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Repose or Not? Informal Objections to Claims of Exemptions After *Taylor v. Freeland*

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REPOSE OR NOT? INFORMAL OBJECTIONS TO CLAIMS OF EXEMPTIONS AFTER *TAYLOR V. FREELAND*

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I. Introduction

In *Taylor v. Freeland & Kronz*,[1] over the untimely objection of the bankruptcy trustee, the United States Supreme Court permitted the bankruptcy debtor to exempt $110,000 that was ineligible for exemption under substantive exemption law. The Court rejected the view that unless the debtor had a good faith claim to the exemption or had a statutory basis for the exemption, even an untimely objection to the debtor's claim of exemption could terminate the debtor's right to the exemption.[2] Disturbed by the prospects of debtors receiving unjustified windfalls, several courts (before and after the *Taylor* decision) have developed "informal objection" doctrines to circumvent the "strict constructionist" doctrine the Court followed in *Taylor*. However, *Taylor*'s potential for encouraging debtors to file fictitious exemption claims in the hope that no timely objection would be filed may be overstated.[3] Both civil and criminal liability may deter debtors who file fictitious exemptions, even those who successfully obtain a *Taylor* exemption.[4]

While *Taylor* established that a late objection is ineffective, it did not consider issues concerning the nature of the objection the trustee must file to avoid debtors obtaining "exemptions by declaration." In particular, the decision did not consider whether the trustee[5] must present a formal objection to the bankruptcy court within the time period prescribed by Rule 4003(b).[6] Nor did the Court consider

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1. 503 U.S. 638 (1992).

2. *See id.* at 644.

3. The trustee in *Taylor* strenuously argued that rejection of his argument, that the debtor must have a good faith claim to an exemption before the limitation period for filing objections by the trustee expired, would encourage debtors to engage in the practice of "exemption by declaration." *Id.*

4. *See generally* Kenneth D. Ferguson, *Discourse and Discharge: Linguistic Analysis and Abuse of the "Exemption by Declaration" Process in Bankruptcy*, 70 AM. BANKR. L.J. 55 (Winter 1996).

5. Since both the bankruptcy trustee and creditors have standing to contest a claim of exemption, throughout the article the word "trustee" will be used as a proxy for both.

6. FED. R. BANKR. P. 4003(b) establishes the time period for objecting to the debtor's list of

whether a formal objection, filed after expiration of Rule 4003(b)'s deadline, could be considered timely upon application of the "relation back" doctrine or some other theory.

This article will argue that 11 U.S.C. § 522(l) is more in the nature of a statute of repose rather than a statute of limitation. One notable characteristic of a statute of repose is that upon expiration of the repose period, the cause of action created by the statute terminates. Therefore, the trustee's right to object to the debtor's claim of exemption under section 522(l) terminates upon expiration of the objection period established by Rule 4003(b). However, the fact that section 522(l) is a functional statute of repose does not affect application of "informal objection" and "relation back" doctrines to cases where, before expiration of the repose period of Rule 4003(b), the trustee files an informal objection to the debtor's claim of exemption. If the informal objection is properly "filed," as that term is defined by Rule 5005,[7] filing occurred before expiration of the thirty-day period for objecting, and the informal objection adequately apprised the debtor of the dispute surrounding the claim of exemption, the trustee's objection rights vest. Once the trustee's objection rights vest, filing of a formal objection after expiration of the repose period under Rule 4003(b) is effective whether you consider the formal objection an amendment to the original informal objection under the relation back doctrine or whether the foundations for vesting of the trustee's objection rights is based on the informal objection alone.

II. Exempting Property from the Bankruptcy Estate

The primary responsibilities of the Chapter 7 trustee are to collect the debtor's nonexempt property, liquidate it, and pay out the proceeds[8] according to the Code's distribution scheme.[9] The ability of the bankruptcy debtor to exempt property from this process is crucial to the debtor achieving a "fresh start."[10]

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exemptions. In relevant part it provides:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the Court.

Id. See FED. R. BANKR. P. 2003(a) (requiring that the meeting of creditors in a Chapter 7 case shall be called by the United States trustee "no fewer than 20 and no more than 40 days after the order for relief").

7. FED. R. BANKR. P. 5005.

8. *See* 11 U.S.C. § 704 (1994).

9. *See* 11 U.S.C. § 726(a) (1994).

10. *In re* Carilli, 65 B.R. 280, 282 (Bankr. E.D.N.Y. 1986) ("A perusal of the legislative history reveals that Congress intended § 522 to provide the debtor with the essentials necessary for a 'fresh start.'"); *In re* Mitchell, 80 B.R. 372, 376 (Bankr. W.D. Tex. 1987) ("In a very real sense, it might be said that there are two independent schemes for assisting the debtor in achieving his fresh start vis-a-vis exemptions. The first, typified by Section 522(l), is aimed principally at freeing select assets from the general creditor body. The second, more restricted in scope and typified by Section 522(f), aims at liberating certain assets from certain kinds of secured creditors."); *In re* Montgomery, 80 B.R. 385, 389 (Bankr. W.D. Tex. 1987) ("Section 522(l) serves an entirely different function, that of promptly liberating

Obtaining the "fresh start" that bankruptcy offers is not cost free. The debtor loses exclusive control of and power to direct the utilization of nonexempt property.[11] The debtor in a Chapter 7 case must surrender all nonexempt unsecured property to the trustee for liquidation and distribution to creditors.[12]

The procedure for exempting property is substantially different under the current Bankruptcy Code than under the prior Bankruptcy Act.[13] Under the Act, if the debtor claimed property as exempt, the trustee was required to "set apart the bankruptcy's exemptions . . . and report the items and estimated value thereof to the courts . . . ."[14] If the debtor or other interested parties disagreed with the trustee's valuation, they had the burden of objecting to the trustee's report.[15] Under the Bankruptcy Code, the requirement of a trustee's report is eliminated.[16] The property the debtor claims as exempt automatically becomes exempt if no one objects.[17] It is the debtor's responsibility under the Code to initiate the exemption process by filing a list with the bankruptcy court of the property

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property the debtor wishes to keep for his "fresh start" from the continuing administration of the bankruptcy court."); Boon v. Miner (*In re* Boon), 108 B.R. 697, 700 (Bankr. W.D. Mo. 1989) ("Under the Code, 'all property of the debtor, even property necessary for a fresh start, is included in the estate . . . [a]fter the property comes into the estate, the debtor is then permitted to exempt property needed for a fresh start.'") (*quoting* Samore v. Graham (*In re* Graham)), 726 F.2d 1268, 1271 (8th Cir. 1984)).

11. Associates Commercial Corp. v. Rash (*In re* Rash), 90 F.3d 1036, 1057 (5th Cir. 1996) ("In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee."), *cert. granted*, 117 S. Ct. 758 (1997); *In re* Duda, 182 B.R. 662, 667 (Bankr. D. Conn. 1995) ("While it is true that the automatic stay prohibits unsecured creditors from proceeding to obtain judicial liens against estate property, *see* § 362(a)(4), (c)(1), the quid pro quo for the stay is that all of the debtors' nonexempt property will be distributed to those unsecured creditors who hold claims which could have been satisfied from that property but for the commencement of the case.").

12. *See Rash*, 90 F.3d at 1057.

13. *See* Bankruptcy Act of June 1, 1898, ch. 541, § 47(a)(ii), 30 Stat. 544, 557, *repealed by* Bankruptcy Reform Act of Nov. 6, 1978, ch. 5, § 522(l), 92 Stat. 2586.

14. *See* Bankruptcy Act of June 1, 1898, § 47(a)(ii), 30 Stat. at 557, *repealed by* Bankruptcy Reform Act of Nov. 6, 1978, § 92, 92 Stat. at 2588.

15. FED. R. BANKR. P. 403 provides in relevant part:

> a) CLAIM OF EXEMPTIONS A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Rule 108. (b) TRUSTEE'S REPORT The trustee shall examine the bankrupt's claim for exemptions, set apart such as are lawfully claimed and allowable, and report to the court the items set apart, the amount or estimated value of each, and the exemptions claimed that are not allowable. The report shall be filed with the court not later than 15 days after the trustee qualifies. If the trustee reports that any exemption claimed is not allowable, he shall forthwith mail or deliver copies of the report to the bankrupt and his attorney. (c) OBJECTIONS TO REPORT. Any creditor or the bankrupt may file objections to the report within 15 days after its filing, unless further time is granted by the court within such 15-day period. Copies of the objections so filed shall be delivered or mailed to the trustee and, if the objections are by a creditor, to the bankrupt and his attorney. After hearing upon notice the court shall determine the issues presented by the objections. The burden of proof shall be on the objector.

Id.

16. *See* 11 U.S.C. § 522(l) (1994).

17. *See id.*; *see also* Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992).

claimed as exempt.[18] In contrast to the exemption process under the Bankruptcy Act, under the Bankruptcy Code, it is the trustee's burden to establish that the debtor is not entitled to the exemptions claimed.[19]

Although section 522(l) establishes the debtor's affirmative duty to file a list of property claimed as exempt, it is Rule 4003(a) that details the substance of that duty.[20] Under Rule 4003(a), Schedule C, the list of property the debtor claims as exempt is included as part of the schedule of assets which must be filed with the bankruptcy petition.[21] In Schedule C, the debtor declares, under penalty of perjury,[22] what property is claimed as exempt, the statutory authority for the exemption, and the exempt property's value.[23]

Rather than requiring the trustee to file a report identifying exempt property, the Code imposes a substitute duty to object to the property the debtor claims as exempt.[24] The deadline for objecting to a claim of exemption is prescribed by Rule 4003(b) as thirty days after the conclusion of the first meeting of creditors.[25] By its terms, Rule 4003(b) prohibits retroactive extension of its deadline.[26] In the absence of a timely objection, the property listed by the debtor

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18. *See* 11 U.S.C. § 522(l) (1994).

19. FED. R. BANKR. P. 4003(c) provides: "BURDEN OF PROOF. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections."

20. FED. R. BANKR. P. 4003(a). The Rule provides, in relevant part:

> A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

Id.

21. 11 U.S.C. § 521(1) specifies the documents which the debtor must file when commencing a bankruptcy case. These documents include "a list of creditors . . . a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." *Id.*; FED. R. BANKR. P. 1007 designates precisely what documents are to filed for a bankruptcy case filed under each chapter of the Code. The Rule also specifies when each of these documents are to be filed.

22. FED. R. BANKR. P. 1008 states that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746."

23. Official Form 6, Schedule C ("Property Claimed as Exempt").

24. *See* 11 U.S.C. § 522(l) (1994).

25. FED. R. BANKR. P. 4003(b) prescribes the time for objecting to the debtor's exemptions. The Rule provides, in relevant part:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court.

Id.

26. *Id.*; *see also* FED. R. BANKR. P. 9006(b)(3) (forbidding retroactive enlargements of time under Rule 4003(b) except as otherwise provided in Rule 4003(b)); FED. R. BANKR. P. 2003(a) (the meeting of creditors in a Chapter 7 case shall be called by the United States trustee "no fewer than 20 and no more than 40 days after the order for relief"); FED. R. BANKR. P. 2003(e) (meetings of Creditors may be adjourned from time to time, and are often continued, when there is unfinished business); *In re* Havanec, 175 B.R. 920, 923 (Bankr. N.D. Ohio 1994) (an adjourned meeting of creditors is not considered a concluded meeting for the purposes of measuring the start of the 30-day period for objecting

on Schedule C is exempt, regardless of whether the property qualifies for exemption under applicable law,[27] and regardless of whether the amount claimed as exempt exceeds the amount permitted by applicable law.[28] This was the Supreme Court's decision in *Taylor*.

A. The Taylor Decision and the Strict Constructionist Doctrine

The Supreme Court in *Taylor* rejected the trustee's attempt to incorporate implicit conditions into section 522(l) to avoid the consequences of his failure to file a timely objection to the debtor's claim of exemption. The debtor in *Taylor* claimed an exemption for the proceeds of her discrimination lawsuit against her employer. The value of the exemption was scheduled as unknown; however, the debtor asserted that the full amount of any recovery was exempt.[29] The trustee never filed an objection to the debtor's exemption claim and did not claim an interest in this lawsuit until after it was settled for $110,000.[30] The debtor contended that the trustee's failure to timely file his objection barred any recovery.

The trustee argued that the purpose of section 522(l) and Rule 4003(b) was not to preclude judicial inquiry into the claimed exemption after expiration of the objection period, but to narrow the scope of judicial review.[31] Regardless of the timeliness of the objection, the trustee argued that unless the debtor makes a good faith claim to an exemption, the Court was not precluded from denying the exemption claimed.[32] The trustee's position had been followed by several courts.[33] Prior to the Supreme Court's decision in *Taylor*, courts disagreed over whether section 522(l) and Rule 4003(b) barred the trustee's untimely filed objection.[34] Three different analytical views were adopted in construing section

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to the debtor's claims of exemptions).

27. *See* Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992).

28. *See id.*

29. *See id.* at 640.

30. *See id.* at 641.

31. *See id.* at 643.

32. *See id.*

33. *See id.*

34. Some courts held the debtor's claim of exemption was granted under § 522(l) only if there was a good faith statutory basis for the exemption. *See, e.g.*, Halverson v. Peterson (*In re* Peterson), 920 F.2d 1389, 1393 (8th Cir. 1990); Munoz v. Dembs (*Matter of* Dembs), 757 F.2d 777, 780 (6th Cir. 1985); *In re* Indvik, 118 B.R. 993, 1002 (Bankr. N.D. Iowa 1990). Other courts granted the exemption if the exemption was valid. *See, e.g.*, Stutterheim v. First State Bank (*In re* Stutterheim), 109 B.R. 1010, 1013 (Bankr. D. Kan. 1989); *In re* Staniforth, 116 B.R. 127, 130-31 (Bankr. W.D. Wis. 1990); *In re* Velis, 109 B.R. 64, 65 (Bankr. D.N.J. 1989), *aff'd*, 123 B.R. 497 (D.N.J. 1991), *aff'd in part & rev'd in part sub nom.* Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); *In re* Bennett, 36 B.R. 893, 894-95 (Bankr. W.D. Ky. 1984). Still other courts strictly construed § 522(l), holding that the exemption is granted if no timely objection is filed. *See, e.g.*, Taylor v. Freeland & Kronz, 938 F.2d 420, 423 (3rd. 1991); *In re* Bradlow, 119 B.R. 330, 331 (Bankr. S.D. Fla. 1990); *In re* Duncan, 107 B.R. 754, 756 (Bankr. W.D. Okla. 1988); Doyle v. Grossman (*In re* Grossman), 80 B.R. 311, 312-13 (Bankr. E.D. Pa. 1987) (citing earlier bankruptcy courts decisions reaching the same result); *In re* Payton, 73 B.R. 31, 33 (Bankr. W.D. Tex. 1987); *In re* Hahn, 60 B.R. 69, 72-73 (Bankr. E.D. Minn. 1986); Kretzer v. DFW Federal Credit Union

522(l) and Rule 4003(b).[35] Under the first view, referred to here as the "strict constructionist" view, courts gave no consideration to the merits of the claimed exemption.[36] According to these courts, the only concern was whether the objection was timely filed. If the objection was not filed within the limitations period of Rule 4003(b), the exemption was granted as claimed.[37]

Fearing that application of the "strict constructionist" view would encourage wholesale exemption declarations by debtors,[38] some courts adopted the "implied statutory basis" view, requiring some statutory basis for the claimed exemption.[39] If there was not a statutory basis for the claimed exemption, the trustee would be allowed to object even after expiration of the limitations period.[40] A literal interpretation, these courts argued, would be an incentive to declare nonexistent exemptions with the hope that no one would object.[41]

Some courts adopted an analytical approach that was a middle ground between the strict constructionist and implied statutory basis theories. This third theory, the "good faith" view, required a determination by the court of whether there was a "good faith statutory basis" for the claimed exemption.[42] Unless a good faith statutory basis existed for the exemption, the debtor would not be shielded by section 522(l). The trustee, therefore, could file an objection after the time for filing has expired. The policy which justified the good faith requirement was that of avoiding an "undeserved windfall" to the debtor, which a literal construction of section 522(l) and Rule 4003(b) would create.[43]

Without much fanfare, the Supreme Court rejected both the implied statutory basis and the good faith theories. According to the Court, by negative implication, Rule 4003(b) indicates that without first extending the time period, trustees simply may not object to the claimed exemption after the thirty-day objection period.[44]

(*In re* Kretzer), 48 B.R. 585, 587 (Bankr. D. Nev. 1985); *In re* Wiesner, 39 B.R. 963, 965 (Bankr. W.D. Wis. 1984); *In re* Gullickson, 39 B.R. 922, 923 (Bankr. W.D. Wis. 1984).

