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Conversion of Nonexempt Assets to Exempt Assets Prior to Bankruptcy—A Question of Fraud?

*Norwest Bank Nebraska, N.A. v. Tveten (In re Tveten)*¹

*In re Johnson*²

I. INTRODUCTION

Today we no longer have debtors' prison for those who cannot pay their debts. We still have insolvent debtors, however, and every year they flock to the bankruptcy courts to receive a discharge of their debts and to achieve a fresh start. This influx of bankruptcies has caused concern about the conversion of nonexempt assets to exempt assets on the eve of bankruptcy.

As one considers the prospect of starting over, common sense dictates the advantage of starting with maximum assets. As one commentator said, "wanting to preserve your property is a natural human desire and therefore, the temptation exists to convert nonexempt assets into exempt assets."³ A question arises whether the conversion of assets should be permitted. Creditors say this practice cheats them out of property to which they are rightfully entitled. Conversely, debtors argue that the Bankruptcy Code does not ban this practice. In fact, the legislative history to section 522, the bankruptcy exemption statute, specifically condones this practice.⁴

The Eighth Circuit recently addressed this issue in two cases, *Norwest Bank Nebraska, N.A. v. Tveten (In re Tveten)*⁵ and *In re Johnson*.⁶ This Note discusses these conflicting cases as they relate to the issue of conversion of assets, and it explores possible solutions to the problem of asset conversion on the eve of bankruptcy.

1. 848 F.2d 871 (8th Cir. 1988).

2. 880 F.2d 78 (8th Cir. 1989).

3. Comment, *The Night Before Bankruptcy: The Eight Circuit's Response to Bankruptcy Estate Planning*, 15 WM. MITCHELL L. REV. 643 (1989) [hereinafter, Comment].

4. S. REP. NO. 989, 95th Cong., 2d Sess. 76 (1978). "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 under the law." *Id.*

5. 848 F.2d 871 (8th Cir. 1988).

6. 880 F.2d 78 (8th Cir. 1989).

II. LEGAL BACKGROUND

A. Exemptions

To begin the analysis, the purpose of exemptions and their function must be considered. When debtors file for bankruptcy under Chapter 7, 11, or 13, all of their assets become property of the estate.⁷ From that estate, debtors can protect certain items from the reach of creditors by exempting their assets under either applicable state law or federal law. In addition, the Bankruptcy Code provides minimum allowances under section 522(b)(2). This provision, however, does not apply if the use of federal exemptions is prohibited by state law.⁸ According to the language in section 522(b)(2), debtors may take either the federal exemptions or state exemptions, whichever are more favorable, unless the state has "opted out" of the federal exemptions.⁹ Approximately thirty-six states have opted out,¹⁰ thus allowing individuals from these states to use only the state exemptions. As a result, the exemptions are dependent upon the individual's state of residence.

It has been said that "[t]he objective of the bankruptcy process is twofold: (1) to allow a debtor a 'fresh start' by relieving indebtedness and (2) to allow an equal distribution of debtor assets to creditors."¹¹ If debtors are allowed a fresh start, then it makes sense that certain items are so vital to their start that without them, they would be unable to achieve success in their new beginning.

There are five social policies used to justify the exemption statutes:

- (1) To provide the debtor with property necessary for his physical survival;
- (2) To protect the dignity, 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

7. 11 U.S.C. § 541(a) (1988).

8. 11 U.S.C. § 522(b) (1988); *Tveten*, 848 F.2d at 873.

9. 11 U.S.C. § 522(b)(1) ("unless the State Law that is applicable to the debtor . . . does not so authorize").

10. 3 COLLIER ON BANKRUPTCY § 522.02 n.4a (15th ed. 1989).

11. McGreevy, *Proposed Reforms in Iowa Bankruptcy Exemption Laws: A Solution to the Fraudulent Conveyance Dilemma*, 74 IOWA L. REV. 1219, 1229 (1989).

12. 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, 621 (1978).

Many items that can be claimed as exempt carry no real value to the creditors, and yet possess great sentimental value to debtors. As Judge Koger, Chief Bankruptcy Judge for the Western District of Missouri, pointed out in a recent article, allowing the creditors to reach these assets gives them unfair leverage over debtors for debt collection.¹³ There are some assets, however, such as homesteads or life insurance policies that hold great value to the creditors and are still considered exempt.

