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UNIFORMITY OF EXEMPTIONS: ASSESSING THE COMMISSION'S PROPOSALS

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I. INTRODUCTION

The bankruptcy system is in need of improvement. One improvement currently being considered is to create uniformity of exemptions. The National Bankruptcy Review Commission [1] ("Commission") has developed three proposals to recommend for Congress to adopt in order to achieve the goal of uniformity of exemptions. [2] This Note concludes that if these proposals are adopted by Congress, they would alter the current system of exemptions in bankruptcy by providing the debtor with more discretion in the exemption process, and by solving some of the prominent problems with the current system.

The first section of this Note discusses the general purposes of exemptions for the debtor and the history of exemptions in bankruptcy law. The second section outlines general problems with the current system of exemptions, while the third section contains prior proposals for uniformity of exemptions. The fourth section is a description of the Commission's proposals for uniformity of exemptions, and the fifth section discusses the potential results of Congress adopting each of the Commission's proposals.

II. OVERVIEW OF EXEMPTIONS

A. Purposes of Exemptions for the Debtor

Exemptions are essential to the debtor. [3] They are the "tools" that the debtor will utilize to begin a new and solvent life, and they protect the debtor and the debtor's family from complete destitution. "Exemption of property . . . lets the debtor maintain an appropriate standard of living as he or she goes forward after the bankruptcy case." [4] The overriding concern that supports the use of exemptions in bankruptcy law is providing the debtor with a *fresh start*: [5] "[a] fundamental component of an individual debtor's fresh start in bankruptcy is the debtor's ability to set aside certain property as exempt from the claims of creditors." [6]

In enacting the Bankruptcy Code ("Code"), the House of Representatives ("House") concluded that the purpose of exemption laws remains to provide the debtor with a chance to turn his or her life around. The House found that "[t]he historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge." [7] The House also stated that "[b]ankruptcy exists to provide relief for an overburdened debtor." [8] In addition, the House also noted that the creditor has an advantage over the debtor because of the debtor's usual lack of sophistication in the credit process. [9]

Authors have commented on the role of exemptions in bankruptcy law. [10] Two influential authors, Alan N. Resnick and Vern Countryman, have described the importance of exemptions. [11] As Resnick noted, there are five social policies promoted by exemptions:

> (1) To provide the debtor with property necessary for his physical survival; (2) To protect the dignity and the cultural and religious identity of the debtor; (3) To enable the debtor to rehabilitate himself financially and earn income in the future; (4) To protect the debtor's family from the adverse consequences of impoverishment; (5) To shift the burden of providing the debtor and his family with minimal financial support from society to the debtor's creditors. [12]

Similarly, Countryman stated that "[t]he exemption policy in bankruptcy is second only to the discharge policy in importance to the debtor," [13] and that "[t]he magnitude of the concern with bankruptcy exemption policy cannot be precisely measured." [14]

B. History of Exemptions

1. Early Bankruptcy Acts

United States bankruptcy law has its origin in the United States Constitution ("Constitution"). [15] Article I, Section 8, Clause 4 states that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." [16] This provision is known as the "Bankruptcy Clause." [17] Numerous Bankruptcy Acts were enacted pursuant to this power granted to Congress, each with different exemption provisions.

The Bankruptcy Act of 1800 [18] contained limited federal exemptions and did not provide for state exemption law to govern. [19] Similarly, The Bankruptcy Act of 1841 [20] contained limited federal exemptions and prohibited the debtor from utilizing state exemptions. [21] The Bankruptcy Act of 1867 [22] signaled a shift in policy by introducing a new exemption process. This Act provided the debtor with an allowance of federal exemptions in conjunction with the debtor's state exemptions. [23] As the Seventh Circuit noted "the 1867 Act provided a federal minimum and . . . ratified as federal law other state exemptions then in force." [24]

Following the Act of 1867, Congress enacted The Bankruptcy Act of 1898. [25] This Act provided no schedule of federal exemptions for the debtor, but relied exclusively on state exemption laws. [26] As Countryman noted, "[t]he typical state exemption law [under the 1898 Act was] . . . a statute or constitutional provision expressly providing that certain property shall be exempt from a creditor's levy or other legal process." [27] In 1938, Congress amended the 1898 Act with The Chandler Act of 1938, [28] which did not revise any important exemption provisions.

2. The Bankruptcy Code of 1978: Creation of the Opt Out Compromise

The Bankruptcy Code of 1978 [29] was enacted to remedy some of the problems associated with the bankruptcy system at that time. One of these problems was that exemption laws governing the debtor's case in some states were not sufficient to ensure the debtor's fresh start. [30] Congress noted that many state exemption laws were "hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors." [31]

Throughout the discussions preceding the enactment of the Code, there was a conflict between the House and Senate concerning the appropriate method of ensuring sufficient exemption levels for all debtors. The House bill provided the debtor with a choice between the state exemptions of the debtor's domicile, or an established list of federal exemptions. [32] This version would ensure that debtors in states with minimal exemptions would be provided with adequate exemptions under the federal laws, and would create nationwide uniformity by establishing a list of federal exemptions. The Senate's approach was different. The Senate bill did not provide the debtor with a choice, but rather mandated the use of state law exemptions. [33]

This debate resulted in "compromise" provisions incorporating ideas from both the House and Senate: [34] the enactment of the "opt out" provision of section 522(b)(1), [35] and the federal exemptions of section 522(d). [36] Under these provisions, the debtor was allowed to exempt items under the state exemptions of the debtor's domicile, or the list of federal exemptions of section 522(d). [37] The states were given the opportunity to "opt

out" of the federal exemption scheme, and mandate that the debtors utilize solely the state law exemptions. [38]

III. PROBLEMS WITH THE CURRENT SYSTEM

There are various problems resulting from the operation of the current bankruptcy system. One such problem is *forum shopping*. Forum shopping is the process of debtors moving from one jurisdiction to another jurisdiction to exempt assets under a more liberal exemption statute. In states with limited or no homestead exemption, [39] a debtor could lose all of the equity in a home to creditors. To avoid this unfortunate result, some debtors seek shelter in states that have large or unlimited homestead exemptions. [40] As the Eighth Circuit has noted, where the debtor relies on exemptions that are *unlimited*, there is the potential for *unlimited* abuse. [41] In an article discussing the current exemption system, Judge William Houston Brown concluded that the opt out system allows for the problem of forum shopping. [42] Judge Brown noted:

> [w]hile such options will not be relevant in the typical consumer bankruptcy case, they will continue to provoke litigation in the cases of more affluent debtors who can afford to plan or who have a financial interest sufficient to justify aggressive planning tactics. Many of these high profile cases involve relocation by debtors shortly before the bankruptcy filing. If all debtors knew that they would be restricted solely to the federal exemptions, they would have little incentive to relocate to more favorable exemption states. [43]

In cases of forum shopping, debtors were involved in numerous flagrant actions. For instance, in one case, within months of the filing of the plaintiff’s case, the defendants converted non−exempt assets into exempt assets under Florida law. [44] These debtors also liquidated their non−exempt assets and purchased annuities, which were exempt in Florida. [45] In other cases, debtors residing in states that do not have large homestead exemptions sold their home, purchased a home in Florida *in cash*, and then filed for bankruptcy claiming their homestead as exempt. [46] Some debtors have also fraudulently obtained funds and used them to improve their homestead, for the sole purpose of defeating the claims of creditors. [47]

There have also been problems with the *debtor selecting assets to be exempt*. In these cases, there were disputes between debtors and creditors concerning whether a certain asset falls under an exemption. [48] For instance, some circuit and bankruptcy courts heard disputes concerning the definition of a "household good," with different results. [49] The lack of consensus in the application of exemption statutes results in continuing disputes and delays in bankruptcy proceedings.

The current system also allows for the problem of *prebankruptcy planning*. In many of these cases, the debtors converted non−exempt assets into exempt property in anticipation of filing for bankruptcy relief. [50] In one case, the debtors sold items that were not exempt and used the proceeds to purchase life insurance policies and to pay off part of the mortgage on their homestead, both of which were exempt. [51] In another case, a transaction occurred simultaneously with the filing for bankruptcy relief, [52] and another debtor admitted to intentionally shielding assets from creditors prior to bankruptcy. [53]

The problem of prebankruptcy planning continues to exist because the House and Senate concluded that the debtor should be "permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." [54] Courts have relied on this language in determining whether an action by a debtor was valid. [55]

This Note will demonstrate that the combination of all of these problems leads to a decrease in the integrity of the bankruptcy system because these problems call into question the effectiveness of the current system in resolving disputes between debtors and creditors, and in determining bankruptcy matters fairly and justly.

IV. PRIOR PROPOSALS FOR UNIFORMITY OF EXEMPTIONS

The Commission on the Bankruptcy Laws of the United States of 1973 [56] ("1973 Commission") recommended that courts should apply exclusively federal law in bankruptcy cases. [57] The 1973 Commission did not propose a lump sum amount, but rather enumerated certain exempt items under this uniform federal law. [58] These items were similar to the current items under section 522.

In making this proposal, the 1973 Commission found that a prominent problem with the exemption system at that time was the use of state exemption laws. [59] The 1973 Commission stated that most of the state exemption laws were "archaic," [60] and noted that the "reference to nonbankruptcy law to determine the exemptions has worked unfairly; it has, contrary to the goals of federal bankruptcy legislation, allowed some creditors to be preferred over others and caused substantial nonuniformity. It has probably also been responsible for some of the dissatisfaction with the bankruptcy process." [61] Ironically, these problems continue to persist today, and are some of the principal problems that the Commission is seeking to solve.

Prior to the Commission's proposals, there were several commentators that proposed solutions to the problem of the lack of uniformity of exemption law. [62] In an early article, Vern Countryman proposed a new exemption policy in bankruptcy law. [63] Countryman outlined several problems with the bankruptcy system at that time, [64] including the problems of variety and obsolescence in state exemption laws resulting from the lack of "periodic legislative revision." [65] Countryman called this system a "patchwork exemption policy." [66] These problems continue to persist today. [67]

In an attempt to resolve these issues, Countryman presented a proposal that is similar to the Commission's current lump sum proposal. [68] Countryman recommended that state exemption laws and federal non−bankruptcy exemption laws should not govern bankruptcy cases, and that the debtor should be "given a prescribed cash allowance from the proceeds of the liquidation of his estate." [69] This proposal would provide the debtor with the discretion to decide which items to exempt. [70] If the proposal was adopted, Countryman concluded that "[n]early all of the problems that have developed in the administration of the present system would be eliminated." [71]

Countryman stated that the main obstacle to instituting his proposal would be in setting the cash allowance amount because the information necessary to make this determination was not readily available. [72] Countryman found that a solution to this situation could be to tie the "amount of the cash allowance to some indicator designed to keep it abreast of the times." [73] Using this indicator could have potentially eliminated the obsolescence that had plagued exemptions throughout the history of bankruptcy law. Countryman's "cash allowance" recommendation combined with the indicator is similar to the Commission's current proposals. [74]

In a more recent article, Thomas H. Jackson discussed the fresh start policy in bankruptcy law. [75] Jackson found that the problems that plagued bankruptcy law were attributed to the debtor's "impulsive behavior, incomplete heuristics, and externalities [which leads to] . . . the tendency to overconsume today and undersave for tomorrow." [76] Jackson argued that the debtor is often incapable of making a prudent decision concerning which property to exempt, [77] and that the solution is to have the legislature create a law that introduces "some mechanism for choosing which assets to shelter." [78]

Jackson initially noted the importance of providing the debtor with discretion in selecting which assets that he or she considered to be "essential." [79] Jackson added that because of the potential for debtor abuses, "it would be necessary to impose some limit on the list of protected assets, or else the debtor seeking discharge would likely deem all of his property essential." [80] The author made two proposals to limit the debtor's discretion. [81] The first proposal was to "formulate a relatively short list of assets considered vital to the typical individual's well−being." [82] The second proposal was to allow the debtor to exempt a lump sum amount of existing assets and to give the debtor discretion in deciding which assets to exempt under the lump sum. [83] This second proposal is similar to the Commission's lump sum proposal. Jackson ultimately concluded that the debtor should be allowed to decide which property to exempt. [84]

In another article, Judge William Houston Brown recommended that Congress should eliminate the opt out provision of the Code and establish an exclusive schedule of federal exemptions. [85] Judge Brown argued that

the current system encourages forum shopping by providing the debtor with a choice between federal and state exemptions. [86] In addition, Judge Brown stated that the system allows the debtor with superior financial resources and planning capabilities to shelter assets by prebankruptcy asset conversion. [87] Judge Brown concluded that if the debtor was restricted to federal exemptions, he or she would have "little incentive to relocate to more favorable exemption states." [88]

The 1973 Commission and these authors emphasized the importance of uniformity of exemptions in bankruptcy law. The Commission's proposals follow similar reasoning and are similar in form to these proposals.

