

allowed to Debtor. The Trustee's objection is sustained, and Debtor's exemptions are disallowed.

Debtor raises three issues. The first is that 11 U.S.C. § 522(b) is unconstitutional. The second is that O.C.G.A. § 44-13-100 is unconstitutional. The third is that Georgia has not effectively opted out of the federal exemptions. These arguments are addressed in order.

Debtor first contends that 11 U.S.C. § 522(b)(1)¹, which permits states to opt out of the federal exemption scheme, is unconstitutional. The Bankruptcy Clause of the U.S. Constitution reads, "The Congress shall have Power [4.] To establish an uniform rule of Naturalization, and uniform Laws on the subject of

¹ 11 USC § 522. Exemptions

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . Such property is--

(1) **property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize;** or, in the alternative,

(2)(A) 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;

(Emphasis added.)

(Subsection (d) lists federal exemptions.)

Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4. Debtor interprets this language to require all bankruptcy law, including exemptions, to be identical in all the states. However, 11 U.S.C. § 522(b)(1) permits states to opt out of the federal exemptions and set their own exemptions. Since the majority of states have opted out,² exemptions in bankruptcy are not uniform throughout the United States. Therefore, argues Debtor, 11 U.S.C. § 522(b)(1) is in violation of the U.S. Constitution article 1 section 8 clause 4. In cases addressing the constitutionality of § 522(b), this is generally referred to as the “uniformity” argument.

Under the Bankruptcy Act of 1898, exemptions were exclusively determined by state law. The uniformity argument was raised soon after in Hanover National Bank v. Moyses. 186 U.S. 181, 46 L.Ed. 1113, 22 S.Ct. 857 (1902). The Supreme Court held that the word ‘uniform’ in the Bankruptcy Clause did not demand national adherence to a fixed set of bankruptcy exemptions, but allowed the varying conditions of different geographical areas to be

² As of March, 1998, thirty-four states had enacted legislation prohibiting election of the federal exemptions listed in 11 U.S.C. § 522(d): Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. 4 Lawrence P. King ed., Collier on Bankruptcy ¶ 522.02[1] n.3 (15th ed. rev. 1998).

respected through reference to state law. Id. The Moyses holding, that the Bankruptcy Clause required geographic uniformity, was affirmed in Stellwagen v. Clum.

Notwithstanding this requirement as to uniformity, the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the states.

245 U.S. 605, 613, 62 L.Ed. 507, 38 S.Ct. 215, 217 (1918) (citing Moyses). Immediately prior to the Bankruptcy Reform Act of 1978, the Supreme Court reaffirmed this interpretation of the Bankruptcy Clause.

The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. 'The problem dealt with (under the Bankruptcy Clause) may present significant variations in different parts of the country.' Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 463 n.7, 57 S.Ct. 556, 562, 81 L.Ed. 736 (1937). We therefore agree with the Special Court that the uniformity clause was not intended 'to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions. 384 F.Supp. at 915.

...Our construction of the Bankruptcy's Clause's uniformity provision comports with this Court's construction of other 'uniform' provisions of the Constitution.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 159, 42 L.Ed.

2d 320, 95 S.Ct. 335, 366 (1974).

