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Toward Effective Implementation of 11 U.S.C. § 522(d)(11)(E): Invigorating a Powerful Bankruptcy Exemption

Uriel Rabinovitz

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Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law. I would like to thank Professor Andrew Kent for his insights and assistance at every stage of this Note. In addition, I would like to thank my parents, sister, and brother for their continuous encouragement and support throughout this process. Thank you to my wife, Aviva, for her constant love and unwavering support.

TOWARD EFFECTIVE IMPLEMENTATION OF 11 U.S.C. § 522(d)(11)(E): INVIGORATING A POWERFUL BANKRUPTCY EXEMPTION

*Uriel Rabinovitz**

This Note explores how bankruptcy courts have analyzed and applied the 11 U.S.C. § 522(d)(11)(E) bankruptcy exemption and the confusion generated by its conflicting interpretations. This Note reviews and scrutinizes the history of the Bankruptcy Law, its goals and purposes, the differences between its underlying themes, and specific mechanisms involved in the implementation of bankruptcy exemptions. With a broader understanding of the rationale behind bankruptcy laws in combination with the relevant legislative history, this Note sets the stage and advocates for an increased consistency in the analysis and application of the 11 U.S.C. § 522(d)(11)(E) exemption.

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INTRODUCTION

Imagine a hard working American Joe the Steelworker, legally blind in one eye, who tries to support his family through his hourly wage job, but falls behind on his debts due to the lasting economic turmoil. Sadly, he further loses his vision in his only good eye in an accident involving negligent handling of equipment by a construction worker. His visual handicap interferes with his ability to provide for his family, and, needless to say, for this family a bad financial situation takes a turn for the worse. After consulting an attorney friend, this industrious American realizes that his only financial option is to file for bankruptcy protection. Concomitantly, in an attempt to save on legal fees and shorten potentially lengthy legal proceedings related to his injury, he decides to forgo a full trial and settle with the construction worker's company for a lump sum payment of \$120,000. The combination of bankruptcy filing and a monetary settlement to compensate for Joe the Steelworker's injury raises new legal uncertainties: Will the settlement be paid directly to the bankruptcy trustee to repay creditors, or can the debtor retain some of these funds? How can the Bankruptcy Code be utilized to help such a beleaguered individual and his dependents? What issues should his lawyer be aware of in order to help him get a much needed fresh start? This Note provides an in-depth analysis of the contradictory rulings of various courts in cases that raise similar questions and proposes resolutions that are in line with the overall objectives of the Bankruptcy Law.

When filing a petition for relief under the Bankruptcy Code, a debtor has multiple avenues available to him depending on the specific circumstances of the case. The most commonly utilized avenues are Chapters 7, 11, or

13.¹ In a Chapter 7 proceeding, assets are generally liquidated in exchange for a release from debt, while debtors are permitted to retain a limited amount of property.² In a Chapter 11 proceeding, assets are reorganized in order to repay the creditors, while the debtor is allowed to retain a significant part of the assets.³ A Chapter 13 proceeding allows the debtor to avoid liquidation by using his future income to effectively repurchase some of his nonexempt property.⁴

The common thread shared by all of the aforementioned proceedings is the creation of an estate by the actual filing for bankruptcy, regardless of the avenue chosen by the debtor.⁵ In principle, such an estate is “a legal fiction in which property and property rights that were previously the debtor’s . . . are deemed held for the purpose of bankruptcy administration.”⁶ The current Bankruptcy Law includes a provision for a discharge of debts, which releases the debtor from personal liability for most types of debts that existed prior to the bankruptcy commencement date.⁷ The discharge prohibits a creditor from exercising any form of collection action on discharged debts.⁸ Moreover, the Bankruptcy Code allows for certain property exemptions.⁹ An exempt property is not a part of the bankruptcy estate, and will not be liquidated.

This Note focuses on the 11 U.S.C. § 522(d)(11)(E) exemption, which allows a debtor to retain “a payment in compensation of loss of future earnings . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.”¹⁰ Although at first glance this statute appears straightforward, an in-depth examination of the term “future earnings” reveals its ambiguity. The language of this statute leaves significant latitude for interpretation by courts regarding the explication of the term “future earnings” and the methods used to determine the size and duration of compensation.

The primary purpose of this Note is to study the discrepancies created by diverse interpretations of the § 522(d)(11)(E) exemption by different courts, and to further promote a more consistent and equitable implementation approach for this exemption. To that end, this Note focuses its analysis on the historic progression of the Bankruptcy Law, its underlying logic, and

1. See JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY 415 (2d ed. 2007).

2. See *generally id.* (explaining the various options available to a debtor when approaching bankruptcy).

3. See MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY 307 (1995).

4. See FERRIELL & JANGER, *supra* note 1, at 641.

5. GEORGE W. KUNEY, MASTERING BANKRUPTCY 36 (2008). The exempt property is not part of the bankruptcy estate; it is not subject to seizure by unsecured creditors and, thus, would not be liquidated. See 11 U.S.C. § 541 (2006); HERBERT, *supra* note 3, at 185.

6. KUNEY, *supra* note 5, at 36.

7. See FERRIELL & JANGER, *supra* note 1, at 465; John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 164 (1996).

8. See FERRIELL & JANGER, *supra* note 1, at 465.

9. See *generally* 11 U.S.C. § 522.

10. *Id.* § 522(d)(11)(E).

conflicting interpretations of the ambiguous language of the § 522(d)(11)(E) exemption.

Part I reviews the historical evolution of bankruptcy laws from the early period of the Roman Empire to the enactment of the current U.S. Bankruptcy Code. It further surveys and analyzes the major policy reasons and purposes behind the protection provided by the Bankruptcy Code. Subsequently, Part I describes and assesses the bankruptcy exemptions and the confusion involving the use of the § 522(d)(11)(E) exemption. Part II explores conflicts among courts pertaining to specific mechanisms involved in the application of the statute. Part III proposes a significant liberalization in the courts' approach toward the § 522(d)(11)(E) exemption that is rooted in the historic development, principles, and rationale of the Bankruptcy Code.

I. THE EVOLUTION OF THE BANKRUPTCY LAW: HISTORY AND PURPOSES

This Part introduces the Bankruptcy Law and describes its historical progress and transformation from its earliest inception to its current form. It then focuses on five policy reasons that establish the underlying rationale for the various components of this law and further assesses the reasoning and the mechanisms involved in the implementation of the bankruptcy exemptions, particularly 11 U.S.C. § 522(d)(11)(D) and (E).

A. *The Bankruptcy Law and the Discharge of Debts: Centuries in the Making*

1. The Early Years

The civil regulation of commerce has always required the development of rules and laws for dealing with failed businesses or businesspeople—the primary ground for bankruptcy.¹¹ Multiple theories have been proposed for the origin of the term “bankruptcy.” According to many scholars, it is derived from a medieval Italian phrase indicating a merchant’s “broken bench.”¹² During that period, merchants sold their commodities from benches, and when a merchant failed to make good on his debt, the creditors assumed possession of his goods and broke his bench to prevent its reopening.¹³ Others have suggested that “bankruptcy” is rooted in the French words *banque*, a bench, and *route*, a trace, implying that the removal of the bench leaves behind only a trace.¹⁴ It has also been acknowledged that it may relate to the German word *bank*, which refers to a

11. See KUNEY, *supra* note 5, at 3.

12. *Id.*; Sandor E. Schick, *Globalization, Bankruptcy and the Myth of the Broken Bench*, 80 AM. BANKR. L.J. 219, 221 (2006).

13. KUNEY, *supra* note 5, at 3.

14. See F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 11 (William S. Hein & Co., Inc. 2002) (1919).

joint stock fund, or that it could have been used figuratively, just as today an insolvent person is described as “broke.”¹⁵

Under the Jewish law, as described in the Bible,¹⁶ a debtor had a moral obligation to repay his debt and might even sell himself into servitude to achieve that goal.¹⁷ Yet, after six years he would be freed and all debt obligations would automatically be discharged.¹⁸ Jewish law emphasizes the importance of an eventual debt discharge. In contrast, under the early Hammurabi’s Code, a debtor was expected to pay his debts under all circumstances.¹⁹ The creditor could imprison a debtor until the debt was repaid in full, or, alternatively, the impoverished debtor could sell himself or his family into slavery.²⁰

In ancient Indian and Irish societies, an unpaid creditor would be allowed to seat himself, often fasting, at the debtor’s doorstep, to generate social pressure and hostility toward the debtor.²¹ Under the Twelve Tables of the Roman Republic (circa 450 BCE), the debtor served as collateral for his debt and could be imprisoned and ransomed upon default.²² When multiple creditors came forward, they were allowed to literally divide the debtor, each taking a portion of his flesh to pay off the debt.²³ Later Roman laws curtailed such acts and gave the creditors the right to seize and liquidate the debtor’s property instead of his physical existence.²⁴ In thirteenth-century England, the Statute of Merchants authorized an immediate imprisonment of any debtor who defaulted.²⁵ If the debt was not paid in full after three months of imprisonment, the debtor’s property and land would be delivered to his creditors until the debt was paid off from the profits while the debtor was locked up in prison.²⁶

For centuries, a “hapless debtor . . . has been chastised and blamed, beaten and maimed, shunned by society, sold into slavery, and even put to

15. See *id.*

16. See generally *Exodus* 21.

17. KUNEY, *supra* note 5, at 4.

18. *Id.* It should be noted that until the seventh year that frees the servant there is no semblance to a discharge unless the entire debt is satisfied. NOEL, *supra* note 14, at 14. According to the Talmud (a central text of mainstream Judaism discussing Jewish Law), even the specific hour that a loan took place was marked on a bond document to allow for an exact reference in prioritizing the creditors. *Id.*

19. See KUNEY, *supra* note 5, at 4.

20. See *id.* at 3–4; Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 230 (1918).

21. See Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 135 (2004).

22. KUNEY, *supra* note 5, at 4; Levinthal, *supra* note 20, at 231.

23. See KUNEY, *supra* note 5, at 4; Levinthal, *supra* note 20, at 231.

24. See KUNEY, *supra* note 5, at 4.

25. See Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal To Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 811 (1983); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) [hereinafter Tabb, *History of the Bankruptcy Laws*].

26. See Countryman, *supra* note 25, at 811; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 7 (explaining that it was common practice to imprison debtors for not paying their debts).

death.”²⁷ However, this perception has been radically altered, and “[p]erhaps no process has undergone such a fundamental change over the course of history than the method in which economic failure is addressed by society.”²⁸

2. Bankruptcy: Coming to America

A significant portion of the U.S. law, including the original Bankruptcy Law, is based on the English common law.²⁹ The history of U.S. bankruptcy can be traced back to 1542, when the first bankruptcy law was passed in England³⁰ providing a “collective remedy that tried to deal fairly with a multiplicity of creditors.”³¹ It originated as a pro-creditor law at its core.³² Indeed, in the subsequent century many statutes were passed with the underlying objectives of benefiting the creditors and penalizing the noncompliant debtors.³³ Only significantly later, in 1705, was a pro-debtor concept of debt discharge introduced.³⁴ From a humane perspective, the advent of the discharge is viewed as a turning point in the evolution of U.S. bankruptcy law: it ushered in the historical “transformation of bankruptcy from a creditors’ collection remedy to a system of statutorily mandated composition mutually beneficial to debtors and creditors.”³⁵ Interestingly, the discharge was originally intended to serve the creditors, as the debtor had to voluntarily surrender assets and give a full financial disclosure, thereby facilitating the creditors’ ability to collect.³⁶ However, some of the brutality incorporated in the old laws remained, including the option of capital punishment for noncooperating debtors.³⁷ William Blackstone described the English bankruptcy laws of the time as “calculated for the

27. Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 153 (2004).

28. *Id.*

29. Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 7–10.

30. See CHARLES J. TABB & RALPH BRUBAKER, *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 57 (2003); Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 7.

31. TABB & BRUBAKER, *supra* note 30, at 57 (emphasis omitted). Under this law the debtor was treated like a common criminal; he could not receive a discharge, nor could he file for bankruptcy, as any proceeding had to be commenced by the creditor, and only merchant debtors could enter bankruptcy. *Id.* at 57–58.

32. See Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 331–32 (1991) [hereinafter Tabb, *The Historical Evolution*]; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 7–9.

33. See Tabb, *The Historical Evolution*, *supra* note 32, at 331–32.

34. *Id.* at 333.

35. See McCoid, *supra* note 7, at 192.

36. See Tabb, *The Historical Evolution*, *supra* note 32, at 333–34; see also *infra* Part I.B.1.

37. See TABB & BRUBAKER, *supra* note 30, at 58; see also Tabb, *The Historical Evolution*, *supra* note 32, at 333 (explaining that while this law marked the evolution of more humane treatment of distressed debtors, the statute itself was intended to alleviate concerns for the creditors’ welfare, despite the fact that it granted debtors only a limited benefit).

benefit of trade, and founded on the principles of humanity as well as justice.”³⁸

There were two important limitations on the first discharge law.³⁹ The eligibility was restricted to traders, whereas an insolvent nontrader could not receive a discharge.⁴⁰ Additionally, bankruptcy was an involuntary remedy.⁴¹ Thus, in contrast to the current bankruptcy laws that allow a debtor to simply file for bankruptcy and receive a discharge, under the 1705 law only creditors could put a debtor in bankruptcy.⁴² These limitations demonstrate that during the early years of the eighteenth century a lack of sympathy toward debtors prevailed, although some scholars do acknowledge that concerns for an honest debtor were also calculated in the passage of the 1705 Act.⁴³

The importance of bankruptcy laws was not lost upon the drafters of the U.S. Constitution.⁴⁴ The Bankruptcy Clause empowers Congress to pass “uniform Laws on the subject of Bankruptcies.”⁴⁵ James Madison described the underlying purpose and the necessity for such a clause, stating that the formation of “uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.”⁴⁶

Yet, the bankruptcy laws of the late eighteenth century were still conceptually distinct from those of our modern era.⁴⁷ The historical

38. See Graydon S. Staring, *Bankruptcy—An Historical View*, 59 TUL. L. REV. 1157, 1159 (1985) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *472).

