DISCLAIMER LAW: A CALL FOR STATUTORY REFORM

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For most of us, the receipt of a gift—either through a will, inter vivos transfer, or otherwise—is a welcome occurrence. But a gift to some individuals creates undesirable consequences. Whether to avoid waiting creditors, a federal tax lien, or to reduce one's overall tax liability, recipients often turn to disclaimer law to avoid the negative consequences of a gratuitous transfer of property. By invoking the disclaimer, the individual keeps the property in "friendly" hands and out of the coffers of creditors or the government.

A tension accompanies disclaimer law that places the interests of personal autonomy at odds with creditors' rights and the efficient running of a governmental tax system. In other areas of law, such as bankruptcy, this tension is normally resolved against the individual. Disclaimer law, however, has traditionally placed absolute control over acceptance of a gift in the hands of the individual. Creditors and the government are thus left with no recourse.

Recognizing that disclaimer law principles contradict traditionally accepted policy goals, courts have begun to alter the application of disclaimer law to shift the balance away from the individual. Most notably, the U.S. Supreme Court determined that a federal tax lien immediately attaches to gifted property, preempting any attempt by the individual to invoke state disclaimer law to avoid the tax lien.

In his note, Andrew Bender examines the courts' departure from common-law disclaimer principles. Although Mr. Bender concludes that disclaimer law needs to be altered in order to achieve broad policy objectives and consistency with bankruptcy and fraudulent transfer law, he disagrees with the judicial approach. Rather, he contends that a legislative solution is necessary, and better suited, to resolve the numerous inconsistencies that result from judicial action.

I. INTRODUCTION

A conflict has arisen under disclaimer law between personal autonomy and the enforceability of creditors' rights, labeled "the problem of the insolvent heir."[1] In his article by the same name, Adam J. Hirsch explores these competing policy concerns and concludes that "morality and

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1. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 589 (1989).

economic efficiency" dictate that at least some debtors should not be able to use a disclaimer to avoid their obligations to creditors.[2] Recently, Hirsch's ideas gained the approval of the U.S. Supreme Court in *Drye v. United States*.[3] But, in favoring the enforceability of a debtor's obligations over concerns for the debtor's personal autonomy, the Court failed to fully recognize long-standing common-law principles and years of statutory interpretation.[4] Unfortunately, this failure is a necessary consequence of any judicial attempt to alter the major policy concerns underlying disclaimer law.[5]

This note addresses Hirsch's contention that debtors too often attempt to use disclaimers to escape obligations to creditors[6] or the government,[7] leading to inequitable and inefficient outcomes.[8] Hirsch accurately identifies the difficulties involved when insolvent individuals disclaim valuable interests to the detriment of their creditors.[9] However, as explained below, judicial action is inappropriate, even in an attempt to counteract insolvent individuals using disclaimers, and can lead to further inconsistencies and confusion.[10] Instead, Hirsch's concerns over what he termed the "rigid and formalistic modes of reasoning"[11] would be best addressed with clear and concise legislative action.[12]

Part II of this note will examine the judicial rigidity and the limited scope of policy considerations involved in disclaimer law that originate in the basic definition and historical development of the disclaimer. The initial uses of a disclaimer, coupled with the gradual expanding of its applications[13] has left little room for a judicial shift in the policy underlying disclaimer law.[14] Part III of this note considers that although disclaimers have been specifically sanctioned by statute, controversies still arise. Such controversy invariably involves an insolvent individual's use of a disclaimer to the detriment of her creditors.[15] Finally, part IV of this note deals with the clash between personal autonomy and creditors'

2. *Id*. at 651–52. It is important to note that Hirsch would limit protection of creditors to involuntary creditors and leave voluntary creditors to bargain for a waiver of the debtor's right to disclaim. *See id*. Furthermore, Hirsch specifically states that "none of [his] conclusions are inescapable." *Id*. at 652.

3. *See* Drye v. United States, 528 U.S. 49, 61 (1999).

4. *See id*. at 59–61.

5. *See infra* Part III.A.

6. *E.g.*, Frances Slocum Bank & Trust Co. v. Estate of Martin, 666 N.E.2d 411, 412 (Ind. Ct. App. 1996); Dyer v. Eckols, 808 S.W.2d 531, 532 (Tex. App. 1991).

7. *E.g.*, Drye Family 1995 Trust v. United States, 152 F.3d 892, 893 (8th Cir. 1998); Leggett v. United States, 120 F.3d 592, 593 (5th Cir. 1997); United States v. Comparato, 22 F.3d 455, 457 (2d Cir. 1994); Mapes v. United States, 15 F.3d 138, 140 (9th Cir. 1994).

8. *See* Hirsch, *supra* note 1, at 603–10.

9. *See id.*

10. *See infra* Part IV.

11. Hirsch, *supra* note 1, at 652.

12. *See infra* Part IV.

13. *See infra* Part II.B.

14. *See infra* Part IV.

15. *See infra* Part III.A.

rights that arises when an insolvent individual invokes disclaimer law.[16] The growing desire to emphasize creditors' rights has led some courts to move away from the "norms" of disclaimer law.[17] This shift can only serve to further confuse the law regarding disclaimers.[18] Action to reform disclaimer law and prevent the "problem of the insolvent heir" needs to be in the form of a clear and concise statutory enactment.[19] It is the legislature, not the judiciary, that is in the best position to promote a greater emphasis on creditors' rights in this area of the law.[20]

II. BACKGROUND

A. Definition of a Disclaimer

"A disclaimer, sometimes called a renunciation, is the refusal to accept gratuitously transferred property."[21] An individual uses a disclaimer to deflect property that would otherwise devolve and vest in her through a will, inter vivos gift, intestate succession, or other gratuitous transfer. The disclaimant's motivation may be a result of many factors; however, the motivation behind the disclaimer is not a relevant question for a court to consider.[22] Although state statutes generally govern disclaimer law,[23] judicial decisions have colored the form and use of the modern disclaimer.

B. Historical Development of Disclaimers

The law of disclaimers developed under a common-law distinction between testate and intestate transfers of property.[24] When a decedent transferred property via a testamentary instrument, a devisee had the option of accepting or rejecting the devise.[25] However, a presumption that a devisee accepted any beneficial devise predominated under the common law.[26] A disclaimer counteracted the presumed acceptance by "re-

16. *See* Hirsch, *supra* note 1, at 588–90.
17. *See infra* Part IV.
18. *See infra* Part IV.
19. *See infra* Part IV.
20. *See infra* Part IV.
21. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 96 (1991); *see also* S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233, 1234–78 (1992).
22. *See* Mapes v. United States, 15 F.3d 138, 141 (9th Cir. 1994); Schoonover v. Osborne, 187 N.W. 20, 22 (1922); N.Y. Trust Co. v. Halkin, 68 N.Y.S.2d 404, 406 (Sup. Ct. 1936); *In re* Estate of Krakoff, 179 N.E.2d 566, 568 (Ohio Prob. Ct. 1961); Bradford v. Calhoun, 109 S.W. 502, 504 (Tenn. 1908).
23. *See* Dyer v. Eckols, 808 S.W.2d 531, 533 n.1 (Tex. App. 1991) (citing forty-four state disclaimer statutes).
24. *See* Hirsch, *supra* note 1, at 591.
25. *See id.*; WAGGONER, *supra* note 21, at 96–97.
26. *See* Hirsch, *supra* note 1, at 592.

lating-back" to the moment of the decedent's death.[27] Therefore, the disclaimer essentially constituted a rejection at the time of death and prevented any interest from ever vesting in the devisee.[28] *Bradford v. Calhoun*[29] contains a discussion of this principle:

> If it be admitted that the law will presume an acceptance [of a testamentary gift], it is not a conclusive presumption; and, when it is shown to have been renounced, it is shown that the title did not vest, and apparently there would be no occasion for divesting a title that had not vested.[30]

The court concluded, "[A] renunciation relates back to the date of the gift . . . ."[31] Thus, the *Bradford* court, as well as a majority of courts, favored protecting a devisee's right to refuse a devise.[32]

In contrast to the treatment of disclaimers under a testamentary transfer, an heir could not disclaim an inheritance when property passed via intestate succession.[33] "This rule derived from the feudal theory that tenancy over land was not a matter of individual choice. Land could neither be alienated nor devised; upon the tenant's death, the land over which he held seisin was 'cast' upon his heir . . . ."[34] Generally, this distinction remained unless statutorily altered.[35] In fact, a disclaimer's inability to prevent property rights from devolving under intestate succession remained standard application of the law in some jurisdictions until fairly recently.[36]

