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THE EFFECTS OF WEST VIRGINIA'S BANKRUPTCY EXEMPTION STATUTE ON RESIDENT DEBTORS

JULIA A. CHINCHECK*

I. INTRODUCTION

Under the authority of the Bankruptcy Reform Act of 1978, West Virginia has "opted-out" of the federal exemptions and provided its debtors with a mandatory set of property exemptions in bankruptcy proceedings. By "opting-out," West Virginia precludes its debtors from exempting property specified under the federal bankruptcy exemption statute and instead mandates that its residents utilize the state legislated bankruptcy exemptions. This note will examine the effects and possible problems caused by West Virginia's "opt-out."
II. Bankruptcy Exemptions in the United States

A. Generally

An exemption is "[a] right given by law to a debtor to retain a portion of his property free from the claims of creditors." Exemption laws are generally one of three types: (1) crystalized exemptions; (2) open designation exemptions; or (3) percentage exemptions.

under which the insured is the debtor or an individual of whom the debtor is a dependent.

(i) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(j) The debtor's right to receive:
   (1) A social security benefit, unemployment compensation, or a local public assistance benefit;
   (2) A veterans' benefit;
   (3) A disability, illness or unemployment benefit;
   (4) Alimony, support or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
   (5) A payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless:
      (A) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
      (B) Such payment is on account of age or length of service; and
      (C) Such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954.

(k) The debtor's right to receive, or property that is traceable to:
   (1) An award under a crime victim's reparation law;
   (2) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
   (3) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
   (4) A payment not to exceed seven thousand five hundred dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
   (5) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

The statute further provides that it will not affect the applicability of other provisions of the Reform Act except for § 522(d).

Pickens v. Pickens, 125 Tex. 410, 414, 83 S.W.2d 951, 954 (1935).

Joslin, Debtors' Exemption Laws: Time for Modernization, 34 Ind. L.J. 355 (1959)
Crystalized exemptions are fixed by either quantity or monetary value. An exemption of $1,000 worth of personal property is crystalized by a monetary value limitation. The debtor may exempt any number of items of personal property until the $1,000 limit is reached. An exemption of one automobile is crystalized by quantity. Only one auto may be exempted but it can be of any value. These crystalized exemptions enable the creditor to determine what amount he may receive from a debtor by specifying how much may be exempted. However, this type of exemption cannot adjust to changes in economic conditions without affirmative legislative action, and, as a result, becomes quickly outdated with time.

Open designation exemptions are not restricted by value or quantity, but rather through the use of limiting phrases. "All necessary household goods" is an example; use of the word "necessary" limits the property exemptable. This type of exemption is "extremely fluid and open-ended," and adjusts through the court system to new economic conditions. Its scope is limited by the bankruptcy court's determination of what is "necessary."

The percentage exemption is not as open-ended as the open designation exemption, but is more flexible than the crystalized exemption. Allowing a debtor to exempt a certain percentage of his monthly wages is an example of a percentage exemption. This type of exemption furnishes the creditor with some certainty of future receipts, yet it also provides some flexibility as the economy fluctuates.

Exemption laws, regardless of type, have generally been enacted to promote five social policies: (1) to provide a debtor with property necessary for physical survival; (2) to protect the debtor's dignity and his cultural and religious identity; (3) to enable a debtor to financially rehabilitate himself and earn income in the future; (4) to protect a debtor's family from the consequences of impoverishment; and (5) to spread the burden of supporting the debtor and his family from society to the debtor's creditors. To further these policies, a debtor may generally exempt food, clothing, household furniture, a home, sentimental items and tools with which to carry on his trade. Such exemptions enable the debtor to maintain economic and social stability for himself and his family.

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[hereinafter referred to as Joslin]. See generally, Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L. Rev. 615, 627-28 (1978) [hereinafter referred to as Resnick].

Joslin, supra note 5, at 356.

Joslin, supra note 5.

Id. at 357.

Id.

Id. at 358.

Resnick, supra note 5, at 621.

Resnick, supra note 5, at 623.
Throughout history, both the federal and later the state governments have provided exemptions for debtors. The federal bankruptcy exemptions were enacted in response to unfortunate economic conditions existing at the time of passage. Several factors, including those based on experience from history and the particular policies of those in charge, led to the enactment of many state exemption laws. As an example, when federal bankruptcy acts failed, states enacted legislation to relieve oppressed debtors. Also, some states enacted liberal exemption laws to attract settlers, in order to increase the population in a state. Following is a chronology of the exemptions provided for debtors in bankruptcy, beginning with the passage of the first Bankruptcy Act of 1800 to the 1978 Bankruptcy Reform Act.