39. See Tabb, *The Historical Evolution*, *supra* note 32, at 334.

40. See *id.* at 334–35.

41. *Id.* at 336.

42. See *id.* The prevailing view was that credit was unjustified and linked with fraud. *Id.* at 335–36.

43. See *id.* at 338 (explaining that Blackstone and others “unmistakenly identified concern for the honest debtor as one of the bases upon which the bankruptcy acts rested.” (citing 2 WILLIAM BLACKSTONE, *supra* note 38, at *472)).

44. See Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 13.

45. U.S. CONST. art. I, § 8, cl. 4. This gave Congress a significant scope of power. See *Engstrom v. De Vos*, 81 F. Supp. 854, 859 (E.D. Wash. 1949) (“The only restrictions on the plenary, constitutionally conferred bankruptcy power of Congress are those to be found in other provisions of the Constitution.”). The Bankruptcy Code both incorporates and overrules state laws. For an analysis of the federalism of bankruptcy, see generally Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063 (2002).

46. TABB & BRUBAKER, *supra* note 30, at 58 (quoting THE FEDERALIST NO. 42 (James Madison)); see also *In re Reiman*, 20 F. Cas. 490, 496 (C.C.S.D.N.Y. 1874) (No. 11,673) (“It cannot be doubted, that [C]ongress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the constitution was adopted. . . . The power given must, indeed, be held to be general, unlimited and unrestricted over the subject.”).

47. See Staring, *supra* note 38, at 1157 (explaining that the “present bankruptcy law of the United States has a scope undreamed of when the bankruptcy power was written into the United States Constitution”); see also Tabb, *The Historical Evolution*, *supra* note 32, at 325 (explaining that the present form of discharge in the United States did not exist until the

transition in the fundamentals of the bankruptcy laws is depicted in the following scholar's note:

In America, bankruptcy law has generally progressed from conservative, creditor-oriented laws to more liberal, debtor-oriented forms of relief. As late as 1785, debtors in Pennsylvania were subject to public flogging and loss of an ear, and New York debtors could be branded with a "T," which marked them as a thief. The modern Bankruptcy Code is far more forgiving, representing a distinct change in society's opinion of debt and the acceptance that the risk of debtor non-payment is best borne by creditors.⁴⁸

The progression of U.S. bankruptcy law itself was a slow process, and a permanent bankruptcy law was not enacted until 1898.⁴⁹ At the onset, after the ratification of the Constitution, the bankruptcy power stood unexercised, despite the financial turmoil of 1792 and 1797 and the consequent imprisonment of thousands of debtors.⁵⁰ Initially, a federal bankruptcy law existed in distinct periods varying from a few years to two decades (from 1800 to 1803, 1841 to 1843, and from 1867 to 1878).⁵¹ "Federal bankruptcy legislation was viewed as a temporary and emergency measure, only appropriate to deal with the aftermath of economic depression."⁵²

The first bankruptcy law, the Bankruptcy Act of 1800,⁵³ was almost identical to the English law, allowing only creditors to file for bankruptcy.⁵⁴ Under this law, the discharge was solely available to merchants with stipulation of their cooperation,⁵⁵ and was contingent on the approval of at least two-thirds of the creditors.⁵⁶ Furthermore, the bankrupt debtor was allowed only limited exemptions⁵⁷ for the "necessary wearing apparel" and

beginning of the twentieth century, and even today many civilized countries still do not offer an overburdened debtor the possibility of discharge).

48. KUNEY, *supra* note 5, at 4.

49. See TABB & BRUBAKER, *supra* note 30, at 58; see also Countryman, *supra* note 25, at 814 (explaining that imprisonment for debt was widely used in the United States in the early nineteenth century, as evidenced by the fact that in Massachusetts, Maryland, New York, and Pennsylvania there were three to five times more individuals incarcerated for debts than for crimes).

50. See Tabb, *The Historical Evolution*, *supra* note 32, at 344; see also FERRIELL & JANGER, *supra* note 1, at 135 (proving that the bankruptcy power was "largely dormant through[out] most of the nineteenth century").

51. See TABB & BRUBAKER, *supra* note 30, at 58. Each of these laws was passed in response to a major financial crisis. *Id.*

52. See FERRIELL & JANGER, *supra* note 1, at 135-36.

53. ch. 19, 1 Stat. 19 (repealed 1803).

54. See TABB & BRUBAKER, *supra* note 30, at 58; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 14-15.

55. See Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 14-15; Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 63 (1990) [hereinafter Tabb, *The Scope of the Fresh Start*].

56. See William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 155 (1997).

57. See *infra* Part I.C (discussing exemptions generally).

“necessary bed and bedding” for him and his family.⁵⁸ The primary purpose of the Bankruptcy Act of 1800 was not to aid debtors, but rather to address attempts to defraud creditors.⁵⁹ Thus, the 1800 Act contributed little to pro-debtor bankruptcy laws in general, or to the evolution of the discharge in particular.⁶⁰

The second bankruptcy act, passed in 1841, was the first pro-debtor bankruptcy law.⁶¹ Via two major modifications, which included removing the restrictions on eligibility for bankruptcy and making the proceedings voluntary, it “introduced a completely new focus and purpose to [the] bankruptcy proceeding[s].”⁶² It now allowed any debtor, merchant and nonmerchant alike, to file for bankruptcy independent of the creditor’s position on the matter.⁶³ Even though the act was repealed just over one year later, it served as the genesis of voluntary proceedings for bankruptcy in the United States.⁶⁴ “In its very simplicity this law fundamentally transformed the underlying assumptions regarding the nature of bankruptcy.”⁶⁵

The Bankruptcy Act of 1867 added an innovative development, as it allowed the debtor to propose a payment plan while keeping his property.⁶⁶ However, as a whole, the laws were still restrictive, as less than one-third of the bankruptcy proceedings led to a discharge.⁶⁷ This was mainly due to the sustained requirement for the creditors’ consent to a debt discharge and to the introduction of additional grounds for denying discharge.⁶⁸

58. Bankruptcy Act of 1800, ch. 19, §§ 5, 18, 2 Stat. 23, 27; *see also* Tabb, *The Historical Evolution*, *supra* note 32, at 346 n.150 (noting that this exemption was narrower than the English statute, which exempted in addition to bedding, all tools of the trade, furniture, and necessary household goods).

59. *See* Staring, *supra* note 38, at 1160.

60. *See* Tabb, *The Historical Evolution*, *supra* note 32, at 345.

61. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 63; *see* Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 16–18.

62. Tabb, *The Historical Evolution*, *supra* note 32, at 349.

63. *See* TABB & BRUBAKER, *supra* note 30, at 59; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 16–17. *But see* Countryman, *supra* note 25, at 815 (explaining that involuntary proceedings remained for debts over \$2000).

64. *See* Tabb, *The Historical Evolution*, *supra* note 32, at 350–51 (explaining that the act was repealed due to widespread discontent).

65. *Id.* at 350; *see also id.* (noting that many alleged that this act was unconstitutional because the reference to bankruptcy in the constitution pertains to “bankruptcy” as it existed in 1789).

66. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878); *see* TABB & BRUBAKER, *supra* note 30, at 59; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 20–21.

67. Tabb, *The Historical Evolution*, *supra* note 32, at 357.

68. *See id.* at 358–59 (explaining that one of the new provisions for denying discharge was loss of property due to gambling); Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 63. Under the Act of 1867, a discharge could also be available with “the debtor’s payment of at least fifty percent of the aggregate debts.” *See* Brown, *supra* note 56, at 157.

The Bankruptcy Act of 1898⁶⁹ marked the beginning of the modern era of pro-debtor bankruptcy laws⁷⁰ and represents a paramount milestone in the evolution of the discharge of debts.⁷¹ With this Act, Congress tried to make the discharge more readily attainable, eliminating the requirement for creditors' consent to a discharge.⁷² Furthermore, voluntary bankruptcy was made available on demand to "[a]ny person who owes debts, except a corporation."⁷³ The Bankruptcy Act of 1898 recognized the public interest in granting a discharge to a hard-struck debtor and in allowing his return to being a productive member of society.⁷⁴

Building on the previous bankruptcy acts, the Bankruptcy Reform Act of 1978 enacted a number of procedural and jurisdictional rules that constitute the Bankruptcy Code as we have it today.⁷⁵ The reformed Bankruptcy Code is "an elegant and sophisticated piece of legislation" that "swept away the years of doctrinal cobwebs and incrustations, replacing them with a lucid, simple, and apparently humane system for dealing with overburdened debtors and helpless corporations."⁷⁶ The modified Bankruptcy Code encompasses the different avenues available to debtors, including Chapter 7 (liquidation), Chapter 11 (reorganization), and Chapter 13 (individual rehabilitation);⁷⁷ the jurisdiction of bankruptcy judges; a new set of federal exemptions (including the 11 U.S.C. § 522(d)(11)(E) exemption);⁷⁸ and the interconnection of state laws with federal laws.⁷⁹ The new Bankruptcy Code legislated a sweeping reform in response to the previous laws that were old fashioned and far removed from the contemporary United States.⁸⁰

69. ch. 541, 30 Stat. 544 (repealed 1979).

70. See TABB & BRUBAKER, *supra* note 30, at 59; Tabb, *The Historical Evolution*, *supra* note 32, at 364; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 23.

71. Tabb, *The Historical Evolution*, *supra* note 32, at 363.

72. See Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 23–24; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 65.

73. Bankruptcy Act of 1898, ch. 541, § 4a, 30 Stat. 544, 547 (1898) (repealed 1978). "The United States Congress in 1898 did not just decline to give the bankruptcy court control over the discharge. At the same time, that control was taken away from creditors. The long-standing requirement of either creditor consent or a minimum dividend as a prerequisite to obtaining a discharge was eliminated. No check on discharges other than the statutory limitations remained." Tabb, *The Historical Evolution*, *supra* note 32, at 364.

74. Tabb, *The Historical Evolution*, *supra* note 32, at 364–65.

75. See FERRIELL & JANGER, *supra* note 1, at 137; Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 32–34.

76. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 121 (1997).

77. KUNEY, *supra* note 5, at xxvii–xxviii.

78. 11 U.S.C. § 522(d)(11)(E) (2006).

79. See George Brody, *The New Bankruptcy Court*, in THE BANKRUPTCY REFORM ACT OF 1978 15–30 (Grace W. Holmes ed., 1979) (discussing the jurisdictional limits of the bankruptcy court).

80. *Id.* One of the central motivations behind the 1978 reforms was the belief that the prior bankruptcy law, fashioned mainly in 1898, was ill-equipped to address the explosion of consumer credit and consumer bankruptcies of recent decades. David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?* 73 AM. BANKR. L.J. 311, 328 (1999); Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 32–34.

The ratified modifications “made bankruptcy a much more debtor-friendly law.”⁸¹

However, modern era bankruptcy laws have not neglected to take into account the interests of the creditors whose debtors fail to repay their debts. In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted.⁸² This pro-creditor act imposed additional restrictions on consumer bankruptcies, seeking to assure that the bankruptcy system would help only those in a crucial need.⁸³ The most significant addition was the implementation of the “means test.”⁸⁴ This test compares the debtor’s average income to the median for households of the same size in the debtor’s state of residence.⁸⁵ The means test seeks to ensure that debtors will pay creditors the maximum that they are able to afford, and if a debtor has sufficient income to pay back portions of his debts, he will be ineligible for bankruptcy relief.⁸⁶ BAPCPA also included provisions to deter serial and abusive bankruptcy filings and mandated consumer counseling to many of those filing for bankruptcy protection.⁸⁷ In addition, certain consumer protection reforms were also implemented, including a penalty to a creditor who unreasonably rebuffs a negotiation of a prebankruptcy payment plan.⁸⁸

Cumulatively, the landmark reforms of the bankruptcy law have tailored it to our modern times where bankruptcy touches multiple corners of society, including megacorporations, mom-and-pop businesses, mass tort victims, polluters, and unfortunate individuals.⁸⁹ In fact, the current Bankruptcy Code is the product of historical evolution that was at least two centuries in the making: what began as a tool to help creditors collect debts has evolved into a mechanism granting relief to downtrodden debtors.⁹⁰ The transformation in the spirit of the law is tightly linked to the social

81. *Personal Bankruptcy Consumer Credit Crisis: Hearings Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of the American Bankruptcy Institute), 1997 WL 176645. The increase of bankruptcy filings in the late 1970s is mainly attributed to the Bankruptcy Reform Act of 1978. Moss & Johnson, *supra* note 80, at 329.

82. Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in scattered sections of 11 U.S.C.).

83. See FERRIELL & JANGER, *supra* note 1, at 141; SHEILA M. WILLIAMS & GEORGE M. BASHARIS, *BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: LAW AND EXPLANATION* 53–54 (2005).

84. WILLIAMS & BASHARIS, *supra* note 83, at 3.

85. See FERRIELL & JANGER, *supra* note 1, at 141.

86. WILLIAMS & BASHARIS, *supra* note 83, at 3. Upon signing the bill, President George W. Bush stated that “[i]n recent years too many people have abused the bankruptcy laws, . . . [t]hey walked away from debts even when they had the ability to repay them.” Associated Press, *Bush Signs Tougher Bankruptcy Bill into Law*, Apr. 20, 2005, <http://www.msnbc.msn.com/id/7575010/>.

87. FERRIELL & JANGER, *supra* note 1, at 142; WILLIAMS & BASHARIS, *supra* note 83, at 55 (“The requirement of financial management education is intended to prevent repeated financial failure.”).

88. See WILLIAMS & BASHARIS, *supra* note 83, at 55.

89. Tabb, *History of the Bankruptcy Laws*, *supra* note 25, at 5.

90. Tabb, *The Historical Evolution*, *supra* note 32, at 370.

advancements that were achieved during this period.⁹¹ As discussed below, the current Bankruptcy Law is built on and tightly related to the historical foundations and policy reasons that gave rise and further growth to this law.⁹²

B. *The Logic Behind the Law: Five Policy Reasons for the Bankruptcy Law*

The underlying rationale for the Bankruptcy Code is supported by multiple interconnected theories.⁹³ The majority of these theories focus exclusively on the benefits to either the debtors or the creditors, and, therefore, they are inherently conflicting. This Part describes five major policy reasons that, according to bankruptcy scholars, form the rational foundation for the Bankruptcy Code. This Part is integral to this Note since the § 522(d)(11)(E) exemption can be better understood and more uniformly applied in the context of an overall objective of achieving the underlying goals of the Bankruptcy Law. Furthermore, the founding principles of the Bankruptcy Law need to be carefully weighed when a new focus is considered for the implementation of its exemptions.

1. Facilitating Collection

The U.S. bankruptcy system is well rooted in the English law,⁹⁴ where bankruptcy began as a response to inadequate collection remedies.⁹⁵ The laws provided a means for the debtor's assets to be accounted for and procurable by his creditors.⁹⁶ A discharge was not part of the original 1542 English law, and when it was incorporated into the then-existing law in 1705, it was intended as a reward to encourage the debtor to cooperate in the discovery and distribution of his assets.⁹⁷ Based on its underlying reasoning, the discharge has been referred to as the "cooperation" policy.⁹⁸

91. *See id.*

92. *See* Hynes, *supra* note 21, at 134 (recording statistics that financial distress was as common in previous generations, as 75,000 Americans were sent to debtor prisons in 1833; relative to the population of that time the ratio is roughly equal to the proportion of bankruptcy filings in 2002).

93. HERBERT, *supra* note 3, at 7 ("[B]ankruptcy law may now suffer from a surplus of theories, some of them very worthy and profoundly insightful but perhaps so removed from the realities of practice that even their authors sometimes confess they are unlikely to affect actual practice . . ."). Admittedly, "[t]he Code is a fundamentally political document which, like most statutes, represents a series of horse-trades (some of which have nothing at all to do with bankruptcy as such)." *Id.* at 2.

94. *See supra* notes 30–45 and accompanying text.

95. *See* Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 111 (1982); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1049 (1987).

96. *See* Howard, *supra* note 95, at 1048.

97. *See id.* at 1049; *see also supra* notes 34–37 and accompanying text.

98. John D. Ayer, *How To Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 368 (1986); Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 91.

Examination of the current U.S. bankruptcy system suggests that facilitating the creditors' ability to collect assets remains a prevailing theme⁹⁹ and that "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code."¹⁰⁰ In fact, some scholars argue that "[b]ankruptcy law, at its core, is [a] debt-collection law."¹⁰¹ Thus, once a debtor files for bankruptcy, the distribution of his assets is compulsory, and his property is gathered, liquidated, and distributed to the benefit of his creditors.¹⁰² This mandatory procedure helps avoid a "grab law" with a first-come, first-served characteristic, enabling the court to oversee an orderly liquidation of the debtor's assets.¹⁰³ A well-organized liquidation is further facilitated by several provisions that prohibit creditors from undermining equitable distribution.¹⁰⁴ Furthermore, a debtor can be barred from discharge if he adversely affects the creditors' ability to discover and collect the assets.¹⁰⁵ Hence, violation of basic societal standards, such as fraud, larceny, or embezzlement would disqualify a debtor from receiving any of the benefits of the Bankruptcy Law.¹⁰⁶

It is interesting to note that while empowering the creditors' collection ability has remained an important component of the Bankruptcy Law, "its power as a collection mechanism [has become] correspondingly constricted."¹⁰⁷ Although the Bankruptcy Law is primarily concerned with providing a compulsory forum for debt collection, this function has been diluted with the increasing liberalization of the discharge and the pro-debtor transformation of the law.¹⁰⁸

99. See *United States v. Kras*, 409 U.S. 434, 447 (1973) (citing J. MACLACHLAN, *BANKRUPTCY* 20–21 (1956)); THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 3 (1986); Howard, *supra* note 95, at 1050 ("Bankruptcy's collection purpose is visible despite the fact that our bankruptcy system does not focus on collections for creditors.").

100. *Begier v. IRS*, 496 U.S. 53, 58 (1990); see also Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395 (1985) ("Most of bankruptcy law is concerned not with defining a debtor's right of discharge, but with providing a compulsory and collective system for satisfying the claims of creditors."); Posner, *supra* note 76, at 50.

101. JACKSON, *supra* note 99, at 3; see also Posner, *supra* note 76, at 50; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 90.

102. See Howard, *supra* note 95, at 1050.

103. See JACKSON, *supra* note 99, at 8–9; Jackson, *supra* note 100, at 1396.

104. See Ayer, *supra* note 98, at 368; Howard, *supra* note 95, at 1050.

105. See Howard, *supra* note 95, at 1050.

106. *Id.* at 1051. Examples of such provisions are concealing property of the estate, shielding business records, making a false oath, or refusing to obey a lawful order. See Ayer, *supra* note 98, at 368. One major factor in bankruptcy legislation has been the protection of creditors from any undesirable debtor conduct, such as fraud. See Brown, *supra* note 56, at 152.

107. See Howard, *supra* note 95, at 1050. The collective function of the bankruptcy law is an important component of both individual and corporate bankruptcy. However, this Note focuses on individual and consumer bankruptcy, as the 11 U.S.C. § 522(d)(11)(E) exemption only applies in this context. See, e.g., *In re Jackson*, 394 B.R. 8, 12 (D. Conn. 2008); *In re Domanski*, 362 B.R. 824, 828 (Bankr. N.D. Ohio 2006); *Walsh v. Kelin* (*In re Kelin*), 341 B.R. 521, 529 (Bankr. W.D. Pa. 2006); *In re David*, No. 04-166, 2004 Bankr. LEXIS 2245, at *15–17 (Bankr. D.D.C. Sept. 8, 2004).

108. See JACKSON, *supra* note 99, at 226–27; see also *United States v. Kras*, 409 U.S. 434, 446–47 (1973) (explaining that the discharge is a relatively recent phenomenon).

2. A Fresh Start

A "fresh start" is one of the modern conventional justifications for the Bankruptcy Law.¹⁰⁹ U.S. bankruptcy law is unique in providing a mandatory and nonwaivable fresh start, which is enabled by a debt discharge¹¹⁰ and certain exemptions that permit debtors to keep a minimum amount of property.¹¹¹ The purpose of a fresh start is to allow the debtor to get out from under the weight of his debt and resume being a contributing member of society.¹¹² The concept of a fresh start "is absolutely central to modern American insolvency law. The debtor . . . receives a second (or third or fourth or fifth) chance at making a go of things."¹¹³ The essence of a fresh start is rooted in the need to free an individual's future earnings and inheritances from his past liabilities.¹¹⁴ In addition, it "does more than merely prevent the debtor and his dependents from starving: it promotes the debtor's rehabilitation by giving him sufficient freedom from the demands of his creditors and sufficient assets of the appropriate kind to enable and motivate him to become an economically productive member of society."¹¹⁵

The U.S. Supreme Court articulated the concept of a fresh start as a vital privilege: "One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'"¹¹⁶ It also communicated the unequivocal importance of emancipating the debtor from the need to devote

109. See HERBERT, *supra* note 3, at 3; JACKSON, *supra* note 99, at 225; Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 206-09 (1994); Howard, *supra* note 95, at 1050.

110. Compare Hynes, *supra* note 21, at 140 (explaining that without a discharge the debtor has little incentive to acquire new assets or to work hard to increase earnings, as these earnings would not be protected), with *id.* at 140 n.135 (quoting economists who argue that with no discharge consumers would work harder in order to repay their debts).

111. See JACKSON, *supra* note 99, at 225; CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* (1997), as reprinted in TABB & BRUBAKER, *supra* note 30, at 66.

112. See HERBERT, *supra* note 3, at 3; Howard, *supra* note 95, at 1050-51. It is worth noting that for certain interests, a debtor cannot claim a fresh start. For public policy reasons, the Bankruptcy Code protects certain types of debts such as mortgages, security, and leasehold rights. In addition, bankruptcy does not create an unblemished fresh start. Private companies are allowed to discriminate based on a past bankruptcy filing, which remains on the debtor's credit report for ten years. HERBERT, *supra* note 3, at 5-6.

113. HERBERT, *supra* note 3, at 3. "This financial redemption find[s] roots deep in myths of the American character. It may not be entirely a coincidence that bankruptcy law became a permanent feature of American life only in 1898, roughly the time that the 'frontier' was 'closed.' While the 19th century provided [migrating debtors]—with a fresh start in newly opened lands—the 20th century offered bankruptcy instead." *Id.* (citation omitted); CHARLES JORDAN TABB, *supra* note 30, at 66 ("Today, however, the goal of providing a financial 'fresh start' for 'honest but unfortunate debtors' has become entrenched in our bankruptcy laws.").

114. See JACKSON, *supra* note 99, at 227.

115. Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 341 (1982).

116. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

“the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.”¹¹⁷

Some scholars argue that a fresh start is justified on moral grounds, underpinned mainly by the ethical aspects of the debt discharge.¹¹⁸ Others further value the fresh start as a form of forgiveness.¹¹⁹ Nonetheless, from a moral perspective, human dignity and the basic common good derived from allowing the fresh start, would be more significant than any economic costs and benefits otherwise obtained.¹²⁰ Indeed, the legislative history shows that debtor relief does serve as a humanitarian response to the financially distressed, as it encompasses attributes of social, distributive, and commutative justice.¹²¹ Accordingly, if morality and forgiveness play a role “the focus of the fresh start policy should be on the adequacy of debtor protection, and not upon the economic or political ramifications of that protection.”¹²²

3. The Economic Theory

Another important justification for bankruptcy laws pertains to an economic theory that is endorsed by the “Chicago School” and often referred to as neoclassical economic theory.¹²³ This theory emphasizes the importance of efficiency in the implementation of the Bankruptcy Law.¹²⁴ According to this economic theory, the principle function of bankruptcy law is to allow for a collective and productive response to financial distress that will not significantly impinge on the rights available to the parties under

117. *Id.* at 245; see also HERBERT, *supra* note 3, at 4 n.9 (explaining that this statement was issued by a Supreme Court that was viewed as reactionary and unsympathetic to the plight of those impoverished by the Great Depression); Howard, *supra* note 95, at 1047 n.1 (arguing that while the quote from *Local Loan Co. v. Hunt* is the usual citation given for “honest but unfortunate debtor” it was actually originated in *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)); *supra* notes 105–06 and accompanying text (discussing a dishonest debtor).

118. See Hirsch, *supra* note 109, at 227–29; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 95.

119. See Hynes, *supra* note 21, at 152 n.220 (listing articles that support the forgiveness theory); see also Tabb, *The Historical Evolution*, *supra* note 32, at 365 (“Societal forgiveness of the debts of the honest unfortunate is considered to be humane.”).

120. See Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 525 (1991); Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 113 (“Mercy says that the debtor should be relieved of his debts . . .”).

121. See Flint, *supra* note 120, at 519–20 (“The central justification for the debtor financial relief provisions of the Bankruptcy Code is founded in a natural law theory of morality.”).

122. *Id.* at 521.