Essentially, the common-law disclaimer was recognized to protect an individual's right to accept or reject a testamentary gift—a policy decision indicating that courts could not be persuaded to force property ownership upon a devisee or legatee.[37] Just as disclaimer law has evolved, the policy reasons underlying the law have changed and developed. The codification of disclaimer law expanded the application and rationale for this doctrine.[38] While disclaimer law incorporates common-

27. *See id.*
28. *See* WAGGONER, *supra* note 21, at 96.
29. 109 S.W. 502, 503 (Tenn. 1908).
30. *Id.*
31. *Id*. at 60.
32. *See* WAGGONER, *supra* note 21, at 96.
33. *See id*.
34. Hirsch, *supra* note 1, at 591.
35. *See* WAGGONER, *supra* note 21, at 97.
36. *See In re* Estate of Krakoff, 179 N.E.2d 566, 568 (Ohio Prob. Ct. 1961).
37. *See* WAGGONER, *supra* note 21, at 96.
38. *See* ALA. CODE § 43-8-291(a) (1991); ALASKA STAT. § 13.12.801 (Michie 2000); ARIZ. REV. STAT. ANN. § 14-2801(A) (West 1995 & Supp. 2000–2001); ARK. CODE ANN. § 28-2-101(a) (Michie 1987); CAL. PROB. CODE § 275 (West 2000); COLO. REV. STAT. ANN. § 15-11-801 (West 1997); CONN. GEN. STAT. ANN. § 45a-579 (West 1993 & Supp. 2000); DEL. CODE ANN. tit. 12, § 601 (1995); D.C. CODE ANN. § 21-2094 (1981); FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); GA. CODE ANN. § 53-2-115 (1997); IDAHO CODE § 15-2-801 (Michie 1998); 755 ILL. COMP. STAT. 5/2-7 (1998); IND. CODE ANN. § 32-3-2-2 (West 1998); IOWA CODE ANN. § 633.704 (West 1998); KAN. STAT. ANN. § 59-2291 (1994); KY. REV. STAT. ANN. § 394.610 (Michie 1999); LA. CIV. CODE ANN. art. 946 (West 2000); ME. REV. STAT. ANN. tit. 18-A, § 2-801 (West 1998); MD. CODE ANN., [EST. & TRUSTS CODE ANN.]

law doctrine, disclaimer statutes have increased the formalities required for a valid disclaimer and extended the application of disclaimers to intestate transfers.[39]

Section 2-801 of the Uniform Probate Code (UPC) provides an example of the formalities typically found in state disclaimer statutes.[40] Generally, this provision provides that a disclaimant must file a signed, written disclaimer describing the property or interest disclaimed no later than nine months after the decedent's death.[41] The effect of filing a valid disclaimer under this provision is that the disclaimed interest passes as if the disclaimant had predeceased the decedent.[42] Furthermore, the UPC, as with most state statutes, incorporates the "relation-back" doctrine established under the common law.[43] While statutory provisions, like the one found in the UPC, have increased the formalities required to execute a disclaimer, they have also led to greater certainty and broader acceptance of disclaimers.[44]

State codification did not interfere with the rights of the disclaimant to reject an interest in a decedent's property. In fact, statutes extended the right to reject property to intestate transfers.[45] Generally, courts welcomed this change.[46] In citing the relevant New York statute, the court in *In re Molloy*[47] stated, "a beneficiary of a testamentary or intestate disposition may renounce such a disposition."[48] The court went on to state

§ 9-201 (1991 & Supp. 2000); MASS. ANN. LAWS ch. 191A, § 2 (Law. Co-op. 1994); MICH. COMP. LAWS ANN. §§ 554.873–.874 (West Supp. 2000–2001); MINN. STAT. ANN. § 525.532 (West 1975 & Supp. 2000–2001); MISS. CODE ANN. § 89-21-9 (1999); 1997 MONT. LAWS 72-2-811(3); NEB. REV. STAT. § 30-2352 (1995); N.H. REV. STAT. ANN. § 563-B:4 (1997); NEV. REV. STAT. § 120.020 (1997); N.J. STAT. ANN. § 3B:9-2 (West Supp. 2000); N.M. STAT. ANN. § 45-2-801 (Michie 1978); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11 (McKinney 1998); N.C. GEN. STAT. § 31B (1999); N.D. CENT. CODE § 30.1-10-01 (1996); OHIO REV. CODE ANN. § 1339.68 (Anderson 1999); OKLA. STAT. ANN. tit. 84, § 23 (West 1990); OR. REV. STAT. § 112.652 (1999); 20 PA. CONS. STAT. ANN. § 6201 (West Supp. 2000); R.I. GEN. LAWS § 34-5-2 (1995); S.C. CODE ANN. § 62-2-801 (Law. Co-op. 1976 & Supp. 2000); S.D. CODIFIED LAWS § 29A-2-801 (Michie 1997 & Supp. 2000); TENN. CODE ANN. § 31-1-103 (Supp. 2000); TEX. PROB. CODE ANN. § 37A (Vernon 1980 & Supp. 2000–2001); UTAH CODE ANN. § 75-2-801 (1993 & Supp. 2000); VT. STAT. ANN. tit. 14, § 1954 (1989); VA. CODE ANN. § 64.1-188 (Michie 1995 & Supp. 2000); W. VA. CODE § 42-6-2 (1997); WIS. STAT. ANN. § 853.40 (West 1991 & Supp. 2000); WYO. STAT. ANN. § 2-1-401 (Michie 1999).

39. *See* Dyer v. Eckols, 808 S.W.2d 531, 533 n.1 (Tex. App. 1991) (citing state disclaimer statutes).

40. *See* UNIF. PROBATE CODE § 2-801 (amended 1993), 8 U.L.A. 19 (Supp. 2000). For an excellent discussion of section 2-801, see Medlin, *supra* note 21, at 1234–78.

41. UNIF. PROBATE CODE § 2-801 (amended 1993), 8 U.L.A. 19 (Supp. 2000).

42. *See id*. *But cf.* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 776 (2nd ed. 1953) (stating that a renunciation may result in an interest falling into the residue of an estate and treating the intended provision as if it never existed).

43. *See* UNIF. PROBATE CODE § 2-801 (amended 1993) (stating that "[a] disclaimer relates back for all purposes to the date of death of the decedent"); *Dyer*, 808 S.W.2d at 533.

44. *See* WAGGONER, *supra* note 21, at 97.

45. *See id*.

46. *See* United States v. Davidson, 55 F. Supp. 2d 1152, 1156 (D. Colo. 1999) (explaining that adopting a statute that allows inheritances to be disclaimed "correct[ed] an unfair situation that arose under the common law").

47. Molloy v. Bane (*In re* Molloy), 631 N.Y.S.2d 910, 912 (N.Y. App. Div. 1995).

48. *Id.*

that an underlying rationale for disclaimers is to allow an individual to accept or reject an interest in property whether that interest passes through a will, inter vivos gift, or statute.[49]

The expanded use of disclaimers led to new difficulties. One example is the difficulty of achieving uniform application of federal tax laws when state disclaimer laws alter the consequences of federal gift tax liabilities.[50] Responding to the inevitable resulting inconsistent application, Congress outlined rules for a "qualified disclaimer" under § 2518 of the Internal Revenue Code (IRC).[51] Section 2518 lists the requirements for a qualified disclaimer to be effective in reducing federal gift tax liabilities.[52] Congress's action not only led to a uniform application of disclaimer law for federal gift tax purposes, but also implicitly recognized this use as valid. Despite statutory actions to clarify disclaimer law, questions still arise as to what constitutes a "valid" use of a disclaimer.

C. Traditional Rationale Behind Disclaimers

Disclaimers originated under common law due to the traditional presumption that a gift be accepted.[53] The primary rationale was that an intended recipient could not have ownership thrust upon her.[54] Essentially, recognition of disclaimers protected "[p]ersonal autonomy."[55] Disclaimers became necessary to protect both the acceptance requirement and personal autonomy once the acceptance of a beneficial gift was presumed.[56] Thus, the execution of a disclaimer rebutted these presumptions, and the gift was rejected. Because a disclaimer "related back" to the time of death, no interest ever vested in an intended recipient.[57] A disclaimant's personal autonomy was protected, and she avoided the intended gift.

