

Look to the States: How the State-Specific Interpretation Clarifies BAPCPA’s § 522 Ambiguity and Protects State Exemption Laws

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ABSTRACT: After Congress revised the Bankruptcy Code in 2005, courts have taken divergent views about how to apply 11 U.S.C. § 522 in relation to state exemptions. Three main interpretations have developed: anti-extraterritoriality, preemption, and state-specific. This Note advocates the state-specific approach, as it prevents forum shopping without rendering state exemption laws void or futile. The state-specific view requires courts to consider both state case law and public policy. When state statutes remain silent, courts applying the state-specific interpretation should liberally construe the exemption statutes in favor of the debtor and allow extraterritorial application.

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I. INTRODUCTION

In 2004, Thomas Hogan had his therapist inform Hogan's wife, Doylene Roberts, that Hogan was "moving on" and that Roberts should do the same.¹ Through his therapist, Hogan told Roberts that he had a girlfriend, that his girlfriend was expecting his child, and that his girlfriend was going to move in with him.² Hogan also informed Roberts that he had pled guilty to a charge of bank fraud and that, as part of his sentence, he would be under house arrest at the house he was currently living at in Newport Beach, California—a house that Roberts had herself purchased.³ Roberts initiated divorce proceedings and moved to Iowa to be closer to her family.⁴

As a result of Hogan's frequent use of Roberts' credit card and general reliance on her income throughout their marriage,⁵ Roberts filed for bankruptcy in Iowa in 2010. Roberts sought to claim the Newport Beach house as an exempt asset under Iowa law.⁶ The trustee in Roberts' case objected to the claimed exemption, arguing that the Newport Beach house was an out-of-state—extraterritorial—exemption, and for that reason not exempt.⁷ Courts are divided on the correct approach for extraterritorial exemptions.⁸

The federal government provides debtors with a set of federal bankruptcy exemptions, but states can choose to "opt out" of the federal framework and offer their own state-defined exemptions.⁹ States that elect to opt out often limit their exemptions to residents and/or property located within the state.¹⁰ In cases like Roberts', where the debtor wants to claim out-of-state property, courts are faced with the question of whether to grant an extraterritorial exemption according to the state's exemption scheme or impose federal exemptions regardless of state law. In answering this

1. *In re Roberts*, 443 B.R. 531, 534 (Bankr. N.D. Iowa 2010).

2. *Id.*

3. *Id.*

4. *Id.* at 535.

5. *Id.* at 534–35.

6. *Id.* at 535–36.

7. *Id.* at 536. Roberts ultimately succeeded and was permitted to claim the Newport Beach house as an exempt asset. *Id.* at 534.

8. See *infra* Part III (discussing the availability of federal exemptions and the extraterritorial application of state exemption laws).

9. See 11 U.S.C. § 522(b)(2) (2012) (allowing states to opt out of federal exemptions, stating: "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. See, e.g., IDAHO CODE ANN. § 11-602(1) (2010). Under Idaho law, a "resident" is an individual intending to maintain Idaho as their home. *Id.* § 11-602(2). The Idaho homestead exemption is limited to \$100,000. *Id.* § 55-1003 (2012).

question, the courts are split into three camps: anti-extraterritoriality, preemption, and state-specific.

Anti-extraterritoriality courts refuse to grant exempt status to out-of-state properties. Preemption courts hold that because bankruptcy is a federal construct, the Federal Bankruptcy Code preempts state exemption statutes; thus, such courts determine whether to grant exemptions based solely on the federal exemption scheme.¹¹ Finally, a majority of courts adopt a state-specific approach and examine extraterritorial exemptions on a state-by-state basis according to state law.¹² These three conflicting interpretations make state exemption claims dubious and bankruptcy proceedings unpredictable, which in turn decreases market stability. Further contributing to the confusion is the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), which Congress enacted in 2005¹³ to address rampant forum shopping.¹⁴

In response to this disagreement, this Note advocates for the state-specific interpretation, which requires courts to interpret and apply a state’s statutory language and case law before granting or denying an extraterritorial homestead exemption. Part II provides an overview of the purpose of exemption laws and the federal government’s attempts to decrease forum shopping. Part III introduces extraterritoriality and further elucidates on the three interpretations. Part IV discusses and compares the major cases supporting the preemption and state-specific interpretations. Finally, Part V argues that the state-specific interpretation is the best analytical tool to protect state sovereignty while maintaining federal exemptions.

II. DEVELOPMENT OF DIVERGENT INTERPRETATIONS AFTER BAPCPA

In 2011, individuals filed 1.3 million bankruptcy petitions in the United States.¹⁵ Debtors file for bankruptcy for a number of reasons.¹⁶ Poor

11. See *Fernandez v. Miller (In re Fernandez)*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,191–92 (W.D. Tex. Aug. 5, 2011) (describing the split between the courts and the resulting interpretative schemes).

12. See *In re Jevne*, 387 B.R. 301, 304–05 (Bankr. S.D. Fla. 2008) (adopting the state-specific interpretation after analyzing the three interpretations).

13. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 18 & 28 U.S.C. (2006 & Supp. V 2011)).

14. See *infra* text accompanying notes 31–32.

15. OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 5 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2011/BAPCPA-report.pdf>.

16. See *id.*

financial management can lead to loan defaults,¹⁷ or divorce proceedings costs or medical bills can rise to insurmountable levels.¹⁸ Whatever the cause, bankruptcy ensures that a debtor's creditors are fairly reimbursed by distributing the debtor's assets once it becomes apparent that he or she will be unable to repay his or her debts, while simultaneously seeking to help the debtor get a fresh start after the distribution process is complete. Balancing the competing interests of the creditor, debtor, and conflicting policy aims often proves difficult. As such, the remainder of this Part will discuss issues related to achieving this balance.

This Part discusses the role of exemptions in bankruptcy cases and how the revised Bankruptcy Code addresses forum shopping. Subpart A discusses how allowing debtors to shield certain property interests from creditors can help get them back on their feet after bankruptcy proceedings come to an end, commonly known as the fresh start. Subpart B covers how the tension between exemption planning and forum shopping led to the recent revision of the Bankruptcy Code. Finally, Subpart C describes BAPCPA and its focus on decreasing forum shopping.

A. GOALS OF BANKRUPTCY EXEMPTIONS

Bankruptcy prevents debtors from making preferential payments to certain creditors while overlooking other claims.¹⁹ After a debtor files for bankruptcy, the trustee, a neutral third party, divides the debtor's assets (collectively called the "debtor's estate"). Of course, creditors lend without expecting debtors to default,²⁰ and they expect their claims to be paid in full. When this proves impossible, creditors prefer the equitable division of the debtor's estate. The trustee is required to arrange creditors' claims in order of priority, which offers creditors fair and detailed access to assets in the estate. Legislators also recognize bankruptcy's potential as an economic development tool.²¹ One of the main purposes of bankruptcy "is to provide a

17. See, e.g., *Schultz v. Wills (In re Wills)*, 126 B.R. 489, 490–91 (Bankr. E.D. Va. 1991) (alleging "cash flow problems," the debtor defaulted on a \$1.7 million loan and filed for bankruptcy).

18. E.g., *Growney v. Growney (In re Growney)*, 15 B.R. 849, 850 (Bankr. W.D.N.Y. 1981) (finding that children's medical and dental bills are non-dischargeable child support obligations).

19. JOHN K. PEARSON & R. PETE SMITH, A CREDITOR'S GUIDE TO BANKRUPTCY: PROTECTING A LENDER'S RIGHTS IN BANKRUPTCY 1 (Roger P. Bruesewitz et al. eds., 1989).

20. This may be due in part to the heavy social stigma associated with bankruptcy. See Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 247 (2006) (finding that studies point to a rising stigma even as the number of households with serious financial issues increases); Sara Murray, *Bankruptcy Comes with Social Stigma*, WALL ST. J. (Nov. 25, 2010, 7:50 PM), <http://blogs.wsj.com/economics/2010/11/25/bankruptcy-comes-with-social-stigma/> (explaining that "bankruptcy is associated with profligacy, with over-spending and over-borrowing").