123. See HERBERT, *supra* note 3, at 8.

124. See Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981–83 (1981); Howard, *supra* note 95, at 1063–68; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 94–95. See generally JACKSON, *supra* note 99 (putting forth a law and economics theory of bankruptcy).

nonbankruptcy laws.¹²⁵ Supporters of this theory hold that the more expansive the Bankruptcy Law grows, the greater its inefficiency becomes, and, therefore, they urge for a reduction in the overall complexity of the bankruptcy system.¹²⁶ Advocates of neoclassical economic theory further argue that the role of the Bankruptcy Law is to enable both sides to get out of the financial crisis through a cost- and time-effective mechanism.¹²⁷ This argument assumes that organized creditors acting collectively will achieve the greatest possible recovery.¹²⁸ Indirectly, such a collective act will also benefit the rest of the economy, since the risk faced by lenders will be reduced, enabling them to subsequently make better and cheaper decisions regarding their lending practices.¹²⁹

The pro-creditor rationale for the economic theory is well delineated in Louis Levinthal's writing on bankruptcy. Levinthal argues that the Bankruptcy Law seeks "to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors."¹³⁰ Proponents of this theory further maintain that the earlier a debtor is released from his debt, the sooner he can resume his contribution to society.¹³¹ In addition to the financial hardship of the debtor's fellow countrymen who bear the burden of supporting these debtors and their families, a large debtor class creates social and political turmoil.¹³² Therefore, the simplest solution is to eliminate the core of the "problem afflicting the debtor class—their debts."¹³³

The argument that bankruptcy relief helps the entire economy was utilized by President John Tyler in his campaign for the Bankruptcy Act of 1841.¹³⁴ He maintained that "[t]he distress incident to the derangements of some years past has visited large numbers of our fellow-citizens with hopeless insolvency, whose energies, both mental and physical, by reason

125. See generally JACKSON, *supra* note 99 (explaining that bankruptcy law should not fiddle with substantive rights, since it may generate uncertainty and result in increased costs with no corresponding benefits).

126. *Id.*

127. *Id.*

128. See HERBERT, *supra* note 3, at 9 ("[O]ver time it makes more sense for creditors to share evenly in larger pools of assets from many debtors than to take their chances of being able to seize a disproportionate number of assets from an occasional, and smaller pool of assets owned by a few of its debtors.").

129. See *id.* at 10; Posner, *supra* note 76, at 51–53; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 94–95.

130. Levinthal, *supra* note 20, at 225.

131. See Hirsch, *supra* note 109, at 207–08; Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 94 ("[T]he very 'fabric of society' is weakened by the existence of a large class of hopeless insolvents.").

132. See Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 94–95 (arguing that until the Bankruptcy Reform Act of 1978, every enactment of a major bankruptcy law took place after a major financial crisis).

133. *Id.* at 95; Hirsch, *supra* note 109, at 207–08.

134. See *supra* notes 61–65 and accompanying text.

of the load of debt pressing upon them, are lost to the country.”¹³⁵ William Blackstone, in the mid-eighteenth century, also alluded to socioeconomic benefits that are expected to flow from such a relief, explaining that with “the assistance of his allowance and his own industry, [the debtor] may become a useful member of the commonwealth.”¹³⁶

Another economic theory supporting debt discharge is the debtor cooperation theory. This theory maintains that a discharge of debt is a carrot offered to the debtor to induce him to cooperate in the bankruptcy proceedings, which include the collection and liquidation of his assets.¹³⁷ Such cooperation is expected to help creditors collect more effectively, as it increases the amount of assets available for distribution while simultaneously decreasing the administrative cost of distribution.¹³⁸

The neoclassical and debtor cooperation theories share common ground. However, while neoclassical economic theory emphasizes the benefits of bankruptcy laws to the economy as a whole, the debtor cooperation theory is centered on serving the creditors themselves.¹³⁹

4. The Social Theory

An additional theory behind the bankruptcy protection, the social theory, aspires to secure the psychological well being of the debtor.¹⁴⁰ This theory emphasizes the demoralizing impact of indebtedness and explains that “a hopeless, unrelievable financial situation leads to a very costly social situation with its resulting relief costs, suicides, and criminality concomitant to financial despair.”¹⁴¹ According to this theory, a debt discharge has an additive value of liberating a debtor from his psychological oppression.¹⁴²

135. See Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 94 (quoting 4 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 54–55 (1897)); see also Hirsch, *supra* note 109, at 207–08 (discussing the effects that an impoverished debtor may have on society as a whole).

136. See Tabb, *The Historical Evolution*, *supra* note 32, at 339 (quoting 2 WILLIAM BLACKSTONE, *supra* note 38, at *471–72).

137. See Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 90–94; *supra* notes 99–108 and accompanying text.

138. See Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 90–91 (noting that this theory was the justification for the discharge in England and for the Bankruptcy Act of 1800).

139. See *supra* Part I.B.1. See generally Howard, *supra* note 95, at 1049–50, 1062–68 (discussing the different roles of bankruptcy with a focus on the collective mechanism and the economic theory as separate goals of the Bankruptcy Law).

140. See Hirsch, *supra* note 109, at 202–06; Howard, *supra* note 95, at 1061; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785–86 (1983) (explaining that the bankruptcy law is used to prevent a debt from demoralizing a person’s confidence); Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 95–99 (explaining the theory behind bankruptcy laws based on a humanitarian theory).

141. G. Stanley Joslin, *The Philosophy of Bankruptcy—A Re-examination*, 17 U. FLA. L. REV. 189, 191 (1964).

142. See Howard, *supra* note 95, at 1061; Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 725–26 (1980) (explaining that the discharge of debt “liberates the bankrupt psychologically”).

Conceivably, the newly freed debtor would now generate a renewed confidence in his ability to resurrect his future and to regain his self-respect.¹⁴³

This theory is intertwined with the notion of a "fresh start." It tries to focus on the social aspects of bankruptcy without applying an all-encompassing theoretical model or fundamental rules that attempt to attribute a monetary value to the Bankruptcy Law.¹⁴⁴ Proponents of this theory point to empirical data suggesting that consumer debtors are comprised of people with a broad range of occupations, that such debtors are likely to own their homes, and that bankruptcy is often preceded by a long period of economic trouble rather than a sudden crisis.¹⁴⁵ In essence, any legitimately hardworking individual could be affected in trying times.¹⁴⁶ Furthermore, it has been demonstrated that few people file for a second bankruptcy after being granted a discharge in the first.¹⁴⁷ Therefore, according to the social theorists, any economic inefficiency, which may be consequent to the bankruptcy relief, is a modest price for society to pay for the financial and psychological well-being of its debtors.¹⁴⁸ A scholar writing in 1919 illustrated this notion, stating that "[t]he history of these laws is evidence of man's humanity to his fellow man."¹⁴⁹ The author further characterized bankruptcy not as "a crime, but as a misfortune, not as a disgrace, but as a malady which needs the soothing remedy of sympathy and encouragement."¹⁵⁰

The psychological well-being of the debtor as a basic principle of the social theory was also acknowledged in Justice Joseph Story's writings on bankruptcy: bankruptcy legislation is set up "to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labour, and the benefits of his paternal superintendence."¹⁵¹

According to social theorists, the discharge is justified as a multifaceted humane act to free the hopeless from their debts. It can be viewed as a form of forgiveness of debts,¹⁵² as well as a mechanism to enhance the intrinsic self-worth of the debtor, allowing him to restore his physical and

143. Howard, *supra* note 95, at 1061.

144. See HERBERT, *supra* note 3, at 12; Howard, *supra* note 95, at 1061.

145. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 85-95, 129, 168-69 (1989).

146. See HERBERT, *supra* note 3, at 12-13.

147. See SULLIVAN, *supra* note 145, at 192-95.

148. See HERBERT, *supra* note 3, at 14; see also Hynes, *supra* note 21, at 163 (arguing that the psychological toll on the debtor has lessened in modern times, as a social stigma and public embarrassment are no longer attached to filing for bankruptcy).

149. NOEL, *supra* note 14, at 200.

150. *Id.*

151. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1101 (1833), as reprinted in TABB & BRUBAKER, *supra* note 30, at 62.

152. See *supra* note 119 and accompanying text.

psychological ability to function.¹⁵³ Even more so, the society as a whole will benefit from the promotion of humanitarian values, “mak[ing] us all better people” with more “worthy” members among us.¹⁵⁴

5. The Debtor Rehabilitation Theory

A House Judiciary Committee report states that an additional purpose of bankruptcy is the “effective rehabilitation of the [debtor],”¹⁵⁵ as allowing the debtor to resume participation in the open credit economy can act as a form of rehabilitation.¹⁵⁶ This rehabilitation theory is also linked to the concepts of fresh start and the economic theory described above.¹⁵⁷ However, as part of the recent 2005 amendments to the Bankruptcy Code, rehabilitation has taken a new form. Until 2005, the Code did not provide for a means of financial education; however, some instructional programs were utilized.¹⁵⁸ The recently amended Bankruptcy Code conditions the debtor’s eligibility for a discharge on completion of a financial education program.¹⁵⁹ “This reform suggests that Congress views financial education as a valuable tool that enables debtors to capitalize on the fresh start.”¹⁶⁰

Cumulatively, the policy reasons behind the current Bankruptcy Law accentuate the social, economic, and psychological benefits not only to the two parties to the dispute—creditors and debtors—but to the commonwealth as a whole.

C. *Can’t Touch This: Exemptions Under the Bankruptcy Code*

A major portion of the Bankruptcy Code is devoted to bankruptcy exemptions.¹⁶¹ A bankruptcy exemption allows for the exclusion of certain properties from the bankruptcy estate and thereby protects them from the creditors.¹⁶² Under the U.S. bankruptcy system, there are federal exemptions as well as state exemptions,¹⁶³ and states have the option to opt out of the federal exemptions.¹⁶⁴ Bankruptcy exemptions were enacted

153. See Tabb, *The Scope of the Fresh Start*, *supra* note 55, at 95.

154. *Id.* at 95–96.

155. H.R. REP. NO. 89-687, at 2 (1965).

156. Howard, *supra* note 95, at 1062; *see supra* notes 82–88 and accompanying text.

157. *See supra* Part I.B.2–3.

158. See Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy’s Fresh Start*, 92 CORNELL L. REV. 67, 73 (2006).

159. *Id.*

160. *Id.*

161. *See generally* 11 U.S.C. § 522 (2006).

162. *See generally* FERRIELL & JANGER, *supra* note 1, at 465.

163. The Bankruptcy Act of 1898 left the exemptions up to the various states to decide. In contrast, the 1978 reform enacted its own set of federal exemptions because of concerns that the exemption laws were limited and out of date. *See* FERRIELL & JANGER, *supra* note 1, at 419. For a discussion of the history of federal and state bankruptcy law, *see* Brown, *supra* note 56, at 151–63.

164. *See* 11 U.S.C. § 522(b)(1); Judith S. Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 27–28 (1983). Thirty-four states have opted out of the federal bankruptcy exemptions. They

with "a view to general national purposes"¹⁶⁵ trying to assure that debtors have adequate assets to support a minimum standard of living, without becoming a public charge.¹⁶⁶ The legislative history behind the bankruptcy exemption statutes indicates that the purpose of the exemption laws has been "to protect a debtor from his creditors, [and] to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. [This] purpose has not changed."¹⁶⁷ Keeping some basic and critical items as well as crucial assets would give debtors a realistic prospect of achieving the "fresh start" that bankruptcy promises.¹⁶⁸ Under certain circumstances, bankruptcy exemptions can be more essential to the overall bankruptcy relief than a discharge.¹⁶⁹ However, striking the appropriate balance between indulgence and necessity may be a rather challenging task.¹⁷⁰

Accordingly, the rational foundation for the bankruptcy exemptions is firmly tied to the economic and social policies endorsed by the legislature.¹⁷¹ The underlying reasoning includes the provision of the debtor with "property necessary for his physical survival," the protection of his "dignity and [his] cultural and religious identity," and the protection of his family "from the adverse consequences of impoverishment,"—thereby enabling the debtor to "rehabilitate himself financially and earn income in the future;" and shifting some of the burden of supporting the debtor's family from society to the creditors.¹⁷² Consistent with the concept of provision of only the essential needs of the debtor and his family, some statutes, both state and federal, limit the exemptions "to the extent

include the following: 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. FERRIELL & JANGER, *supra* note 1, at 419 n.21.

165. Koffler, *supra* note 164, at 31.

166. Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 397 (2005); Koffler, *supra* note 164, at 30.

167. Veryl Victoria Miles, *A Debtor's Right To Avoid Liens Against Exempt Property Under Section 522 of the Bankruptcy Code: Meaningless or Meaningful?*, 65 AM. BANKR. L.J. 117, 135 (1991) (quoting H.R. REP. NO. 95-595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087).

168. See FERRIELL & JANGER, *supra* note 1, at 465.

169. See Koffler, *supra* note 164, at 32–33.

170. See HERBERT, *supra* note 3, at 185.

171. See Brown, *supra* note 56, at 169.

172. Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets To Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 621 (1978). See generally Frank Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445 (1960) (explaining that the protection of the debtor's family is the main objective of the exemption legislation). "The emphasis most often is upon the allowance of 'the basic necessities of life,' with the somewhat contradictory qualification that the debtor should not 'be left destitute and a public charge.'" Brown, *supra* note 56, at 170 (quoting *Fin. One v. Bland (In re Bland)*, 793 F.2d 1172, 1173 (11th Cir. 1986)).

reasonably necessary for the support of the debtor and any dependent of the debtor.”¹⁷³

Altogether, the bankruptcy exemptions “play a critical role in the preservation of a healthy economy and a stable society,” and, therefore, their purpose and underlying rationale should be an important consideration in the implementation of the § 522(d)(11)(E) exemption.¹⁷⁴

D. *11 U.S.C. § 522(d)(11)(E): A Difficult-To-Understand Exemption*

The current framework of the Bankruptcy Law in the United States was established with the enactment of the Bankruptcy Code in 1979.¹⁷⁵ The Code included the 11 U.S.C. § 522(d)(11)(E) exemption, and it has not been altered or amended since.¹⁷⁶ This specific section of the Bankruptcy Code deals with potential exemptions that a debtor may use in his bankruptcy proceeding. The statute states,

(d) The following property may be exempted under subsection (b)(2) of this section:

....