B. History

1. The Bankruptcy Act of 1800

Under the Bankruptcy Act of 1800, Congress established a uniform system of bankruptcy throughout the United States. A merchant, banker, broker, factor, underwriter or marine insurer could be adjudged a bankrupt for commission of an act of bankruptcy provided in the statute. However, bankruptcy proceedings were available only to the mercantile class and not to consumer debtors. Proceedings against merchant debtors were involuntary and commenced upon the filing of a single creditor's petition to whom the debtor owed a minimum of $1,000. Voluntary proceedings were not available at this time to debtors in bankruptcy. Under the Act, a debtor was subject to imprisonment after being declared bankrupt if he did not surrender all assets in good faith to be included in his estate. The sentence im-

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13 The existing economic conditions are discussed more fully at infra subsection B, History.
14 C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935) [hereinafter referred to as C. WARREN]; Resnick, supra note 5, at 621.
15 In 1864, Florida provided a homestead exemption of $16,000 and a personalty exemption of $1,000; Arkansas provided $5,000 in homestead and $2,000 in personalty exemptions; Georgia provided $2,000 in homestead and $1,000 in personalty exemptions; Louisiana provided $16,000 homestead and $2,000 personalty exemptions; Mississippi provided a homestead exemption of 240 acres and a personalty exemption of $4,000; North and South Carolina each provided $1,000 homestead and $500 personalty exemptions; Virginia provided exemptions of $2,000 in both homestead and personalty; Kansas provided $5,000 homestead and $1,200 personalty exemptions; and Texas provided a homestead exemption of 200 acres. Thomas, Homestead and Exemption Laws of the Southern States, 10 AMER. LAW. REG. 137 (1871).
17 Id.
18 Id. at 21.
19 Id.
20 Voluntary bankruptcy was not available in the United States until passage of the Bankruptcy Act of 1841, 5 Stat. 440 (1841).
22 Id.; Countryman, A History of American Bankruptcy Law, 81 COMM. L.J. 226, 228 (1976) [hereinafter referred to as Countryman].
posed ranged anywhere from one to ten years in duration. The debtor would be released from prison if he obtained a discharge through the consent of two-thirds in number and value of his creditors. All of the bankrupt's assets, absent his exempt property, were transferred to assignees who turned the property over to creditors in satisfaction of the bankrupt's debts. The bankrupt debtor was allowed to exempt necessary wearing apparel for himself, his wife and children, and necessary beds and bedding.

Mounting dissatisfaction prompted the repeal of this Bankruptcy Act in 1803, two years short of its natural expiration date. Dissatisfaction resulted because bankruptcy proceedings were available only to merchants. Additionally, travel to distant federal courts which had jurisdiction of bankruptcy proceedings was difficult and time consuming. Often creditors received little compensation because most debtors were in jail.

In the early 1800's individual and business debts began to accumulate once more throughout the population and demands were voiced by the citizenry and legislators for a new national bankruptcy law. From 1817 to 1820, a severe economic depression gripped the United States. This depression followed the War of 1812 as a result of increases in the number of imported goods and haphazard loan-making by banks. Debtors were forced to rely on the existing state laws for release from imprisonment or for discharge from debts.

In 1822, a bill which provided for voluntary bankruptcy for nonmerchants was introduced and defeated in Congress. Additional bankruptcy bills appeared in Congress throughout the 1820's, only to be defeated.

During the 1830's, many states passed legislation prohibiting imprisonment for debt. Then, in 1837, the economic conditions of the Great Panic struck the United States. Once again, economic misfortune revived the
pressure on Congress to adopt national bankruptcy legislation to aid troubled debtors. The bill that eventually passed provided both voluntary and involuntary bankruptcy for merchant and nonmerchant debtors.

2. The Bankruptcy Act of 1841

The Bankruptcy Act of 1841 was enacted on July 25, 1841, by a 26-23 vote. This Act permitted voluntary bankruptcy for the first time in United States history: "All persons whatsoever ... who shall, by petition ... verified by oath, or ... by solemn affirmation, apply to the proper court ... and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act...." Once a debtor was declared bankrupt, all of his property—real, personal or mixed—was assigned to an assignee appointed by the proper court. Statutory exemptions were provided, including:

The necessary household and kitchen furniture and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall on exception taken, be subject to the final decision of said Court.

The Bankruptcy Act of 1841 was repealed by Congress in 1843. Although this Act worked well, creditors opposed it because of the large number of debtors being discharged. Increased prosperity and the popularity and generosity of state exemption laws passed after the Panic of 1837 led to the Act's repeal, and any probankruptcy sentiment was virtually eliminated.