21. See Margaret Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201 (1996), reprinted in BARRY E. ADLER, FOUNDATIONS OF BANKRUPTCY LAW 97, 98–99 (2005)

fresh start to the honest but unfortunate debtor” in need of debt relief, and, through the discharge of his or her debts, restore the debtor’s ability to contribute to the economy once again.²² Legislators recognize that “[i]f debtors were not permitted to keep some minimal property,” they would likely have to resort to welfare or other government programs, draining societal resources.²³

In hopes of providing debtors with this “fresh start,” federal and state laws provide several exemptions—assets that are not to be liquidated and distributed in a bankruptcy proceeding—shielding certain property interests from creditors.²⁴ Under the federal Bankruptcy Code, states may individually opt out of the federal exemptions and define their own exemptions.²⁵ While states differ on the number of and limits to exemptions, legislators of all states recognize that debtors need a dwelling place—or homestead—that must be shielded from creditors.²⁶ Homestead exemptions generally allow debtors to exempt their primary residence from sale or reserve a statutorily-defined amount of equity in the debtor’s estate.²⁷ Thus, debtors who own multiple properties or do not own a homestead might consider transferring assets to utilize any available exemptions.

(explaining that the migration of “deadbeat[s] . . . who cross[] state lines to avoid repayment of a debt” may help states that need immigrants, and noting that such states might grant broad fresh start rights that allow the “deadbeat” to “shelter future income from his creditors and first wives and children”).

22. See *In re Lusiak*, 247 B.R. 699, 702 (Bankr. N.D. Ohio 2000); 3 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKRUPTCY LAW AND PRACTICE* § 56:1 (3d ed. 2013) (“Exemptions are provided by every state and by federal bankruptcy law in order to protect debtors and their families from destitution”); see also *Purpose of Statute—Providing Debtor with a Fresh Start*, in 4 *BANKR. SERVICE LAW*, ED. § 39:11 (West 2013).

23. Gregory M. Messer, *Bankruptcy Exemptions*, in *CONSUMER AND SMALL BUSINESS BANKRUPTCY 2010*, at 59, 61 (Commercial Law & Practice, Course Handbook Ser. No. A-923, 2010). Corporate debtors cannot qualify for exemptions. See NORTON & NORTON, *supra* note 22, § 56:3 (stating that exemptions are not available to “corporations, partnerships, and governmental units”).

24. NORTON & NORTON, *supra* note 22, § 56:1 (“Debtors must claim their exemptions in order to enjoy them”).

25. See 11 U.S.C. § 522(b)(3) (2012) (allowing debtors to exempt property found in § 522(d) or according to “State or local law”); *Fernandez v. Miller* (*In re Fernandez*), [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,189 (W.D. Tex. Aug. 5, 2011) (describing opt-out scheme). In some states, debtors may choose to use either the federal exemption scheme or their state’s exemptions. DAVID L. BUCHBINDER, *FUNDAMENTALS OF BANKRUPTCY* § 9:1, at 155 (1991) (citing 11 U.S.C. § 522(b)).

26. *In re Lusiak*, 247 B.R. at 702.

27. BLACK’S LAW DICTIONARY 802 (9th ed. 2009) (defining “homestead law” as “[a] statute exempting a homestead from execution or judicial sale for debt, unless all owners . . . have jointly mortgaged the property or otherwise subjected it to creditors’ claims”); see also BUCHBINDER, *supra* note 25, § 9:2, at 158.

B. EXEMPTION PLANNING

Creditors cannot liquidate exempt assets, which allows debtors to start fresh with their exempt property.²⁸ Exemption planning involves rearranging assets to prevent creditors from reaching those assets. In the bankruptcy context, debtors convert nonexempt assets into exempt assets.²⁹ Debtors are allowed to convert nonexempt assets up to the “eve of bankruptcy” with the explicit intent of protecting as much of their estate as possible.³⁰ This may include moving assets, purchasing property, or moving to another state.

Policymakers struggle to balance the interests of creditors and debtors. Creditors need penalties and debt collection regulations in order to continue lending, while debtors are concerned with asset planning and protection from harsh or unfair debt collection practices. However, both creditors and debtors are concerned with forum shopping.³¹ This concern is heightened by debtors who transfer assets just before filing or who move to states that have high exemption ceilings. Debtors may wish to move to a state with favorable exemptions prior to filing for bankruptcy, but creditors require some degree of stability and predictability. Congress designed the extended pre-bankruptcy petition period to “thwart forum shopping by debtors who move to states with more generous exemption rights.”³² However, exemption planning is not without its limits. For example, courts refuse to grant exemptions where a debtor acts with the intent to defraud a

28. BUCHBINDER, *supra* note 25, § 9.1, at 154.

29. See GEORGE E. NELSON, DEBTORS HAVE RIGHTS TOO! 72–73 (1964) (emphasizing the need for a debtor to “take all available money and put it into exempt items”). Nelson goes on to caution debtors against fraud but notes that “for the most practical reasons [the fraudulent conveyance provision] of the Bankruptcy Act is unenforceable.” *Id.* at 73. Asset planning takes up a great deal of the bankruptcy attorney’s work. Creditors who have “valid and unavowed” liens against exempt property can enforce their liens and claims even if the property is claimed as exempt. See CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW PRINCIPLES, POLICIES, AND PRACTICE 687 (2d ed. 2006).

30. See *Hanson v. First Nat’l Bank in Brookings*, 848 F.2d 866, 868–69 (8th Cir. 1988) (finding no fraudulent conveyance where debtors purchased exempt life insurance policies two weeks before filing and prepaid over \$11,000 on their home mortgage).

31. See *In re Ocean Place Dev., LLC.*, 447 B.R. 726, 736 (Bankr. D.N.J. 2011) (“A federal court in bankruptcy is not allowed to upend the property law of the state in which it sits, for to do so would encourage forum shopping and allow a party to receive a windfall merely by reason of the happenstance of bankruptcy.”) (quoting *First Fid. Bank, N.A. v. Jason Realty, L.P. (In re Jason Realty, L.P.)*, 59 F.3d 423, 427 (3d Cir. 1995) (internal quotation marks omitted)).

32. *In re Jevne*, 387 B.R. 301, 303 (Bankr. S.D. Fla. 2008); see also *In re Shell*, 478 B.R. 889, 898 (Bankr. N.D. Ind. 2012), *rev’d*, *Shell v. Yoon*, No. 2:12-CV-439;JVB, 2013 WL 5406266 (N.D. Ind. Sept. 24, 2013); *In re Capps*, 438 B.R. 668, 672 n.3 (Bankr. D. Idaho 2010); H.R. REP. NO. 109-31, at 102 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 178–179.

creditor.³³ In addition, some states limit exemptions to property within the state's borders.³⁴

For years, scholars have counseled creditors not to allow debtors a "head start" at the creditor's expense.³⁵ A debtor who transfers assets or moves on the eve of bankruptcy decreases the creditor's chances for repayment. In attempting to control assets and discourage insolvent debtors from transferring assets,³⁶ some creditors, particularly through collection agencies, utilize arguably "harassing techniques."³⁷ Congress has made many attempts to balance the interests of creditors and debtors, and current debtor/creditor law relies on the Bankruptcy Code and other Acts.³⁸ Regulations guide, but do not guarantee, fair practices. As bankruptcy filings increased through the 2000s,³⁹ Congress substantially revised the Bankruptcy Code.⁴⁰ One amendment addressed forum shopping through an extended residency requirement, and today a debtor must reside in a state for several months before qualifying to claim that state's exemptions.⁴¹

C. BAPCPA'S EFFORT TO DISCOURAGE FORUM SHOPPING

Congress enacted BAPCPA in 2005.⁴² BAPCPA aims to provide new protections for debtors and to legitimize the bankruptcy process for truly insolvent debtors.⁴³ BAPCPA also attempts to decrease forum shopping.⁴⁴

33. See *Hanson*, 848 F.2d at 868 (citing *Ford v. Poston*, 773 F.2d 52, 54 (4th Cir. 1985)); *Prod. Credit Ass'n v. Shirley*, 485 N.W.2d 469, 471, 475-76 (Iowa 1992) (holding that selling corporate stock to family members for less than fair market value while retaining use constituted actual intent to defraud a creditor).

34. See, e.g., sources cited *supra* note 10.

35. PEARSON & SMITH, *supra* note 19, at 225.

36. See LYNN M. LOPUCKI & CHRISTOPHER R. MIRICK, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS 12 (2003).

37. See *George v. Jordan Marsh Co.*, 268 N.E.2d 915, 915, 921 (Mass. 1971) (finding a creditor could be liable for emotional distress after the creditor's harassing phone calls caused the plaintiff to suffer two heart attacks).

38. See, e.g., 15 U.S.C. § 1692 (2012) (regulating the contacts creditors and debt collectors have with debtors).

39. U.S. COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2011 AND 2012 (March 25, 2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2012/0312_f.pdf (showing over 1.3 million bankruptcy filings for the twelve-month period ending on March 31, 2012).

40. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 18 & 28 U.S.C. (2006 & Supp. V 2011)).

