The Failure of the Virginia Exemption Plan

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Even though a creditor successfully reduces his claim to judgment, he nonetheless faces certain restrictions on the property of the debtor that he may appropriate to satisfy his judgment. In Virginia, these restrictions take the form of exemption laws reflecting the legislature's determination that, as a matter of public policy, the debtor may designate certain property to be exempt from the creditor's process. Although rarely articulated, the primary purpose of the exemption scheme is to strike a balance between competing public interests of protecting the debtor and his family against their own fiscal improvidence and at the same time, ensuring the judgment creditor that assets other than those essential for the debtor's maintenance and care will be available to satisfy the amount due.¹

In carrying out the intent of the legislature, the courts of Virginia have stated that the exemption statutes are not to be strictly construed but rather interpreted liberally in favor of the debtor.² Accordingly, the judgment creditor must be fully informed about the various exemptions available to the debtor not only to ascertain whether his judgment is collectible, but also to avoid the expense of attempting to enforce his judgment against property that the debtor is entitled to exempt. Likewise, the debtor must be aware of his exemption rights lest he lose them unwittingly.

This Note will detail the exemptions available to a debtor in Virginia and explain why the current scheme of exemptions no longer is viable. The exemptions that Congress has made available to a debtor under the Bankruptcy Reform Act of 1978 also will be con-

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1. The Supreme Court of Appeals of West Virginia has declared that the object of the exemption statutes is to provide the debtor and his family with "the bread of life and a pillow whereon to lay the head, to save them from destruction and absolute want." State ex rel. Burt v. Allen, 48 W Va. 154, 162-63, 35 S.E. 990, 993 (1900).

Other purposes of exemption statutes are to preserve the family unit, to effect the rehabilitation of the debtor and thereby to help him manage his debts, and to minimize judgment debtor's losses through forced execution sales. See Vukowich, Debtors' Exemption Rights, 62 Ga. L.J. 779, 785-88 (1974).

sidered to demonstrate how the federal exemptions affect Virginia's statutory scheme. Finally, some suggestions will be made as to how Virginia might proceed to establish a more realistic exemption plan.

Although the primary purpose of this Symposium is to focus on Virginia's postjudgment collection procedure, the Virginia exemption plan cannot be evaluated apart from its effect in a bankruptcy context. Many of the exemptions available to a debtor in Virginia have been written and revised with an awareness of their effects in bankruptcy. A recent legislative enactment makes the state exemption scheme an integral part of the exemptions available to the bankrupt.\(^3\)

To label Virginia's statutory exemptions a "scheme" or a "plan" is somewhat misleading because an investigation of the exemption statutes reveals that, although the great bulk of the available exemptions constitute one section of the Code of Virginia,\(^4\) many other exemptions are scattered throughout the Code.\(^5\) Additionally, the legislature has enacted many of the individual exemption statutes without considering other exemptions or attempting to maintain the necessary balance between competing debtor and

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3. See, e.g., Va. Code § 34-17 (Repl. Vol. 1976). The Code provides the following:

The real or personal estate which a householder, his surviving spouse or minor children are entitled to hold as exempt may be set apart at any time before it is subjected by sale or otherwise, provided that (1) any person who files a voluntary petition in bankruptcy may set it apart before or on the same day that he files his petition but not thereafter, or (2) any person against whom an involuntary petition in bankruptcy is filed may set it apart at any time before the expiration of the period after its adjudication within which he is required to file his schedules.

Id. See also Note, Bankruptcy Exemptions: Critique and Suggestions, 68 Yale L.J. 1459, 1463 n.33 (1959).

4. Title 34 of the Virginia Code, entitled "Homestead and Other Exemptions," contains the majority of the state's exemptions.

creditor interests. If these statutes represent a "plan," it is neither a consolidated nor a coherent one.

THE VIRGINIA EXEMPTIONS

The Homestead

Central to the Virginia exemption scheme, and probably the debtor's most valuable right, is the so-called "homestead." Originally intended to protect the family and to maintain the home, the homestead exemption was available only to those who had a legal or moral duty to support others. Recent amendments, however, have extended the exemption to any person, married or unmarried, who maintains a separate residence or living quarters, regardless of whether others live with him.

The Virginia statute explicitly states that the debtor may claim the homestead exemption out of real or personal property, or both. Occasionally revised, the present statute permits the debtor to select homestead property up to a maximum value of $5,000.

9. Id. § 34-1 (Supp. 1979) (as amended 1978 and 1979). Before 1978, the statute defined a "householder," the one entitled to claim the homestead exemption, as "one who occupies such a relationship towards persons living with him as to entitle them to a legal or moral right to look to him for support and who, in turn, has the duty of supporting such persons." Id. § 34-1 (Repl. Vol. 1976). In 1978, the legislature, evidently to expand the reach of the exemption, added the following sentence: "The word 'householder' shall also include any person who maintains a separate residence of his own whether or not others are living with him." Act of March 25, 1978, c. 253, 1978 Va. Acts 398 (emphasis supplied). And in 1979, apparently to clarify the import of the 1978 amendment and also to simplify the definition, the General Assembly of Virginia repealed all existing language and amended the relevant portion of the statute to read, "The word 'householder' as used in this title shall include any person, married or unmarried, who maintains a separate residence or living quarters, whether or not others are living with him." VA. CODE § 34-1 (Supp. 1979).
10. Id. § 34-4.
11. Id. § 34-4 (Supp. 1979). In 1975 the legislature increased the homestead exemption amount from $2,000 to $3,500. Act of March 20, 1975, c. 466, 1975 Va. Acts 800. The exemption was increased in 1977 to $5,000. Act of March 29, 1977, c. 496, 1977 Va. Acts 738. The frequent increases reflect the legislature's concern that the exemption is not keeping pace with inflation. Despite these attempts, the debtor continually loses the true value of the exemption in a period of sustained inflation.