(11) The debtor’s right to receive, or property that is traceable to . . .

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.¹⁷⁷

This statute is present in the bankruptcy laws of multiple states.¹⁷⁸ While a number of states have opted out of the federal exemptions,¹⁷⁹ many have enacted very similar statutes, and some have even copied the exact language of § 522(d)(11)(E) into their own bankruptcy laws.¹⁸⁰ Exemption of a payment in compensation of loss of future earnings is of significance, as any interest in potential future income has consistently been held to be property of the bankruptcy estate.¹⁸¹ Yet, in the millions of bankruptcy cases filed throughout the United States since 1979,¹⁸² less than one hundred court decisions have analyzed the § 522(d)(11)(E) exemption.¹⁸³

173. See 11 U.S.C. §§ 522(d)(10)(D), 522(d)(11)(E) (2006).

174. See Koffler, *supra* note 164, at 106.

175. See HERBERT, *supra* note 3, at 51.

176. See generally 11 U.S.C. § 522(d).

177. *Id.*

178. See sources cited *infra* note 180.

179. See *supra* note 164 and accompanying text.

180. Hynes, *supra* note 21, at 139; see e.g., GA. CODE ANN. § 44-13-100(a)(11)(E) (2002); ME. REV. STAT. ANN. tit. 14, § 4422(14)(E) (2002); TENN. CODE ANN. § 26-2-111(3) (2000).

181. See *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993).

182. See TABB & BRUBAKER, *supra* note 30, at 55–56.

183. See, e.g., *In re Jackson*, 394 B.R. 8, 11 (D. Conn. 2008); *In re Domanski*, 362 B.R. 824, 828 (Bankr. N.D. Ohio 2006); *Walsh v. Kelin* (*In re Kelin*), 341 B.R. 521, 529 (Bankr.

Although this exemption would apparently apply only in cases where the debtor receives a settlement to be paid as a wage substitute for loss of future earnings, its infrequent usage is somewhat surprising. Even more so, the useful practitioner's guide to bankruptcy *Collier on Bankruptcy* does not offer explanations regarding this statute.¹⁸⁴ In fact, an analysis is given for each of the first four subsections of § 522(d)(11), but there is no mention of § 522(d)(11)(E).¹⁸⁵ In theory, it is possible that a consequent unfamiliarity of practitioners with the statute led to its sparse usage even in cases where it might have been appropriate.¹⁸⁶

As stated, the statute is arguably ambiguous, particularly with regard to the following issues: What constitutes "future earnings"? Should the court decide if a specific payment is destined to compensate for "future earnings"? Should courts permit the combination of this exemption with the others included in § 522(d)(11)? Courts have grappled with these issues, but have not reached a consensus on how to apply this statute. Several courts have noted the lack of clarity, stating that "[t]he Bankruptcy Code provides no guidance concerning what qualifies as lost future earnings for purposes of § 522(d)(11)(E),"¹⁸⁷ that the court "is not aware of any case law interpreting this language,"¹⁸⁸ and that "the court has found no case law that directly determines the relationship between pre- and post-petition loss of earnings under section 522(d)(11)(E)."¹⁸⁹

To complicate matters, debtors often make motions to exempt property using both § 522(d)(11)(D) and § 522(d)(11)(E).¹⁹⁰ Section 522(d)(11)(D) allows the exemption of "a payment, not to exceed \$20,200, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent."¹⁹¹ Courts have struggled to define "personal bodily injury," and whether it should include mental and emotional injuries.¹⁹² Thus, § 522(d)(11)(D) with its own share of ambiguity "has caused considerable

W.D. Pa. 2006); *In re David*, No. 04-166, 2004 Bankr. LEXIS 2245, at *15-17 (Bankr. D.D.C. Sept. 8, 2004).

184. See 3 COLLIER ON BANKRUPTCY § 522.09 (15th ed. rev. 2006).

185. See *id.* § 522.20.

186. See generally *id.*

187. *Kelin*, 341 B.R. at 529.

188. *In re Domanski*, 362 B.R. at 828; see also *In re Bartholomew*, 214 B.R. 322, 325 (Bankr. S.D. Ohio 1997) ("There is very little case law interpreting this statute in Ohio courts or a similar provision in 11 U.S.C. § 522(d)(11)(E).").

189. *In re Jackson*, 394 B.R. 8, 11 (D. Conn. 2008).

190. See *In re Lowery*, No. 05-13536-WHD, 2007 Bankr. LEXIS 3729, at *8-10 (Bankr. N.D. Ga. Sept. 24, 2007); *In re Scotti*, 245 B.R. 17, 19 (Bankr. D.N.J. 2000); *In re Bova*, 205 B.R. 467, 475-78 (Bankr. E.D. Pa. 1997); *Gaertner v. Claude* (*In re Claude*), 206 B.R. 374, 375 (Bankr. W.D. Pa. 1997); *In re Rockefeller*, 100 B.R. 874, 876 (Bankr. E.D. Mich. 1989).

191. 11 U.S.C. § 522(d)(11)(D) (2006).

192. See generally Louis J. Papera, Note, *Confusion over § 522(d)(11)(D): What Congress Really Meant by Exempting Payments for "Personal Bodily Injury" and Why They Got It Wrong*, 16 EMORY BANKR. DEV. J. 503 (2000) (discussing the conflicting approaches in applying the § 522(d)(11)(D) exemption).

consternation”¹⁹³ and “has been the bane of many bankruptcy judges.”¹⁹⁴ The blurred lines between these exemptions may also stem from the fact that some courts have decided cases based on the § 522(d)(11)(D) exemption while avoiding the analysis of § 522(d)(11)(E).¹⁹⁵

Thus, the obscurity of the § 522(d)(11)(E) exemption is mainly derived from the ambiguous wording of the statute, and the preferential utilization of the related § 522(d)(11)(D) exemption as a substitute for determining the compensation in cases of personal bodily injuries.¹⁹⁶

II. “FUTURE EARNINGS”: WHAT DOES IT MEAN AND HOW IS IT APPLIED?

Part I provided information on the history and rationale of bankruptcy law in the United States, and also introduced the § 522(d)(11)(E) exemption. This Part examines substantial conflicts in the application of 11 U.S.C. § 522(d)(11)(E). It includes an assessment of whether the exemption is limited strictly to a payment in compensation of tort-related injuries. It also examines the time frame relative to the bankruptcy filing date that would satisfy the term “future” in the statute’s wording. It further discusses a potential retroactive allocation of a certain amount of the settlement as a payment for “future earnings.” Finally, it assesses the combined use of the 11 U.S.C. § 522(d)(11)(D) and § 522(d)(11)(E) exemptions. These issues are particularly pertinent to the situation faced by Joe the Steelworker when confronted with a combination of bankruptcy and a monetary settlement for his injury.

A. “Future Earnings”: What Is Included?

1. Do Grounds for Compensation Play a Role in Its Exemption?

The legislative history behind § 522(d)(11)(E) states that its purpose is “to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings. Those items are handled separately by the bill.”¹⁹⁷ In *In re Seymour* the court reasoned based on the legislative history that the intent of Congress in enacting this exemption was “to protect those amounts that are meant to replace the debtor’s source of future support to the extent that it is necessary to allow for the debtor’s fresh start.”¹⁹⁸

193. *Walsh v. Kelin (In re Kelin)*, 341 B.R. 521, 528 (Bankr. W.D. Pa. 2006).

194. *Walsh v. Reschick (In re Reschick)*, 343 B.R. 151, 156 (Bankr. W.D. Pa. 2006).

195. *See, e.g., Kaliner v. Murphy (In re Murphy)*, No. 98-36084, 2000 Bankr. LEXIS 59 (Bankr. E.D. Pa. Jan. 19, 2000) (ruling that since other exemptions apply, there is no need to ascertain whether § 522(d)(11)(E) is applicable).

196. *See supra* notes 187–95 and accompanying text.

197. H.R. REP. NO. 95-595, at 362 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087.

198. *In re Seymour*, 285 B.R. 57, 59 (Bankr. N.D. Ga. 2002).

Courts have agreed that the § 522(d)(11)(E) exemption does not include actual future earnings but, rather, only payments that are made to the debtor as a specific compensation for loss of future earnings.¹⁹⁹ However, in light of Congress's reasoning for implementing this exemption, a major unresolved issue that remains is whether § 522(d)(11)(E) only applies to "compensation of loss of future earnings"²⁰⁰ stemming from a bodily injury tort case or whether it can be applied to other instances not necessarily involving physical traumas. Would the hypothetical Joe the Steelworker be able to use the § 522(d)(11)(E) exemption only for a monetary compensation made for bodily trauma or also for potential compensation made on different grounds, such as wrongful termination or sexual harassment?

An Ohio court, interpreting its state statute that is identical in its language to § 522(d)(11)(E), held that the exemption is not restricted to compensation made for loss of future earnings as a result of bodily injury:

"compensation for loss of future earnings implies a payment based on an accident or some type of mishap that impairs the ability of the recipient to earn wages." . . . Thus . . . exemptible compensation under [the Ohio statute] requires that it be for more than bodily injury; as a result of the injury, the Debtor must have additionally received compensation for the loss of future wages.²⁰¹

A divergent ruling by the court in *In re Williams* indicated that "[b]ased on this legislative history . . . § 522(d)(11) only cover[s] compensation received in the nature of tort liability."²⁰² Consequently, the exemption would be limited to compensation stemming from a physical mishap.²⁰³

199. *In re Bartholomew*, 214 B.R. 322, 325 (Bankr. S.D. Ohio 1997) (citing *In re Carson*, 82 B.R. 847 (Bankr. S.D. Ohio 1987)). It should be noted that evidence of past earnings is not a prerequisite for granting an exemption for loss of future earnings, since there are cases where the plaintiff did not have a job and still the exemption was granted. *In re Gilbert*, 213 B.R. 502, 503–04 (Bankr. E.D. Ky. 1997).

200. 11 U.S.C. § 522(d)(11)(E) (2006). *Black's Law Dictionary* defines "earnings" as "[r]evenue gained from labor or services, from the investment of capital, or from assets." BLACK'S LAW DICTIONARY 585 (9th ed. 2009). The term "earnings" has been perceived as broader in scope than "wages" or "salary," which are also used in the Bankruptcy Code. See *Litzler v. Sholdra* (*In re Sholdra*), 270 B.R. 64, 69 (Bankr. N.D. Tex. 2001) ("Reading 'earnings' as broader in scope (or at least something other) than salary or wages is consistent with both the common meanings accorded the words and the meanings given in Black's Law Dictionary. Wages are paid for time actually worked. Salary refers to a periodic payment for services rendered without regard to time worked. Earnings refers to all income generated by an individual." (citing BLACK'S LAW DICTIONARY 1373 (7th ed. 1999))).

201. *In re Domanski*, 362 B.R. 824, 828 (Bankr. N.D. Ohio 2006) (quoting *In re Phillips*, 45 B.R. 529, 531 (Bankr. N.D. Ohio 1984)); see also *Pope III v. Clark* (*In re Clark*), 274 B.R. 127, 138 (Bankr. W.D. Pa. 2002) (holding that the § 522(d)(11)(E) exemption does not apply to compensation paid as restitution for money that was wrongfully converted, as it is not intended to replace a source of future income).

202. *In re Williams*, 181 B.R. 298, 300 (Bankr. W.D. Mich. 1995).

203. See *In re Simon*, 71 B.R. 65, 67 (Bankr. N.D. Ohio 1987) ("The word 'compensation' would seem to indicate that this was the section for tort settlements."); *Casarrow v. Evans* (*In re Evans*), 29 B.R. 336, 339 (Bankr. D.N.J. 1983) (holding that "[t]he entire tenor of § 522(d)(11) relates to tort compensation, i.e. crime victim's reparation, life

Contrasting comments in *In re Sanchez* stated that there is “nothing within the language of Section 522(d)(11)(E) to suggest that the restricted exemption provided therein could not also include settlements, judgments, or awards for lost future earnings arising from workers’ compensation or other non-tort related claims.”²⁰⁴ This opinion implies that compensation for loss of future earnings on the basis of grounds other than bodily injury would fully qualify for this exemption.²⁰⁵ This ruling was further affirmed by an additional court that maintained that “Section 522(d)(11)(E) is clear, concise, and stands alone. It does not require bodily injury as a prerequisite for exemption.”²⁰⁶ Indeed, courts have chosen this interpretation, allowing the application of the § 522(d)(11)(E) exemption to payments received by the debtor for wrongful termination,²⁰⁷ § 1983 claims,²⁰⁸ disability payments,²⁰⁹ buyouts,²¹⁰ and sexual harassment claims.²¹¹ This approach has been further supported by a court’s explicit contention that no societal interest would be served by allowing a debtor “to exempt compensation for lost future earnings caused by bodily injury but denying the benefit of the exemption to other debtors whose loss of earnings results from a wrongful act that does not inflict actual harm to their person (e.g., retaliatory discharge, breach of contract, etc.).”²¹²

2. Can § 522(d)(11)(E) Be Used in a Workers’ Compensation Claim?

Assuming that the down and out debtor, Joe the Steelworker, was injured while on the job and received a settlement through workers’ compensation, would such a payment be eligible for the § 522(d)(11)(E) exemption?

insurance payments, bodily injury and loss of future earnings. . . . Therefore, section 522(d)(11) is most reasonably interpreted as applying to general tort-related awards”).