35. *See* Taylor, 938 F.2d at 423.

36. *See Taylor*, 938 F.2d at 423; *Bradlow*, 119 B.R. at 331; *Duncan*, 107 B.R. at 756; *Grossman*, 80 B.R. at 312-13 (citing earlier bankruptcy courts decisions reaching the same result); *Payton*, 73 B.R. at 33; *Hahn*, 60 B.R. at 72-73; *Kretzer*, 48 B.R. at 587; *Wiesner*, 39 B.R. at 965; *Gullickson*, 39 B.R. at 923.

37. *See Taylor*, 938 F.2d at 423 (citing *In re* Bardlow, 119 B.R. 330 (Bankr. S.D. Fla. 1990); *In re* Duncan, 107 B.R. 754 (Bankr. W.D. Okla. 1988); Doyle v. Grossman (*In re* Grossman), 80 B.R. 311 (Bankr. E.d. Pa. 1987); *In re* Payton, 73 B.R. 31 (Bankr. W.D. Tex. 1987)).

38. *See In re* Bennett, 36 B.R. 893, 895 (Bankr. W.D. Ky. 1984).

39. *See In re* Stutterheim, 109 B.R. 1010, 1013 (Bankr. D. Kan. 1989); *In re* Staniforth, 116 B.R. 127, 130-31 (Bankr. W.D. Wis. 1990); *In re* Velis, 109 B.R. 64, 65 (Bankr. D.N.J. 1989), *aff'd*, 123 B.R. 497 (D.N.J. 1991), *aff'd in part & rev'd in part sub nom* Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); *In re* Bennett, 36 B.R. 893, 894-95 (Bankr. W.D. Ky. 1984); *In re* Hensen, 101 B.R. 33, 34-36 (Bankr. N.D. Ind. 1988); *In re* Dembs, 757 F.2d. 777, 780 (6th Cir. 1985).

40. *See Taylor*, 938 F.2d at 423.

41. *See In re* Bennett, 36 B.R. at 895; *Taylor*, 938 F.2d at 426.

42. *See In re* Peterson, 920 F.2d 1389, 1393 (8th Cir. 1990); *In re* Dembs, 757 F.2d 777, 780 (6th Cir. 1985); *In re* Indvik, 118 B.R. 993, 1002 (Bankr. N.D. Iowa 1990).

43. *See Taylor*, 938 F.2d. at 425-26; *Peterson*, 920 F.2d at 1393.

44. *See* Taylor v. Freeland & Kronz, 503 U.S. 638, 643 (1992).

The Supreme Court agreed with the Third Circuit's position that the literal construction advances the strong policy goals of finality[45] and certainty[46] reflected by Bankruptcy Rules.

The need for finality and certainty is particularly acute in bankruptcy.[47] In the case of exemptions declared by the debtor in the bankruptcy schedules, final determination of the debtor's entitlement to the exemption claimed is made by the court following a timely filed objection, or, if no objection is timely filed, by the default rules established by section 522(l) and Rule 4003(b).[48] After expiration of the time for filing objections, debtors can be assured that actions which they take with respect to their property will not be questioned for an indeterminate period of time in the future.[49] According to the court, "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."[50]

The *Taylor* decision did not consider the nature of the objection which the trustee must file to satisfy the requirements of Rule 4003(b). In particular, does Rule 4003(b) authorize an informal objection, or must the trustee file a formal document denominated "Objection to Exemption?" Does *Taylor*'s strict constructionist doctrine prohibit reliance on informal objection doctrines? These issues will be the considered in the analysis which follows.

B. Current Doctrinal Approaches to Untimely Filed Objections: Informal Objection Doctrines

Section 522(l) of the Code provides that property the debtor claims as exempt is exempt if an objection is not timely filed.[51] The Supreme Court's decision in

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45. *See Taylor*, 503 U.S. at 644 ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."); *see also In re* Kazi, 985 F.2d 318, 322 (7th Cir. 1993) ("It would be inconsistent with Taylor's emphasis on finality to allow objecting parties to raise the issue of the debtors' actual notice of opposition to claimed exemptions after the 30-day period has run."); Redfield v. Peat, Marwick, Mitchell & Co. (*In re* Robertson), 105 B.R. 440, 449 (Bankr. ND. Ill. 1989); *In re* Kjerstad, 56 B.R. 260, 262 (Bankr. D.S.D. 1984) ("There is no finality for a debtor who has not been served with an objection, notwithstanding the fact that the objection is filed with the Clerk of the Bankruptcy Court . . . . [P]rejudice to the debtor will be presumed when considered in the light of the applicable rules and the policy of finality behind them.").

46. *See Taylor*, 938 F.2d at 424. The Supreme Court's decision in *Taylor* only identified finality as the policy the decision advances; however, the decision does not preclude certainty as a second policy goal of Rule 4003(b).

47. *See id.* at 425 ("This need is reflected by Bankruptcy Rule 9006, which states that '[i]n the interest of prompt administration of bankruptcy cases certain time periods may not be extended.' (citation omitted) Thus, where there is a date when the parties' rights can be finally determined — in this case, thirty days after the creditors' meeting if no objection is filed — the parties can proceed from that date knowing which property is property of the estate and which property belongs to the debtor."); *In re* Towns, 74 B.R. 563, 567 (Bankr. S.D. Iowa, 1987); *In re* Grethan, 14 B.R. 221, 225 (Bankr. N.D. Iowa, 1981); *In re* Van Pelt, 83 B.R. 617, 619 (Bankr. S.D. Iowa, 1987).

48. *See Taylor*, 503 U.S. at 643.

49. *See Taylor*, 938 F.2d at 425 ("The debtor from that day forward can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property.").

50. *See Taylor*, 503 U.S. at 644.

51. *See* 11 U.S.C. § 522(l) (1994).

Taylor precludes bankruptcy courts from conditioning exemptions on the debtor having a good faith claim to the exemptions or a valid statutory basis for the exemptions.[52] Courts were legitimately concerned that a literal application of section 522(l) would lead to a proliferation of the "exemption by declaration" phenomenon. The *Taylor* court recognized this concern, but pointed to alternative remedies available to the bankruptcy court to discourage proliferation of the "exemption by declaration" phenomenon.[53] However, the possibility that criminal or civil penalties may result from claiming fictitious exemptions would discourage this conduct by debtors and their attorneys.[54]

Many courts have taken more of an indirect approach to curbing proliferation of the "exemption by declaration" phenomenon. Rather than excusing the trustee's failure to timely object to a debtor's claim of exemptions, these courts have relied on informal objection doctrines to hold that the trustee has satisfied her obligation to timely object under Rule 4003(b). Other courts, however, reject these informal objection theories, holding that *Taylor* precludes reliance on such doctrines. Each of the informal objection doctrines, along with the strict constructionist doctrine applied in *Taylor*, will be examined in the materials that follow.

1. The Surrogate Objection Doctrine

The informal objection doctrine that evolved[55] from the "surrogate objection" doctrine and culminated with the "relation back" doctrine had its genesis in two analogous lines of cases. These cases have one factual similarity, a formal objection to claimed exemptions was not filed by the trustee. Under the first line of cases, courts generally avoided the consequence of the trustee's failure to file an objection by declaring that a pleading filed before expiration of the deadline constituted a "surrogate objection," thus abolishing the need for a formal objection.[56] These

52. *See Taylor*, 503 U S. at 643. In response to the Trustee's argument that "courts may invalidate a claimed exemption after expiration of the 30-day period if the debtor did not have a good-faith or reasonably disputable basis for claiming it", the Supreme Court stated: "We reject Taylor's argument." *Id.*

53. *Id.* at 644. The Court stated that "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings." *Id.*; *see, e.g.*, 11 U.S.C. § 727(a)(4)(B) (1994) (authorizing denial of discharge for presenting fraudulent claims); RULE 1008 (requiring filings to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury); RULE 9011 (authorizing sanctions for signing certain documents not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); 18 U.S.C. § 152 (1996) (imposing criminal penalties for fraud in bankruptcy cases). These provisions may limit bad-faith claims of exemptions by debtors.

54. *See* Ferguson, *supra* note 4, at 61-93.

55. The analysis of the application of the relation back doctrine in this context, much like Darwin's theory of evolution, is an analytical construct. Therefore, the date a case is decided is not crucial to charting the evolution of this doctrine. The decision's date, like fossil remains scientists discover and utilize in constructing the evolution theory, may be a snapshot in time that displays the evolutionary process, rather than the fully evolved doctrine.

56. *See* Liberty State Bank and Trust v. Grosslight (*In re* Grosslight), 757 F.2d 773, 777 (6th Cir. 1985) (treating an adversary proceeding as an objection to the debtor's claim of exemption); *In re* Dembs, 757 F.2d 777, 780-81 (6th Cir. 1985) (treating complaint as objection, but denying the objection because

courts concluded that the surrogate objection filed by the trustee within the limitations period of Rule 4003(b) comprised the objection to the debtor's claim of exemptions.[57]

Two Sixth Circuit decisions, both decided the same day, illustrate this doctrine. In *Matter of Dembs*,[58] a creditor brought an adversary action to satisfy a state court judgment out of the Dembs' entireties property three months after the debtors' Chapter 7 discharge was granted. In framing the issue, the Sixth Circuit implicitly determined that the creditors' adversary complaint constituted a surrogate objection.[59] The court stated that "if the plaintiff's complaint is taken as a timely objection to the claim of exemption, the objection may well be valid."[60] The court concluded that the issue before it was therefore "whether the complaint was timely."[61] Timeliness of the complaint is relevant in the context of Rule 4003(b) only if the complaint can constitute an objection.

Because neither Rule 4003 nor its precursor, Rule 403, applied, the *Dembs* court resolved the timeliness issue by concluding "[t]here was thus no time limit imposed by rule on the creditor's objection to the claimed exemption";[62] therefore, the complaint had to satisfy grounds for revocation of discharge under 11 U.S.C. § 727(b).[63] The court concluded that no such grounds were demonstrated. The significance of *Dembs* was the court's determination that the complaint filed by the creditor constituted a surrogate objection.

The Sixth Circuit reached a similar conclusion in *In re Grosslight*.[64] In *Grosslight*, Liberty State Bank & Trust instituted an adversary proceeding twenty-

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it was filed post-discharge); Young v. Adler (*In re* Young), 806 F.2d 1303, 1305 (5th Cir. 1987) (trustee's motion requesting all future annuity payments be turned over to the trustee was effective as an objection, relying, however on notice-based doctrine); *In re* Starns, 52 B.R. 405, 411 (S.D. Tex. 1985) (filing motion for relief from the automatic stay was sufficient to bring the issue before the court in a timely manner with sufficient notice to interested parties, however, relying on notice-based doctrine); Applebee v. Brawn (*In re* Brawn), 138 B.R. 327, 333 n.29 (Bankr. D. Me. 1992) ("Plaintiffs' response to Hayward's § 522(f) motion qualifies, in and of itself, as the 'objection' Rule 4003(b) requires.").

57. *See Grosslight*, 757 F.2d at 777; *Dembs*, 757 F.2d at 779; *Young*, 806 F.2d at 1305; *Brawn*, 138 B.R. at 333 n.29.

58. 757 F.2d 777 (6th Cir. 1985).

59. *See id.* at 779.

60. *Id.* at 779.

61. *Id.*

62. *See id.* at 781. According to the *Dembs*' court:

> The question here, however, is whether Rule 4003 had taken effect on May 31, 1983, the date plaintiff first sought to reach the entireties property in this case. The Supreme Court transmitted these rules to Congress on April 25, 1983. They took effect on August 1, 1983, and are applicable to proceedings pending on that date, except to the extent that in the opinion of the court their application in a pending proceeding would not be feasible or would work injustice. This case was still pending on August 1, 1983, but we do not think the rules can be applied retroactively to actions already taken by the parties, for they were without notice that a restrictive rule might be applied."

Id. at 780.

63. *See id.* at 781. Section 727 is the discharge provision of the Bankruptcy Code. A Chapter 7 debtor is granted discharge unless the debtor has engaged in any number of ten offenses.

64. 757 F.2d 773 (6th Cir. 1985).

four days after the debtors, Terry and Sandra Grosslight, filed bankruptcy. The Grosslights were both signatories on a promissory note in favor of the Bank. The debtors filed bankruptcy approximately one year after the bank instituted a civil action in state court to enforce their liability on the promissory note. Rather than filing an objection to the Grosslights' claim that their entireties property was exempt, Liberty filed an adversary proceeding seeking relief from the automatic stay to allow it to proceed with its state court action.[65] Liberty wished to reach the Grosslights' entireties property by this procedure.

Relying on its decision in *Dembs*, the Sixth Circuit ruled that it would "treat this adversary proceeding as an objection to the claim of exemptions."[66] In reaching this conclusion, the Sixth Circuit reasoned that although the bank did not satisfy the letter of the procedure set forth in Rule 4003(b), the court was "satisfied that [Liberty's] failure to do so resulted from an excusable uncertainty as to the proper procedure and that its filing did meet procedural concerns."[67]

In addition to the Sixth Circuit's decisions recognizing that motions for relief from the automatic stay[68] and adversary complaints[69] are surrogate objections, other courts have added to the litany of pleadings that qualify as surrogate objections.[70] The essential element of the surrogate objection doctrine is that the trustee file a pleading within the limitations period of Rule 4003(b) raising the basis for the trustee's objection to the debtor's exemption claim.[71] However, for courts following the "notice-based" doctrine (covered in the following section), the surrogate objection must also place the debtor on notice that the trustee objects to or disputes her exemption claim.

2. Notice-Based Doctrine

In the second line of cases in the doctrinal evolution of the informal objection theory, as in the first line of cases discussed above, the trustee generally never filed an objection to the debtor's claim of exemption. The analytical approach taken by these courts in determining whether Rule 4003(b) is satisfied is referred to as the "notice-based" doctrine. In terms of what constitutes an informal objection, the notice-based theory is more liberal than the surrogate objection theory.[72] The

65. *See id.* at 774.

66. *Id.* at 777.

67. *Id. But see In re* Indvik, 118 B.R. 993, 1001 (Bankr. N.D. Iowa 1990) (disagreeing with the Sixth Circuit's ruling in *Grosslight*).

68. *See Grosslight*, 757 F.2d at 777.

69. *See Dembs*, 757 F.2d at 779.

70. *See In re* Young, 806 F.2d 1303, 1305 (5th Cir. 1987) (trustee's motion requesting all future annuity payments be turned over to the trustee was effective as an objection, but relying on notice based analysis); *In re* Brawn, 138 B.R. 327, 333 n.29 (Bankr. D. Me. 1992) ("Plaintiffs' response to Hayward's § 522(f) motion qualifies, in and of itself, as the 'objection' Rule 4003(b) requires.").