Section 34-4.1 of the Virginia Code states that resident veterans having a "service connected disability" of 40% or more are entitled to claim as exempt an additional $2,000 worth of real or personal property. VA. CODE § 34-4.1 (Supp. 1979).
Presumably, the legislative intent in expanding the exemption beyond real property is to treat as equally as possible all debtors, whether homeowners or renters; if the exemption had been limited to real property, homeowners would be favored even though a substantial portion of the population does not own homes. By allowing the debtor to select personal property the renter can exempt enough money to continue his rental payments for some time into the future. Nonetheless, the statute does not obligate the debtor to select any particular property; the property selected need bear no relationship to the preservation of the debtor's home. He is free to exempt his savings account, automobile, television, boat, or all of these provided the aggregate value does not exceed $5,000.

Procedural Requirements

Despite the central importance of the homestead exemption, there are a number of obstacles the debtor must overcome before he may validly claim it. The statute specifies that the debtor must "select" the property to be exempted. The Virginia Supreme Court has interpreted this provision to mean that the privilege is personal to the debtor; if he fails to act, no one else may claim the exemption on his behalf. More important, however, is the re-

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13. This is clearly the effect of the language found in § 34-4 of the Code, the homestead provision. Section 34-13, however, apparently enacted to complement § 34-4 and to emphasize that the debtor may claim any amount of the homestead in personal property, actually conflicts with the language of § 34-4. As currently written, § 34-13 limits the amount of the personal estate to $3,500, despite the $5,000 limitation found in § 34-4. The only logical explanation for this discrepancy is legislative oversight; apparently, the legislature neglected to update the monetary amount in this section in 1977 when it did so in all other pertinent sections. In years past, §§ 34-4 and 34-13 have referred to the same monetary ceiling. Of course, another, more strained interpretation is possible, namely, that the legislature deliberately is limiting the homestead in personal property to $3,500. This is unlikely because, in addition to contradicting § 34-4, it clearly would be inconsistent with the policy of treating homeowners and renters alike. In any event, the section duplicates § 34-4 and therefore is unnecessary; rather than being revised, it should be repealed. See, e.g., Va. Code § 34-4 (Supp. 1979) and Va. Code § 34-13 (Repl. Vol. 1976).


15. See Linkenhoker's Heirs v. Detrick, 81 Va. 44, 56-57 (1885). In the event of the death of the debtor, others may be entitled to claim the homestead exemption. See note 34 infra.
requirement that the debtor must declare the homestead strictly in compliance with the statutorily prescribed procedure. If the homestead is claimed in real property, the debtor must claim the exemption in writing and have the writing recorded in the county where the real estate is located.\textsuperscript{16} If the homestead is claimed in personal property, the property must be clearly identified in a writing signed by the debtor and recorded in the county where the debtor resides.\textsuperscript{17} Until the debtor complies with the requirement of recordation, he is not entitled to the exemption.\textsuperscript{18} Also, the debtor must attach to the recorded instrument a "cash valuation" of the property exempted in order for his creditors to determine whether the claimed value fairly represents the true value of the property.\textsuperscript{19}

Another less formidable obstacle to the debtor is the time limitation for recording the exemption. The relevant statute specifies that the property which the debtor is entitled to hold as exempt may be set apart "at any time before it is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process."\textsuperscript{20} In keeping with the general policy of construing exemption statutes liberally in favor of the debtor, particularly the homestead,\textsuperscript{21} the Virginia Supreme Court has recently held that so long as the court has not decreed a sale of the property or ordered a garnishee to pay money to the judgment creditor, the debtor may file a homestead deed.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{16} VA. CODE \textsection 34-6 (Repl. Vol. 1976).
\item \textsuperscript{17} Id. \textsection 34-14.
\item \textsuperscript{18} In re Robnette, 34 F Supp. 518, 521 (W.D. Va. 1932).
\item \textsuperscript{19} In re Waltrip, 260 F Supp. 448, 451-52 (E.D. Va. 1966). See also In re Wilson, 108 F 197, 198 (W.D. Va. 1901). The courts have offered no guidance regarding how the debtor should arrive at a just "cash valuation."
\item \textsuperscript{20} VA. CODE \textsection 34-17 (Repl. Vol. 1976).
\item \textsuperscript{21} See Home Owners' Loan Corp. v. Reese, 170 Va. 275, 279, 196 S.E. 625, 626 (1938).
\item \textsuperscript{22} Wilson v. Virginia Nat'l Bank, 214 Va. 14, 15, 196 S.E.2d 920, 921 (1973) (per curiam). In Wilson, the bank obtained a judgment on April 22, 1971, against Mrs. Wilson. When she received life insurance proceeds in January 1972, the bank caused garnishment summonses to be served on other banks as garnishees. Mrs. Wilson recorded her homestead deed on April 10, 1972. The court held that the filing was timely and that she could claim the benefit of the exemption. Section 34-17 specifies certain filing requirements applicable when the debtor is claiming the exemption in a bankruptcy proceeding. See note 3 supra.
\end{itemize}
Claims Enforceable Against the Homestead

Another concern of the debtor is the Virginia statute that provides that certain debts exist against which the homestead exemption may not be asserted. In other words, creditors whose judgments are based upon these specified kinds of debts can enforce their claims against the debtor's property despite the homestead. Paramount among these are claims based on debts that aided the debtor in acquiring the property For example, if the debtor owns a house valued at $50,000 and encumbered by a $45,000 deed of trust which secures a debt that allowed the debtor to purchase the house, a third party creditor may make no claim against the property because the debtor is permitted to claim the full $5,000 "equity" in the house and the deed of trust beneficiary is entitled to claim the remaining $45,000. If, however, the debtor's "equity" in his home exceeds the $5,000 maximum, then the third party credi-

23. VA. Code § 34-5 (Repl. Vol. 1976). The statute reads as follows:
Such exemption shall not extend to any execution order or other process issued on any demand in the following cases:
(1) For the purchase price of such property or any part thereof. If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provisions of the preceding section (§ 34-4).
(2) For services rendered by a laboring person or mechanic.
(3) For liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.
(4) For a lawful claim for any taxes, levies or assessments.
(5) For rent.
(6) For the legal or taxable fees of any public officer or officer of a court.
(7) Such exemption shall not be claimed or held in a shifting stock of merchandise or in any property.