The Bankruptcy Reform Act of 1978 altered bankruptcy's reliance on the states to set exemptions. 11 U.S.C. § 522(b). States could now either restrict debtors to the state exemptions (opting out) or allow them a choice between state and federal exemptions. *Id.* In the next decade, a number of courts considered the constitutionality of the new law. Matter of Sullivan, 680 F.2d 1131 (7th Cir. 1982), cert. denied, 459 U.S. 992, 103 S.Ct. 349, 74 L.Ed. 2d 388 (1983); Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983), cert. denied 104 S.Ct. 427, 464 U.S. 983, 78 L.Ed.2d 361 (1983); In re Stinson, 36 B.R. 946 (Bkrtcy.App. 9th Cir. 1984); In re Talmadge, 832 F.2d 1120 (9th Cir. 1987); In re Brown, 7 B.R. 264 (Bkrtcy.Tex. 1980); In re Lausch, D.C., 16 B.R. 162 (M.D.Fl. 1981); Foster v. City Loan and Sav. Co., 16 B.R. 467 (D.Ohio 1981); Matter of Reynolds, 24 B.R. 344 (Bkrtcy. Ohio 1982); In re Keyworth, 47 B.R. 966 (D.Colo. 1985); In re Pelter, 46 B.R. 492 (Bkrtcy.W.D.Okl. 1986); In re Thompson, 829 B.R. 985 (Bkrtcy.W.D.Wis. 1988); In re Holt, 84 B.R. 991 (Bkrtcy.W.D.Ark. 1988). These courts were unanimous in holding that 11 U.S.C. § 522(b), authorizing states to opt out of the federal exemption scheme, is constitutional. *Id.*

In Matter of Sullivan, the Seventh Circuit Court of Appeals comprehensively discussed the constitutionality of § 522(b).

680 F.2d 1131 (7th Cir. 1982). Only weeks earlier, the Supreme Court had once more affirmed that 'uniformity' in the Bankruptcy Clause tolerated geographical variation. Railway Labor Executives' Association v. Gibbons, 455 U.S. 457, 469, 71 L.Ed.2d 335, 102 S.Ct. 1169, 1176 (1982). The Seventh Circuit concluded,

The Supreme Court established in Moyses, however, that only geographic uniformity is required by the bankruptcy clause of the constitution. We find no evidence that the Supreme Court has retreated from the Moyses rule or that the Code differs from the 1898 Act in such a way as to make Moyses inapposite.

Sullivan, 680 F.2d at 1138. When Sullivan was appealed, the Supreme Court denied certiorari. 459 U.S. 992, 103 S.Ct. 349, 74 L.Ed. 2d 388 (1983); see also Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983), cert. denied 104 S.Ct. 427, 464 U.S. 983, 78 L.Ed.2d 361 (1983) (certiorari also denied to 6th Circuit decision that § 522(b) is constitutional). Thus, courts at all levels have clearly and consistently refuted Debtor's proposition that 11 U.S.C. § 522(b) is unconstitutional due to lack of uniformity.

Debtor's second contention is that Georgia's law of bankruptcy exemptions, set out in O.C.G.A. § 44-13-100, is unconstitutional. Here, Debtor concedes that states may opt out, but claims that state exemptions must be no less generous than the federal exemptions. Debtor's preemption argument rests on inference. Congress raised the dollar amounts of the federal

exemptions in 1994, and Debtor infers from those changes that the federal exemptions set a minimum. Georgia's exemptions are below the federal exemptions. Therefore, according to Debtor, Georgia's exemptions are preempted by the federal exemptions.

Case law does not support the preemption argument. Clark v. Chicago Mun. Emp. Credit Union, 119 F.3d 540 (7th Cir. 1997) rehearing and suggestion for rehearing denied (states opting out of federal exemptions may provide "less solace" to debtors; debtors still emerge from bankruptcy free of pre-existing debt); In re Storer, 58 F.3d 1125 (6th Cir. 1995) certiorari denied Storer v. French, 116 S.Ct. 520, 516 U.S. 990, 133 L.Ed. 2d 428 (1995) (Congress did not intend to preempt bankruptcy exemptions since it vested in the states the ultimate authority to determine their own bankruptcy exemptions; states are empowered to opt out and create less inclusive or more restrictive exemption schemes than the federal one); In re Lawrence, 219 B.R. 786 (E.D.Tenn. 1998) (state exemptions may be more or less generous than federal exemptions).

