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Raymond C. Marier

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BANKRUPTCY EXEMPTIONS: A FULL CIRCLE BACK TO THE ACT OF 1800?

I

THE GREAT SOCIETY

The emergence of the individual consumer in American economic society is largely attributable to the tremendous growth of consumer credit. Heavy wallets bulging, not with the green scrip that daily grows less familiar, but rather with plastic and metal wafers, are hallmarks of a system that encourages acquisition of goods and services on the "buy now, pay later" basis. As of the summer of 1967, over ninety-five billion dollars worth of consumer credit was outstanding.¹ In such an environment, it is inevitable that many individuals become overextended, and that a few, finding the burden of debt intolerable, are forced to turn to society for relief. Bankruptcy has thus become increasingly significant in our credit-oriented society.²

The last comprehensive bankruptcy legislation was the Act of July 1, 1898,³ which, as amended, remains in force today. The problem of bankruptcy at that time was considerably less significant than it is today, and Congress did not contemplate that the bulk of bankruptcy petitions would be filed by individuals voluntarily seeking relief.⁴ Nevertheless, the statute provided:

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months im-

¹ Address by Jack N. Eisendrath, Attorney, to the American Home Economics Ass'n Nat'l Workshop of Consumer Credit in Family Financial Management, at Madison, Wisc., Oct. 10, 1967. [hereinafter cited as Eisendrath].

² Personal bankruptcies climbed from 91 per 100,000 to 98 per 100,000 between fiscal 1966 and 1967. Research Serv. Div., Nat'l Consumer Fin. Ass'n, Report on 1967 Nonbusiness Bankruptcies by States, table II, at 4 (Oct. 12, 1967) [hereinafter cited as Research Serv. Div.]. Most disturbing is that more voluntary bankrupts seek relief with less real reason to go into bankruptcy. The indebtedness of bankrupts at the time of filing is actually rather slight relative to their assets or income. G. BRUNNER, PERSONAL BANKRUPTCIES: TRENDS AND CHARACTERISTICS 54-59 (1965).

³ Ch. 541, 30 Stat. 544.

⁴ "Written before the era of consumer credit, the legislation was designed primarily for the needs of commercial and industrial organizations." G. BRUNNER, *supra* note 2, at 8. Since 1957, nonbusiness voluntary bankruptcies have increased from 63,601 to 191,709. Research Serv. Div., *supra* note 2, table I, at 3. This accounts for over 90% of bankruptcies currently filed. *See id.*

mediately preceding the filing of the petition, or for a longer portion of such six months than in any other State⁵

All states provide such exemptions for the benefit of debtors. The exemption statutes preclude creditors from attaching or executing upon certain items of personal or real property of the debtor.

Although the Bankruptcy Act looks to state substantive law for catalogues of exempted items, it contains its own procedure for claiming exemptions in bankruptcy proceedings. The petition in a voluntary action must be accompanied by a statement of personal affairs, a schedule of liabilities, and a schedule of assets.⁶ The bankrupt may include with his schedule of assets a list of the property he claims as exempt, or he may claim his exemptions at a later time, provided the delay is not prejudicial to his creditors' rights.⁷ The bankruptcy court will set aside the property claimed as exempt, and the title to nonexempt property will vest in the trustee in bankruptcy, who is responsible for distributing the nonexempt assets to the bankrupt's creditors.⁸ Upon discharge, the termination of bankruptcy proceedings, the bankrupt retains full title and possession of the exempt property.⁹

The story of the Medders provides a striking example of possible results under a bankruptcy scheme that incorporates diverse state exemption laws. Ernest Medders was a seventy-five dollar a week mechanic's helper in Memphis, Tennessee. His wife helped meet living expenses by working as a practical nurse. In 1961, the couple migrated

⁵ Bankruptcy Act § 6, 52 Stat. 847 (1938), 11 U.S.C. § 24 (1964).

⁶ Bankruptcy Act § 7a(8), 11 U.S.C. § 25(a)(8) (1964). After compliance with these procedures and the payment of a statutory fee, the court will adjudge the petitioner a bankrupt. Adjudication is treated as an application for discharge in bankruptcy. Bankruptcy Act § 14a, 11 U.S.C. § 32(a) (1964).

⁷ Failure to file a timely claim for exemptions may be construed as a waiver of exemption rights. *Patton v. Fidelity-Philadelphia Trust Co.*, 246 F. Supp. 1015 (E.D. Pa. 1965); *In re Roark*, 28 F. Supp. 515 (E.D. Ky. 1939); *In re Brooks*, 27 F.2d 146 (N.D. Tex. 1928).

⁸ Bankruptcy Act § 47, 11 U.S.C. § 75 (1964).

⁹ Problems arise where there is a dispute concerning the status of the property claimed to be exempt. Theoretically the trustee never obtains title to the exempt property. *See Hogan v. Hall*, 118 F.2d 247 (5th Cir. 1941); *In re Power*, 115 F.2d 69 (7th Cir. 1940); *In re Lippow*, 92 F.2d 619 (7th Cir. 1937). But in the case of such a dispute, he may take possession and assert title during the bankruptcy proceedings. *Schrepel v. Davis*, 283 F. 29 (8th Cir. 1922). The true locus of title may be determined by a finding of the bankruptcy court. Although disputes concerning state exemption statutes may be litigated in state courts, expense and time factors generally favor settlement of the issue in the bankruptcy court itself. *See Kirkpatrick Hardware Co. v. Rodgers*, 35 Ga. App. 790, 134 S.E. 806 (1926), which held that a decision of the bankruptcy court setting aside an exemption was to be given the same effect as a similar state court decision. Where the adjudication is in the bankrupt's favor, his title is restored. *See In re Hausman*, 209 F. Supp. 219 (M.D. Ga. 1962).

to Texas, where Ernest's claim of heirship to a 500 million dollar oil fortune induced several private loans. Confidence in his apparent prosperity snowballed, eventually producing an indebtedness of over three million dollars. His failure to pay a relatively small feed store bill finally resulted in bankruptcy proceedings in which creditors' claims of over two million dollars were filed. As permitted by Texas law,¹⁰ the Medders claimed their rural homestead as exempt from the claims. The "homestead" consisted of nearly 200 acres of land, a 250 thousand dollar house, and a 175 thousand dollar "party barn," onetime scene of gala affairs for Houston society. An auction of the nonexempt assets yielded funds sufficient to pay only about one third of the claims.¹¹ Though it may safely be presumed that neither the Texas legislature nor Congress intended such an exaggerated result, the present scheme appears to justify the Medders' claim to their entire homestead.

