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Personal Bankruptcy Discharge and the Myth of the Unchecked Homestead Exemption

I. INTRODUCTION

Recently one commentator suggested that methods of approval of discharge in modern bankruptcy law can be as arbitrary as the personalities of the varied judges hearing the proceedings.¹ Thus, the line between prudent pre-bankruptcy planning and fraudulent conveyances has become so blurred that it may no longer exist. The Eighth Circuit recently attempted to clear at least some of the murky waters of pre-filing bankruptcy conveyances. Critics charge, however, that confusion remains.²

The problem with planning before filing bankruptcy lies in the competing concerns of debtors and creditors. While creditors want as much of their debts paid as possible, debtors naturally want to preserve as much of their property as possible. Once debtors consult attorneys and elect to declare bankruptcy, their goal will be to shield as much of their assets as possible from the reach of their creditors. The law balances these two conflicting desires by using exemptions, which are categories of property beyond the creditors' reach. Depending on the location of the debtor, exemptions may be either state or federal in origin. The use of exemptions in pre-bankruptcy planning becomes most controversial when debtors elect to use various categories of state exemptions that are virtually limitless monetarily.

As the debtor's use of exemptions grows monetarily, however, many courts find the debtor's actions closer to fraud. That gray area between wisely using generous state exemptions and fraudulently abusing them is the topic of this Comment. If the court finds that "the debtor, with intent to hinder, delay, or defraud a creditor," transferred property within a year of filing the bankruptcy petition, the court will deny the debtor's request for a discharge,³ perpetuating his liability. The results of a court granting or denying discharge

1. Regarding debtors in two similar cases, Judge Frank Koger remarked that "[f]or all practical purposes, there was only one difference in their bankruptcy cases, i.e., Dr. Tveten drew the Honorable Robert J. Kressel and Dr. Johnson drew the Honorable Gregory F. Kishel as their respective Bankruptcy Judges." Koger, *Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become A Hog?)*, 93 COM. L.J. 465, 471 (1989).

2. See Koger, *supra* note 1; Hansen v. First Nat'l Bank in Brookings, 848 F.2d 866 (8th Cir. 1988) (Arnold, J., concurring); Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871 (8th Cir. 1988) (Arnold, J., dissenting) [hereinafter *Tveten II*].

3. 11 U.S.C. § 727(a) (1988).

are quite different; but predicting which facts will merit a discharge can be difficult. Glaringly similar planning actions may yield completely opposite results. Debtors must walk a fine line between ensuring the best possible fresh start and completely losing their right to discharge of their debts.

In states with generous homestead exemptions,⁴ lawyers should carefully examine with their clients the possibility of paying off a homestead debt in contemplation of bankruptcy. While the gains from paying off a homestead debt may be great, there are some risks in such action.⁵ The attorney's advice to go through with the payment should never be given unequivocally, and only in special circumstances.

II. THE USE OF EXEMPTIONS

The policy reasons for erasing the debts of the bankrupt individual vary. The practice of leaving debtors with some assets is a long-defended practice in the law.⁶ In the typical bankruptcy situation, sufficient assets are simply not available to pay off the bankrupt individual's debts. The purpose behind these exemptions is to give debtors a fresh start following the discharge of their debts in bankruptcy.⁷ While broad concepts of fairness and compassion exist,⁸ an even more basic argument for leaving debtors some assets after bankruptcy is purely pragmatic. If debtors were forced to surrender all of their property, the state at some point would be burdened with providing the

4. Some examples of states with generous homestead exemptions include Minnesota, Texas, Kansas, Arkansas, Florida, Oklahoma, Iowa and Nebraska.

5. "As under current law, the debtor will 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 to under the law." H.R. REP. NO. 595, 95th Cong., 1st Sess. 361 (1977).

6. Koger, *supra* note 1, at 467.

7. Other policy reasons include the following:

- (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.

Resnick, *Prudent Planning or Fraudulent Transfer?*, 31 RUTGERS L. REV. 615, 621 (1978).

8. *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934).

debtors' basic needs.⁹ To reduce the chances of this happening, both federal and state law provide debtors with categories of property exempt from the claims of creditors. The law must then balance, however, the concern for giving debtors a fresh start with the competing concern of assisting creditors in the collection of valid debts.

When debtors transfer assets into exempt categories, unsecured creditors are forced to share on a pro rata basis only those assets remaining after exemptions. Thus, debtors' use of exemptions hurts primarily the unsecured creditors. The secured creditors, on the other hand, may take their collateral out of the estate upon lifting of the stay and treat any deficiency as an unsecured debt.

Courts will not interpret laws as generously for debtors in bankruptcy proceedings. While statutory exemptions may exist, their use is subject to closer scrutiny than the use of income tax exemptions. Indeed, society may look with envy and admiration at taxpayers whose clever use of an exemption relieved them of nearly all their tax burden. On the other hand, society might look with disdain upon debtors whose excessive use of a bankruptcy exemption kept a large sum from the reach of their legitimate creditors. The reason for this distinction probably lies in the identity of the creditor. Society has more sympathy for a private creditor than the U.S. Treasury. Further, since the government drafts the tax laws, perhaps it should suffer from the ambiguities and loopholes in the laws. In any event, it is important to note that the courts' treatment of tax exemptions differs radically from bankruptcy exemptions.

Of all the generous state exemptions, none is more prevalent than the homestead exemption. "The homestead exemption was a Texas creation."¹⁰ Indeed, the original Texas homestead exemption predates the Bankruptcy Act of 1898 by nearly six decades, and even predates the statehood of Texas. Texans viewed the homestead exemption as the next logical step after clothing and tools of the trade exemptions.¹¹ In its present form the Texas homestead exemption is perhaps the most generous of all state homestead exemptions.¹²

9. Koger, *supra* note 1, at 466. See also *In re Ellington*, 63 Bankr. 271 (Bankr. N.D. Iowa 1986).

10. Interpretive Commentary, TEX. CONST. ANN. art. 16, § 50 (Vernon 1973). "The earliest homestead exemption law was the Statute of January 26, 1839." *Id.*

11. *Id.*

12. The Texas homestead law states as follows:

The homestead of a family, or single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of

It is also one of the most firmly entrenched. Texans initially adopted the exemption by statute.¹³ Then, while drafting the Texas State Constitution of 1845, they were "determined to safeguard the homestead by putting it beyond the reach of legislators as well as creditors by incorporating an exemption provision in the constitution."¹⁴ With the history that this exemption enjoys, it becomes easier to understand why the federal government has been hesitant to preempt it.