24. Other examples include claims made by a mechanic or "laboring person" which is defined to include any householder who receives wages for his services. Id. § 34-1 (Repl. Vol. 1976). This broad definition effectively establishes a significant exception to the homestead exemption because many persons, claiming to be included within the definition, may be able to defeat the debtor's claim to the homestead exemption.

Other claims assertable against the homestead include claims of an attorney for money collected; claims for rent; any lawful claim for taxes, levies, or assessment; claims for the fees of any public officer or an officer of a court; and any claim based upon a "shifting stock" of merchandise when the conveyance by the debtor is subsequently set aside because of fraud or lack of consideration. Id. § 34-5. "Shifting stock" is property assigned for the benefit of creditors or following an adjudication of voluntary or involuntary bankruptcy. Id. § 34-5(7).
tor is entitled to have the property sold in order to satisfy his claim.\textsuperscript{25} The proceeds of the sale first go to the deed of trust beneficiary, because his claim is one of the exceptions to the homestead,\textsuperscript{26} and therefore superior, to the debtor to the extent of $5,000; the excess is paid to the judgment creditor.\textsuperscript{27} Any surplus remaining after the judgment creditor has been paid will be returned to the debtor.

The debtor may claim his homestead exemption only once.\textsuperscript{28} When the house or other property previously claimed as the homestead, is sold, however, the debtor may retain his homestead exemption.\textsuperscript{29} He does this by applying the proceeds of the sale of the exempt property to the purchase of new property; in effect, the debtor's exemption "carries over." To ensure that the exemption does "carry over," the debtor must comply with the recordation requirements for declaration of the homestead in the new property and specify in the writing that the new property was partially or wholly acquired with exempt proceeds.\textsuperscript{30} Failure to comply with this procedure results in the loss of the exemption.

Other Provisions Relating to the Homestead

Several other aspects of the Virginia homestead provision deserve mention. Homestead rights survive the death of the homesteader.\textsuperscript{31} When the homesteader dies the surviving spouse and minor children may claim the benefit of the exemption not only as to the debts of the deceased but also as to their own debts.\textsuperscript{32} The surviving spouse may claim this benefit until remarriage.\textsuperscript{33} If the homesteader dies before having selected a homestead, then the surviving spouse or minor children are entitled to claim the exemption.\textsuperscript{34}

\textsuperscript{25} Id. § 34-19 (Supp. 1979).
\textsuperscript{26} Id. § 34-5(1) (Repl. Vol. 1976).
\textsuperscript{27} Id. § 34-19 (Supp. 1979).
\textsuperscript{28} Id. § 34-21 (Supp. 1979).
\textsuperscript{29} Id. §§ 34-7, 34-9, 34-20 (Repl. Vol. 1976).
\textsuperscript{30} Id. § 34-20; see notes 16-17, 19 supra & accompanying text.
\textsuperscript{31} Id. §§ 34-10, 34-15 (Repl. Vol. 1976).
\textsuperscript{32} Id.
\textsuperscript{33} Id. The minor children, if any, may claim the benefit of the exemption until they marry or reach the age of 18. Id.
\textsuperscript{34} Id. §§ 34-11, 34-15. If the surviving spouse claims and receives either dower or
One important aspect of the exemption scheme is that if at the
time the debtor declares his homestead the value of the property is
within the statutory ceiling of $5,000, then any subsequent in-
crease in value of the homestead is also exempt. 35 Additionally, any
rents and profits derived from the homestead property may be
held exempt to the same extent as the homestead itself. 36 Thus, if
a judgment creditor cannot enforce his judgment against certain
property because the debtor has properly selected it as his home-
stead, the creditor likewise will be unable to reach rents and profits
derived from the property.

Waiver of Homestead

The Code of Virginia expressly provides that the debtor may
waive his homestead exemption. 37 The Virginia Supreme Court has
upheld the waiver noting that the right to waive the homestead
exemption is as much a part of the statutory provisions as the
right to claim the exemption. 38 The United States District Court

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35. Id. § 34-18 (Supp. 1979). The statute provides the following:
The rents and profits of the property set apart as the homestead shall be ex-
empt in the same manner as the corpus of the homestead and if the whole real
and personal estate set apart be not of greater value than five thousand dollars
at the time it is so set apart the exemption thereof shall not be affected by any
increase in its value afterwards, unless such increase consists of permanent im-
provements placed upon real estate set apart by means derived from some
other source than the homestead.

36. Id.

Although this statute has yet to be interpreted by the courts, the language suggests that
the property designated as the homestead cannot exceed a total value of $5,000 if the debtor
intends to claim the benefit of a subsequent increase in value of the property. In other
words, if the exemption applies to less than the property's total value the exemption always
will be limited to $5,000. This discourages the debtor from declaring his house to be his
homestead exemption when the value of "whole real and personal estate" exceeds $5,000.
The use of the term "estate" instead of "property," however, suggests that the $5,000 limit
applies not to value of the property but rather the debtor's interest in the property. Argua-
ably, this would allow the debtor to claim an increase in his exemption value in proportion to
the increase in the value of the entire property.