The policy reasons behind the exemption statutes appear to favor debtors. Nevertheless, when examining the statutes one must balance the goal of a fresh start with the objective of providing a fair distribution to the creditors. Balancing the rights of debtors and creditors is one of the reasons why debtors who are found to have intended to hinder, delay, or defraud a creditor,¹⁴ will be denied a discharge of all their debts. Although state law may determine which exemptions apply, federal law determines a debtor's right to a discharge.¹⁵

Denial of a discharge for all debts has been termed a "global denial."¹⁶ Debtors who turn over all their property to the trustee for distribution to creditors may still have debts to pay. Therefore, the consequences of a "global denial" are far more serious than that of a partial denial under 11 U.S.C. section 523. A partial denial is given under this section for such things as an incomplete creditor list.¹⁷

If a debtor converts nonexempt assets to exempt assets and is found to have had an intent to hinder, delay, or defraud the creditors, the result is a global denial of a discharge under section 727.¹⁸ The underlying themes of the Eighth Circuit cases *In re Tveten* and *In re Johnson* are the harsh consequences of transferring assets in a manner deemed fraudulent.

13. Koger, *Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?)*, 93 COM. L.J. 465, 466 (1989).

14. See 11 U.S.C. § 727(a)(2) (1988).

15. *In re Reed*, 700 F.2d 986, 991 (5th Cir. 1983).

16. E. WARREN AND J.L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 226 (1986).

17. 11 U.S.C. § 523(a)(3)(A) (1988).

18. 11 U.S.C. § 727 (1988); *In re Reed*, 700 F.2d 986 (5th Cir. 1983).

III. THE CASES

A. *In re Tveten*¹⁹

The Eighth Circuit upheld the bankruptcy court's decision in *In re Tveten*, which denied the debtor's discharge, finding that the debtor, Dr. Omar Tveten, intended to defraud, delay, and hinder his creditors.²⁰ Before filing a Chapter 11 plan, Dr. Tveten converted most of his nonexempt assets into exempt property totalling about \$700,000.²¹ Dr. Tveten initiated seventeen separate transfers to accomplish this conversion.²² "Tveten concedes that the purpose of these transfers was to shield his assets from creditors."²³ The nonexempt property included land that was sold to his brother and parents, salary and bonuses, life insurance and annuities, his KEOGH plan and retirement fund, a home, and his corporation's profit sharing plan.²⁴ All of the proceeds from the nonexempt property were converted into life insurance and annuities with a fraternal association.²⁵ Minnesota law provided at that time²⁶ that benefits payable from fraternal associations could not be attached by creditors and therefore were exempt.²⁷

The Eighth Circuit based its holding on a comparison of previous case law. Tveten's pattern of conduct demonstrated fraudulent intent²⁸ similar to that found in *In re Reed*,²⁹ in which the Fifth Circuit concluded that the debtor's "whole pattern of conduct evinces that intent."³⁰ In *Reed*, the debtor, as did Tveten, converted nonexempt assets, including a mortgage, and diverted receipts from his business to protect them from his creditors.³¹ The Eighth Circuit also pointed to the fact that "the state exemption relied on by Tveten was unlimited, with the potential for unlimited abuse . . . His attempt

19. 848 F.2d 871 (8th Cir. 1988).

20. *Id.* at 872.

21. *Id.*

22. *Id.*

23. *Id.* at 873.

24. *Id.* at 872-73.

25. *Id.* at 873.

26. The exemption was later found unconstitutional. *In re Johnson*, 880 F.2d 78, 80 (8th Cir. 1989).

27. *Tveten*, 848 F.2d at 873.

28. *Id.* at 876.

29. 700 F.2d 986 (5th Cir. 1983).

30. *Id.* at 991.