Over the next fifteen years, little pressure was exerted upon Congress to pass a new national bankruptcy statute since a period of prosperity reigned throughout. Moreover, state exemptions passed after the 1837 panic provided

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37 5 Stat. 440 (1841).
38 C. WARREN, supra note 14.
40 Id.
41 Id. at 443.
42 5 Stat. 440, 441 (1841).
44 5 Stat. 440 (1841).
45 C. WARREN, supra note 14, at 81-82.
47 C. WARREN, supra note 14, at 87.
adequate relief from creditors. However, the Panic of 1857 brought a renewed public interest in national bankruptcy legislation because of an accumulation of debts resulting from the depressed economic conditions. In 1867, Congress responded to its constituents.48

3. The Bankruptcy Act of 1867

On March 2, 1867, the third federal bankruptcy act49 was enacted as permanent legislation in response to the poor economic conditions following the Civil War. This Act50 again instituted a uniform system of bankruptcy throughout the United States and provided for both voluntary and involuntary proceedings for merchant and nonmerchant debtors.51 The debtor, in voluntary proceedings, filed a petition which was considered to be an act of bankruptcy. Once the debtor was adjudged bankrupt, his entire estate was assigned and conveyed to an assignee appointed by the creditors. Certain property of the debtor was exempted from assignment:

That there shall be excepted from operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipment of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to exemption laws in force in the year eighteen hundred and sixty-four.52

West Virginia in 1864 made provisions for a homestead exemption. This $500 homestead exemption was available to a husband or parent residing in West Virginia53 and could be utilized when filing bankruptcy under the 1867 Act.

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48 Id. at 95.
49 14 Stat. 517 (1867). This Act was the first to be construed as permanent bankruptcy legislation.
50 Id.
51 Id.
52 Id. at 522-23.
53 W. VA. CODE § 29-7 (1864) provided that:
A husband or parent residing in this state may hold as a homestead real estate not exceeding five hundred dollars in value, to be exempt from execution or other process for any debt contracted or liability incurred after the first day of June, eighteen hundred and sixty-four.
In 1878, the Bankruptcy Act of 1867 was repealed because of dissatisfaction with the acts of bankruptcy provided in the statute which rendered a debtor a bankrupt. Once again debtors relied upon state exemption laws to provide relief from creditors until 1898.

4. The Bankruptcy Act of 1898

The fourth bankruptcy act was passed by Congress on July 1, 1898, following the economic depression of the mid-nineties. Voluntary and involuntary bankruptcy were available to the merchant and nonmerchant debtors. Involuntary petitions could be filed against a person who committed an act of bankruptcy. Any person owing debts, except a corporation, could file a voluntary petition to be adjudged bankrupt. However, a federal set of bankruptcy exemptions was not prescribed by this act; bankrupts were to use state law exemptions which were in effect upon filing of the bankruptcy petition.

West Virginia provided both real and personal property exemptions at this time. Personal property not exceeding $200 in value was exempt for residents, along with $50 worth of working tools of a mechanic, artisan or laborer. A homestead exemption was also available up to $1,000 in value.

54 20 Stat. 99 (1878).
55 See H.OLECK, DEBTOR AND CREDITOR LAW: STATE AND FEDERAL 177 (1953).
56 C. WARREN, supra note 14, at 109.
57 30 Stat. 544 (1898).
58 30 Stat. 544, 546 (1898). The acts of bankruptcy are:
(1) convey, transfer, conceal or permit such actions of any part of his property with intent to defraud or delay his creditors.
(2) preferential transfers while insolvent.
(3) suffer or permit a creditor preference through legal proceedings without at least 5 days before final disposition of preferential property to vacate such preference.
(4) make a general assignment for benefit of creditors.
(5) written admission of inability to pay debts and willingness to be adjudged bankrupt on that ground.
59 30 Stat. 544, 547 (1898) provides:
This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.
60 W. VA. CODE § 41-23 (1899). Under this statute:
Any husband or parent residing in this State, or a widow, or the infant children of deceased parents, may set aside and hold personal property to the value of not exceeding two hundred dollars, to the exempt from execution or other process except as hereinafter provided.
And any mechanic, artisan or laborer residing in this State, whether he be a husband or parent, or not, may hold the working tools of his trade or occupation to the value of fifty dollars exempt from forced sale or execution. Provided, that in no case shall the exemptions allowed any one person exceed two hundred dollars.
61 W. VA. CODE § 41-30 (1899) provides:
The Bankruptcy Act of 1898 was in effect until its repeal in 1979.62

5. The Chandler Act of 1938

The Chandler Act of 193863 amended the exemption laws provided in the Act of 1898.64 Under the Chandler Act, bankrupts were provided:

[T]he exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other state.65

West Virginia law provided the resident debtor with a $200 personal property exemption and a $50 working tools exemption.66 A homestead of $1,000 in value was exempt from execution for those who qualified.67 The Chandler Act of 1938 was repealed in 1979 when the Bankruptcy Reform Act of 197868 was enacted.

Three forces began to emerge in the 1960's which moved toward a major change of bankruptcy law in the United States.69 The National Bankruptcy Conference attempted to organize and improve bankruptcy law and the bankruptcy court system.70 Bankruptcy referees, the precursors of the present bankruptcy judges, endeavored in Congress to provide means to im-

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63 52 Stat. 840 (1938).
64 30 Stat. 544 (1898).
65 52 Stat. 840, 847 (1938).
66 W. VA. CODE § 41-23 (1937) provides:
Any husband or parent residing in this State, or the infant children of deceased or insane parents, may hold a homestead of the value of one thousand dollars, subject to the provisions of section forty-eight of article six of the constitution of this State, upon complying with the provisions of the next section of this chapter.