Traditionally, courts would not examine the motivation behind a disclaimer.[58] This refusal to examine a disclaimant's motivation led to additional uses of disclaimers.[59] Besides facilitating avoidance of burdensome property, disclaimers have been touted as a means of minimizing

49. *See id*.
50. *See* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES 79 (1988).
51. *See id*.; I.R.C. § 2518 (1994).
52. *See* I.R.C. § 2518 (1994).
53. *See* WAGGONER, *supra* note 21, at 96.
54. *See id*.; *In re Molloy*, 631 N.Y.S.2d at 913; *In re* Estate of Krakoff, 179 N.E.2d 566, 568 (Ohio Prob. Ct. 1961); Bradford v. Calhoun, 109 S.W. 502, 503 (Tenn. 1908).
55. Hirsch, *supra* note 1, at 588.
56. *See id.* at 592.
57. *See* WAGGONER, *supra* note 21, at 96; *see also* Gen. Fin. Corp. v. Hansen (*In re* Hansen), 248 N.E.2d 709, 713 (Ill. App. Ct. 1969); Frances Slocum Bank & Trust Co. v. Estate of Martin, 666 N.E.2d 411, 415 (Ind. Ct. App. 1996); *Bradford*, 109 S.W. at 504; Dyer v. Eckols, 808 S.W.2d 531, 534 (Tex. App. 1991).
58. *See* cases cited *supra* note 22.
59. *See* Medlin, *supra* note 21, at 1234–37.

taxes, avoiding creditors, and averting tax liens.[60] Each of these uses has found judicial support, and courts have struggled to incorporate these new uses into the traditional framework of disclaimer law.[61] Thus, a brief examination of some of the current uses of disclaimers is appropriate.

D. Current Use of Disclaimers

1. Avoiding Estate Taxes

The most common use of the modern disclaimer is to adjust gift tax liabilities, particularly the marital deduction.[62] This action is often referred to as "post-mortem estate planning."[63] Typically, such "planning" involves a disclaimer executed to adjust the amount transferred, resulting in a minimization of federal gift taxes.[64] Often, individuals resort to this action when the size of the estate is uncertain,[65] or when there is a drafting error in the estate plan.[66] It is important to recognize that legislative enactment has validated this use of a disclaimer. When Congress enacted § 2518 of the Internal Revenue Code, specifying what actions must be taken to execute a "qualified disclaimer," it recognized minimizing gift tax burdens as a valid use of a disclaimer.[67]

2. Maintaining Social Assistance Benefits

Another creative use of disclaimers is to maintain an individual's public assistance benefits.[68] Typically, the disclaimant rejects a beneficial interest to maintain her entitlement to public assistance.[69] Case law regarding this use of disclaimers is somewhat limited; however, the cases that can be found seem to turn on the benefit statute involved[70] and whether the issue involves a reclamation of past benefits[71] or a continuation of future benefits.[72] Essentially, if the case involves an effort to reclaim past benefits given to the disclaimant, the disclaimer defeats the

60. *See id*. at 1237, 1255–69.

61. *See* Hirsch, *supra* note 1, at 605–10.

62. *See* Ted D. Englebrecht & Kayoko Witt, *Using Disclaimers After the New Regulations*, J. FIN. PLAN., May 1999, at 79, 84.

63. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 124 (4th ed. 1990).

64. *See id*.

65. *See* Englebrecht & Witt, *supra* note 62, at 84.

66. For a more complete discussion about using disclaimers to avoid or minimize estate and gift taxes, see *id*.

67. Section 2518 provided a uniform set of requirements for a "qualified disclaimer." These uniform requirements prevented differing results under the Internal Revenue Code that might occur due to differences in state disclaimer statutes. *See* I.R.C. § 2518 (1994).

68. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 155–56 (6th ed. 2000).

69. *See* Molloy v. Bane (*In re* Molloy), 631 N.Y.S.2d 910, 911–12 (N.Y. App. Div. 1995).

70. *See id*. at 912.

71. *See In re* Estate of Schiffman, 430 N.Y.S.2d 229, 230 (N.Y. Sur. Ct. 1980).

72. *See Molloy*, 631 N.Y.S.2d at 911.

reclamation effort, just as it would a general creditor.[73] However, if the case involves the discontinuation of future benefits, the disclaimant will normally not fair as well.[74] In most cases, the benefit statute provides that refusing to pursue another means of support leads to loss of benefits.[75] Therefore, a disclaimer generally cannot be used to *maintain* social assistance benefits.

3. Avoiding Creditors

Another use of a disclaimer is to avoid creditors. Essentially, this use prevents a decedent's property from passing to an individual who, on her own, cannot possibly fulfill her obligations to creditors.[76] If the insolvent individual accepts the property, creditors will deplete it. In an effort to keep the property in "friendly" hands, the insolvent individual disclaims, thus preventing her creditors from attaching to the property.[77] Generally, the property will then pass to a close relative of the decedent and/or the disclaimant.[78] This use of a disclaimer leaves the disclaimant's creditors little recourse.

There are several rationales for allowing a disclaimer to avoid creditors. The first rationale is the aforementioned emphasis on personal autonomy.[79] The second is the effectuation of testamentary intent.[80] The idea underlying this rationale is that the decedent did not intend for the property to pass to the disclaimant's creditors. By allowing the individual to disclaim, the property is transferred to a "friendly" party, and the testator's intent is not frustrated.[81]

The third rationale is that the majority of statutory law implicitly recognizes the insolvent individual's right to disclaim her interest.[82] This allowance is evident in two ways. First, the implicit recognition of the right to disclaim despite the potential recipient's insolvency is apparent from the language of statutes read in the context of the historical development of disclaimer law. State statutes often imply that an insolvent individual, or an individual under any circumstances, may disclaim a gratuitous transfer.[83] This implication stems from the fact that most states have adopted the common-law doctrine relating the disclaimer back to the time of the decedent's death.[84] By allowing the disclaimer to relate back

73. *See Schiffman*, 430 N.Y.S.2d at 231.
74. *See Molloy*, 631 N.Y.S.2d at 914.
75. *See id*.
76. *E.g.*, Frances Slocum Bank & Trust Co. v. Estate of Martin, 666 N.E.2d 411, 412 (Ind. Ct. App. 1996); Dyer v. Eckols, 808 S.W.2d 531, 532 (Tex. App. 1991).
77. *See* cases cited *supra* note 76.
78. *E.g.,* Dyer v. Eckols, 808 S.W.2d 531, 533 (Tex. App. 1991).
79. *See supra* notes 54–55 and accompanying text.
80. *See* Hirsch, *supra* note 1, at 632–38.
81. *See id*.
82. *See* statutes cited *supra* note 38.
83. *See* statutes cited *supra* note 38.
84. *See supra* notes 38–39 and accompanying text.

to the time of death, there is no property interest that ever vests in the disclaimant.[85] Thus, a creditor cannot attach to anything because the disclaimant never held an interest in the property. The UPC, which serves as a basis for many state statutes, reads, "A disclaimer relates back *for all purposes* to the date of death of the decedent."[86] This language, found in most disclaimer statutes, indicates that the disclaimer "relates back" to the time of death whether it is to avoid burdensome property, reduce tax burdens, avoid creditors, or reach any other result. The language is essentially an extension of the common-law idea that the motive of the disclaimant was irrelevant in determining a disclaimer's validity.[87]

Second, some state legislatures have taken action to specifically address the matter of insolvent individuals disclaiming property. At least six states have incorporated language in their disclaimer statutes that prevent insolvent individuals from disclaiming property.[88] For example, the Florida Probate Code and the Minnesota Probate Code contain identical language that states, "the right to disclaim otherwise conferred by this section shall be barred if the beneficiary is insolvent at the time of the event giving rise to the right to disclaim."[89] While the statutes still contain language indicating that a disclaimer relates back to the date of death for all purposes,[90] the quoted language limits the use of disclaimers, preventing an insolvent individual from disclaiming her interest in the first place. Thus, it does not matter if the disclaimer relates back or not. These states had to take positive action to limit insolvent individuals' use of disclaimers because without explicit prohibitions, the statutes implicitly permit the use of disclaimers regardless of motive.

4. *Avoiding Tax Liens*

Using disclaimers to avoid tax liens has also caused controversy. This use involves an individual with outstanding tax obligations.[91] If a

85. *See supra* notes 26–30 and accompanying text; *see also* Medlin, *supra* note 21, at 1262–65.

> [T]he disclaimant is considered to have never possessed or owned any right or title to the disclaimed interest. If the disclaimer relates back to the transferor's date of death, and if the disclaimant is deemed to have predeceased the transferor, then the disclaimant could not possibly have held any right or title in the disclaimed interest.

Id. at 1262.