41. See 11 U.S.C. § 522(b)(3)(A) (2012) (setting forth 730 and 180 day domiciliary requirements).

42. BAPCPA, 119 Stat. 23.

43. Many commentators expressed frustration at BAPCPA's number of additional constraints on debtors and argue that BAPCPA's stated purpose is not substantiated. For a summary of some of the new requirements, see Rob Dean, *BAPCPA: The Bankruptcy Abuse*

The Bankruptcy Code dictates which state's exemption laws apply to a debtor. Debtors file bankruptcy petitions in the state they resided in for the 180 days immediately preceding the filing.⁴⁵ Before 2005, this venue requirement mirrored the residency rules: a debtor needed to live in a state for the greater part of 180 days before the debtor could claim that state's exemptions.⁴⁶ BAPCPA retained the 180-day venue requirement,⁴⁷ but it increased the domicile requirement to 730 days.⁴⁸ If a debtor has not been domiciled in a state for at least 730 days, the statute "looks back" to the state where the debtor lived for the immediately preceding 180 days.⁴⁹

This "look back" period creates a unique issue for creditors seeking to seize a debtor's house. Debtors who moved to their current state of residence less than 730 days before filing for bankruptcy may not use that state's exemption laws.⁵⁰ Residency typically signifies where a person "actually lives,"⁵¹ whereas domicile requires the debtor's physical presence and intent to remain.⁵² "A person . . . may have more than one residence at a time but only one domicile."⁵³ Even if a debtor meets the traditional definition of residency, that debtor must also meet the higher domicile standard. This higher standard is intended to discourage debtors from engaging in undesirable forum shopping. Thus, regardless of where a debtor currently lives, debtors who file for bankruptcy within two years of moving must claim their prior state's exemptions.

III. EXTRATERRITORIAL APPLICATION OF EXEMPTIONS

Before BAPCPA, "exemption laws were construed by courts located within the state whose exemption law applied."⁵⁴ Now, because of the new

Prevention and Consumer Protection Act, MD. BANKR. BLOG (Sept. 21, 2009, 8:05 PM), <http://www.marylandbankruptcy.org/2009/09/bapcpa-bankruptcy-abuse-prevention-and.html>.

44. See *Fernandez v. Miller* (*In re Fernandez*), [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,190 (W.D. Tex. Aug. 5, 2011) ("Congress's purpose in extending the 'look-back' window was to prevent debtors from forum-shopping . . .").

45. *In re Jevne*, 387 B.R. 301, 302–03 (Bankr. S.D. Fla. 2008).

46. See 11 U.S.C. § 522(b)(2)(A) (2000 & Supp. IV 2004); 28 U.S.C. § 1408(1) (2000); *In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,190; *In re Williams*, 369 B.R. 470, 473 (Bankr. W.D. Ark. 2007). Realistically, debtors could utilize state exemptions after residing in the state for ninety-one days (the "longer portion" of 180 days) in order to claim the state exemptions. See BUCHBINDER, *supra* note 25, § 9.1, at 155.

47. 28 U.S.C. § 1408(1) (2006); *In re Jevne*, 387 B.R. at 303.

48. 11 U.S.C. § 522(b)(3)(A) (2012).

49. *See id.*

50. *In re Jevne*, 387 B.R. at 303.

51. BLACK'S LAW DICTIONARY 1423 (9th ed. 2009) (defining "residence"). For clarity purposes, this Note refers to debtors who do not meet the 730-day residency requirement as "nonresident local debtors."

52. *Id.* at 558 (defining "domicile").

53. *Id.* at 1423 (defining "residence").

54. *In re Jevne*, 387 B.R. at 303.

730 day domicile requirement, courts that construe exemption laws are not always located in that state. For instance, a bankruptcy court located in Arkansas might interpret the Iowa homestead exemption.⁵⁵ These courts often interpret whether a state statute has extraterritorial application. This is problematic and can lead to inconsistent and contradictory results because not all federal bankruptcy courts approach the federal-state exemption dichotomy in the same manner.

The extraterritoriality question is a two-part inquiry: “[(1)] whether a non-resident can use a state’s exemption laws [altogether], and [(2)] whether a state’s exemption laws can apply to property outside the state.”⁵⁶ Subpart A briefly describes the federal opt-out scheme. Subpart B defines the three main interpretations: anti-extraterritoriality, preemption, and state-specific.

A. AVAILABILITY OF FEDERAL EXEMPTIONS TO NON-RESIDENT DEBTORS

When a non-resident debtor who has recently moved to another state files for bankruptcy, courts must first consider whether the debtor may claim the former state’s exemptions altogether. If the court answers in the affirmative, the court also considers whether that state’s opt-out status applies to the non-resident debtor.⁵⁷ In these cases, trustees might allege that debtors do not qualify for federal exemptions when the debtor’s former state opted out of the federal exemptions.⁵⁸ Because Congress allows states to opt out,⁵⁹ courts parse statutes for language excluding non-residents, and as a result of BAPCPA’s exemption alterations, bankruptcy courts must now interpret the “exemption laws of many different states.”⁶⁰

Twenty-two states limit their exemptions to residents.⁶¹ Conversely, twenty-two states, by statute, allow nonresident local debtors to claim their exemptions.⁶² The remaining states mix residency and domicile provisions.⁶³ In states that limit exemptions to residents, nonresident local debtors claim

55. See *In re Williams*, 369 B.R. 470, 471 (Bankr. W.D. Ark. 2007).

56. *Fernandez v. Miller (In re Fernandez)*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,190 (W.D. Tex. Aug. 5, 2011).

57. *Id.* at 103,191.

58. *Id.*

59. See 11 U.S.C. § 522(b)(2) (2012) (providing federal opt-out scheme); *Camp v. Ingalls (In re Camp)*, 631 F.3d 757, 760 (5th Cir. 2011) (discussing the ability to opt out).

60. *In re Jevne*, 387 B.R. 301, 303 (Bankr. S.D. Fla. 2008).

61. NORTON & NORTON, *supra* note 22, at app. 56-B.

62. See *id.*

63. See KAN. STAT. ANN. § 60-2301 (2005 & Supp. 2012); *id.* § 60-2304 (2005) (stating that “[e]very person residing in this state” qualifies for the personal property exemptions, whereas the homestead statute does not have any express granting or limiting language on the basis of domicile or residency in Kansas). But see *In re George*, 440 B.R. 14, 164 (Bankr. E.D. Wis. 2010) (arguing that a court can imply a residency requirement in exemption statutes).

federal exemptions.⁶⁴ In states where the statute excludes residents from claiming the federal exemption scheme, but does not address non-residents, courts typically allow non-residents to claim the federal exemptions.⁶⁵ However, some courts disregard state statutes in favor of the federal provisions.⁶⁶

B. EXTRATERRITORIAL APPLICATION OF STATE EXEMPTION LAWS

While these statutory differences pose challenges for debtors as they navigate their available exemptions, the new BAPCPA domicile requirement poses another interpretative issue, particularly involving the homestead exemption.⁶⁷ When a state statute does not specify whether real property must be located within the state to be exempt, courts must consider whether to grant extraterritorial exemptions and allow a debtor to exempt the out-of-state real property.⁶⁸ Imagine Debtor A, who moved to New Mexico after living in Vermont for a year. Debtor A filed for bankruptcy in New Mexico within two years of moving. Debtor A must claim Vermont's exemptions. Should Debtor A own a homestead in New Mexico and wish to claim it as exempt, the process becomes further complicated. The bankruptcy trustee and reviewing court must determine whether Vermont's statute allows extraterritorial application. In this example, Vermont's statutory language would fail to assist the trustee: "[t]he homestead of a natural person consisting of a dwelling house . . . owned and used or kept by such person as a homestead . . . shall be exempt from attachment and execution."⁶⁹ The statutory language does not specify whether the "dwelling house" must be located within Vermont or if debtors may exempt properties located in other states.

Currently, courts are split on how to analyze whether a state's homestead exemption has extraterritorial application.⁷⁰ Thus, courts use the three divergent approaches: anti-extraterritoriality, preemption, and state-

64. NORTON & NORTON, *supra* note 22, at app. 56-B.

65. See *Camp v. Ingalls (In re Camp)*, 631 F.3d 757, 760–61 (5th Cir. 2011) (citing cases that interpret statutes from Georgia, Colorado, South Dakota, and Alabama, and allowing a debtor to use the federal exemptions under Florida law); *In re Adams*, 375 B.R. 532, 533 (Bankr. W.D. Mo. 2007) (validating the parties' agreement that if Florida's exemption laws did not apply, the debtors could claim the federal exemptions).