71. *See Dembs*, 757 F.2d at 780; *Grosslight*, 757 F.2d at 777; *Young*, 806 F.2d at 1305 (trustee's motion requesting all future annuity payments be turned over to the trustee was effective as an objection, but relying on notice based analysis); *Brawn*, 138 B.R. at 333 n.29.

72. *See In re* Indvik, 118 B.R. 993, 1001 (Bankr. N.D. Iowa. 1990) (stating that the *Young* "decision is too liberal in its reading of what constitutes an objection to exemptions.").

court's determination that Rule 4003(b) "establishes a notice procedure to alert the debtors that the property claimed as exempt cannot be so treated until the controversy surrounding its status is resolved,"[73] or that its purpose is to provide the debtor notice that her exemption claim is disputed,[74] is crucial to application of the notice-based theory. The critical element of this theory is that the debtor receive actual notice that the trustee disputes the exemption claim within the limitations period of Rule 4003(b).

In *In re Earnest*,[75] the debtors claimed that proceeds of the sale of their homestead were exempt.[76] The trustee notified the debtors shortly after commencement of the Chapter 7 proceeding of the trustee's continuing interest in the proceeds. However, the trustee failed to file formal objections within the time designated for filing objections.[77] In one of two consolidated cases in *Earnest*, the trustee filed a formal objection one year after the debtor received the proceeds of the sale of homestead property. In the other, the debtor requested a determination by the court of the exempt status of the homestead proceeds.

The court concluded that, because the debtors "received actual notice from their trustees very early in their proceedings that the trustees questioned the status of the allegedly exempt promissory notes,"[78] "the steps the trustees did take were sufficient to bring the issue before the court in a timely manner with sufficient notice to interested parties and met the intent of the rule."[79] The court found support for this conclusion by recognizing that "the purpose of the time limits under . . . Bankruptcy 4003 is to encourage early determination of exemption questions so all parties may then freely pursue their rights with regard to the exempt property."[80] To achieve this end, the court resolved that Rule 4003 "also establishes

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73. *In re* Earnest, 42 B.R. 395, 401 (Bankr. D. Ore. 1984); *In re* Starns, 52 B.R. 405, 409 (Bankr. S.D. Tex. 1985).

74. *See Young*, 806 F.2d at 1305 ("The basic purpose of the thirty day requirement in Rule 4003(b) is to ensure timely notice to debtors that the trustee objects to their claimed exemptions."); *see also In re* Peterson, 920 F.2d 1389, 1392 n.4 (8th Cir. 1990) (agreeing with the Fifth Circuit "that the primary purpose of Rule 4003(b) is to ensure timely notice of the trustee's objection to a claimed exemption."); Geekie v. Owens (*In re* Owen), 74 B.R. 697, 698 (Bankr. C.D. Ill. 1987) ("[T]he Court believes the Trustee has complied with the basic purpose of the thirty day requirement of Rule 4003(b), which is to ensure timely notice to debtors that the trustee objects to their claimed exemptions."); *In re* Stanley, 143 B.R. 900, 904 (Bankr. W.D. Mo. 1992).

75. 42 B.R. 395 (Bankr. D. Or. 1984).

76. *Id.* at 396-97. *Earnest* actually involves two separate cases in which each debtor sold their respective homes prior to filing bankruptcy. Both debtors received promissory notes as consideration for the respective transfers. Within a year of each transaction, the debtors filed bankruptcy and each claimed the proceeds of the promissory notes exempt as homestead property.

77. *See id.* at 400. Rule 4003 was not in effect at the time of the trustees' decisions not to file formal objections to the claims of exemption. The trustees failed to follow procedures established by local bankruptcy rules for filing timely objections to the debtor's claims of exemptions. *Id.*

78. *Id.* at 401.

79. *Id.*

80. *Id.* at 401.

a notice procedure to alert the debtors that the property claimed exempt cannot be so treated until the controversy surrounding its status is resolved."[81]

In *In re Starns*,[82] the court refused to treat the limitations period of Rule 4003 as a "technical pleading requirement."[83] The trustee in *Starns* filed a motion for relief from the automatic stay before the meeting of creditors.[84] The trustee sought relief from the automatic stay to institute foreclosure proceedings against all nonexempt real property, including two tracts of real estate the debtor claimed as exempt. The debtor argued that because the motion for relief from the automatic stay was filed before the meeting of creditors, and hence before Rule 4003(b)'s thirty-day period began to run, the motion did not qualify as an objection filed within thirty days following the meeting of creditors as Rule 4003(b) requires.

Adopting the rationale of *Earnest*, the court in *Starns* determined that the intent of Rule 4003 was satisfied because "the Debtor received actual notice from Freedman early in the proceeding that the scheduled exemptions were disputed."[85] According to the court, the steps taken by the trustee in filing the motion for relief from the automatic stay before the beginning of the limitations period of Rule 4003(b) "were sufficient to bring the issue before the court in a timely manner with sufficient notice to interested parties."[86]

Other courts have further refined the informal objection doctrine by merging the notice-based theory and the surrogate objection theory, so that even where the surrogate objection is filed within the limitations period, the surrogate objection must withstand scrutiny under the notice-based analysis.[87]

The Eighth Circuit's decision in *In re Peterson*[88] illustrates this merger. The debtors' initial bankruptcy schedules did not indicate that they had an ownership interest in a house they built on land owned by the debtor's father. Approximately one month after the meeting of creditors, the trustee sent a letter to the debtors informing them that he would seek recovery of the value of the improvements

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81. *Id.*

82. 52 B.R. 405 (S.D. Tex. 1985).

83. *Id.* at 410.

84. Rule 4003(b) measures the thirty-day period for filing objections to the debtor's claimed exemption beginning after conclusion of the meeting of creditors.

85. *Starns*, 52 B.R. at 411.

86. *Id.* at 411. Where the debtor claimed an annuity as exempt property after the trustee filed a motion claiming an interest in the annuity contract, the Fifth Circuit stated:

> Debtor amended his filing statement to include the annuity he claims to be exempt only after Trustee filed a motion arguing that the annuity is part of the bankruptcy estate. Trustee levied his objections, thus effectively complying with the rule, prior to Debtor's amending of his statement. Debtor does not, and surely cannot, complain that he did not have actual notice of Trustee's objections. To allow Debtor to gain refuge behind Rule 4003(b) when he amended his financial statement *in response* to Trustee's objections would be to elevate form over substance.

In re Young, 806 F.2d 1303, 1305 (5th Cir. 1986).

87. *See In re* Peterson, 920 F.2d 1389, 1391-92 (8th Cir. 1990); Palatine National Bank v. Harrigan (*In re* Harrigan), 74 B.R. 224, 229-30 (Bankr. N.D. Ill. 1987); Geekie v. Owen (*In re* Owen), 74 B.R. 697, 698 (Bankr. C.D. Ill. 1987); *In re* Stanley, 143 B.R. 900, 904 (Bankr. W.D. Mo. 1992).

88. 920 F.2d 1389 (8th Cir. 1990). *Peterson* was decided before *Taylor*.

constructed on the land. The trustee advised the debtors they could avoid this if they amended the bankruptcy schedules to claim the property as exempt. Almost a year later the trustee sent a second letter to the debtors informing them that he might file fraudulent transfer actions to recover the value of real estate for the bankruptcy estate.

Later that month the trustee filed an adversary action in which he sought alternative remedies: either to have the bankruptcy court transfer the value of the property to the estate or, if the court determined that constructing improvements on the land constituted a transfer, to nullify this transfer. On June 14, 1988, the debtors amended their bankruptcy schedules and asserted a homestead exemption claim in the home. The trustee did not file a formal objection to the debtors' exemption claim until July 18, 1988, well beyond the limitations period of Rule 4003(b). The trustee argued that his objection was not untimely because his previous letters to the debtors and the adversary proceeding filed against the debtors provided actual notice that the trustee objected to the debtors' claim of exemption.[89]

The Eighth Circuit ruled that neither the trustee's correspondence to the debtors nor the complaint filed in the bankruptcy court provided notice sufficient to satisfy the requirements of Rule 4003(b).[90] In rejecting the trustee's reliance on both the *In re Owen*[91] and *In re Young*[92] decisions, the Court pronounced that surrogate objections must also meet the notice-based standard in order to satisfy the notice requirement of Rule 4003(b). According to the court, the merger standard was implicit in both the *Owen*[93] and *Young*[94] decisions relied on by the trustees. The trustee's complaint in the *Owen* decision, according to the Eighth Circuit in *Peterson*, "expressly objected to the homestead exemption."[95] It follows, therefore, that the *Owen* decision stands for the proposition that there must be an express objection to the claimed exemption in the surrogate document if the surrogate objection is to satisfy the notice requirement of Rule 4003(b).

In distinguishing the *Young* decision, the Eighth Circuit in *Peterson* decided that the surrogate objection would also satisfy the notice requirements of Rule 4003(b) if the trustee implicitly objected to the debtor's claim of exemption. According to the court, the requirement that something in the complaint must put the debtor on notice of the trustee's objection to the claimed exemption logically follows from the following statement by the *Young* court: "Debtor does not, and surely cannot, complain that he did not have actual notice of Trustee's objections."[96] "The logical implication of this statement is that there must have been something in the

89. *See id.* at 1391.

90. *Id.* ("[N]owhere in the Trustee's complaint or his correspondence with the Debtors is there any mention of the claimed homestead exemption's invalidity under the relevant law.").

91. 74 B.R. 697 (Bankr. C.D. Ill. 1987).

92. 806 F.2d 1303 (5th Cir. 1987).

93. *See Peterson*, 920 F.2d at 1391.

94. *See id.* at 1392.

95. *See id.* at 1391.

96. *Young*, 806 F.2d at 1305.

complaint that provided notice of the trustee's objection."[97] "[T]here [was] nothing in the Trustee's complaint or correspondence that would put the Debtors on notice that the Trustee objected to their claimed . . . exemption."[98] Therefore, regardless of the form of notice to the debtor,[99] the actions of the trustee must satisfy the notice-based theory.[100]

3. Relation Back Doctrine

a) Relation Back and Federal Rule of Civil Procedure 15(c)

The "relation back" doctrine, as expressed in Rule 15(c) of the Federal Rules of Civil Procedure, has both common law and statutory roots.[101] This doctrine was regularly applied by federal courts prior to the adoption of the Federal Rules.[102] The principal concept underlying Rule 15 is that once suit is instituted, the parties are not entitled to the protection afforded by the statute of limitations against a claim or defense, later asserted in an amended pleading, that arose out of the same conduct or transaction that was the basis for the original suit.[103]

Rule 15(c)[104] establishes the standard for determining when an amendment will relate back to the date of the originally filed pleading. Under the Rule, if a claim or defense asserted in an amended pleading arises out of the same conduct, transaction, or occurrence established in the original pleading, the amendment relates back to the date of the original pleading.[105] The amendment will not relate back if it asserts a cause of action founded on a different transaction,[106] separate acts,[107] "separate

97. *Peterson*, 920 F.2d at 1392.

98. *Id.*; *see also In re* Harrigan, 74 B.R. 224, 230 (Bankr. N.D. Ill. 1987) ("The Bank cannot escape the requirements of Rule 4003(b) by initiating state court proceedings that did not adequately put the debtors on notice that their exemptions were being contested."); *In re* Brawn, 138 B.R. 327, 333 (Bankr. D. Me. 1992) ("Thus, although they did not file a distinct objection at first, plaintiffs manifested their intention to contest Hayward's $60,000 exemption claim and effectively communicated that intention to Hayward and the court well within Rule 4003(b)'s thirty day period."); *In re* Stanley, 143 B.R. 900, 904 (Bankr. W.D. Mo. 1992) ("In this case, it is clear that the debtor and her attorney were quite aware of the Bank's objection to the propriety of the debtor's exemption claimed . . . . In its motion [for relief from the automatic stay], the Bank alleged that the debtor held no equity in the real estate in question, which would preclude the debtor from claiming the homestead exemption under Missouri law.").

99. Some courts have limited the form notice within the limitation period must take. Therefore, a letter to the debtor that the trustee questions the exemptions claim may not be a formal enough document. *See Peterson*, 920 F.2d at 1392.

100. *See id.*

101. *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1471 (1990) [hereinafter WRIGHT].

102. *See id.* at 503.

103. *See* 6A WRIGHT, *supra* note 101, § 1496 at 64.

104. FED. R. CIV. PRO. 15(c) in relevant part provides: "An amendment of a pleading relates back to the date of the original pleading when . . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." *Id.*

105. *See id.*

106. *See* Resolution Trust Corp. v. Norris, 830 F.Supp. 351, 360-61 (S.D. Tex. 1993) (claim based on new loan does not relate back).

107. *See* Hunt v. American Bank & Trust Co. of Baton Rouge, 783 F.2d 1011, 1014 (11th Cir.

violation of the same statute,"[108] separate occurrence,[109] or separate conduct[110] than in the original pleading. However, changing the theory relied on in the initial complaint does not run afoul of Rule 15(c),[111] neither does an amendment "correct[ing] technical deficiencies or expand[ing] or modify[ing] the facts alleged in the earlier pleading,"[112] so long as the modification or correction does not "significantly alter the claim or defense."[113]

Rule 15(c)'s function is not simply to promote the joinder of claims and parties.[114] If its function were merely to promote joinder of parties and claims, the "identity of transaction" test discussed above would be the only criterion for determining whether amendments relate back.[115] However, since Rule 15(c)'s primary function is to ameliorate the effects of the statute of limitations when amendments are made after expiration of the period of limitation,[116] courts reason that the original pleading must also provide the defendant adequate notice of acts giving rise to the claims in subsequent amendments.[117] The notice requirement is a judicially imposed element

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1986) (claims based on two allegedly fraudulent transactions did not relate back to original complaint, which alleged a separate transaction); Gromes v. Avco Corp., 964 F.2d 1330, 1334 (2nd Cir. 1992) ("To the extent that the 1987 refusal was a separate act, then Gromes' claim does not relate back to the date of the initial filing since that filing related only to the 1985 events."); *In re* Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig., 467 F. Supp. 227, 260 (W.D. Tex. 1979) (amended complaint did not relate back to original complaint, since it "allege[d] new events not even mentioned in the original complaint"); *In re* Crazy Eddie Secur. Litig., 747 F.Supp. 850, 855 (E.D.N.Y. 1990) (claims in amended complaint relating to stock sales in December 1985 and March 1986 did not relate back to original complaint, which alleged material misstatements in connection with sale in March 1985); *In re* Bausch & Lomb Secur. Litig., 941 F.Supp. 1352, 1366 (W.D.N.Y. 1996) ("In addition, these claims do not meet Rule 15(c)(2)'s requirement that 'the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .' The October 13 press release was not mentioned in the prior pleadings and constitutes a separate alleged act of fraud.").

108. 6A WRIGHT, *supra* note 101, § 1497 at 74.

109. *See* Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 808 F.Supp. 1474, 1482 (D. Nev. 1992).

110. *See* 6A WRIGHT, *supra* note 101, § 1497 at 70-74.

111. *See* Federal Deposit Ins. Corp. v. Bennett, 898 F.2d 477, 480 (5th Cir. 1990) ("The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." (quoting 6A. WRIGHT, *supra* note 101, § 149 at 94)).

112. *See* 6A WRIGHT, *supra* note 101, § 1497 at 74.

113. *Id.* at 84.

114. *See* Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 808 F.Supp. 1474, 1482 (D. Nev. 1992) ("Because the rationale of the relation back rule is to ameliorate the effect of the statute of limitations rather than to promote the joinder of claims and parties, the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim raised by the amended pleading." (footnote omitted)).

115. *See id.*

116. *See id.*; *see also* 6A WRIGHT, *supra* note 101, § 1497 at 85.

117. *See* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149-50 n.3 (1984).