V. THE COMMISSION's PROPOSALS FOR UNIFORMITY OF EXEMPTIONS

A. Elimination of the Opt Out

The first proposal to improve the exemption system is entitled the "Elimination of Opt Out," [89] and provides:

> [a] consumer debtor who has filed a petition for relief under the Bankruptcy Code should be allowed to exempt property as provided in section 522 of the Code. Subsection (b)(1) and (2) of section 522 should be repealed. [90]

This proposal eliminates the opt out provision in section 522. [91] Therefore, debtors in states that have opted out of the federal statute would no longer utilize state exemption statutes in bankruptcy proceedings. If a debtor files for relief under federal bankruptcy laws, he or she would be required to employ the federal exemptions. [92] In actions under state law, however, "[s]tate exemption law would be fully applicable to individuals who deal with their creditors under state law and for the creditors who pursue their rights through state law." [93]

The Commission created this proposal upon the "premise of national uniformity." [94] The Commission reasoned that the current exemption system produces varied results, [95] and that a comparison of state law exemptions reveals a "lack of rationale" involving real and personal property. [96] In addition, the Commission explained that the proposal rectifies problems associated with state and federal systems working hand in hand. [97] The Commission found that the current exemption system created difficulties when integrating state law exemptions with the federal statute. [98] Depending on the state law that governs the bankruptcy proceeding, outcomes for debtors and their creditors are different. [99] The Commission also noted that "[d]ebtors with roughly equivalent economic profiles and similar property are receiving vastly dissimilar treatment through the federal bankruptcy system, and correspondingly their creditors do as well." [100]

The Commission stated that the proposal would begin restoring the integrity of the bankruptcy system [101] by establishing a "carefully balanced exemption policy." [102] If the proposal is adopted by Congress, a debtor will no longer be able to take advantage of a generous state's exemption laws and shield assets, [103] disturbing the trend of "less needy and better represented" debtors receiving more favorable results than other less fortunate debtors. [104]

B. Homestead Property: Another Compromise

The Commission's second proposal is entitled "Homestead Property," [105] and provides:

> [t]he debtor should be able to exempt the debtor's aggregate interest as a fee owner, a joint tenant, or a tenant by the entirety, in real property or personal property that the debtor or a dependent of the debtor uses as a residence in the amount determined by the laws of the state in which the debtor resides, but not less than $20,000 and not more than $100,000. Subsection (m) of section 522 should be revised to reflect that all exemptions except for the homestead exemption shall apply separately to each debtor in a joint case. [106]

In its report, the Commission emphasized the importance of the home to the debtor, [107] and noted that it is utilized as a long−term investment for many families. [108] In formulating the homestead proposal, the Commission sought "[t]o reconcile state law interest in the homestead with bankruptcy policy considerations," [109] and to provide "limited incorporation of states' long−standing interest in setting the parameters of homestead protection." [110] The Commission found that "[s]tates traditionally have held a particularly strong interest in the homestead rights," [111] that there are many states that do not sufficiently protect the homestead for debtors, [112] and that the diversity of protections of the current system established inequitable results for debtors residing in different states. [113] The Commission concluded that a preemptive federal homestead exemption would solve this dilemma. [114] However, the Commission was concerned with the decision making authority in the individual states, while establishing national uniformity in the homestead exemption. [115] The "compromise" created by these competing concerns is a "floor−and−ceiling approach." [116]

Under this proposal, Congress would initially establish an acceptable range for the homestead exemption, and then the states would determine the amount of the exemption within the specific range set by Congress, and the "character of property" that would fall under the state's homestead exemption. [117] The Commission recommended that the appropriate range for the homestead exemption should have a floor of $20,000, and a ceiling of $100,000. [118] Thus, "[t]he floor−and−ceiling approach is a compromise that preserves some of the state variation while it narrows the range of differences to eliminate the most serious concerns about unprotected and overprotected homeowners." [119]

In determining the floor amount, the Commission examined and compared homestead exemptions of the states. [120] The Commission emphasized that "[t]he floor must reflect the fact that the homestead is both a physical shelter and a long−term savings device." [121] "The Commission ultimately adopted the $20,000 floor as being the least drastic change while ensuring that families forced to avail themselves of bankruptcy protection can retain a reasonable amount of equity in their homes." [122]

In determining the ceiling amount, the Commission also examined and compared the homestead exemptions of the states. [123] The Commission decided upon a ceiling of $100,000 and reasoned that "[c]apping exemptions has no effect on the majority of state homestead exemptions that are lower than $100,000." [124]

C. Nonhomestead Lump Sum Exemption

The third proposal to improve the exemption process is entitled the "Nonhomestead Lump Sum Exemption," [125] and provides:

> [w]ith respect to property of the estate not otherwise exempt by other provisions, a debtor should be permitted to retain up to $20,000 in value in any form. A debtor who claims no homestead exemption should be permitted to exempt an additional $15,000 of property in any form. [126]

The Commission stated that this lump sum proposal would be used by the debtor to exempt items that the debtor deems to be necessary. [127] The debtor would have a lump sum of $20,000 which would be used to exempt personal items and there would be no regulation of the type of property that the debtor would choose to exempt, or how many items the debtor exempted. [128] The discretion would lie entirely with the debtor. [129]

In making this proposal, the Commission considered several factors. The Commission found that there was vast *intrastate* disparity among the results of cases under the same state law depending on which area of the state the debtor resides. [130] The Commission designed this proposal to also recognize the "tremendous *nationwide* diversity" in this country. [131] The Commission noted that variety in "cultures, trades, and climate yields diversity" and commented that "[n]o legislature—federal or state—can know exactly what types of property optimally facilitate the rehabilitation of any given family." [132]

In providing the debtor with discretion to select which personal property to exempt, the Commission reasoned that the debtor should have the power to decide which property to exempt, because "[d]ebtors are in a superior

position to know what items are most essential to their own fresh starts." [133] The Commission also that adding the debtor's decision−making to the exemption process would result in an efficient system and concluded that this system would be "fair and reasonable" to both debtors and creditors. [134]

This proposal also provides for a "Homestead Equalization Exemption." [135] Recognizing that not all debtors are homeowners, the Commission's proposal would provide the nonhomeowner debtors with $15,000 of an additional lump sum amount. [136] The Commission reasoned that this would "reduce discrimination" against nonhomeowners and would also "provide some balance for . . . homeowner debtors who have no equity in their homes at all." [137]

D. Application of Indexing

The Commission's proposals were designed to solve the problem of outdated state exemption laws. [138] An important provision in the homestead and lump sum proposals is the "Application of Indexing." [139] The Commission stated that section 104 of the Code [140] would apply to the floor−and−ceiling and lump sum exemption provisions. [141] This would provide for a readjustment every three years of the amounts of these exemptions to reflect the change in the Consumer Price Index. [142] This continuing adjustment would ensure that the exemption amounts remained updated and sufficient for the debtor's fresh start. [143]

The Commission did not intend to radically alter the Code, [144] but instead intended to focus primarily on improving the current system of exemptions. [145] This Note concludes that these proposals would in fact radically change the current exemption system, but are necessary to limit the problems resulting from it. [146]

VI. POTENTIAL RESULTS OF CONGRESS ADOPTING THE COMMISSION's PROPOSALS

A. Other Commentators' Predictions

Commentators have criticized the Commission's proposals. [147] Judge Edith Hollan Jones of the United States Court of Appeals for the Fifth Circuit, a member of the Commission, critiqued the framework of the proposals for uniformity of exemptions in a dissent of the Commission's report. [148] Judge Jones concluded that the Commission's proposals for exemptions are "too generous to debtors." [149] Judge Jones found that the exemption amounts of the proposals "remain extremely high compared to those available in most states, and they are much higher than those in the current federal exemptions," resulting in a "head start, not a fresh start." [150] Judge Jones reasoned that "[t]he image of the bankruptcy process will be further tarnished by this exemption proposal." [151]

Brady C. Williamson, the Chairman of the Commission, made a statement supporting the Commission's proposals to a House Judiciary Subcommittee. [152] Williamson noted that Congress should strive in revising the bankruptcy laws to "restore balance" in the bankruptcy system between debtors and creditors. [153] Williamson stated that the Commission's proposals involving exemptions "hold the promise of improving the system, significantly and almost immediately . . . ." [154] Williamson reasoned that the current system of utilizing state exemptions "has become a patchwork of provisions that invite debtor abuse," [155] and stated that "the inconsistency in state exemptions is the single greatest threat to the integrity of the bankruptcy system because it threatens public confidence in the fairness and balance of the bankruptcy laws." [156] Williamson concluded that adopting the Commission's proposals would end these abuses. [157]

Williamson conceded that the Commission's proposals have been met with opposition, but countered that "if any proposal that advances through the legislative process has the endorsement of any single interest, it is almost certainly the wrong proposal." [158] Williamson stated that "[t]he Commission's recommendations and its report are controversial. They are meant to be controversial." [159] Williamson did note, however, that although the Commission's exemption proposals were controversial, "there was virtually no dissent on the need for uniformity." [160]

B. The Proposals Will Limit Some Prominent Problems With the Current System

This Note will demonstrate that the adoption of the Commission's proposals would benefit the bankruptcy system because these proposals would limit some of the prominent problems associated with the bankruptcy system.

1. Elimination of the Opt Out

In order to fully evaluate the potential results of Congress instituting the Commission's proposals, the constitutional implications involving the proposals must be examined. This Note concludes that the Commission's proposal for eliminating the opt out provision would minimize the constitutional issues that have been raised in past cases. [161]

a. The Proposal To Eliminate the Opt Out Satisfies Geographical Uniformity

The "Bankruptcy Clause" of the Constitution gives Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." [162] In *Hanover National Bank of the City of New York v. Moyses*, [163] the United States Supreme Court held that this provision requires *geographical*, rather than personal uniformity. [164] The Court also found that the exemption provisions of the Bankruptcy Act of 1898 did not constitute an unconstitutional delegation of power, [165] and that the bankruptcy system was uniform throughout the United States. [166]

Under the Act of 1898, federal bankruptcy law recognized state exemption laws. [167] The Court found that this Act did not violate the Bankruptcy Clause's requirement of uniformity and reasoned that it was geographically uniform because "[t]he general operation of the law is uniform although it may result in . . . [different] particulars . . . in different states." [168] In making this determination, the Court stated that "[t]he laws passed on the subject [of bankruptcies] must . . . be uniform throughout the United States, but that uniformity is geographical, and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule." [169] The Court thus upheld the continued use of state exemption laws in cases despite different results depending on the debtor's domicile. [170]

The requirement of geographical uniformity is not a rigid standard. In the current system, there are different outcomes in bankruptcy cases involving exemptions depending on the state law that governs the case. As the Seventh Circuit has noted, "[i]f the Constitution required federal bankruptcy laws to be 'truly' uniform, this difference would be unconstitutional." [171]

This Note concludes that the Commission's proposal to eliminate the opt out satisfies the requirement of geographical uniformity. The proposal would comply with the Supreme Court's interpretation of the Bankruptcy Clause throughout the history of exemption law, would eliminate the differences in exemption laws because state exemptions would no longer be applied to debtors and would thus establish a uniform federal law throughout the states, as required by the Bankruptcy Clause.

b. Supremacy Clause v. States' Concurrent Powers: No Contest

The "Supremacy Clause" states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . Laws of any State to the Contrary notwithstanding." [172] The United States Supreme Court has found that "'acts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution,' are invalid under the Supremacy Clause." [173] The state legislatures, however, have *concurrent* legislative power to enact bankruptcy laws. [174] This concurrent power was recognized early in our history in *Sturges v. Crowninshield*. [175] In this landmark Supreme Court case in bankruptcy law, Chief Justice Marshall stated:

> the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation of the subject must cease. It is not the mere existence of the power, but its exercise, which is

> incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states. [176]

This case ensured that the states had concurrent power to enact bankruptcy laws. Similarly, in *Moyses*, the Court upheld the delegation of power to the states. [177] Therefore, there is no unconstitutional delegation by Congress of the power to enact bankruptcy laws because the states are exercising their own concurrent power. [178]

Although the Supreme Court has recognized the concurrent power of the states, it is not mandatory to recognize this concurrent power. [179] The Supremacy Clause will invalidate state laws that conflict with federal laws. In perhaps a foreshadowing to the Commission's proposals, the Sixth Circuit provided some engaging dicta. The court stated that "if Congress intended to foreclose the states from promulgating more restrictive exemptions it could simply have enacted the [federal] exemption scheme . . . and not provided the states with an election to opt−out. The Supremacy Clause would have prevented the states from promulgating more restrictive and, therefore, inconsistent bankruptcy exemptions." [180]

This Note concludes that the Commission's proposal would eliminate the conflict that exists today between the mandatory use of federal exemptions in some states and the states' concurrent bankruptcy powers. In addition, although preserving state variation was an important reason for the enactment of the opt out provision, uniformity of exemptions has become more important in the eyes of the Commission. [181] As one author noted, "the fact that uniform exemptions in bankruptcy are not mandated by the Constitution does not mean they are not preferable to the present scheme." [182]

2. Homestead Property: The Floor−and−Ceiling Proposal Limits *Forum Shopping*

This Note argues that this compromise by the Commission would minimize the problem of forum shopping in states with large or unlimited homestead exemptions. As the Supreme Court of Florida so eloquently noted, "[t]he homestead exemption is intended to be a shield, not a sword." [183]

Federal and state courts in Florida have examined the reoccurring problem of forum shopping. In *Bank Leumi Trust Company of New York v. Lang*, [184] the defendants were New Jersey residents and owned and operated a business in New Jersey. [185] The defendants personally guaranteed loans for the business to the plaintiff, which was a banking institution. [186] After some business turmoil, the defendants' business filed for bankruptcy. [187] The plaintiff then filed suit and obtained a judgment for over $1.8 million against the defendants personally as recourse for the debt owed to it by the business. [188] Following the commencement of this action, the defendants sold their New Jersey home and purchased a home in Florida for over $500,000 *in cash*. [189] In the instant case, the plaintiff attempted to invalidate this purchase by arguing that the defendants "convert[ed] their non−exempt New Jersey assets into purportedly exempt Florida assets . . . with the intent of placing all of their otherwise non−exempt assets out of Bank Leumi's reach." [190] The defendants argued that their homestead was exempt under Florida law. [191]

The District Court for the Southern District of Florida found that the sole purpose behind the defendants' conversion of their assets was defrauding their creditors. [192] A combination of factors led to this conclusion. [193] First, the court considered the timing of the transactions. [194] The evidence revealed that the defendants converted their non−exempt assets into assets that are exempt under Florida law within six months of the filing of the plaintiff's case. [195] The court stated that "[t]he timing of these transactions strongly suggest that the Lang's decided to take advantage of Florida's generous exemption laws . . . ." [196] Second, the court was concerned with the nature of these investments, the most egregious being the entirely exempt homestead. [197] Third, the court stated that the defendants' credibility was damaged because Mr. Lang claimed that they had established residency in Florida prior to this case, when the evidence clearly contradicted this statement. [198] Finally, the court found that there was no prospect of employment in Florida for the defendants, [199] and that they intended to mislead their creditors by concealing assets from them. [200]

Notwithstanding all of these findings, the court held that the defendants' home was exempt and free from the plaintiff's claims. [201] In making this determination, the court reviewed a provision of the Florida Constitution [202] that protected the homestead from creditors' claims. [203] This provision contains three exceptions to the protection it grants. [204] Prior to the District Court's analysis of this provision, the Supreme Court of Florida in *Butterworth v. Caggiano* [205] strictly construed this provision and concluded that the homestead is exempt from forfeitures because forfeitures are not mentioned as one of the three exceptions. [206] The District Court in *Bank Leumi* followed the Florida Supreme Court's analysis of the provision, [207] and stated:

> the homestead exemption does not contain an exception for real property which is acquired in the state of Florida for the sole purpose of defeating the claims of out−of−state creditors. In light of the Supreme Court's admonition in Caggiano that the three exceptions to the homestead exemption should be read narrowly, this Court is unwilling to graft an additional exception. [208]

This narrow application of the Florida statute resulted in an unfair outcome to the creditors because the debtors were able to shelter over $500,000 in their exempt homestead.

Several bankruptcy courts in Florida have followed the reasoning in *Bank Leumi* and have upheld the complete exemption of the homestead. [209] However, in *In re Coplan*, [210] a Bankruptcy Court for the Middle District of Florida held differently. In this case, the debtors were husband and wife who lived and operated a business in Wisconsin. [211] The business was funded through a line of credit personally guaranteed by the husband. [212] After experiencing a significant net loss to the business, the husband resigned his position in the business, sold his home in Wisconsin and purchased a home in Florida for $228,000 *in cash*, [213] all of which occurred in less than one month. [214] The business soon thereafter ceased its operations. [215] The debtors also purchased exempt annuities, liquidated their non−exempt assets for living expenses and then filed for bankruptcy and claimed their homestead as exempt under Florida law. [216] The debtors would have been limited to an exemption of $40,000 in Wisconsin, [217] as compared to an unlimited one in Florida. [218]

In this case, unlike the preceding ones, this Bankruptcy Court did not allow the home to be fully exempt under Florida law. The court held that a $40,000 exemption was allowable on the homestead [219] because the purchase of the home in Florida was solely for the purpose of shielding assets from creditors. [220] The court reasoned that "[a]s soon as it became apparent that the business was failing, the debtors undertook a well considered and carefully orchestrated series of maneuvers for the purpose of shielding their assets from the reach of their creditors." [221]

In the current system, if a debtor is experiencing financial difficulties, the solution is to sell all non−exempt assets, move to Florida, and invest the proceeds in a home. This flagrant activity has damaged the credibility of the exemption system. [222] In some instances, the system allows for an unfair outcome to creditors. This Note argues that these unjust results will be minimized in future cases because the Commission's homestead proposal would limit the problem of forum shopping.

In the cases of forum shopping previously discussed, the debtors were coming from states with minute homestead exemptions. By setting the homestead exemption floor at the $20,000 mark, in states with exemption levels that are currently lower than this amount, [223] there would be less motivation for a debtor to liquidate non−exempt assets and shield them in states with large or unlimited homestead exemptions. By setting a ceiling on the homestead exemption amount, states that currently have unlimited homestead exemptions [224] would not continue to be attractive havens for debtors who reside in states with little or no homestead exemption. This Note concludes that the incentive to flock to Florida or similar jurisdictions would be minimized if the Commission's homestead proposal is adopted.

3. Nonhomestead Lump Sum Exemption

a. A Proposal For Discretion in the Lump Sum

The Code provides the debtor with a lump sum exemption in section 522(d)(5). [225] This provision states that the debtor may exempt "[t]he debtor's aggregate interest *in any property*, not to exceed in value $800 plus up to $7,500 of any unused amount" of the homestead exemption. [226] A review of the legislative history of section 522 suggests that this exemption is a general or "wild card" exemption, which can be applied to any property. In discussing the purposes of section 522, the House stated that "[p]aragraph (5) permits the exemption . . . *in any property*, in order not to discriminate against the nonhomeowner." [227]

This provision has also been interpreted by several circuit courts of appeals as a general exemption. [228] In *Augustine v. U.S.*, [229] the debtors claimed the government's security interest in their farm tools as exempt under the general exemption. [230] The government objected and contended that the debtors could only exempt these assets under subsection (d)(6), [231] which exempted tools of the trade. [232] The Third Circuit upheld the debtors' exemption and found that the general exemption could be applied to the kinds of property subject to liens. [233] The court reasoned that "it is undisputed that Congress intended in a non−discriminatory fashion to grant nonhomeowners an exemption equal in value to that of homeowners . . . to be applied to whatever property the nonhomeowner debtors might choose." [234] Moreover, in *In re Smith*, [235] the Seventh Circuit held that the debtor's cause of action is "property" that could be claimed as exempt under the general exemption. [236] In making this determination, the court reasoned that this section should be construed liberally, and noted that "[i]n view of Congress' goal of providing a meaningful fresh start for debtors, it makes no sense to limit the type of property that may be applied to the general exemption without a clear statement of Congressional intent to do so." [237]

The lump sum provision benefits the debtor by leaving the discretion in his or her hands. If there are some personal items that the debtor feels are necessary to keep which are not exempt under another provision in section 522, the general exemption provides the debtor with the opportunity to exempt them. The Commission's proposal of a lump sum exemption, however, will inevitably create some difficulties because a lump sum exemption will not work effectively on a larger scale. Therefore, there must be some direction and surveillance of the debtor in selecting which property will fall under the lump sum exemption.

By creating a lump sum exemption that provides the debtor with *complete* discretion in selecting property to exempt, the Commission is leaving an important decision in the hands of an individual who has not been financially responsible in the past. The Commission cannot merely assume that the debtor's dire financial situation was the result of bad luck or poor planning. It is assuming good faith on the part of a debtor who may have intentionally defrauded creditors in the past. For example, one of the purposes of establishing uniformity in the Code was to curtail forum shopping, a potentially fraudulent activity by the debtor. [238] In addition, this blanket exemption amount may cause problems in families with an irresponsible debtor, who chooses to exempt personal items instead of family necessities. For instance, this provision would be detrimental to a family where the debtor chooses to exempt a stereo instead of clothing. [239]

In another respect, the Commission's lump sum proposal may cause the debtor to make *irrational* decisions. In New York, for example, the exemption statutes provide for the exemption of a wedding ring. [240] This item usually has tremendous sentimental value to the individual, and is often an item worth thousands of dollars. In New York, the statute does not set a dollar limit for the wedding ring. [241] This allows the debtor to exempt a wedding ring without fearing that a large portion of the exemption amounts would be used for this item. By not enumerating the property that a debtor can apply to the lump sum exemption, the Commission is forcing the debtor to choose between practical items, such as kitchen utensils, books or clothing, and a personal item such as a wedding ring. In some instances, the debtor's emotions may influence this decision, leaving the debtor's family in a desperate situation. [242]

While there are problems involving the Commission's lump sum proposal, in balancing the competing interests, this Note supports the proposal because the benefits derived from the proposal are greater than the risks. To eliminate the potential for *abuses* by a debtor, this Note argues that the discretion involving the lump sum could be shifted to the courts. The debtor would submit a request to the court for exempted items and list reasons for each item and the court would decide upon the merits of each item. This would provide the debtor with the ability to demonstrate that there is or is not a need for a certain exemption.

