I. Issues Presented

1. Whether, by its terms, Louisiana's exemption law may be applied to persons and property outside the state.
2. Whether a presumption against extraterritoriality requires that Louisiana's exemption law be interpreted not to apply to persons and property outside the state.
3. Whether applying Louisiana's exemptions to non-resident debtors and their property violates due process.
4. Whether the Trustee's separate objection to an exemption for unemployment compensation should be denied in this appeal because it was not presented to the bankruptcy court and because it was brought after the deadline established by Fed. R. Bankr. P. 4003(b).

II. Summary of the Argument

This appeal raises an important question about exemptions in bankruptcy cases. Bankruptcy exemptions give debtors, after discharge of their debts, continued ownership of some of their property, free from creditors' claims, to help them support themselves and their dependents. *Sheehan v. Morehead (in Re Morehead)*, 283 F.3d 199, 206 (4th

Cir. 2002) (the purpose of bankruptcy exemptions is "to protect a debtor from his creditors [and] provide him with the basic necessities of life so that . . . the debtor will not be left destitute") (quoting H.R. Rep. No. 95-595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. at 6087).

Section 522(b) of the Bankruptcy Code (Title 11, U.S.C.) sets out a complicated formula for determining what law defines the property that a debtor may exempt, but in this case, that issue is not in dispute. The Trustee and the debtors agree that Louisiana law determines the extent of the debtors' exemptions. The disagreement is about the scope of Louisiana's exemption law.

The Trustee contends that the law covers only tangible property located within Louisiana, and so has objected to the debtors' list of exemptions in property connected to West Virginia. Because the Ashes moved to West Virginia several months before their bankruptcy filing, they have little property remaining in Louisiana, and so—if the Trustee's objection were correct—they would have almost no exempt property following their bankruptcy. However, as the Bankruptcy Court

held in denying the objection, the Louisiana exemption law is not limited by the location of the property it covers, and so the Ashes may exempt property now located in West Virginia.

There are several reasons for this conclusion. First, the Bankruptcy Code itself does not prohibit state exemption law from applying outside the state, but to the contrary, specifically provides for such an application.

Second, reading Louisiana exemption law to cover out-of-state property follows straightforward statutory language. Louisiana's law sets out the property subject to exemption and includes no limitation based on the property's location. The Trustee has cited no authority interpreting the language of Louisiana law in any different manner. Rather, the Trustee's interpretation is based on a "presumption against extraterritoriality"— which, the Trustee asserts, requires that unless a law expressly provides for application outside the boundaries of the jurisdiction that enacted it, the law should be interpreted as applying only within those boundaries. No such presumption, however, applies to Louisiana's exemption law. The decisions cited by the Trustee arose in the context of litigation over the effects that federal legislation could

have in foreign countries, and do not have any bearing on how state laws should be interpreted. The Bankruptcy Court correctly noted that questions over the extent and nature of bankruptcy exemptions have nothing to do with the international concerns that caution against applying U.S. law in foreign countries. There is no "presumption" that a state law cannot apply beyond its borders.

The Trustee has also argued that, if the Louisiana exemption laws were interpreted to apply outside of Louisiana they would create an unconstitutional denial of due process. This also is mistaken. Although state laws have occasionally been invalidated because they improperly imposed burdens on persons or property beyond state boundaries, Louisiana's exemptions have no effect of this sort; they only are enforceable in jurisdictions outside of Louisiana to the extent that the other jurisdictions permit or require Louisiana law to apply. The Bankruptcy Code itself makes Louisiana's exemption laws effective as to persons and property outside the state, and its adoption of state exemption laws in no way violates the Constitution.

Finally, the Trustee raised an objection to a particular exemption claimed by the debtors, an exemption to their right to receive unemployment compensation. This new objection should be denied, both because it is being raised for the first time on appeal, and because it was raised well after the objection deadline of Fed. R. Bankr. P. 4003(b)(1).

III. Argument

A. The Bankruptcy Code allows state exemption law to apply outside the boundaries of the state.

The first question presented in this appeal is whether the Bankruptcy Code allows a state law to provide for exemptions that affect persons and property outside the state's boundaries. The Code actually requires state law to have such extraterritorial effects, while assuring that debtors retain meaningful exemption rights. The Code's exemption provisions, however, are somewhat involved, particularly for debtors who have lived in different states before filing their bankruptcy cases. Three separate directives, all in § 522(b) of the Code, bear on the issue.