The remainder of this Note seeks to analyze the current confusion and inadequacy of the state exemption laws and to propose a rational approach to the problem of bankruptcy exemptions. The proposed approach must take account of differences in bankrupts: their peculiar abilities to meet their obligations outside of bankruptcy and to obtain relief within bankruptcy. Although each bankrupt may be unique, reference will occasionally be made to a "typical" bankrupt, representing the vast majority of bankrupts for whom a statute must primarily be designed.

II

THE EXEMPTION STATUTES

Exemption statutes reflect a basically sound policy: to prevent creditors in bankruptcy proceedings from stripping the defaulting debtor of all his property, thereby forcing him into penury and making his dependents wards of the state.¹² But the states have experienced difficulty in balancing creditor and debtor interests. The result is a

¹⁰ TEXAS CONST. art. 16, § 51.

¹¹ N.Y. Times, May 25, 1967, at 41, col. 3; N.Y. Times, May 26, 1967, at 25, col. 1; N.Y. Times, May 27, 1967, at 28, col. 2.

¹² The United States Supreme Court declared:

It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.

Burlingham v. Crouse, 228 U.S. 459, 473 (1913). It is a recognized purpose of exemption statutes to provide a minimum security for the dependents of the debtor. *First Nat'l Bank v. Tiffany*, 40 Wash. 2d 193, 202, 242 P.2d 169, 173 (1952).

considerable lack of uniformity in the exemptions permitted by various state laws. The antiquity of the exemption statutes and the widespread failure to modernize them have exaggerated the lack of uniformity and poignantly demonstrated that many of the exemption provisions have little modern relevance.

A. *A Call for Uniformity*

The Bankruptcy Act of 1841¹³ provided for voluntary bankruptcy proceedings by individual debtors and included a federal exemption for apparel, furniture, and other items of necessity up to a maximum of three hundred dollars.¹⁴ Increased prosperity and the popularity and generosity of state exemption laws passed after the panic of 1837 led to the Act's repeal, and any pro-bankruptcy sentiment was virtually eliminated until after the 1857 panic,¹⁵ when economic disruption coupled with the Civil War brought about the Bankruptcy Act of 1867.¹⁶

Incorporation of state exemption laws in the Bankruptcy Act of 1841 was debated by Congress, but no provision was made to include state exemptions.¹⁷ It was believed that, since Congress alone could make laws on bankruptcy, inclusion of state law would destroy the constitutionally required uniformity.¹⁸ The issue had not been resolved when the Act of 1867 included state exemptions as an accommodation to the debtor-oriented western states,¹⁹ but the courts later upheld the constitutionality of the inclusion provision.²⁰

¹³ Act of Aug. 19, 1841, ch. 9, 5 Stat. 440.

¹⁴ *Id.* § 3, 5 Stat. at 442.

¹⁵ C. WARREN, *BANKRUPTCY IN THE HISTORY OF THE UNITED STATES*, 87-88, 95 (1935).

¹⁶ Act of March 2, 1867, ch. 176, 14 Stat. 517. See generally C. WARREN, *supra* note 15, at 95-106.

¹⁷ C. WARREN, *supra* note 15, at 100.

¹⁸ The uniformity concept in bankruptcy finds its roots in the Federal Constitution, which provides that "[t]he Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

¹⁹ To satisfy western states' demands for the inclusion of their generous exemption laws, C. WARREN, *supra* note 15, at 100, the act provided that the state laws were to apply where their allowances were greater than the maximum federal exemption of \$500. Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 522.

²⁰ *E.g.*, *Darling v. Berry*, 13 F. 659 (C.C.D. Ia. 1882). The courts' attempts to find uniformity, where none in fact existed, resulted in some tortuous semantics. One court explained its reasoning in the following terms:

If congress saw cause to pass bankrupt laws under the grant of power referred to, the injunction is that they shall be uniform throughout the United States When viewed with reference to the state exemption laws, there is a uniformity which, on reflection, readily suggests itself. Though the states vary in the extent of their exemptions, yet what remains the bankrupt law distributes equally among the creditors. Nor does the bankrupt law in any way vary or change the rights

The present Bankruptcy Act retains the inclusion of state exemption laws, and dispenses with a federal exemption.²¹ When the law was passed in 1898, the power of Congress to use state exemptions of property had been acknowledged by the courts.²² The rationale for finding uniformity was that the creditor extends credit with knowledge of the exemption statute of his debtor's domiciliary state. Since his contract with the debtor is subject to this implied restriction, it is not unfair to the creditor that his remedy in case of the debtor's default is limited and tempered by the exemption law. The rationale seems to lose much of its force in light of the growth of national credit and the emergence of a mobile society. When the 1898 Act was passed, credit was mostly of local importance. The local creditor at that time was better able to adjust his business to reflect increased risks under higher exemptions. Today's nationwide corporate creditor may treat the risk of debtor bankruptcy as a cost of doing interstate business, but it is impractical to differentiate between debtors to account for local exemption variations.

The mobility of the population also invalidates the local creditor assumption. Section 6 of the Bankruptcy Act applies the exemption law of the state in which the bankrupt has been domiciled for six months prior to bankruptcy. When the bankrupt has moved within that six-month period, the law of the state in which the bankrupt was domiciled for the greater part of the six months preceding bankruptcy is determinative. The arbitrary six month rule fails to guarantee that a creditor will maintain his rights under the law of the state within which he contracted with the debtor. A truly uniform exemption law would eliminate the significance of the domiciliary requirement and would clarify creditors' rights by allowing creditors to know that wherever

of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor under the state laws than the unexempted part of his assets, the very thing that is attained by the bankrupt law, which, therefore, is strictly uniform.

In re Beckerford, 3 F. Cas. 26, 27 (No. 1209) (C.C.D. Mo. 1870). A later court considering the identical question agreed with the earlier decision but used language that belies the fragile logic there employed. "A bankrupt law . . . to be constitutional must be uniform. Whatever rules it prescribes for one it must for all. It must be uniform in its operations, not only within a state, but within and among all the states." *In re Deckert*, 7 F. Cas. 334, 335-36 (No. 3728) (C.C.E.D. Va. 1874) (emphasis added). To justify its result, the court was forced to define "operations" as procedural rights only, not substantive rights under the bankruptcy law. The Supreme Court upheld both cases and the constitutionality of state exemption law inclusion in *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189-90 (1902).

²¹ Bankruptcy Act § 6, 11 U.S.C. § 24 (1964).

²² *E.g.*, *In re Beckerford*, 3 F. Cas. 26 (No. 1209) (C.C.D. Mo. 1870); *Dozier v. Wilson*, 84 Ga. 301, 10 S.E. 743 (1890). *See also* C. WARREN, *supra* note 15, at 144.

the debtor goes, the debt will be under no increased jeopardy because of varying exemption laws. The modern meaning to be ascribed to "uniformity" of exemptions should be uniformity of kind and amount in all judicial districts.