To determine whether an item should be exempt, the court could utilize a *discretionary standard*, such as: "assets which are necessary for the debtor's rehabilitation." After the court is satisfied that the debtor and the debtor's family are sufficiently protected because they have exempted enough "necessary" items, then the court would allow the exempting of personal items. The lump sum provision could also have a subsection stating: "the debtor can exempt *any property* up to $500." [243] This would leave some complete discretion in the hands of the debtor. This Note submits that the Commission's lump sum proposal, coupled with this *discretionary standard*, would provide a more effective and efficient exemption process for personal items.

b. Lump Sum Limits Disputes Concerning Whether Property Should Be Exempt

There have been instances of disputes between debtors and creditors concerning whether certain assets should be exempt, [244] such as the Fourth Circuit case *McGreevy v. ITT Financial Services* (*In re McGreevy*). [245] In this case, the creditor objected to the debtor's claim that a shotgun and rifle constituted household goods under section 522(f)(2)(A), [246] which allows for the avoidance of liens on household goods. [247] In examining the applicable case law, the Fourth Circuit noted that bankruptcy courts have defined household goods in principally two different manners. [248]

Under the first definition, "only those goods that are found and used in or around the debtor's home *and* that are necessary to a debtor's fresh start after bankruptcy constitute 'household goods.'" [249] The court described this as the "necessity" requirement. [250] As the court noted, this definition was utilized by the Bankruptcy Court for the District of Maryland in *Barnes v. ITT Financial Services* (*In re Barnes*). [251] In *Barnes*, [252] the debtor claimed firearms and a VCR as exempt and asserted them to be household goods. [253] The Bankruptcy Court held that the VCR was a household good and the firearms were not, and stated the rule that household goods are "items of personal property reasonably necessary for the day−to−day existence of people in the context of their homes. Such items generally consist of consumer goods used in or near a house, apartment or other residence." [254] The Fourth Circuit in *McGreevy* rejected this interpretation because it was "without foundation" in section 522. [255]

Under the second definition, "'household goods' include *all* goods typically found and used in or around the home, whether or not they would be considered strictly necessary to a debtor's fresh start." [256] The Fourth Circuit noted that there has been an inconsistency by the bankruptcy courts in applying this rule, [257] and rejected this interpretation because it failed "to capture fully the functional nexus between the good and the household that distinguishes a household good from a good that happens . . . to be used in the house." [258]

The Fourth Circuit held that the debtor's firearms were not household goods and therefore not exempt, [259] and instead adopted its own definition of household goods. The court stated that "'household goods' under section 522(f)(2)(A) are those items of personal property that are typically found in or around the home and used by the debtor or his dependents to support and facilitate day−to−day living within the home, including maintenance and upkeep of the home itself." [260] The court reasoned that "the requisite functional nexus exists where—and only where—the good is used to support and facilitate daily life within the house." [261]

This difference in the definition of household goods is an example of the problems associated with disputes between debtors and creditors concerning whether a certain asset falls under an exemption. There were generally two approaches at the time of *McGreevy*, and the Fourth Circuit presented yet another one. This lack of uniformity in the application of exemption statutes continues the potential for disputes.

These disputes cause delays in bankruptcy proceedings and hardships to the debtor or the creditor, depending on how a court makes its determination. This Note argues that the Commission's proposal of a lump sum exemption would eliminate the need for these disputes because the debtor would no longer attempt to "fit" an asset under a certain exemption, and the creditor or trustee would no longer need to object to the debtor's list of exemptions. This would lighten the bankruptcy courts' calendars to facilitate a more important purpose of a bankruptcy filing: ensuring the debtor's fresh start.

c. Lump Sum Limits Prebankruptcy Asset Conversion

This Note argues that the Commission's lump sum proposal would limit the problem of prebankruptcy planning. There have been instances of prebankruptcy asset conversion in bankruptcy cases. [262] An examination of a trilogy of Eighth Circuit cases outlines the problem of prebankruptcy asset conversion.

In *Panuska v. Johnson* (*In re Johnson*), [263] the evidence revealed that the debtor converted his non−exempt assets into exempt property in anticipation of his filing for bankruptcy relief. [264] The debtor paid debts in the amount of $175,000 secured against his home from the sale of his non−exempt assets and other items. [265] The debtor then filed for chapter 7 and claimed the home as exempt. [266] The trustee objected to this exemption and argued that the debtor's discharge should be denied under section 727(a)(2) [267] because the debtor's actions "constituted fraud because . . . [he] was intentionally trying to insulate property from his creditors." [268] The Eighth Circuit held that the debtor was entitled to the homestead exemption, [269] and concluded that "there is nothing fraudulent per se about making even significant use of other legal exemptions," [270] and that "conduct sufficient to defeat discharge requires indicia of fraud beyond mere use of the exemptions . . . ." [271]

In making its determination, the court relied upon two cases it had recently decided, *Hanson v. First National Bank in Brookings* [272] and *Norwest Bank Nebraska, N.A. v. Tveten*. [273] In *Hanson*, the debtors resided in South Dakota and were experiencing financial difficulties. [274] The debtors sold items totaling over $35,000 that were not exempt, purchased life insurance policies worth close to $20,000 and used the remaining proceeds to pay off part of the mortgage on their homestead. [275] The debtors subsequently filed for bankruptcy relief and claimed the life insurance policies and homestead as exempt. [276] The creditor objected to these exemptions and claimed that the debtors had converted their non−exempt property on the eve of bankruptcy with the intent of defrauding their creditors. [277]

The court initially noted that in South Dakota, a debtor was able to exempt up to $20,000 in proceeds of life insurance policies and that the homestead exemption was unlimited. [278] In examining prebankruptcy asset conversion cases, the court stated that "[i]t is well established that under the Code, a debtor's conversion of non−exempt property on the eve of bankruptcy for the express purpose of placing that property beyond the reach of creditors, without more, will not deprive the debtor of the exemption to which he otherwise would be entitled . . . ." [279] There needs to be evidence of fraudulent intent on the part of the debtor.

The court noted that *extrinsic evidence of fraud* has been accepted in proving fraudulent intent. [280] The evidence revealed that in converting their assets, the debtors had sold the non−exempt assets to family members. [281] The court found that these sales, with nothing more, were not extrinsic evidence of fraud, and held that the creditor did not establish indicia of fraud. [282]

In contrast to *Hanson*, the Eighth Circuit came to a different result in *Tveten*. [283] In *Tveten*, the debtor owed nearly $19 million to his creditors resulting from personally guaranteed highly leveraged investments that were unsuccessful. [284] The debtor liquidated his non−exempt assets, including land, life insurance policies, annuities, net salary and bonuses, a KEOGH plan and individual retirement fund, his corporation's profit sharing plan and his home, which had a net total value over $700,000, [285] and converted these assets into life insurance and annuity contracts with a fraternal benefit association, free from attachment by creditors. [286] The debtor thereafter filed for bankruptcy relief and sought a discharge of $18.92 million. [287] The creditors objected to the exemptions and argued that the discharge should be denied under section 727(a)(2). [288]

The Eighth Circuit restated the rule that "absent extrinsic evidence of fraud, mere conversion of non−exempt property to exempt property is not fraudulent as to creditors even if the motivation behind the conversion is to place those assets beyond the reach of creditors." [289] The court, however, denied the debtor's discharge reasoning that extrinsic evidence pointed to the debtor's intent to defraud his creditors by converting assets on the eve of bankruptcy. [290] The court found that the state exemptions relied on by the debtor were unlimited, and that the debtor liquidated his assets and converted them to exempt property in seventeen transfers on the eve of bankruptcy. [291] The court also noted that the debtor's "attempt to shield property worth approximately $700,000 goes well beyond the purpose for which exemptions are permitted." [292]

Despite similar facts, the same panel of judges on the Eighth Circuit decided *Hanson* and *Tveten* differently. This lack of uniformity in the application of bankruptcy statutes continues the potential for disputes, as it similarly did in disputes between debtors and creditors concerning whether certain assets should be exempt.

Although courts have allowed prebankruptcy planning, limiting it would increase the integrity of the bankruptcy system. This Note concludes that the Commission's proposal of a lump sum exemption would limit prebankruptcy asset conversion of non−homestead assets. If *any property* can be exempt under the Commission's proposal, the debtor would not attempt to convert non−exempt assets into exempt assets because the proposal would instill in the debtor complete discretion regarding which property should be exempt.

In many cases, while the creditors are racing to levy on the debtor's assets, the debtor is racing to the attorney's office seeking assistance with planning around his or her financial problems. These simultaneous races are to no avail to the creditor, who usually must succumb to the careful and systematic actions by the debtor. Although prebankruptcy planning is permitted absent intent to defraud creditors, it produces a result which is inherently wrong: an unfair advantage over the creditor.

VII. CONCLUSION

The Commission's proposals to create uniformity of exemptions should be adopted by Congress. Although Congress may adopt the proposals with different monetary amounts, the framework of these proposals is necessary because uniform federal exemptions will work more effectively than the current system.

By eliminating the states ability to opt out of the federal system of exemptions and select their own exemption statutes, the Commission's proposal creates nationwide uniformity of exemptions. This proposal benefits the system for two reasons. First, the proposal satisfies the constitutional standard of geographical uniformity mandated by the United States Supreme Court. Second, the proposal would eliminate the conflict that exists today between the use of federal exemptions in some states and the states' concurrent bankruptcy powers.

The Commission's proposals involving the homestead and personal property will limit several of the prominent problems associated with the current system of exemptions. The floor−and−ceiling approach creates greater uniformity, while retaining some level of state autonomy in deciding a suitable exemption amount for homesteads. This proposal would also limit forum shopping because the state homestead exemption amounts would lie within a reasonable range. The lump sum proposal would limit disputes among claimed exemptions and prebankruptcy planning. The lump sum proposal would also limit actions by a debtor which may not be fraudulent under the existing law, but which deface the bankruptcy system. Solving these problems would ensure an increase in the integrity of the bankruptcy system. In addition, since the lump sum proposal creates a potential for abuses by the debtor, the courts should be in power to examine the debtor's claimed exemptions in order to ensure their rational selection.

If the Commission's proposals are adopted, the playing field of bankruptcy will be level for all participants. The scales of justice will no longer be tipped in the debtor's favor.

Richard M. Lombino

FOOTNOTES:

[1] The National Bankruptcy Review Commission was established by Title VI of The Bankruptcy Reform Act of 1994. Pub. L. No. 103−394, 1994 U.S.C.C.A.N. (108 Stat.) 4106. The Commission was created to review and to make recommendations to amend the bankruptcy laws. The Commission filed its report on October 20, 1997 with President William Jefferson Clinton, Chief Justice William H. Rehnquist and Congress.Back To Text

[2] Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report at 117−44 (1997) [hereinafter Commission Report].Back To Text

[3] When a debtor files for bankruptcy, he or she may exempt certain assets from the bankruptcy estate and from the reach of creditors.Back To Text

[4] 4 Collier On Bankruptcy ¶ 522.01, at 10 (Lawrence P. King et al. eds., 15th ed. rev. 1997) [hereinafter Collier].Back To Text

[5] *See* Grogan v. Garner, 498 U.S. 279, 287 (1991) (stating the fresh start is for the "'honest but unfortunate debtor'") (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)); Giles v. Credithrift of Am., Inc. (*In re* Pine), 717 F.2d 281, 284 (6th Cir. 1983) (commenting "[a] purpose of the Bankruptcy Act was to ensure that debtors be able to make fresh starts after bankruptcy"); Augustine v. U.S., 675 F.2d 582, 584 (3d Cir. 1982) (noting "[i]n order to give debtors a fresh start, Congress in Section 522 of the Code provided for the exemption of certain property which would otherwise be distributed to unsecured creditors") (citing H.R. Rep. No. 95−595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963).Back To Text

[6] 4 Collier, *supra* note 4, ¶ 522.01, at 10.Back To Text

[7] H.R. Rep. No. 95−595, at 127 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087.Back To Text

[8] *Id*. Back To Text

[9] *See* H.R. Rep. No. 95−595, at 127, *reprinted in* 1978 U.S.C.C.A.N. at 6088 (stating that "[i]n most of these cases the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a *substantial* advantage") (emphasis added).Back To Text

[10] *See* William Houston Brown, *Political And Ethical Considerations Of Exemption Limitations: The "Opt−Out" As Child Of The First And Parent Of The Second*, 71 Am. Bankr. L.J. 149, 163−70 (1997) (outlining purposes of bankruptcy exemptions and fresh start doctrine); Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 Ind. L.J. 549, 549 (1995) (discussing fresh start doctrine in bankruptcy law); Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 30 (1983) (noting that exemptions serve to protect debtors from "overreaching" creditors); William J. Woodward, Jr., *Exemptions, Opting Out, and Bankruptcy Reform*, 43 Ohio St. L.J. 335, 335 (1982) (noting Congress' view that exemptions are "central to the individual debtor's fresh start following bankruptcy . . . ."); Tracey Nicolau Bosomworth, Note, *Federal Exemptions and the Opt−Out Provisions of Section 522: A Constitutional Challenge*, 58 Ind. L.J. 143, 143 (1982) (noting policy concern of Code was providing debtors with fresh start).Back To Text

[11] *See* Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 Rutgers L. Rev. 615 (1978); Vern Countryman, *For a New Exemption Policy in Bankruptcy*, 14 Rutgers L. Rev. 678 (1960).Back To Text