Texans saw the exemption as an offset to economic danger with a three-fold purpose:

- (1) to preserve the integrity of the family as the basic element of social organization, and incidentally, to encourage colonization for in a frontier society each pioneer family was of definite value to the community; (2) to provide the debtor with a home for his family and some means to support them and to recoup his economic losses so as to prevent the family from becoming a burdensome charge upon the public; (3) to retain in pioneers the feeling of freedom and sense of independence which was deemed necessary to the continued existence of democratic institutions.¹⁵

The need to promote westward expansion has long since passed in the United States. Preserving family integrity, preventing debtors from burdening society, and instilling feelings of independence and stability in citizens, however, are policies as worthy today as 152 years ago.

Many states followed the lead of Texas and created generous homestead exemptions. These states are primarily located in the West, in contrast to states with parsimonious exemptions, which are typically located in the East.

III. THE INTERPLAY BETWEEN STATE AND FEDERAL LAW

The competing interests of the debtor and the creditor have evolved into the Bankruptcy Reform Act of 1978.¹⁶ The Act reflects the interplay between state governments and the federal government in a federalist system because respective issues are resolved at either the state or federal levels. Under the United States Code, for example, a state may allow the debtor

a family homestead, given in the same manner as is required in the making a sale and conveyance of the homestead

TEX. CONST. ANN. art. 16, § 50 (Vernon 1973).

13. See *supra* note 10.

14. Interpretive Commentary, TEX. CONST. art. 16, § 50 (1973).

15. *Id.*

16. 11 U.S.C. §§ 101 to-109(g)(2) (1988).

undergoing bankruptcy proceedings to choose either state law exemptions or the federal bankruptcy exemptions found in the Code.¹⁷

The Code, in section 522(b),¹⁸ allows states to opt out of the federal exemptions appearing in section 522(d), leaving only state exemptions and federal non-bankruptcy exemptions for a state's residents.¹⁹ More precisely, "Congress, after creating a 'federal' exemption in the Code, deemed it appropriate to allow each state the opportunity to 'opt out' of the exemptions listed in section 522(d) or mandate its own exemption laws."²⁰ Unless state law prohibits, debtors may choose either the federal bankruptcy exemptions of section 522(d), or state or federal non-bankruptcy exemptions, depending on which one better suits the debtors' needs. By exercising the opt-out provision of section 522(b)(2)(A), the state removes the section 522(d) exemptions from the debtors' choice. Yet even if a state has opted out of the federal bankruptcy exemptions of section 522(d), debtors "may, in accordance with section 522(b)(2)(A) exempt property of the estate that is exempt under federal non-bankruptcy law."²¹ Thus, "the authority for this 'opting-out' statute, does not give the states the power to opt out of section 522 in its entirety. Instead, the power is clearly limited by its language to exclude only the federal exemptions specified in section 522(d)."²² After some controversy regarding its constitutionality, the "opt-out" provision of the 1978 Act was upheld.²³ Since the passage of the Bankruptcy Reform Act of 1978, thirty

17. See generally 11 U.S.C. § 522 (1988).

18. 11 U.S.C. § 522(b) (1988).

19. 11 U.S.C. § 522(d) (1988).

20. Eanes v. Shepherd, 33 Bankr. 984, 987 (W.D. Va. 1983).

21. *Id.*

22. *Id.* Section 522(b) states in pertinent part:

Notwithstanding section 541 of this Title, an individual debtor may exempt from property of the estate —

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor or under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal Law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition

11 U.S.C. § 522(b) (1988).

23. *In re Lausch*, 16 Bankr. 162 (Bankr. M.D. Fla. 1981). The court relied on the constitutionality of state "opt out" under the Bankruptcy Act of 1898 ("Old Act") and held that "state laws concerning the field of bankruptcy are invalid under the Supremacy Clause only if they are *inconsistent* with federal bankruptcy statutes." *Id.*

nine states have exercised the opt-out provision, leaving debtors in those states with only state exemptions and federal non-bankruptcy exemptions.²⁴

It is the states, and not the federal government, that have provided the generous exemption categories that are the subject of the cases in this Comment. Minnesota is one example of a state that has opted out of the section 522(d) exemptions and has provided generous state exemptions.²⁵ The Minnesota provisions derive in part from its state constitution, which provides that a "reasonable amount of property shall be exempt from sale or seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law."²⁶ In short, the Minnesota Legislature can exempt by statute any property, so long as the exemption meets Minnesota's constitutional limit of reasonableness. Once the legislature enacts an exemption statute, it is presumed constitutional. "[A] duly enacted statute carries with it a presumption in favor of its constitutionality and this presumption prevails unless the party challenging a statute's constitutionality has demonstrated beyond a reasonable doubt that it violates a constitutional provision."²⁷

Some exemptions in Minnesota, however, have been struck down for lack of reasonableness. Until recently, Minnesota had an unlimited exemption for annuities purchased from state chartered fraternal benefit societies. "When determining whether annuities or unmatured life insurance policies are exempt from creditors' levy by being a 'reasonable amount,' by necessity 'reasonable amount' must be synonymous with 'reasonable value.'"²⁸ Since these two statutory exemptions were not limited in value monetarily,²⁹ the Minnesota Supreme Court held that they were unconstitutional.³⁰ The court declined to impose its own limit, saying "[r]ather than invade the province of the legislature by attempting to rewrite the two exemption statutes so as to provide an objective bench mark by which the 'reasonable amount' of

at 164 (emphasis added) (citing *Perez v. Campbell*, 402 U.S. 637 (1971)).

24. See E. WARREN AND J. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS*, at 26 (2d. ed. 1991).

25. MINN. CONST. art. 1, § 12.

26. *Id.* (emphasis added).

27. *In re Tveten*, 402 N.W.2d 551, 556 (Minn. 1987) (citing *Contos v. Herbst*, 278 N.W.2d 732, 736 (Minn. 1974)), *appeal dismissed sub nom.* *Prest v. Herbst*, 444 U.S. 804 (1979) [hereinafter *Tveten I*].

28. *Tveten I*, 402 N.W.2d at 558.

29. MINN. STAT. ANN. § 550.37 subd. 11 (West 1976), provides the exemption to fraternal benefit associations. MINN. STAT. ANN. § 550.39 (West 1976), provides the exemption for life insurance.