First, paragraph (1) of § 522(b) gives the debtor a choice between two sets of exemptible property: either paragraph (2)—incorporating the "federal" bankruptcy exemptions set out later in § 522(d)—or paragraph

(3), allowing exemptions in three subparagraphs: (A) exemptions set out in the applicable "State or local law," (B) exemptions in property held in tenancy by the entireties, and (C) exemptions in certain retirement funds. Paragraph (2), however, removes the federal exemption option if "the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize." By enacting a law denying authorization to use the federal bankruptcy exemptions, a state is said to have "opted out" of the federal exemptions in paragraph (2).

A number of states have limited their opt-out provisions to citizens or domicile holders of their own states. *See, e.g., In re Chandler*, 362 B.R. 723, 725 (Bankr. N.D. W.Va. 2007), dealing with a Georgia statute providing that "an individual debtor whose domicile is in Georgia is prohibited from applying or utilizing 11 U.S.C. Section 522(d) in connection with exempting property from his or her estate." Provisions like this have been held inapplicable to debtors who are not citizens or domiciled residents of the relevant state, so that these debtors may still elect federal exemptions. *Chandler*, 362 B.R. at 726-27; *Camp v. Ingalls (In re Camp)*, 631 F.3d 757, 760-61 (5th Cir. 2011) (applying Florida's opt-out provision).

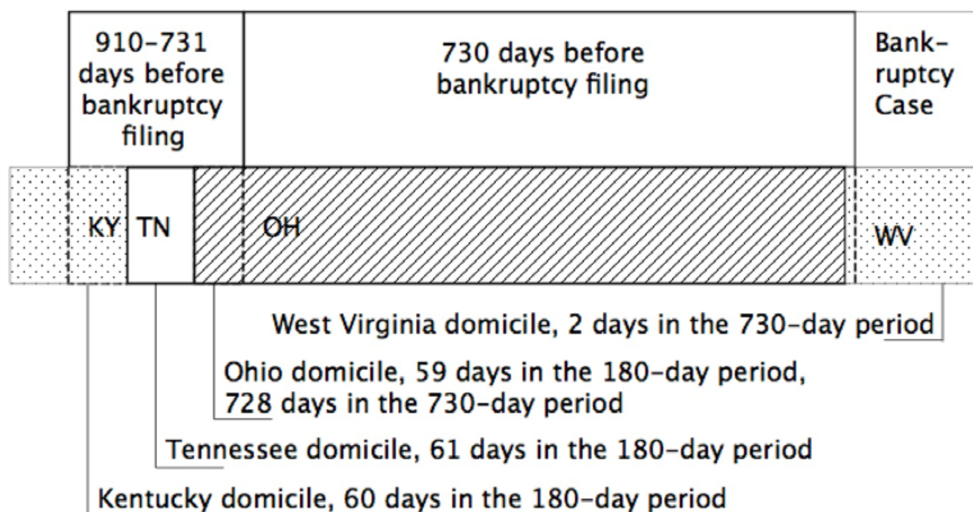
Second, paragraph (3)(A) defines what state law is applicable: the state law "applicable . . . to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition."[1] Under this provision, domicile in a single state for the entire 730-day pre-filing period is required for that state's exemption law to be applicable. So, for example, if a debtor had changed domicile from Ohio to West Virginia two days before filing bankruptcy, the debtor's domicile during the 730-day period would no longer determine the applicable exemption law. Instead, because the debtor was not domiciled in "a single State" for the entire 730-day period, the applicable state law under paragraph (3)(A) would be the law for "the place 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." Under these provisions, a very short time of

[1] This 730-day requirement does not require that the debtor's domicile be in the state where the bankruptcy is filed, since venue for the bankruptcy case may be in a jurisdiction other than the one in which the debtor is domiciled. Under 28 U.S.C. § 1408(1), venue can be in the place of the debtor's residence or business, and under 28 U.S.C. § 1408(2) venue can be in the place where an affiliate of the debtor has filed a bankruptcy case. *See In re Barrington Spring House, LLC*, 509 B.R. 587, 602-03 (Bankr. S.D. Ohio 2014). So, for example, if the debtor was domiciled throughout the 730-day period in Ohio, but filed the bankruptcy case in West Virginia based on a principal place of business in that state, the Ohio exemption law would be applicable.

domicile in a state can result in that state's exemption law being applicable later.[2]

Third, an unnumbered, "hanging" paragraph following § 522(b)(3)(C) provides that the debtor may elect the federal exemptions