66. See *infra* Part IV.A; see also *In re Shell*, 478 B.R. 889, 898 (Bankr. N.D. Ind. 2012), *rev'd*, *Shell v. Yoon*, No. 2:12-CV-439-JVB, 2013 WL 5406266 (N.D. Ind. Sept. 24, 2013).

67. A homestead exemption typically allows debtors to exempt equity in the debtor's home or dwelling place. See *supra* note 27 and accompanying text.

68. See *Fernandez v. Miller (In re Fernandez)*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,191–92 (W.D. Tex. Aug. 5, 2011).

69. VT. STAT. ANN. tit. 27, § 101 (2012).

70. *In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,192.

specific.⁷¹ The remainder of this Part will further address each of these approaches in succession.

1. Anti-Extraterritoriality Interpretation: Exemptions Cannot Apply Across State Boundaries

Courts that adopt the anti-extraterritoriality interpretation hold that “[s]tate exemption laws do not have extraterritorial effect” because creditors rely on state debt collection remedies.⁷² The anti-extraterritoriality interpretation began in the late nineteenth century in state courts, and most of the old case law has not been overruled.⁷³ While state courts continue to uphold the anti-extraterritoriality view, the vast majority of federal courts reject this interpretation.⁷⁴ Anti-extraterritoriality interpretations at the federal level ignore whether state laws actually allow for extraterritorial effect.⁷⁵ Because bankruptcy courts are federal, and federal courts have not adopted this interpretation, this Note primarily focuses on the remaining two interpretations.

2. Preemption Interpretation: Federal Laws Supersede State Exemption Laws

Under the preemption view, courts usually grant extraterritorial exemptions. These courts rely on the Supremacy Clause: bankruptcy is based on federal law, and federal law preempts any conflicting state provisions.⁷⁶ This seemingly straightforward interpretation “places” debtors in their state of domicile, under § 522(a), *at the time they were domiciled there*.⁷⁷ However, the preemption interpretation may overlook the congressional purpose behind BAPCPA, disregard state precedent, and/or fail to consider state statutory language.⁷⁸

71. *Id.*

72. *In re Fernandez*, 445 B.R. 790, 795 (Bankr. W.D. Tex. 2011) (citing Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEV. J. 401, 416 & n.103 (2006)), *overruled by In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,192.

73. Bartell, *supra* note 72, at 414 n.79 (citing four cases, three of which were decided before 1925).

74. *In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,192 (noting that the only federal court to date that had applied this view was the lower *Fernandez* court, which was reversed on appeal).

75. *Id.* (“[W]hen applying a former domicile state’s exemption laws, the [anti-extraterritorial] bankruptcy court should apply them as if it were a state court of the forum state where the bankruptcy court were located, giving them like effect.”).

76. *In re Shell*, 479 B.R. 889, 898 (Bankr. N.D. Ind. 2012), *rev’d*, *Shell v. Yoon*, No. 2:12-CV-439-JVB, 2013 WL 5406266 (N.D. Ind. Sept. 24, 2013); *In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,199–200.

77. *In re Shell*, 479 B.R. at 898–99.

78. *In re Fernandez*, [2010–2011 Transfer Binder] Bankr. L. Rep. (CCH) at 103,200.

3. State-Specific Interpretation: Individualized Analysis

The state-specific view holds that it is permissible to grant an extraterritorial exemption if a state's exemption laws allow extraterritoriality.⁷⁹ Courts using this interpretation follow three steps. First, if the state statute is restricted to property within that state, courts cannot give the statute extraterritorial application.⁸⁰ Second, if the plain language of the statute is silent regarding whether the property must be located within the state, the reviewing court will look to state case law and the public policy of the exemption state.⁸¹ Finally, where there is a silent statute and no case law precedent, courts usually interpret exemptions liberally in favor of the debtor and grant the extraterritorial exemption.⁸²

IV. INTERPRETING STATE AND FEDERAL EXEMPTIONS UNDER § 522

This Note advocates for the state-specific interpretation, because trustees can fulfill the history and stated purposes of BAPCPA only by interpreting each state's exemptions individually. Subpart A covers the development and results of the preemption interpretation. Subpart B describes the analysis of courts that apply the state-specific view. After discussing the three steps state-specific courts take, Subpart C recommends a default rule of interpretation.

A. *PREEMPTION'S PREFERENCE FOR BROAD FEDERAL PURPOSES OVER STATE COURT HOLDINGS AND STATUTES*

At times, state choice-of-law provisions conflict with federal choice-of-law provisions.⁸³ When this conflict occurs, federal laws preempt state laws.⁸⁴ In the bankruptcy context, states choose whether debtors may file under only that state's exemptions or elect the federal exemptions. The federal bankruptcy choice-of-law statute is complex and subject to interpretation.⁸⁵ This confusion has led some courts to conclude that "Congress intended to preempt inconsistent state law when it enacted § 522(b)(3)(A)."⁸⁶ An increasing number of courts are adopting the preemption interpretation.⁸⁷

79. *Id.* at 103,191-92.

80. *In re Jevne*, 387 B.R. 301, 304 (Bankr. S.D. Fla. 2008).

81. *Id.* at 304-05.

82. *Id.*

83. *In re Garrett*, 435 B.R. 434, 440 (Bankr. S.D. Tex. 2010).

84. See U.S. CONST. art. VI, cl. 2; see also *In re Garrett*, 435 B.R. at 451 (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)).

85. See 11 U.S.C. § 522(b)(3)(A) (2012).

86. *In re Garrett*, 435 B.R. at 441.

87. This may be because the preemption approach is the most clear-cut. See *Fernandez v. Miller (In re Fernandez)*, [2010-2011] Bankr. L. Rep. (CCH) ¶ 82,050, at 103,199 (W.D. Tex. Aug. 5, 2011) (adopting the state-specific interpretation, but noting that preemption "is the most straightforward and facially appealing").

This Subpart uses Iowa's homestead exemption to illustrate how preemption courts interpret silent statutes—even with persuasive state case law on the topic.⁸⁸ This Subpart also shows that preemption courts may go to great lengths to disregard state law, even when the applicable federal provisions are not directly conflicting.

1. The Iowa Cases: How *In re Stephens* and *In re Williams* Preempted Iowa's Precedent

The Iowa legislature explicitly restricts personal property exemptions to residents,⁸⁹ but it leaves the homestead exemption open to “every person . . . where there is no special declaration of statute to the contrary.”⁹⁰ However, the Iowa homestead statute is silent on whether homesteads located *outside* Iowa qualify for exempt status, or whether nonresidents may exempt a homestead in Iowa. Iowa opted out of the federal exemptions.⁹¹ The Iowa Code exempts homesteads “where there is no special declaration of statute to the contrary.”⁹²

Based on this statutory silence, a bankruptcy court in Oklahoma held that Iowa's homestead exemption has extraterritorial effect in *In re Stephens*.⁹³ On appeal, the *Stephens* court overturned the district court's ruling that restricted exemptions to property within Iowa, because the plain language of the statute did not restrict homestead exemptions to property located within the state of Iowa.⁹⁴ The court contrasted Iowa's personal property exemption, which is explicitly restricted to residents, with the silent homestead exemption statute.⁹⁵ The court held that Iowa's statutory

88. The Iowa homestead exemption is as follows:

The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Persons who reside together as a single household unit are entitled to claim in the aggregate only one homestead to be exempt from judicial sale. A single person may claim only one homestead to be exempt from judicial sale. For purposes of this section, “household unit” means all persons of whatever ages, whether or not related, who habitually reside together in the same household as a group.

IOWA CODE § 561.16 (2013).

89. *Id.* § 627.6.

90. *Id.* § 561.16.

91. *Id.* § 627.10 (“A debtor to whom the law of this state applies on the date of filing of a petition in bankruptcy is not entitled to elect to exempt from property of the bankruptcy estate the property that is specified in 11 U.S.C. § 522(d) (1979).”).

92. *Id.* § 561.16.

93. *Stephens v. Holbrook (In re Stephens)*, 402 B.R. 1, 7 (B.A.P. 10th Cir. 2009).

94. *Id.* at 6–7.

95. *Id.* at 7.