37. Id. § 34-22. Note, however, that this statute is partially overruled by the Bankruptcy

38. See, e.g., Home Owners' Loan Corp. v. Reese, 170 Va. 275, 279, 196 S.E. 625, 626
for the Eastern District of Virginia recently rejected the argument that the statutory right of homestead waiver is either unconstitutional as a matter of state law or void as contrary to public policy. Nonetheless, the waiver must be clear and unequivocal; it may not arise from mere implication. The waiver must be in writing, either in the instrument under which the debtor is liable or in a writing affixed thereto; the writing must state that the debtor waives the homestead exemption that he otherwise would be entitled to claim.

Procedurally, if the judgment creditor has a valid waiver, the creditor may enforce his claim against the property of the debtor. If, however, his claim is unsecured, the creditor first must exhaust all other assets of the debtor before proceeding against the homestead.

Poor Debtor’s Exemption

Virginia, in a statute commonly referred to as the Poor Debtor’s Exemption, allows a resident debtor to exempt over seventy specific items of personalty, any or all of which may be claimed.

(1938) (“The right to claim, or to waive, the homestead exemption is a purely personal right. It is a mere personal privilege extended in the benignity of the law to the debtor, which he may waive or claim at his election.”) (citation omitted).

40. Home Owners’ Loan Corp. v. Reese, 170 Va. 275, 279, 196 S.E. 625, 626 (1938). In Reese, the Home Owners’ Loan Corp. made a loan to Mr. and Mrs. Porter. The loan was evidenced by a negotiable promissory note and secured by a deed of trust on certain realty. Both the note and the deed of trust waived the benefit of the homestead exemption. Subsequently, the Porters conveyed the property to Reese, who expressly assumed payment of the indebtedness secured by the deed of trust. No mention was made of any waiver of homestead in the transaction with Reese. When Reese later defaulted on the loan, the property was foreclosed on, leaving a deficiency of $1,500. Home Owners’ attempted to sue Reese but he contended that he had not waived the benefit of the homestead exemption. The Virginia Supreme Court held that the exemption waiver was not binding on Reese. Stated the court, “The assumption clause contains no declaration of the waiver of the homestead. There is no such declaration of Reese by writing, upon any instrument for the payment of money, or in any writing annexed thereto.” Id. at 279, 196 S.E. at 626.
41. VA. CODE § 34-22 (Repl. Vol. 1976). The debtor, however, may waive only his homestead exemption, not any other exemptions. Id.
42. Other property of the debtor may be exempt. See id. §§ 34-26, 34-27 (Supp. 1979), 34-29 (Repl. Vol. 1976). See also note 5 supra.
44. Id. § 34-26 (Supp. 1979). The Code provides as follows:

In addition to the estate, not exceeding in value five thousand dollars, which
Farmers are allowed to exempt additional items.45 If applicable, every householder residing in this State shall be entitled to hold exempt, as provided in chapter 2 (§ 34-4 et. seq.) of this title, he shall also be entitled to hold exempt from levy or distress the following articles or so much or so many thereof as he may have, to be selected by him or his agents:

1. The family Bible.
2. (1a) Wedding and engagement rings.
3. Family pictures, schoolbooks and library for the use of the family.
4. A lot in a burial ground.
5. All necessary wearing apparel of the debtor and his family, all beds, bedsteads and bedding necessary for the use of such family, two dressers or two dressing tables, wardrobes, chifforobes or chests of drawers or a dresser and a dressing table; carpets, rugs, linoleum or other floor covering; and all stoves and appendages put up and kept for the use of the family not exceeding three.

6. All cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale; one cow and her calf until one year old, one horse, six chairs, six plates, one table, twelve knives, twelve forks, two dozen spoons, twelve dishes, or if the family consists of more than twelve, then a plate, knife, fork and two spoons, and a dish for each member thereof; two basins, one pot, one oven, six pieces of wooden or earthenware; one dining room table, one buffet, china press, one icebox, freezer or refrigerator of any construction, one washing machine, one clothes dryer not to exceed one hundred fifty dollars in value, one loom and its appurtenances, one kitchen safe or one kitchen cabinet or press, one spinning wheel, one pair of cards, one axe and provisions other than those hereinafter set out of the value of fifty dollars; two hoes; fifty bushels of shelled corn, or, in lieu thereof, twenty-five bushels of rye or buckwheat; five bushels of wheat, or one barrel of flour; twenty bushels of potatoes, two hundred pounds of bacon or pork, three hogs, fowl not exceeding in value twenty-five dollars, all canned and frozen goods, canned fruits, preserved fruits or home-prepared food put up and prepared for use and consumption of the family, twenty-five dollars in value of forage or hay, one cooking stove and utensils for cooking therewith, one sewing machine, and in case of a mechanic, the tools and utensils of his trade, and in case of an oysterman or fisherman his boat and tackle, not exceeding one thousand five hundred dollars in value; if the boat and tackle exceed fifteen hundred dollars in value the same shall be sold, and out of the proceeds the oysterman or fisherman shall first receive one thousand five hundred dollars in lieu of such boat and tackle.

No officer or other person shall levy or distrain upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process.

Id.

45. The Code provides the following exemptions for a householder actually engaged in agriculture:

[A] pair of horses or mules unless he selects or has selected a horse or a mule [under § 34-26], in which case he shall be entitled under this section only one ., one wagon or cart, one tractor, not exceeding in value three thousand dollars, two plows, one drag, one harvest cradle, one pitchfork, one rake, two iron wedges and fertilizer and fertilizer material not exceeding in value one
these exemptions are absolute and may not be waived. The Poor Debtor's Exemption originally was intended to assure that a debtor could retain sufficient belongings, generally limited to necessities, to provide for himself and his family. A glance at the items enumerated, however, reveals that the list is badly antiquated, and ill-suited to provide the intended benefit to the debtor in today's modern economy. Representative of the list are the following items: the family bible, fifty bushels of shelled corn, one cow and her calf until one year old, one loom, and one spinning wheel.

