¹²⁷ Instead, wrote the court, “Congress ... did not intend[] § 522(b)(3)(A) to allow debtors to claim exemptions under state bankruptcy-specific exemption laws such as MCL § 600.5451.”¹²⁸ The court framed the issue as whether Congress aimed “to allow a debtor to claim

Colo. 1990); *In re Lennen*, 71 B.R. 80, 80 (Bankr. N.D. Cal. 1987); *In re Reynolds*, 24 B.R. 344, 344 (Bankr. S.D. Ohio 1982); see also *Weinstein*, 164 F.3d at 677 (holding that the Bankruptcy Code preempted certain provisions of the Massachusetts Homestead Act).

¹²² See *In re Regevig*, 389 B.R. at 736 (invalidating California’s bankruptcy-only law). The case was brought in the Bankruptcy Court for the District of Arizona because “[t]he Debtors are currently Arizona residents but apparently were not Arizona residents for all of the 730 days preceding the filing of this case.” *Id.* at 737. *In re Regevig* serves as an example of BAPCPA’s new residency restrictions at play.

¹²³ See COLO. REV. STAT. § 13-54-107 (1987); *In re Kulp*, 949 F.2d 1106, 1107 (10th Cir. 1991); *In re Brown*, 2007 WL 2120380 (Bankr. N.D. N.Y. 2007); *In re Shumaker*, 124 B.R. 820, 824 (Bankr. D. Mont. 1991); *In re Vasko*, 6 B.R. 317, 318 (Bankr. N.D. Ohio 1980).

¹²⁴ Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 431 (1998); see also Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1176 (2011) (citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) (“The Supreme Court often, but not necessarily, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of [law]. One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals. Hence a square and irreconcilable conflict of this nature ordinarily should be enough to secure review, assuming that the underlying question has substantial practical importance.”)).

¹²⁵ *In re Reinhart*, 460 B.R. 466 (Bankr. E.D. Mich. 2011).

¹²⁶ *Id.* at 467.

¹²⁷ *Id.* at 466.

¹²⁸ *Id.* at 468.

exemptions only in property that is exempt under the state law from execution on a judgment.”¹²⁹ Though it is perhaps encouraging that another Michigan court has rejected the *In re Schafer* line of reasoning, debtors may find little solace if the outcome is effectively the same.

Early in 2010, the Supreme Court declined to hear the *Sheehan v. Peveich* appeal.¹³⁰ Considering the breadth of the circuit split and the importance of the issues cases in the *Sheehan* and *In re Schafer* mold present, this decision is every bit as surprising as it is disappointing. Though the Sixth Circuit Bankruptcy Appellate Panel has heard and ruled on *In re Schafer* since that denial, if the Supreme Court was especially concerned with bankruptcy uniformity, it likely would have granted certiorari to *Sheehan*. Because it has declined to do so, the assumption that it will not tackle the bankruptcy-only exemption issue appears altogether wise.¹³¹ If Michigan would have liked to ensure its debtors had the most favorable series of exemptions possible, opting out of the Bankruptcy Code would have exhibited far greater attentiveness to those debtors’ needs.

It would be defeatist and somewhat misguided for debtors to conclude that the outlook is entirely grim. Most importantly, the Sixth Circuit has recently held that Michigan did indeed have the authority to provide a different array of exemptions to bankrupt debtors.¹³² Moreover, New York upheld the constitutionality of that state’s bankruptcy specific exemption scheme.¹³³ When viewed in conjunction with the comparable ruling, courtesy

¹²⁹ *Id.* at 467.

¹³⁰ Connelly, *supra* note 100, at 14 (citing *Sheehan v. Jackson*, 130 S. Ct. 1066 (2010)). *Sheehan* was not the only recent bankruptcy case to emerge from West Virginia vindicating state-only exemptions. See *In re Morrell*, 394 B.R. 405, 405 (Bankr. N.D. W. Va. 2008). In *In re Morrell*, the court, looking to the legislative history of section 522, noted that “[t]he opt-out provision itself does not limit a State’s authority to enact bankruptcy only exemptions, and bankruptcy only exemptions are consistent with ideals of federalism.” *Id.* at 415 (citation omitted).

¹³¹ The Supreme Court, however, has not been altogether silent recently on tools-of-the-trade exemptions. See *Schwab v. Reilly*, 130 S. Ct. 2652 (2010). There, a caterer claimed a tools-of-the-trade exemption under the Federal Bankruptcy Code to which the trustee did not object within thirty days of the creditors meetings. *Id.* at 2657–58. Dealing yet another blow to debtors seeking the safe harbor of bankruptcy exemptions, the Court held that creditors and trustees did not have to object formally to a claimed exemption that equals the statutory cap in order to limit a debtor’s exemption to that value, rather than the full value of the property. *Id.* at 2652. It seems curious that the Court would grant certiorari to such a case due in large part to “a disagreement among the Courts of Appeals” but decline to hear *In re Schafer* or *Sheehan* on appeal. *Id.* at 2657.