67 W. VA. CODE § 41-30 (1937) provides:
Any husband or parent residing in this State, or the widower, or the infant children of deceased parents, may set apart and hold personal property to the value of not exceeding two hundred dollars, to be exempt from execution or other process, except as hereinafter provided. And any mechanic, artisan or laborer residing in this State, whether he be a husband or parent, or not, may hold the working tools of his trade or occupation to the value of fifty dollars exempt from forced sale of execution. Provided that in no case shall the exemption allowed any one person exceed two hundred dollars.

prove the debtor's opportunity for a "fresh start" and the bankruptcy court system.\textsuperscript{71} Also, a task force from the Brookings Institute performed a study of the bankruptcy system in the United States\textsuperscript{72} which revealed that the current bankruptcy system was a disaster. In 1970, Congress created the Commission on the Bankruptcy Laws of the United States.\textsuperscript{73} The Commission drafted a proposed bill introduced into the Ninety-third Congress as H.R. 10792.\textsuperscript{74} Also, the National Conference of Bankruptcy Judges drafted a separate bill introduced to the Ninety-third Congress as H.R. 16643.\textsuperscript{75} Hearings on both proposals lasted for nearly two years.\textsuperscript{76} Drafting of the bill began soon thereafter in committee, the final result being the Bankruptcy Reform Act of 1978.

6. The Bankruptcy Reform Act of 1978

On November 6, 1978, the Bankruptcy Reform Act of 1978\textsuperscript{77} was signed into law by President Carter. This Act represented the "first time since 1877 [that] the bankruptcy statute itself prescribed the amount and kind of property that is not subject to distribution to creditors."\textsuperscript{78}

Upon voluntary petition, a debtor was provided with a liberal set of federal exemptions\textsuperscript{79} to facilitate a "fresh start." However, in a compromise
marily for the personal, family or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed in value $400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive:

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veteran's benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

   (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

   (ii) such payment is on account of age or length of service; and

   (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(a), 403(b), 408 or 409).

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

(A) An award under a crime victim's reparation law;

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) A payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
move, Congress included an opt-out provision whereby the individual states could preclude resident debtors from utilizing the federal bankruptcy exemptions. Debtors residing in those states which have opted-out may use only state exemptions when filing bankruptcy. West Virginia is one of thirty-one states to opt-out of the federal bankruptcy exemption scheme. However, the opt-out provision does not affect the applicability of any other section of the Bankruptcy Reform Act of 1978.

Under this Act, all of the debtor's property is combined into an estate under the direction of a trustee. A debtor must specifically claim property as exempt for it to be withdrawn from his estate by filing a separate list of property, or by filling in Schedule B-4 of Official Form 6-Schedules. The property must be sufficiently described so that the trustee and the creditors may determine what property the debtor is claiming as exempt. A creditor's objections to exemptions claimed by the debtor triggers a hearing before

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6 11 U.S.C. § 541(a): "The commencement of a case . . . creates an estate." Section 541(a)(1) to (7) is a list of the property includible in the debtor's estate. Section 541(b) provides that "Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor."
7 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 74.04 (1982).
the bankruptcy court. If there are no objections the trustee delivers possession of the exempt property to the debtor.

However, under the Reform Act, certain exceptions exist to the general rule of nonliability of a debtor's exempt property for debts and liens. Exempt property is liable to satisfy nondischargeable tax claims and nondischargeable family support claims. Also, liens which are not avoided by the trustee's powers are enforceable against exempt property. Such enforceable claims are to be distinguished from nondischargeable debts from which the debtor's exempt property is protected.

III. COMPARISON OF WEST VIRGINIA AND FEDERAL BANKRUPTCY EXEMPTIONS

The West Virginia bankruptcy exemptions track the federal bankruptcy exemptions almost exactly. Both exemption schemes provide the debtor: (1) a $7,500 exemption in real or personal property used as a residence by the debtor or held as a burial plot for the debtor or dependent; (2) a $1,200 exemption in one motor vehicle, the value of which is the debtor's equity in the property less any unavowed security interests; (3) a $500 exemption of jewelry held for the personal, family or household use of the debtor or his dependents; (4) a $400 exemption in any property plus any unused amount of the $7,500 real or personal property exemption provided above; (5) a $750 exemption of any professional books or tools of the debtor's trade; (6) an exemption of any unmatured life insurance contract (except credit life in-
urance contract); an exemption of $4,000 of the loan value of an unmatured life insurance policy; an exemption for professionally prescribed health aids; (9) an exemption for the debtor's right to receive future benefits (Social Security, Veterans' Administration benefits, pension plans, etc.); and (10) an exemption for certain types of compensation for losses (wrongful death awards, life insurance of dependent). Debtors under either system are eligible for other nonbankruptcy federal exemptions.