> The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations

of Rule 15(c)'s relation back doctrine.[118] Therefore, only if the initial pleading "g[a]ve the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"[119] will the original pleading be one that could be rehabilitated by Rule 15(c)(2).[120] It is this judicially imposed notice requirement that is the basis for application of Rule 15(c)(2)'s relation back doctrine to informal objections to exemption claims.

b) Relation Back and Notice-Based Informal Exemption Objections

Although the notice-based informal objection cases can be characterized as implicitly applying the relation back doctrine, only a small number of bankruptcy courts have expressly applied Rule 15(c) in determining whether an amended objection relates back to an earlier objection filed within the limitations period of Rule 4003(b).[121] Bankruptcy courts relying on Rule 15(c) to determine whether a late-filed objection relates back to an earlier objection have done so without considering whether the court is authorized to apply Rule 15(c) to contested matters such as proceedings involving objections to the debtor's claim of exemption.[122]

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were intended to provide. Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Because the initial "pleading" did not contain such notice, it was not an original pleading that could be rehabilitated by invoking Rule 15(c).

Id. at 150 n.3 (citations omitted); *see also* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1300 (5th Cir. 1971) ("As long as the amended complaint refers to the same transaction or occurrence that formed the basis for the original complaint and the defendant was put on notice of the claim by the first complaint, there will be no bar to amendment; even new defendants and new theories of recovery will be allowed.'" (quoting Travelers Ins. Co. v. Brown, 338 F.2d 229, 234 (5th Cir. 1964))); Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985) ("In determining if an amended complaint relates back, this Court regards as 'critical' whether the opposing party was put on notice regarding the claim raised therein." (citing *Woods Exploration*, 438 F.2d at 1299)).

118. *See* 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1497 at 85 (2d ed. 1987) ("[A]lthough not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim raised by the amended pleading.").

119. *Baldwin County Welcome Center*, 466 U.S. at 150 n.3 (quoting Conley v. Givson, 355 U.S. 41, 47 (1957).

120. *See id.*

121. *See In re* Blum, 39 B.R. 897, 898 (Bankr. S.D. Fla. 1984) ("The Debtors have argued that the objections to claimed exemptions which were first presented by the amended objections should be overruled as untimely and that the amendments should not relate back to the original, timely filing date. *See* Federal Rule of Civil Procedure 15(c). The Court agrees . . . ."); *In re* Froid, 89 B.R. 950, 952 (Bankr. M.D. Fla. 1988) ("Had the amended Objection merely raised new legal ground to support the original timely filed Objection, then the amended Objection would relate back to the original Objection." (citing *Blum*)); *In re* Swift, 124 B.R. 475, 479 (Bankr. W.D. Tex. 1991) ("Under standard principles of pleading, an amended pleading in pending litigation relates back to and supersedes the original pleading. Fed. R. Civ. P. 15(c).").

122. *See* FED. R. CIV. PRO. 15. Rule 15 ordinarily only applies to adversary proceedings. Since an objection to debtor's claim of exemptions is a contested matter, however, Rule 15 is inapplicable to this proceeding. However, the Bankruptcy court has the discretion to apply the Federal Rules of Civil Procedure, including Rule 15, to contested matters. *See* FED. R. BANKR. P. 9014.

The court in *In re Blum*,[123] for example, applied Rule 15(c) to determine that an amended objection to the debtors' exemption claims did not relate back to the initial objection, since it dealt with different exempt property than that in the initial objection.[124] On the other hand, if the amendment had merely advanced a new theory to support the original claim, the amendment would have related back to the initial objection.[125] The trustee in *Blum* amended his objections to the debtors' exemption claims. The alleged exempt property the trustee objected to in the original objection was different from the property objected to in the amended objections.

The bankruptcy court summarily agreed with the debtors' contention that Rule 15(c) prevented the amended objection from relating back to the date of the trustee's timely objections. The court agreed with the debtors because "the original objections clearly were directed only to the claimed exemptions for specific property then totaling in value $17,460.53, and the amended objections did not merely raise new legal grounds to support the original objections."[126] The court concluded that "since the objections set forth in the amended objections relate to different property claimed as exempt than that referred to in the original objections, the amended objections do not relate back to the original filing date."[127]

The Court in *Nuttleman v. Myers (In re Nuttleman)*[128] refused to apply the relation back doctrine where the original objection was dismissed because, according to the court, there was not an original pleading to which the amendment could relate back.[129] The trustee filed a timely objection to the debtors' claim of exemptions. The bankruptcy court later denied the objection, because the trustee had not filed the required proof of service.[130] The trustee then filed a second objection, along with the required proof of service. The debtor contended the second objection was untimely because it was filed beyond the thirty-day limitation period of Rule 4003(b). The district court rejected the bankruptcy court's ruling that the trustee's second objection related back to the date of the originally dismissed objection.[131]

The district court recognized that the "'relation back' doctrine is typically applied in situations where an amended complaint is filed after the running of the applicable statute of limitations,"[132] and that bankruptcy courts have applied the doctrine to "cases involving situations where an amended objection to a claim of exemptions has been filed."[133] The court concluded that since the bankruptcy court's order dismissing the original objection was neither vacated nor set aside,

123. 39 B.R. 897 (Bankr. S.D. Fla. 1984).
124. *See id.* at 898-99.
125. *See id.* at 898.
126. *Id.*
127. *Id.* at 898-99.
128. 128 B.R. 254 (D. Neb. 1991).
129. *See id.* at 256.
130. *See id.* at 255.
131. *See id.* at 256.
132. *Id.*
133. *Id.*

> there was no original objection in [sic] which the February 28, 1990 objection could "relate back" to. To allow the objection to "relate back" in this case would be like allowing an "amended" complaint to relate back to an original complaint subsequent to its dismissal by the court in order to avoid the statute of limitations. Clearly, this would be improper.[134]

The common element of both Rule 15(c)'s relation back doctrine and the notice-based doctrine is notice to the debtor by the original pleading. The court's reference to the notice-based objection cases in *In re Sherf*[135] vaguely suggests that the notice-based informal objection doctrine was a disguised application of the relation back doctrine. The court in *Sherf* considered objections to discharge analogous to informal objections to claims of exemptions. The court justified application of the relation back doctrine to Rule 4004's time deadline for objecting to discharge by relying on notice-based informal objection cases.[136] It was in making its reference to notice-based cases that the court suggested that the notice-based informal objection doctrine was a disguised application of the relation back doctrine.[137]

The creditor in *Sherf* timely filed a document in the bankruptcy court denominated an "objection to discharge."[138] The clerk of the bankruptcy court advised the creditor that it should have filed a "complaint" objecting to discharge. After the creditor filed a pleading denominated "complaint objecting to discharge," the bankruptcy clerk's office informed the creditors that the complaint was improperly filed.[139] The creditors then filed an untimely motion for leave to file a late complaint objecting to discharge.[140] The court's analysis in allowing the motion is instructive.

The *Sherf* court relied on the Fifth Circuit's opinion in *Matter of McGuirt*[141] and the bankruptcy court's decision in *Rose v. Beltz (In re Beltz)*[142] for the proposition that an untimely filed objection to discharge could relate back to an earlier pleading, if the earlier pleading provided the debtor actual notice of the existence and nature of the objection to discharge.[143] In the next paragraph of the opinion, the *Sherf* court noted that "[v]arious court rulings on the timeliness of the filing of pleading involving deadlines set by other provisions of the Bankruptcy Rules have employed

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134. *Id.*; *see also* Dade County v. Rohr Industries, 826 F.2d 983, 989 (11th Cir. 1987) (Dade County failed to appeal the district court's dismissal of its initial complaint. It instead filed a second complaint that the court ruled was time barred. The court refused to apply the relation back doctrine to find that the second complaint was timely because it related back to the date of the initial complaint.).

135. 135 B.R. 810 (Bankr. S.D. Tex. 1991).

136. *See id.* at 814.

137. *See id.* at 813.

138. *Id.* at 811.

139. *See id.* at 812.

140. *See id.*

141. 879 F.2d 182 (5th Cir. 1989).

142. 51 B.R. 84 (Bankr. S.D. Ohio 1985).

143. *See Sherf*, 135 B.R. at 812-13.

the 'relation back' or notice based exception to the involved Bankruptcy Rule."[144] One of the Bankruptcy Rules the court referred to was Rule 4003(b).

The facts of *Starns*,[145] a notice-based informal objection case relied on by the *Sherf* court, obscured the connection between the relation back and the notice-based informal objection doctrines. Notice is the common element of both doctrines and analysis of this element is identical in both doctrines. Because the trustee in *Starns* never filed a formal objection to the debtor's exemption, the *Starns* court only engaged in the first part of the analysis: whether a motion for relief from the automatic stay could constitute the objection.[146] The court concluded that the motion could be the objection, because it provided the debtor notice that the trustee objected to the claimed exemption.[147] The *Starns* court had no occasion to speak directly on whether a subsequent filing could relate back because there was no subsequent filing that could be argued was an amendment.

The *Sherf* decision was a precursor to those later decisions that can be construed to support the notion that notice was a shared element of the notice-based informal objection and the relation back doctrines. The Eighth Circuit's analysis in *Halverson v. Peterson* (*In re Peterson*)[148] can support the conclusion that the notice element of both the notice-based informal objection and the relation back doctrines are identical. In *Peterson*, the Eighth Circuit ruled that neither the trustee's correspondence to the debtors nor the complaint filed in the bankruptcy court provided notice sufficient to satisfy the requirements of Rule 4003(b).[149] Before filing an adversary action, the trustee in *Peterson* had informed the debtors that by amending their claim of exemption, they would prevent the trustee from distributing certain property of the estate. The court rejected the trustee's argument that his two letters to the debtors and the adversary action he filed provided sufficient notice to meet the requirements of Rule 4003(b). In its analysis, the court expressly articulated the test for determining whether a surrogate objection satisfied the notice-based informal objection doctrine.[150] The court's analysis of the *Owen*[151] and *Young*[152] decisions support the contention that the notice-based informal objection doctrine was in fact a relation back analysis.

The notice standard pronounced by the court in *Peterson* is the same standard for determining whether the original objection provided the debtor sufficient notice to justify application of the relation back doctrine. According to the Eighth Circuit in *Peterson*, the original objection provides the debtor sufficient notice if in it the trustee

144. *Id.* at 813.

145. 52 B.R. 405 (Bankr. S.D. Tex. 1985).

146. *See id.* at 411.

147. *See id.*

148. 920 F.2d 1389 (8th Cir. 1990). See the discussion accompanying notes 88-89 for a detailed analysis of the facts of *Peterson*.

149. *See id.* at 1391 ("[N]owhere in the Trustee's complaint or his correspondence with the Debtors is there any mention of the claimed homestead exemption's invalidity under relevant law.").

150. *See id.* at 1393; *see supra* text accompanying notes 90-100.

151. Geekie v. Owen (*In re* Owen), 74 B.R. 697 (Bankr. C.D. Ill. 1987).

152. Young v. Adler (*In re* Young), 806 F.2d 1303 (5th Cir. 1987).

expressly objects to the exemption claim.[153] Implicated in the *Peterson* court's determination that the informal objection must expressly object to the exemption claim is the conclusion that in order to relate back to an earlier filed informal objection, the informal objection must expressly notify the debtor that the exemption claim is disputed.

The Eighth Circuit also concluded that the debtor is given the requisite notice if the court finds that the trustee's objection to the debtor's exemption claim is implicit from the language of the document.[154] The same reasoning may be applied in determining whether the prior document provided the debtor notice that the trustee objects to the debtor's claim of exemption so that an untimely filed formal objection would relate back to the timely informal objection. This conclusion follows from the *Peterson* court's conclusion that something in the complaint impliedly put the debtor on notice that the trustee objected to the claimed exemption.[155]

The notice-based objection cases represent an application of the notice element of the relation back doctrine to informal objections to exemption claims. If the late-filed formal objection to the debtor's claim of exemption arose out of the same conduct, transaction, or occurrence established in the informal objection, the amended or formal objection relates back to the timely informal notice of objection. Although the notice-based objection cases did not expressly determine that the late-filed formal objection arose out of the same conduct, transaction, or occurrence as the informal objection, this conclusion is implied in those decisions.

Beyond the limits inherent in requiring both adequate notice to the debtor and requiring that the formal objection arise out of the same transaction as the informal objection, there are other limits on the relation back principle in this context. The informal objection may be limited to documents that were filed. Rule 4003(b) provides that "[t]he trustee . . . may *file* objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors."[156] The term "file" under Rule 5005(a)[157] means filed with the clerk of the court in the district where the bankruptcy case is pending.[158] The term can also mean filed with the bankruptcy judge, if the judge so permits.[159] The term "file" also applies to a

153. *See Peterson*, 920 F.2d at 1392.

154. *See id.*

155. *See id.*

156. FED. R. BANKR. P. 4003(b) (emphasis added).

157. FED. R. BANKR. P. 5005(a). The Rule provides, in relevant part:

> The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

Id.

158. *See id.*

159. *See id.*

document erroneously filed with specific officers of the court.[160] Therefore, informal objections to which the relation back doctrine applies is limited to documents delivered to the court, delivered to the clerk, or misdelivered to an officer of the court or the trustee within the meaning of Rule 5005(c).[161]

Because Rule 4003(b) provides that "[t]he trustee or any creditor may file objections,"[162] it can be argued that filing an objection is permissive rather than mandatory. Therefore, for the purpose of application of the relation back doctrine, an objection need not be filed as defined by Rule 5005. If this argument is valid, the number of documents that would qualify as informal objections would be larger than the class of documents defined in Rule 5005. Under this analysis, there would be no requirement that the document be filed. The bankruptcy court asked to determine whether an informal objection satisfies the relation back doctrine and would not be limited to relying only on documents that were filed with the bankruptcy court and its officers.

Since filing an objection would not be required under this theory, the first issue in application of the relation back doctrine would therefore be whether the debtor had notice within the limitations period that her exemption claim was disputed. That notice may come from an objection to the debtor's discharge, a motion for relief from the automatic stay, or a letter mailed to the debtor. If the debtor has notice within the limitations period of Rule 4003(b) that the exemption claim is disputed, the formal objection, although filed after expiration of the limitations period, would relate back to the date notice was given to the debtor. Such a conclusion would be inconsistent with the text of Rule 4003(b), which does not make objecting to the debtor's exemption claims mandatory. Deciding whether or not to object to the debtor's claim of exemption is left to the discretion of the trustee. However, if the trustee does decide to object, the objection must be a writing filed with the bankruptcy court.[163]

4. Strict Constructionist Doctrine

Although the issue of whether an informal exemption objection may serve as an objection under Rule 4003(b) was not before the Supreme Court in *Taylor v. Freeland & Kronz*,[164] some courts have considered the "strict constructionist" doctrine expressed by the Supreme Court equally applicable to informal objections

160. FED. R. BANKR. P. 5005(c). The Rule provides, in relevant part:

> A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court .... In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

Id.

161. *See In re* Vaughn Chevrolet, Inc., 160 B.R. 316 (Bankr. E.D. Tenn. 1993) (analyzing an informal proof of claim).

162. FED. R. BANKR. P. 4003(b) ("The trustee ... may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors ....").

163. *See supra* text accompanying notes 195-200.

164. 503 U.S. 638 (1992).

to exemption claims.[165] Although some courts have limited the *Taylor* decision in significant ways,[166] others have ruled that *Taylor* precludes application of the surrogate objection and the notice-based informal objection doctrines.[167] *In re Canino*[168] illustrates application of the strict constructionist doctrine to informal objection to claims of exemption.[169]

The debtors[170] claimed the equity in their residence, $155,053.57, as exempt under the homestead exemption. This exemption claim exceeded the statutory exemption available under California law. The debtors also claimed the value of their 1991 Ford Escort, $7500, as exempt. This exemption claim exceeded the statutory exemption limit by $6300.