“silence” and lack of “current” case law lent the existing statute extraterritorial effect.⁹⁶

Similarly, in *In re Williams*, the debtors filed their bankruptcy petition in Arkansas but claimed Iowa exemptions.⁹⁷ The debtors argued that without a homestead, they would not receive a “fresh start.”⁹⁸ The *Williams* court refused to follow Iowa’s precedential case law, relying instead on a 2005 case that refused to give state sovereignty priority over federal provisions.⁹⁹ The *Williams* court stated that “[s]ection 522(b)(3)(A) encompasses a federal choice of law, the result of which may be contrary to a state court decision interpreting the statute.”¹⁰⁰ The court indicated that it placed great weight on preserving the homestead and the debtor’s fresh start.¹⁰¹

Unfortunately, *Williams* and *Stephens* disregarded precedential state law: the Iowa Supreme Court had previously limited the application of Iowa’s exemption laws to property within the state.¹⁰² In 1882, *Rogers v. Raisor* held that a debtor was not permitted a homestead exemption after the debtor sold an Iowa home and used the proceeds to purchase a new home in Missouri.¹⁰³ The *Rogers* court reasoned that when the funds were carried to Missouri, the funds “lost the distinctive character of being the proceeds of a sale of a homestead.”¹⁰⁴ Similarly, *Dalton v. Webb* held that proceeds used to purchase and sell a Nebraska home did not qualify as part of an exempt Iowa homestead.¹⁰⁵ As recently as 2003, a federal bankruptcy court granted a trustee’s objection to debtors exempting Nebraska property under Iowa law, recognizing that Iowa state courts historically refuse to apply exemptions in an extraterritorial manner.¹⁰⁶

Iowa’s homestead exemption demonstrates how federal preemption courts might treat state precedent in other states with similar statutory

96. In 1882, the Iowa Supreme Court held that Iowa’s homestead exemption could not have extraterritorial application. See *Rogers v. Raisor*, 14 N.W. 317, 318 (Iowa 1882). The *Stephens* panel disregarded this precedent. *In re Stephens*, 402 B.R. at 7–8.

97. *In re Williams*, 369 B.R. 470, 471–72 (Bankr. W.D. Ark. 2007).

98. *Id.* at 472.

99. *Id.* at 475. In *In re Drenttel*, two judges held that Minnesota exemption law could exempt a debtor’s Arizona residence. *Drenttel v. Jensen-Carter (In re Drenttel)*, 403 F.3d 611, 612 (8th Cir. 2005). The court refused to apply state choice-of-law rules because it would “reduc[e] the barriers to forum shopping by debtors.” *Id.* at 614. The Minnesota statute at issue did not explicitly limit debtors to using the homestead within the state. *Id.* at 615. The *Drenttel* court noted that “the location of the home is not relevant.” *Id.*

100. *In re Williams*, 369 B.R. at 476.

101. *Id.*

102. *Rogers v. Raisor*, 14 N.W. 317, 318 (Iowa 1882).

103. *Id.*

104. *Id.*

105. *Dalton v. Webb*, 50 N.W. 58, 59 (Iowa 1891).

106. *In re Bausback*, No. 02-0825-WH, 2003 WL 25932295, at *3–4 (Bankr. S.D. Iowa June 3, 2003) (citing *Dalton*, 50 N.W. at 59, and *Rogers*, 14 N.W. at 318.).

language.¹⁰⁷ Most recently, a colorful Indiana case explicitly rejected the state-specific interpretation even though the state statute at issue clearly restricted exemptions to residents.¹⁰⁸

2. Extensions of the Preemptive View: *In re Shell* and *In re Adams*

Federal law should only preempt state statutes and case law when there is a direct conflict. In *In re Shell*, a debtor filed for bankruptcy in Indiana three months after moving from Illinois.¹⁰⁹ The debtor wanted to claim the federal exemptions, but the trustee argued that the debtor needed to claim Illinois exemptions.¹¹⁰ Indiana and Illinois are both opt-out states.¹¹¹ The court compared the bankruptcy exemptions to federally-funded construction projects, where federal regulations specify the scope and basic requirements and the state authorities actually execute the project.¹¹² The court required the debtor to claim the Illinois exemptions because she lived in Illinois and was subject to Illinois law.¹¹³ The court looked to “the factual circumstances of the debtor in relation to the issue of ‘domicile’ which existed during the 180 day period.”¹¹⁴ After positing several hypothetical situations where debtors lived in other countries, became naturalized, or traveled extensively, the court concluded that “Congress intended that debtors resort to the federal exemptions as a last resort, and not in a circumstance in which a debtor clearly was a resident.”¹¹⁵

In a Missouri case, *In re Adams*, the debtors wanted to claim Florida’s homestead exemption for their Missouri property.¹¹⁶ The *Adams* court characterized the issue as “whether the property to be claimed exempt is located in Florida or elsewhere,” and it determined that the debtors could

107. See NORTON & NORTON, *supra* note 22, at apps. 56-B, 56-160 to -163 (noting that Iowa, Kentucky, Maryland, New Mexico, North Dakota, and South Dakota have silent statutes).

108. *In re Shell*, 478 B.R. 889, 897–98 (Bankr. N.D. Ind. 2012), *rev’d*, *Shell v. Yoon*, No. 2:12-CV-439-JVB, 2013 WL 5406266 (N.D. Ind. Sept. 24, 2013).

109. See *id.* at 890, 900 n.4 (“It gives one a headache to even say or read [§ 522(b)(3)(A)], doesn’t it?”).

110. *Id.* at 890. The debtor wanted to claim federal exemptions because she was not a resident of Illinois. *Id.*

111. NORTON & NORTON, *supra* note 22, at app. 56-160 (displaying chart with opt-out scheme).

112. *In re Shell*, 478 B.R. at 898.

113. *Id.* at 901.

114. *Id.* at 898 (emphasis omitted).

115. *Id.* at 899–900 (asking readers to “send [the judge] an email if you know the answer to these issues,” and after describing six unusual (but admittedly possible) situations, asking readers, “SO . . . WHERE WERE THEY DOMICILED” under the state laws and federal code). On appeal, the District Court reversed because “the controlling statutory texts plainly leave the federal exemptions open to [the debtor].” *Shell v. Yoon*, No. 2:12-CV-439-JVB, 2013 WL 5406266, at *1 (N.D. Ind. Sept. 24, 2013).

116. *In re Adams*, 375 B.R. 532, 533 (Bankr. W.D. Mo. 2007).

not exempt their Missouri homestead under Florida law.¹¹⁷ The Florida Constitution sets out Florida's exemption laws,¹¹⁸ but it does not explicitly cover whether exemptions apply to out-of-state property.¹¹⁹ Appropriately, the court turned to Florida state case law, but it then relied on a federal opinion that interpreted the homestead exemption as only applicable to in-state properties.¹²⁰ The court intended to discourage debtors from forum shopping and reasoned that state legislators intend to protect the homes of families located within the state.¹²¹ The *Adams* court relied on forum shopping analysis even though the debtors moved *out* of Florida, not into the state to take advantage of its exemptions.¹²²

These cases show that bankruptcy courts do not always consider the explicit intent of a state's law, even when the state law does not conflict with federal law. The preemptive interpretation needlessly disregards state precedent and adds a layer of unpredictability to the already tenuous debtor-creditor relationship. In contrast, the state-specific view encourages federal courts to examine and respect state precedent.

B. STATE-SPECIFIC TREATMENT OF STATE PRECEDENT

The state-specific interpretation follows three main principles. First, courts deny extraterritorial application if state statutes explicitly restrict exemptions to property within the state.¹²³ Second, if the statute is silent about whether the property must be located inside the state, courts look to state case law.¹²⁴ Third, where the statute does not specify whether out-of-state real property can be exempt, and the state has no persuasive or precedential state case law, courts must decide in the first instance whether to give the statute extraterritorial application.¹²⁵ This Subpart gives an overview of the state-specific analysis and treatment of state law.

117. *Id.* at 532, 533 n.3.

118. FLA. CONST. art. X, § 4(a) (granting exemptions for any "natural person").

119. *In re Adams*, 375 B.R. at 533.

120. *Id.* at 534; *see also In re Schlakman*, No. 05-36921-BKC-PGH, 2007 WL 1482011, at *3 (Bankr. S.D. Fla. Jan. 16, 2007) ("[T]he Florida homestead exemption only applies to homesteads situated within the State of Florida.").

121. *In re Adams*, 375 B.R. at 534 ("The [*Schlakman*] court reasoned that its holding would discourage debtors from forum shopping to take advantage of Florida's generous homestead exemption" (citing *In re Schlakman*, 2007 WL 1482011, at *3)). The *Schlakman* court also did not allow proceeds from the sale of a homestead in another state to be exempt even if the debtors intended to purchase a home in Florida: "for the homestead exemption to extend to the proceeds from the sale of a homestead, the original homestead must be exempt under Florida law." *In re Schlakman*, 2007 WL 1482011, at *3.

122. *In re Adams*, 375 B.R. at 534-35.

123. *In re Jevne*, 387 B.R. 301, 304 (Bankr. S.D. Fla. 2008).