204. *In re Sanchez*, 362 B.R. 342, 359 (Bankr. W.D. Mich. 2007); *see also In re Carson*, 82 B.R. 847, 855 (Bankr. S.D. Ohio 1987) (holding that reading bodily injury into § 522(d)(11)(E) ignores the plain wording of the statute).

205. *See In re Sanchez*, 362 B.R. at 359.

206. *In re Lewis*, 406 B.R. 518, 521 (E.D. Mich. 2009).

207. *See In re Jackson*, 394 B.R. 8 (D. Conn. 2008) (using the § 522(d)(11)(E) exemption in a case of a settlement for a wrongful termination); *In re Carson*, 82 B.R. at 856 (allowing the exemption for a settlement of a suit under the Employment Discrimination Act).

208. *See In re David*, No. 04-166, 2004 Bankr. LEXIS 2245, at *16 (Bankr. D.D.C. Sept. 8, 2004) (allowing the § 522(d)(11)(E) exemption on part of damages to be paid out from a § 1983 lawsuit).

209. *In re Sanchez*, 362 B.R. at 342.

210. *In re Lewis*, 406 B.R. at 518 (ruling that § 522(d)(11)(E) can apply to buyouts).

211. *See In re Hanson*, 226 B.R. 106, 108–09 (Bankr. D. Idaho 1998) (holding that the § 522(d)(11)(E) equivalent state statute could be used to exempt a claim of sexual harassment that does not involve bodily injury). The fact that the legislative history of § 522(d)(11)(E) explicitly states that the exception is for “compensation of actual bodily injury” would not preclude a court from applying it in other instances as well. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’ Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”).

212. *In re Carson*, 82 B.R. at 856 (citing *In re Forbes*, 58 B.R. 706 (Bankr. S.D. Fla. 1986)).

Courts have disagreed on whether workers' compensation claims are exempt under § 522(d)(11)(E). In *In re LaBelle*,²¹³ a severely disabled debtor, who received weekly workers' compensation payments, argued that these benefits should be exempted under § 522(d)(10)(C), which applies to "[t]he debtor's right to receive . . . a disability, illness, or unemployment benefit."²¹⁴ The trustee argued that workers' compensation awards fall within the scope of § 522(d)(11)(E), and, thus, the exemption should be limited only to what is reasonably necessary to support a debtor and his dependents, as prescribed in the statute.²¹⁵

The court ruled that the entire workers' compensation benefit may be exempted under § 522(d)(10)(C), as workers' compensation payments *do not* fall under § 522(d)(11)(E).²¹⁶ Citing the legislative history, the court explained that "[t]he House Report in discussing paragraph (10) speaks of 'benefits that are akin to future earnings[,] [and] [i]n discussing paragraph (11) it speaks of 'compensation for losses.'"²¹⁷ The court thereby reasoned that, since § 522(d)(11)(E) refers to recoveries for losses that could amount to hundreds of thousands of dollars, it was necessary for Congress to limit the exemption to only what is reasonably necessary to support the debtor and his dependents.²¹⁸ In contrast, § 522(d)(10)(C) has no stated limitation as it only "exempts benefits that are strictly akin to future earnings of the debtor."²¹⁹ Such benefits, the court ruled, encompass workers' compensation, which would not need to be limited under the Bankruptcy Code, because workers' compensation has its own independent limitations incorporated in the Workers Compensation Act.²²⁰ Other courts have also ruled that workers' compensation awards can only be exempt under § 522(d)(10)(C) and not § 522(d)(11)(E).²²¹

Yet, another court in *In re Sanchez*²²² ruled differently. In that case, the debtor requested the exemption of a lump sum payment that was part of a settlement attributable to a workers' compensation claim pursuant to the

213. 18 B.R. 169 (Bankr. D. Me. 1982).

214. 11 U.S.C. § 522(d)(10)(C) (2006); see *In re LaBelle*, 18 B.R. at 169 n.4.

215. *In re LaBelle*, 18 B.R. at 169.

216. See *id.* at 171; see also *In re Williams*, 181 B.R. 298, 300–01 (Bankr. W.D. Mich. 1995) (holding that workers' compensation is beyond the scope of § 522(d)(11)(D) and (E)); *In re Thomas*, No. 4-89-6305, 1990 Bankr. LEXIS 1020 (Bankr. D. Minn. May 11, 1990) (holding that a workers' compensation award can only be exempted under § 522(d)(10)(C) and not under § 522(d)(11)(E)); *Casarow v. Evans (In re Evans)*, 29 B.R. 336, 339 (Bankr. D.N.J. 1983) (ruling on similar facts that "section 522(d)(11) is most reasonably interpreted as applying to general tort-related awards, and not workers' compensation awards").

217. *In re La Belle*, 18 B.R. at 170 (citing H.R. 595, 95th Cong. 362 (1977)).

218. See *id.*

219. *Id.*

220. *Id.*

221. See *Szybist v. Michael (In re Michael)*, 262 B.R. 296, 298 (Bankr. M.D. Pa. 2001); *In re Chavis*, 207 B.R. 845, 847–48 (Bankr. W.D. Pa. 1997); *In re Williams*, 181 B.R. at 300–02; *In re Cain*, 91 B.R. 182, 183–84 (Bankr. N.D. Ga. 1988); *Evans*, 29 B.R. at 339 n.213.

222. 362 B.R. 342 (Bankr. W.D. Mich. 2007).

§ 522(d)(11)(E) exemption.²²³ The court held that § 522(d)(10) and § 522(d)(11) are not mutually exclusive, and a workers' compensation settlement *can be* exempted under § 522(d)(11)(E) as well as under § 522(d)(10)(C).²²⁴ The court reasoned that § 522(d)(10)(C) does not encompass all the possible outcomes that may result from a workers' compensation claim, and, therefore, it is not the only acceptable exemption for such a claim.²²⁵ The court also partly relied on the fact that an exemption should be "liberally construed in favor of the debtor."²²⁶

B. "Future Earnings": When Do They Start?

Courts have explicitly ruled that the § 522(d)(11)(E) exemption can only apply to lost future income and not past earnings.²²⁷ A recent decision distinctly ruled that the § 522(d)(11)(E) exemption only applies to a payment in compensation for the loss of future earnings that come about after the debtor has filed for bankruptcy.²²⁸ In that case, Richard Jackson and Angela Shelton, husband and wife, worked for the same company and were simultaneously fired on March 13, 2003.²²⁹ Thereafter, they filed a wrongful termination lawsuit.²³⁰ Subsequently, on October 31, 2003, Jackson and Shelton filed a joint Chapter 7 bankruptcy petition, and pursuant to § 522(d)(11)(E), exempted the value of their lawsuit from the estate.²³¹ In April 2004, Jackson and Shelton received \$135,000 in a settlement of their wrongful termination suit.²³² The agreement specified

223. *Id.* at 345.

224. *Id.* at 356.

225. *See id.*

226. *See id.* at 358 (listing cases that hold that exemptions should receive a liberal rather than a narrow interpretation); *see also id.* (explaining that the *In re LaBelle* court could agree with this ruling, as that holding was specific to the trustee's argument that the workers' compensation claim should be exempt under § 522(d)(11)(E), whereas in the present case the debtor argued for the use of the § 522(d)(11)(E) exemption for a workers' compensation settlement). It is interesting to note that the two cited cases, *In re LaBelle* and *In re Sanchez*, had contradictory rulings on the exemption of workers' compensation under § 522(d)(11)(E), but both ruled in favor of the debtors. Although the two courts drew different inferences from the ambiguous language of the law, they both remained dedicated to the pro-debtor purpose of the § 522(d)(11)(E) exemption. *See In re Sanchez*, 362 B.R. at 342; *In re LaBelle*, 18 B.R. 169, 170 (Bankr. D. Me. 1982).

227. *See In re Basket*, No. C07-5700RJB, 2008 U.S. Dist. LEXIS 43995, at *14 (W.D. Wash. June 2, 2008) (ruling that the § 522(d)(11)(E) exemption should not be allowed because the settlement was for past wages, not future wages); *Pequeno v. Schmidt*, 307 B.R. 568, 584 (Bankr. S.D. Tex. 2004) (ruling that the lawsuit settlement was not compensation for future earnings, and thus not exempt).

228. *See In re Jackson*, 394 B.R. 8, 11 (D. Conn. 2008); *see also Klein v. Chappell (In re Chappell)*, 373 B.R. 73, 77 (B.A.P. 9th Cir. 2007) ("[T]he critical date for determining exemption rights is the petition date." (quoting *Goswami v. MTC Dist. (In re Goswami)*, 304 B.R. 386, 391-92 (B.A.P. 9th Cir. 2003))).

229. *See In re Jackson*, 394 B.R. at 10.

230. *Id.*

231. *Id.*

232. *Id.* The settlement specifically stated that the payment was only for compensation for Jackson's termination; Shelton dropped her claim as part of the agreement. *Id.*

that the compensation of Jackson's lost future earnings covered the period between March 14, 2003, and March 13, 2004.²³³ The Bankruptcy Court held that the term "loss of future earnings" in § 522(d)(11)(E) allows the debtor to exempt only the future earnings that would have been paid after the commencement of the bankruptcy case.²³⁴ Thus, since there were 366 days accounted for in the settlement (March 14, 2003, to March 13, 2004), and only 135 of those days were after the October 31, 2003, petition date, the exemption should only account for the prorated portion of those 135 days.²³⁵

On appeal, the U.S. District Court for the District of Connecticut stated that "the court has found no case law that directly determines the relationship between pre- and post-petition loss of earnings under section 522(d)(11)(E)."²³⁶ The court went on to reason that a debtor's estate is indisputably created on the bankruptcy petition date;²³⁷ and that "[t]he clear and unambiguous language of the statute . . . allows an exemption for a loss of any future earnings after creation of that estate."²³⁸ Therefore, the district court affirmed the ruling of the bankruptcy court.²³⁹

Other courts, while not specifically analyzing the pre- and postpetition issue, have seemingly ruled otherwise or have not addressed the issue. In *In re Scotti*²⁴⁰ the debtor sued his doctor for malpractice during a routine procedure that occurred in August 1993.²⁴¹ Approximately five years later, on April 24, 1998, the debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.²⁴² Thereafter, he settled his medical malpractice action for \$85,000 and sought to exempt \$23,635.16 under § 522(d)(11)(E).²⁴³ The court assumed that the complaint filed in the medical malpractice case included a broadly worded clause, which could be construed to include payment for lost wages, and, therefore, the court ruled against the Trustee's motion and allowed the exemption.²⁴⁴ Although it is reasonable to assume that such a payment for compensation of lost earnings would at least partly correspond to the prepetition time period, the court

233. *Id.*

234. *Id.* (citing *In re Jackson*, 376 B.R. 75, 78 (Bankr. D. Conn. 2007)).

235. *See id.* (citing *In re Jackson*, 376 B.R. at 79); *see also In re Hurst*, 239 B.R. 89, 92 (Bankr. D. Md. 1999) (holding that "any portion of [the debtor's] . . . settlement or award that is for prepetition lost wages may not be exempted" under the Maryland statute that is equivalent to § 522(d)(11)(E)).

236. *In re Jackson*, 394 B.R. at 11.

237. *Id.* (citing 11 U.S.C. § 541(a) (2006)).

238. *Id.* (explaining that to read the term "future" as applying to all earnings after the date of termination, and not the date of the petition, is against the clear language of the statute, and "[t]o allow an exemption for earnings prior to the petition date would make the statute retroactive instead of future looking").

239. *Id.* at 12.

240. 245 B.R. 17 (Bankr. D.N.J. 2000).

241. *Id.* at 18.

242. *Id.*

243. *Id.* at 19.

244. *Id.* at 21–22.

allowed the utilization of § 522(d)(11)(E) despite the lengthy interval of almost five years between the malpractice and the filing dates.²⁴⁵

These cases demonstrate that the inconclusiveness of the term “future” in the statute has engendered contradictory rulings with regard to compensation that retroactively covered, at least partly, the prepetition period.

C. “Future Earnings”: Can They Be Retroactively Assumed into a Settlement?

Bankruptcy cases in which the debtor attempts to invoke the § 522(d)(11)(E) exemption usually involve a monetary settlement that the debtor wishes to exclude from his bankruptcy estate. However, often enough these settlements fail to state or are vague about what the payment is meant to compensate for.²⁴⁶ Would the \$120,000 settlement of Joe the Steelworker be exempt under § 522(d)(11)(E) even though it did not contain a specific allocation for future earnings? The retroactive allocation of future earnings into a monetary settlement has been met with contradictory attitudes by different courts: while some have adamantly refused to involve speculation in their ruling, others have been willing to estimate the proportion of future earnings within an existing monetary settlement.