The trustee did not file a formal written objection to the debtors' exemption claim. The trustee, however, had taken a course of action that could be interpreted as inconsistent with recognizing the legitimacy of the debtors' exemption claims. First, the trustee moved to employ a real estate broker to sell the debtors' residence. After initially denying the trustee's motion, the bankruptcy court granted the motion. After the residence was sold, the trustee claimed that the sale proceeds which exceeded the debtors' statutory homestead exemption limit was available for distribution to creditors. The trustee also took possession of the debtors' vehicle and notified all interested parties of his intention to sell the automobile. The sale of the automobile was conducted three days before the conclusion of the meeting of creditors. The trustee turned over only $1200 to the debtor, $6300 less than the exempt amount claimed by the debtors. The debtors asserted that the trustee could not contest the exemption claim for the first time after expiration of the thirty-day limitations period. The trustee, however, argued that his actions, all of which occurred within the thirty-

165. *See* Canino v. Bleau (*In re* Canino), 185 B.R. 584 (B.A.P. 9th Cir. 1995); Clark v. Kazi (*In re* Kazi), 125 B.R. 981, 989 (Bankr. S.D. Ill. 1991), *aff'd*, No. 91-001690-WDS, 1992 WL 611260 (S.D. Ill. Jan. 21, 1992), *aff'd*, 985 F.2d 318 (7th Cir. 1993).

166. *See* Brayshaw v. Brayshaw (*In re* Brayshaw), 912 F.2d 1255, 1257 (10th Cir. 1990) (ruling that the bankruptcy court must actually grant the trustee's motion to extend the period for objecting to the debtor's exemption before expiration of the 30-day period in Rule 4003(b)); Mercer v. Monzack, 53 F.3d 1, 3 (1st Cir. 1995) ("Nothing in *Taylor* intimates that 'property of the estate' not plainly listed in Schedule B-4 nonetheless becomes exempt by operation of law under section 522(l)."); Alderman v. Martinson (*In re* Alderman), 195 B.R. 106, 110 (B.A.P. 9th Cir. 1996) (ruling that the *Taylor* decision does not allow challenges to the validity of exemption after expiration of the 30-day limitation period, but does allow challenges to valuation of the property the debtor claims as exempt after expiration of the limitation period); Stoulig v. Traina, 169 B.R. 597, 601 (Bankr. E.D. La. 1994), *aff'd*, 45 F.3d 957 (5th Cir. 1995) (ruling that the bankruptcy court must act to grant the extension for objecting to the debtor's exemption claim before expiration of the 30-day period of Rule 4003(b)).

167. *See Canino*, 185 B.R. at 592 (Since Rule 4003(b) "does not provide for a formal objection, it is illogical that there could be an informal objection under its provisions."); *Kazi*, 125 B.R. at 989 ("Whether debtors had actual notice of the objections within the time period prescribed by Rule 4003(b), however, is irrelevant."); *Kazi*, 985 F.2d at 322 ("Moreover, *Taylor* forecloses the trustee's 'actual notice' argument.").

168. 185 B.R. 584 (B.A.P. 9th Cir. 1995).

169. *See id.* at 592.

170. This case was originally filed as a joint petition. One of the joint petitioners who had been placed under conservatorship was dismissed from the bankruptcy case. *Id.* at 587-88.

day period of Rule 4003(b), constituted an informal objection to the debtors' claimed exemption. Therefore, his objection was timely.

The Ninth Circuit Bankruptcy Appellate Panel framed the issue as follows: "Whether the bankruptcy court erred by concluding that Trustee's activities in relation to the sale and distribution of the assets claimed by Debtor as exempt constituted an informal objection . . . ."[171] The debtor contended that the *Taylor* decision, requiring strict construction of the provisions of Rule 4003(b), was controlling. Therefore, the court was compelled to reject application of an informal objection doctrine.

In distinguishing its case from the *Taylor* decision, the *Canino* court noted several factual dissimilarities. In particular, the trustee in *Taylor* did nothing in response to the debtor's exemption claim, while the trustee in *Canino* took several steps that were inconsistent with the debtor's exemption claim, including, "[taking] possession of the car, notic[ing] it for sale and [selling] it, . . . [and] appl[ying] for employment of a real estate broker to sell the residence . . . ."[172] The court, however, did not agree that the actions of the trustee rose to the level of an objection under Rule 4003.[173] The court reasoned that in taking possession of the car, selling it, and in employing a real estate broker to sell the debtor's residence, the trustee was simply acting in accordance with his statutory duties to collect property of the estate and convert it to money.[174] If the trustee believed the exemption claim was invalid, "it was his duty to object to the claimed exemptions, which he did not do."[175]

The court disagreed with the bankruptcy court's ruling that the actions of the trustee constituted an informal objection.[176] The court also rejected the bankruptcy court's analogizing informal objections under Rule 4003 to informal proof of claims under Rule 3001(a).[177] To successfully reach its conclusion that the trustee's actions amounted to an informal objection, the bankruptcy court assumed that the reasoning which led courts to adopt informal proof of claims under Rule 3001(a) could be applied to Rule 4003.[178] According to the court, the procedure for objecting to exemption claims under Rule 4003 is so substantially different from the procedural requirements of Rule 3001 that reliance on analysis of informal proof of claims cases is not justified.[179] Rule 3001 prescribes an official form for filing proof of claims. No such official form exists, nor does Rule 4003 prescribe an official form for objecting to exemption claims.[180]

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171. *Id.* at 589.
172. *Id.* at 591.
173. *See id.*
174. *See id.*
175. *Id.* at 592.
176. *See id.*
177. *See id.* FED. R. BANKR. P. 3001(a) in relevant part provides that "[a] proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form."
178. *See Canino*, 185 B.R. at 592.
179. *See id.*
180. *See id.*

Further, a liberal amendment policy under Rule 3001 has led to validation of informal proofs of claims.[181] An informal proof of claim is logical because Rule 3001 explicitly provides an official form, and from this official form courts may determine whether the informal proof of claim arose "out of demands against the estate or out of correspondence between a creditor and the trustee or debtor-in-possession which demonstrates an intent on the part of the creditor to assert a claim against the bankruptcy estate."[182] This liberal amendment policy is contrasted with the narrow construction policy established by the Supreme Court in *Taylor*.[183] Rule 4003 "does not allude to an official form or specific writing, which could generate errors that amount to technicalities leading to a need to promote liberal amendment."[184] According to the *Canino* court, since Rule 4003 "does not provide for a formal objection, it is illogical that there could be an informal objection under its provision. In other words, there is either an objection or no objection."[185]

Finally, the court concluded that the trustee's actions did not satisfy the notice-based informal objection doctrine. According to the court, even if it were to accept the informal objection doctrine for the sake of argument, the trustee's actions did not satisfy its requirements. Drawing on the informal proof of claims analysis, the court noted that the lesson learned from informal proof analysis "is that the objection must be explicit and not prejudicial to the debtor."[186] The trustee's actions did not, according to the court, "constitute an explicit objection to the debtor's claimed exemptions."[187] Condoning de facto objections under Rule 4003 would encourage trustees and creditors to improperly seize assets as a means of informally objecting to the debtor's claimed exemptions, which may offend debtors due process rights.[188]

It could be argued that the debtor in *Canino* had no notice of the trustee's objection to the claimed exemption.[189] The decision, therefore, does not foreclose application of the notice-based doctrine. This issue was considered by the Seventh Circuit in *In re Kazi*.[190] In that case the "debtors had actual notice of the trustee's opposition to the claimed exemption within the 30-day period"[191] of Rule 4003(b).

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181. *See id.*

182. *Id.*

183. *See id.*

184. *Id.* at 592.

185. *Id.*

186. *See id.* at 591.

187. *Id.*

188. *See id.* at 592. The court stated:

> Unfortunately, it appears that to condone de facto objections under . . . [Rule] 4003, would mean that trustees and creditors everywhere will be improperly seizing assets . . . . [Rule] 4003 also provides for notice and hearing on the objection. The panel has grave misgivings that Trustee's actions, if accepted as an informal objection, would violate Debtor's due process rights or, at the least, be prejudicial to Debtor.

Id.

189. *See id.* at 591 ("Debtor stated that Trustee's actions were 'confusing' because she thought she was entitled to retain possession of the assets.").

190. 985 F.2d 318 (7th Cir. 1993).

191. *Id.* at 320 ("The parties agree also that debtors had actual notice of the trustee's opposition to the claimed exemption within the 30-day period.").

The trustee in *Kazi* argued "that failure to file a written objection to claimed exemption within the 30-day period does not mean a court may not consider the objection if the debtors had actual notice of the objection."[192] The *Kazi* court rejected this argument, ruling that *Taylor* "forecloses the trustee's 'actual notice' argument."[193] The court adopted the literal interpretative approach of *Taylor*. According to the court in *Kazi*, "[i]f the time limitation of Rule 4003(b) is to be interpreted literally, it follows that the requirement of written objections should also be interpreted literally. It would be inconsistent with Taylor's emphasis on finality to allow objecting parties to raise the issue of the debtors' actual notice of opposition to claimed exemptions after the 30-day period has run."[194]

The strict constructionist doctrine expressed by the Supreme Court is equally applicable to informal objections to exemption claims,[195] and requires rejection of informal objections that do not meet the requirements of Rule 4003(b). At minimum, the language of Rule 4003(b) limits what constitutes an informal objection. Rule 4003(b) provides that "[t]he trustee or any creditor *may* file objections to the list of property claimed as exempt."[196] The word "may" is "here used in its usual signification, there being nothing to show the intention of . . . [the Supreme Court] to affix to any other meaning."[197] Usually the word "may" implies permissive or discretionary conduct.[198] The word is an "auxiliary verb, qualifying the meaning of another verb . . . ."[199] The verb whose meaning the word "may" qualifies is the verb "file." Whatever meaning is given to the verb "file," that meaning is qualified in that the conduct, to "file," is permissive, not mandatory. Therefore, although the trustee is not required by Rule 4003(b) to file an objection to every claim of exemption made by debtors, the trustee may, at her discretion, file an objection to the debtors' claims of exemption.

The fact that the trustee has discretion to file or not to file gives us no clue as to the nature of the objection that Rule 4003(b) requires. The meaning of the word "file," however, tells what discretion the trustee has with regard to objections she does file. Under Rule 5005(a),[200] "objections and other papers required to be *filed*

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192. *Id.* at 321.

193. *Id.* at 322.

194. *Id.*

195. *See In re* Canino, 185 B.R. 584, 591 (Bankr. App. 9th Cir. 1995); *In re* Kazi, 125 B.R. 981, 988 (Bankr. S.D. Ill. 1991).

196. FED. R. BANKR. P. 4003(b) (emphasis added).

197. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 411 (1914). The advisory notes to the 1991 amendments to Rule 4003 shed some light on the meaning Congress intended: "Subdivision (b) is intended to facilitate the filing of objections to exemptions claimed on a supplemental schedule filed under Rule 1007(h)." FED. R. BANKR. P. 4003 advisory note.

198. *See* Shea v. Shea, 537 P.2d 417, 418 (Okla. 1975).

199. *Lexington Mill*, 232 U.S. at 411.

200. FED. R. BANKR. P. 5005(a). The Rule provides, in relevant part:

> The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with

by these rules . . . shall be filed with the clerk in the district where the case under the Code is pending."[201] Requiring the trustee to file the objection with the clerk in the district where the bankruptcy case is pending eliminates a series of items from consideration as objections. Conduct cannot be filed. Therefore, conduct that could be interpreted as inconsistent with recognizing the legitimacy of the debtor's exemption claims[202] cannot constitute an objection.[203]

The *Kazi* and *Canino* decisions are correct. In *Kazi*, the court ruled that *Taylor* foreclosed the argument that actual notice to the debtor, without a written objection, could satisfy Rule 4003(b)'s requirement to timely file an objection.[204] In *Canino*, the appellate court rejected the informal objection doctrine, not only because "it is illogical that there could be an informal objection . . . . "[205] but also because conduct providing the debtor notice does not rise to the level of an informal objection.[206]

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the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

Id.

201. *Id.* (emphasis added).

202. *See Canino*, 185 B.R. at 591.

203. The filing must be a writing. *In re* Kazi, 985 F.2d 318, 321 (7th Cir. 1993). Although filing means submitting a writing to the Clerk, the bankruptcy court has discretion to accept a written objection as filed under Rule 5005(a) if the objection it is filed with the bankruptcy judge, rather than the clerk of the court. See FED. R. BANKR. P. 5005(a), which provides that "objections and *other papers* required to be *filed* by these rules . . . shall be filed with the clerk in the district where the case under the Code in pending . . . ." The rule also prohibits the clerk from refusing "to accept for filing any petition or *other paper* presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices." *Id.* (emphasis added). The objection is also considered filed if erroneously delivered to the "United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court . . . ." FED. R. BANKR. P. 5005(c). The Rule provides, in relevant part:

> A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court . . . . In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

Id.

204. *See Kazi*, 985 F.2d at 322. In *Kazi*, the court stated:

> Moreover, *Taylor* forecloses the trustee's "actual notice" argument. If the time limitation of Rule 4003(b) is to be interpreted literally, it follows that the requirement of written objections should also be interpreted literally. It would be inconsistent with Taylor's emphasis on finality to allow objecting parties to raise the issue of the debtors' actual notice of opposition to claimed exemptions after the 30-day period has run. Therefore, summary judgment for the debtors is affirmed on the issue under the "literal" approach adopted by the Supreme Court in Taylor.

Id.

205. *In re Canino*, 185 B.R. 584, 591 (B.A.P. 9th Cir. 1995).

206. *See id.*

These decisions may be limited to their facts. If a document is filed as that term is defined under Rule 5005(a), and the document explicitly objects to the debtor's exemption claim, it will constitute a valid objection under Rule 4003(b). This will be so regardless of whether the document is denominated an "Objection to Exemption Claims" or "Motion for Relief from the Automatic Stay."

III. Section 522(l), a Statute of Repose or Statute of Limitations?

Congress, in enacting section 522(l), promulgated a statutory provision that created corresponding rights in debtors and trustees. Rule 4003(b) simply limits the period within which those rights could be exercised. Under section 522(l), the bankruptcy debtor who properly files the list of property she claims is exempt has an inchoate exemption right that will vest unless a party in interest timely objects to the exemption claim.[207] The trustee can effectively prevent the debtor's exemption right from vesting, if he timely objects.[208] The trustee's right to prevent vesting of the debtor's exemption right may not be exercised if the objection is not filed within the limitations period of Rule 4003(b).[209]

Section 522(l) may be considered as either a statute of limitation or a statute of repose. Whether section 522(l) is a statute of limitation or a statute of repose may significantly affect bankruptcy courts' authority to apply the informal objection and relation back doctrines in resolving whether objections to the debtor's claim of exemption were timely filed, and may affect the trustee's ability to rely on those doctrines in an effort to prevent vesting of the debtor's exemption right.

After a general analysis of statutes of limitation and statutes of repose, this section of the article will argue that section 522(l) is more in the nature of a statute of repose. Therefore, after expiration of the repose period of Rule 4003(b), the trustee's right to object to the debtor's claim of exemption terminates. The fact that the trustee's objection right terminates after expiration of the repose period will not significantly affect reliance on the notice-based informal objection theories or the relation back doctrine.

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207. 11 U.S.C. § 522(l) (1994). Section 522(l), in relevant part, provides that "[t]he debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt." *See also Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44 ("The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt. [The trustee] cannot contest the exemption at this time whether or not [the debtor] had a colorable statutory basis for claiming it.").

208. FED. R. BANKR. P. 4003(b) establishes the time period for objecting to the debtor's list of exemptions. In relevant part, it provides:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the Court.