[12] Resnick, *supra* note 11, at 621.Back To Text

[13] Countryman, *supra* note 11, at 678.Back To Text

[14] *Id.*Back To Text

[15] *See* U.S. Const. art. I.Back To Text

[16] U.S. Const. art. I, § 8, cl. 4.Back To Text

[17] *See infra* notes 162−171 and accompanying text.Back To Text

[18] 2 Stat. 19 (1800) (repealed 1803).Back To Text

[19] *See id.* at 23 (providing for necessary clothing and bedding).Back To Text

[20] 5 Stat. 440 (1841) (repealed 1843).Back To Text

[21] *See id.* at 442−43.Back To Text

[22] 14 Stat. 517 (1867) (repealed 1878).Back To Text

[23] *See id.* at 522−24.Back To Text

[24] *In re* Sullivan, 680 F.2d 1131, 1134 (7th Cir. 1982).Back To Text

[25] 30 Stat. 544 (1898) (repealed 1978).Back To Text

[26] *See id*. at 548.Back To Text

[27] Countryman, *supra* note 11, at 698.Back To Text

[28] 52 Stat. 840 (1938) (repealed 1978).Back To Text

[29] 11 U.S.C. § 101−1330 (1994).Back To Text

[30] *See infra* notes 94−100 and accompanying text. Back To Text

[31] *See* H.R. Rep. No. 95−595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087 (stating "[t]he purpose [of exemptions] has not changed, but neither have the level of exemptions in many States. Thus, the purpose has largely been defeated").Back To Text

[32] *See* H.R. Rep. No. 95−595, at 126−27, *reprinted in* 1978 U.S.C.C.A.N. at 6087−88 (discussing choices of bankrupt debtor).Back To Text

[33] S. Rep. No. 95−989, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5792 (discussing and rejecting House approach).Back To Text

[34] In discussing the opt out provision, the Honorable Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, stated that "[s]ection 522 of the House amendment represents a *compromise* on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment." 124 Cong. Rec. 11089, statement by Legislative Leader (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6452 (emphasis added). *See also* Storer v. French (*In re* Storer), 58 F.3d 1125, 1130 (6th Cir. 1995) (stating "it was reasonable for Congress, as a *compromise* between two rational alternatives, to pass legislation that contains elements of each of those alternatives") (emphasis added); Giles v. Credithrift of Am., Inc. (*In re* Pine), 717 F.2d 281, 282 (6th Cir. 1983) (stating "[s]ection 522(b) emerged from Congress as a *compromise*") (emphasis added); *see generally In re* Sullivan, 680 F.2d 1131, 1136 (7th Cir. 1982) (stating "[t]he statute's treatment of exemptions reflects at the very least a mixed intention on the part of Congress").Back To Text

[35] 11 U.S.C. § 522(b)(1) (1994).Back To Text

[36] 11 U.S.C. § 522(d).Back To Text

[37] *See* 11 U.S.C § 522(b)(1) (stating debtor may exempt "property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection

specifically does not so authorize . . . .").Back To Text

[38] *See Storer*, 58 F.3d at 1127 (stating "Congress vested states with the authority to deny their citizens the ability to use the federal exemption scheme embodied in Bankruptcy Code § 522(d)"); *In re* Lee, 22 B.R. 977, 979 (Bankr. C.D. Cal. 1982) (stating "[t]he intention of Congress was not to create in the states the power to make the bankruptcy laws for its residents. The intention was solely to allow the states to 'not authorize' the use of § 522(d) exemptions for all of that state's residents"); *see also* McManus v. AVCO Fin. Serv., Inc., 681 F.2d 353, 355 (5th Cir. 1982) (stating "[s]ection 522(b) expressly grants the states broad discretion and an open−ended opportunity to determine what property may be exempt from the bankruptcy estate, as long as the state law does not conflict with property exempt under federal law other than the laundry list").Back To Text

[39] *See, e.g.*, Ohio Rev. Code Ann. § 2329.66(A)(1)(a) & (b) (Anderson 1996) (providing homestead exemption of $5,000); Ky. Rev. Stat. Ann. § 427.060 (Michie 1996) (limiting homestead exemption to $5,000); Mich. Const. art. X, § 3 (providing $3,500 for homestead exemption).Back To Text

[40] *See, e.g.*, Fla. Const. art. X, § 4 (providing unlimited homestead exemption); Tex. Prop. Code Ann. § 41.001 (providing unlimited homestead exemption); S.D. Codified Laws § 43−31−1 (Michie 1996) (providing unlimited homestead exemption).Back To Text

[41] *See* Norwest Bank Nebraska v. Tveten, 848 F.2d 871, 876 (8th Cir. 1988) (commenting that debtor did not want "fresh start," but rather a "head start").Back To Text

[42] *See* Brown, *supra* note 10, at 209.Back To Text

[43] *Id.Back To Text*

[44] *See* Bank Leumi Trust Co. v. Lang, 898 F. Supp. 883, 884 (S.D. Fla. 1995) (stating that debtor sold non−exempt assets for exempt ones).Back To Text

[45] *See id.Back To Text*

[46] *See In re* Popek, 188 B.R. 701, 703−04 (Bankr. S.D. Fla. 1995) (illustrating debtor who manipulated homestead exemption); *In re* Coplan, 156 B.R. 88, 89 (Bankr. M.D. Fla. 1993) (selling Wisconsin home, purchasing Florida home and claiming it as exempt); Govaert v. Primack (*In re* Primack), 89 B.R. 954, 958 (Bankr. S.D. Fla. 1988) (selling Colorado home, purchasing Florida home and claiming it as exempt).Back To Text

[47] *See* Gepfrich v. Gepfrich, 582 So.2d 743, 743−44 (Fla. 4th DCA 1991) (noting debtor was trying to escape paying alimony); La Mar v. Lechlider, 185 So. 833, 835 (Fla. 1939) (stating fake note and mortgage was attempt to avoid creditor's claim); Jones v. Carpenter, 106 So. 127, 128−29 (Fla. 1925) (noting equitable lien was used to defeat claim).Back To Text

[48] *See* Rainier Equip. Fin., Inc. v. Taylor (*In re* Taylor), 861 F.2d 550, 552−53 (9th Cir. 1988) (discussing logging truck and trailer as "tools of the trade"); *In re* Williams, 171 B.R. 451, 452 (D.N.H. 1994) (noting automobile purchased with exempt proceeds from worker's compensation); *In re* Johnson, 14 B.R. 14, 15 (Bankr. W.D. Ky. 1981) (discussing whether bus was an exempt automobile).Back To Text

[49] *See* McGreevy v. ITT Fin. Servs. (*In re* McGreevy), 955 F.2d 957, 962 (4th Cir. 1992) (holding debtor's firearms were not household goods); Barnes v. ITT Fin. Servs. (*In re* Barnes), 117 B.R. 842, 847 (Bankr. D. Md. 1990) (finding debtor's firearms were not exempt household goods); Heights Fin. Corp. v. Barley (*In re* Barley), 74 B.R. 450, 452 (Bankr. N.D. Ind. 1987) (holding "rifle would fit within the definition of household goods . . . .").Back To Text

[50] *See* Panuska v. Johnson (*In re* Johnson), 880 F.2d 78, 79 (8th Cir. 1989) (discussing conversion of assets into exempt musical instruments and life insurance); Norwest Bank Nebraska v. Tveten, 848 F.2d 871, 872−73 (8th Cir. 1988) (pointing out conversion of $700,000 of non−exempt property); Weissing v. Levine (*In re* Levine), 139 B.R. 551, 552 (Bankr. M.D. Fla. 1992) (examining conversion of non−exempt assets into annuity life insurance policies); Cristol v. Blum (*In re* Blum), 41 B.R. 816, 818 (Bankr. S.D. Fla. 1984) (illustrating conversion of non−exempt assets into exempt homestead and annuity).Back To Text

[51] *See* Hanson v. First Nat'l Bank in Brookings, 848 F.2d 866, 867 (8th Cir. 1988) (discussing prebankruptcy planning of debtors).Back To Text

[52] *See In re* Swecker, 157 B.R. 694, 695 (Bankr. M.D. Fla. 1993) (discussing purchase of exempt annuities).Back To Text

[53] *See* Park Nat'l Bank of St. Louis Park v. Whitney (*In re* Whitney), 107 B.R. 645, 649 (Bankr. D. Minn. 1989) (noting debtor knew actions would delay or impede creditors).Back To Text

[54] H.R. Rep. No. 95−595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317; S. Rep. No. 95−989, at 75−76, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862.Back To Text

[55] *See, e.g.*, Weissing v. Levine (*In re* Levine), 139 B.R. 551, 553 (Bankr. M.D. Fla. 1992); Barnett Bank of Pascon County v. Decker (*In re* Decker), 105 B.R. 79, 83 (Bankr. M.D. Fla. 1989); Federal Land Bank of Omaha v. Ellingson (*In re* Ellingson), 63 B.R. 271, 278 (Bankr. N.D. Iowa 1986) (quoting from H.R. Rep. 95−595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317).Back To Text

[56] In 1970, Congress established the Commission on the Bankruptcy Laws of the United States to "study, analyze, evaluate and recommend changes" to the bankruptcy laws. Act of July 24, 1970, Pub. L. No. 91−354, 84 Stat. 468.Back To Text

[57] *See* B Appendix Collier On Bankruptcy App. Pt. 4(c), at 423 (Lawrence P. King et al. eds., 15th ed. rev. 1997) [hereinafter B Collier] (recommending that Bankruptcy Act prescribe exemptions to supersede state law).Back To Text

[58] *See id.* at 425−26. Some of these items included a homestead, wearing apparel, jewelry, household furnishings, tools of the trade and motor vehicles. *See id.* In addition, the 1973 Commission formulated these proposals into a statute form. *See id.* at 694−700.Back To Text

[59] *See id.* at 424.Back To Text

[60] *See* B Collier, *supra* note 57, App. Pt. 4(c), at 424.Back To Text

[61] *See id.**Back To Text*

[62] *See* Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 Am. Bankr. L.J. 221, 236−40 (1997) (finding a need for a uniform federal lump sum exemption on personal property and the elimination of the opt out); Douglas E. Deutsch, Note, *Exemption Reform: Examining The Proposals*, 3 Am. Bankr. Inst. L. Rev. 207, 213−228 (1995) (discussing possible alternatives to reform exemption policy); James B. Haines, Jr., *Section 522's Opt−Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 Ariz. St. L.J. 1, 41−42 (proposing elimination of opt out and establishment of a floor of federal exemptions); Anthony L. Martin, Comment, *Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt Out" Provision is Constitutional*, 1981 S. Ill. U. L.J. 65, 72 (finding need to mandate identical exemptions in all states); William T. Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts' Exemption Rights*, 63 Cal. L. Rev. 1439, 1443 (1975) (finding need for a national bankruptcy exemption standard).Back To Text

[63] *See* Countryman, *supra* note 11, at 746−48 (providing that bankruptcy exemption policy is neither well defined nor satisfactory).Back To Text

[64] *See id.* at 682−84 (discussing Act of 1898 and Chandler Amendments of 1938). Countryman's article was written before enactment of the Code and its opt out provision.Back To Text

[65] *Id.* at 682−83.Back To Text

[66] *Id.* at 683−84.Back To Text

[67] *See* Commission Report, *supra* note 2, at 126 (noting varying results in states).Back To Text

[68] *See infra* notes 125−137 and accompanying text.Back To Text

[69] Countryman, *supra* note 11, at 746.Back To Text

[70] Countryman stated:

> [i]f the estate included specific items of property of peculiar value to the debtor, such as an automobile, tools of a trade or the library of a professional man, he could use his cash exemption to bid for them at the trustee’s sale, perhaps being required only to meet the highest competing bid. Similarly, some or all of the cash exemption could be invested in the family home and the trustee could sell a mortgage for the unencumbered difference between the amount invested and the appraised value.

Id.Back To Text

[71] *Id.* at 746.Back To Text

[72] *See id.* at 747.Back To Text

[73] *Id.Back To Text*

[74] *See infra* notes 125−143 and accompanying text.Back To Text

[75] *See* Thomas H. Jackson, *The Fresh−Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985).Back To Text

[76] *Id.* at 1434−35.Back To Text

[77] *See id.* at 1435.Back To Text

[78] *Id.Back To Text*

[79] *Id.Back To Text*

[80] Jackson, *supra* note 75, at 1435.Back To Text

[81] *See id.Back To Text*

[82] *Id.Back To Text*

[83] *Id.* (citing Countryman, *supra* note 11, at 746−47). Jackson argued that this option was favorable because it "might better reflect the individual’s subjective belief about his needs for various assets in the future."