Life Insurance

The two primary sections of the Code dealing with the life insurance exemptions are not widely known, probably because the section thousand dollars.

_Id_ § 34-27. For definition of a householder, see note 57 _infra._


47. _Id._ § 34-26. See note 44 _supra._

48. _Va. Code_ §§ 38.1-448 to 449 (Repl. Vol. 1976). The statutes provide as follows:

§ 38.1-448: If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, such lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or the executors or administrators of such insured or the person so effecting such insurance, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee predeceases such person; provided, that, subject to the statute of limitations, the amount of any premiums for such insurance paid with intent to defraud creditors, or paid under such circumstances as to be void under _§ 55-81_, with interest thereon, shall enure to the benefit of such creditors from the proceeds of the policy.

§ 38.1-449:

In the case of policies under the terms of which the right to change the beneficiary is reserved and as to which the cash surrender or loan value thereof is claimed by such creditors, such insurance shall not be entitled to the protection afforded by _§ 38.1-448_, except that in the case of householders or heads of families or their beneficiaries or their assignees the total amount of such insurance entitled to the protection afforded by _§ 38.1-448_ shall not exceed ten thousand dollars and when the amount of such insurance represented by two or more policies exceeds such limit, the protection afforded by _§ 38.1-448_ shall be allowed as to each of such policies pro rata in accordance with the respec-
tions are not indexed under the heading "Exemptions." Enacted in 1946, the sections are poorly drafted and susceptible to varying interpretations. No cases have been decided that construe these sections; the two law review articles that have been written on the sections conflict, in part, in their interpretation of the statutes.

Section 38.1-448 of the Virginia Code declares that, absent fraud, the third party beneficiary or assignee of a life insurance policy is entitled to the full "proceeds and avails" of the policy as against the creditors of the insured. Although not stated explicitly, the language of the statute implies that the protection does not extend to the beneficiary against claims of his creditors. Thus, if the beneficiary is himself liable, the protection will not apply. Therefore, many creditors are anxious to obtain the signatures of both husband and wife on the obligation. Significantly, the protection afforded the beneficiary of the policy is unlimited. The creditors of the insured cannot reach any of the proceeds regardless of the amount.

Section 38.1-449 of the Code, however, limits the reach of section 38.1-448. Section 38.1-449 declares that if the policyholder reserves the right to change the beneficiary, a reservation present in nearly all life insurance policies today, and if the creditor attempts to reach the cash surrender or loan value of the policy, then the pro-

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50. The first section consists of one 200-word sentence and the second of one 119-word sentence.


52. Compare the interpretations of the final part of § 38.1-449 of Worthington, supra note 51, at 250 and Faris, supra note 49, at 39.

53. If the policy was assigned to a third party in fraud of creditors then the creditors may reach the full proceeds. Also, the insured's creditors may reach the proceeds of a policy payable to a third person to the extent of the premium actually paid in fraud of creditors. VA. CODE § 38.1-448 (Repl. Vol. 1976). See also Worthington, supra note 51, at 251-53.


55. "The freedom of policies from the reach of the insured's creditors does not imply that the proceeds which have become due because of maturity are not to be liable for the debts of the named or statutory beneficiary. Such further exemption must rest on an additional statutory mandate." Riesenfeld, Life Insurance and Creditors' Remedies in the United States, 4 U.C.L.A. L. REV. 583, 602 (1957) (emphasis original).

56. See Worthington, supra note 51, at 243.
tection afforded a beneficiary by section 38.1-448 shall not apply. Clearly, as to such policies, the creditors may reach the full amount of the cash surrender or loan value, thereby forcing the debtor either to terminate the policy or to pay to the creditor an equivalent amount. If, however, the insured debtor is a householder, then the total amount of the insurance entitled to the protection of section 38.1-448 is limited to $10,000.

The authors of the two articles that discuss sections 38.1-448 and 38.1-449 proceed from the premise, without articulating their reasons, that the $10,000 limitation applies to the face value of the policy. Under their interpretation, the cash surrender values of policies with face values of up to $10,000 are exempt, but if the face value is in excess of this amount, then only that surrender value or loan value which is attributable to $10,000 of the face value is exempt. The remainder of the surrender value is available to the creditors. This interpretation, although reasonable, is only one way to construe the statute. Indeed, the interpretation is not entirely faithful to the language of the statute. The primary difficulty with their interpretation is that neither Code section refers to the "face value" of the policy. The proper construction of the statute may be that the $10,000 limitation does not apply to the face value of the policy, but rather to its cash surrender or loan value. If this interpretation is correct, the insured debtor's life insurance policies are protected fully as long as their cash surrender or loan value does not exceed $10,000. The creditors may reach such policies only to the extent the cash surrender or loan value exceeds $10,000.

This alternative interpretation might be criticized on the ground that it provides too generous an exemption to the debtor and withholds too great an amount from the creditors. The issue is one of

60. See Faris, supra note 49, at 39; Worthington, supra note 51, at 250.
61. Another difficulty in interpreting the statute as exempting cash surrender value attributable to $10,000 of face value is that in one instance the exemption may be zero and in another many thousands of dollars, because the cash surrender value is largely a function of the age of the policy. In general, the older the policy, the greater the surrender value. Why the legislature would provide for such an amorphous exemption is unclear.
statutory construction, not an evaluation of the wisdom of the legislative judgment. Indeed, this more generous interpretation of section 38.1-449 seems entirely consistent with the liberal exemption provided in section 38.1-448, under which the exempt proceeds available to the beneficiary are unlimited. Equally important, the exemption of section 38.1-449 is provided only for the "householder," a favored individual in Virginia exemption law. Moreover, the section containing the troublesome language, although not referring to "face value," does refer to the cash surrender or loan value of insurance policies. The language of section 38.1-449 concerning monetary limitations should refer to cash surrender or loan value because sections 38.1-448 and 38.1-449 make no reference to the term "face value" and the language of the value limitation seems to refer back to surrender or loan value.