Id.

209. *See Taylor*, 503 U.S. at 643.

A. Overview of Statutes of Repose and Statutes of Limitations

Courts have not always been consistent in distinguishing between statutes of limitations and statutes of repose.[210] Unless there is an understanding of what meaning to attach to the term "statute of repose," there can be analytical difficulties.[211] Professor McGovern, a noted commentator on the constitutionality of statutes of repose, recognized five definitional formulations for distinguishing statutes of limitation and statutes of repose. Only four of those formulations are relevant for the purpose of this discussion. Under the first formulation, statutes of repose and statutes of limitation are identical creatures: they are legislative enactments that prescribe the period within which a cause of action may be brought.[212] "Older treatise writers and judges often used 'repose' and 'limitations' interchangeably."[213]

Statutes of limitation and statutes of repose may also be distinguished on policy grounds. Under the second formulation, limitation statutes serve a more limited function than do statutes of repose. Statutes of limitation serve to "reduce the evidentiary inequities created when defendants are forced to defend stale claims."[214] Evidentiary inequities arise because, under the "discovery rule,"[215] a statute of limitation begins to run when the cause of action accrues, that is when the plaintiff knows or should have known of her injuries.[216] Under the discovery rule, a plaintiff may not learn of her injuries for many years after the injuries occur.[217] Because a statute of limitation designates the time period, beginning with when injuries were discoverable, within which a cause of action must be filed, statutes of limitation "represent a public policy judgment by . . . [legislatures] as to the time at which an

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210. *See* Josephine H. Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 628 (1985) ("The terms 'statute of repose' can create analytical difficulties because it lacks a precise definition and often is confused with 'statute of limitations.'"); Lisa K. Mehs, *Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eight Circuit Allows Plaintiffs to Breathe Easier*, 24 CREIGHTON L. REV. 965, 966 (1991); Mark W. Peacock, *An Equitable Approach to Products Liability Statutes of Repose*, 14 N. ILL. U. L. REV. 223, 226 (1993);.

211. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 582 (1981).

212. *Id.*

213. McGovern, *supra* note 211, at 582-83.

214. *See* McGovern, *supra* note 211, at 583; *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945). In *Chase*,

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.

Id. at 314; *see also* Rumberg v. Weber Aircraft Corp., 424 F.Supp. 294, 298 (D.Cal. 1976) ("The purpose of the statute of limitations, in the oft-quoted words of Justice Holmes is to "(prevent) surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'").

215. *See* Hinkle v. Henderson, 85 F.3d 298, 301 (7th Cir. 1996).

216. *See id.*

217. *See id.*

action becomes too stale to proceed in its courts."[218] The primary concern is the prevention of stale claims, rather than the repose which the defendant receives because the limitations period has run. The repose given defendants by statutes of limitation is an incidental benefit.[219]

In contrast, a repose statute is "an act that promotes a policy of finality in legal relationships . . . ."[220] The primary function served by statutes of repose is "to relieve potential defendants from anxiety over liability for acts committed long ago."[221] While a statute of limitations defines the period within which, after the plaintiff knows or should have known of her injuries, a cause of action must be filed, a statute of repose "limits potential liability by limiting the time during which a cause of action can arise."[222] Because statutes of repose "make the filing of suit within a specified time period a substantive part of plaintiff's cause of action,"[223] they are considered substantive provisions.[224] The time for filing suit, with a repose statute,

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218. Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of limitation, then, are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, . . . although this may be their effect.") (citation omitted).

219. *See id.*

220. McGovern, *supra* note 211, at 583. According to Professor McGovern, a variety of statutory devices may be used to accomplish this result and, hence, because these may employ "[v]arious types of prescriptive time periods . . . [the time periods may] be defined as repose periods." *Id.* These include statutes of limitation, escheat, and adverse possession. However, according to McGovern, a statute of limitation "is designed to accomplish the more limited function of reducing the evidentiary inequities created when defendants are forced to defend stale claims." *Id.*; *see also Hinkle*, 85 F.3d at 302 ("[T]he statute of repose . . . embodies two essential and related purposes: to prevent indefinite potential liability for a particular act or omission . . . , and second, to afford defendants . . . greater certainty in predicting potential liability."); Shadburne v. Dalkon Shield Claimants Trust, 851 F.Supp. 712, 715 (D. Md. 1994) (identifying the second policy underlying statutes of repose and stating that "people are entitled to plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability"); Bruce v. Hamilton, 894 S.W.2d 274, 276 (Tenn. Ct. App. 1993) ("The three-year-limit in the medical malpractice statute of repose provided certainty as to the time period during which a health care provider may be subject to potential liability . . . ."), *overruled by* Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995). The *Cronin* decision did not overrule *Bruce v. Hamilton's* analysis of the distinction between statutes of repose and statutes of limitation. The *Cronin* court disagreed with *Hamilton's* ruling that Tennessee's saving statute was not applicable to Tennessee's statute of repose. *Cronin*, 906 S.W.2d at 913.

221. *Goad*, 831 F.2d at 511.

222. *Hinkle*, 85 F.3d at 301; *see also* Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) ("A statute of repose presents 'an absolute time limit beyond which liability no longer exists . . . .'" (quoting First United Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989))); Nesladek v. Ford Motor Co., 46 F.3d 734, 737 (8th Cir. 1995) ("A statute of repose, on the other hand, directly impacts on the accrual of a cause of action in the first instance. It operates as a statutory bar independent of the actions (or inaction) of the litigants — often before those litigants can ever be identified.") (citation omitted).

223. *Goad*, 831 F.2d at 511.

224. *See id.* at 511 ("Statutes of repose are meant to be a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights."); Delon Hampton & Assoc., Chartered v. Washington Metro. Area Transit Auth., 943 F.2d 355, 360-361 (4th Cir. 1991) ("unlike a "pure" statute of limitation that merely bars the maintenance of a remedy, the statute of repose bars the remedy and extinguishes the underlying cause of action. The exemption from suit accorded those named in the statute is a substantive right . . . ."); *Bruce*, 894 S.W.2d at 276 ("Statutes of repose are

"is engrafted onto a substantive right created by law."[225] This distinction between statutes of limitation and statutes of repose "correspond[s] to the distinction between procedural and substantive law."[226] "Statutes of repose are meant to be 'a substantive definition of rights as distinguished from procedural limitation on the remedy used to enforce rights.'"[227]

The consequence of this substantive/procedural distinction between statutes of repose and statutes of limitation is that because a statute of repose is substantive, it relates to the jurisdiction of the court, and any "failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction which it might otherwise have."[228] If the court lacks subject matter jurisdiction after expiration of the period of repose, it also loses equity jurisdiction.

Statutes of repose set the outside time limit after which a cause of action is extinguished. Statutes of repose are not subject to equitable tolling principles,[229] because "to do so would upset the economic balance struck by the legislative body."[230]

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substantive rather than procedural . . . . A statute of repose is a substantive provision because it expressly qualifies the right which the statute creates by barring a right of action even before the injury occurred if the injury occurs subsequent to the prescribed time period.").

225. *Goad*, 831 F.2d at 511.

226. *Id.*

227. *Id.* (quoting Bolick v. American Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982)).; *but see* Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995). In *Shadburne*, the court ruled that the substantive/procedural distinction between statutes of repose and statute of limitation is not controlling when determining whether retroactive application of an exception to a statute of repose violates the due process clause of the Fifth Amendment. The court held that "recent developments in the law require us to apply the rational basis test in determining whether retroactive legislation violates the Due Process Clause of the Fifth Amendment. For purposes of constitutional analysis, the same test applies regardless of whether the statute at issue is one of repose or one of limitation." *Id.* at 1077; *see also* Wesley Theological Seminary v. United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989). In *Wesley*, the court resolved the constitutional question "without classifying the District's statute as substantive or procedural." The court ruled that the question for due process purposes is whether the legislature acted in an arbitrary and irrational way in retroactively applying an exception to a statute of repose. *Id.* at 122.

228. *Hinkle*, 896 F. Supp. 190, 194 (C.D. Ill. 1995) *rev'd on other grounds*, 85 F.3d 298 (7th Cir. 1996); *see also* Botelho v. Citicorp Mortgage, Inc. (*In re* Botelho), 195 B.R. 558, 568 (Bankr. D. Mass. 1996); Bruce v. Hamilton, 894 S.W.2d 274, 276 (Tenn. Ct. App. 1993) ("Because a statute of repose is substantive it relates to the jurisdiction of the court and any failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction which it might otherwise have.") (citation omitted), *overruled on other grounds by* Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995).

229. Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 ("A statute of repose represents an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body."); *see also* Lampf, Pleva, Lipkin, Prupis & Petigrow v. Gibertson, 501 U.S. 350, 358-61 (1991) (determining that section 10(b) of the Securities Exchange Act of 1934 is not subject to equitable tolling); Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CAL. L. REV. 1587, 1591 (1993) ("[A] statute of repose is a type of statute of limitation which is not subject to equitable principles.").

230. *Amoco*, 85 F.3d at 1472.

Under the third definitional formulation identified by Professor McGovern, a statute of repose is considered a species of statutes of limitation.[231] Under this formulation, a statute of repose would be that "portion of a statute of limitation that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action."[232] Because these statutes contain both limitations and repose components, the terms "bifurcated" or "two-tier," have been used to describe them.[233] An example of a bifurcated statute is Georgia's medical malpractice limitations provision. The statute has both a two-year statute of limitations[234] and a five-year statute of repose,[235] both of which are found in the same statutory sections of the Georgia Code.[236] The statute specifically provides that the legislature intended to create a bifurcated statute.[237]

The fourth definition identified by Professor McGovern distinguishes between statutes of repose and statutes of limitation on the basis of when each statute begins to run.[238] Unlike a statute of limitations that begins running upon accrual of the cause of action, a statute of repose may begin running at some time other than accrual of the cause of action.[239] A statute of repose may begin running much

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231. *See* McGovern, *supra* note 211, at 583; *see also* Leslie, *supra* note 229, at 1591 (considering a statute of repose a type of statute of limitation, but distinguishing statutes of repose and statutes of limitation on the basis that a statute of repose is not subject to equitable principles).

232. McGovern, *supra* note 211, at 583.

233. *See* McGovern, *supra* note 211, at 584. Professor McGovern states:

> For example, a tort statute of limitation might run for two years, with an exception that the statute would not begin to run until a plaintiff discovers, or through the exercise of reasonable diligence should discover, an injury. A statute of repose would be the additional statutory language providing that in no event should a cause of action be brought more than ten years after the elements of a cause of action have accrued.

Id.; *see also* Hinkle v. Henderson, 85 F.3d 298, 301 (7th Cir. 1996) (describing Illinois bifurcated medical malpractice statute.).

234. *See* GA. CODE ANN. § 9-3-71(a) (1985) ("Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.").

235. *See id.* § 9-3-71(b) ("Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.").

236. *See* Hanflik v. Ratchford, 848 F.Supp. 1539, 1542 (N.D. Ga. 1994) ("Both the applicable statute of limitation and statute of repose are codified at O.C.G.A. § 9-3-71. Although this code section is entitled "General limitation", subsection '(a)' contains the two year statute of limitation while subsections '(b)' and '(c)' contain the five year statute of repose and abrogation.").

237. In relevant part, GA. CODE ANN. § 9-3-71(c) provides: "Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation."

238. *See* McGovern, *supra* note 211, at 584.

239. *See* McGovern, *supra* note 211, at 584; *see also* Hinds v. Kellogg, 776 F.Supp 1102, 1104 (E.D. Va. 1991) ("Thus, like Virginia's statute of repose, . . . Indiana's product liability statute of repose is triggered by an event unrelated to the accrual of a cause of action — the date of delivery to the initial user."); Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995). In *Cronin*, the court stated:

> Accordingly, where the one-year statute of limitations governs the time within which legal proceedings may be commenced after the cause of action accrues, the three-year medical malpractice statute of repose limits the time within which an action may be

earlier than the time when the cause of action accrues.

It is conceivable, therefore, that with a statute of repose a plaintiff's right to sue may terminate before her cause of action has accrued.[240] When, for example, a ten-year statute of repose is compared with a two-year statute of limitations, the right to enforce a cause of action for injuries may be terminated under the ten-year statute of repose before the two-year statute of limitations begins running on the same cause of action. This would occur if, for example, the statute of repose begins running from the date the product is first placed into the stream of commerce. If injury occurs in the eleventh year following introduction of the product into the stream of commerce, the ten-year statute of repose would have already run. Therefore, the plaintiff would have no cause of action against the defendant. In comparison, the two-year statute of limitations would not begin running until the date of injury, assuming that the cause of action accrues on the date of the injury. Thus, in the absence of a statute of repose, plaintiff would have two years from that date to enforce her cause of action against the defendant, thirteen years after the product was first placed into commerce.

According to McGovern, "[a] fifth definition of 'statute of repose' has been found in the 'useful safe life' provisions of product liability statutes."[241] Under these provisions, the defendant is not liable if it proves that the product has been used beyond its useful safe life.[242] Rather than being a definition of a statute of repose, the "useful safe life" distinction is more another example of a statute of repose. Therefore, the "useful safe life" distinction will not be discussed further in this article.

Rather than choosing one formulation as the definitive statement of what constitutes a statute of repose, it makes more analytical sense to consider each formulation as one factor in distinguishing between statutes of limitation and statutes of repose. Analysis of these factors demonstrates that section 522(l) is more in the nature of a statute of repose.

1. Statutes of Repose and Statutes of Limitation Both Prescribe the Time Period Within Which a Cause of Action May Be Brought

Section 522(l) establishes the mechanism through which a bankruptcy debtor exempts property from property of the estate. The first step in this process involves filing a list of property the debtor claims to be exempt property.[243] According to the statute, "[u]nless a party in interest objects, the property claimed as exempt on such

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> brought, but it is entirely unrelated to the accrual of a cause of action and can, in fact, bar a cause of action before it has accrued.

Id. at 912.

240. *See Cronin*, 906 S.W.2d at 912.

241. McGovern, *supra* note 211, at 586.

242. *See* McGovern, *supra* note 211, at 586. The fifth definition is specific to products liability actions and will not be discussed further in this article.

243. 11 U.S.C. § 522(l) (1994), in relevant part provides: "The debtor shall file a list of property the debtor claims as exempt under subsection (b) of this section."

list is exempt."[244] The statute does not prescribe when a party in interest must file an objection in order to prevent the listed property from becoming exempt. The time period is found in Bankruptcy Rule 4003(b), which provides:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors . . . or the filing of any amendment to the list or supplemental schedules, within such period, further time is granted by the court.[245]

Under the first definitional formulation identified by Professor McGovern, statutes of repose and statutes of limitation "are [simply] legislative enactments that prescribe the period within which a cause of action may be brought."[246] Nowhere does the text of section 522(l) provide a time period within which the trustee must object to the debtor's list of exemptions. The lack of a limitations period in the text of section 522(1) leaves open the possibility that the legislature never intended the debtor's exemption rights in exempt property to vest, since the statute provides no cut-off date after which the trustee is precluded from objecting.

The absence of a limitations period in the text of section 522(l) is not fatal, since Rule 4003(b) establishes the limitations period. Because the section 522(l) provides that property claimed as exempt is exempt if no one objects, the text of section 522(l) and Rule 4003(b) indicates that Congress did intend that the trustee's right to object to the list of property claimed as exempt would terminate on a specified date.[247] After the limitations period under Rule 4003(b) has run, the trustee no longer has a right to object to the status of the debtor's exempt property.[248]

The fact that the cut-off period for objecting to claimed exemptions is found in the accompanying Bankruptcy Rule 4003(b) does not preclude a determination that section 522 is a statute of repose or a statute of limitation. However, a definition that considers statutes of repose to be no different from statutes of limitation provides no basis for or reason to distinguish between the two. In a broader conceptual sense, statutes of repose and statutes of limitation are identical: they both establish a period beyond which a cause of action may not be brought. One needs a more elucidating test to identify the distinctions between the two types of statutes. This test does not do the job.