Jackson, *supra* note 75, at 1435.Back To Text

[84] *See id.* at 1438−39.Back To Text

[85] *See* Brown, *supra* note 10, at 151.Back To Text

[86] *See id.* at 209 (stating the current system "provides an incentive for debtors to search for the most liberal of available exemptions").Back To Text

[87] *See id.* at 209−10.Back To Text

[88] *Id.* at 209.Back To Text

[89] Commission Report, *supra* note 2, at 121.Back To Text

[90] *Id*.Back To Text

[91] *See id.* at 125.Back To Text

[92] *See id*.Back To Text

[93] *Id*.Back To Text

[94] Commission Report, *supra* note 2, at 125.Back To Text

[95] *See id.* at 121.Back To Text

[96] *Id.* at 122. The Commission illustrated that some states have little or no homestead exemption, while other states have an unlimited one. *See id.* These discrepancies had no relation to "regional variations in cost of living or property use . . . ." *Id.* The Commission also furnished an example of a disparity in a personal property exemption where one state provides up to $20,000 for a automobile, while another exempts $1,000. *See* Commission Report, *supra* note 2, at 122.Back To Text

[97] *See id*.Back To Text

[98] *See id.Back To Text*

[99] *See id*.Back To Text

[100] *Id.* at 122. The Commission noted that a debtor in one state may not be capable of exempting certain items, while a debtor in a neighboring state might enjoy that same exemption. *See* Commission Report, *supra* note 2, at 122.Back To Text

[101] *See id*. at 124.Back To Text

[102] *Id.Back To Text*

[103] *See id.* at 125.Back To Text

[104] *Id.* at 124.Back To Text

[105] *See* Commission Report, *supra* note 2, at 124.Back To Text

[106] *Id.* at 125.Back To Text

[107] *See id*. (stating that "a home not only provides physical family shelter but it is also the most significant and valuable financial asset they will own") (citing U.S. Dep't of Commerce, Bureau of the Census, 1990 Hous. Highlights Fin. Facts, Table 1 State and Reg'l Ranking by Median Home Value: 1970−1990 (June 1992)).Back To Text

[108] *See* Commission Report, *supra* note 2, at 125−26. While discussing the homestead exemption in Public Health Trust of Dade County v. Lopez (*In re* Estate of Taylor), 531 So.2d 946 (Fla. 1988), the Florida Supreme Court noted the importance of the homestead exemption:

> [a]s a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.

Id. at 948 (citing Bigelow v. Dunphe, 197 So. 328, 330 (Fla. 1940)).Back To Text

[109] Commission Report, *supra* note 2, at 126.Back To Text

[110] *Id.Back To Text*

[111] *Id*. Back To Text

[112] *See id*. (noting that some states "recognize no homestead at all" and many others "have only nominal homestead exemptions"). The Commission compiled data concerning the homestead exemptions of the states and found that there is a wide range of amounts exempted by the states. *See id*. Some states, such as Florida and Texas, have unlimited homestead exemptions, while other states, such as Illinois and New Jersey, have little or no homestead exemption at all. *See* Commission Report, *supra* note 2, at 126.Back To Text

[113] *See id*. (noting that some homestead exemptions were too high, while some were too low).Back To Text

[114] *See id*. (noting this proposal will "promote debtor rehabilitation and . . . advance other governmental policies . . . .").Back To Text

[115] *See id.* (noting that state's authority concerning homestead exemptions had to be limited).Back To Text

[116] *See id.* at 127. The Commission made two additional changes to the current homestead exemption. First, the Commission stated that the "floor and ceiling amounts should apply equally to all households, regardless of whether a debtor files singly or jointly." Commission Report, *supra* note 2, at 131. The current system allows for twice the exemption amount for married couples who file jointly. *See* 11 U.S.C. § 522(m) (1994) (providing that section 522 "shall apply separately with respect to each debtor in a joint case"). The Commission reasoned that "[t]he need for a homestead may be based more on the formation of a household than on whether one or two adults live in the home." Commission Report, *supra* note 2, at 131. Second, the homestead proposal applies without regard to the form of the property, which includes property held in tenancy by the entirety. *See id.Back To Text*

[117] *See id*. at 126.Back To Text

[118] *See id.* at 127−30.Back To Text

[119] *Id.* at 127.Back To Text

[120] *See generally* Commission Report, *supra* note 2, at 127−28 (examining factors "such as the number of states with exemptions at that level, a comparison of the proposed floor with the current federal exemption, and policy reasons for protecting the homestead"). Back To Text

[121] *Id.* at 127. The Commission noted that most homeowners do not have equity in their home above $20,000. *See id.* However, elderly homeowners may be discriminated against if the floor is set too low because most of their savings may be invested in their home. *See id.*Back To Text

[122] *Id.* at 129.Back To Text

[123] *See* Commission Report, *supra* note 2, at 130 (discussing different maximum amounts in states).Back To Text

[124] *Id.* Back To Text

[125] *Id.* at 133.Back To Text

[126] *Id.* Back To Text

[127] *See id.*Back To Text

[128] *See* Commission Report, *supra* note 2, at 133.*Back To Text*

[129] *See id.* at 134.Back To Text

[130] *See id.* at 133 (discussing impact of different cost of living standards). The Commission noted the example of housing costs in Manhattan, as compared with upstate New York. *Id.*Back To Text

[131] *Id.* at 134 (emphasis added).Back To Text

[132] Commission Report, *supra* note 2, at 133.Back To Text

[133] *Id.* at 134 (citing Jackson, *supra* note 75, at 1439).Back To Text

[134] *See* Commission Report, *supra* note 2, at 134 (explaining how debtor decision making helps reach goals of bankruptcy).Back To Text

[135] *Id.* at 135.Back To Text

[136] *See id.* at 135−36.Back To Text

[137] *Id.* at 136.Back To Text

[138] *See id.* at 131−32.Back To Text

[139] *See* Commission Report, *supra* note 2, at 131−32.Back To Text

[140] 11 U.S.C. § 104 (1994). Section 104(b)(1)(A) states that "[o]n April 1, 1998, and at each 3−year interval ending on April 1 thereafter, each dollar amount in effect under sections . . . 522(d), . . . immediately before such April 1 shall be adjusted– (A) to reflect the change in the Consumer Price Index . . . ." *Id.* at § 104(b)(1)(A).Back To Text

[141] *See* Commission Report, *supra* note 2, at 132−33.Back To Text

[142] *See id.*Back To Text

[143] *See id.*Back To Text

[144] The House Judiciary Committee's Subcommittee on Commercial and Administrative Law met on November 13, 1997 to discuss consumer bankruptcy and to review the recommendations of the Commission. During these proceedings, Brady C. Williamson, chairman of the Commission, "urged the subcommittee to create legislation that would maintain and restore balance to the bankruptcy system, contending that 'the case for radical, architectural change in the bankruptcy system . . . has, in my view, not been made.'" *Reform: House Judiciary Subcommittee Holds Hearing on Review Commission's Report*, BNA Bankr. L. Daily, Dec. 1, 1997, at d3.Back To Text

[145] *See* Commission Report, *supra* note 2, at 125.Back To Text

[146] A discussion of the professionally−prescribed medical devices and health aids, rights to receive benefits and payments and rights to future payments proposals is beyond the scope of this Note.Back To Text

[147] *See Reform: Review Commission's Consumer Proposals 'Miss Mark' Credit Union Group Asserts*, BNA Bankr. L. Daily, Jan. 16, 1998, at d2 (noting National Association of Federal Credit Union's objection to Commission's proposals because they "greatly increase the rights of debtors without regard to the rights of creditors and the effects on consumers"); *Reform: House Judiciary Subcommittee Holds Hearing On Review Commission's Report*, BNA Bankr. L. Daily, Dec. 1, 1997, at d3 (quoting Rep. George W. Gekas' (R−Pa) remarks "that the Commission's report 'falls considerably short' in the area of consumer bankruptcy . . . ."); Henry E. Hildebrand, III, *Uniformity Meets Reality*, Am. Bankr. Inst. J., July/August 1996, at 16 (stating Commission's proposals fail to take into account cost of living differences in various states); *see also* Jeffrey Marks, *Bankruptcy Reforms Controversial*, Cin. Bus. Courier, Dec. 5, 1997, at 55 (noting that Commission's proposals are "not only dramatic, but highly controversial"); *The Commission's Consumer Bankruptcy Recommendations*, 7 No. 6 Cons. Bankr. News (LRP) 3 (1997) (noting "[c]ritics of the proposal assert that the amount of the exemption is so generous that it will encourage people to file for Chapter 7").Back To Text

[148] *See* Hon. Edith H. Jones & Comm'r James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law By Four Dissenting Commissioners*, Commission Report, *supra* note 2, ch. 5, Individual Commissioner Views 25−28.Back To Text

[149] *Id*. at 26 (noting that under this proposal, debtors could discharge debt while holding onto assets).Back To Text

[150] *Id.* at 27.Back To Text

[151] *Id.* at 28.Back To Text

[152] *See Hearings on the National Bankruptcy Review Commission's Report Before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Brady C. Williamson, Chairman of the National Bankruptcy Review Commission) [hereinafter *Subcomm. Review Commission Report*].Back To Text

[153] *Id.* Williamson also stated that "the Commission has tried to reaffirm the principle of balance in bankruptcy law. We can offer no clearer recommendation and no better legacy to the Congress than that." *Id.*Back To Text

[154] *Id.*Back To Text

[155] *Id.*Back To Text

[156] *Subcomm. Review Commission Report*, *supra* note 152.Back To Text

[157] *See id.* (stating "[t]he Commission has recommended that Congress stop these abuses by adopting uniform personal property exemptions that apply to every debtor in every state").Back To Text

[158] *Id.*Back To Text

[159] *Id.*Back To Text

[160] *Id.*Back To Text

[161] *See* Storer v. French (*In re* Storer), 58 F.3d 1125, 1130 (6th Cir. 1995) (holding opt out provision was constitutional because allowing the states to opt out of the federal exemptions was authorized by the Bankruptcy Clause); Rhodes v. Stewart, 705 F.2d 159, 164 (6th Cir. 1983) (holding opt out clause constitutional because it was "an exercise of the legislative prerogative to establish a 'uniform law' and therefore falls within that scope of authority provided to Congress in the Bankruptcy Clause"); *In re* Sullivan, 680 F.2d 1131, 1138 (7th Cir. 1982) (noting that "it was not an unconstitutional delegation of federal power for the federal bankruptcy laws to recognize state exemption laws") (citing Hanover Nat'l Bank of the City of N.Y. v. Moyses, 186 U.S. 181, 190 (1902)).Back To Text

[162] U.S. Const. art. I, § 8, cl. 4. In the Federalist Papers, while discussing the Bankruptcy Clause, James Madison wrote:

> [t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 465−66 (1982) (quoting The Federalist No. 42, at 285 (James Madison) (N.Y. Heritage Press, 1945)). *See also* Hildebrand, *supra* note 147, at 16 (stating "[t]he Constitution empowers Congress to enact 'uniform' bankruptcy laws, theoretically precluding each state from establishing different bankruptcy standards").Back To Text

[163] 186 U.S. 181 (1902).Back To Text

[164] *See id.* at 188. The Supreme Court has also noted that "[t]he uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner." *Gibbons*, 455 U.S. at 469.Back To Text

[165] *Moyses*, 186 U.S. at 188−89. The Court reasoned "[n]or can we perceive in the recognition of the local law in the matter of exemptions, . . . any attempt by Congress to unlawfully delegate its legislative power." *Id.* at 190 (citations omitted).Back To Text

[166] *See id.* at 190. The Supreme Court has examined the issue of uniformity of exemptions in other cases as well. In Sturges v. Crowninshield, 17 U.S. (9 Wheat) 122 (1819), the Court stated:

> Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject [of bankruptcies] throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend.