86. UNIF. PROBATE CODE § 2-801(d)(1) (amended 1993) (emphasis added), 8 U.L.A. 19 (Supp. 2000).

87. *See* cases cited *supra* note 22.

88. *See* ALA. CODE § 43-8-295 (1991); FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); MASS. ANN. LAWS ch. 191A, § 8 (Law. Co-op. 1994); MINN. STAT. ANN. § 525.532(6) (West Supp. 2000–2001); N.J. STAT. ANN. § 3B:9-9(a) (West Supp. 2000); WIS. STAT. ANN. § 853.40(7)(b) (West 1991).

89. FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); MINN. STAT. ANN. § 525.532(6) (West Supp. 2000–2001).

90. *See* FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); MINN. STAT. ANN. § 525.532(6) (West Supp. 2000–2001).

91. *E.g.*, Drye Family 1995 Trust v. United States, 152 F.3d 892, 898–99 (8th Cir. 1998); Leggett v. United States, 120 F.3d 592, 595 (5th Cir. 1997); United States v. Comparato, 22 F.3d 455, 457 (2d Cir. 1994); Mapes v. United States, 15 F.3d 138, 140 (9th Cir. 1994).

gratuitous transfer vests in the individual, a federal tax lien will attach to the interest.[92] To avoid the attachment of the tax lien, the individual disclaims her interest.[93] Controversy exists as to whether there is any interest for the tax lien to attach to, despite the disclaimer.

When considering whether a tax lien can attach prior to a disclaimer, it is important to understand how a tax lien operates. The language of § 6321 of the IRC outlines the operation of a federal tax lien. It states, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person."[94] A tax lien arises at the time of assessment, and the Internal Revenue Service (IRS) must notify the taxpayer within sixty days of the assessment.[95] Generally, payment must be made within ten days after notice or a tax lien is created under the statute.[96] "[T]he lien created by § 6321 takes effect retroactively as of the date of the assessment and continues until the assessed amount . . . is paid or becomes unenforceable by reasons of lapse of time."[97]

The broad scope of the statute, written to reach "all property and rights to property," is the center of the debate over whether a disclaimer prevents a lien from attaching.[98] In *Drye v. United States*,[99] the Supreme Court answered this question. Before this decision, a circuit split[100] developed because § 6321 does not create property rights; it only defines the consequences that result from property rights created under state law.[101] Therefore, courts had to look to state law to determine whether a sufficient property interest was created in the disclaimant to which the lien could attach.[102] The interpretation of state law led to differing results.

Prior to the *Drye* decision,[103] when a federal court looked to the state law to determine whether a sufficient property interest was created, one of two conclusions was reached. First, some courts interpreted the state disclaimer laws such that the disclaimer related back to the time of death. Thus, the disclaimant never had an interest in the property.[104]

92. *See infra* notes 94–101 and accompanying text.
93. *See* cases cited *supra* note 91.
94. I.R.C. § 6321 (1994).
95. *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 111.6.4 (2d ed. 1992).
96. *See id.*
97. *Id.*
98. *See id*.
99. 528 U.S. 49 (1999).
100. *See* Drye Family 1995 Trust v. United States, 152 F.3d 892, 898–99 (8th Cir. 1998); Leggett v. United States, 120 F.3d 592, 595 (5th Cir. 1997); United States v. Comparato, 22 F.3d 455, 457–58 (2d Cir. 1994); Mapes v. United States, 15 F.3d 138, 140 (9th Cir. 1994).
101. *See* United States v. Bess, 357 U.S. 51, 55 (1958).
102. *See id.* at 53–54.
103. *Drye*, 528 U.S. at 49.
104. *See Leggett*, 120 F.3d at 595; *Mapes*, 15 F.3d at 140.

Because there was no interest in the property under state law, the tax lien failed to attach, and the disclaimant effectively avoided encumbrances on the property.[105] This approach is consistent with state laws that incorporate the relation-back doctrine.[106] Furthermore, traditional rationales, including personal autonomy, testamentary intent, and statutory silence all support this approach.[107]

Second, some courts, including the Supreme Court in *Drye*,[108] interpreted the state disclaimer laws such that an interest in the property is created in the disclaimant instantly upon the death of the decedent.[109] This line of cases relies heavily on the presumption that a beneficial gift is always accepted; consequently, the relation back in time is treated as a legal fiction that does not affect the operation of federal law.[110] These courts argue that the relation-back doctrine is not relevant because an interest is instantly created in the transferee,[111] and the examination under state law ends there. "'Once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [§ 6321], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law."[112] Under this rationale, the tax lien attaches to the property interest despite the disclaimer. These courts argue that ignoring the relation-back doctrine is simply a matter of federal law controlling rather than state law.[113] However, this approach is not consistent with common-law, state statutory, or federal statutory approaches to disclaimers.[114] As will be demonstrated below, neither the case law nor the language of disclaimer statutes supports the Court's disregard for the relation-back doctrine.

III. ANALYSIS

A. *Questions Raised When Insolvents Disclaim*

When an individual disclaims a beneficial interest to avoid fulfilling her financial obligations, several policy concerns are implicated. Often, these policy concerns are in conflict. The first of these competing policy

105. *See* cases cited *supra* note 91.
106. *See supra* notes 26–32, 43 and accompanying text.
107. *See supra* notes 26–33, 45–51, 79–90 and accompanying text.
108. *See Drye*, 528 U.S. at 60–61.
109. *See id.*; Drye Family 1995 Trust v. United States, 152 F.3d 892, 898–99 (8th Cir. 1998); United States v. Comparato, 22 F.3d 455, 457 (2d Cir. 1994); *In re* Adler, 869 F. Supp. 1021, 1026–27 (E.D.N.Y. 1994).
110. *See* cases cited *supra* note 109.
111. *See Drye*, 528 U.S. at 58–61.
112. *Drye Family 1995 Trust*, 152 F.3d at 895 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1989) and United States v. Bess, 357 U.S. 51, 56 (1958)); *see also Drye*, 528 U.S. at 56–59.
113. *See Drye*, 528 U.S. at 58–60.
114. *See supra* notes 26–32, 43 and accompanying text.

concerns includes the underlying rationales of disclaimer law.[115] The second includes the underlying rationales of creditors' rights and maintaining the federal tax system.[116]

Several important concepts underlie disclaimers.[117] First, disclaimers protect personal autonomy. This belief evolved from the traditional view that a required element of a gift is acceptance.[118] Once an acceptance of a beneficial transfer was presumed under the law, disclaimers provided the intended beneficiary with a means of retroactively rejecting the interest.[119] Because, disclaimers initially protected personal autonomy, they developed such that motive was irrelevant.[120] Under this rationale, the disclaimant should not be forced to accept a gift, regardless of her reasons for rejecting it.

Second, and closely related to personal autonomy, is that disclaimers protect an intended beneficiary's need to reject burdensome property.[121] Some examples used to illustrate burdensome property are property encumbered beyond fair market value and property that would significantly increase a recipient's tax obligations.[122] Under this rationale, the belief prevails that the disclaimant should not be forced to accept a gift if doing so would impose too great a burden on her.[123] Essentially, there is a general agreement and recognition that any individual using a disclaimer in this manner possesses a valid motive.[124]

Third, disclaimers protect a testator's intent.[125] This rationale directly relates to insolvent individuals using disclaimers. The concern here is that if an insolvent individual is not allowed to disclaim her interest in an estate, the devise would not reach the intended beneficiary. Instead, the devise would be diverted to the intended beneficiary's creditors or the government due to the intended beneficiary's unsatisfied obligations.[126] The goal behind such a disclaimer is to avoid frustrating the wishes of the testator because of the beneficiary's outstanding obligations.[127]

While these issues are all valid policy concerns, they do not exist in a vacuum. They must be balanced against competing policy concerns

115. *See* Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 31–32 (1993); Hirsch, *supra* note 1 at 588.

116. *See* Parker, *supra* note 115, at 31–32.

117. *See supra* notes 53–56 and accompanying text.

118. *See supra* note 37 and accompanying text.

119. *See supra* notes 26–32 and accompanying text.

120. *See* cases cited *supra* note 22.

121. *See* Parker, *supra* note 115, at 31–32.

122. *See id*. at 32.

123. *See id*.

124. Agreement and recognition of the validity of using a disclaimer to avoid burdensome property can be seen in the statutory allowance of disclaimers to reduce gift taxation under I.R.C. § 2518. *See supra* notes 62–67 and accompanying text.

125. *See* Parker, *supra* note 115, at 32.