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244. *Id.*

245. FED. R. BANKR. P. 4003(b).

246. McGovern, *supra* note 210, at 582.

247. The legislative history of section 522(l) provides: "Subsection (1) requires the debtor to file a list of property that he claims as exempt form the property of the estate. Absent an objection to the list, the property is exempted." H.R. REP. NO. 595, 95th Cong, 2d Sess. 363, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6319; *see* Taylor v. Freeland & Kronz, 938 F.2d 420, 423 (3d Cir. 1991) (quoting Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (stating that where the text of the statute is clear, it "all but resolves this case, for the general rule of statutory interpretation is that where the 'terms of a statute [are] unambiguous, judicial inquiry is complete except in rare circumstances.'")).

248. *See Taylor*, 503 U.S. at 644.

2. Statutes of Repose and Statutes of Limitation Can Be Distinguished on the Basis of the Policy Each Is Intended to Implement

Statutes of limitation "represent a public policy judgment by . . . [legislatures] as to the time at which an action becomes too stale to proceed in its courts."[249] On the other hand, statutes of repose promote the policy of finality,[250] by "limiting [the] time during which [a] cause of action can arise."[251] Statutes of repose set an outside limit after which, regardless of whether the cause of action has accrued, the cause of action is extinguished.[252] Whether section 522(l) is a statute of repose or a statute of limitation will turn on whether the policy advanced by section 522(l) and Rule 4003(b) correspond more closely to policies promoted by statutes of limitation or repose.

The limitations period in Rule 4003(b) and the statutory framework of section 522(l) serves a policy function that is more consistent with the finality policy served by statutes of repose than the policy of preventing stale claims which statutes of limitation serve. Courts have identified divergent policies served by Rule 4003(b). According to the Third Circuit in *Taylor v. Freeland & Kronz*,[253] "[t]he time limits and obligations established by section 522(l) and Rule 4003(b) serve the dual purposes of finality and certainty."[254] The need for finality and certainty in a bankruptcy context "is especially acute."[255] The Supreme Court, affirming the Third Circuit's decision in *Taylor*, agreed that although "[d]eadlines may lead to unwelcomed results, . . . they prompt parties to act and they produce finality."[256] Other courts, although not expressly identifying the finality policy, have described the policy in similar terms.[257]

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249. Goad v. Celotex Corp., 831 F.2d 508, 510 (stating that "[s]tatutes of limitation . . . are primary instruments of public policy and of court management . . . .").

250. *See* McGovern, *supra* note 211, at 583.

251. Hinkle v. Henderson, 85 F.3d 298, 301 (7th Cir. 1996) (citing BLACK'S LAW DICTIONARY 1411 (6th ed. 1990)).

252. *See* Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) (stating that "[a] statute of repose represents an absolute time limit beyond which liability no longer exists . . . .").

253. 938 F.2d 420 (3rd Cir. 1991).

254. *Id.* at 425.

255. *Id.* According to the Fifth Circuit:

> This need is reflected by Bankruptcy Rule 9006, which states that '[i]n the interest of prompt administration of bankruptcy cases certain time periods may not be extended . . . .' Thus, where there is a date when parties' rights can be finally determined — in this case, thirty days after the creditors' meeting if no objection is filed — the parties can proceed from that date knowing which property is property of the estate and which property belongs to the debtor. The debtor from that day forward can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property.

Id. at 425.

256. Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992).

257. *See In re* Grossman, 80 B.R. 311, 315 (Bankr. E.D. Pa. 1987) ("Thus, the deadline for objections and the filing of exemptions where no objection is made serves the necessary purpose of establishing a date on which the rights of various parties can be fixed.").

Still other courts have opined that the time limits and obligations established by section 522(l) and Rule 4003(b) serve "to ensure timely notice to debtors that the trustee objects to the claimed exemption."[258] Courts that focus on the notice policy served by section 522(l) and Rule 4003(b) have done so primarily in the context of determining whether informal objections to the debtor's exemption claims are approved by section 522(l) and Rule 4003(b).[259] Although some courts have suggested policy justifications for section 522(l) and Rule 4003(b) in addition to the policy of finality, the finality policy which these provisions serve earns section 522(l) and Rule 4003(b) the statute of repose designation.

The time period for objecting to exemption claims is so short, thirty days following the conclusion of the meeting of creditors, that it would be difficult to conclude that section 522(l) and Rule 4003(b) are designed to serve an evidentiary function. The time period for objecting to the debtor's claims of exemption is so short that it is unlikely that concerns regarding the lapse of memories, disappearance of witnesses, or the loss of evidence would be at issue. Therefore, because section 522(l) and Rule 4003(b) advance a finality policy and not an evidentiary policy, under the policy-based formulation, section 522(l) is a statute of repose.

3. Statutes of Repose Are Substantive Not Procedural in Nature as Are Statutes of Limitation

Section 522(l) is a statute of repose and may be distinguished from a statute of limitations on the basis that, unlike a statute of limitation, section 522(l) is a substantive rather than a procedural provision. The limitations period of a statute of limitation begins running, under the "discovery rule,"[260] when plaintiff's injuries are discoverable. Because the plaintiff's cause of action accrues when the plaintiff knows or should have known of his injuries under the discovery rule,[261] a plaintiff may not discover her injuries for many years after the injury actually occurred.[262] The length of time between occurrence and discovery of plaintiff's injuries may be so long that defendants may be unduly disadvantaged when forced to defend claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.[263] It is this evidentiary inequity[264] statutes of

258. *In re* Young, 806 F.2d 1303, 1305 (5th Cir. 1987); *see also In re* Stanley, 143 B.R. 900, 904 (Bankr. W.D. Md. 1992) (agreeing with *Young* that the purpose of Rule 4003(b) is to ensure timely notice to the debtor that the trustee disputes the exemption claim).

259. *See supra* text accompanying notes 72-100.

260. *See* Hinkle v. Henderson, 85 F.3d 298, 301 (7th Cir. 1996).

261. *See id.*

262. *See id.*

263. *See* McGovern, *supra* note 211, at 583; *see also* Chase Sec. Corp. v. Doneldson, 325 U.S. 304 (1945). In *Chase*, the Supreme Court stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.

Id. at 314; *see also* Rumberg v. Weber Aircraft Corp., 424 F. Supp. 294, 298 (C.D. Cal. 1976) ("The

limitation were designed to prevent.[265]

Unlike a statute of limitations which serves to prevent prosecution of stale claims, the limitations period of Rule 4003(b) is so short that it is unlikely that section 522(l) and Rule 4003(b) were intended to protect debtors from the evidentiary inequities defendants face when defending against stale claims. Rule 4003(b)'s limitations period was intended to fix the rights to exempt property within a relatively short period of time after commencement of the bankruptcy case.

A statute of limitation is "primarily [an] instrument of public policy and of court management, and do[es] not confer upon defendants any right to be free from liability . . . ."[266] It is merely "a procedural device that operates as a defense to limit the remedy available from an existing cause of action."[267] A statute of limitation "extinguish[es], after [a] period of time, [the] right to prosecute [an] accrued cause of action . . . ."[268] A statute of limitation achieves its function of barring stale claims by preventing prosecution of an existing cause of action.

Statutes of limitation do not extinguish a cause of action, rather they prevent the plaintiffs from taking any action to enforce their rights. Therefore, although a cause of action may be unenforceable after the running of a statute of limitation, the cause of action still continues to exist. Section 522(l) is a statute of repose because the effect of the trustee's failure to object to the debtor's claim of exemption is to extinguish the trustee's right to prevent vesting of the debtor's exemption right. Potential liability is limited by statutes of repose "by limiting the time during which a cause of action can arise."[269] After the running of a statute of repose, the cause of action no longer exists.[270] Statutes of repose are considered substantive provisions,[271] because they "make the filing of suit within a specified time period

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purpose of the statute of limitations, in the oft-quoted words of Justice Holmes is to '(prevent) surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'").

264. *See* McGovern, *supra* note 211, at 583.

265. *See Rumberg*, 424 F.Supp. at 298.

266. Goad v. Celotex Corp., 831 F.2d 508, 510.

267. First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 865 (4th.Cir. 1989).

268. Hinkle v. Henderson, 85 F.2d 298, 301 (7th Cir. 1996).

269. *Id.*; *see also* Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) (stating that "[a] statute of repose represents an absolute time limit beyond which liability no longer exists . . . ."); Nesladek v. Ford Motor Company, 46 F.3d 734, 737 (8th. Cir. 1995) ("A statute of repose, on the other hand, directly impacts on the accrual of a cause of action in the first instance. It operates as a statutory bar independent of the actions (or inaction) of the litigants — often before those litigants can ever be identified.") (citation omitted).

270. *See Amoco Prod. Co.*, 85 F.3d at 1464.

271. *See* Bruce v. Hamilton, 894 S.W.2d 274, 276 (Tenn. Ct. App. 1993) ("Statutes of repose are substantive rather than procedural . . . . A statute of repose is a substantive provision because it expressly qualifies the right which the statute creates by barring a right of action even before the injury occurred if the injury occurs subsequent to the prescribed time period."); Delon Hampton & Assoc., Chartered v. Washington Metro. Area Transit Auth., 943 F.2d 355, 360-361 (4th. Cir. 1991) ("unlike a 'pure' statute of limitation that merely bars the maintenance of a remedy, the statute of repose bars the remedy and extinguishes the underlying cause of action. The exemption from suit accorded those named in the statute

a substantive part of plaintiff's cause of action."[272] That is, unless the cause of action is filed within the period specified by the statutes, the cause of action vanishes.

Section 522(l) creates a substantive right in the trustee to object to the property the debtor claims as exempt. Section 522(l) makes filing the objection within the time specified by Rule 4003(b) a substantive part of the trustee's right to prevent property claimed as exempt by the debtor from becoming exempt. According to the Supreme Court in *Taylor*, the trustee's objection right is not subject to a condition that the property qualify as exempt property.[273] One characteristic of a statute of repose is that "the time for filing suit is engrafted onto a substantive right created by law."[274] Engrafted into the trustee's substantive right under section 522(l) to prevent property claimed as exempt from becoming exempt property is the limitation that this right must be exercised within thirty days following conclusion of the meeting of creditors. If the right to object is not exercised within this period, the debtor's exemption rights vest, the property claimed as exempt becomes exempt, the property claimed as exempt is no longer property of the estate, and the trustee's rights to the property never comes into existence. Since Rule 4003(b) measures the beginning of the limitations period for objecting to the debtor's exemption claims from an event unrelated to accrual of the trustee's cause of action, section 522(l) is a statute of repose.

4. Statutes of Repose and Statutes of Limitation Are Distinguished on the Basis of When the Statute Begins To Run[275]

McGovern also distinguished between statutes of repose and statutes of limitation on the basis of when each statute begins to run.[276] Under this formulation, the limitations period for a statute of limitation begins running upon accrual of the cause of action, while the beginning of the limitations period for a statute of repose is measured from an event unrelated to accrual of the cause of action.[277] A products

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is a substantive right . . . ."); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of repose are meant to be a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.").

272. *Goad*, 831 F.2d at 511.

273. Taylor v. Freeland & Kronz, 503 U.S. 638, 643 (1992).

274. *Goad*, 831 F.2d at 511.

275. The third formulation for distinguishing between statutes of repose and statutes of limitation identified by McGovern, that a "statute of repose" is a generic term that describes statutes of which a statute of limitation is but a variety, simply recognizes that a single statute may contain differing limitation provisions each of which serves its respective function. A statute of repose would be that portion of the bifurcated statute that places a cap or outer limit on a statute that begins to run when the cause of action accrues. *See* McGovern, *supra* note 211, at 583; *see supra* text accompanying notes 231-37. Section 522(1) is not a bifurcated statute, containing both a repose portion and limitations provision. This formulation will not be considered, since this definition is more a description of a type of statute rather than a test for distinguishing between statutes of limitation and statutes of repose.

276. *See* McGovern, *supra* note 211, at 584.

277. *See* McGovern, *supra* note 211, at 584; *see also* Hinds v. Compair Kellogg, 776 F. Supp 1102, 1104 (E.D. Va. 1991) ("Thus, like Virginia's statute of repose, . . . Indiana's product liability statute of repose is triggered by an event unrelated to the accrual of a cause of action — the date of delivery to the initial user."); Cronin v. Howe, 906 S.W.2d 910 (Tenn. 1995). In *Cronin*, the court stated:

liability statute of repose, for example, might provide that any product liability action must be commenced within ten years after the product was first sold or leased. A statute of limitation, on the other hand, would require the cause of action be brought within two years after the cause of action accrued.

Section 522(l) and Rule 4003(b) establish a specific outside time limit for objecting to the debtor's claim of exemption. Like a products liability statute of repose, the limitations period for objecting to the debtor's exemption claim begins following occurrence of a specific event: the conclusion of the meeting of creditors. Unlike statutes of limitation, Rule 4003(b) does not allow the trustee to object upon accrual of the trustee's objection right, i.e, within thirty days following the date the trustee knew or had reason to know that the debtor's exemption claim was invalid.[278]

Section 522(l) is a statute of repose because, unlike a statute of limitation which begins running upon accrual of the cause of action, the limitations period for filing objections to debtors' claims of exemption begins running from a specified date: the conclusion of the meeting of creditors.[279] While that date may also coincide with the date the trustee learns reasons for objecting to the debtor's exemption claims, it could be argued because the trustee's cause of action (the right to prevent vesting of the debtor's exemption rights by timely objecting) accrues at the conclusion of the meeting of creditors, section 522(l) is a statute of limitation.

However, the period for objecting to the debtor's exemption claims begins running regardless of the level of the trustee's actual or constructive knowledge. The period for objecting to the debtor's exemption claim is triggered by an event other than accrual of the trustee's cause of action under section 522(l) and Rule 4003(b), conclusion of the meeting of creditors.

Accrual of the trustee's right to object is not an element of the cause of action under section 522(l) and Rule 4003(b). These provisions establish a specific event, upon occurrence of which the thirty-day limitations period begins to run. This is exactly the manner in which the limitations period of a statute of repose begins running. Because the time period under Rule 4003(b) begins running upon conclusion of the meeting of creditors and not upon accrual of the substantive right to object under section 522(l), section 522(l) is a statute of repose.

> Accordingly, where the one-year statute of limitations governs the time within which legal proceedings may be commenced after the cause of action accrues, the three-year medical malpractice statute of repose limits the time within which an action may be brought, but it is entirely unrelated to the accrual of a cause of action and can, in fact, bar a cause of action before it has accrued.

Id. at 912.

278. *See In re* Keyworth, 47 B.R. 966, 969 (Bankr. D. Colo. 1985) ("Rule 4003(b) provides that any objection may be filed within thirty (30) days after the conclusion of the § 341 meeting, not within thirty (30) days of discovering facts forming a basis for the objection.").

279. The limitations period of a statute of limitation begins running when the cause of action accrues, that is, when the plaintiff knows or should have known of her injuries. On the other hand, with a statute of repose, the limitations period begins running at an arbitrary time determined by a legislature, not by when injury occurs, or a cause of action accrues. *See McGovern, supra* note 211, at 276; *see also* Stephen J. Werber, *The Constitutional Dimension of a National Product Liability Statute of Repose*, 40 VILL. L. REV. 985, 989 (1995).