However, one major difference exists between the state and federal exemption plans. The debtor claiming federal bankruptcy exemptions has an unlimited exemption in household goods, furnishings, appliances, books, animals, musical instruments and crops, as long as each item claimed does not exceed $200 in value. The West Virginia debtor may exempt the same personal property with each item not to exceed $200 in value. However, personal property exemptable in West Virginia cannot exceed $1,000 in total value.

The federal bankruptcy exemptions reflect that property which Congress has determined is necessary for the debtor's "fresh start." Although a state may opt-out of the federal exemption scheme, this policy of a "fresh start" applies to the states. The personal property exemption limitation in West Virginia likely impairs this policy by restricting the debtor's possessions to

109 A comment of 11 U.S.C. § 522 (Supp. IV 1980) provides a list of other federal nonbankruptcy exemptions:
112 Legislative History, supra note 73, at 6087.
114 Legislative History, supra note 73, at 6087.
115 The property limitation is $1,000. W. Va. Code § 38-10-4(c) (Supp. 1983).
begin a "fresh start." With these inflationary times, $1,000 worth of household goods, furnishings and appliances can be reached quickly with few assets. Also, by placing a $1,000 limit, the West Virginia Legislature has crystalized this exemption by value. Some may feel that in 1983 $1,000 is not a small figure. However, in a few years, that amount may be rendered inadequate. The Legislature must be mindful that bankruptcy exists to provide relief for an overburdened debtor\textsuperscript{118} and to provide the debtor with a "fresh start."\textsuperscript{117}

IV. PROBLEMS PRESENTED UNDER THE WEST VIRGINIA BANKRUPTCY EXEMPTIONS

The following sections of this Note outline problems with the West Virginia bankruptcy exemption statute. Areas discussed include the lack of a debtor wage exemption and the difficulty in defining an "item." The lien avoidance provision of the Reform Act and the disparate treatment between West Virginia bankruptcy and nonbankruptcy debtors are also addressed. Finally, the crystalized format of the exemption statute is examined.

A. Wages

The West Virginia bankruptcy exemption scheme does not furnish debtors with an express exemption for wages. Under present law, a debtor's wages may be exempted under the "hotchpot" exemption. The "hotchpot" exemption covers any property, including prepetition wages,\textsuperscript{118} up to $400 in value, plus any of the unused $7,500 homestead exemption. However, earnings from services performed by a debtor after the filing of the bankruptcy petition do not become part of the debtor's estate\textsuperscript{119} for distribution to creditors and need not be exempted. In addition, West Virginia's Consumer Credit Protection Act does not provide an exemption from garnishment of wages in a bankruptcy proceeding.\textsuperscript{120} The Consumer Protection Act does, however, provide for a maximum of 25% of disposable earnings per week to be subject to assignment.\textsuperscript{121}

Since no express wage exemption is provided, many attorneys may neglect to exempt a debtor's wages, earned prior to the filing of the bankruptcy petition, which have not yet been paid. Depending upon the amount of "hotchpot" exemption remaining, a debtor may not be able to ex-

\textsuperscript{118} Legislative History, supra note 73.
\textsuperscript{119} Id.
\textsuperscript{119} W. VA. CODE § 38-10-4(e) (Supp. 1983).
\textsuperscript{119} 11 U.S.C. § 541(a)(6) (Supp. IV 1980): "[E]arnings from services performed by an individual debtor after the commencement of the case do not become part of the debtor's estate."
\textsuperscript{120} W. VA. CODE § 46A-2-118 (1980).
\textsuperscript{121} W. VA. CODE § 46A-2-116(1) (1980).
empt any of his wages. On the contrary, use of the "hotchpot" exemption for wages may deprive the West Virginia debtor of other property from which he may derive greater benefits, given the $1,000 limit on personal property. However, since the Reform Act does not provide a wage exemption, one may argue that it is not necessary to furnish a "fresh start." Nevertheless, wages play a vital role in furthering the policy of protecting a debtor's family from impoverishment. Without wages earned prior to filing bankruptcy, the debtor and his family may be required to exist for two weeks or more without funds to purchase food. Viewed in this light, the need for an express wage exemption may be seen as important to guaranteeing a "fresh start."

B. Item

Under the West Virginia bankruptcy exemption statute, a debtor is allowed to exempt his "[i]nterest, not to exceed two hundred dollars in value in any particular item . . ." of personal property. An item does not refer to the group "household goods" or "household furniture," based on the language of the statute. "[A] particular item . . ." of household goods refers to an individual unit within the class of household goods because of the use of the word "particular." Yet the question remains, what is an item? The quandary posed by the legislature's use of the undefined word "item" may be illustrated through the example of a bed. The "item" may be considered the entire bed, which means everything necessary to assure a good night's sleep. On the other hand, the "item" might refer to one mattress, one boxspring, one headboard or one bed frame. The problem is further compounded when, as a whole, the item is not exemptable because its value is greater than the per item limitation of $200, yet is exemptable as pieces. A dining room set (table and four chairs) may be worth $600 and not exempt in this form. However, each chair and the table may be individually exemptable because the value of each is less than $200. Is the "item" the table and four chairs together or any one of the five pieces?