126. *See id.*

127. *See id*.

underlying creditors' rights and maintenance of the federal tax system. Several important concepts must be considered. First, a viable system where creditors can enforce the obligations of the debtor must be maintained.[128] Without a consistent and effective means of enforcing obligations, no debtor-creditor system could exist. "The creditor's right of recovery thus lies at the core of debtor-creditor law, irrespective of the debtor's personal wishes."[129] In one sense, the balance between the creditor's rights and personal autonomy has always been, and always must be, weighed heavily in favor of the creditor's rights.[130] To maintain such a system, the debtor must surrender a certain amount of her personal autonomy to the creditor. Otherwise, very few individuals would be willing to take on the uncertain role of creditor.

It is for these reasons that the system does protect creditors. Fraudulent conveyance law and the Federal Bankruptcy Code (Bankruptcy Code) both demonstrate the value of creditors' rights.[131] A fraudulent conveyance occurs when an insolvent individual conveys property or other interest such that it is beyond her creditors' reach while still enjoying benefit from the property or interest.[132] Statutes in place in most states, as well as their incorporation into the Bankruptcy Code, provide creditors with a remedy against the transferred property or interest despite the efforts of the insolvent.[133] Under these circumstances, the evasive motive of the debtor is paramount in the policy decision. A transfer or action taken to avoid an obligation to creditors is condemned, and despite the debtor's action, the creditors' right to have the debts satisfied prevails.[134]

Second, the Bankruptcy Code also demonstrates the importance of creditors' rights. "One of the [Bankruptcy] Code's primary policies is fairness to all creditors."[135] The Bankruptcy Code strives for uniformity in proceedings surrounding bankruptcy actions.[136] Uniformity is valued because it lowers the risk involved for creditors and supports enforcement of creditors' rights.[137] There is a general weighing of a debtor's personal autonomy against the rights of the creditor in collecting debt

128. *See* Hirsch, *supra* note 1, at 588.

129. *Id*.

130. If creditors cannot enforce debtors' obligations, no functional market for capital can exist. *See id*. at 610–16. The high risk involved will scare off most creditors, leaving only creditors seeking extremely high returns. The high-risk/high-return atmosphere means high cost for debtors. Thus, the number of eligible debtors will also be reduced. With the number of willing creditors and eligible debtors so vastly reduced, the system is essentially destroyed all together.

131. *See* Parker, *supra* note 115, at 33–35.

132. DAVID G. EPSTEIN, BANKRUPTCY AND OTHER DEBTOR-CREDITOR LAWS IN A NUTSHELL 62 (5th ed. 1995).

133. *See id*. at 66–77.

134. *See id*. at 62–63.

135. Parker, *supra* note 115, at 34.

136. *See id.* at 48.

137. *See id*.

throughout the Bankruptcy Code.[138] It is important to note that a creditor's rights do not always prevail over a debtor's interest.[139] Even so, underlying policy rationales favor protecting a creditor in instances where a debtor acts to undermine the creditors' rights.[140] This rationale, however, contradicts disclaimer law, which disregards a disclaimant's motive.

In fact, the lack of regard for the motivation behind a disclaimer has caused a great deal of difficulty in the application of the Bankruptcy Code.[141] Furthermore, because of variations in state disclaimer laws, courts have not been able to achieve uniform results.[142] In response to these difficulties, provisions were added to the Bankruptcy Code to deal with these specific policy concerns.[143] Under the Bankruptcy Code, an individual who files for bankruptcy relief cannot subsequently disclaim an interest in a gratuitous transfer.[144] However, courts have interpreted this specific congressional action to apply only to disclaimers enacted subsequent to the bankruptcy filing.[145] This interpretation leaves the creditor unprotected from disclaimers enacted prior to bankruptcy filings. While the legislative action is not definitive in determining the validity of all disclaimers under bankruptcy law, it is further evidence that the scale is tipped in favor of protecting creditors' rights over an individual's right to disclaim.

Third, the federal tax system must be maintained. It can simply be noted that without the ability to enforce tax laws, the government could not operate. With this fact in mind, the right to disclaim must be balanced against the need for a consistent, functioning tax system. Because the right to disclaim functioned only under state law in the past,[146] inconsistencies arose when disclaimers were used for federal tax purposes.[147] For example, when a disclaimer was used to reduce gift tax liabilities, widely differing results were obtained.[148] Due to the inconsistency, Congress enacted § 2518 of the IRC in an effort to unify the application and result of disclaimers under federal tax law.[149] While this enactment provided for uniform application of disclaimers when a disclaimant's motive

138. *See* Hirsch, *supra* note 1, at 590.

139. *See id.* (citing the examples of protecting the debtor's dependents through the creation of homestead rights and family allowances).

140. *See* Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401, 404 (Cal. 1940); Stein v. Brown, 480 N.E.2d 1121, 1124 (Ohio 1985); Butcher v. Butcher (*In re* Estate of Reed), 566 P.2d 587, 589 (Wyo. 1977) (finding that a disclaimer is a fraudulent transfer). *But see In re* Hansen, 248 N.E.2d 709, 713 (Ill. App. Ct. 1969); Frances Slocum Bank and Trust Co. v. Estate of Martin, 666 N.E.2d 411, 415 (Ind. Ct. App. 1996); Bradford v. Calhoun, 109 S.W. 502, 504 (Tenn. 1908); Dyer v. Eckols, 808 S.W.2d 531, 535 (Tex. App. 1991) (finding that a disclaimer is not a fraudulent transfer).

141. *See* Parker, *supra* note 115, at 35.

142. *See id.*

143. *See* 11 U.S.C. § 541(a)(5) (1994).

144. *See id.*; *see also* Parker, *supra* note 115, at 35.

145. *See* Parker, *supra* note 115, at 35–39.

146. *See supra* notes 37–48 and accompanying text.

147. *See supra* notes 50–52 and accompanying text.

148. *See supra* notes 50–52 and accompanying text.

149. *See supra* notes 50–52 and accompanying text.

is considered valid,[150] it did not provide for disclaimers used to avoid tax liens.

When they avoid tax liens, disclaimants frustrate the government's ability to collect outstanding tax obligations. When an individual acts in this manner, her motive contradicts the rationales underlying the IRC and the Bankruptcy Code. However, due to the traditional view that a disclaimant's motive is irrelevant[151] and the view that it is not valid to evade one's financial obligations, courts have struggled to deal with these uses of disclaimers.[152]

Fourth, the question of a testator's intent must be balanced against creditor or governmental rights. One view is that allowing disclaimers to avoid creditors or tax obligations protects the testator's intent. However, allowing the disclaimer does not truly fulfill the testator's intent. In either case, the intended recipient does not ultimately receive the property. While proponents of disclaimers argue that the property will be transferred to someone "friendly" to the testator,[153] such as an heir, friend, or charity, they have no basis for assuming that the testator would have such an intent. In fact, the testator could explicitly provide for an alternative disposition in the event that the initial recipient should disclaim.[154] However, if the testator fails to provide for an alternative disposition prior to death, she has implicitly indicated a desire for statutory default rules to govern.[155] Furthermore, it is no less likely that a testator intends to help the devisee pay off debts and begin anew. At the very least, it seems that creditors' rights should be favored above personal autonomy when dealing with questions of insolvent individuals using disclaimers.[156]

Given the policies behind fraudulent conveyance law, the Bankruptcy Code, and the federal taxing system, the protection of creditors' rights and government tax liens seem favored over an insolvent individual's right to disclaim. However, given the development of disclaimers under the common law and state and federal statutory enactment, there appears to be a conflict between the generally favored policy stance and the general state of the law. Action is required to rectify this inconsistency; however, piecemeal attempts to remedy this situation have complicated the goal of reaching a justifiable resolution.

150. *See supra* notes 62–67 and accompanying text.

151. *See* cases cited *supra* note 22.

152. *See supra* notes 131–33.

153. *E.g.*, Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401 (Cal. 1940); Stein v. Brown, 480 N.E.2d 1121 (Ohio 1985); Butcher v. Butcher (*In re* Estate of Reed), 566 P.2d 587 (Wyo. 1977).

154. *See* Medlin, *supra* note 21, at 1256.

155. *See id*.

156. *See* Hirsch, *supra* note 1, at 651–52. It is important to note that Hirsch would limit protection of creditors to involuntary creditors and leave voluntary creditors to bargain for a waiver of the debtor's right to disclaim.