30. The court noted that the limit need not be a fixed dollar amount, but might even be an amount "reasonably necessary for the support of the debtor and any dependent of the debtor." *Tveten I*, 402 N.W.2d at 558.

property exemption may be ascertained, we hold that both statutes violate article 1, section 12 of the Minnesota Constitution."³¹

Exemptions may also be unconstitutional on other grounds. The Minnesota Supreme Court declared in dictum that the Minnesota statutes exempting state chartered fraternal organizations would fail on other grounds, namely that support of such organizations amounted to "special legislation" and was unconstitutional.³² The court addressed this issue in *In re Tveten*,³³ responding to an inquiry from the United States Bankruptcy Court for the District of Minnesota on matters of Minnesota state law.³⁴ This interaction between Minnesota courts and the federal courts is a clear example of how federalism works in the bankruptcy system. The applicability and interpretation of state exemptions lies in the hands of the respective state's judicial system.

While the Minnesota courts have not examined the homestead exemption under legislation analysis, they did analyze whether the exemption fulfilled the "reasonable amount" requirement of the state constitution.³⁵ In Minnesota and other states, the amount of exemptible homestead property is limited by acreage rather than dollars.³⁶ Different acreage limits correspond to varying geographic areas throughout the state, with the smaller limit enforced mostly in urban areas. The Minnesota Supreme Court upheld this acreage limitation as "reasonable" within the meaning of article 1, section 2, of the Minnesota Constitution, notwithstanding the exemption's lack of a monetary limit.³⁷ Thus, the "reasonable amount must mean reasonable [monetary] value" holding of the Minnesota Supreme Court in *In re Tveten* simply does not apply to the homestead exemption.

With these different exemptions operating in a federal system, an important point is that while state courts determine exemption questions,³⁸ federal law determines a debtor's right to a discharge.³⁹ Once a debtor has

31. *Id.*

32. *Id.*

33. 402 N.W.2d 551 (Minn. 1987).

34. *Id.*

35. *Id.* at 551.

36. "The homestead may include any quantity of land not exceeding 160 acres, and not included in the laid out or platted portion of any city. If it be within the laid out or platted portion of such place its area shall not exceed one half an acre." MINN. STAT. ANN. § 510.02 (West 1986).

37. *In re Haggerty*, 448 N.W.2d 363, 368 (Minn. 1989).

38. 11 U.S.C. § 522(b)(2)(A) (1988). Exempt property is "any property that is exempt under . . . State or local law that is applicable." *Id.*

39. 11 U.S.C. § 727(a) (1988). Section 727(a) lists ten examples of fraudulent and illicit activities that preclude discharge in bankruptcy. *Id.*

transferred non-exempt assets into exempt assets, they are beyond the reach of creditors regardless of the outcome of the bankruptcy proceeding. If the bankruptcy court denies a debtor's request for a discharge, however, the debtor's personal liability remains.

Making use of bankruptcy exemptions alone will not constitute fraud. The conversion of non-exempt property into exempt property by itself before filing "is not fraudulent as to the creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law."⁴⁰ Furthermore, the closeness in proximity between the transfer and the filing will not constitute fraud by itself. Courts have held that a "debtor can convert nonexempt property into exempt property on the eve of bankruptcy."⁴¹ The exemptions are created by the legislatures for the benefit of debtors, and "there is nothing fraudulent per se about making even significant use" of the exemptions.⁴² While the amount of assets transferred into exemptions may be indicia of fraud, "[u]ltimately, fixed dollar limits on the use of exemptions must be set by the legislatures. . . . In light of the danger that judges will inadvertently fix inconsistent or arbitrary limits [on what constitutes fraud] on the statutory exemptions, we must err in favor of the debtor."⁴³

Yet, while judge-made limits should occur infrequently, they do in fact occur. If the limit turns out to be arbitrary, then an appellate court might find the problem difficult to cure. Where a trial judge sets an arbitrary limit, the appellate court would presumably want to overturn the decision. The appellate court, however, may overturn such a decision only if it was "clearly erroneous" on the record. This standard of review chills the effectiveness of appellate review, and most trial court decisions stand.

Obviously it is to the debtor's advantage to convert as many non-exempt assets as possible into an exempt category.⁴⁴ Conversion of assets from exempt form into non-exempt form, however, will not in itself constitute fraud. "[A]bsent extrinsic evidence of fraud, mere conversion of non-exempt property to exempt property is not fraudulent to creditors even if motivation behind the conversion is to place those assets beyond the reach of credi-

40. *In re Ford*, 53 Bankr. 444 (W.D. Va. 1984), *aff'd sub nom. Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985).

41. *Ford*, 53 Bankr. at 448.

42. *Panska v. Johnson (In re Johnson)*, 880 F.2d 78, 83 (8th Cir. 1989).

43. *Id.* at 83-4.

44. "Whether the parsimonious allowances in the Northeastern states or the magnanimous allowances in the Southwestern states are at issue, it can substantially benefit any debtor to 'engineer' his or her assets so that he or she may retain as much of what he or she has that is not specifically mortgaged or pledged to some creditor." Koger, *supra* note 1, at 467.

tors."⁴⁵ The linchpin, then, in an approval or denial of discharge is evidence of "intent to hinder, delay or defraud."⁴⁶ "Since fraudulent intent rarely is susceptible of direct proof, courts long have accepted extrinsic evidence of fraud."⁴⁷

What the court will consider as evidence of fraud is a separate issue. While the federal courts weigh admissible evidence to determine if fraud exists, the state courts determine the admissibility of the evidence that may be weighed to determine fraud.⁴⁸ Minnesota has adopted the Uniform Fraudulent Conveyances Act ("UFCA").⁴⁹ While the UFCA does not specifically mention that the amount of the transfer is evidence of fraud, case law has been expanded to include it. "[W]here an exemption, other than a homestead exemption, is not limited in amount, the amount of property converted into exempt forms and the form may be considered in determining whether fraudulent intent exists."⁵⁰

In sum, while many exemption transactions are approved by state statutes in specific dollar amounts, those without dollar limitations (excluding homestead) are treated differently: "[T]he Court . . . leaves the distinction [for these exemptions] between permissible and impermissible claims of exemption to each bankruptcy judge's own sense of proportion."⁵¹ An appellate judge can only overturn this decision under the "clearly erroneous" standard.⁵² The evidence on the record must indicate clear error in a judge's own sense of proportion. Such occurrences are rare.

IV. MISSOURI AND NEIGHBORING STATES

The homestead exemptions of Missouri and surrounding states dramatically illustrate the disparity in these exemptions. Not surprisingly, the homestead exemptions in states bordering Missouri reflect the national shift towards more generous exemptions as one moves west.⁵³ As a result of this disparity,

45. *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 874 (8th Cir. 1988).