In *In re Whitson*²⁴⁷ a debtor tried to exempt a \$130,000 settlement from a personal injury lawsuit under § 522(d)(11)(E).²⁴⁸ The trustee argued that the court “should determine which portion of the award [was] attributable to [the debtor’s] loss of future earnings.”²⁴⁹ The court ruled that such a decision would be based on speculation, and was of the opinion that “[w]hen called upon to allocate an award or settlement to exemptible and non-exemptible damages, courts should not resort to speculation.”²⁵⁰ The court ruled that the trustee did not meet the burden of proof necessary to establish that the settlement was not properly exemptible.²⁵¹

245. *Id.* at 22; see also *In re Sanchez*, 362 B.R. 342, 359–60 (Bankr. W.D. Mich. 2007) (holding that when the bankruptcy petition was filed on October 16, 2005, and a settlement was paid forty-seven days earlier on August 30, 2005, the court allowed the use of the § 522(d)(11)(E) exemption, but did not prorate the settlement payment, so that only wages from the postpetition date would be exempted).

246. See, e.g., *Mercer v. Monzack*, 170 B.R. 759, 761 (Bankr. D.R.I. 1994) (a settlement was made “with no designation or allocation of funds to any specific category of damages”).

247. 319 B.R. 614 (Bankr. E.D. Ark. 2005).

248. *Id.* at 615.

249. *Id.* at 616.

250. *Id.* at 617. When the settlement clearly states that it is a payment for “personal physical injur[i]es” the court will not speculate on the meaning of an unambiguous document. See *Prichard v. Wheatley*, No. 3:06CV-230-H, 2006 U.S. Dist. LEXIS 65043, at *3 (W.D. Ky. Sept. 11, 2006).

251. *In re Whitson*, 319 B.R. at 618. The trustee, who is the objecting party, has the burden to prove that the proceeds are not compensation for lost earnings. *In re Gilbert*, 213 B.R. 502, 503 (Bankr. E.D. Ky. 1997); see also FED. R. BANKR. P. 4003(c) (the trustee bears the burden of proof that any exemption is not properly claimed).

An additional example of a court's refusal to speculate retroactively on the specific allocation of a monetary settlement is demonstrated in *In re Pless*.²⁵² In this case, a debtor settled a claim stemming from a car accident for \$25,000 and "there was no allocation made with respect to the monies to be paid to the [d]ebtor under the terms of the [s]ettlement delineating a portion to bodily injury and another to the loss of future earnings."²⁵³ The court declined to speculate which portion was designated to compensate for future earnings and, therefore, did not grant the New York state equivalent of the § 522(d)(11)(E) exemption.²⁵⁴ In *In re Cramer*²⁵⁵ a jury award of \$55,500 for a personal injury designated a specific amount for lost earnings, but did not distinguish between loss of future earnings and loss of past earnings.²⁵⁶ The court granted the § 522(d)(11)(E) exemption for the approximate amount of \$20,000 remaining after other exemptions were used.²⁵⁷ The court refused to speculate on the amount that would correspond to future earnings, explaining that it would not be necessary had the creditor met his burden of proof.²⁵⁸ Indeed, the court stated that "the fact that we have been reduced to speculation necessarily mandates the conclusion that the [objector] has not met his burden."²⁵⁹

Yet, other courts did permit an assumption that a payment for lost wages was included in the settlement. In *In re Scotti*²⁶⁰ the court assumed that the medical malpractice settlement included an *ad damnum* clause to compensate a claim for lost wages.²⁶¹ The court in *In re Smith*,²⁶² while deciding the case for other reasons, designated part of the proceeds from a \$100,000 settlement as future earnings, even though the settlement itself did not contain specific allocations.²⁶³

252. 202 B.R. 664 (Bankr. N.D.N.Y. 1996).

253. *Id.* at 667-68.

254. *Id.* at 668.

255. 130 B.R. 193 (Bankr. E.D. Pa. 1991).

256. *See id.* at 194-95.

257. *See id.* at 195.

258. *Id.*

259. *Id.* (quoting *In re Magnus*, 84 B.R. 976, 979 (Bankr. E.D. Pa. 1988)); *see also In re Patterson*, 128 B.R. 737, 741 (Bankr. W.D. Tex. 1991) (declining § 522(d)(11)(E) exemption and sustaining the trustee's objection because "the settlement was never reduced to writing and . . . there was in fact no particular allocation agreement or understanding").

260. *In re Scotti*, 245 B.R. 17, 22 (Bankr. D.N.J. 2000).

261. *See id.*; *supra* notes 240-45 and accompanying text.

262. 179 B.R. 437 (Bankr. E.D. Pa. 1995).

263. *Id.* at 446 n.4 ("[T]he fact that (1) the initial lump sum payment covered most, if not all damages other than the Debtor's considerable lost wages; (2) the Debtor in fact suffered a substantial wage loss as a result of her injuries; and (3) the payments were made to her personally, make such an allocation reasonable and acceptable."); *In re Harris*, 50 B.R. 157, 159-61 (Bankr. E.D. Wis. 1985) (holding that where a settlement made no distinction between medical expenses, actual loss, or anything else, the creditor has not met the burden of proof to establish that the exemptions are not properly claimed); *see also In re Haga*, 48 B.R. 492, 496 (Bankr. E.D. Tenn. 1985) (allowing an allocation of settlement to be designated for loss of future income); *Ford Motor Credit Co. v. Territo (In re Territo)*, 36 B.R. 667, 671 (Bankr. E.D.N.Y. 1984) (allowing a settlement to be reasonably attributed to loss of future earnings).

D. *Can § 522(d)(11)(E) Be Used in Combination with the Other Exemptions in § 522(d)(11)?*

Another exemption under 11 U.S.C. § 522(d) states,

(d) The following property may be exempted under subsection (b)(2) of this section:

....

(11) The debtor's right to receive, or property that is traceable to . . .

(D) a payment, not to exceed \$20,200, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent²⁶⁴

Would Joe the Steelworker be able to use both the § 522(d)(11)(E) and the § 522(d)(11)(D) exemptions simultaneously in order to better provide for his now-bankrupt family?²⁶⁵ Courts have struggled with the possibility of combining these two exemptions for the proceeds from one case of personal injury, and contrasting rulings have resulted.

The majority of the courts hold that the § 522(d)(11)(E) and § 522(d)(11)(D) exemptions can be stacked upon each other for a compensation stemming from a single physical injury.²⁶⁶ Thus, in *In re Lowery*,²⁶⁷ the court determined that the § 522(d)(11)(E) exemption contains only a single limitation, that the compensation be reasonably necessary for the support of the debtor and the debtor's dependants, and therefore there is no restriction on combining it with other exemptions.²⁶⁸

Yet, a minority of courts have ruled against the combination of the two exemptions. In *In re Russell*²⁶⁹ the debtor tried to use both § 522(d)(11)(E) and § 522(d)(11)(D) to exempt a personal injury award stemming from a single injurious incident.²⁷⁰ The court ruled that "the debtor may not make two separate exemptions with respect to a particular personal injury

264. 11 U.S.C. § 522(d) (2006).

265. See *supra* notes 191, 264.

266. See *In re Basket*, No. C07-5700RJB, 2008 U.S. Dist. LEXIS 43995, at *9 (W.D. Wash. June 2, 2008) (implying that a debtor could use both § 522(d)(11)(D) and § 522(d)(11)(E) exemptions); *In re Cramer*, 130 B.R. 193, 195 (Bankr. E.D. Pa. 1991) (allowing the use of both the § 522(d)(11)(D) and § 522(d)(11)(E) exemptions); see also *In re Lowery*, No. 05-13536WHD, 2007 Bankr. LEXIS 3729, at *10 (Bankr. N.D. Ga. Sept. 24, 2007) (listing a number of cases that hold that both exemptions can be used); *id.* at *9 (rejecting the argument that the word "or" in § 522(d)(11) suggests that the legislature intended to allow the use of only one of the exemptions in a single case).

267. 2007 Bankr. LEXIS 3729.

268. See *id.* at *9 ("This interpretation does justice to the plain language of the statute and also furthers the primary purpose of the exemption provisions, which is to ensure that debtors leave the protection of the bankruptcy system with a 'fresh start' and do not become a burden on the public."). "This result is consistent with the general rule that exemptions should be construed liberally in favor of the debtor and furthers the primary purpose of the exemption scheme." *Id.* at *10; see also *supra* note 226.

269. 148 B.R. 564 (Bankr. E.D. Ark. 1992).

270. *Id.* at 565–66.

judgment or settlement; the debtor must elect one exemption with regard to that personal injury award.”²⁷¹ A similar ruling in *In re Howard*,²⁷² although based on a different rationale, stated that “because of the conjunctive ‘or’ between subsections (D) and (E), a debtor is required to elect between rather than stack the debtor’s exemptions under these two provisions.”²⁷³

III. 11 U.S.C. § 522(d)(11)(E): MAKE THE MOST OUT OF IT

Part II examined the divergent views of courts on the scope and appropriate use of § 522(d)(11)(E). Part III of this Note synthesizes the analyses included in Parts I and II to endorse a tolerant and permissive approach for a consistent and effective utilization of the 11 U.S.C. § 522(d)(11)(E) exemption. This Note proposes that a broad pro-debtor interpretation of the § 522(d)(11)(E) exemption is fully supported by the historical progression of the law in a pro-debtor direction,²⁷⁴ by the underlying reasoning and purposes of the Bankruptcy Code,²⁷⁵ and by the in-depth analyses of the conflicting rulings with regard to implementation of specific aspects of this exemption.²⁷⁶

A. *The Gradual Pro-debtor Transformation of the Bankruptcy Code: Ramifications for § 522(d)(11)(E) Implementation*

When an accidental bodily injury occurs, as in the case of Joe the Steelworker, the compensatory cost, which includes lost earnings, medical bills, and mental suffering, may reach hundreds of thousands of dollars, depending on the severity and duration of the injury. Therefore, a personal injury victim is a strong candidate for a receipt of financial assistance. Yet, creditors in bankruptcy cases claim the personal injury recoveries of over 1.5 million Americans each year.²⁷⁷ An important, if not ironic, fact is that illness or injury is the foundation for almost forty-seven percent of the bankruptcy petitions.²⁷⁸ Thus, an accident may lead to a bankruptcy filing, which in turn may cause the redirection of the settlement pay to the

271. *Id.* at 566; see also *Frank v. Herb (In re Herb)*, No. 1-08-bk-01138, 2009 Bankr. LEXIS 1656, at *3–4 (Bankr. M.D. Pa. June 18, 2009) (“Because § 522(d)(11) provides for mutually exclusive options, the Debtors are left with no choice but to choose between them.”).

272. *In re Howard*, 169 B.R. 77, 81 n.4 (Bankr. S.D. Ga. 1994).

273. *Id.* at 81 n.4 (referencing the Georgia state statute equivalent to 11 U.S.C. § 522(d)(11)(D) and 11 U.S.C. § 522(d)(11)(E)).

274. See *supra* Part I.A.

275. See *supra* Part I.B.

276. See *supra* Parts I.C., II.

277. See Joseph J. Blyskal, III, *Levying Flesh and Charging Society, Creditors, and Insurance Companies for It: The Irony of Including Personal Injury Awards in the Bankruptcy Estate*, 23 EMORY BANKR. DEV. J. 677, 678 (2007) (citing ELIZABETH WARREN & JAY WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* (4th ed. 2001)).

278. See Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability To Pay*, 51 AM. U. L. REV. 229, 236 (2001).

creditors, rather than to the unfortunate debtor, further increasing the frustration and overall suffering of the likes of Joe and his family.

While social norms and bankruptcy laws have come a long way since debtors were imprisoned,²⁷⁹ sold into slavery,²⁸⁰ or even forced to pay debts with their own flesh,²⁸¹ a more liberal approach to the bankruptcy exemptions is still necessary to reinforce the stated goal of a “true” fresh start.²⁸² The general purpose of the exemption laws is to protect a debtor from harassment by creditors and to make available to him the basic necessities of life such that, even if the creditors collect all of the nonexempt assets, the debtor will not be left penniless at the expense of the public.²⁸³

To effectively benefit a bankrupt debtor, the exemptions put in place by Congress should be interpreted by the courts in a way that will ensure that their underlying objectives will be fully attained. The 11 U.S.C. § 522(d)(11)(E) exemption is a powerful and valuable tool that should not be diminished by circumstances that may allow for a pro-creditor interpretation of this statute.²⁸⁴ This Note proposes that in a case in which § 522(d)(11)(E) is applicable, courts should exercise its pro-debtor power to the fullest degree. It should be emphasized that this Note’s recommendation is restricted to the § 522(d)(11)(E) exemption. Inherently, the bankruptcy exemptions, and § 522(d)(11)(E) in particular, were designed as a lifeline for the debtor’s economic, social, and psychological survival.²⁸⁵ This Note’s recommendation to enhance the effectiveness of the § 522(d)(11)(E) exemption through a substantial liberalization in its usage will not likely have significant repercussions on creditors’ rights. These rights are sufficiently safeguarded by other components of the Bankruptcy Code and by the statute itself, which includes a significant limitation on the exemption size, limiting it to what is “reasonably necessary for the support of the debtor and any dependent of the debtor.”²⁸⁶

A broad and flexible application of bankruptcy laws, especially the exemptions, is in line with the historical progression of these laws in the United States.²⁸⁷ For decades, the Bankruptcy Code has moved in a pro-debtor direction, easing the restrictions on the application of discharge and promoting a debtor-oriented structure for relief.²⁸⁸ The pro-debtor transformation started with the advent of the bankruptcy discharge in

279. See *supra* notes 20, 25–26 and accompanying text.

280. See *supra* notes 17–20 and accompanying text.

281. See *supra* note 23, 27 and accompanying text.

282. See *supra* note 116.

283. See *Clark v. O’Neill (In re Clark)*, 711 F.2d 21, 23 (3d Cir. 1983) (quoting H.R. REP. NO. 95-595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087); see also *supra* notes 167–73 and accompanying text.