B. *Geographic Variation*

Local tradition and history are major factors responsible for the present lack of uniformity among state exemption laws. The eastern states tend to favor creditors by allowing only parsimonious exemptions. The western states, originally populated largely by immigrants and agrarian refugee debtors from the East, typically provide larger, more numerous exemptions. California and Texas offer the most generous exemptions. California recently increased the dollar limitation on its homestead exemption from 12,500 dollars to 15,000 dollars.²³ Texas, perhaps the most liberal, allows for either of two homesteads: a rural ranch of no more than 200 acres, or an urban business homestead valued at 5,000 dollars or less at the time of its declaration as a homestead,²⁴ but with no limit on the value of the fixtures thereon.²⁵ In sharp contrast is the Connecticut policy. When confronted with the insufficiency of its statutory homestead exemption of one thousand dollars, the Connecticut legislature met the problem by simply abolishing the exemption.²⁶ Although the economies of the states have converged greatly since the last century, the spirit and often the letter of the exemption laws formulated then are still influential, and cognizance is still given to policy decisions of bygone legislatures.²⁷

Specialized pressure groups have also been influential in the formulation of the exemption laws, and have aggravated further the problem

²³ CAL. CIV. CODE ANN. § 1260 (West Supp. 1967), amending Stats. 1953, ch. 943, p. 2319, § 1.

²⁴ TEX. CONST. art 16, § 51; TEX. REV. CIV. STAT. ANN. arts. 3832-33 (1966).

²⁵ TEX. REV. CIV. STAT. ANN. art. 3833 (1966).

²⁶ Conn. Pub. Acts 1958, ch. 27, § 42. Connecticut thus joins Delaware, Maryland, Pennsylvania, Rhode Island, and the District of Columbia. See NAT'L ASS'N OF CREDIT MANAGEMENT, CREDIT MANUAL OF COMMERCIAL LAWS 334-43 (1967). It is interesting to note that Connecticut ranks second only to the District of Columbia in average annual per capita income. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 327, table 465 (1967).

²⁷ This is not to say, however, that updating the individual states' statutes would solve the lack of uniformity problem. There is a basically generous attitude of many western states toward exemption laws that has carried over to the present time and contrasts with the generally tighter restrictions of the eastern states. If dollar limitations were modernized, there would still probably be wide differences in what is regarded as adequate or necessary. For instance, the present cost of a watch varies between ten dollars and several hundred dollars. The question whether a particular watch is adequate or necessary would be answered differently in various locales. See generally Joslin, *Debtors' Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959).

of promoting uniformity, Exemptions maintained by groups with continuing influence include the following: fishing boats and nets,²⁸ unpaid milk proceeds,²⁹ oyster boats and rigging,³⁰ trade tools,³¹ and professional libraries.³² Even where such groups have weakened or disappeared, or the exemption has lost contemporary utility, the laws remain on the books. Molasses mills,³³ ferry boats,³⁴ workers' bicycles,³⁵ and two tons of coal³⁶ are examples of exempt items for which there is virtually no current justification.

C. Value Obsolescence

Where a dollar limitation is placed on the value of the exempt property, the shrinkage of the dollar and the failure periodically to update the limitation has in many instances frustrated the legislative intent to provide the debtor with a substantial exemption. South Carolina retains its homestead exemption at the 1895 level of one thousand dollars.³⁷ By interpretation, courts have required partition of the homestead where its value has exceeded the dollar limit of a small exemption, even though partition defeats the statutory intent to provide a minimal homestead for the debtor.³⁸ Wage exemptions provide another striking example of obsolescence resulting from legislative inattention. Exemptions of twenty-five dollars a week in Indiana³⁹ and one hundred dollars a month in Maryland,⁴⁰ established in 1897 and 1874 respectively, do not amount to a living wage in 1968.

Continual inflation creates the need for frequent review of the

²⁸ CAL. CIV. PRO. CODE §§ 690.8, 690.13 (West 1955).

²⁹ N.Y. CIV. PRAC. LAW § 5205(g) (McKinney 1963).

³⁰ CONN. GEN. STAT. ANN. § 52-352 (1958).

³¹ See, e.g., *id.*; MICH. STAT. ANN. § 27A.6023(5) (Rev. vol. Supp. 1965); MO. ANN. STAT. § 513.435(7) (Supp. 1967); N.Y. CIV. PRAC. LAW §§ 5205(a)(7), 5205(b)(4) (McKinney 1963).

³² See, e.g., CAL. CIV. PRO. CODE § 690.4 (West Supp. 1967); KAN. STAT. ANN. § 60-2304(9) (1963); MINN. STAT. ANN. § 550.37(8) (Supp. 1967); MO. ANN. STAT. § 513.435(7) (Supp. 1967); N.Y. CIV. PRAC. LAW §§ 5205(a)(7), 5205(b)(4) (McKinney 1963); R.I. GEN. LAWS ANN. § 9-26-4(2) (1956).

³³ MISS. CODE ANN. § 307(o) (Supp. 1966).

³⁴ TEX. REV. CIV. STAT. ANN. art. 3836 (1966).

³⁵ CAL. CIV. PRO. CODE § 690.4 (West Supp. 1967).

³⁶ CONN. GEN. STAT. ANN. § 52-352 (1958).

³⁷ S.C. CONST. art. 3, § 28. A proper updating would increase South Carolina's dollar limit to approximately \$4,000, since \$1.15 in 1967 has the same purchasing power as 34.5 cents had in 1913. BUREAU OF THE CENSUS, *supra* note 26, at 349 table 498, at 355 table 504 (1967).

³⁸ *Norwood v. Watson*, 242 F. 885 (4th Cir. 1917); ILL. ANN. STAT. ch. 52, §§ 10-12 (Smith-Hurd 1965); ME. REV. STAT. ANN. tit. 14, § 4553 (1964); MICH. STAT. ANN. §§ 27A.6027, 27A.6059 (Supp. 1965).

³⁹ IND. ANN. STAT. § 3-505 (1946).

⁴⁰ MD. ANN. CODE art. 9, § 31 (Supp. 1967), construed in *Shriver v. Carlin & Fulton Co.*, 155 Md. 51, 141 A. 434 (1928). See also MICH. STAT. ANN. § 27A.7511 (1962).

dollar limitations on exemptions. The states have not fulfilled that need, and there is no evidence that they will do so in the future. Perhaps the failure to update the homestead exemption may be justified by the increasing tendency of the urban dweller to rent his home, thereby rendering the homestead allowance inappropriate. But legislatures have failed to substitute an exemption suitable for the apartment dweller.