46. 11 U.S.C. § 727(a) (1988).

47. *Hansen v. First Nat'l Bank in Brookings*, 848 F.2d 866, 868 (8th Cir. 1988).

48. *Compare Tveten I*, 402 N.W.2d 551, 556 (Minn. 1987) with *Tveten II*, 848 F.2d at 874. While 11 U.S.C. § 727(a) (1988) defines fraudulent activities, the Minnesota Supreme Court ruled on the state homestead exemption to separate value from evidence of fraud. *Tveten I*, 402 N.W.2d at 556.

49. MINN. STAT. ANN. § 513.20 (West 1986).

50. *Panuska v. Johnson (In re Johnson)*, 880 F.2d 78, 82 (8th Cir. 1989).

51. Koger, *supra* note 1, at 465.

52. *McCormick v Securities State Bank*, 822 F.2d 806, 808 (8th Cir. 1987); *In re Cadarette*, 601 F.2d 648, 650 (2d Cir. 1979).

53. See Koger, *supra* note 1, at 466-67.

someone considering bankruptcy should be mindful of exemptions in other states. Debtors who change domiciles with the appropriate cause⁵⁴ may monetarily expand their use of exemptions.

Missouri falls into the category of states having meager homestead exemptions, with an \$8,000 limit.⁵⁵ Of the eight sister states with which Missouri shares its borders, Tennessee,⁵⁶ Kentucky,⁵⁷ and Illinois⁵⁸ have similar low limit homestead exemptions, ranging from \$5,000 to \$7,500. On the other end of the range of homestead exemptions are Kansas⁵⁹ and Iowa,⁶⁰ which have homestead exemptions limited only by acreage and not by dollar amounts. The remaining three, Oklahoma,⁶¹ Nebraska,⁶² and Arkansas,⁶³ combine dollar limits with acreage limits, having monetary limits on larger tracts of land, but only acreage limits on smaller tracts of land down to as small as 1/4 of an acre. Once a state permits any unlimited exemption on any tract of land, however, debtors can significantly expand the monetary use of the homestead exemption. In the states with the smallest acreage exemptions without monetary limits, the debtors' homestead exemptions still

54. To use that particular state's exemptions, debtors must be domiciled in a state for 180 days prior to filing for bankruptcy, or have lived in the state whose exemptions they wish to use longer than any other state during that 180 day period. 11 U.S.C. § 522(b)(2)(A) (1988).

55. The \$8,000 limit applies to both individual and joint husband and wife filings. MO. REV. STAT. § 513.475 (1986).

56. The Tennessee homestead exemption limits single filings to \$5,000, and joint filings to \$7,500. TENN. CODE ANN. § 26-2-301 (1984).

57. The Kentucky exemption is \$5,000 for single or joint filings. KY. REV. STAT. ANN. § 427.060 (Michie/Bobbs-Merrill 1980).

58. The Illinois homestead exemption is \$5,000, single or joint. ILL. REV. STAT. ch. 110, para. 12-901 (1983).

59. Kansas limits its homestead by acreage to 160 acres of farmland, or one acre of land in a city or town, including the buildings thereon. No monetary limit exists. KAN. STAT. ANN. § 60.2301 (1983).

60. Iowa limits its homestead by acreage to 40 acres of farmland, or 1/2 acre of land within a city. No monetary limit exists. IOWA CODE §§ 561.1, 561.2, 561.16. (1987).

61. The Oklahoma homestead exemption limits a 160 acre exemption to no more than \$5,000, but has an unlimited exemption of 1/4 of an acre. OKLA. STAT. tit. 31, § 1, 2 (1987).

62. Nebraska limits a 160 acre homestead exemption to \$10,000, but puts no limit on the homestead that occupies no more two lots of an incorporated area. NEB. REV. STAT. § 40-101 (1986).

63. The Arkansas homestead exemption limits farmland to 160 acres limited to \$2,500, while placing no limit on 80 acres of farmland. It limits one acre of land in an incorporated area to \$2,500, yet places no monetary limit on a 1/4 acre homestead exemption there. ARK. STAT. ANN. § 16-66-210 (1989).

would only be limited by the amount of the most expensive houses they could buy in the state, including the 1/4 acre of ground surrounding it. As a result, the potential abuses in the pure acreage limit states such as Kansas and Iowa also exist in the mixed acreage/dollar limit states such as Oklahoma, Nebraska, and Arkansas. The only truly effective limits exist in states such as Missouri, Illinois, Kentucky, and Tennessee, which specifically set dollar limits. Recent support for such monetary limits exists. Judges who would support the granting of a discharge where the debtor has made significant use of homestead exemptions have expressed support for some type of monetary limit.⁶⁴

V. SIMILAR CASES, OPPOSITE RESULTS

Of the factors that serve as extrinsic evidence of fraud, five that receive considerable attention in a bankruptcy judge's decision are, in ascending order of likelihood of non-discharge: "(1) Size of the amount 'engineered'; (2) Proximity (in time) of the 'engineering' to filing; (3) Did debtor convert secured property or newly acquired funds to acquire the exempt property; (4) Did the 'engineering' benefit insiders of the bankrupt; [and] (5) Misleading contacts with creditors during the 'engineering' process."⁶⁵ The category of the exemption chosen is an important factor as well.⁶⁶

*First Texas Savings Association v. Reed (In re Reed)*⁶⁷ is an example of the types of fraud that transform the use of exemptions into the abuse of exemptions. It was not the mere use of the exemptions that cost Reed his discharge, but the way in which he made conversions to utilize the exemptions. Reed converted funds into exempt assets by obtaining advances from his alter ego corporate shell, by obtaining loans from that same corporation, by keeping receipts from his business deposited in a hidden bank account, and by selling personal assets for amounts which looked suspiciously less than fair market value.⁶⁸ Had the funds that Reed converted into exempt assets been from a different source, and not tied to deceit, then the dollar amounts of the exemptions probably would not have made the exemptions fraudulent.⁶⁹ The key to the finding of fraud in *Reed* was the source of the funds converted.⁷⁰

64. See, e.g., *Tveten II*, 848 F.2d 871, 878 (8th. Cir. 1988) (Arnold, J., dissenting) (supporting a dollar limit on homestead exemptions).

65. Koger, *supra* note 1, at 474.

66. See generally *Tveten II*, 848 F.2d at 873-75.

67. 700 F.2d 986 (5th Cir. 1983)

68. *Id.* at 988-89.