Arguably, this alternative interpretation also might be objectionable because, although section 38.1-449 declares that the "total amount of such insurance entitled to the protection afforded by [section] 38.1-448 shall not exceed ten thousand dollars," section 38.1-448 clearly refers to face value. As already noted, section 38.1-448 nowhere mentions face value; neither does it, as one author has assumed, refer exclusively to rights "which arise upon the death of the insured." Rather, section 38.1-448 refers only to "proceeds and avails" and it has been asserted correctly that "'proceeds and avails' include benefits payable while the insured is still living.

Benefits such as the cash surrender value and the loan value are unquestionably benefits potentially payable while the insured is still living and thus are included in the "proceeds and avails" language of section 38.1-448. Hence, the argument that

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64. Worthington, supra note 51, at 247.
65. See In re White, 185 F. Supp. 609, 613 (N.D. W Va. 1960), and cases cited therein. The court in In re White, interpreting an identical statute, rejected the trustee's argument that the words "proceeds and avails" referred only to the "death benefits" payable upon the maturity of the policy by the death of the insured. The court held that the words "proceeds and avails" when used in life insurance exemption statutes comprehend the protection of cash surrender values and other values built up during the life of the policies as well as the death benefits. Accord, Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 281, 284, 177 S.E.2d 291, 296-97 (1970) (construing statute almost identical to Virginia statute); see Schwartz v. Seldon, 153 F.2d 334, 336 (2d Cir. 1945).
the reference in section 38.1-449 to section 38.1-448 implies that the $10,000 limitation refers to face value stems from a misinterpretation of section 38.1-448 and is not persuasive.

In summary, under the proposed interpretation, the life insurance exemption afforded the Virginia debtor is a generous one.66 The interest of a beneficiary in a life insurance policy is fully exempt from the creditors of the insured, subject to section 38.1-449 which states that if the insured has reserved the right to change the beneficiary, then the creditor may reach the full cash surrender or loan value of the policy unless the insured debtor is the head of the household. In that event, the cash surrender or loan value of the policy is exempt up to the value of $10,000.

**Other Virginia Exemptions**

Virginia exempts certain social welfare benefits provided under the auspices of the state.67 The Virginia Code insulates all workmen’s compensation benefits from the claims of creditors;68 likewise, the statute invalidates any assignment by the debtor of his workmen’s compensation benefits.69

A person who receives unemployment compensation holds the proceeds exempt from any process to collect a judgment.70 The ex-

66. In comparison Iowa protects from creditors the proceeds of life insurance payable to the husband, wife or children of the insured. Iowa also exempts from creditors claims up to $15,000 in proceeds from husband's life insurance provided the debts are incurred before the death of the husband. IOWA CODE ANN. § 511.37 (West 1949). Thus, Iowa differs from Virginia in that beneficiaries other than the spouse and children of the insured receive no protection.

In North Carolina, on the other hand, the entire proceeds of insurance policies, regardless of cash surrender value or loan value, are exempt from the claims of creditors of the insured provided, 1) the creditor cannot demonstrate fraud by the debtor; 2) the proceeds are payable to beneficiaries other than the insured. N.C. GEN. STAT. § 58-206 (1975). See also id. § 58-205 (Supp. 1979) (variant formulation of exemption to clarify rights of relatives of insured). North Carolina thus is more generous than Virginia because it imposes no limit on the beneficiaries or amount of the exemption.

67. For other miscellaneous Virginia exemptions, see note 5 supra.

68. VA. CODE § 65.1-82 (Repl. Vol. 1973) states that, "No claim for compensation under this Act shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors." Id.

69. Id.

70. Id. § 60.1-125 (Repl. Vol. 1973). The text of the section states that
[a]ny assignment, pledge or encumbrance of any right to benefits which are or may become due or payable under this title shall be void; and such rights to
emption, however, is not absolute. The statute does not exempt unemployment compensation funds that have been commingled with other funds of the debtor.\textsuperscript{71} Also, a creditor whose claim derived from furnishing "necessaries" to the debtor, his spouse, or his dependents is not barred by the exemption.\textsuperscript{72}

These exemptions serve the public policy goal of ensuring that the debtor and his family retain some minimal degree of protection in times of hardship. At the same time, the exemption reflects a realization that to subject such social welfare benefits to the claims of creditors would undermine the intended purpose of the programs, to provide help for the debtor who is incapable of providing for himself. The provision that denies the exemption when the funds have been commingled may have the effect of denying the exemption from operating because the uninformed debtor innocently could commingle his unemployment compensation funds with other funds in his general checking account.

\section*{FEDERAL EXEMPTIONS AVAILABLE TO VIRGINIA DEBTORS}

\subsection*{Wage Exemption}

The wage exemption is of paramount importance to the debtor because it gives him the opportunity to retain a minimal amount of his wages with which to rehabilitate himself. In 1968 Congress passed the Consumer Credit Protection Act.\textsuperscript{73} Title III of the Act limits garnishment of earnings to the lesser of twenty-five percent of "disposable earnings"\textsuperscript{74} per week or the amount by which disposable earnings for a week exceed thirty times the federal minimum hourly wage.\textsuperscript{75} "Disposable earnings" are defined as "that

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\item benefits shall be exempt from levy, execution, attachment or any other remedy whatsoever provided for the collection of debts; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.
\end{itemize}
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\textit{Id.}

\textsuperscript{71.} \textit{Id.}

\textsuperscript{72.} \textit{Id.}


\textsuperscript{74.} \textit{Id.} § 1672(b).