Id. at 193−94. In addition, in *Gibbons*, the Court noted that pursuant to the Bankruptcy Clause, "Congress has the power to enact bankruptcy laws that are uniform throughout the United States." *Gibbons*, 455 U.S. at 469. The Court also stated that "the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States." *Id.* at 468.Back To Text

[167] *See supra* notes 25−28 and accompanying text.Back To Text

[168] *Moyses*, 186 U.S. at 190. *See also* Central Bank of Akron v. Ambrose (*In re* Ambrose), 4 B.R. 395, 398 (Bankr. N.D. Ohio 1980) (stating "[t]he uniformity which is required by the Constitution relates to the law itself and not to its results upon the varying rights of debtor and creditor under the laws of the several states") (citing Thomas v. Woode, 173 F. 585, 591−92 (8th Cir. 1909)).Back To Text

[169] *Moyses*, 186 U.S. at 188.Back To Text

[170] *See id.* at 190.Back To Text

[171] *In re* Sullivan, 680 F.2d 1131, 1137−38 (7th Cir. 1982). *See also Ambrose*, 4 B.R. at 398 (stating "[a]bsolute uniformity in the application of [bankruptcy laws] . . . is impossible, since Congress cannot create uniform conditions and circumstances in the various states of the Union") (citing *Woode*, 173 F. at 591−92).Back To Text

[172] U.S. Const. art. VI, cl. 2. The Supremacy Clause states in full:

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.Back To Text

[173] Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 41 (1824)). *See also* Rhodes v. Stewart, 705 F.2d 159, 163 (6th Cir. 1983) (stating "[t]he Supremacy Clause and the doctrine of preemption will serve to invalidate state promulgations to the extent that they are inconsistent with or contrary to federal laws") (citing *Perez*, 402 U.S. at 649); Kosto v. Lausch (*In re* Lausch), 16 B.R. 162, 164 (M.D. Fla. 1981) (noting "[s]tate laws concerning the field of bankruptcy are invalid under the Supremacy Clause only if they are inconsistent with federal bankruptcy statutes") (citing *Perez*, 402 U.S. at 649).Back To Text

[174] *See In re Sullivan*, 680 F.2d at 1137 (noting *concurrent* bankruptcy powers of the states); *In re Lausch*, 16 B.R. at 164−65 (acknowledging states have *concurrent* legislative power to enact bankruptcy laws).Back To Text

[175] 17 U.S. (9 Wheat) 122 (1819).Back To Text

[176] *Id.* at 195−96.Back To Text

[177] Hanover Nat'l Bank of the City of N.Y. v. Moyses, 186 U.S. 181, 188−89 (1902).Back To Text

[178] *See* Rhodes v. Stewart, 705 F.2d 159, 163 (6th Cir. 1983) (stating it was "fundamental" that state and federal legislatures have concurrent authority to enact bankruptcy laws) (citing Sturges v. Crowninshield, 17 U.S. 122, 196 (1819)); Giles v. Credithrift of Am., Inc. (*In re* Pine), 717 F.2d 281, 284 (6th Cir. 1983) (noting that "[b]y enacting the 'opting out' scheme without limitation, the legislators expressed their preference for state control of exemptions"); *In re* Sullivan, 680 F.2d 1131, 1137 (7th Cir. 1982) (stating "[w]here a State is thus exercising its own power, no unconstitutional delegation of Congressional power can be found") (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 439−40 (1946)).Back To Text

[179] *See* Stellwagen v. Clum, 245 U.S. 605, 613 (1918) (stating that "[n]otwithstanding this requirement as to uniformity, the bankruptcy acts of Congress *may* recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states") (emphasis added); Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 469 (1982) (noting that "Congress *can* give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement") (emphasis

added) (citing *Moyses*, 186 U.S. at 189−90); *see also* Kosto v. Lausch (*In re* Lausch), 16 B.R. 162, 165 (M.D. Fla. 1981) (stating that opting out "is not an unconstitutional delegation of congressional legislative power but rather is *merely a recognition* of the concurrent legislative power of the state legislatures to enact laws governing bankruptcy exemptions") (emphasis added).Back To Text

[180] *Rhodes*, 705 F.2d at 164. *See also* Storer v. French (*In re* Storer), 58 F.3d 1125, 1128 (6th Cir. 1995) (quoting *Rhodes*, 705 F.2d at 163).Back To Text

[181] *See* Commission Report, *supra* note 2, at 121 (stating "current exemption policy is channeled away from bankruptcy policy−makers toward a variety of state legislatures"); *see also* Ponoroff, *supra* note 62, at 239−43 (finding no validity in argument of states' concurrent bankruptcy powers). Ponoroff stated that "traditional justifications for local control over exemption policy in bankruptcy do not warrant the 'fragmented exemption picture on a national level' that state control produces." *Id.* at 240 (quoting Brown, *supra* note 10, at app. II).Back To Text

[182] Ponoroff, *supra* note 62, at 237.Back To Text

[183] Palm Beach Sav. & Loan Ass'n v. Fishbein, 619 So.2d 267, 271 (Fla. 1993). In addition, the Senate stated that "the policy of the bankruptcy law is to provide a fresh start, but not instant affluence . . . ." S. Rep. No. 95−989, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5792.Back To Text

[184] 898 F. Supp. 883 (S.D. Fla. 1995).Back To Text

[185] *See id.* at 884.Back To Text

[186] *See id.*Back To Text

[187] *See id.*Back To Text

[188] *See id.*Back To Text

[189] *Bank Leumi*, 898 F. Supp. at 884. The defendants also purchased approximately $500,000 worth of annuities, which are exempt under Fla. Stat. § 222.14. *See Bank Leumi*, 898 F. Supp. at 884.Back To Text

[190] *Id.* at 885 (alteration in original).Back To Text

[191] *See id.*Back To Text

[192] *See id.*Back To Text

[193] *See id.*Back To Text

[194] *See Bank Leumi*, 898 F. Supp. at 885.Back To Text

[195] *See id.*Back To Text

[196] *Id.*Back To Text

[197] *See id.* at 885−86. The court also considered the purchase of the annuities. *See id.*Back To Text

[198] *See Bank Leumi*, 898 F. Supp. at 885.Back To Text

[199] *See id.*Back To Text

[200] *See id.* at 886.Back To Text

[201] *See id.* at 887.Back To Text

[202] The provision cited by the court is Article X, Section 4(a)(1) of the Florida Constitution, which states:

> [t]here shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for the house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead . . . .

Fla. Const. art. X, § 4(a)(1). *See Bank Leumi*, 898 F. Supp. at 887.Back To Text

[203] *See id.* The court in *Bank Leumi* also distinguished a line of cases cited by the plaintiff in which equitable liens were imposed where proceeds from fraud were used to purchase or improve a homestead, which is dissimilar to the facts in *Bank Leumi*. *Id.* at 888 (citing La Mar v. Lechlider, 185 So. 833 (Fla. 1939), Jones v. Carpenter, 106 So. 127 (Fla. 1925), and Gepfrich v. Gepfrich, 582 So.2d 743 (Fla. 4th DCA 1991)). The leading case is *Carpenter*. In this case, the defendant, the president of a company, removed funds and assets from the company and used these funds to pay for improvements to his homestead. *See id.* at 128. In less than two months after the funds were taken, the company filed for bankruptcy. *See id.* at 129. The defendant never paid these sums back to the company and claimed that these improvements were exempt under the homestead exemption. *See id.* at 128. The Supreme Court of Florida held that an equitable lien can be enforced against the defendant's homestead and reasoned that "[t]o hold otherwise would mean the abandonment of a fundamental principle of equity jurisprudence and substituting in lieu thereof a code of business ethics and commercial integrity conceived in the conscience of the embezzler." *Id.* at 130.

The court in *Bank Leumi* found a "crucial" distinction between the facts in *Bank Leumi* and this line of cases. *Bank Leumi*, 898 F. Supp. at 888−89. In the *Carpenter* line of cases, the debtors fraudulently obtained funds and used the funds to purchase or improve their homestead, for the purpose of defeating the claims of creditors. *Id.* at 888. In contrast, in *Bank Leumi*, the court found that the defendants did not intend to put the borrowed money into the homestead to defeat the creditors' claims, but rather "borrowed [the funds] for a legitimate purpose—for a business which ultimately failed." *Id.* Unfortunately, this "crucial" distinction led to an unjust result. The court in *Bank Leumi* acknowledged that "this result appears to negate basic concepts of fairness . . . ." *Id.* at 889.Back To Text

[204] *See supra* note 202.Back To Text

[205] 605 So.2d 56 (Fla. 1992).Back To Text

[206] *See id.* at 58−60. This case did not examine the issue of forum shopping.Back To Text

[207] The court also rejected the plaintiff's argument that *Caggiano* was overruled by the Florida Supreme Court in Palm Beach Sav. & Loan Ass'n v. Fishbein, 619 So.2d 267 (Fla. 1993). In *Fishbein*, the debtor borrowed $1.2 million from the plaintiff and secured the loan with a mortgage on his home. *See id.* at 268. The debtor then used the majority of the money to pay three existing mortgages on his home. *See id*. The court imposed an equitable lien on the property in the amount of the original mortgages and reasoned that "where equity demands it this Court has not hesitated to permit equitable liens to be imposed on homesteads beyond the literal language of article X, section 4." *Id.* at 270. In *Bank Leumi*, the court distinguished *Fishbein* and noted that *Fishbein* applies to cases in which "a creditor steps into the shoes of a predecessor creditor" because the debtor fraudulently utilizes the proceeds from one creditor to pay off another creditor. *Bank Leumi*, 898 F. Supp. at 888.Back To Text

[208] *Bank Leumi*, 898 F. Supp. at 887 (emphasis added).Back To Text

[209] *See In re* Clements, 194 B.R. 923, 927 (Bankr. M.D. Fla. 1996) (reasoning that the exceptions provided by the Florida Constitution must be strictly construed and holding that since the debtor did not fraudulently incur the debt owed to the creditor, the homestead was completely exempt); Ezrol v. Lane (*In re* Lane), 190 B.R. 125, 128 (Bankr. S.D. Fla. 1995) (strictly construing the provision in the Florida Constitution and holding that a homestead could be exempt even where the debtor acquired it to defeat the claims of creditors); *In re* Popek, 188 B.R. 701, 704 (Bankr. S.D. Fla. 1995) (finding that the homestead exemption should be strictly construed and holding that the debtor was allowed to exempt the entire value of his homestead, free from the creditor's claim); *see also* Govaert v. Primack (*In re* Primack), 89 B.R. 954, 959 (Bankr. S.D. Fla. 1988) (upholding homestead exemption and reasoning that there was no actual intent on the part of the debtors to "hinder, delay or defraud any creditor in connection with the debtors' establishment of their Florida homestead").Back To Text

[210] 156 B.R. 88 (Bankr. M.D. Fla. 1993).Back To Text

[211] *See id.* at 89.Back To Text

[212] *See id.Back To Text*

[213] *See id.Back To Text*

[214] *See id.* at 90.Back To Text

[215] *See Coplan*, 156 B.R. at 90.Back To Text

[216] *See id.Back To Text*

[217] Wis. Stat. § 815.20(1) (1997).Back To Text

[218] Fla. Const. art. X, § 4(a)(1).Back To Text

[219] *See Coplan*, 156 B.R. at 92.Back To Text

[220] *See id.*Back To Text

[221] *Id.* Interestingly, the court in *Coplan* did not consider the exceptions in the Florida Constitution as the courts did in *Clements*, *Lane*, and *Popek* discussed, *supra* note 209, but instead relied upon general principles of fairness and equity.Back To Text

[222] In addition, as long as the debtor did not fraudulently obtain funds and use the funds to purchase or improve a homestead for the purpose of defeating the claims of creditors, a *crucial* distinction found in the *Carpenter* line of cases discussed *supra* note 203, the debtor can be rewarded with an entirely exempt homestead. If the debtor borrowed the funds for a legitimate purpose, the homestead exemption will similarly be saved.Back To Text

[223] *See, e.g.*, Ohio Rev. Code Ann. § 2329.66(A)(1)(a) & (b) (Anderson 1996) (setting homestead exemption at $5,000); Ky. Rev. Stat. Ann. § 427.060 (Michie 1996) (limiting homestead exemption to $5,000); Mich. Const. art. X, § 3 (providing $3,500 in homestead exemption amount).Back To Text