31. *Id.* at 989.

to shield property worth approximately \$700,000 goes well beyond the purpose for which exemptions are permitted."³²

B. *In re Johnson*³³

About a year later, the Eighth Circuit upheld the bankruptcy court's finding that no fraud existed when a debtor converted nonexempt assets into his exempt homestead in *In re Johnson*.³⁴ In *Johnson*, Dr. Robert Johnson converted about \$400,000 of nonexempt property into exempt property before filing for a Chapter 7 bankruptcy.³⁵ He paid debts worth \$175,000 on his home and paid a mortgage of \$100,000.³⁶ He also converted assets into annuities and individual retirement accounts worth \$247,000, life insurance worth \$4,000, and musical instruments worth \$8,000.³⁷

The court held that Johnson was entitled to the homestead exemption.³⁸ The case was remanded, however, to the bankruptcy court to examine the other exemptions.³⁹ In upholding the homestead exemption, the Eighth Circuit recognized that "Minnesota's homestead exemption secures a right guaranteed to its citizens in the State Constitution."⁴⁰ The court also pointed to Minnesota's strong social policies supporting the homestead exemption.⁴¹

IV. COMMENT

The facts of the two cases are very similar. Both debtors were physicians who had invested in the same ventures; both had the same attorney; both engaged in pre-bankruptcy planning to convert nonexempt assets into exempt property; and both filed for bankruptcy in the same court. Further, in both cases the creditors, using the same attorney, posed the same arguments. Yet the cases yielded different results. Did only one case evidence fraud and thereby warrant a denial of discharge?

The only real differences between the cases were that Tveten converted assets into annuities under a Chapter 11 plan and Johnson converted assets into his homestead under a Chapter 7 petition. Otherwise, as Judge Koger

32. *Tveten*, 848 F.2d at 876.

33. 880 F.2d 78 (8th Cir. 1989).

34. *Id.* at 83.

35. *Id.* at 79.

36. *Id.*

37. *Id.*

38. *Id.* at 84.

39. *Id.*

40. *Id.* at 82.

41. *Id.*

pointed out, the primary difference was that "Dr. Tveten drew the Honorable Robert J. Kressel and Dr. Johnson drew the Honorable Gregory F. Kishel as their respective bankruptcy judges."⁴²

Possibly the different results occurred because Tveten filed in Chapter 11 and Johnson sought a discharge in Chapter 7. That argument is not valid, however, because according to 11 U.S.C. section 1141(d)(3)(C), "[t]he confirmation of a plan does not discharge a debtor if the debtor would be denied a discharge under section 727(a) of this title if the case were a case under Chapter 7 of this title."⁴³ Therefore, both debtors were seeking a discharge under essentially the same code section.

A better approach differentiates the cases based upon the types of exemptions chosen. One argument is that allowing debtors to raise the value of their homestead exemptions decreases the burden the debtors and their families place on society and thus helps the community.⁴⁴ If debtors have fallen on hard times, it is likely that home repairs have gone unattended. By allowing the money to go back into the homes, buildings that were eyesores may be made pleasing. This allows the neighbors to reap the benefits of a well kept neighborhood if they wish to sell their homes. Without the homestead exemption, a domino effect could occur with one house decreasing the value of the next house and so on. A problem with this argument, however, is that the money may often go toward decreasing the mortgage rather than toward improvements.

In *Tveten*, the court held that Dr. Tveten exhibited fraudulent intent rather than prudent planning.⁴⁵ In so holding, the court relied on such factors as the lack of upper limit for the transfers, the number of transfers (seventeen), transfers to family members, and the doctor's knowledge of creditors' suits.⁴⁶ The court borrowed a phrase from *In re Zouhar*,⁴⁷ saying that "Tveten did not want a mere fresh start, he wanted a head start."⁴⁸

In *Johnson*, however, the court said the "[d]ebtor did nothing more than exercise a prerogative that was fully his under law."⁴⁹ The court further noted certain extrinsic evidence that can be used to show fraud, including

42. Koger, *supra* note 13, at 471.

43. 11 U.S.C. § 1141(d)(3)(C) (1988).

44. See Comment, *Personal Bankruptcy Discharge and the Myth of the Unchecked Homestead Exemption*, 56 MO. L. REV. 683 (1991).

45. *Tveten*, 848 F.2d at 877.

46. *Id.* at 876.

47. 10 Bankr. 154, 156 (Bankr. D.N.M. 1981).

48. *Tveten*, 848 F.2d at 876.