Bankruptcy courts have recognized that defining "item" is a factual issue. Thus, courts must look elsewhere for interpretation of the term. The legislative history of the Bankruptcy Reform Act does not furnish any

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124 Resnick, supra note 14, at 621.
126 Id. at § 38-10-4(c).
127 Id.
128 The West Virginia exemption statute places a $200 limit per item of household goods exempted. W. VA. CODE § 38-10-4(c) (Supp. 1983).
assistance. Black's Law Dictionary, Fourth Edition, defines "item" as "one of the portions, equal or unequal, into which anything is divided; something less than a whole." One court has defined item to be "an article of household goods or something singled out from a category of things of the same kind." Although the above definitions of "item" may not provide an exacting answer, bankruptcy courts have held that exemption provisions are to be liberally construed.\[1983\]

Wisconsin's bankruptcy court has permitted the exemption of a six-place service of sterling silver flatware. The total value of the service for six (thirty pieces) was $6,000. Because the total value of the flatware was more than $200, the sterling was not exempt as a total of thirty pieces of personal property of the debtor. However, the value of each of the thirty individual pieces of sterling was $200. The Wisconsin court exempted the entire set of flatware (all thirty pieces) by exempting each piece of sterling.

Armed with the definitions of "item," case law, and the liberal construction given exemptions, an "item" may be described as the smallest indivisible component of exempt property usable in such form. This description would be treating an "item" much like the atom with respect to an element. Therefore, under this definition of item, the dining room set is exemptable as five individual items, each with a value of less than $200. As an extreme example, the use of a china cabinet is helpful. Even though its drawers can be removed, the china cabinet is not usable without drawers. Neither are the drawers usable as such without the cabinet. Therefore, the china cabinet with drawers is an item. The definition proposed is in keeping with the "fresh start" objective of the exemption statutes. Such definition would enable the debtor to keep items of personal property that help maintain some social stability for himself and his family.

By applying the proposed definition of item, the above Wisconsin debtor could exempt the thirty pieces of sterling. The smallest indivisible component of the flatware was any one of the thirty eating utensils. Each piece can function as a fork, spoon or knife without need of the other pieces. Therefore, any one of the thirty eating utensils is exemptable.

Further, the fact that West Virginia has imposed a $1,000 limit on household goods and furniture exemptions seems to support this interpretation of "item." The Legislature appears to have recognized that an "item" under the unlimited federal exemptions would permit a large number of personal property to be exempted and therefore held from a creditor's reach.


\[1983\] 14 Brugioni v. Maryland Casualty Co., 382 S.W.2d 707 (Mo. 1964).
C. Application of Lien Avoidance Provision

The West Virginia bankruptcy exemption statute, while opting out of the federal property exemptions, does not disturb the right of a debtor to avoid liens on exempt property. Under the terms of the opt-out provision states were permitted to enact property exemptions for resident debtors. Lien avoidance provides that a debtor may avoid a judicial lien on any exempt property and on a nonpossessory, nonpurchase-money security interest on personal and household items, professional books and tools and professionally prescribed health aids.

The right to avoid a judicial lien on exempt property enables the debtor to “undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy.” Even though a creditor may precede the debtor into court, the debtor still has a right to his exemptions.

The right to avoid a nonpossessory, nonpurchase-money security interest “allows the debtor, after bankruptcy has been filed . . . to undo the consequences of a contract of adhesion, signed in ignorance.” Such interests are obtained when creditors lend money to a consumer debtor. The creditor takes a security interest in the debtor’s possessions as collateral and obtains a waiver of the debtor’s right to exemptions. Should the debtor fail to meet his liability, the creditor often uses “threats of repossession of all of the debtor’s household goods as a means of obtaining payment” or reaffirmation. These threats of repossession provide the creditor with an unfair advantage over the debtor. The property secured often has little resale value, but the

116 11 U.S.C. § 522(f) (Supp. IV 1980) provides:
Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
(1) a judicial lien; or
(2) a nonpossessory, nonpurchase-money security interest in any—
   (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
   (B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or
   (C) professionally prescribed health aids for the debtor or a dependent of the debtor.
118 Legislative History, supra note 73, at 6087.
119 Id. at 6088.
120 Id.
122 Id. at 6088. Campbell v. Avco Financial Services, 8 Bankr. 425 (S.D. Ohio 1981) (liens on household goods are taken for the psychological effect to “encourage reaffirmation and payment of the debts in full”).
replacement costs to the debtor are very high. Since a creditor receives little monetary value from such goods, the property is therefore more valuable left in the debtor's possession as a means of leverage. The debtor is then forced into making payments he cannot afford. This lien avoidance provision is designed to eliminate these unfair advantages a creditor may obtain over a debtor.