D. *Judicial Efforts to Modernize*

The basic defect of the state exemption statutes is their reflection of an agrarian, rather than an industrial, economy. Where state legislatures have defaulted in updating the types of and limitations on exempted items, the courts have often attempted to redefine the exemptions to meet modern needs.⁴¹ Equivocal statutory language is susceptible to such judicial manipulation. Thus, courts have substituted motor vehicles for "carriages and wagons,"⁴² and tractors or trucks for "tools of the trade" or "beasts of burden."⁴³ But some language, such as stated cash amounts,⁴⁴ cannot be recast. Courts have also faced interpretive problems in determining the status of contemporary items such as pianos, radios, phonographs, and televisions. Though they have developed no consistent pattern of treatment, the courts are understandably wary of classifying expensive luxuries as necessities subject to exemption.⁴⁵ Thus, outdated exemption laws will often force courts into the unfortunate position of being able to do equity, if at all, only through a tortured statutory construction.

⁴¹ To be sure, the language of the statute is directed to the more primitive agrarian economy of 1868, but the Kansas court has insisted that . . . manifest intent be given contemporary effect through the technique of "liberal construction."

Cantrell v. Molz-Frick Implement Co., 278 F.2d 546, 547 (10th Cir. 1960). *But see* Michaelson v. Elliot, 209 F.2d 625 (8th Cir. 1954) (a television set is neither an article of furniture nor a musical instrument for exemption purposes).

⁴² *E.g.*, Phillips v. Palomo & Sons, 270 F.2d 791 (5th Cir. 1959); Peyton v. Farmers' Nat'l Bank, 261 F. 326 (5th Cir. 1919); Patten v. Sturgeon, 214 F. 65 (8th Cir. 1914); *In re* Thompson, 103 F. Supp. 942 (S.D. Tex. 1952). *But see In re* McEuen, 19 F. Supp. 924 (W.D. Ky. 1937) ("wagon" literally construed).

⁴³ *E.g.*, *In re* Pioch, 235 F.2d 903 (3d Cir. 1956); Gunn v. Credit Serv. Corp., 46 So. 2d 628 (La. Ct. App. 1950); Pellish Bros. v. Cooper, 47 Wyo. 480, 38 P.2d 607 (1934). *But see* Law v. Simon, 110 Colo. 545, 136 P.2d 520 (1943) (*semble*) (businessman's automobile not exempted).

⁴⁴ *See, e.g.*, *In re* Collier, 111 F. 503 (D. Mass. 1901).

⁴⁵ *Compare* Goldsmith v. M. Jackman & Sons, Inc., 327 F.2d 184 (10th Cir. 1964), Sellers v. Bell, 94 F. 801, 812 (5th Cir. 1899), and *In re* Richards, 64 F. Supp. 923 (S.D. Tex. 1946), with *In re* Everleth, 129 F. 620 (D. Vt. 1904), and Towns v. Pratt, 33 N.H. 345 (1856).

III

THE FRAMEWORK OF AN UPDATED EXEMPTION POLICY

An exemption policy must be evolutionary rather than static. The history of the application of laws exempting specific items of property illustrates the inflexibility of such an approach. Constantly changing needs preclude the use of a permanent roster of exempted items.⁴⁶

The best solution seems to be an exemption based on a single medium—cash.⁴⁷ Cash amounts could be updated by using consumer or market indices⁴⁸ incorporated by reference into the exemption statutes. This would assure that the amount of the cash exemption would be automatically revised to reflect current purchasing power. The base amount of the cash exemption should rationally reflect the personal needs of the bankrupt debtor and his dependents. Evaluation of those needs demonstrates the desirability of two distinct exemptions. The first should provide a subsistence allowance for the support of the bankrupt and his dependents during the proceedings. Both the Bankruptcy Act of 1800⁴⁹ and the British Bankruptcy Act⁵⁰ contain provisions for a similar allowance. The second exemption should provide a rehabilitation allowance sufficient to enable the bankrupt to rejoin society as a productive member. Cutting corners here may utterly defeat rehabilitation;⁵¹ there is no social sense in returning a three-legged horse to the race.

Since no truly typical bankrupt exists, a separate determination of the twofold exemption allowance must be made for each of three discernible classes of bankrupts. The first class consists of wage earners, who have filed over eighty percent of the voluntary bankruptcy peti-

⁴⁶ Laws exempting general "classes" of property would probably invite conflicting interpretations, thereby compromising national uniformity. Moreover, just as the drafters of the horse and buggy exemptions did not foresee the Model-T and its progeny, legislators today may not foresee tomorrow's "necessities" well enough to cover them with a "class."

⁴⁷ Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1507 (1959).

⁴⁸ See, e.g., BUREAU OF THE CENSUS, *supra* note 26, at 355, table 504 (1967).

⁴⁹ Act of April 4, 1800, ch. 19, § 53, 2 Stat. 34.

⁵⁰ Bankruptcy Act of 1914, 4 & 5 Geo. 5, c. 59, § 58.

⁵¹ The present law provides that no person may seek a discharge in bankruptcy if he has received a discharge within the previous six years. Bankruptcy Act § 14(c)(5), 11 U.S.C. § 32(c)(5) (1964). Such a "sink or swim" proposal does not solve the problem of rehabilitation, but rather merely prevents recidivism, a goal of dubious value. This policy seems to recognize a basic fault in the rehabilitative nature of the present bankruptcy-exemption system: the chance for rehabilitation afforded by the present Bankruptcy Act is too uncertain to allow multiple consecutive discharges in bankruptcy.

tions in recent years.⁵² The second class consists of self-employed proprietors and professionals, who share the unique rehabilitative need of business and professional re-establishment. The last class is comprised of the bankrupt without assets, who cannot benefit from any exemption out of his estate.⁵³

A. *The Wage Earner and Chapter XIII*

Wage earners, representing by far the most numerous of personal bankrupts, should be encouraged to find relief outside of bankruptcy where feasible. This policy has been embodied in Chapter XIII of the Bankruptcy Act,⁵⁴ which works on the same assumption as that which motivates the consumer creditor; that the wage earner's chief asset is his wage potential.⁵⁵ Chapter XIII is not strictly a bankruptcy provision; it entails the formulation of plans by which the debtor may be relieved from the "psychic burden" of his debts while paying them gradually out of his income.⁵⁶ In essence, it provides an extension of time, up to three years,⁵⁷ over which the debtor may apply his income in excess of sustenance requirements to the payment of his debts. Cred-

⁵² There were 208,243 bankruptcies in fiscal year 1967, of which 191,709 were voluntary nonbusiness individual bankruptcies. Over 80% of these individuals were employed both prior to and at the time of bankruptcy. Research Serv. Div., *supra* note 2, at 1-2; see R. DOLPHIN, AN ANALYSIS OF ECONOMIC AND PERSONAL FACTORS LEADING TO CONSUMER BANKRUPTCY 57-61 (1965). Since fewer than 1% of the individual bankruptcy filings are involuntary, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY STATISTICS 5 (1966) [hereinafter cited as BANKRUPTCY STATISTICS], all petitions filed by individuals in 1967 numbered approximately 194,000.