B. Judicial Struggles with Insolvency and Disclaimers

Due to the apparent inconsistency between prevailing policy concerns and the current state of disclaimer law, courts have struggled with insolvent individuals disclaiming interests to avoid creditors or tax obligations. Many courts have attempted to move away from the traditional approach that allows disclaimers without examining the disclaimant's motive.[157] These courts have attempted to prevent insolvent individuals from disclaiming interests without overstepping the role of the judiciary.[158]

Several state courts labeled an insolvent individual's disclaimer a fraudulent transfer in an attempt to protect creditors' rights.[159] The problem with this approach is that disclaimers normally incorporate the relation-back doctrine, under which no transfer is recognized.[160] The disclaimant is treated as though she never received an interest. The courts opposing this line of cases point to the fact that no interest ever vests in the disclaimant; therefore, the disclaimant cannot be held accountable for a fraudulent transfer.[161]

Proponents of treating disclaimers as fraudulent transfers often provide two main arguments to support their position. First, these courts argue that the power to disclaim is analogous to a general power of appointment.[162] These courts argue that because a disclaimer results in title vesting in another, it is sufficiently similar to the power to vest title in another under a general power of appointment.[163] Without discussing the significant differences between *directing* title to vest in a specific individual *of choice* under a general power of appointment, and *allowing* title to pass as if the disclaimant had predeceased the testator under a disclaimer, these courts decide the similarities between the two doctrines warrant the application of the rules governing general power of appointment to actions involving disclaimers.[164] Because a general power of appointment cannot be used to defeat a creditor's claim, these courts argue that a disclaimer cannot be used to accomplish this goal either.[165]

157. *See* cases cited *supra* note 22.

158. *See* cases cited *supra* note 153.

159. *See* cases cited *supra* note 153.

160. *See supra* notes 25–31 and accompanying text; *see also* Medlin, *supra* note 21, at 1262–65.

161. *See generally* Gen. Fin. Corp. v. Hansen (*In re* Estate of Hansen), 248 N.E.2d 709 (Ill. App. Ct. 1969); Frances Slocum Bank and Trust Co. v. Estate of Martin, 666 N.E.2d 411 (Ind. Ct. App. 1996); Bradford v. Calhoun, 109 S.W. 502 (Tenn. 1908); Dyer v. Eckols, 808 S.W.2d 531 (Tex. App. 1991).

162. *See* Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401, 403–04 (Cal. 1940); Stein v. Brown, 480 N.E.2d 1121, 1122–23 (Ohio 1985). For a further discussion of the analogy between a disclaimer and a general power of appointment, see Hirsch, *supra* note 1, at 605–10.

163. *See* cases cited *supra* note 161.

164. *See* cases cited *supra* note 161.

165. *See* cases cited *supra* note 161.

They deem both actions to be fraudulent conveyances and allow creditors to take action against such voidable transfers.[166]

Second, these courts argue that even if a disclaimer is not sufficiently similar to a general power of appointment, the relation-back doctrine should not control the rights of a creditor because it is a legal fiction.[167] They argue that this legal fiction was first recognized at a time when the only concerns involved were the rights of the disclaimant and the protection of the free flow of property between generations.[168] The courts also cite the historical denial of a right to disclaim property under intestate transfers to support the conclusion that the relation-back doctrine is not an absolute rule.[169] The conclusion is that realistic policy considerations outweigh the application of a fictitious legal norm.

These arguments fail to recognize at least two important aspects of disclaimer law. First, the analogy between a power of appointment and a disclaimer is flawed due to the different levels of control over the property.[170] In fact, disclaimer statutes specifically prohibit the disclaimant from directing the interest to another transferee of her choice.[171] The UPC states that "the disclaimed interest devolves as if the disclaimant had predeceased the decedent."[172] Similarly, the qualified disclaimer section of the IRC "prohibits the disclaimant from directing the disclaimed interest to another transferee."[173] In either case, the disclaimant does not directly designate the recipient of the disclaimed interest.[174] This result differs from a general power of appointment where the holder of the power may assign the interest, or refuse to exercise the power entirely.[175] If exercised, the holder of the power directly designates the recipient of the interest. There is no statutory designee involved. Thus, this portion of the argument does not support the analogy between a power of appointment and a disclaimer.

Second, the analysis suffers from a blatant disregard for longstanding disclaimer principles. For example, common-law disclaimer rules incorporated the relation-back doctrine to deal with the presumed acceptance of a testamentary gift.[176] While these courts view the relation-back doctrine as a legal fiction substituting a retroactive rejection in

166. *See Kalt*, 108 P.2d at 404; *Stein*, 480 N.E.2d at 1124.

167. *See Kalt*, 108 P.2d at 403; *Stein*, 480 N.E.2d at 1123.

168. *See* Hirsch, *supra* note 1, at 604.

169. *See Kalt*, 108 P.2d at 402.

170. *See* Medlin, *supra* note 21, at 1255–57.

171. *See id*. at 1280–81; *see also* I.R.C. § 2518 (1994); UNIF. PROBATE CODE § 2-801 (amended 1993), 8 U.L.A. 19 (Supp. 2000).

172. UNIF. PROBATE CODE § 2-801 (amended 1993), 8 U.L.A. 19 (Supp. 2000).

173. Medlin, *supra* note 21, at 1280–81 (discussing I.R.C. § 2518 (1994)).

174. *See id.* While it is true that the interest is likely to devolve to a party "friendly" to the disclaimant, this result is simply statutory in nature. In the event that the testator does not designate an alternate transferee, it is the legislature, through the statutory provisions, that selects the alternative transferee. It is not the disclaimant that undertakes the designation.

175. *See* Hirsch, *supra* note 1, at 608.

176. *See supra* notes 25–32 and accompanying text.

place of a presumed acceptance,[177] it is just as logical to view the presumed acceptance as the legal fiction.[178] In other words, the acceptance should never have been recognized.[179] Essentially, the relation-back doctrine can be viewed as erasing any effect of the presumed acceptance in favor of the disclaimant's rejection—a rejection that was always the disclaimant's intent. Beyond the argument over legal fiction and legal reality, these courts ignored long-standing disclaimer law and, arguably, invented doctrine in an attempt to justify judicial activism.[180]

Unquestionably, the common-law rules allowing disclaimers to avoid *testate* transfers but prohibiting use in avoiding *intestate* succession were based on an outdated rationale regarding the succession of real property.[181] Furthermore, these common-law rules are presently irrelevant because the distinction was dropped upon the enactment of disclaimer statutes.[182] Some of these courts attempted to disguise their disregard for the well-established rule of ignoring the disclaimant's motive.[183] However, curbing debtors' use of disclaimers to avoid creditors was clearly the driving force behind these rulings.[184] In fact, it was not beyond one court to openly base its decision on the disclaimant's intent.[185] These cases ignoring disclaimer law have either been overruled or remain a minority approach.[186] Arguably, judicial action to prevent insolvent individuals from using disclaimers without statutory revision constitutes judicial activism. While the judiciary attempts to deal with insolvent individuals disclaiming to the detriment of their creditors, it is also faced with disclaimants attempting to avoid tax obligations.

An interest in protecting the policies underlying the IRC has also led to judicial attempts to curb the use of disclaimers.[187] Until December 1999, a circuit split predominated as to whether a disclaimer could defeat the operation of a federal tax lien.[188] Prior to the *Drye* decision,[189] courts

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177. *See* cases cited *supra* note 161.
178. *See supra* notes 25–32 and accompanying text.
179. *See supra* notes 25–32 and accompanying text.
180. *See* cases cited *supra* note 153.
181. *See supra* notes 24–36 and accompanying text.
182. *See supra* notes 44–49 and accompanying text. Note that the change in the law came about due to statutory enactment.
183. *See* Stein v. Brown, 480 N.E.2d 1121, 1124 (Ohio 1985).
184. *See id*. at 1124 (stating that the court cannot condone a debtor's disclaimer when it is used to avoid creditors, especially when the property is transferred to close family members and there is a high probability that the disclaimant will retain some enjoyment of the property); *see also* Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401, 403 (Cal. 1940).
185. *See* Butcher v. Butcher (*In re* Estate of Reed), 566 P.2d 587, 590–91 (Wyo. 1977).
186. *See* Drye v. United States, 528 U.S. 49, 60–61 (1999). Note that the decision in *Drye* is in regard to federal tax liens and does not directly apply to creditors.
187. *See id*.
188. *See id*. at 479–80; *see also* Drye Family 1995 Trust v. United States, 152 F.3d 892, 897–98 (8th Cir. 1998); United States v. Comparato, 22 F.3d 455, 458 (2d Cir. 1994) (holding that a disclaimer cannot defeat the attachment of a federal tax lien). *But see* Leggett v. United States, 120 F.3d 592 (5th Cir. 1997); Mapes v. United States, 15 F.3d 138, 141 (9th Cir. 1994).
189. *See Drye*, 528 U.S. 49, 60–61.

urging that a state law disclaimer could not defeat a federal tax lien conducted their analysis under the assumption that a state law property interest instantly vested in the potential recipient.[190] The courts then proceeded under the federal statutes outlining the operation of tax liens[191] without further considering state law.[192] These courts relied on case law indicating that once state law created a sufficient property interest in the taxpayer, federal law controls.[193] Therefore, the courts concluded that the property interest was instantly created under state law and that federal law then allowed the tax lien to attach.[194] In *Drye*, the Supreme Court adopted an approach consistent with this view.[195]

There can be little dispute over the fact that once state law creates a *sufficient* property interest, federal law operates, and any subsequent action under state law is no longer relevant.[196] However, the Court's approach is, at best, a half-hearted examination of state law and disregards both the long-standing application of the relation-back doctrine and statutory enactment. A complete exploration of the relevant law would render as relevant at least two other considerations.