To avoid judicial liens or nonpossessory, nonpurchase-money security interests, the debtor must prove: (1) that his exemptions have been granted; (2) that the lien being avoided is a judicial lien or a nonpossessory, nonpurchase-money security interest; (3) that such lien impairs the debtor's exemptions; and (4) that the debtor is entitled to have such liens avoided. However, West Virginia may be impairing lien avoidance through its exemption statute. The West Virginia bankruptcy exemptions limit the amount of household goods which a debtor may exempt to $1,000 in value. The lien avoidance provision permits the debtor to avoid a nonpossessory, nonpurchase-money security interest in household goods, furnishings and other personal property "to the extent that such lien impairs an exemption to which the debtor would have been entitled...." West Virginia's exemption statute provides that "this section shall not be construed to affect the applicability of any provision of the 'Bankruptcy Reform Act of 1978' except the exemption provision." However, the $1,000 limitation does indeed affect the applicability of the lien avoidance provision. If a debtor exempts five items of household goods worth $200 each, the maximum of $1,000 is reached. Then the debtor can avoid only five liens rather than liens on all the property which the debtor is entitled to exempt. Under the $1,000 limitation, a debtor would be entitled to few exemptions. This frustrates the purposes behind lien avoidance. The right to avoid liens on exempt property is granted to provide the debtor with a "fresh start."

D. Differing Treatment of Bankrupts and Insolvent Debtors in West Virginia

West Virginia provides two different sets of exemptions for debtors. If
the debtor elects to file a voluntary petition in bankruptcy, he is entitled to exempt a minimum of $11,350 in value of real and personal property. If the debtor is insolvent yet does not file bankruptcy, he is entitled to a maximum exemption from execution of $6,050 in value in real and personal property. The debtor who files bankruptcy is entitled to a $7,500 homestead exemption while the other debtor may exempt up to $5,000 of value in a homestead. This bankruptcy exemption can be used by debtors who do not own a home through the "hotchpot" exemption. The unused portion of the $7,500 plus an additional $400 can be used to exempt any property of the debtor under the "hotchpot." However, the nonbankruptcy debtor's homestead exemption may only be used to exempt an interest in a home from lien and does not apply to the nonhomeowner.

The debtor in bankruptcy also may exempt $750 in professional books or tools of the trade used by him. The nonbankruptcy debtor may exempt only $50 worth of trade tools provided he is a mechanic, artisan or laborer. A debtor is therefore permitted to keep $700 more in tools of his trades if he files bankruptcy.

Further, the debtor in bankruptcy may exempt up to $1,000 in interest in household goods, clothing, furnishings, appliances, books, animals, crops or musical instruments for his personal, family or household use. The non-bankruptcy insolvent debtor may also exempt up to $1,000 in personal prop-

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152 In bankruptcy a debtor may exempt:
- $7,500 homestead
- 1,200 car
- 1,000 personal property
- 500 jewelry
- 400 hotchpot
- 750 tools

$11,350 total

151 In nonbankruptcy proceedings, the debtor may exempt:
- $1,000 personal property
- 50 tools

$1,050

$5,000 homestead

total $6,050


155 Id. at § 38-10-4(e).

156 Id. at § 38-10-4(f).


Those household items exempted in bankruptcy may not exceed $200 in value of any particular item whereas the nonbankruptcy debtor may exempt property of any value up to $1,000. However, the debtor in bankruptcy may further exempt $1,200 interest in a motor vehicle; $500 in jewelry; an unmatured life insurance contract; professionally prescribed health aids; and a right to receive future benefits and compensation for losses. These exemptions are not provided for the nonbankruptcy debtor.

Furthermore, if the debtor and spouse file a joint petition in bankruptcy, the above exemptions are doubled. Each spouse is entitled to a full set of exemptions. The insolvent debtor and spouse under the nonbankruptcy scheme are entitled to only one set of exemptions. Although the nonbankruptcy exemption statute says "any," it means one, not every, "husband, wife, parent. . . ."

Since a substantial disparity exists between the exemptions provided a debtor in bankruptcy and insolvent nonbankruptcy debtor, several issues arise. If the debtor fares better in bankruptcy than under the other state exemptions, the number of voluntary liquidation petitions in bankruptcy will likely increase. One solution might be to increase the other state exemption

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11 U.S.C. § 522(m) (Supp. IV 1980) provides that: "This section shall apply separately with respect to each debtor in a joint case." Under 11 U.S.C. § 302(a) (Supp. IV 1980) a "joint case . . . is commenced by the filing . . . of a single petition . . . by an individual that may be a debtor . . . and such individual's spouse . . . ."


171 Id.
to the point where a debtor will not be induced to file bankruptcy rather than pay his debts. This solution may not require parity between the two exemption schemes, but merely an increase to the point where a little less exempt property is balanced against the social stigma of filing bankruptcy.