⁵³ Most bankruptcy filings by individuals involve assetless estates, which cannot contribute significantly to the discharge of creditors' claims. In fiscal year 1965, there were 108,134 no-asset cases out of 149,820 voluntary straight bankruptcy filings. The average realization from these cases was only \$109. BANKRUPTCY STATISTICS, *supra* note 52, at 5, 8. It appears, however, that this realization was computed after the exemptions of the bankrupt had been taken from the estate.

⁵⁴ 52 Stat. 883 (1938), 11 U.S.C. §§ 1001-86 (1964).

⁵⁵ R. DOLPHIN, *supra* note 52, at 96.

⁵⁶ Bankruptcy Act § 623, 11 U.S.C. § 1023 (1964). Since this is not a bankruptcy provision, several states have enacted wage-earner relief plans. See, e.g., MICH. STAT. ANN. § 27A.5301 (Rev. vol. 1962); Shanker, *Comparison of Ch. XIII Proceedings and State Wage Earner Relief Plans*, 19 PERSONAL FIN. L.Q. 153 (1965).

Psychic burden arises from the number of creditors and collection tactics used. "Tactics commonly used include threatening calls to their wives while they were at work, calls late at night, calls and letters to the employer, and sometimes visits to the employer." R. DOLPHIN, *supra* note 52, at 57. The larger the number of creditors, the more likely it is that the bankrupt will be subjected to such tactics. Creditors of the typical bankrupt number between 16 and 20. Address by Suzanne Matsen to the American Home Economics Ass'n Nat'l Workshop of Consumer Credit in Family Financial Management, at Madison, Wis., Oct. 10, 1967, at 3 [hereinafter cited as Matsen].

⁵⁷ Bankruptcy Act § 661, 11 U.S.C. § 1061 (1964).

itors should favor a Chapter XIII plan over bankruptcy, since they recover a far greater proportion of the credit they have extended.⁵⁸ Where it appears that the debt of the Chapter XIII petitioner is too great to be satisfied from wage payments within three years, the debtor may enter into a composition plan, combining debt extension with discharge. Under such a plan, the debtor pays as much as he can from his wages over the three years. At the end of the period, he is discharged from the balance of his debts, and forfeits none of his assets.

Although Chapter XIII appears far more favorable to both creditors and debtors than straight bankruptcy, it is not widely used. Although all wage earners theoretically are eligible for a Chapter XIII extension or composition, only seventeen percent entered such plans in fiscal year 1967.⁵⁹ Several reasons may be offered for the wage earner's failure to take advantage of Chapter XIII, including ignorance of the possibility of an extension or composition, poor counselling,⁶⁰ moral irresponsibility and lack of desire to pay creditors to avoid the stigma of bankruptcy,⁶¹ and inability to qualify for an extension or to structure an adequate composition plan. Furthermore, although Chapter XIII proceedings are voluntary and the debtor may withdraw at any time to seek discharge in straight bankruptcy, the move into Chapter XIII is not his choice alone. The debtor's petition for an extension or composition can be blocked by a majority of unsecured creditors or by any secured creditor.⁶²

Greater use of Chapter XIII proceedings would reduce exemption problems. But since the "stigma" of bankruptcy seemingly does little to encourage use of Chapter XIII, the problem is to make extension and composition plans more attractive to both creditors and debtors. It has been suggested that a small cash exemption in bankruptcy

⁵⁸ The statistics are impressive. Of the 18,513 asset cases of bankruptcy determined in 1965, \$67,290,022 were paid to creditors whose claims totalled \$410,710,957. *BANKRUPTCY STATISTICS*, *supra* note 52, table F-6 (1965). Of the 127,142 nominal- and no-asset cases, \$2,197,452 were applied to \$293,088,358 worth of claims. *Id.* table F-9. On the other hand, in 9,660 Chapter XIII arrangements debtors managed to pay off \$16,206,660 towards claims worth \$16,905,370—close to total recovery. *Id.* table F-8.

⁵⁹ Research Serv. Div., *supra* note 2, table III, at 5.

⁶⁰ R. DOLPHIN, *supra* note 52, at 27.

⁶¹ There are some debts bankrupts feel less compulsion to pay than others. Deficiency judgments, for example, arise where the value of the repossessed security is not sufficient to offset the credit balance outstanding on the loan at the time of the repossession. These deficiency debts are regarded with particular hostility. Most debtors cannot see why they should have to pay for an item that no longer benefits them. G. BRUNNER, *supra* note 2, at 13; R. DOLPHIN, *supra* note 52, at 105-07.

⁶² Bankruptcy Act § 652, 11 U.S.C. § 1052 (1964).

would force more wage earners into Chapter XIII.⁶³ Unless restricted to wage earners, however, the low exemption would be unfair, since the choice of relief for bankrupts other than wage earners is limited to straight bankruptcy. It has also been suggested that bankruptcy should not be available to persons whose total debt is below a statutory minimum.⁶⁴ The intended effect would be to reduce the number of voluntary petitions filed. The theory is somewhat problematic, since a minimum debt requirement might encourage debtors to delay seeking relief in order to build up the requisite minimum debt. The result might be a further dissipation of assets rather than increased use of Chapter XIII. Another approach is to deny bankruptcy discharge as a statutory privilege to those wage earners capable of carrying out a successful extension or composition.⁶⁵ The best solution for encouraging use of Chapter XIII would seem to be to reduce the percentage of creditors, both secured and unsecured, needed for a Chapter XIII plan. In all probability, this would increase debtors' use of the plans and would result in satisfaction of a greater proportion of their debts.⁶⁶

Increased use of Chapter XIII would yield no real prejudice to creditors since they fare much worse in a voluntary bankruptcy proceeding. Secured creditors would retain their preferential position and would either be paid first or would have a high percentage of the income diverted to satisfy their claims.⁶⁷ By making Chapter XIII more attractive and more accessible, nonbankruptcy relief could be obtained by more wage-earning debtors.⁶⁸ When a wage earner cannot success-

⁶³ Comment, *supra* note 47, at 1509.

⁶⁴ G. BRUNNER, *supra* note 2, at 54.

⁶⁵ R. DOLPHIN, *supra* note 52, at 112.

⁶⁶ See note 58 *supra*.

⁶⁷ Under the present Chapter XIII system, all secured creditors must assent to the wage-earner's plan. Bankruptcy Act §§ 651, 652, 11 U.S.C. §§ 1051, 1052 (1964). Approval of the plan binds all the creditors, including the non-assenting unsecured creditors. Bankruptcy Act § 657, 11 U.S.C. § 1057 (1964). Reducing the number of secured creditors needed to approve a plan would necessitate such a bribe to prevent foreclosure unless all of the non-assenting secured creditors are to be bound.