\textsuperscript{75.} The current federal minimum hourly wage is $3.10. 29 U.S.C.A. § 106(a)(1) (West
part of earnings remaining after the deduction of any amounts required by law to be withheld. The Act, binding on all states to the extent that it establishes a minimum amount that the debtor is entitled to hold exempt from garnishment proceedings, expressly permits states the option of providing an even greater wage exemption. Virginia has adopted the federal wage exemption almost verbatim. The statute guarantees to the debtor, on a weekly basis, the greater of either seventy-five percent of his disposable earnings or thirty times the current federal minimum hourly wage.

Miscellaneous Federal Exemptions.

The United States Congress has provided an assortment of other exemptions applicable to monies owed to or received by the debtor derived from certain specified federal funds. Payments of benefits due or to become due under any law administered by the Veteran's Administration are exempt from the claims of creditors either before or after they have been received by the beneficiary. This law has been interpreted to protect funds after they have been deposited in the debtor's bank account but held not to extend to real or personal property purchased with the exempt funds. Other statutes exempt Social Security payments, Foreign Service Retirement and Disability payments, and any compensation received from the federal government arising out of injury or death.

1978). As of January 1, 1981, the minimum wage will increase to $3.35 per hour. Id. See Note, Garnishment in Virginia, supra this issue.

77. Id. § 1673(c) (West Supp. 1979).
78. Id. § 1677 (West 1974).
from a "war risk hazard."\textsuperscript{85} The wages of a master, seaman, apprentice, and fisherman employed on fishing vessels are exempt from execution, garnishment, or attachment,\textsuperscript{86} as are all death and disability benefits paid under the Longshoremen's and Harbor Workers' Compensation Act.\textsuperscript{87} Although civil service retirement benefits are protected,\textsuperscript{88} at least one federal court has held that the exemption applies only to future pension amounts and not to those already paid and accumulated in segregated savings accounts.\textsuperscript{89} The Railroad Retirement Act provides an exemption for all annuities and pensions that derive from the Act;\textsuperscript{90} a similar exemption is applicable to Railroad Unemployment Insurance benefits.\textsuperscript{91} Finally, Congress has exempted all special pensions paid to winners of the Congressional Medal of Honor.\textsuperscript{92}

\section*{The Inadequacy of the Present Exemption Scheme}

\subsection*{Its Anachronistic Character}

Probably the most obvious failure of the Virginia scheme lies in its anachronistic nature. The outdated character of the statutory exemptions is illustrated most dramatically by the Poor Debtor's Exemption\textsuperscript{93} which was enacted in 1837.\textsuperscript{94} The language of the statute as it appears today is similar to the language used over 142 years ago.\textsuperscript{95} Obviously written for an agrarian society, the statute is

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93. Va. Code § 34-26 (Supp. 1979); see notes 44-46 supra & accompanying text.
95. A comparison of the following language of the original statute provides an illustration of the piecemeal revision the statute has undergone:

\textit{Be it enacted by the general assembly, That it shall be lawful for each white person in this commonwealth, being a husband or parent, against whom an execution may hereafter issue upon judgments for which the cause of action shall arise after the first day of August, eighteen hundred and thirty-seven, to select or set apart one cow, one bedstead, bed and necessary bedding for the same, half dozen knives and forks, six plates, two dishes, two basins, one pot, one oven, six pieces of wood or earthenware, one loom and its appurtenances,}
wholly inadequate to provide for the needs of a debtor in modern times. For example, few debtors today are likely to own a loom, twenty-five bushels of rye or buckwheat, a barrel of flour, or three hogs. Although the statute has been amended numerous times since its enactment, it remains one of the most out-of-date provisions in the Virginia Code. The amendments represent nothing more than piecemeal attempts by the legislature to include random contemporary items. The 1976 amendment, for example, added to the list a freezer and a clothes dryer. The net result of these piecemeal reforms, however, is a provision of the Code which refers, in the same sentence, to such items as a loom, a spinning wheel, and a sewing machine. Further evidence of the anachronistic nature of these provisions is revealed by the omission of the debtor's automobile, a virtual necessity, although the statue is careful to exempt an axe and a deck of cards. Likewise, the statutory exemptions offer no protection for alimony or child support payments the debtor may be receiving. If one purpose of the exemption laws is to provide basic necessities for the debtor and his family, support income under a court decree should merit legislative protection.

one spinning wheel, one pair of cards, one axe, also five barrels of corn, or one barrel of flour, two hundred pounds of bacon or pork, five dollars in value of hay or other forage

Id.

96. The clothes dryer was limited to a value of $150; the 1976 amendment also added frozen goods to the list. Acts of March 24, 1976, c. 150, § 5, 1976 Va. Acts 186.
98. Id. Some imaginative attorneys, however, have not been constrained by such statutes. In California, a court recently held that an automobile that was used by a licensed real estate salesperson to transport himself and prospective buyers to and from properties for sales could be considered a "tool or an implement" and therefore was exempt from execution. Sun Ltd. v. Casey, 157 Cal. Rptr. 576 (Ct. App. 1979).
99. See Vukowich, supra note 1, at 824-25:

Although alimony and child support payments represent an important type of support income, these payments rarely are exempted from the claims of either the payor's or the payee's creditors. This failure to protect support payments after receipt obviously contradicts the avowed purpose of the exemption laws — protection of debtors' families.