¹³² See *In re Schafer*, 689 F.3d 601, 607 (6th Cir. 2012) (stating that “an interpretation of § 522 that permits states to enact bankruptcy-specific exemptions schemes does not run afoul of either the Bankruptcy or Supremacy Clauses of the Constitution”).

¹³³ See *In re Brown*, 2007 WL 2120380 (Bankr. N.D. N.Y. 2007).

of the Fourth Circuit in *Sheehan*, the Supreme Court's refusal to grant certiorari becomes even more baffling than before.¹³⁴ BAPCPA was enacted in large measure to abate the exploitation of the Bankruptcy Code's geographic idiosyncrasies.¹³⁵ The current patchwork of bankruptcy legislation and jurisprudence throughout the nation, however, may well elicit the directly opposite effect. Indeed, if exemption law is more favorable to a debtor in New York than it is elsewhere, there would seem to be a strong incentive for an enterprising, yet risk-averse, small business owner to establish his or her business in New York or perhaps even to relocate there.

The problem is that this situation is not borne of policy, but of interpretation. If the New York legislature aimed to encourage small business owners to relocate to New York, it is of course well within its right to offer a more enticing tax regimen than its neighbors offer.¹³⁶ It is not, however, entitled to its own federal Constitution; no state is.¹³⁷ The court's reasoning in *In re Brown* appears persuasive when it concludes, citing age-old precedent, that "a federal bankruptcy law which recognizes and enforces state laws, affecting exemptions and priorities of payment is a uniform law, even though the law may operate differently from state to state."¹³⁸

CONCLUSION

Though *In re Regevig* stands for the proposition that opting out of the Bankruptcy Code and enacting a bankruptcy-only paradigm may not be

¹³⁴ The Bankruptcy Appellate Panel for the Sixth Circuit did issue its ruling in *In re Schafer* on February 24, 2011, after the court denied certiorari to *Sheehan*. See *In re Reinhart*, 460 B.R. at 467. It is possible that in light of the Sixth Circuit's decision in *In re Schafer*, 689 F.3d 601, 607 (6th Cir. 2012), the Supreme Court is more likely to grant certiorari.

¹³⁵ ABI Bankruptcy Conference Report, *supra* note 36.

¹³⁶ *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336–37 (1977) ("Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.").

¹³⁷ Even the Bankruptcy Clause gives Congress the power to "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The Supreme Court has held that the uniformity mandated under the Constitution is geographical uniformity, not personal uniformity. *In re Snape*, 172 B.R. 361, 363 (Bankr. M.D. Fla. 1994) (citing *Hanover Bank v. Moyses*, 186 U.S. 181 (1903)). The crucial difference is that "Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement." *In re Sullivan*, 680 F.2d 1131, 1135 (7th Cir. 1982).

¹³⁸ *In re Brown*, 2007 WL 2120380 (citing *Nehme v. INS*, 252 F.3d 415, 428 (5th Cir. 2001); *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

enough to rebut claims that the scheme is unconstitutional,¹³⁹ and the Supreme Court has asserted that the state's ability to define its exemptions is not absolute and must yield to conflicting policies in the Bankruptcy Code,¹⁴⁰ the evidence is on balance far too overwhelming to ignore.¹⁴¹ If states aim to maximize the protection of their bankrupt debtors, which is the apparent justification for offering those debtors a choice between federal and state exemption law, opting out of the Bankruptcy Code appears to be the most viable avenue to accomplish that noble goal.

*Ryan Malone**

¹³⁹ See *In re Kanter*, 505 F.2d 228, 228 (9th Cir. 1974); *In re Regevig*, 389 B.R. 736, 736 (Bankr. D. Ariz. 2008); *In re Wallace*, 347 B.R. 626, 626 (Bankr. W.D. Mich. 2006); *In re Cross*, 255 B.R. 25, 26 (Bankr. N.D. Ind. 2000); *In re Mata*, 115 B.R. 288, 288–89 (Bankr. D. Colo. 1990); *In re Lennen*, 71 B.R. 80, 80 (Bankr. N.D. Cal. 1987); *In re Reynolds*, 24 B.R. 344, 344 (Bankr. S.D. Ohio 1982).

¹⁴⁰ *Owen v. Owen*, 500 U.S. 305, 313 (1991).

¹⁴¹ See, e.g., *In re Kulp*, 949 F.2d 1106, 1106 (10th Cir. 1991); *In re Brown*, 2007 WL 2120380, at *17 (Bankr. N.D. N.Y. 2007); *In re Shumaker*, 124 B.R. 820, 824 (Bankr. D. Mont. 1991); *In re Vasko*, 6 B.R. 317, 317 (Bankr. N.D. Ohio 1980).

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