49. *Johnson*, 880 F.2d at 80.

misleading or deceiving creditors and conveying property at below fair market values.⁵⁰

Judge Koger explained the conflicting *Tveten* and *Johnson* decisions by saying "the key issue was that the tolerance level of Judge Kishel [*Johnson*] is higher than the tolerance level of Judge Kressel [*Tveten*]."⁵¹ Another commentator said that the only way to reconcile *Tveten* and *Johnson* is to consider the standard of review.⁵² The question of whether a debtor intended to hinder, delay, or defraud the creditor is a question of fact, and the clearly erroneous standard of review applies.⁵³ The decisions are not inconsistent because in both cases the bankruptcy courts' findings were not clearly erroneous.⁵⁴

A. What Constitutes Fraud?

The conversion of nonexempt assets to exempt assets before the filing of bankruptcy does not in itself constitute fraud.⁵⁵ The legislative history of 11 U.S.C. section 522, the bankruptcy exemption statute, states, "[a]s 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 debtors to make full use of the exemptions to which he is entitled under the law."⁵⁶ "This blanket approval of conversion is qualified, however, by denial of discharge if there was extrinsic evidence of the debtor's intent to defraud creditors."⁵⁷

In evaluating whether extrinsic evidence of fraud is present, Judge Koger noted that courts consider certain pre-filing activities, which he refers to as the "badges of fraud," to determine what was a fraudulent transfer. Those badges of fraud include:

1. Lack or inadequacy of consideration;
2. Family, friendship or close associate relationship between the parties;
3. Retention of possession, benefit or use of the property in question;
4. The financial condition of the party sought to be charged, both before and after the transaction in question;

50. *Id.* at 82.

51. Koger, *supra* note 13, at 472.

52. Comment, *supra* note 3, at 677-78.

53. *Id.* at 678.

54. *Id.*

55. *In re Reed*, 700 F.2d 986, 990 (5th Cir. 1983).

56. S. REP. NO. 989, 95th Cong., 2d Sess. 76 (1978).

57. *Tveten*, 848 F.2d at 874.

5. A pattern or series of transactions or course of conduct after incurring debt or after the onset of financial difficulties or threat of suits by creditors;
6. The general chronology of the events and transactions in question;
7. Value removed from the estate; and
8. Debtor's insolvency at the time of the transfer.⁵⁸

B. Recent Cases

The "badges of fraud" have been used in several cases decided after *Tveten* and *Johnson*. A Seventh Circuit case, *In re Smiley*,⁵⁹ focused on three different conclusions reached by courts on what constituted fraud while discussing the homestead exemption in an involuntary proceeding. The first group of courts found that fraud existed "upon a finding that at least part of the debtor's motivation for obtaining exempt property was to keep assets away from creditors."⁶⁰ Yet, as *Smiley* points out, "debtors have mixed motives for acquiring exempt assets (to buy a new house, . . . and to shield assets from creditors)."⁶¹ What debtor would not pass this threshold level?

The second group of courts looked to the policy underlying the bankruptcy exemptions. These courts decided that they should set limits on the amounts that may be shielded.⁶² This group of courts cited *In re Tveten* to support their conclusion.⁶³

The third group of courts looked to see if the debtor had "committed some act extrinsic to the conversion which hinders, delays or defrauds" the creditors.⁶⁴ These courts ignore the amount of the exemption claimed and the motive for the conversion of exempt assets into nonexempt assets. Instead, they look to extrinsic signs such as whether:

- 1) the debtor obtained credit to purchase exempt property;
- 2) the conversion occurred after the entry of a large judgment against the debtor;

58. Koger, *supra* note 13, at 470.

59. 864 F.2d 562 (7th Cir. 1989).

60. *Id.* at 566 (citing *In re Ford*, 53 Bankr. 444, 450 (Bankr. W.D. Va. 1984); *In re Schwingle*, 15 Bankr. 291, 294-95 (Bankr. W.D. Wis. 1981)).

61. *Id.* at 567.

62. *Id.* (citing *In re Collins*, 19 Bankr. 874, 877 (Bankr. M.D. Fla. 1982); *In re Reed*, 11 Bankr. 683, 688 (Bankr. N.D. Tex. 1981); *In re Zouhar*, 10 Bankr. 154, 157 (Bankr. D.N.M. 1981)).

63. *Id.* at 567 n.1.