124. *Id.*

125. *Id.* at 304-05.

1. Deference to State Statutory Language

The first step of the state-specific interpretation directs courts to look at the plain language of the state exemption.¹²⁶ In *In re Kelsey*, the debtors moved from Colorado to Florida and filed their petition claiming Colorado exemptions.¹²⁷ The court reviewed Colorado's statutes, which stated in part, "every homestead *in the state of Colorado* shall be exempt."¹²⁸ Because the Colorado statute expressly limits homestead exemptions to property located within the state, the debtors were unable to exempt their Florida property.¹²⁹ The *Kelsey* court specifically declined to follow a Florida bankruptcy court that applied Colorado's laws extraterritorially.¹³⁰ Unlike *Shell*, which misinterpreted Indiana's statutory language, the *Kelsey* court upheld clear and specific statutory language.¹³¹ The anti-extraterritoriality and preemption views often do not consult state statutes together with the federal provisions to determine which law(s) may be used. This failure to consider both statutory sources results in uncertain results for creditors and debtors and needlessly subordinates state statutes in an area of law where both federal and state provisions are relevant.

2. Deference to State Court Holdings Denying Extraterritorial Exemptions

Courts generally accept that exemption laws should be liberally construed to favor the debtor.¹³² In some cases, however, courts create exceptions to this general principle. For example, two courts interpreting Idaho's laws have refused to grant extraterritorial exemptions because of Idaho case law.¹³³ In 2010, a federal bankruptcy court in Idaho refused to apply Idaho's homestead exemption in an extraterritorial manner.¹³⁴ Idaho state courts rely on the construction that exemption laws are construed

126. *See id.* at 304.

127. *In re Kelsey*, 477 B.R. 870, 872 (Bankr. M.D. Fla. 2012).

128. *Id.* at 874 (quoting COLO. REV. STAT. § 38-41-201 (2012)).

129. *Id.* The Colorado statutory scheme is the opposite of Iowa's. *See supra* Part IV.A.1. Here, the *Kelsey* debtors were able to exempt their personal property. *See* COLO. REV. STAT. § 13-54-102 (2012). Using the state-specific interpretive steps, the *Kelsey* court noted a Colorado Supreme Court case from 1910 and granted the debtor's personal property exemptions because there was no "contrary Colorado statute or decisional law on this issue." *In re Kelsey*, 477 B.R. at 875-77 (citing *Sandberg v. Borstadt*, 109 P. 419 (Colo. 1910)).

130. *In re Kelsey*, 477 B.R. at 877-78 (disagreeing with *In re Underwood*, 342 B.R. 358 (Bankr. N.D. Fla. 2006)).

131. *Id.* at 875-76.

132. *See, e.g.*, 19 JOHN R. KENNEL, *Exemptions*, in ILLINOIS LAW AND PRACTICE § 1, at 296 nn.3-4 (2009) (citing cases supporting liberal construction in favor of debtor); 37 JACK K. LEVIN, *Homesteads*, in CALIFORNIA JURISPRUDENCE 3D § 9, at 443-44 nn.1-2 (2001 & Supp. 2013) (same).

133. *See In re Capps*, 438 B.R. 668 (Bankr. D. Idaho 2010); *In re Halpin*, No. 93-03215, 1994 WL 594199 (Bankr. D. Idaho Nov. 1, 1994).

134. *In re Capps*, 438 B.R. at 675.

liberally in favor of the debtor.¹³⁵ Nonetheless, the federal bankruptcy court relied on previous lower court predictions and a “lack of decisional support for applying the Idaho statute extraterritorially,” combined with a general public policy against forum shopping, to deny the debtor from exempting a Colorado property.¹³⁶ The Idaho exemption statutes expressly provide that “[n]onresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence.”¹³⁷

Similarly, in 2012 the Bankruptcy Appellate Panel for the Ninth Circuit held that a debtor’s real property in Alaska was not exempt under Idaho law.¹³⁸ The panel was interpreting state law and was accordingly “bound by the decisions of that state’s supreme court.”¹³⁹ The Idaho Supreme Court had not ruled on the specific facts of this extraterritoriality issue, but it had addressed other extraterritoriality issues.¹⁴⁰ Like most states, Idaho construes exemptions liberally but refuses to “extend the exemption statutes beyond what they reasonably could be construed to cover.”¹⁴¹ In fact, past Idaho cases explicitly declined to expand the statutory exemptions.¹⁴²

Of course, not all states have precedential case law on extraterritoriality. In *In re Ginther*, the Bankruptcy Court for the District of Kansas considered an issue of first impression in Kansas.¹⁴³ The debtors in *Ginther* sold their Kansas home and planned to exempt the proceeds for purchase of a home in Colorado.¹⁴⁴ The debtors possessed “no intention of returning to Kansas.”¹⁴⁵ The *Ginther* court held that “proceeds . . . used to purchase a

135. *Gugino v. Ramsey (In re Ramsey)*, Nos. ID-11-1592-JuMkH, 11-00977-TLM, 2012 WL 3205415, at *4 (B.A.P. 9th Cir. Aug. 3, 2012) (“[E]xemption statutes are to be liberally construed in favor of the debtor.” (citing *In re Steinmetz*, 261 B.R. 32, 33 (Bankr. D. Idaho 2001))).

136. *In re Capps*, 438 B.R. at 672.

137. IDAHO CODE ANN. § 11-602(1) (2010). Under Idaho law, “residents” are individuals intending to make Idaho their home. *Id.* § 11-602(2). The Idaho homestead exemption is limited to \$100,000. *Id.* § 55-1003 (2012).

138. *Stephens v. Hopkins (In re Stephens)*, Nos. ID-11-1304-MkHJu, 10-41450-JDP, 2012 WL 3205362, at *1 (B.A.P. 9th Cir. Aug. 2, 2012).

139. *Id.* at *2 (citing *Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re Kekauoha-Alisa)*, 674 F.3d 1083, 1087 (9th Cir. 2012)).

140. *See id.* at *3 (citing Idaho Supreme Court cases dealing with bonds, birth certificates, and water rights where the state court ruled against extraterritorial application in all three situations).

141. *Id.*

142. *Id.* at *3-4 (“[A]s our statutes are silent upon the question under consideration, this court will not undertake to supply omissions made by the law-making power . . . [A]n amendment [of Idaho’s homestead laws] may be desired, [but] this court will not assume the power to amend the statutes, and thus usurp the legislative functions of a co-ordinate branch of our state government.” (quoting *Wright v. Westheimer*, 28 P. 430, 433 (Idaho 1891))).

143. *In re Ginther*, 282 B.R. 16, 19 (Bankr. D. Kan. 2002).

144. *Id.* at 17.

145. *Id.* at 18.

homestead outside of Kansas” are not exempt under Kansas law.¹⁴⁶ Kansas has constitutional and statutory protection of the homestead and case law protection of proceeds.¹⁴⁷ Where no statute limits the exemption to property within the state, courts should consider state case law for precedent that reflects state intent without conflicting with federal provisions.¹⁴⁸

3. Liberal Application in Favor of the Debtor

This deference to state case law also upholds one of the principle tenets of bankruptcy construction: where there is no law to the contrary, courts liberally construe exemption laws in favor of debtors.¹⁴⁹ Even before BAPCPA, courts interpreted state exemption laws, *not* state choice-of-law provisions.¹⁵⁰ The federal government made a choice of law to allow debtors to use state exemptions when the state opted out.¹⁵¹ When a debtor uses a state exemption, and the state exemption law does not specify where exempt property must be located, courts should turn to state case law in order to uphold state intent, which, pursuant to the federal scheme giving states the ability to opt out, should be the controlling factor. In *In re Arrol*, the court granted a California exemption because California courts historically construed exemptions liberally in favor of the debtor and the California legislature wanted to provide a home for individuals and families.¹⁵² This legislative goal existed “independently from state boundary lines.”¹⁵³ *Arrol* is consistent with the Idaho cases: whereas Idaho had anti-debtor state case

146. *Id.* at 19.

147. KAN. CONST. art. 15, § 9; KAN. STAT. ANN. § 60-2301 (2005 & Supp. 2012). Kansas cases addressing this issue include *First National Bank of Manhattan v. Dempsey*, 11 P.2d 735, 736 (Kan. 1932) (garnishment proceeding where money was held exempt even though debtor intended to invest and live in another homestead), and *Smith v. Gore*, 23 Kan. 488, 490 (1880) (property not exempt where debtor sold land and nothing on the record showed that he had the desire to purchase additional land).

148. *See, e.g., Arrol v. Broach (In re Arrol)*, 170 F.3d 934, 937 (9th Cir. 1999).