69. *Id.* at 991-92.

70. *Id.*

In *Hanson v. First National Bank in Brookings*,⁷¹ the controversy in the bankruptcy court's approval of discharge surrounded transferring assets to insiders of the debtor, and the debtor maintaining de facto possession of the transferred assets, the proceeds of which were invested in exemptions. Hanson was a South Dakota farmer, who as part of his pre-bankruptcy planning sold motor vehicles to his son who still lived at home with the debtor.⁷² The transfer, however, was for fair market value.⁷³ The debtor also sold household goods to his brother for fair market value, yet the debtor retained possession of these items because his brother was in Alaska.⁷⁴ The creditor charged that the Hansons, "while insolvent, committed a 'classic badge of fraud' by transferring their property to family members and at the same time retaining the use and enjoyment of that property."⁷⁵ The Eighth Circuit upheld the discharge because the transfers had been for fair market value, and because the debtor's retaining possession of them was reasonable under the circumstances.⁷⁶ Although the transfers were for adequate consideration on paper, the fact that the Hansons sold the assets to insiders *and* retained possession of them had to weigh heavily on the court. Yet using the clearly erroneous standard, the Eighth Circuit let the lower court ruling stand.

Perhaps most interesting in *Hanson* is Judge Arnold's concurrence. His concurrence essentially serves as a precursor to his strong dissent in *Tveten II*,⁷⁷ which is reported on the very page that his *Hanson* concurrence ends. Judge Arnold pointed out that Hanson *merely* used his exemptions wisely,⁷⁸ then went on to analyze the upcoming case, *Tveten II*.

Much of the significance of *Tveten II* lies in its relation to another recent bankruptcy case decided by the Eighth Circuit, *Panuska v. Johnson (In re Johnson)*.⁷⁹ Moreover, the bankruptcy attorney's task of distinguishing between prudent pre-filing planning and fraud will be accomplished, if it indeed can be, by comparing case examples. *Johnson* and *Tveten II* provide especially fertile ground for comparison in that the two debtors were acquaintances, both were doctors who lost money in the same investment, and both chose the same bankruptcy attorney. Much to Tveten's dismay, the

71. 848 F.2d 866 (8th Cir. 1988).

72. *Id.* at 867.

73. *Id.*

74. *Id.*

75. *Id.* at 869.

76. *Id.*

77. 848 F.2d 871 (8th Cir. 1988).

78. *Hanson*, 848 F.2d at 870.

79. 880 F.2d 79 (8th Cir. 1989).

similarities ended there, as Johnson was granted discharge⁸⁰ and Tveten was not.⁸¹

A. *Norwest Bank Nebraska, N.A. v. Tveten*

Tveten chose not to make use of the homestead exemption. With the help of the same attorney as Johnson, Tveten planned his Chapter 11 filing by converting non-exempt property into exempt categories. Unlike Johnson, he liquidated his home along with most of his non-exempt assets⁸² and converted them into two exemption categories: life insurance, and annuities purchased from state chartered fraternal organizations.⁸³ These conversions totaled nearly \$700,000.⁸⁴ The trustee contended that these transfers amounted to fraud. The bankruptcy court held that even if the exemptions were permissible, Tveten had abused the protection permitted a debtor under the Bankruptcy Code and denied him discharge.⁸⁵ Using the "clearly erroneous" standard of review, both the Federal Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit affirmed the bankruptcy court's denial of discharge.⁸⁶ Technically, in *Tveten II* the amount converted served as indicia of fraud, which in turn led to denial of Tveten's discharge. The amount converted, however, might have been a non-issue but for the exemption category utilized. In any event, the dissent argued strongly that the amount Tveten converted into unlimited exemptions was legally irrelevant.⁸⁷

80. *Id.* at 83-4.

81. *Tveten II*, 848 F.2d at 872.

82. *Id.* at 872-73. In seventeen separate transfers, Tveten put his assets into exempt status. One of the assets he liquidated was his family home. *Id.*

83. The exemption for fraternal organizations is found in MINN. STAT. ANN. § 550.37(11) (West 1986).

84. *Tveten II*, 848 F.2d at 872.

85. *Id.*

86. *Id.* at 876-77.

87. While Judge Arnold dissented in *Tveten II*, he addressed this issue of the amount of Tveten's conversion in his concurring opinion in the prior case, *Hanson*. Judge Arnold said that "as far as I can tell, [all the differences between *Tveten* and *Hanson*, including the amounts converted] are legally irrelevant." *Hanson*, 848 F.2d at 870 (Arnold, J., concurring).

B. Panuska v. Johnson

The facts surrounding *Johnson* are relatively simple. Robert J. Johnson was a Minnesota physician who invested in Growth Ventures, Inc. ("GVI"), a real estate enterprise that eventually went sour.⁸⁸ Although GVI enjoyed corporate status, Johnson became personally liable to its creditors after he personally guaranteed GVI's indebtedness.⁸⁹ When his creditors obtained judgments against him, Johnson consulted a bankruptcy attorney and began converting his non-exempt property into property that qualified under Minnesota law as exempt, beyond the reach of his creditors.⁹⁰ Johnson took advantage of four categories of exempt property: musical instruments,⁹¹ life insurance,⁹² annuities received from fraternal organizations,⁹³ and the homestead exemption.⁹⁴ More specifically, he paid off \$175,000 in debts secured against his \$285,000 home, set up a nearly \$250,000 retirement account, invested \$4,000 in life insurance, and bought \$8,000 worth of musical instruments.⁹⁵ The rest of his assets were submitted for liquidation under Chapter 7⁹⁶ on January 24, 1986.⁹⁷

Panuska, the bankruptcy trustee, argued that Johnson was barred from discharge, alleging that Johnson's transfers were intended "to hinder, delay or defraud his creditors."⁹⁸ The trial court approved Johnson's pre-filing conversion of nearly \$400,000 in assets into property exempt from the claims of his creditors.⁹⁹ The trustee appealed the decision to the United States District Court for the District of Minnesota, which affirmed the decision.¹⁰⁰ The trustee then appealed to the United States Court of Appeals for the Eighth Circuit. Relying on the clearly erroneous standard, the Eighth Circuit affirmed

88. *Johnson*, 880 F.2d at 79.

89. *Id.*

90. *Id.*

91. MINN. STAT. ANN. § 550.37(2) (West 1986).

92. *Id.* § 550.39.

93. *Id.* § 550.37(11).