[2] Section 522(b)(3)(A) divides the debtor's domicile into two time periods: a period of 730 days immediately before the bankruptcy filing, and a period of 180 days before the 730-day period, i.e., the period between 910 and 731 days before the filing period. Suppose—as shown in the drawing below—a debtor (1) had a domicile in Kentucky for many years, continuing for 60 days beyond the 910th day before a bankruptcy filing, (2) established a new domicile in Tennessee for 61 days, (3) then moved to Ohio, maintaining a domicile there until (4) moving to West Virginia two days before filing a bankruptcy case in that state. Tennessee—in which the debtor had the shortest time of domicile— would provide the applicable exemption law. Ohio law would be inapplicable because the debtor's Ohio domicile was in place neither for the entire 730-day pre-filing period nor for the greatest portion of the preceding 180-day period, and the 60 days of Kentucky domicile during 180-day period would be just short of the 61 days of domicile in Tennessee. The period of Kentucky domicile before the 910th day would be irrelevant.



of § 522(d) "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption." There are two distinct ways in which the state law applicable under § 522(b)(3)(A) could make a debtor "ineligible for any exemption."

The first is a *personal* exclusion: a state's exemption law might be limited by its terms to those who have a domicile or residence in that state or are citizens of that state. For a person who, by moving, no longer has the required connection with the state, state law would provide no exemptions—and the debtor would be able to use the federal exemptions under the hanging paragraph—even if the state had opted out of the federal exemptions.

The second is a *property* exclusion: even if a state exemption law has no exclusion based on the debtor's personal location or status, the law might exempt only property that is connected to the state, being located within its borders or created under its laws. By excluding from exemption property that is not connected to the state, a law would deny

exemptions to the property that a debtor had moved to another state in the process of relocating.[3]

---

[3] There are conflicting decisions about the extent to which property exclusions allow federal exemptions under the hanging paragraph. One interpretation is that the debtor must be foreclosed from *all* exemptions, so that as long as there is any property that a debtor may exempt under state law, the debtor is limited to those exemptions and may not claim federal exemptions. This approach was taken by the Bankruptcy Court for the District of Idaho in two decisions, *In re Wilson,* 2014 Bankr. LEXIS 1446 (Bankr. D. Idaho 2015), and *In re Katseanes*, 2007 Bankr. LEXIS 3475, 2007 WL 2962637 (Bankr. D. Idaho 2007). In each, the debtors had not maintained a domicile in Idaho during the entire 730 days before their bankruptcy filing, and the applicable state laws under § 522(b)(3)(A)—Colorado and Utah respectively—included a property exclusion in their homestead exemptions, limiting the exemptions to a home located within the state. *See* Colo. Rev. Stat. § 38-41-201 ("Every homestead in the state of Colorado shall be exempt . . . ."), Utah Code § 78-23-3(2)(a) ("An individual is entitled to a homestead exemption consisting of property in this state . . . ."). The decision in *Wilson* and *Katseanes* was that because *some* state exemptions were still available to the debtors, they were not able to use the hanging paragraph to claim any federal exemptions—and so were given no homestead exemption whatever.

The better interpretation of the hanging paragraph is that if state law eliminates *any* particular exemption because of the debtor's domicile, the debtor may choose to use a federal exemption that covers that property. This was the approach taken in *In re Kelsey*, 477 B.R. 870 (Bankr. M.D. Fla. 2012). The situation in *Kelsey* was like the one facing the Idaho court in *Wilson.* The debtors had moved to Florida from Colorado, and Colorado exemption law was applicable, providing them with personal property exemptions, but not allowing them a homestead exemption in their Florida real estate. So, as in *Wilson*, the court in *Kelsey* determined that other Colorado exemptions were available to the debtors, but not the homestead exemption. However, instead of holding that the debtors should receive no homestead exemption, the court applied the hanging paragraph to allow the debtors to claim the federal homestead exemption set out in § 522(d)(1). *Id.* at 878-79. If the Trustee were correct that Louisiana's exemptions did not apply to particular assets in West Virginia, the Ashes would similarly be able to assert the parallel federal exemptions for those assets.

The combination of these elements of § 522(b) plainly allows a state's exemption law to apply outside of the state's boundaries. Indeed, if this were not possible, there would be no need for the hanging paragraph protecting against state law that excludes exemptions against non-resident debtors. *See Arlington Central School Dist. Bd. of Ed. v. Murphy,* 548 U. S. 291, 299, n. 1, 126 S. Ct. 2455 (2006) ("[I]t is generally presumed that statutes do not contain surplusage").

On the other hand, to have extraterritorial effect, a state's exemption law must have three features: (1) an opt-out provision, applicable to out-of-state debtors, so that non-resident debtors cannot elect the federal exemptions under § 522(b)(2); (2) an extension of its exemptions to everyone to whom they apply, rather than only to state residents or citizens, so that the hanging paragraph does come into effect, allowing federal exemptions; and (3) avoidance of exemptions limited to property located within the state, again to prevent the hanging paragraph from applying federal exemptions.