149. *See, e.g., Gugino v. Ramsey (In re Ramsey)*, Nos. ID-11-1592-JuMkH, 11-00977-TLM, 2012 WL 3205415, at *4 (B.A.P. 9th Cir. Aug. 3, 2012).

150. *See, e.g., In re Arrol*, 170 F.3d at 935.

151. *Id.* at 935–36. (“The plain language of section 522(b)(2)(A) points us to the state’s exemption laws, not to its conflict of laws rules.”). It is important to note that *In re Arrol* is a pre-BAPCPA case. At that time, the domiciliary requirement was as follows:

[Debtors may exempt] any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor’s domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place[.]

11 U.S.C. § 522(b)(2)(A) (1994 & Supp. V 1999).

152. *In re Arrol*, 170 F.3d at 936–37.

153. *Id.* at 936.

law, the *Arrol* court found no California precedent limiting California exemptions to property within the state.¹⁵⁴

Similarly, in *In re Jevne*, a federal bankruptcy court granted extraterritoriality under Rhode Island's silent exemption statute.¹⁵⁵ The debtors filed for bankruptcy in Rhode Island after moving and purchasing property in Florida.¹⁵⁶ The *Jevne* court noted that Congress enacted BAPCPA to prevent debtors from moving to states with generous exemption laws, and that federal courts now construe many different states' exemption laws.¹⁵⁷ The court stated in explaining *In re Franklino* that it "would not hesitate to certify to the Rhode Island Supreme Court the question of whether Rhode Island Gen. Laws § 9-26-4.1 has extraterritorial effect. Unfortunately, the Court [was] without a procedure that would allow it to do so."¹⁵⁸ Thus, the court granted extraterritorial application because Rhode Island's case law was not adverse to extraterritoriality.¹⁵⁹ The trustee in *Jevne* wanted to apply dicta from another case, but the court noted that the case "was a pre-BAPCPA case that did not involve § 522(b)(3)(A)'s new choice of law provision," whereas the debtors in *Jevne* filed under the new provision.¹⁶⁰ Where case law is silent, it is appropriate to grant extraterritoriality liberally in favor of the debtor.

V. COURTS SHOULD USE THE STATE-SPECIFIC INTERPRETATION IN ORDER TO LIBERALLY CONSTRUE EXEMPTIONS IN FAVOR OF DEBTORS AND PROVIDE MARKET STABILITY

As discussed above, no cohesive approach is consistently applied to exemption statutes for out-of-state property. The lack of uniformity has created a variety of interpretations,¹⁶¹ resulting in less predictable outcomes for debtors and creditors. Particularly with regard to exemptions, which determine whether the debtor is able to receive a fresh start and may substantially impact the amount available for distribution to creditors,

154. *In re Stephens*, Nos. ID-11-1304-MkHJu, 10-41450-JDP, 2012 WL 3205362, at *4 (B.A.P. 9th Cir. Aug. 2, 2012) (citing *In re Arrol*, 170 F.3d at 937).

155. *In re Jevne*, 387 B.R. 301, 302, 305 (Bankr. S.D. Fla. 2008); see R.I. GEN. LAWS § 9-26-4.1 (2008). In 2012, the Rhode Island legislature revised, but did not controvert, this statute. 2012 R.I. Pub. Laws 1885-87; 2012 R.I. Pub. Laws 1930-31.

156. *In re Jevne*, 387 B.R. at 302, 305.

157. *Id.* at 303.

158. *Id.* at 306 n.3 (citing *In re Franklino*, 329 B.R. 363 (Bankr. D.R.I. 2005)).

159. *Id.* at 306.

160. See *id.* at 305 (citing *In re Schlakman*, No. 05-36921-BKC-PGH, 2007 WL 1482011 (Bankr. S.D. Fla. Jan. 16, 2007)).

161. See Ryan P. Rivera, *State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws*, 39 REAL PROP. PROB. & TR. J. 71, 97 (2004) ("The most noteworthy problem with the treatment of state homestead exemptions in federal bankruptcy proceedings is the current scheme is devoid of uniformity.").

certainty is vital.¹⁶² As such, courts should prefer the state-specific interpretation for two main reasons. First, Subpart A explains how the state-specific interpretation best supports the historical preference for liberally applying exemptions in favor of the debtor. Second, Subpart B demonstrates that following state case law best preserves the state exemption framework on which creditors and debtors rely. Subpart C concludes with additional recommendations for policymakers, creditors, debtors, and courts.

A. *THE STATE-SPECIFIC INTERPRETATION ENCOURAGES COURTS TO CONSTRUE EXEMPTIONS LIBERALLY IN FAVOR OF DEBTORS*

Generally, federal courts must follow state court interpretations of state exemption statutes.¹⁶³ Federal courts can interpret state exemption provisions if a state court has not already done so.¹⁶⁴ When state courts allow liberal construction of exemptions, federal bankruptcy courts should follow that principle while considering that state's exemptions.¹⁶⁵ This Subpart discusses how the state-specific interpretation best fulfills the historical construction to liberally grant exemptions.

Courts that follow the state-specific interpretation are not required to grant extraterritorial application,¹⁶⁶ and they should not automatically allow a debtor to exempt out-of-state property without consulting case law. The *Ginther* court correctly upheld Kansas state precedent and denied an extraterritorial exemption based on a 1911 Kansas Supreme Court case.¹⁶⁷ Conversely, federal courts' interpretations of Iowa case law resulted in a departure from Iowa Supreme Court precedent that stood from 1882 to 2003 in bankruptcy and state courts.¹⁶⁸ States possess a great deal of freedom to determine their economic policies. States may opt out of federal exemptions, and some states, like Indiana, restrict exemptions to debtors

162. Stefanie A. Lindquist & Frank C. Cross, Univ. of Tex. Sch. of Law, Stability, Predictability and the Rule of Law: *Stare Decisis* As Reciprocity Norm 1 (Mar. 26, 2010), available at <http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> ("In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively.").

163. *Frost v. Cnty. of Santa Barbara (In re Frost)*, 111 B.R. 306, 310 (Bankr. C.D. Cal. 1990) (citing *Jennings v. Stannus & Son (In re Stannus & Son)*, 191 F. 347 (9th Cir. 1911)).

164. *Id.* (citing *Richardson v. Woodward*, 104 F. 873 (4th Cir. 1900)).

165. *Id.* (citing *In re Neale*, 274 F. Supp. 969 (N.D. Tex. 1967)).

166. *Compare* *Stephens v. Holbrook (In re Stephens)*, 402 B.R. 1, 8 (B.A.P. 10th Cir. 2009) (finding extraterritorial application because no statutory indication to the contrary), *and In re Jevne*, 387 B.R. 301, 305-06 (Bankr. S.D. Fla. 2008) (granting extraterritorial application where Rhode Island statute silent on the topic), *with In re Capps*, 438 B.R. 668, 674-75 (Bankr. D. Idaho 2010) (refusing to apply exemptions in an extraterritorial manner because of forum shopping concerns).

167. *See supra* notes 143-47 and accompanying text.

168. *See supra* Part IV.A.1 (describing Iowa's exemptions and the federal cases granting extraterritorial exemptions under Iowa law).

domiciled or residing in that state.¹⁶⁹ In extraterritorial cases, federal courts should examine state precedent for indications of a liberal construction of exemption statutes. After a court discovers persuasive case law against extraterritoriality, creditors should have access to a debtor's out-of-state real property. Thus, when federal courts must interpret a silent state statute, they should defer to available state precedent.

Because one of the main purposes of bankruptcy is to provide a fresh start for debtors,¹⁷⁰ most courts "generally require homestead exemptions to be liberally construed in favor of debtors."¹⁷¹ Both federal and state exemption laws have a "humanitarian purpose[]" and most state supreme courts indicate a preference for this liberal application.¹⁷² Of course, courts should not rewrite statutes to enlarge exemptions beyond their intended scope or to benefit debtors who do not fall within the class of persons expected to benefit from the exemption.¹⁷³ Thus, in situations where the statute specifically limits an exemption to *residents*, the legislature likely intended to deny non-residents the exemptions.

The preemption interpretation needlessly ignores the long-held principle of construction that liberally applies exemptions in favor of debtors. Similarly, the unpopular anti-extraterritoriality interpretation contradicts a state's commitment to liberal application in favor of debtors. The state-specific interpretation, on the other hand, requires courts to determine whether the state emphasizes a debtor's fresh start. Where no contrary state precedent exists, courts should liberally apply exemptions. This preference for the debtor fulfills the fresh start principle and allows debtors to make a positive contribution to the economy more quickly.