94. *Id.* § 510.01

95. *Johnson*, 880 F.2d at 79.

96. The difference of Johnson electing Chapter 7 and Tveten electing Chapter 11 is unimportant in this analysis. "The proscription against discharging a debtor with fraudulent intent in a Chapter 7 proceeding is equally applicable against a debtor applying for a Chapter 11 discharge." *Tveten II*, 848 F.2d at 874.

97. *Johnson*, 880 F.2d at 79.

98. *Id.*

99. *Panuska v. Johnson (In re Johnson)*, 80 Bankr. 953 (Bankr. D. Minn. 1987), *aff'd*, 101 Bankr. 997 (D. Minn. 1988), *remanded*, 880 F.2d 78 (8th Cir. 1989).

100. *Id.*

the discharge.¹⁰¹ That court held that: (1) the debtor's conversion of property into homestead property did not establish fraud; and (2) a remand was required for a determination of whether conversion of property into musical instruments and life insurance to take advantage of Minnesota exemptions was fraudulent.¹⁰²

The Eighth Circuit's analysis of the Minnesota homestead exemption is most significant. Johnson paid off \$175,000 of his homestead debt. While the next step in analyzing most Minnesota exemptions would be whether the monetary value of the exemption constituted fraud, such was not the case with Johnson's homestead exemption. The court held that the amount of property converted into the homestead exemption could not be considered as evidence of fraud; however, with other exemptions the amount converted could be considered as separate indicia of fraud absent other traditional evidence.¹⁰³ The court went on to find that no such traditional extrinsic evidence of fraud existed on the record regarding the \$175,000 transfer, and therefore upheld the transfer.¹⁰⁴

The Eighth Circuit respected the Minnesota Supreme Court's value analysis of *Tveten I*, and repeated the policy reasons behind exemptions. Since the statute limits the amount of exemption by acreage, the Minnesota Supreme Court has held that this satisfies the "reasonable amount" requirement in the state constitution. Even though the homestead exemption carries no monetary limit as *Tveten I* requires for other exemptions, the Eighth Circuit honored Minnesota's valueless requirement.¹⁰⁵ The court also noted Minnesota's¹⁰⁶ strong social policy favoring the homestead exemption. After Minnesota upheld the exemption, the Eighth Circuit merely had to decide whether it would "choose to invade a prerogative [of providing exemptions] bestowed on the states by Congress."¹⁰⁷ The court reasoned that "since no exemption is more central to the legitimate aims of state law makers than a homestead exemption . . . [the value analysis] in *Tveten I* does not apply to traditional homestead exemptions absent traditional evidence of fraud."¹⁰⁸

101. *Johnson*, 880 F.2d at 84.

102. *Id.*

103. *Id.* at 83.

104. *Id.* at 84.

105. "[N]o exemption is more central to the legitimate aims of state lawmakers than the homestead exemption. Our support of the homestead exemption is longstanding." *Id.*

106. *See* Title Ins. Co. of Minn. v. Agora Leases, Inc., 320 N.W.2d 884, 885 (Minn. 1982); *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 230-31, 43 N.W. 52, 53 (Minn. 1889); *Cogel v. Mickow*, 11 Minn. 354, 356 (Minn. 1866).

107. *Johnson*, 880 F.2d at 82.

108. *Id.* at 83.

In short, as long as a debtor does not intentionally materially mislead a creditor, or convey assets for less than fair market value, or retain conveyed property for his personal use, then the debtor may transfer non-exempt assets in *any* amount into a homestead. There is no requirement that the debtor inhabit the home for any length of time after filing, nor is there any requirement that the debtor even own the house for any length of time preceding filing. The homestead simply must comply with the acreage amount.¹⁰⁹

Next, the Eighth Circuit analyzed Johnson's use of the Minnesota life insurance and musical instrument exemptions. Regarding these two exemptions, the Eighth Circuit remanded the case to "be examined for fraudulent intent under the standards announced in *Tveten I*."¹¹⁰ *Tveten I* held that exemptions are unconstitutional insofar as they grant a value-limitless exemption. Like the annuities and retirement exemptions Johnson used, life insurance and musical instruments were also limitless. The Minnesota Supreme Court, however, had not yet ruled these exemptions unconstitutional. The Eighth Circuit remanded consideration of these exemptions to the trial court to determine if the evidence of the amount Johnson exempted in these two categories constituted fraud.¹¹¹

Distinguishing *Johnson* from *Tveten II* is difficult. If *Tveten* had gotten loans on the eve of bankruptcy, then converted the proceeds into his annuity exemption, it is unlikely his case would have received much attention. It stands out primarily because absent from his case were the traditional indicia of fraud: sale for less than fair market value, falsifying of financial documents, and retention of property allegedly conveyed. Strangely, although the cases had similar outcomes, *Reed* is distinguishable from *Tveten II* due to the traditional evidence of fraud in the former and its absence in the latter. Yet it is difficult to distinguish *Johnson* from *Tveten II*, cases with opposite outcomes. The irony regarding *Johnson* is that *Tveten II*, a case with similar facts, had a completely opposite outcome. The court distinguished the outcome in *Johnson* from that in *Tveten II* based primarily on the categories of statutory exemptions. The court assumed that certain categories of exemptions were more susceptible to fraud than others.

109. See MINN. STAT. ANN. § 510.02 (West 1986).

110. *Johnson*, 880 F.2d at 84.

111. *Id.*

VI. NEW TRENDS IN THE FIFTH CIRCUIT

The record of appellate courts affirming bankruptcy court decisions under the clearly erroneous standard remained so unshakable that the Honorable Judge Koger remarked in a 1988 article¹¹² that since 1978, judges in *all* reported district and circuit cases had upheld the bankruptcy courts' decisions either granting or denying a discharge. Finally, in *In re Bowyer*,¹¹³ a court using the clearly erroneous standard of review overturned the decision of a bankruptcy court, if only indirectly.