B. Louisiana's exemption law applies to out-of-state debtors and their property.

1. Louisiana exemption law complies with all of the Bankruptcy Code's requirements for extraterritorial effect.

The three requirements for state exemption law to have extraterritorial effect, set out in § 522(b) of the Bankruptcy Code and outlined above, are all clearly met by the exemption law of Louisiana, as reflected in the following provisions.

(a) *An effective opt-out.* La. R.S. 13:3881.B(1)(2006) states:

> In cases instituted under the provisions of Title 11 of the United States Code, entitled "Bankruptcy", there shall be exempt from the property of the estate of an individual debtor only that property and income which is exempt under the laws of the state of Louisiana and under federal laws other than Subsection (d) of Section 522 of said Title 11 of the United States Code.

This provision limits exemptions to those under § 522(b)(3), eliminating the federal bankruptcy exemptions, and it contains no limitation to current residents or citizens of Louisiana.

(b) *Exemptions applicable to all individuals.* La. R.S. 13:3881.A sets out a list of the property "exempt from seizure," La. R.S. 12:1 (2011) establishes a homestead exemption, and La. R.S. 23:1205.A (2011) establishes an exemption for worker's compensation payments.

There is nothing in any of these sections, or elsewhere in the Louisiana law, limiting their application to current residents or citizens of Louisiana.

(c) *Exemptions not limited to property connected to Louisiana.* With the arguable exception of the worker's compensation exemption—discussed in the last section of this argument—none of the exemptions allowed by Louisiana law are limited to property that is located in Louisiana or that was created only under Louisiana law.

As the Bankruptcy Court pointed out in its opinion denying the Trustee's objection (Docket No. 63 at 5), the Trustee has identified no provision of the Louisiana constitution and no Louisiana case law that would limit the scope of the Louisiana's exemption law. So unless there is some other basis for limiting it, that law is effective in bankruptcy to extend Louisiana exemptions to non-residents of Louisiana and their property, wherever located.

2. No presumption against extraterritoriality applies to Louisiana's exemption law.

Because the language of Louisiana's exemption law contains no limit on its coverage beyond Louisiana, the Trustee's objection to exempting the debtors' West Virginia property is based almost exclusively

on a presumption that the Louisiana law—despite the absence of any provision to that effect—has no effect outside of Louisiana. There is no such presumption.

The Bankruptcy Court's opinion (Docket No. 63 at 4, 5-6) sets out the basic reason why the Trustee's presumption argument fails: it relies exclusively on decisions dealing with the international effects of federal legislation, not the effect of state legislation in other states. The principal authority that the Trustee cites is *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and its statement of the presumption against extraterritoriality makes clear that the presumption has no application to matters internal to the United States:

> The question here is . . . whether a claim [under the federal Alien Tort Statute, "ATS"] may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 2878, (2010), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454, 127 S. Ct. 1746 (2007).

The other authorities cited by the Trustee that recognize a presumption against extraterritoriality similarly deal with transnational concerns. The Trustee offers no support for the proposition that state laws should be presumed to have no effect outside state boundaries.

Indeed, the presumption that the Trustee advocates has only been used by federal courts interpreting federal legislation. There is no basis for applying that interpretative standard to state law. Rather, state law should be interpreted under the standards applied by the state courts charged with its implementation. So, rather than applying a rule of interpretation that has not been adopted in Louisiana, Louisiana's exemption law should be interpreted under the standards of Louisiana's Civil Code, Article 9: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."

3. Lousiana's exemption law does not violate the United States Constitution.

The only other arguments made by the Trustee for denying the effectiveness of Louisiana's exemption law beyond its boundaries is are constitutional ones. The Trustee (Brief at 26-27) quotes *Connecticut*

General Life Insurance Co. v. Johnson, 303 U.S. 77, 80-81 (1938), for the proposition that it would deny due process if a state were able to enforce its laws against a corporation whose "property and activities" were both outside the state. And similarly, the Trustee argues the Full Faith and Credit clause does not justify "compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." (Brief at 28-29, quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm.,* 306 U.S. 493, 501, 59 S. Ct. 629 (1939)).

These arguments fail, again for the reason given in the Bankruptcy Court's decision: "The Louisiana exemption statutes operate beyond their borders only by operation of federal law." Docket No. 63 at 4.