⁶⁸ Matsen, *supra* note 56, at 8, indicates that the petitioners in bankruptcy had a median income of between \$4,000 and \$5,000 per year and a total debt of about \$4,800. More optimistic figures indicate a considerably lower median debt. G. BRUNNER, *supra* note 2, at 53 (under \$3,000 in Ohio); R. DOLPHIN, *supra* note 52, at 63 (\$3,184 in Michigan). Brunner's figures suggest even more encouraging results than above: "The average bankrupt with income of \$6,500 had debt, of all kinds, of only \$3,640." G. BRUNNER, *supra* note 2, at 91. Spreading debt over three years would leave the debtor with an income of \$5,300 per year. Brunner asserts that debtors with incomes of \$3,000 or more (70% of the cases) had debts amounting to 55% to 68% of yearly income. *Id.* Under a three-year plan, these wage earners could recover between 75% and 80% of their wages while paying their debts in full.

fully complete a Chapter XIII program, however, other avenues of relief must be made available to him. Thus, the determination of a cash exemption allowance must be made for those wage earners who still find it necessary to pursue straight bankruptcy.

B. *Valuation of a Subsistence Allowance for Bankrupts*

In Great Britain, the bankruptcy trustee "may from time to time . . . make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family . . ." ⁶⁹ Sustenance and rehabilitation are recognized as separate goals that require separate exemptions. Our Bankruptcy Act, on the other hand, makes no provision for the bankrupt's support during proceedings, apart from those state wage exemptions incorporated by section 6 of the Act. The original Bankruptcy Act of 1800 did provide for such an allowance,⁷⁰ but it was not revived in the Act of 1841 and has not returned since. A sustenance allowance is desirable from at least two standpoints: it preserves the rehabilitative exemption for its intended post-bankruptcy purpose, and it provides family security during the adjudicatory process.

Two quantitative components are needed to calculate a subsistence allowance: the duration of the bankruptcy proceedings, and the per diem dollar amount necessary to insure adequate support. In the interest of uniformity, a maximum time for completion of bankruptcy proceedings, and thus for duration of the subsistence allowance, must be prescribed. The Bankruptcy Act presently provides that property interests obtained by bequest, devise, or inheritance, and an interest by the entirety that becomes transferable by the bankrupt, shall be vested in the trustee only if obtained within six months after bankruptcy adjudication.⁷¹ Although the six-month limit appears to be arbitrary, it reflects a legislative determination that the bankrupt's property should not be encumbered by the proceedings for longer than six months. This same six months seems to represent a reasonable maximum time for the duration of the subsistence allowance.

In all cases, however, it is especially in the interest of creditors to insure that the estate is closed and the bankrupt discharged as soon as possible, since the allowance is cut off and more of the estate is preserved for the creditors. It seems, therefore, that on a vote of creditors at their meeting, the bankrupt could be presented for summary dis-

⁶⁹ Bankruptcy Act of 1914, 4 & 5 Geo. 5, c. 59, § 58.

⁷⁰ Act of April 4, 1800, ch. 19, § 53, 2 Stat. 34.

⁷¹ Bankruptcy Act § 70(a)(7), 11 U.S.C. § 110(a)(7) (1964).

charge, under certain conditions. Adjustments between the estate, now severed from the bankrupt, and the creditors could then be made as soon as fair notice requirements permit. One such condition of summary discharge could be the existence of no, or nominal, assets. In the assetless or nominal asset estate, the time for administration can be cut down drastically. In such cases, the office of trustee is often bypassed under the current law.⁷² This procedure indicates the interest of the bankruptcy courts in streamlining proceedings in situations where a laborious administration would be unprofitable to all concerned. Streamlining practices ought to be encouraged and extended.

In addition to summary discharge concurred in by the creditors the bankruptcy court could grant a pro forma discharge immediately, eliminating the subsistence allowance. Such a proceeding might permit a maximum saving to creditors, while enabling the debtor immediately to begin re-establishing himself. Assets received after the discharge would not be subject to further claims by his bankrupt estate. This procedure could be applied where the estate is sufficiently assetless so that the creditors probably would not be prejudiced. The estate could always be reopened in the event a creditor objected after receiving notice of the discharge. A charge of fraud would be sufficient ground to cause a withdrawal of the discharge. In such a case, the bankrupt's sustenance allowance would be reinstated from the withdrawal until up to six months after his initial adjudication. Giving the reins to creditors on this point may encourage cheaper, more efficient proceedings.

The dollar amount per day should be tied to official indices that will enable the allowance to retain its purchasing power. A recent study of bankruptcy indicates the minimum subsistence requirements for families of various sizes. Figures were developed for both "adequate" and "comfortable" living.⁷³ The data show that the bankrupt with a wife and two children would require 1,380 dollars for "ade-

⁷² General Orders in Bankruptcy, order 15, 11 U.S.C. Appendix, promulgated pursuant to 28 U.S.C. § 2075 (1964).

⁷³ The following were cited as minimum incomes necessary *after taxes* for maintenance:

Adequate		Comfortable
\$1270	1 person	\$1652
1799	2 persons	2344
2312	3 persons	3013
2763	4 persons	3600
3171	5 persons	4133
3553	6 persons	4630
4118	7 or more persons	5364

quate" living through a six-month period. Tables developed for various locales could become a permanent part of the exemption structure.

Variations should also exist for the different classes of bankrupts. To account for the wages of the bankruptcy-electing wage earner, each item of income received within six months of adjudication should automatically become part of the estate, as would be true under the Chapter XIII plan.⁷⁴ A subsistence allowance would be returned to the bankrupt from each paycheck, and any excess would be retained for the benefit of creditors. For the professional or self-employed bankrupt with no income, the exemption would be funded by sale of the assets comprising the bankrupt estate. As with existing exemptions, the assetless bankrupt would not benefit from a cash exemption for subsistence. The exemptions would merely allow the bankrupt to retain a portion of his existing assets, and would not provide a new fund for his benefit.⁷⁵

Administering a subsistence allowance may prove difficult, since the needs of statistically similar bankrupts may differ to such an extent that the amount exempted becomes a float to one and a millstone to another. Yet, even a fairly rigid system based on comprehensive tables that attempt, at least, to take account of varying circumstances, seems more capable of uniform application than the discretionary British dole system, which would tend to collect the barnacles of case law.

C. *Valuation of a Rehabilitative Allowance for Bankrupts*

In order to sustain the advantage afforded by a discharge in bankruptcy, the law should provide an exemption of sufficient material inventory to facilitate the bankrupt's economic rehabilitation. State statutes exempting homestead and other itemized properties are founded on myriad determinations of the standard of necessity. Uniformity demands that valuation of a cash allowance for rehabilitation be based on a single standard of necessity that reflects the interests of both the bankrupt and his creditors.