First, the relation-back doctrine is not necessarily a simple legal fiction that retroactively extinguishes a vested property interest in the disclaimant. As stated earlier, it is just as logical to view the presumption of acceptance as a legal fiction with the relation-back doctrine as the reality.[197] Following the long-standing doctrine that the disclaimer relates back in time for *all purposes*, other courts have come to the conclusion that a disclaimer does defeat a federal tax lien.[198] Because they fully considered all aspects of state law, these courts recognized that state law *never* created a property interest in the disclaimant, and there was no sufficient interest to which the tax lien could attach.[199] Furthermore, these courts did not necessarily agree with the results from a policy standpoint but recognized that it is not the judiciary's place to alter the operation of disclaimer law.[200]

190. *See supra* notes 108–14 and accompanying text.
191. *See supra* notes 111–14 and accompanying text.
192. *See supra* notes 108–12 and accompanying text.
193. *Drye Family 1995 Trust*, 152 F.3d at 895.
194. *See supra* notes 109–10 and accompanying text.
195. *See* Drye v. United States, 528 U.S. 49, 60–61 (1999).
196. *See* United States v. Bess, 357 U.S. 51, 55 (1958).
197. *See supra* notes 176–79 and accompanying text.
198. *See* Leggett v. United States, 120 F.3d 592, 593 (5th Cir. 1997); Mapes v. United States, 15 F.3d 138, 139 (9th Cir. 1994).
199. *See Leggett*, 120 F.3d at 598; *Mapes*, 15 F.3d at 140.
200. *See Leggett*, 120 F.3d at 598. Advancing a legislative solution, Judge Jerry E. Smith wrote:

> In closing, we note that Congress easily can expand the IRS's lien power, if it so desires. For example, Congress can follow what it did with § 2511(a), and define property more broadly than state law does. Alternatively, Congress simply can prohibit persons subject to § 6321 from filing disclaimers. We decline the IRS's invitation to rewrite the law ourselves, as that power lies exclusively in the legislative branch.

Id. at 598.

Second, not allowing the disclaimer to relate back in time for all purposes contradicts most statutory language. As stated earlier, when states codified disclaimer law, most incorporated the relation-back doctrine, retroactively applying disclaimers to the time of the decedent's death or other relevant occurrences.[201] The same courts that ignore state law to avoid a disclaimer being used to defeat a tax lien[202] also ignore inconsistencies within federal legislation. Although the disclaimer provision found within the IRC[203] is not controlling on whether a disclaimer defeats the attachment of a federal tax lien, it does aid in deciding how federal courts should look at this issue.[204] Section 2518 of the IRC outlines the conditions for a qualified disclaimer.[205] Most significant in this analysis is the IRC's incorporation of the relation-back doctrine. "For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest *as if the interest had never been transferred to such person*."[206]

This language illustrates the consistent recognition of the relation-back doctrine throughout statutory schemes and the common law. Neither common nor statutory law justifies judicial actions altering the application of disclaimers. Essentially, courts advocating that a disclaimer cannot defeat either creditors' rights or federal tax liens attempt to enforce policy decisions through judicial activism. Still, other courts have continued to recognize the well-established treatment of disclaimers, despite the valid policy concerns. Fairness to creditors, creditors' rights, and uniform applications of laws will continue to cause inconsistencies as long as a solution to "the problem of the insolvent heir" is pursued through judicial activism.

Despite precedent and statutory language indicating a contrary result, the Supreme Court has ultimately resolved the matter of whether a disclaimer can defeat a federal tax lien in the negative.[207] In *Drye*, the Court did not make a great effort to square its opinion with well-established notions of disclaimer law. Instead, it limited its examination of state property rights such that anything remotely resembling a state property right ended the state law exploration, leading to an immediate dependence on federal tax law.[208] While federal law does control once a *sufficient* state law property interest exists,[209] the Court gave little consid-

201. *See supra* notes 37–49 and accompanying text.
202. *See supra* notes 188–93 and accompanying text.
203. *See* I.R.C. § 2518 (1994).
204. This provision is intended to provide uniform application of state law disclaimers when a disclaimer is executed to reduce the burden of federal gift taxes. *See supra* notes 35–39 and accompanying text.
205. *See* I.R.C. § 2518 (1994).
206. I.R.C. § 2518 (1994) (emphasis added).
207. *See* Drye v. United States, 528 U.S. 49, 60 (1999).
208. *See id*.
209. *See* United States v. Bess, 357 U.S. 51, 56–57 (1958).

eration as to whether the interest involved was sufficient.[210] The Court brushed aside any arguments about disclaimer law or the relation-back doctrine as if these ideas had never existed.[211] While the Court likely acted with the intent of addressing "the problem of the insolvent heir,"[212] its actions were more likely to lead to more confusion and uncertainty.

After *Drye*, it seems that a state law disclaimer cannot defeat the enforcement of a federal tax lien.[213] However, we are left to wonder if the decision is limited to its facts. Due to the Court's limited discussion of the aspects of disclaimer law and its focus on a minimal property interest,[214] one could imagine factual scenarios that might change the outcome. For instance, what if a case involves a testamentary transfer?[215] What if the testamentary transfer included a provision for an alternative devisee? What if the alternative devisee is not a close family member of the disclaimant? Because the Court has ignored the basic principles underlying disclaimer law,[216] all of these considerations could potentially be relevant to the analysis. If well-established aspects of disclaimer law do not apply, then it could be that any argument as to the validity of a disclaimer is potentially fair game. One must wonder whether this decision signals an opportunity for a wholesale review of the policy considerations underlying disclaimer law. Will disclaimers now be ineffective against creditors in state law or federal bankruptcy proceedings? In essence, the Court has, at least temporarily, created more uncertainty and confusion. Yet, it is primarily the uncertainty and confusion that raised concerns with "the problem of the insolvent heir" in the first place.[217]

It is unlikely that the Court intended to raise these issues. Instead, the Court sought to incorporate a greater recognition of a functional tax system, and perhaps, by implication, creditors' rights, into the underlying policy of disclaimer law.[218] Incorporating these policy concerns into disclaimer law may be beneficial. However, legislative action would provide the benefits of these policies while minimizing uncertainty related to the change in law.

210. The Court stated "[U]nder Arkansas law Drye had, at his mother's death, a valuable, transferable, legally protected right to the property at issue." *Drye*, 528 U.S. at 59–60. This statement further indicates the superficial review of state law. Had a creditor sought attachment to this interest in state court, there would undoubtedly have been a decision that Drye never had an interest in the property because the disclaimer relates back to the time of his mother's death. *See* ARK. CODE ANN. §§ 28-2-101, -107 (1987).

211. *See Drye*, 528 U.S. at 59–61.

212. *See id.*

213. *See id*.

214. *See id.* at 59–61.

215. In *Drye*, Ms. Irma Drye died intestate. *See id*. at 52. Furthermore, the Court relied on the concept of inheritance in its decision. "Arkansas law primarily gave Drye a right of considerable value—the right either to inherit or to channel the inheritance to a close family member." *Id.* at 60.

216. *See supra* notes 24–61 and accompanying text.

217. *See supra* notes 128–56 and accompanying text.

218. *See Drye*, 528 U.S. at 61 (citing Hirsch, *supra* note 1, at 607–08).