The debtor in that case, Dr. Bowyer, was a physician living beyond his means in Austin, Texas, at the time he filed for bankruptcy on October 28, 1987. Dr. Bowyer had agreed in April of 1987 in a financing statement with his bank, the predecessor to the creditor NCNB (the "Bank"), that he would inform the Bank "of any material change in his financial condition."¹¹⁴ In July of 1987, Bowyer sold Canadian gold mapleleaf coins listed on his financing statement for \$18,000, but did not inform the Bank of this change in his listed assets.¹¹⁵ His wife carried the proceeds of the sale in her purse.¹¹⁶

Of this \$18,000, Bowyer spent \$6,000 to send his wife and her friends to Hawaii, \$4,000 on Parent's Weekend at his daughter's private school in mid-October, and still more on household furnishings and clothes.¹¹⁷ Additionally, Bowyer's wife withdrew \$24,002 on October 13, 1987, from a money market account at the Bank and used the money to satisfy their homestead debt, utilizing what the Fifth Circuit described as a "more than generous" Texas homestead exemption.¹¹⁸

The bankruptcy court decided, and the district court affirmed, that these actions did not prove intent to defraud creditors. On this point, the Fifth Circuit agreed. "The bankruptcy court's finding, affirmed by the district court, that Bowyer did not have actual intent to defraud creditors is not clearly erroneous."¹¹⁹ Although the lower courts ruled on intent to defraud, "[t]he bankruptcy court did not rule expressly on whether there was intent to hinder or delay" creditors.¹²⁰ On appeal, the Fifth Circuit seized on this uncovered point. Using the clearly erroneous standard of review, the court found that

112. Koger, *supra* note 1, at 477-78.

113. 916 F.2d 1056 (5th Cir. 1990).

114. *Id.* at 1057.

115. *Id.* at 1057-58.

116. *Id.* at 1057.

117. *Id.* at 1058.

118. *Id.*

119. *Id.* at 1059.

120. *Id.*

Bowyer's activities demonstrated an intent to "hinder or delay" the creditors.¹²¹ The court overturned the lower courts' ruling and denied Bowyer's discharge.¹²²

The Fifth Circuit's reasoning is noteworthy. The court noted that the wife's keeping of the \$18,000 in proceeds from the sale of the gold maple-leaves, rather than depositing them in a bank account, was "especially critical to finding extrinsic evidence to hinder or delay."¹²³ Although the Fifth Circuit explicitly relied on the fact that Mrs. Bowyer kept the sale proceeds in her purse, the court indirectly indicated in at least three instances its suspicion of the Texas homestead exemption. The court referred to the exemption as "more than generous."¹²⁴ Further, the Bowyers' argument that their actions were allowable pre-bankruptcy planning "fails in light of the spending spree and the separate satisfaction of the homestead mortgage."¹²⁵ Additionally, the court's "analysis recognizes that while some pre-bankruptcy planning is appropriate, the wholesale expenditure of non-exempt assets on the eve of bankruptcy (especially where there are liberal state law exemptions), may not be."¹²⁶ Perhaps the Fifth Circuit's repeated references to the extreme use of the limitless homestead exemption suggest it is adopting the "pig becomes a hog standard," and considering the amount converted into the homestead, if only indirectly.¹²⁷

Also noteworthy is the trend continued by the Fifth Circuit giving deference to the bankruptcy judge's decisions under the "clearly erroneous"¹²⁸ standard of review. Using this standard, the Fifth Circuit let stand the lower courts' rulings that Bowyer had no actual intent to defraud creditors while engineering his bankruptcy, and that Bowyer's acts of concealment did not render his acts fraudulent.¹²⁹ The bankruptcy court did not rule expressly on whether there was intent to hinder or delay, however, thus leaving the

121. *Id.* at 1060. 11 U.S.C. § 727(a) (1988) states the following: "The court shall grant the debtor a discharge, unless- . . . the debtor, with intent to *hinder, delay* or defraud a creditor" has transferred assets. (emphasis added).

122. *Bowyer*, 916 F.2d at 1060.

123. *Id.*

124. *Id.*

125. *Id.* at 1060.

126. *Id.*

127. *Id.* See *In re Zouhar*, 10 Bankr. 154 (Bankr. D.N.M. 1981). *Zouhar* coined the expression "when a pig becomes a hog it goes to slaughter" to indicate when a debtor had gone so far using the exemptions that it amounted to fraud. *Id.* at 157.

128. "A finding of fact is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), *reh'g denied*, 333 U.S. 869 (1948).

129. *Bowyer*, 916 F.2d at 1059.

Fifth Circuit free to attack the decision without overruling the lower courts on the clearly erroneous standard.¹³⁰ Essentially, the lack of a lower court ruling on the specific "hinder or delay" language in section 727 afforded the Fifth Circuit solid ground on which to base its analysis without directly overruling a lower court or directly attacking a debtor's significant last minute use of a homestead exemption. Apparently, however, the debtor's last minute use of the homestead exemption, the unlimited nature of the exemption, and the lower courts' findings of no intent to defraud still bothered the Fifth Circuit. Yet, the court was not bothered enough to directly overturn the lower courts' decisions as clearly erroneous. Perhaps the court was warning debtors that if they plan to make significant use of their homestead exemptions, then the rest of their planning had better be free from controversy.

VII. THE MYTH OF THE UNCHECKED HOMESTEAD EXEMPTION

The homestead analysis, per se, is effectively inapplicable in Missouri for individuals who declare bankruptcy in the state, as the state legislature has placed a limit for the homestead exemption at \$8,000.¹³¹ For Missourians who change their domicile before filing for bankruptcy, however, the analysis becomes quite important. With exemptions other than the homestead exemption, the amount of money transferred can be independent evidence of fraud. Yet, the distinction between exemptions is actually a fiction. The Eighth Circuit gives great deference to the homestead exemption because of the social policy favoring it. What, other than the statutes enacted by a democratically elected legislature, demonstrates this "social policy"? Presumably, a strong social policy should exist for all the exemptions the state's legislature adopts. The purpose of every exemption is to provide the debtor with a fresh start after bankruptcy. Has not the legislature deemed all the exemptions equally worthy of that purpose by enacting them? If the Minnesota legislature felt differently about various exemptions, they failed to note those differences.