64. *Id.* (citing *In re Adlman*, 541 F.2d 999 (2d Cir. 1976); *Grover v. Jackson*, 472 F.2d 589 (9th Cir. 1973); *Love v. Melnick*, 341 F.2d 680 (9th Cir. 1965); *Forsberg v. Sec. State Bank of Canova*, 15 F.2d 499 (8th Cir. 1926); *In re Johnson*, 80 Bankr. 953 (Bankr. D. Minn. 1987)).

- 3) the debtor engaged in a pattern of sharp dealing prior to bankruptcy; and
- 4) the conversion rendered the debtor insolvent.⁶⁵

In *Smiley*, the court found that the size of Mr. Smiley's homestead exemption was irrelevant, but that his course of conduct was evidence of fraud.⁶⁶ Mr. Smiley made efforts to hide from his creditors his conversion of nonexempt assets to exempt assets.⁶⁷ "Mr. Smiley's statements that his assets, in their unencumbered form, were available to his creditors, kept them from filing an involuntary petition until they discovered by their own effort the additional mortgage."⁶⁸ The court said that at the very least Mr. Smiley intended to hinder or delay his creditors.⁶⁹

A Minnesota case, *In re Whitney*,⁷⁰ upholding the conversion of nonexempt assets into homestead exemptions, stated that "one point is abundantly clear: the *Tveten* approach of considering the value of the converted assets has no application where the issue is an objection to a claim of homestead exemption."⁷¹ The court looked to the traditional "badges of fraud" and decided that the debtor did not borrow from his investors or sell collateral to increase his homestead.⁷² Also, there was nothing materially covert about his dealings with his creditors.⁷³ The court said the "debtor needed the home as a place to live. Given his background, his selection of a home of this value is certainly not unusual."⁷⁴

Further, an exemption for an annuity was found not to be a fraudulent transfer in *In re Smith*.⁷⁵ In *Smith*, the debtor purchased a \$90,000 annuity with proceeds from personal injury insurance.⁷⁶ The court, citing *Tveten* and *Johnson*, looked to see if the transfer resulted from covert actions.⁷⁷ The court said that the medical treatment Mr. Smith received was not due to any representations that he would pay his bills, and there was nothing covert about the transfer of the insurance proceeds into an annuity.⁷⁸ In fact, the annuity

65. *Id.*

66. *Id.*

67. *Id.* at 568.

68. *Id.*

69. *Id.*

70. 107 Bankr. 645 (Bankr. D. Minn. 1989).

71. *Id.* at 651.

72. *Id.* at 652.

73. *Id.*

74. *Id.* at 653.

75. 113 Bankr. 579 (Bankr. D.N.D. 1990).

76. *Id.* at 580.

77. *Id.* at 587.

78. *Id.*

furthered Mr. Smith's future financial security.⁷⁹ Perhaps the result would be different if the annuity had paid more than \$728 per month.

C. Advising Clients

A commentator stated that lawyers are severely handicapped in advising their clients regarding conversion of nonexempt assets to exempt assets for at least four reasons:

- (1) lack of uniformity in state exemption laws;
- (2) lack of uniformity in court decisions that claim to be applying similar principles but reach different results;
- (3) the question of whether and to what extent a creditor can attack an exemption claim for fraud; and
- (4) the consequences to the debtor if a court determines that the asset conversion worked as a fraud on creditors.⁸⁰

How can attorneys advise their clients? Is it poor advice not to tell clients about conversions, or is it negligent to suggest a conversion that may turn out to be fraudulent? Clearly an attorney must be very careful in counseling clients.

Judge Koger drew three conclusions in his article:

1. The bankruptcy judge's tolerance of the debtor's prefiling activities determines the outcome.⁸¹
2. The bankruptcy judge's ruling will be reversed infrequently.⁸²
3. The party who wins the first battle will almost inevitably win the war. As a result, an attorney should make every effort to win at the trial level.⁸³

These problems will not exist in every state. In *Tveten* and *Johnson*, both debtors took advantage of Minnesota statutes allowing debtors to choose between the federal and state exemptions.⁸⁴ This issue may not arise in

79. *Id.*

80. Hardin, *Bankruptcy Planning: Risks of Converting Nonexempt Property to Exempt Property on the Eve of Bankruptcy*, 12 OKLA. CITY U.L. REV. 279, 334 (1987).