"If a State opts out, then its debtors are limited to the exemptions provided by state law. Nothing in subsection (b) (or elsewhere in the code) limits a State's power to restrict the scope of its exemption; indeed, it could theoretically accord no exemptions at all." Owen v. Owen, 500 U.S. 305, 308, 114 L.Ed.2d

350, 111 S.Ct. 1833, 1835 (1991). Since Justice Scalia's statement of a zero minimum in 1991, Congress's only modification to 11 U.S.C. § 522(b) has been to change "Bankruptcy Rules" to "Federal Rules of Bankruptcy." In § 522(d), the dollar amounts of exemptions were raised, and the "Internal Revenue Code of 1954" became "Internal Revenue Code of 1986" with IRC provisions renumbered accordingly. Mere updating does not evince Congressional intent to overturn the reference to the opt out option of subsection (b) used in the Owen rationale.

Interestingly, some courts considered and rejected the opposite preemption argument, that federal exemptions set a maximum. In re Butcher, 189 B.R. 357 (Bkrtcy.D.Md. 1995) affirmed 125 F.3d 238 (creditor objected to Maryland's unlimited exemption for personal injury settlement; exemption was not preempted by Bankruptcy Code); In re Snape, 172 B.R. 361 (Bkrtcy.M.D.Fla. 1994) (creditor objected to Florida homestead exemption; Florida's high homestead exemption was not preempted by 11 U.S.C. § 522(d)); In re Lausch, D.C., 16 B.R. 162 (M.D.Fla. 1981) (trustee objected to Florida exemption). In all of these cases, 11 U.S.C. § 522(d) was held to have no preemptive effect. Id. Thus, Debtor's preemption argument has failed both when the federal exemptions are argued to be a ceiling and when they are argued to be a floor.

Debtor's third and final argument is that after the 1994 amendments to the Bankruptcy Code, states had to opt out again if they wished to continue allowing only state exemptions. Georgia did not do so. Debtor contends that the Georgia state exemptions are not effective and the federal exemptions must be permitted because Georgia took no action in response to the 1994 changes.

Debtor quotes no statutory language, points to no statements of Congressional intent, and provides no other support for a federal requirement that states re-enact their bankruptcy exemptions. It is inconceivable that a federal law would require thirty-four states immediately to re-enact state law without providing clear notification of such a requirement. Yet Debtor has not shown any notification to the states. Research has failed to reveal a single decision addressing re-enactment of opt-out statutes.

In fact, the Georgia legislature did amend O.C.G.A. § 44-13-100 effective July 1, 1995. Provisions for individual retirement accounts were added to the list of Georgia bankruptcy exemptions. Adding to Georgia exemptions cannot be construed as intent to allow federal exemptions. Furthermore, two published bankruptcy cases confirm that post-1994 Georgia is still deemed to have opted out of the federal exemptions. In re Davis, 216 B.R. 898 (Bkrtcy.N.D.Ga.

1997); Matter of Ambrose, 179 B.R. 982 (Bkrtcy.S.D.Ga. 1995). "Georgia has opted out of the federal exemption scheme found in section 522(d) of the Bankruptcy Code, see O.C.G.A. § 44-13-100(b), and thus, a debtor who files bankruptcy while domiciled in Georgia is limited to the list of exemptions found in O.C.G.A. § 44-13-100(a)." Ambrose, 179 B.R. at 984 n.2.

Debtor's claim that 11 U.S.C. § 522(b) results in non-uniform law and is therefore unconstitutional has been overruled at all levels of the federal judiciary. Debtor's preemption argument has been similarly dismissed. Finally, Debtor has put forth nothing to support the assertion that states must re-enact opt-out legislation following the 1994 amendments to the Bankruptcy Code. Federal law, state law, and case law all call for Debtor's exemptions to conform to O.C.G.A. § 44-13-100.

It is, therefore, ORDERED that the Trustee's objection is sustained. The exemptions allowed in the Chapter 7 bankruptcy case of Eva Gene Harris, No. 99-10241-JSD, must conform to the Official Code of Georgia, § 44-13-100. The Debtor is further ORDERED to file an amended schedule of exemptions in compliance with this order within thirty (30) days of the date of this order and serve a copy of same on the Trustee.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 21st Day of October, 1999.