B. THE STATE-SPECIFIC INTERPRETATION OFFERS GREATER STABILITY AND PREDICTABILITY

When federal bankruptcy courts construe state statutes, a consistent approach to extraterritoriality will offer debtors and creditors stability. Liberally construing exemptions in favor of the debtor is a well-accepted principle, but bankruptcy courts do not consistently apply this liberal construction in extraterritoriality cases. This Subpart discusses how the state-

169. IND. CODE ANN. § 34-55-10-2(c) (2011).

170. See *supra* Part II.A (indicating the historical importance of a fresh start and rehabilitating the debtor). The fresh start is not always the bare minimum, as some states do not cap the dollar value of their homestead exemptions, resulting in what is known as the "millionaire's loophole." See Patrick McGheehan, *In Florida, No Wolves at the Door*, N.Y. TIMES (Jan. 16, 2005), http://www.nytimes.com/2005/01/16/business/yourmoney/16agenda.html?_r=1&.

171. *In re Stephens*, 402 B.R. at 6.

172. *Carlson v. Diaz (In re Carlson)*, 303 B.R. 478, 482 (B.A.P. 10th Cir. 2004).

173. See *In re Cole*, 185 B.R. 95, 98 (Bankr. D. Me. 1995).

specific interpretation provides a measure of certainty and predictability in bankruptcy petitions.

Since the global economic downturn in 2008, the lending market continues to gradually improve.¹⁷⁴ While drafting and amending the Federal Bankruptcy Code, Congress recognized that state exemption laws differ. Creditors and debtors are accustomed to state differences, and imposing a blanket rule (i.e., preemption or anti-extraterritoriality) needlessly challenges state sovereignty. The preemption interpretation requires a court to determine domicile under § 522 and then look to the factual circumstances of debtors at the time and place of domicile. For some debtors, courts would have to look back nearly three years to determine domicile.¹⁷⁵ The preemption approach fails to consider that a debtor's financial situation may drastically change in a period of a few years. Many individuals who file for bankruptcy do so after a sudden event, such as unexpected medical bills or marital troubles.¹⁷⁶ Requiring debtors and courts to apply the former state's law after many months or even years decreases market stability.

Because the Federal Code expressly allows different state provisions, courts should construe § 522 as a whole and give weight to state provisions. Preemption unnecessarily destabilizes predictability and effectively renders state choice without value. The *Shell* court adopted the preemption view in part because there are many hypothetical situations where state exemptions may not apply, but the Bankruptcy Code provides a fallback: debtors who do not fit under any state exemptions can claim certain federal exemptions.¹⁷⁷ Creditors rely on state laws when they lend to consumers, and a uniform system for how to deal with silent statutes is beneficial to strengthen the market. More importantly, a uniform system allows bankruptcy courts to offer debtors a fresh start with less controversy, as state exemption statutes change infrequently.

Before moving, debtors can consult their attorneys if they have questions about the new state's exemption statute. For debtors whose financial issues arise after they move to a new state, attorneys should conduct

174. See *Increasing Home Equity Revolving Credit Reaches Three-Year High*, NAT'L MORTG. PROF. MAG. (Oct. 16, 2012), <http://nationalmortgageprofessional.com/news31831/increasing-home-equity-revolving-credit-reaches-three-year-high> (“[R]ecent stability has given way to consistent growth. . . . [Fewer] delinquencies are positive signs of a stable foundation towards recovery.” (internal quotation marks omitted)).

175. *In re Shell*, 478 B.R. 889, 898 (Bankr. N.D. Ind. 2012), *rev'd*, *Shell v. Yoon*, No. 2:12-CV-439-JVB, 2013 WL 5406266 (N.D. Ind. Sept. 24, 2013).

176. See *supra* notes 15–18 and accompanying text.

177. See 11 U.S.C. § 522(b)(3) (2012). The paragraph under “(C)” is known as the “hanging paragraph.” See *In re Shell*, 478 B.R. at 894.

careful asset planning.¹⁷⁸ For the rare cases that fall through the loopholes of the Code, the fallback provision in the hanging paragraph of § 522 does not harm state sovereignty or negatively impact creditors.¹⁷⁹ Creditors always expect some type of exemptions, and the federal exemption scheme typically offers fewer exemptions than the states.¹⁸⁰

C. FURTHER RECOMMENDATIONS TO INCREASE CLARITY

This Note advocates the state-specific interpretation because it best upholds the liberal application of exemptions doctrine, state statutes, and state case law. Under the state-specific interpretation, courts grant or deny extraterritoriality using a state-focused framework. Extraterritorial issues arise in only a few states,¹⁸¹ but because federal courts interpret state law in other regions of the country, courts and parties should be familiar with the state-specific interpretation. Attorneys, creditors, courts, and legislators all play a role in clarifying extraterritorial exemptions.

Debtors rely on their attorneys for sound legal advice. The decision whether to file bankruptcy is often fraught with emotions and distress from collection methods. Attorneys for debtors should explore how long the debtor has lived in that state, if they plan to move to another state, and explain the timeline of filing a bankruptcy petition. Creditors also use attorneys to advise them on collection methods, appear at meetings of creditors, and file claims in court. Attorneys for creditors should be aware of the various state provisions in order to better advise their clients of the likelihood of recovering their funds or property.

Courts can implement a few simple changes to improve the predictability of bankruptcy exemption cases. When the state courts (or federal courts sitting within that state) review extraterritorial issues or rule on exemptions, the courts should expressly cite to applicable precedent and explain whether their decision adopts or rejects state precedent. One way for federal courts to clarify what a state wants is to certify the question to that state's supreme court.¹⁸² While the *Jevne* court explicitly noted that no certification procedure existed for clarification,¹⁸³ it is a possible option for

178. In some cases, attorneys might even suggest moving. See, e.g., John E. Sullivan III, *Asset Protection for Ohioans: Why the Planning Is Better Outside Ohio*, 20 OHIO PROB. L.J. 74 (2009) (explaining that in most situations residents of Ohio would be better off outside the state).

179. See *supra* note 177 and accompanying text.

180. The federal exemptions limit debtors to \$15,000 for real property and \$2,400 for a car. 11 U.S.C. § 522(d)(1)–(2) (2012). Many states have higher exemptions. Iowa's statute provides up to \$7000 for a motor vehicle, \$7000 for wedding and engagement rings, a shotgun and a musket or a rifle, certain family heirloom items such as bibles and paintings (\$1,000 limit), and apparel and burial plot exemptions. See IOWA CODE § 627.6 (1)–(2) (2013). Idaho's homestead exempts property up to \$100,000. IDAHO CODE ANN. § 55-1003 (2012).

181. See NORTON & NORTON, *supra* note 22, at app. 56-B.

182. See, e.g., TENN. CT. R. 23, available at <https://www.tncourts.gov/rules/supreme-court/23>.

183. See *In re Jevne*, 387 B.R. 301, 305–06 n.3 (Bankr. S.D. Fla. 2008).

future clarity. The state-specific interpretation relies on state court precedent,¹⁸⁴ and both federal and state courts should clarify their use of such precedent.

Legislators in states with “silent statutes” can clarify their public policy by specifying whether exemptions are available to former residents and out-of-state property. As the above cases illustrated, statutory silence leaves room for either extraterritorial or non-extraterritorial application.¹⁸⁵ Statutory clarity would decrease the confusion between non-resident debtors and out-of-state property. Enacting a statute that explicitly allows for property exemptions regardless of location, or a statute that restricts exemptions to in-state property, would assist creditors, trustees, debtors, and courts. All of these steps would help clarify the existing system and provide stability for the market.

VI. CONCLUSION

BAPCPA’s effort to prevent forum shopping has created a divergence of opinion among bankruptcy appellate courts. Creditors and debtors require stability to facilitate lending, and the anti-extraterritoriality and preemption approaches needlessly disregard state precedent. The state-specific interpretation gives debtors, trustees, practitioners, and courts the ability to predict outcomes and avoid costly appeals and unnecessary motions. Under the state-specific analysis, states know that federal courts will respect and uphold state sovereignty. If states choose to amend their exemption statutes for clarity, or implement a certification procedure, bankruptcy courts will accordingly follow that state’s preferences through the state-specific interpretation.

184. See, e.g., *id.* at 304.

185. For example, Colorado’s statute does not allow for extraterritorial application on its face: “Every homestead in the state of Colorado shall be exempt.” COLO. REV. STAT. § 38-41-201(1) (2013). On the other hand, Iowa’s exemption for homesteads is open to “every person,” even though Iowa’s personal property exemption is restricted to residents. IOWA CODE §§ 561.16, 627.6 (2013).