[224] *See, e.g.*, Fla. Const. art. X, § 4 (providing unlimited homestead exemption); Tex. Prop. Code Ann. § 41.001 (providing unlimited homestead exemption); S.D. Codified Laws § 43−31−1 (Michie 1996) (providing unlimited homestead exemption).Back To Text

[225] 11 U.S.C. § 522(d)(5) (1994).Back To Text

[226] *Id.* (emphasis added).Back To Text

[227] H.R. Rep. No. 95−595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317 (emphasis added).Back To Text

[228] Several bankruptcy courts have also followed this reasoning. *See, e.g.*, *In re* Hilbert, 12 B.R. 434, 436 (Bankr. E.D. Pa. 1981) (holding that "Congress intended the phrase ‘any property’ in Section 522(d)(5) to mean any property of the estate," not just property enumerated under section 522); *In re* Nichols, 4 B.R. 711, 717 (Bankr. E.D. Mich. 1980) (stating "[t]o suggest that the use of the word ‘any’ may mean less than an unlimited, unspecified number unnecessarily circumscribes the plain meaning of the word"); Boozer v. Kennesaw Fin. Co. (*In re* Boozer), 4 B.R. 524, 528 (Bankr. N.D. Ga. 1980) (holding an exemption under section 522(d)(5) "may be used to exempt property of any character"); *see also* Krupp v. Doyle (*In re* Laird), 6 B.R. 273, 276 (Bankr. E.D. Pa. 1980) (stating section 522(d)(5) should be interpreted broadly).Back To Text

[229] 675 F.2d 582 (3d Cir. 1982).Back To Text

[230] *See id.* at 585.Back To Text

[231] 11 U.S.C. § 522(d)(6) (1994).Back To Text

[232] *See Augustine*, 675 F.2d at 585−86.Back To Text

[233] *See id.* at 586.Back To Text

[234] *Id.* (citing H.R. Rep. No. 95−595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317).Back To Text

[235] 640 F.2d 888 (7th Cir. 1981).Back To Text

[236] *See id.* at 889.Back To Text

[237] *Id.* at 891.Back To Text

[238] *See supra* notes 183−224 and accompanying text.Back To Text

[239] Section 522(*l*) provides that the debtor’s dependent can claim exemptions if the debtor does not file a list of exemptions. 11 U.S.C. § 522(*l*) (1994). "Because the Code’s intention is as much to protect the debtor’s dependents as it is to protect the debtor, it is necessary that the dependents have some means of preserving the debtor’s exemptions." 4 Collier, *supra* note 4, ¶ 522.04[1], at 19. However, this section provides protection only where the debtor fails to claim exemptions. It would not protect against a debtor claming items under the Commission’s lump sum exemption that would cause a detriment to the debtor’s family.Back To Text

[240] *See* N.Y. C.P.L.R. 5205(a)(6) (McKinney 1997) (providing that "[t]he following personal property when owned by any person is exempt . . . 6. a wedding ring . . . .").Back To Text

[241] *See id.Back To Text*

[242] In an article discussed *supra* in section III reviewing the fresh−start policy in bankruptcy law, Thomas H. Jackson debated whether it would be wise to allow debtors to choose which assets to exempt. *See* Jackson, *supra* note 75, at 1438−39. Jackson outlined what he termed an "impulse" personality. *See id.* at 1408. The author stated that "[t]he ‘impulse’ personality . . . approaches life like an addict, unable to consider or plan for the future. The impulse personality does not authentically ‘choose,’ because it does not rationally ponder how

a given decision will affect the individual's long−term interests." *Id.* In addition, Jackson stated:

> [t]he control of impulsive behavior, then, may provide a key to justifying discharge policy. If unrestrained individuals would generally choose to consume today rather than save for tomorrow, and if this tendency stems in part from impulse, they may opt for a way of removing or at least restricting that choice. If individuals cannot control the impulse themselves, they may want the assistance of a socially imposed rule, one that will simply enforce the hypothesized decisions of their fully rational selves.

Id. at 1409. Jackson did, however, conclude that impulsive behavior does not warrant denying the debtor the decision making power. *See id.* at 1439. Jackson reasoned that "[t]here is . . . a strong reason for allowing debtors to choose which forms of their wealth to protect. Only an individual can accurately measure the difference between the value he places on an asset and the market price." Jackson, *supra* note 75, at 1439. However, Jackson did make two proposals to limit the debtor's discretion. *See id.* at 1435.Back To Text

[243] This provision would be interpreted broadly in a similar manner as the general exemption of section 522(d)(5) (1994). *See supra* notes 225−37 and accompanying text.Back To Text

[244] *See, e.g.*, Rainier Equip. Fin., Inc. v. Taylor (*In re* Taylor), 861 F.2d 550, 552−53 (9th Cir. 1988) (deciding dispute concerning whether logging truck and trailer are exempt as tools of the trade); *In re* Thompson, 750 F.2d 628, 631 (8th Cir. 1984) (disallowing exemption for pigs because they were not being used for personal, family or household use); *In re* Williams, 171 B.R. 451, 453−55 (D.N.H. 1994) (holding Chevrolet Corvette purchased with proceeds from workers' compensation benefits was exempt); *In re* McCain, 114 B.R. 652, 653 (Bankr. E.D. Mo. 1990) (discussing whether firearms and camera were household goods); *In re* Griffths, 86 B.R. 639, 644 (Bankr. W.D. Wash. 1988) (deciding dispute concerning whether ping−pong table, lawnmower, tents and camping equipment, televisions, camera drill and table saw are considered household goods); *In re* Johnson, 14 B.R. 14, 14−15 (Bankr. W.D. Ky. 1981) (upholding exemption of bus because the term "motor vehicle" was not limited in scope to solely "automobiles").Back To Text

[245] 955 F.2d 957 (4th Cir. 1992).Back To Text

[246] 11 U.S.C. § 522(f)(2)(A) (1994).Back To Text

[247] *See McGreevy*, 955 F.2d at 958.Back To Text

[248] *See id.* at 959.Back To Text

[249] *Id.* (footnote omitted).Back To Text

[250] *See id.**Back To Text*

[251] *See id.**Back To Text*

[252] 117 B.R. 842 (Bankr. D. Md. 1990).Back To Text

[253] *See id.* at 843. This assertion was made under Maryland law, Md. Courts & Jud. Proc. Code Ann. § 11−504(b) & (f) (1989), because Maryland had opted out of the federal system. *Barnes*, 117 B.R. at 845.Back To Text

[254] *Id.* at 847.Back To Text

[255] *McGreevey*, 955 F.2d at 960.Back To Text

[256] *Id.* at 960 (footnote omitted).Back To Text

[257] *See id*. at 960−61 (comparing Barrick v. AVCO Consumer Discount Co. (*In re* Barrick), 95 B.R. 310, 313 (Bankr. M.D. Pa. 1989), which found that "a gun is not a household good," with Heights Fin. Corp. v. Barley (*In re* Barley), 74 B.R. 450, 452 (Bankr. N.D. Ind. 1987), which found that a "rifle would fit within the definition of household goods . . . .").Back To Text

[258] *McGreevey*, 955 F.2d at 961.Back To Text

[259] *See id.* at 962.Back To Text

[260] *Id.* at 961−62.Back To Text

[261] *Id.* at 961.Back To Text

[262] *See* NCNB Tex. Nat'l Bank v. Bowyer (*In re* Bowyer), 932 F.2d 1100, 1103 (5th Cir. 1991) (holding debtor's prebankruptcy planning did not require denial of discharge because debtor had no intent to delay or hinder creditors); Abbott Bank−Hemingford v. Armstrong (*In re* Armstrong), 931 F.2d 1233, 1239 (8th Cir. 1991) (finding that debtors had acted with intent to hinder, delay or defraud their creditors in their prebankruptcy planning); *In re* Swecker, 157 B.R. 694, 696 (Bankr. M.D. Fla. 1993) (upholding debtors' claimed exemptions after the debtors sold their non−exempt mutual funds and purchased an exempt annuity with the proceeds because there was not extrinsic evidence of the debtor's fraudulent intent); Park Nat'l Bank of St. Louis Park v. Whitney (*In re* Whitney), 107 B.R. 645, 649 (Bankr. D. Minn. 1989) (holding creditors failed to prove that the debtor acted with actual fraudulent intent in converting his assets even though the debtor "admitted taking steps to shield assets from the reach of creditors prior to bankruptcy . . . [and] that he knew the actions that he took would delay or impede creditors from reaching his assets"); Cristol v. Blum (*In re* Blum), 41 B.R. 816, 818 (Bankr. S.D. Fla. 1984) (holding debtor's transfers of non−exempt into exempt assets were "legitimate pre−bankruptcy planning allowed by the Bankruptcy Code"); *In re* James, 31 B.R. 67, 69 (Bankr. D.S.D. 1983) (upholding debtors' claimed exemptions because there was "no allegation of fraudulent intent").Back To Text

[263] 880 F.2d 78 (8th Cir. 1989).Back To Text

[264] *See id.* at 79.Back To Text

[265] *See id.* The debtor also invested in exempt assets such as annuities, individual retirement accounts, life insurance and musical instruments worth over $250,000. *See id.**Back To Text*

[266] *See id.**Back To Text*

[267] 11 U.S.C. § 727(a)(2) (1994) (stating "[t]he court shall grant the debtor a discharge, unless . . . the debtor, with intent to hinder, delay or defraud a creditor" transfers or conceals estate property).Back To Text

[268] *Johnson*, 880 F.2d at 80.Back To Text

[269] *See id.* at 84.Back To Text

[270] *Id.* at 83.Back To Text

[271] *Id.* at 82.Back To Text

[272] 848 F.2d 866 (8th Cir. 1988).Back To Text

[273] 848 F.2d 871 (8th Cir. 1988).Back To Text

[274] *See Hanson*, 848 F.2d at 867.Back To Text

[275] *See id.*Back To Text

[276] *See id.*Back To Text

[277] *See id.*Back To Text

[278] *See id.* (citing S.D. Codified Laws Ann. § 58−12−4 (1978) and § 43−45−3 (1983)).Back To Text

[279] *Hanson*, 848 F.2d at 868 (citing Ford v. Poston, 773 F.2d 52, 54 (4th Cir. 1985) (noting that under Code debtor is still permitted to make full use of exemptions even if debtor converts property from non−exempt to exempt on eve of bankruptcy)); Armstrong v. Lindberg (*In re* Lindberg), 735 F.2d 1087, 1090 (8th Cir. 1984) (stating that debtors may take full advantage of exemptions even if they convert property from non−exempt to exempt on eve of bankruptcy). *See also* First Tex. Sav. Ass'n, Inc. v. Reed (*In re* Reed), 700 F.2d 986, 991 (5th Cir. 1983) (noting that evidence of actual intent to defraud creditors is required to deny discharge); Bank of Pa. v. Adlman (*In re* Adlman), 541 F.2d 999, 1003 (2d Cir. 1976) (noting that lower court erred when it held that transfer on eve of bankruptcy of non−exempt assets compels denial of discharge).Back To Text

[280] *See Hanson*, 848 F.2d at 868. In *Johnson*, the Eighth Circuit stated that "extrinsic evidence can be composed of: further conduct intentionally designed to materially mislead or deceive creditors about the debtor's position; conveyances for less than fair value; or, the continued retention, benefit or use of property allegedly conveyed together with evidence that the conveyance was for inadequate consideration." Panuska v. Johnson (*In re* Johnson), 880 F.2d 78, 82 (8th Cir. 1989).Back To Text

[281] *Hanson*, 848 F.2d at 867.Back To Text

[282] *See id.* at 869.Back To Text

[283] 848 F.2d 871 (8th Cir. 1988).Back To Text

[284] *See id.* at 872.Back To Text

[285] *See id.* at 872−73.Back To Text

[286] *See id.* at 873.Back To Text

[287] *See id.*Back To Text

[288] *Tveten*, 848 F.2d at 873.Back To Text

[289] *Id.* at 874 (citing cases discussed *supra* note 279).Back To Text

[290] *Tveten*, 848 F.2d at 876−77.Back To Text

[291] *See id.* at 876.Back To Text

[292] *Id.*Back To Text