Perhaps both the Eighth Circuit and the Minnesota Supreme Court, by labeling historically based feelings as "strong social policy," have exercised legislative authority. The real problem with a monetarily unchecked homestead exemption is the myth of its uniqueness. Many might agree that a home is the necessary foundation for a debtor's fresh start. With the burden of providing the basic need of shelter obviated, the debtor's post-bankruptcy income is less tied up. It is naive, however, to assume that because the history of home ownership in America is special, bankrupt debtors under the

130. *Id.* The Fifth Circuit went on to note that "the term 'defraud' does not subsume 'hinder or delay.'" *Id.*

131. MO. REV. STAT. § 513.475 (1986).

stress of pre-filing planning will not use the homestead exemption as feverishly as any other exemption. The potential for abuse is even more dangerous in that the exemption is so malleable. Debtors in a pro-homestead state need not restrict themselves to paying off their present home, from where this social policy has its roots. On the contrary, the Eighth Circuit would let them sell their family home, then pool their cumulative assets into a new piece of real estate.¹³²

The myth of the homestead exemption, then, is that debtors will not abuse a limitless homestead exemption in the same way they might abuse a limitless annuity. Even in today's soft real estate market, there is little appreciable difference between a \$700,000 annuity and a \$700,000 home that debtors could later sell at their convenience. True, the home is somewhat less liquid and the debtor may absorb some transaction costs, but these are relatively minor factors in proportion to the home's total value. Tveten, blind to the heretofore unannounced "strong social policy" accompanying the homestead exemption but absent from the annuity exemption, transferred \$700,000 into exempt annuities and was eventually denied discharge. Had Tveten foreseen *Johnson*, he simply could have dumped the same \$700,000 into residential real estate and received his discharge. With bankruptcy concluded, he could sell the residential real estate. At worst, Tveten might have experienced some relatively minor transaction costs. In the end, however, he would have ended up with an amount far closer to \$700,000 than non-dischargeable indebtedness. Further, the ironic result in *Tveten II* is worsened because Tveten sold his own present home, lost his homestead exemption, and converted the proceeds into exemptions which a democratically elected legislature recognized as exempt.

Lastly, the Supreme Court of Minnesota held that the legislature gave an unfair subsidy to state chartered fraternal organizations.¹³³ To this argument, one might counter that the same unfair advantage was given to the real estate business through the homestead exemption. Again, the court perpetuates the myth that the uniqueness of the family home in itself will somehow prevent bankruptcy abuses. The court in *Johnson* offered no support for such a proposition.

VIII. SOME POSSIBLE SOLUTIONS

Consideration of paying off a homestead debt in contemplation of bankruptcy is not limited to people in states with generous homestead exemptions. For example, because the Missouri exemption of \$8,000 per individual (and per married couple as well) is low, Missourians could

132. *Panuska v. Johnson (In re Johnson)*, 880 F.2d 78, 83-4 (8th Cir. 1989).

133. *Tveten I*, 402 N.W.2d at 556.

conceivably change residences before filing and move to another state. The Code requires that for a particular state's law to apply, the debtor must have lived in that state for the greater portion of the 180 days preceding bankruptcy filing, or 91 days.¹³⁴ For a client from a small homestead exemption state worried about his financial position over the next few months, a move to a state with more generous exemptions may be wise. Perhaps Missouri's parsimonious exemption even encourages such speculation by debtors. In this instance, a bankruptcy attorney in Missouri or a similar state would do well to be aware of homestead exemptions in other states.

If a problem does exist with the homestead exemption, it is national in scope. Consider solving the problem of debtors forum shopping for generous homestead exemptions on the state level. One would approach a state legislator in Minnesota or Texas and explain that people from around the country with hundreds of thousands of dollars to spend want to invest it in their state's real estate market. How could the state ever be convinced this would be a problem?

Simple cures for the abused homestead exemption are difficult to find. Clearly, the homestead exemption needs some check. The Minnesota acreage limit, while constitutional, is certainly not effective. In Missouri, the \$8,000 limit may well motivate individuals at risk of bankruptcy to seek greener pastures in other states.

Most simply and fairly, a flat national dollar limit on the homestead exemption, or at least the last minute transfers into the exemption, would cure the problem. Whether such a change will ever take place, however, is unclear. With the interests of states running so deep, the encroachment of the monetary limit on state's rights may not be worth its positive effects.

Perhaps other limitations could be explored as well. Even if states with generous exemptions decline to set a monetary limit, they might want to limit the homestead exemption in other ways. The real myth of the unchecked homestead exemption is that debtors will not use it as any other exemption, and liquidate it immediately after the close of his case. One possible solution to this problem would be in the way the bankruptcy trustee conveys the homestead back to debtors. Instead of conveying it to debtors in fee simple absolute, as is now done, the trustee could convey the property to the bankrupt individuals in fee simple subject to a condition subsequent. That condition could be that the debtors use the property as their homestead for a specified number of years, or forfeit it. This technique would preserve the debtors' place to live and prevent the debtors from immediately converting it to cash after bankruptcy. The duration of the conditional fee, however, would extend the bankruptcy court's supervision of the debtor, create potential administra-

134. See 11 U.S.C. § 522(b)(2) (1988).

tive burdens, and prevent the "fresh start" bankruptcy seeks to achieve. Such a solution seems impractical.

While the fee simple subject to a condition subsequent may not be practical, requiring a debtor to have owned a home for a specific number of years before filing bankruptcy to qualify for the exemption would promote the ideals behind the homestead's special treatment and might justify different value homestead exemptions for different debtors. The "feelings of personal independence, together with love of country and kindred"¹³⁵ nurtured in a home that some attribute as policy reasons for the homestead exemption might not yet exist in a newly purchased home. States with generous homestead exemptions could then place a monetary limit on the homestead exemption for debtors who could not meet a time requirement of prior ownership. Indeed, individuals who purchase their homes close to filing would be the debtors at greatest risk of using the homestead as just another investment because they have not had time to develop the emotional tie to the land as has the long term owner. To limit the exemption's application to a home in which the debtor has resided for a substantial period adds credence to an otherwise amorphous exemption. This time requirement better supports the social policy concerns.

IX. CONCLUSION

In the midst of the murky waters of pre-bankruptcy planning, some clarity does exist. First, the monetarily unchecked homestead exemption is subject to abuse like any other exemption, and therefore needs reform. Next, even after *Bowyer*, the deference that appellate courts using the clearly erroneous standard of review give to bankruptcy court decisions remains strong. To a large extent, winning the first battle at the bankruptcy court level still does mean winning the war.¹³⁶ Further, the Honorable Judge Arnold's convincing argument that the size of the exemption claimed is legally irrelevant¹³⁷ is not accepted, and excessive use of exemptions could turn the pig into a hog and cost a debtor a discharge. In the eyes of the Eighth Circuit, however, the homestead exemption is an exception. In a sense, the homestead pig may eat to his heart's content and not worry about being labeled as a hog. The caveat to this exception is that, if a debtor in the Fifth Circuit elects to feast on the homestead exemption, the courts may scrutinize his other pre-bankruptcy planning more closely.

MATTHEW J. KEMNER

135. *Johnson*, 880 F.2d at 83.

136. Koger, *supra* note 1, at 478.

137. *See supra*, note 87 and accompanying text.