IV. RESOLUTION

The Supreme Court's decision in *Drye* is an example of the difficulty involved with a judicial solution to the problem of insolvent individuals disclaiming valuable interests. While creating inconsistency and confusion, the decision appears to overstep the powers of the judiciary and encroach on the powers of the legislative branch.[219] Creditors' rights may outweigh personal autonomy when balancing the policies underlying disclaimers,[220] but judicial action only serves to confuse the issue. A much more direct, simplified, and consistent result can be obtained through legislative enactment.[221]

As stated earlier, six states have included provisions in their disclaimer statutes prohibiting insolvent individuals from using disclaimers.[222] As these statutes demonstrate, the simple addition of a sentence to a state's disclaimer statute can effectively address "the problem of the insolvent heir."[223] For example, two statutes include the following language: "The right to disclaim otherwise conferred by this section shall be barred if the beneficiary is insolvent at the time of the event giving rise to the right to disclaim."[224] This addition to the statute leaves little room for the insolvent individual to argue that their attempted disclaimer is effective against those seeking attachment to the beneficial interest. Furthermore, this result is accomplished without frustrating past judicial decisions in related areas or ignoring the doctrine of stare decisis. However, relying solely on individual state legislatures to enact such provisions raises possible concerns over inaction and inconsistency.

State legislatures have failed to act on this issue thus far.[225] This fact is evident in that a majority of state statutes do not contain language ad-

219. *See* Leggett v. United States, 120 F.3d 592, 598 (5th Cir. 1997).

220. *See* Hirsch, *supra* note 1, at 588–90.

221. *E.g.*, ALA. CODE § 43-8-295 (1991); FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); MASS. ANN. LAWS ch. 191A, § 8 (Law. Co-op. 1994); MINN. STAT. ANN. § 525.532(6) (West 1975 & Supp. 2000–2001); N.J. STAT. ANN. § 3B:9-9 (West Supp. 2000); WIS. STAT. ANN. § 853.40(7)(b) (West 1991 & Supp. 2000). Certainly, statutory action is not free from faults. State and federal legislators may not feel that the issues involved with "the problem of the insolvent heir" are pressing enough to warrant *immediate* legislative action. Furthermore, they may feel that there is not enough academic or public discourse on the issues involved to serve as an informational basis for proposed legislation. However, these faults can be overcome. Furthermore, it must be noted that the faults of statutory action are not synonymous with support for judicial action. One cannot argue that current legislative inaction favors judicial action. If there is any implication to be drawn from the legislative inaction, it is that courts should continue to apply the established principles of disclaimer law. Ultimately, it must be recognized that these principles were not established in a short period of time, nor should they be wiped away as a result of singular judicial action. The best course for the judicial branch is to continue to apply statutory and common-law principles of disclaimer law as they currently stand.

222. *See supra* notes 88–90 and accompanying text.

223. *See supra* notes 88–90 and accompanying text.

224. FLA. STAT. ANN. § 732.801 (West 1995 & Supp. 2000); MINN. STAT. ANN. § 525.532(6) (West 1975 & Supp. 2000–2001).

225. However, it must be noted that this fact far from supports judicial action. In fact, legislative inaction supports maintaining the status quo interpretation of disclaimer law.

dressing the problem of insolvent individuals using disclaimers.[226] It is not surprising that legislatures would hesitate to alter this well-established area of the law without a proper foundation for the changes. In light of legislative inaction to date, coupled the impracticality of judicial action, an open dialogue regarding "the problem of the insolvent heir" is required. It must be noted, however, that even with an open dialogue, state disclaimer statutes will not be altered with great immediacy. While the alteration of each state's disclaimer statute stands as a long-term goal, more expedient results can be achieved when federal law is implicated.

Congress can legislate a response to inconsistencies arising when federal law implicates state law disclaimers. A more expedient result can be achieved since only one, as opposed to fifty, legislative body is involved. In this vein, the Fifth Circuit, made a direct call for federal legislative action in the *Leggett* case.[227] In reversing the lower court's ruling that a tax lien attached despite a valid state law disclaimer, Judge Smith stated, "Congress simply can prohibit persons subject to § 6321 from filing disclaimers."[228] Judge Smith recognized that judicial action was not required and acknowledged the potentially simple and expedient legislative solution. This same rationale can be applied in the realm of bankruptcy law. While Congressional action in the area of bankruptcy has already partially addressed the issue of insolvent disclaimers, further action is necessary to resolve "the problem of the insolvent heir."

Unlike the IRC, the Bankruptcy Code does contain a definition of "property." Section 541 of the Bankruptcy Code has been recognized as a means of preventing an insolvent individual from disclaiming a valuable interest to the detriment of her creditors once she has filed a bankruptcy petition.[229]The broad and inclusive definition of property contains reference to property that a debtor "becomes entitled to acquire."[230] Courts have interpreted this reference as applicable where a debtor disclaims after petitioning for bankruptcy relief.[231] While the definition in the statute has prevented an insolvent individual from disclaiming to the detriment of her creditors once she has filed for bankruptcy relief, a dis-

226. *See supra* note 88 and accompanying text.
227. *See* Leggett v. United States, 120 F.3d 592, 598 (5th Cir. 1997).
228. *Id*.
229. *See* Parker, *supra* note 115, at 34–35.
230. *Id*. at 35.
231. *See id.* The statutory language involved does help to justify the judicial interpretation. However, the action does seem suspect under analysis of judicial action involving tax liens. *See supra* notes 189–219 and accompanying text. Admittedly, this situation appears to differ from the *Drye* case. Here, courts are basing the decision on a *federal statutory* definition of property that *specifically* refers to an interest that an individual is entitled to acquire. In *Drye*, the Court based its decision on the mere mention of "rights to property" in the Internal Revenue Code. *See* Drye v. United States, 528 U.S. 49, 58–59 (1999).

claimer enacted prior to a bankruptcy filing is still valid.[232] The statutory language is somewhat effective in combating "the problem of the insolvent heir." However, a more purposeful and focused statutory enactment will prove beneficial. Such Congressional action could fully address "the problem of the insolvent heir" where federal law implicates state law disclaimers.[233] Statutory language stating that disclaimers enacted within a certain number of days prior to filing a bankruptcy petition will not be considered effective will provide broad protection for creditors.[234] This action, coupled with the other federal and state statutory actions proposed above, will effectively solve "the problem of the insolvent heir."

V. CONCLUSION

Adam Hirsch's article "*The Problem of the Insolvent Heir*" argues that too often individuals are allowed to disclaim valuable interests to the detriment of their creditors.[235] However, judicial solutions[236] are not a proper method of dealing with this problem as they only serve to confuse the issues involved. Judicial invasion of state law disclaimers will inevitably conflict with well-established principles of disclaimer law.[237] While such fragmented efforts may provide the desired result in individual cases, the decision will be, at least temporarily, limited to the facts presented. Simple statutory language can address "the problem of the insolvent heir" without encountering the difficulties involved with judicial action. These additions will avoid inappropriate, piecemeal judicial "solutions" that confuse the issues and instead address the policy concerns underlying disclaimer law. Judge Smith summarized this position in *Leggett*, "We decline the . . . invitation to rewrite the law ourselves, as that power lies exclusively in the legislative branch."[238] As disclaimer law continues to develop, the *legislature*, not the judiciary, must favor the enforcement of debtor's obligations over concerns for the debtor's personal autonomy.

232. *See* Parker, *supra* note 115, at 35. The statutory definition refers to property of the estate. Prior to the petitioner seeking bankruptcy relief, there is no "property of the estate," and the section does not apply. *See id*.

233. It should be noted that Parker calls for a judicial solution to pre-petition disclaimers. *See* Parker, *supra* note 115, at 35. This author does not agree with this proposal for the same reasons outlined above. *See supra* notes 157–218 and accompanying text.

234. Essentially, such language will give *statutory* credence to the fraudulent conveyance arguments. *See supra* notes 159–86.

235. *See* Hirsch, *supra* note 1, at 646–48. It should be noted that Hirsch recognized that this conclusion was open to debate. Hirsch, *supra* note 1, at 652. Furthermore, Hirsch envisioned protecting only involuntary creditors from disclaimers. Hirsch, *supra* note 1, at 651–52.

236. Hirsch refers to a "judicial challenge" involved with reconciling the conflict between creditors' rights and personal autonomy. *See* Hirsch, *supra* note 1, at 589. Likewise Parker calls for a judicial solution to the problems surrounding disclaimers in bankruptcy. *See* Parker, *supra* note 115, at 35.

237. *See supra* notes 157–218 and accompanying text.

238. Leggett v. United States, 120 F.3d 592, 598 (5th Cir. 1997).