81. Koger, *supra* note 13, at 478.

82. This is because the standard of review is "clearly erroneous". *In re Johnson*, 880 F.2d 78, 82 (8th Cir. 1989).

83. Koger, *supra* note 13, at 478.

84. MINN. STAT. § 550.371 (1988). Minnesota has not "opted out" of the federal exemptions.

states that have less liberal exemption laws than Minnesota's laws, and it may not arise in states like Missouri that have opted out of the federal scheme.⁸⁵

In Minnesota, the homestead exemption is defined by acreage rather than dollar amount,⁸⁶ and the benefits payable from fraternal associations had no upper limits.⁸⁷ After Dr. Tveten converted his nonexempt assets into fraternal benefits, however, the Minnesota Supreme Court struck down the exemption for fraternal benefits as unconstitutional because without a limit "it violated the state constitution which allows exemptions only for '[a] reasonable amount of property . . .'"⁸⁸ Judge Koger suggested that the Supreme Court's holding was a response to abuses by the state's debtors.⁸⁹

D. Solutions

Conversion of non-exempt assets to exempt assets on the eve of bankruptcy is a serious problem in many states. There are options, however, to solve this problem. An easy option would allow all conversions. This option would eliminate the need for standards and make the law very simple. This option, however, would eliminate the objective of providing creditors a fair distribution. Under this option debtors would convert everything to nonexempt assets, regardless of whether such transactions would be "truly" fraudulent conversions or not. The debtor would have nothing to lose by making a fraudulent transfer and the code section would lose its power.

The opposing position would allow no conversions of nonexempt assets into exempt assets. This option would yield a much fairer result to creditors. The debtors and the social policies behind the exemptions may be sacrificed, however. Wise debtors would place their assets in exempt categories when proceeding with risky ventures, thereby protecting their assets in the event of bankruptcy. Less informed debtors would be ignorant of these options and risk higher losses.

One commentator suggested that Congress should make conversions voidable if they occurred within a certain period before filing.⁹⁰ This approach would provide an easy standard to follow, but it also would allow for manipulation of the system. In addition, what is fair to one debtor may not be fair to another depending upon the debtor's residence and their applicable state laws.

85. MO. REV. STAT. § 513.427 (1990). The Missouri homestead exemption is limited to \$8,000 (one per family), so this issue has less severe ramifications. *Id.*

86. MINN. STAT. § 510.02 (1990).

87. MINN. STAT. § 550.37 (1986).

88. *Johnson*, 880 F.2d at 80 (quoting Minn. Const. art. 1, § 12).

89. Koger, *supra* note 13, at 477.

90. Comment, *supra* note 3, at 684.

Another option would reduce the number of exemption categories. This option, however, has several flaws. First, state exemptions would not be affected by federal legislation. Second, disparity between state statutes would still exist. Further, several states have "opted out" of the federal exemptions, thus making the federal exemptions useless.

A better idea is to establish a ceiling on the amount of exemptions.⁹¹ "[A] debtor would be allowed to convert nonexempt property to any type of exempt property, subject to the dollar cap."⁹² This approach has several advantages. It provides a simple rule with a bright line test and allows all debtors to be treated the same way. It also would aid attorneys in planning their clients' bankruptcy. For this option to be truly effective, however, it should be combined with a repeal of all "opt out" provisions, so only the federal exemptions would be permitted.⁹³ Although this proposal would limit debtors to federal exemptions, those exemptions advance social policies by allowing debtors a fresh start.⁹⁴ With this added provision all debtors, regardless of their state of domicile, would have the same rights. The only drawback would be variations in the cost of living from state to state.

No one system is perfect; however, the system can be improved. A combined system of a total dollar cap, without regard to exemption categories, plus the elimination of the "opt out" provisions, best meets the balancing test of the policies behind the bankruptcy process: a fresh start and fairness in distribution to the creditors.

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91. Cowell, *The Debtor and Conversion of Nonexempt Assets on the Eve of Bankruptcy: Astute Bankruptcy Estate Planning or Fraud?*, 18 CAP. U.L. REV. 567, 586 (1989).

92. *Id.*

93. Comment, *supra* note 3, at 684.

94. *Id.*