B. Application of Informal Objection Doctrines to a Statute of Repose, Section 522(l)

1. Merged Informal Objection Doctrine

Current informal objection theory evolved from merger of the surrogate objection and the notice-based doctrines. The essential element of the surrogate objection doctrine is the requirement that the trustee file a pleading, although not necessarily a pleading denominated an "Objection to Debtor Exemption," within the limitations period established by Rule 4003(b). The pleading must at least raise the issue of the trustee's objection to the debtor's exemption claim.[280] The notice-based doctrine is premised on the notion that Rule 4003(b) established a notice procedure to alert debtors that there may be controversy surrounding the property claimed as exempt.[281] Therefore, if the debtor receives notice, within the limitations period of Rule 4003(b), that her exemption claim is disputed, the notice requirement of Rule 4003 is met.

Merger of the surrogate objection and notice-based doctrines resulted in a more precise standard for determining whether pleadings qualify as a surrogate objection and whether the objections adequately appraised the debtor of the dispute regarding the exemptions claimed. To qualify as a surrogate objection under Rule 4003(b), the objection must be filed. A document is filed under Rule 5005(a)[282] if it is filed with clerk of the bankruptcy court in the district where the bankruptcy case is pending,[283] with the judge,[284] or erroneously filed with specific officers of the court.[285] Under this analysis, letters to the debtor would not qualify as a surrogate objection,[286] nor would taking possession of the property claimed as exempt.[287] The fact that the statute to which the merged surrogate/notice-based objection theory is applied may be considered a statute of repose does not matter. If the surrogate objection was filed within the meaning of Rule 5005, if it was filed within the period prescribed by Rule

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280. *See In re* Dembs, 757 F.2d 777, 779 (6th Cir. 1985); *In re* Grosslight, 757 F.2d 773, 777 (6th Cir. 1985); *In re* Young, 806 F.2d 1303, 1305 (5th Cir. 1987) (trustee's motion requesting all future annuity payments be turned over to the trustee was effective as an objection, but relying on notice based analysis); *In re* Brawn, 138 B.R. 327, 333 n.29 (Bankr. D. Me. 1992) ("Plaintiff's response to Hayward's § 522(f) motion qualifies, in and of itself, as the 'objection' Rule 4003(b) requires.").

281. *See Young*, 806 F.2d at 1305 ("The basic purpose of the thirty day requirement in Rule 4003(b) is to ensure timely notice to debtors that the trustee objects to their claimed exemptions."); *see also In re* Peterson, 920 F.2d 1389, 1392 n.4 (8th Cir. 1990) (agreeing with the Fifth Circuit "that the primary purpose of Rule 4003(b) is to ensure timely notice of the trustee's objection to a claimed exemption."); *In re Owen*, 74 B.R. 697, 698 (Bankr. C.D. Ill. 1987) ("[T]he Court believes the *Trustee* has complied with the basic purpose of the thirty day requirement of Rule 4003(b), which is to ensure timely notice to debtors that the trustee objects to their claimed exemptions."); *In re* Stanley, 143 B.R. 900, 904 (Bankr. W.D. Mo. 1992).

282. FED. R. BANKR. P. 5005(a).

283. *See id.*

284. *See id.*

285. *See* FED. R. BANKR. P. 5005(c).

286. *See Peterson*, 920 F.2d at 1389.

287. *See In re* Canino, 185 B.R. 584 (B.A.P. 9th Cir. 1995).

4003(b), and if it adequately apprised the debtor of the dispute concerning her exemption claim, the objection would be timely.

2. Relation Back Doctrine

One distinguishing factor between statutes of repose and statutes of limitation is that upon expiration of the limitations period of a statute of repose the cause of action is extinguished, while the cause of action is only unenforceable after expiration of a statute of limitation. Application of the relation back doctrine to each of these statutes raises a fundamental question. If the cause of action is extinguished after running of the statute of repose, will an amended pleading — filed after expiration of the limitations period — relate back to the date of the original pleading, particularly since the cause of action no longer exists? Courts have differed on whether Rule 15(c)'s relation back doctrine is applicable to statutes of repose. Some courts hold a statute of repose prevents relation back after expiration of the repose period,[288] while other courts reach the opposite conclusion.[289]

Courts refusing to apply the relation back doctrine of Rule 15(c) to statutes of repose direct their analysis to the substantive/procedural distinction between statutes of repose and statutes of limitation. A statute of repose defines a substantive right which is extinguished after running of the limitations period. Therefore, these courts conclude, because rights under a statute of repose are extinguished after expiration of the limitations period, application of the relation back doctrine "would have the effect of reactivating a cause of action that the Legislature obviously intended to eliminate."[290] The idea is that, once rights under a statute of repose are extinguished, there is no cause of action to which an amended complaint can relate back.

Courts that have applied the Rule 15(c)'s relation back doctrine to statutes of repose are not deterred by the notion that upon the running of a statute of repose, the cause of action is extinguished under the substantive/procedural distinction. These courts reason that "[t]his distinction primarily affects the application of various equitable tolling doctrines, . . . which delay the running of statutes of limitations."[291] Therefore, a plaintiff may not employ equitable tolling if the statute is one of repose rather than a statute of limitation.[292] Since Rule 15(c) does not apply tolling

288. *See* Resolution Trust Corp. v. Olson, 768 F. Supp 283, 285 (D. Ariz. 1991) ("Relation back under Rule 15 does not apply when the statute at issue defines substantive rights rather than merely limiting procedural remedies."); Valley Nat'l Bank of Ariz. v. Kohlhase, 897 P.2d 738, 741 n.2 (Ariz. Ct. App. 1995) (agreeing with *Olson*); Federal Leasing, Inc. v. Amperif Corp., 840 F.Supp 1068, 1072 n.5 (D. Md. 1993) (citing *Olson* with approval); Tindol v. Boston Housing Auth., 487 N.E.2d 488, 491 (Mass. 1986) (holding Rule 15(c) not applicable to statute of repose); Ferrera & Sons v. Samuels, 486 N.E.2d 58 (Mass. 1985).

289. *See* Boesky Sec. Litig. v. Wickes Cos., 882 F.Supp 1371, 1381 (S.D.N.Y. 1995) (rejecting notion that Rule 15(c) is a tolling doctrine which cannot be applied to statutes of repose.); Neuner v. C.G. Reality Capital Ventures-1 (*In re* Sharp Run Assoc.), 157 B.R. 766, 783 (Bankr. D.N.J. 1993) ("We do not agree that § 46(a) is a statute of repose, nor do we agree that statutes of repose automatically bar relation back.").

290. *Ferrera & Sons*, 486 N.E.2d at 60; *see also Tindol*, 487 N.E. at 490 (agreeing with Ferrera).

291. *Sharp Run Assoc.*, 157 B.R. at 783.

292. *See id.*

principles,[293] the fact that the statute to which the rule is being applied is a statute of repose is no bar to application of its relation back doctrine.[294]

The question of whether Rule 15(c)'s relation back doctrine may be applied to statutes of repose may be resolved on policy grounds. Statutes of repose serve one relevant policy goal above and beyond those served by statutes of limitations: "to give defendants greater certainty and predictability."[295] Application of Rule 15(c) to statutes of repose and to section 522(l) would not impair this policy goal.

Equitable tolling principles may not be employed if the statute is a statute of repose, because equitable tolling would operate to prevent running of the repose period. The operative effect of tolling is to give a party additional time to initiate an original cause of action. Extending the repose period for an unknown time period to enable a plaintiff, or in this case the bankruptcy trustee, to initiate an original cause of action would be in direct contravention of the principal policy goal of statutes of repose, which is "to give defendants greater certainty and predictability."[296]

Rule 15(c), however, does not provide a party additional time within which to initiate the party's original cause of action or to initiate an action that is unrelated to the original action. The basis for application of Rule 15(c)'s relation back doctrine is that the cause of action has already been filed and the party amending her pleading is allowed to better delineate the contours of the original suit. The doctrine does not allow a party to raise a new cause of action which did not arise out of the same conduct or transaction that was the basis for the original suit. Application of Rule 15(c) would not impair the policies of certainty and predictability advanced by a statute of repose.

Where the bankruptcy trustee files a formal or informal objection within the repose period prescribed by Rule 4003(b), filing vests the trustee's objection right. If the trustee filed the original objection within the repose period and the original objection apprised the debtor of the dispute surrounding her exemption claim, the trustee may later amend the original objection. However, the trustee will not be allowed to amend the original objection if the trustee's initial formal or informal objection was filed after expiration of the repose period of Rule 4003(b).

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293. *See Boesky Sec. Litig.*, 882 F. Supp at 1381. The *Boesky* court stated:

> Rule 15(c) is not a tolling doctrine. Tolling doctrines stop the statute of limitations from running even if the accrual date has passed . . . . However, the effect of Rule 15(c) is not to suspend the running of a statute of limitations; instead, it allows a litigant to sue upon a claim on which the statute of limitation has already run out and that would be barred were it to be brought in a separate action . . . . Therefore, Lampf's holding that tolling principles do not apply to the three year statute of repose applicable to 10(b) claims does not mean that Rule 15(c) cannot allow a § 10(b) claim to be added by amendment to a timely-filed complaint, even though the amendment is proposed . . . more than three years after the § 10(b) violation.

Id. (citations omitted).

294. According to the court in *Sharps Run Assoc.*, the only circumstance under which application of Rule 15(c) would be prohibited is "[w]here relating back a new pleading would truly disturb the 'repose' of the limiting statue . . . ." *Sharps Run Assoc.*, 157 B.R. at 784.

295. Hinkle v. Henderson, 85 F.3d 298, 303 (7th Cir. 1996).

296. *Id.*

IV. Conclusion

Only three of the five definitional formulations identified by McGovern[297] for distinguishing between statutes of limitation and statutes of repose are relevant in determining whether section 522(l) is a statute of repose. Application of these formulations support the conclusion that section 522(l) is a statute of repose. Considering section 522(l) a statute of repose is consistent with the Supreme Court's ruling in *Taylor* that the time deadlines are to be strictly construed. The conclusion that section 522(l) is a statute of repose does not radically affect the bankruptcy court's authority to employ informal objection and relation back doctrines in rescuing the trustee who fails to timely object to the debtor's claims of exemption.

Current informal objection doctrine is the result of a merger of the surrogate objection and notice-based doctrines. The merger of these doctrines establishes a precise standard for determining whether pleadings qualify as a surrogate objection and whether they adequately apprise the debtor of the trustee's dispute regarding the property the debtor claims is exempt. To qualify as a surrogate objection under Rule 4003(b), the objection must be filed. A document is filed under Rule 5005(a)[298] if it is filed with clerk of the bankruptcy court in the district where the bankruptcy case is pending,[299] filed with the judge,[300] or erroneously filed with specific officers of the court.[301] Under this analysis, letters to the debtor would not qualify as a surrogate objection,[302] nor would taking possession of the property claimed as exempt.[303]

Application of the merged surrogate/notice-based objection theory is not affected by whether the statute under consideration is a statute of repose or a statute of limitation. If an informal objection is filed before expiration of the limitations period of Rule 4003(b), the objection is timely regardless or whether section 522(l) is considered a statute of repose. If the surrogate objection is filed within the meaning of Rule 5005, if it is filed within the limitations period of Rule 4003(b), and it adequately apprises the debtor of the dispute concerning her exemption claim, the objection would be timely regardless of whether the statute is a statute of repose.

Under the first definitional formulation for distinguishing between statutes of repose and statutes of limitation, these statutes may be distinguished on the basis of the policy each serves. Statutes of repose serve one relevant policy goal above and beyond those served by statutes of limitations: "to give defendants greater certainty and predictability."[304] These policy goals are identical to the policy goal of certainty and finality advanced by section 522(l). These policy goals are not impaired because

297. *See supra* text accompanying notes 210-94.
298. FED. R. BANKR. P. 5005(a).
299. *See id.*
300. *See id.*
301. *See* FED. R. BANKR. P. 5005(c).
302. *See In re* Peterson, 920 F.2d 1389, 1389 (8th Cir. 1990).
303. *See In re* Canino, 185 B.R. 584, 589 (B.A.P. 9th Cir. 1995).
304. Hinkle v. Henderson, 85 F.3d 298, 303 (7th Cir. 1996).

Rule 4003(b) is applied to allow relation back of a formal objection to an informal objection that was filed before expiration of the repose period of Rule 4003(b).

Application of the relation back doctrine allows an amended objection to relate back to the trustee's timely informal or formal objection to the debtor's exemption claims. The trustee's timely objection, if it satisfies Rule 15(c), will apprise the debtor of the pending court proceeding. When the bankruptcy trustee timely files an objection to the debtor's exemption claim, whether the objection is considered a formal or informal objection, the trustee's right to prevent property the debtor claims as exempt from becoming exempt vests. It is this vesting of the trustee's right upon timely filing of her objection to the debtor's exemption claim that satisfies the policies of certainty and predictability.

Once the trustee's right vests as to the specific property the debtor claimed was exempt, the trustee may amend the objection so long as the amendment does not raise an objection to property that was not objected to in the original objection. Raising an objection to property claimed as exempt for the first time in the amended objection prevents relation back to the original timely filed informal or formal objection. Because Rule 15(c)'s relation back doctrine prevents relation back of an objection to property the debtor claims as exempt if the first time the objection is raised is in the amendment filed after expiration of the repose period, the policy goal of certainty and predictability are preserved.

Under the substantive/procedural analysis, the second definitional formulation, section 522(l) is considered a statute of repose because it is a substantive rights provision rather than procedural. Statutes of repose are considered substantive provisions because initiating the cause within the repose period is a substantive part of the cause of action created under the statute. The repose period defines the period within which the cause of action can arise.[305] Therefore, unless the cause of action is initiated within the repose period, the cause of action is extinguished.

A statute of limitation, on the other hand, is "primarily [an] instrument[] of public policy and of court management, and do[es] not confer upon defendants any right to be free from liability . . . ."[306] It is merely "a procedural device that operates as a defense to limit the remedy available from an existing cause of action."[307] A cause of action in not extinguished upon running of a statute of limitation; rather the cause of action is unenforceable.

Under section 522(l) the trustee has a substantive right to object to the property the debtor claims is exempt. Therefore, filing the objection within the time specified by Rule 4003(b) is a substantive part of the trustee's right to prevent property of the

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305. *See Hinkle*, 85 F.3d at 301; *see also* Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) ("A statute of repose presents an absolute time limit beyond which liability no longer exists . . . ."); Nesladek v. Ford Motor Co., 46 F.3d 734, 737 (8th. Cir. 1995) ("A statute of repose, on the other hand, directly impacts on the accrual of a cause of action in the first instance. It operates as a statutory bar independent of the actions (or inaction) of the litigants — often before those litigants can ever be identified.") (citation omitted).

306. Goad v. Celotex Corp., 831 F.2d 508, 510 (4th Cir. 1987).

307. First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989).

debtor from becoming exempt. If the right to object is not exercised within the repose period of Rule 4003(b), the debtor's exemption rights vest, the property claimed as exempt becomes exempt, the property claimed as exempt is no longer property of the estate, and the trustee's rights to the property never come into existence.

Finally, under the third definitional formulation, section 522(l) is a statute of repose since Rule 4003(b) measures the beginning of the repose period from the conclusion of the meeting of creditors. Unlike the case of a statute of limitation where accrual of the cause of action triggers the running of the limitations period, the meeting of creditors, an event other than accrual of the trustee's right to object, measures the beginning of the repose period under Rule 4003(b).

Under this formulation, statutes of limitation and statutes of repose may be distinguished on the basis of the event which triggers the starting date for measuring the thirty-day limitations period. A statute of repose begins running from a defined event, rather than when the cause of action accrues. The thirty-day limitations period associated with section 522(l) begins running upon conclusion of the meeting of creditors, rather than when the trustee's right to object to the debtor's exemption claims accrues, supporting the proposition that section 522(l) is a statute of repose. These distinguishing features, policy considerations, substantive rights considerations, and what triggers the running of the limitations period, all support the conclusion that section 522(l) is a statute of repose.