To determine a plausible rehabilitative allowance, the rosters of exempt items in current state statutes⁷⁶ and home inventories should be

⁷⁴ Bankruptcy Act § 611, 11 U.S.C. § 1011 (1964).

⁷⁵ The case of the indigent bankrupt presents a problem insoluble by exemption laws. The solution is to find a subsistence income source for the indigent bankrupt. Referral to local welfare agencies is the most obvious answer. With current social legislation for the poor, a federal program of relief coupled with occupational rehabilitation or "temporary employment" programs could be utilized. This therapeutic alternative is the most feasible one for the unemployed, assetless bankrupt who had refrained from seeking bankruptcy relief.

⁷⁶ Despite the clear disadvantages of a roster-type statute, the items contained therein do have a rehabilitative flavor, and have not been included wholly without reason.

consulted.⁷⁷ Although existing data on home and personal inventories do not represent minimum necessities, two studies do provide sufficient information to permit the approximation of a replacement cost valuation for such minimum inventories.⁷⁸ The following rehabilitative allowances can be justified: 2,200 dollars for an unmarried bankrupt, and 3,900 dollars for the typical bankrupt, who is married with two children.⁷⁹

The proposed exemption makes no allowance for a homestead, as traditionally provided for by many state statutes. The reasons are that homestead exemptions are inappropriate in light of current housing patterns and that the sustenance allowance makes some provision for shelter.

The first reason is by far the more impelling rationale for eliminating homesteads from an exemption scheme. With the exception of California and Texas, no state currently exempts a homestead of sufficient value to qualify as a habitable dwelling in urban and suburban areas, where typical bankrupts reside. To exempt a homestead of reasonable usefulness, an allowance of ten thousand dollars or more would have to be made. This is a rather large amount to withhold from creditors. Because of the wide range of climates and building costs nationally, great variations would inevitably arise in the actual housing exemption. It is patently absurd to include in a statute an architect's conception of the prototypical bankruptcy bungalow as an alternative to value fixing.

Moreover, since most bankrupts are fairly young,⁸⁰ those who own their homes are liable to have them heavily mortgaged. The mortgagee's security interest in the home renders the exemption nugatory on foreclosure. The bankrupt is left with his equity, not a house. Fi-

⁷⁷ A typical household inventory includes kitchen appliances, utensils, household textiles, and furniture. Apparel and jewelry are usually segregated as personal inventory items. Both household and personal assets should be accounted for in determining a single cash exemption.

⁷⁸ Wells, *Financial Management Practices of Young Families* (unpublished thesis in Cornell University Library 1958); Stein, *Ithaca [N.Y.] Families and Their Inventories, A Pilot Study of Inventories of Household Goods Other than Wearing Apparel* (unpublished thesis in Cornell University Library 1965).

⁷⁹ The exemption allowances were developed from data provided by the two studies. The inventory groups (heavy appliances, small appliances, furniture, household textiles—sheets, towels, etc., and various utensil groups) were summed. Certain items needed no duplication for the married bankrupt. For married bankrupts, approximately \$1,000 was added to the single bankrupt's allowance. A large portion of this was a clothing allowance of \$500. Approximately \$350 per child was added to the allowance based on considerations of furniture and clothing.

⁸⁰ R. DOLPHIN, *supra* note 52, at 48-49; Matsen, *supra* note 56, at 3.

nally, many bankrupts are urban renters. Exemption of a homestead will not affect them, since they have no homestead to exempt. The subsistence allowance would provide for shelter by including rent for the bankrupt for the period of the adjudication proceedings.

D. *The Buy-Back Scheme*

When contrasted with the average value of exemptions presently claimed (\$943),⁸¹ the suggested figures (\$2,200 and \$3,900) appear high. The discrepancy results from assigning a replacement cost valuation to the inventories. Since it would be unjust to force creditors to re-equip the bankrupt with new goods, the bankrupt should be compelled to apply part of his exemption to "buy back" essential items of his own household equipment, apparel, and other goods. The repurchase scheme would entail the use of replacement costs, but only in the sense that such an amount would be deducted from the bankrupt's exemption for each item repurchased. The trustee⁸² would oversee the bankrupt to insure responsible use of the exemption, making sure that the bankrupt does not elect to take cash when he might reasonably purchase items from the estate that would be useful in his rehabilitation. Vesting discretion in the trustee would assure the creditor that the bankrupt cannot simply elect his exemption in cash and leave his used household goods in the estate. It would also assure society that the bankrupt is using his allowance for its intended purpose—rehabilitation.

Some examples should clarify the operation of a buy-back scheme. Suppose bankrupt *A* owns a living room suite that would cost five hundred dollars to replace with comparable furnishings. Under the proposed plan, he may apply five hundred dollars of his exemption allowance to repurchase these furnishings. As a result he would keep his own furniture and release five hundred dollars to the bankrupt estate for the benefit of his creditors. He could, however, elect to redeem other items in his estate. The guiding hand of the trustee would approve the selection of the goods to be retrieved from the estate, and

⁸¹ Comment, *supra* note 47, at 1505.

⁸² Under the proposed plan, the office of the trustee would involve considerably different duties and powers from those he currently exerts. Even under the present law, however, the trustee may select for the bankrupt property to be exempted for his benefit, where the exemption statute calls for items to a specified dollar amount and the bankrupt has claimed this amount but has not itemized the property he wishes to keep. *In re Lippow*, 92 F.2d 619, 620 (7th Cir. 1937). Since far broader discretionary powers would be called for in the successful operation of the buy-back scheme, the current practice of electing the trustee in a creditors' meeting would not be appropriate. The referee would have to appoint a trustee sufficiently knowledgeable in such matters.

would prevent the bankrupt from using the exemption allowance to buy new goods duplicating those in the estate. The selection process would continue until the exemption has been completely used by the bankrupt. Since in the typical situation there are few, if any, assets that could readily be liquidated to give the bankrupt actual cash to finance his repurchases, dealings between the exemption fund and the estate would exist only on paper. A situation may arise, however, where there are no items to be retrieved, or where those available for repurchase would in no way facilitate rehabilitation or enhance family security. Here actual cash obtained from liquidation of assets would be turned over to the bankrupt in the amount of the exemption. If the bankrupt is assetless, and the exemption cannot be funded by sale of assets, he must seek relief as a pauper.⁸³ Where the bankrupt has fraudulently conveyed his repurchasable items, suitable fines could be levied against his cash exemption.