Indeed, there is nothing in the Louisiana exemption law that compels any entity outside of Louisiana to comply with its terms. Only if another jurisdiction chooses to recognize the application of Louisiana's law does it have effect. So, for example, if a citizen of Louisiana owned a home in Arkansas, any creditor who wanted to enforce a judgment against the home would have to apply to the Arkansas courts. It is pos-

sible that those courts might choose to apply Louisiana's homestead exemption—as noted above, the exemption is not limited to property in Louisiana—but Louisiana's exemption law makes no pretense of being able to nullify the contrary law of other states. If the Arkansas courts determined, under Arkansas choice of law principles, that any homestead exemption would have to be derived from Arkansas law, the Louisiana statute would not be offended. On the other hand, when enforcement is sought against property of a debtor who resides outside of the state where the property is located, it would be completely appropriate for the state in which the enforcement is sought to choose to apply the exemption law of the debtor's state of residence. An Idaho statute makes precisely this choice. *See* Idaho Code Ann. § 11-602(1) ("Residents of this state are entitled to the exemptions provided by this act. Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence.").

Most significantly, as the Bankruptcy Court noted, the enforcement of Louisiana's exemption law here is through the Bankruptcy Code and the federal judicial system. This is a choice made by Congress, which has the authority under the Constitution to determine

what exemptions should apply in bankruptcy cases, incorporating state law to the extent it chooses. *Hanover National Bank v. Moyses,* 186 U.S. 181,190 (1902) (treatment of exemptions under the 1898 Bankruptcy Act, applying state law, was constitutional as a “uniform” bankruptcy law). Congress’s choice to apply the state exemption law of a state in which the debtor formerly had a domicile is completely constitutional.

C. The Trustee’s objection to the debtors’ claimed exemption in a worker’s compensation payment should be denied as untimely.

The Trustee’s final argument deviates from the bulk of his brief, and challenges a particular exemption—in a worker’s compensation payment—claimed by the debtors. The Trustee contends that the applicable Louisiana statute— La. R.S. 23:1205.A (2011)—applies only to a worker’s compensation payment due under Louisiana’s worker’s compensation law, and so cannot apply to any payment to the debtors under West Virginia law. If this argument had been made timely, it would have generated argument both about the scope of the exemption and—if it were found to be subject to a property exclusion—whether a federal exemption for payments due to injury or lost wages (§ 522(d)(11)(D) and

(E)) would be available under the hanging paragraph, as discussed at n.3 above.

However, the Trustee is making this argument for the first time on appeal. It appears nowhere in his objection to the debtors' exemptions (Docket No. 16), or in any other filing, and it was not considered by the Bankruptcy Court. Arguments made for the first time on appeal are generally not considered. *See, e.g., In re Khoe*, 255 B.R. 581, 585-86 (E.D. Cal. 2000) (noting, in an appeal from a bankruptcy court decision, that "[t]he court generally does not decide issues raised for the first time on appeal; such arguments are deemed to have been waived").

But the untimeliness of the Trustee's argument regarding worker's compensation defeats it even if this Court determines to consider the argument. Federal Rule of Bankruptcy Procedure 4003(b)(1) sets a strict deadline for filing objections to exemptions:

> (Except as provided in paragraphs (2) and (3) [applicable only in situations of fraud or other specified debtor misconduct], a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under_§ 341 is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

The § 341 meeting to which the rule refers was concluded in this case on September 17, 2015 (see Docket 13), making the deadline for filing an objection to the debtors' exemptions October 17, 2015. No party in interest made a motion for an extension of the deadline. Accordingly, the Trustee's current objection, made after the deadline, must be denied. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 644, 112 S. Ct. 1644, 1648 (1992), in which the Supreme Court held that an untimely objection to exemptions—even groundless exemptions—could not be retroactively validated, stating the rule bluntly:

> Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality. In this case, despite what respondents repeatedly told him, [the trustee] did not object to the claimed exemption. If [he] did not know the value of the [property sought to be exempted], he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object, see Rule 4003(b). Having done neither, Taylor cannot now seek to deprive [debtors] of the exemption.

Conclusion

As discussed above, the judgment of the bankruptcy court, denying the Trustee's objection to the debtors' exemptions, should be affirmed.

Respectfully submitted,

/s/ Todd B. Johnson

Eugene R. Wedoff
144 N. Elmwood Ave.
Oak Park, IL 60302
(312) 285-5849
erwedoff@me.com

Todd B. Johnson, Esq.
Johnson Law, PLLC
PO Box 519
Morgantown, WV 26507
(304) 292-7933
todd@jlawpllc.com

Attorneys for Debtors-Appellees
Keith Doyle Ash and
Phyllis Jean Ash