Further, the bankruptcy exemptions may provide an unfair advantage to those who can afford to file bankruptcy. No *in forma pauperis* petitions are available. Therefore, those who cannot afford a $60 filing fee will be unable to petition for bankruptcy.

Questions arise concerning the permissibility of the disparate treatment with respect to exemptions of debtors who file bankruptcy and those who do not. However, this unequal treatment is not a violation of the nonbankruptcy debtor's equal protection rights. Such an argument has generally been dismissed by the bankruptcy courts.172

[The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rest on grounds wholly irrelevant to the achievement of the State's objective. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . .]173

Without access to the legislative history surrounding the passage of the West Virginia bankruptcy exemptions statute, the task of determining the grounds on which the classification174 rests is difficult. However, the differing treatment of bankruptcy and nonbankruptcy debtors may be grounded in the federal objective to provide a "fresh start" for debtors in bankruptcy. "To promote this legitimate State interest of rehabilitating the financially distressed bankrupt debtors to the benefit of the entire State . . .,"175 the West Virginia Legislature appears to have created a classification which is not "wholly irrelevant"176 to the objective of providing a "fresh start." Therefore, West Virginia's bankruptcy exemption statute does not violate the equal protection rights of the nonbankruptcy debtor.

E. Crystalized Exemption Statute

Although not presently a problem, the West Virginia bankruptcy exemp-

172 *In re* Bloom, 5 Bankr. 451 (N.D. Ohio 1980); *See also In re* Vasco, 6 Bankr. 317, 320 (N.D. Ohio 1980) ("The passage of the new Bankruptcy Code by Congress has not precluded the states from making exemption laws which apply only in bankruptcy proceedings. If an exemption constructed in such a manner is unconstitutional it will be so because it is in conflict with the federal legislation.")


174 The classification is bankruptcy debtor.

175 *In re* Bloom, 5 Bankr. 451 (N.D. Ohio 1980).

176 *Id.*
BANKRUPTCY EXEMPTION

May become quickly outdated because most of the exemptions are crystallized by monetary value. As explained earlier, this type of exemption is fixed by a quantity or dollar figure. For example, the $500 exemption for jewelry and the $7,500 real and personal property exemption are value crystallized. An exemption of $1,200 in one motor vehicle is crystallized by value and amount. These types of exemptions cannot adjust to change and require an act of the legislature to amend the value limitations. More flexibility is needed in order that these exemptions can keep pace with changing economic conditions. In but a few years the present bankruptcy exemptions may not be sufficient to provide a "fresh start" for debtors.

A proposed alternative would be to retain the value crystallized exemptions but also to provide additional sums to be added to the statutory values once a year. The amount to be added would be tied to the inflation rate. For example, the year in which the exemption statute was passed is the base year, or 1980 for our purposes. In 1980 with "X" inflation rate, the motor vehicle exemption is $1,200. In 1983, with "X + 3" inflation rate, the exemption must now be $1,600 to exempt the same amount in 1983 as in 1980. Although the dollar figures are increasing, the debtor in both years is exempting the same amount of property. In this same context, the dollar values could decrease as inflation decreases until the original statutory amounts are reached.

This method adds flexibility to the exemption statute and permits the exemptions to reflect economic fluctuations. Also, under this method, the legislature would not need to amend the dollar figures. Even the numerical calculations necessary to the success of this method would not be a formidable task with the use of today’s computer technology. However, the inflation rate used in the calculations would be one-year old. Such a method would not reflect a sharp increase in inflation until the following year. Should the problems be worked out of this system, it might prove to be more useful than the present system.

V. CONCLUSION

Although the West Virginia bankruptcy exemption statute is a great im-

180 Joslin, supra, at § 38-10-4(a).
181 Joslin, supra, at § 38-10-4(b).
182 Joslin, supra note 5.
183 An alternative would be to tie the amounts added into the Consumer Price Index. Without
provement over the previous exemptions available and is more adequate to serve the debtor's needs and to provide his "fresh start," many problems exist within this new system. From the foregoing discussion, the need to "debug" the West Virginia bankruptcy exemption scheme\textsuperscript{134} is evident. The statute itself may soon be outdated because of the fixed dollar exemption format. In a few years, the exemptions may no longer provide the requisite "fresh start" to debtors. Steps need to be taken now to prevent future problems.

The legislature should consider the possibility of a wage exemption. Such an exemption would enable the debtor to exempt his prepetition wages without using the "hotchpot" exemption.\textsuperscript{135} Additionally, the term "item" should be more precisely defined as the smallest indivisible component of exempt property which is usable in such form. Finally, lien avoidance on household goods needs to be liberalized. These changes would be more consistent with the policy of a "fresh start" and would bring West Virginia more in line with the intent of the Bankruptcy Reform Act.

\textsuperscript{134} \textit{W. VA. CODE} § 38-10-4 (Supp. 1983).
\textsuperscript{135} \textit{Id.} at § 38-10-4(e).