284. See *supra* notes 214–21 and accompanying text.

285. See generally *supra* Part I.C.

286. 11 U.S.C. § 522(d)(11)(E) (2006); see *supra* note 218 and accompanying text.

287. 11 U.S.C. § 522(d)(11)(E). See generally *supra* Part I.A.2.

288. See generally *supra* Part I.A.2.

1705,²⁸⁹ and gained further significance and focus through the Bankruptcy Clause,²⁹⁰ Congress's 1898 ratification of the Bankruptcy Act,²⁹¹ and the massive reforms of 1978.²⁹² In essence, bankruptcy protection in the United States has become an essential right.²⁹³

Although a sizeable exemption may impinge on one of the major goals of bankruptcy—reimbursing the creditors with what they are rightfully owed²⁹⁴—as a society we would be better off in erring on the side of the debtor, and therefore courts should resolve complex bankruptcy circumstances implying loss of future earnings by granting the relevant exemptions. Such an approach would be in line with the general rule that the bankruptcy exemptions should be interpreted liberally in favor of the debtor.²⁹⁵ Such a practice would also be in accordance with the major goals and principles of the Bankruptcy Law and, in particular, with the legislative purpose of the § 522(d)(1)(E) exemption.²⁹⁶

Moreover, expansive pro-debtor implementation of § 522(d)(1)(E) will also sustain the social²⁹⁷ and economic²⁹⁸ benefits of potential rehabilitation of the debtor. Such benefits extend beyond the debtor's personal gains, as they may protect the commonwealth from untoward social behavior. When a bankrupt debtor is forced to give a large portion of a monetary settlement to his creditors, he is likely to feel uncompensated for his suffering. Such a perception of injustice may culminate in further social and economic strain in the forms of unemployment, drug use, or even criminal behavior.²⁹⁹ Furthermore, the sooner the debtor is relieved of his insolvency and resumes reasonable functioning as a member of society, the better off the economy as a whole will be.³⁰⁰

289. See *supra* notes 34–35 and accompanying text.

290. See *supra* note 45 and accompanying text.

291. See *supra* notes 70–74 and accompanying text.

292. See *supra* notes 75–81 and accompanying text.

293. See *supra* notes 116–17 and accompanying text. While many of the amendments to the original Bankruptcy Code and the 2005 reforms were pro-creditor, they aimed at limiting access to debtors who are not truly worthy of bankruptcy protection. See FERRIELL & JANGER, *supra* note 1, at 4.

294. See *supra* notes 99–103 and accompanying text.

295. See *In re Lowery*, No. 05-13536, 2007 Bankr. LEXIS 3729, at *9 (Bankr. N.D. Ga. Sept. 24, 2007). In an overwhelming majority of bankruptcy cases, the U.S. trustee is the one objecting to the use of an exemption, and an approach favoring the debtor would be in line with the Federal Rules of Bankruptcy Procedure, which provide that “the objecting party has the burden of proving that the exemptions are not properly claimed.” FED. R. BANKR. P. 4003(c); see, e.g., *In re Rockefeller*, 100 B.R. 874, 877 (Bankr. E.D. Mich. 1989); *In re Harris*, 50 B.R. 157, 159 (Bankr. E.D. Wis. 1985); see also *supra* note 268.

296. See *supra* notes 171–73 and accompanying text.

297. See *supra* notes 140–43, 152–55 and accompanying text.

298. See *supra* notes 131–36 and accompanying text.

299. See Blyskal, *supra* note 277, at 683 n.55 (quoting DAN B. DOBBS, THE LAW OF TORTS § 10 (1993)); *supra* note 141 and accompanying text.

300. See *supra* notes 128–29 and accompanying text (explaining that bankruptcy laws enable efficient recovery of assets, which in turn reduces the risk faced by lenders and results in cheaper lending practices); see also *supra* notes 131–33 and accompanying text.

An expansive reading seems particularly appropriate for the § 522(d)(11)(E) exemption, which inherently involves an injured, and often severely injured, debtor. A combination of financial hardship and physical injury will likely accentuate the psychological pressure on an already downtrodden individual. The bankruptcy system in general, and the courts in particular, should attempt to alleviate the distress and anxiety that such a debtor and his family are suffering.³⁰¹

The Bankruptcy Law has been featured as “evidence of man’s humanity to his fellow man.”³⁰² The recommended pro-debtor emphasis in the implementation of the § 522(d)(11)(E) exemption comports with this characterization and reflects how far “humanity” has progressed with regard to bankruptcy.

B. *Curbing the Conflicting Applications of § 522(d)(11)(E)*

A major goal of the Bankruptcy Law is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”³⁰³ When courts seek to help such an “honest debtor” secure a feasible fresh start and put his life back in order, they should not limit his prospect for a successful fresh start by avoidable technicalities.³⁰⁴ Therefore, an exemption of a payment for “compensation of loss of future earnings”³⁰⁵ should not be restricted to compensation paid due to an afflicted bodily injury.³⁰⁶ Settlements stemming from disability payments, wrongful termination, or discrimination suits should also be considered compensation for loss of future earnings, and therefore exemptible.³⁰⁷ Reading into the statute a requirement for bodily injury ignores the plain wording of the statute.³⁰⁸ Indeed, the distinction between loss of future earnings due to bodily injury and loss of future earnings due to other categories of injury was bluntly rejected by a court that could conceive no societal interest in such an approach.³⁰⁹ The proceeds from such settlements usually play a significant role in sustaining the debtor’s livelihood and therefore should be exempted from the bankruptcy estate

(explaining that bankruptcy laws deal with the social and political turmoil created by a large debtor class and reduce society’s burden of financially supporting members of this group).

301. See *supra* notes 118–21 and accompanying text (explaining that a fresh start can be justified on moral and ethical grounds).

302. NOEL, *supra* note 14, at 200.

303. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (citations omitted); see *supra* notes 109–17.

304. See generally *supra* Part II (discussing the conflicts among courts with regard to intrinsic details in the implementation of the § 522(d)(11)(E) exemption).

305. 11 U.S.C. § 522(d)(11)(E) (2006).

306. See *supra* notes 201–12 and accompanying text.

307. See *supra* notes 201–12 and accompanying text.

308. See *In re Carson*, 82 B.R. 847, 856 (Bankr. S.D. Ohio 1987).

309. See *id.*; see also *supra* notes 206–12 and accompanying text.

pursuant to § 522(d)(11)(E).³¹⁰ Furthermore, one of the pro-debtor goals of bankruptcy protection is to achieve an "effective rehabilitation" for the debtor.³¹¹ Limiting an exemption that enables a debtor to protect money needed for reasonable support of his family by denying its use in workers' compensation claims impedes such a rehabilitation process.³¹²

Even a liberal approach to § 522(d)(11)(E) will not cause unreasonable losses to creditors because of the explicit limitation in the statute that only permits the exemption of what is "reasonably necessary for the support of the debtor and any dependent of the debtor."³¹³ Yet, from the debtor's perspective, a liberal application of this exemption may be self-defeating, particularly in those cases where it will inevitably reduce the exempt compensation to what is reasonably necessary for the debtor and his dependents. Hence, in order to remain committed to the pro-debtor foundation of the Bankruptcy Code, the court should give significant consideration to the various exemptions provided by the Bankruptcy Code and select the most appropriate one for a specific set of circumstances.

When confronted with a settlement that does not designate any specific portion of the proceeds to loss of future earnings, courts should not hesitate to allocate a reasonable amount towards future income.³¹⁴ This should be done regardless of whether the interests of the debtor³¹⁵ or the creditors and trustees are taken into account.³¹⁶ While a court may not be best equipped with the exact financial formulas, it undoubtedly can make an educated estimate.³¹⁷

Moreover, prohibiting the combined utilization of the § 522(d)(11)(E) exemption with the § 522(d)(11)(D) exemption may hinder the debtor's progress towards a new start.³¹⁸ Allowing for simultaneous use of the § 522(d)(11)(E) and § 522(d)(11)(D) exemptions "does justice to the plain language of the statute and also furthers the primary purpose of the

310. See *supra* notes 206–12 and accompanying text. When the court's goal is to set the debtor on track for a fresh start "free from the obligations and responsibilities consequent upon business misfortunes," the distinction between the various grounds of compensations for loss of future income should not play a part. *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 555 (1915); see *supra* notes 109–14 and accompanying text.

311. See H.R. REP. NO. 89-687, at 2 (1965); *supra* notes 155–58 and accompanying text.

312. See *supra* notes 213–26 and accompanying text.

313. 11 U.S.C. § 522(d)(11)(E) (2006). A two-part test is involved in the application of § 522(d)(11)(E): only after the court determines that an asset is a payment in compensation for a loss of future earnings does it proceed to calculate whether and to what extent it is reasonably necessary for the support of a debtor. See *In re Rockefeller*, 100 B.R. 874, 877–79 (Bankr. E.D. Mich. 1989); see *supra* notes 215–21 and accompanying text.

314. See *supra* notes 260–63 and accompanying text.

315. See *In re Pless*, 202 B.R. 664, 667–68 (Bankr. N.D.N.Y. 1996) (holding that the exemption was not granted because the court would not speculate on the exact portion of the settlement that was meant to compensate for loss of future earnings).

316. See *In re Cramer*, 130 B.R. 193, 195–96 (Bankr. E.D. Pa. 1991) (holding that since the court needed to speculate, the trustee did not meet his burden of proof, and, therefore, the exemption was granted); *supra* notes 250–52.

317. See *supra* notes 260–63 and accompanying text.

318. See *supra* notes 265–66 and accompanying text.

exemption provisions, which is to ensure that debtors leave the protection of the bankruptcy system with a ‘fresh start’ and do not become a burden on the public.”³¹⁹

Notwithstanding the above recommendation to liberalize the use of the § 522(d)(11)(E) exemption, courts should not permit the inclusion of a payment that is intended to compensate for prepetition future earnings.³²⁰ A bankruptcy court only has jurisdiction over a bankruptcy estate.³²¹ Permitting a debtor to exempt payments for prepetition income would contradict the unambiguous intention of the statute.³²² However, when a final ruling is delayed by a lengthy judicial process, the petition date rather than the decision date should be the decisive factor.³²³ Furthermore, the court should factor in the inflation rate for the duration of the legal process. A beleaguered debtor should not be faced with a further monetary loss solely because it takes months and often years for a court to grant his exemption.

In summation, any interpretation of the § 522(d)(11)(E) exemption that is in line with the plain reading of the statute will also embrace a pro-debtor attitude. Expansive and more consistent pro-debtor implementation of this exemption will promote the humane foundation of the Bankruptcy Code, facilitate a fresh start for a poverty-stricken debtor, and yield multiple social and economic benefits to the involved parties and the community as a whole.

CONCLUSION

Courts have disagreed on several vital issues concerning the 11 U.S.C. § 522(d)(11)(E) exemption, ranging from the circumstances for its relevance to the specific procedures involved in its implementation. This Note studied the historic progression and transformation of the Bankruptcy Code and conducted an in-depth analysis of its underlying rationale and principles. Consistent with these principles, interpreting the exemption in favor of debtors should alleviate some of the confusion involved in its application and increase the success rate of bankrupt debtors who try to exempt a compensatory payment for their loss of future earnings from the bankruptcy estate. Courts should invigorate the power of 11 U.S.C. § 522(d)(11)(E) so that a debtor who has suffered through the double misfortune of financial crisis and injury will be able to effectively use the bankruptcy system to sustain his livelihood. 11 U.S.C. § 522(d)(11)(E) is a

319. *In re Lowery*, No. 05-13536, 2007 Bankr. LEXIS 3729, at *9 (Bankr. N.D. Ga. Sept. 24, 2007). The § 522(d)(11)(D) exemption is capped at \$20,200, whereas the § 522(d)(11)(E) exemption may be larger, provided that the money is reasonably necessary for the support of the debtor and his dependents. Concomitant use of both exemptions may result in a significantly increased compensation for the debtor.

320. *See supra* notes 240–45 and accompanying text.

321. *See* 11 U.S.C. § 541 (2006). An estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” *Id.* § 541(a)(1).

322. *See supra* note 238 and accompanying text.

323. *See supra* notes 227–45 and accompanying text.

valuable tool that can help a debtor emerge robustly from bankruptcy and become a productive member of society, thereby promoting the historical goals of the bankruptcy laws.