Suppose bankrupt *B*'s living room suite would cost five thousand dollars to replace. Applying his entire exemption would retrieve a mere fraction of these furnishings and would leave him nothing for other necessities. He should therefore forfeit his furniture and use the cash from his exemption to purchase a more modest suite comparable to bankrupt *A*'s. The estate benefits from the sale value of the five thousand dollar suite, less any portion of cash from the liquidation applied against the cash exemption should *B* elect to purchase goods outside the estate.

Such a buy-back system would be flexible enough to accommodate creditors in high-, low-, and no-inventory situations by mitigating the replacement cost valuation for the exemption. Allowing the trustee discretionary powers over the bankrupt's repurchase selections would overcome the improvident bankrupt's fruitless dissipation of a straight cash exemption.

E. *Additional Allowances*

Special consideration should be given to the professional and the self-employed bankrupt. In addition to the standard household exemption enjoyed by other bankrupts, an extra allowance should be made if the bankrupt shows an intent to return to his former occupation. The bankrupt professional or tradesman will need his library, equipment, or tools of the trade. Existing statutes generally favor such exemptions with fairly generous allowances.⁸⁴ To bring into balance the creditor-debtor conflict in this area, a maximum allowance should be

⁸³ See note 75 *supra*.

⁸⁴ See note 31 *supra*.

established in accordance with the nature of the individual's trade or profession and the equipment needed to maintain a minimal competency in his field. Again the policy of the Bankruptcy Act is not served by returning a person to the business or profession on an economic crutch. Unfortunately, equipment costs vary widely for different trades and professions. An allowance sufficient to fully equip the mechanic might not purchase a dentist's chair. Several formulations of the exemptions may be necessary to take account of these diversities. However, a single liberal allowance with a buy-back operation similar to that proposed for the general rehabilitation exemption seems more consonant with uniformity and simplicity.⁸⁵ Thus, the exemption might allow one man to buy back his tools fully, while permitting another to rent them or make a down payment on new tools.

IV

ENACTMENT OF A MODERN EXEMPTION POLICY

Although enactment of a uniform cash exemption seems to be the best solution to the exemption problem, the question of who should enact the requisite legislation remains. There are two alternatives: enactment by the states of a uniform exemption law, and federal pre-emption by amendment of Section 6 of the Bankruptcy Act.

A. *Retention of Control by the States*

A uniform law for the states would probably provide an exemption the value of which would be between the high and the low values in current statutes. Creditors in states with low exemptions would probably oppose such a law, although provisions for easing Chapter XIII requirements and requiring a minimum debt for a voluntary filing may somewhat reverse this tendency.⁸⁶ In high exemption states, creditors would be likely to favor the lower exemption in a uniform act. Adoption of a uniform act probably would be resisted strenuously by special interest groups anxious to retain itemized exemptions, by an improvised debtor's lobby, and by simple inertia.

Since state revision of exemption laws has been laggard, a uniform proposal on exemptions probably would not receive widespread ac-

⁸⁵ *E.g.*, N.Y. CIV. PRAC. LAW §§ 5205(a)(7), 5205(b)(4) (McKinney 1963).

⁸⁶ Over a six-year period, 33.7% of the voluntary bankruptcies in Ohio would have been "avoided" under a \$2,000 minimum debt requirement. G. BRUNNER, *supra* note 2, at 54.

ceptance. Adoption by only some of the states would not achieve the goal of a comprehensive, uniform exemption policy.

B. *Federal Preemption*

At least one court has noted that it is within the power of Congress to exclude state exemptions altogether.⁸⁷ Such a policy is not wholly without precedent. The Bankruptcy Acts of 1800 and 1841 utilized preemption to achieve uniformity. In 1867 Congress compromised the preemption approach by allowing both a minimum federal exemption⁸⁸ and a state exemption. Since it does not appear that state legislatures can realistically be expected to adopt uniform legislation, return to a federal exemption seems to be the best path to the desired result.⁸⁹

A strong argument for federal control is the federal nature of the bankruptcy problem itself. The volume of filings and the increasingly national character of credit⁹⁰ gives the exemption problem a distinctly national character. The lack of uniform economies within the states themselves indicates the need for a national solution. Chicago and Manhattan, although separated by nearly half a continent, have a greater economic affinity than Manhattan and rural Chenango County, both presently subject to the same New York State exemption law.

V

SUMMARY OF PROPOSED CHANGES

Federal exemption policy should (1) facilitate the use of Chapter XIII proceedings, and thereby diminish the frequency of petitions in bankruptcy, and (2) provide a federal exemption in Section 6 of the Bankruptcy Act, preempting state exemption laws.

Chapter XIII should be made more accessible and attractive to the wage earner. Eliminating the veto power of each secured creditor by requiring only majority approval of the plan would enhance the availability of Chapter XIII proceedings. Denying bankruptcy discharge to

⁸⁷ Novak v. O'Neal, 201 F.2d 227, 231 n.4 (5th Cir. 1953).

⁸⁸ Act of March 2, 1867, ch. 176, § 14, 14 Stat. 522.

⁸⁹ Comment, *supra* note 47, at 1508-09. It would not be particularly difficult for Congress to finance research necessary for exemption reform. For example, the fund collected by the Referees in Bankruptcy has accumulated over \$10 million and could be used to finance such research. BANKRUPTCY STATISTICS, *supra* note 52, Letter of Transmittal (1965).

⁹⁰ Use of credit cards of national corporations by consumers points up this recent phenomenon. In 1966, for example, 168,000 gasoline credit cards were used in nearly 40% of the households in the Milwaukee, Wisconsin, area. Eisendrath, *supra* note 1, at 2.

those wage earners eligible for Chapter XIII proceedings would also encourage the use of the Chapter XIII alternative.

A federal exemption substituted for state exemptions should be measured in cash and tied to economic indices to prevent obsolescence. The exemption should be twofold: a subsistence allowance and a rehabilitative allowance. The subsistence allowance should be granted for a limited time only, which time might be shortened by creditors seeking a summary discharge for the bankrupt or otherwise hastening bankruptcy procedures. Both exemptions should be valued to comprehend various bankrupts and their dependents, and allowances should be enacted in tabular form as an appendix to section 6. The federal exemption should eliminate the homestead exemption as such and provide for adequate shelter in the subsistence allowance. It should also make provision for special professional and tradesman allowances to enable such bankrupts to return to their former occupations with ample opportunity to succeed.

Far broader discretionary powers should be granted to both the referee and the trustee. The referee should be given the power to effect summary discharges in asset cases on agreement of the creditors, and in low-asset cases on his own motion, with adequate safeguards to protect the creditors by allowing them to reopen the estate after a post-discharge hearing. Added to the office of trustee should be discretionary powers to oversee the use of the rehabilitative exemption. Use of the buy-back scheme would protect creditors and help assure the bankrupt's rehabilitation. In exceptional cases, where the sustenance allowance is abused, his power should extend to managing the bankrupt until the end of proceedings.

Raymond C. Marier