Id. But see note 79 supra. See also Note, Enforcing Family Support Obligations in Virginia, infra this issue.
Favortism

Another shortcoming of the Virginia exemption scheme is that certain debtors are favored over others for no apparent reason. For example, certain debtors, especially farmers, are more likely to possess a greater proportion of the items exempted under the Poor Debtor's Exemption than are other debtors. Although this statute exempts the mechanic's tools as well as the boat and tackle of an oysterman or fisherman, it provides no such protection for any other occupations. The statute that exempts certain articles belonging to the "householder engaged in agriculture" further illustrates the inherent favoritism of the exemption scheme. As noted previously, this section allows the farmer to exempt certain articles in addition to the homestead exemption, and in addition to the items specified in the Poor Debtor's Exemption. Although perhaps justifiable when most individuals engaged in some form of farming, this special protection of a debtor engaged in agriculture today is unreasonable.

Lack of Notice

Another defect in Virginia's exemption plan, which may rise to constitutional dimension, is the failure to require any form of notice to the debtor of the availability of his exemptions. That many debtors have been deprived of the exemptions to which they are entitled simply because they were unaware of their exemption rights is probable. The lack of a statutory mandate that the debtor be fully informed of his rights is especially egregious; the purpose of the exemption statutes is thwarted if the debtor is ignorant of their existence. A statute that ensures that the debtor know his

100. Vukowich, supra note 1, at 829. The author notes that "[n]ot all debtors' needs are the same, and the statutory specifications consequently often favor certain debtors over others." Id.


104. The number of farms in Virginia dropped from 80,000 in 1964 to 53,000 in 1974. During the same period, the amount of agricultural production fell from 12,002,000 acres to 9,678,000 acres while the average acreage per farm rose from 149 acres to 184 acres. U.S. Fact Book 679 (1978).

Concomitantly, nonagricultural employees rose from a total of 1,018,000 in 1960 to 1,805,000 in 1974. Id. at 401.
exemption rights and that guarantees him a right to a hearing when necessary can remedy what arguably is a lack of due process in the Virginia exemption plan.105

*Failure to Advance Policies*

The current statutory exemptions fail to advance in any consistent and coherent fashion the basic policy goals that underlie the exemption scheme. If the exemptions are intended to reconcile the competing concerns of debtor and creditor, the present scheme in Virginia is inadequate. From the debtor’s point of view, many of Virginia’s exemptions are unrealistically conservative. From the creditor’s point of view, allowing the debtor to claim certain exemptions regardless of need is unfair and goes beyond the public policy justification of providing minimal necessary protection to the debtor.

The homestead exemption provides an illustration. The purpose of this exemption is to safeguard the debtor’s home. This purpose, however, is undermined by the inadequacy of the $5,000 limit.108 Because of the rapid rise in property values caused by today’s inflationary economy a homeowner doubtless will acquire $5,000 worth of equity in his house in a very short time. Thus, because the homestead exemption currently is limited to $5,000 and because the debtor’s equity frequently will exceed this amount, the debtor’s home may be subject to a forced sale. The debtor and his family consequently may lose their home and though they will get $5,000 that probably will be inadequate to permit the purchase of a new home.107 The Virginia homestead exemption therefore

104. See Greenfield, *A Constitutional Limitation on the Enforcement of Judgments—Due Process and Exemptions*, 1975 WASH. U.L.Q. 877. The author concludes that “[i]t is clear that existing statutes, which do not provide for any notice or hearing before levy, do not meet current standards of due process.” *Id.* at 923.

105. See *id.* at 928. Greenfield suggests a form of notice that informs the debtor not only of the specific property actually being levied upon by the sheriff but also of all categories of property that may be claimed as exempt. Such a notice states that if the debtor wishes to claim as exempt any property the sheriff is attempting to levy upon he must complete an attached “Claim of Exemption” within 10 days after the levy. If the judgment creditor desires to contest the claim of exemption, he must do so within seven days after the claim of exemption is returned to the sheriff, in which event a hearing will be held after notice to the debtor to determine whether the debtor is entitled to keep the property as exempt. *Id.*

should be increased to a figure that more accurately reflects today's increased home values, such as $15,000 or $20,000. Also, the amount of the exemption could be stabilized by indexing it to market conditions.

The current homestead exemption is ill-suited to accomplish its purposes in other ways. For example, if the homestead exemption represents the judgment of the legislature regarding the minimum amount to which any debtor is entitled, that judgment is undermined by the many procedural obstacles placed between the debtor and his enjoyment of the exemption. Specifically, if the exemption did not have to be "declared" but was automatic, the debtor could not lose his exemption unwittingly. Also, if the exemption is truly for the benefit of the debtors' family as much as the debtor himself, then that policy is subverted if the homestead can be lost when the debtor fails to claim it; the debtor's family should be entitled to claim the exemption if the debtor neglects to act. Furthermore, because the homestead exemption is not self-executing, the debtor, even after he has complied with all the prescribed procedures, still may have to obtain a motion to quash at his own expense if his exempt property is appropriated by creditors. Such procedural obstacles increase the likelihood that the homestead will be lost because of technicalities.

The most serious failing of the homestead exemption is the statute providing for its waiver. Virtually every recorded deed of

107. See Vukowich, supra note 1, at 806.

108. For example, California provides heads of households with a $40,000 real property homestead exemption. CAL. CIV. CODE § 1260 (West Supp. 1979). The homestead value is that which exceeds liens and encumbrances on the property. Id. All others are entitled to a $25,000 exemption in real property over and above liens and encumbrances on the property. Id. Texas is even more generous. The state constitution offers every family a choice between a rural homestead of two hundred acres with no value limitation or an urban residential homestead plus an urban business homestead. TEX. CONST. art. 16, § 5 (1876).

109. See notes 16-19 supra & accompanying text.

110. See notes 14-15 supra & accompanying text.

111. The spouse and children of the debtor can claim the homestead only after the debtor's death. VA. CODE §§ 34-11, -15 (Repl. Vol. 1976). Additionally, when the debtor waives his homestead, the spouse or children cannot contest the waiver after the debtor's death. Linkenhoker's Heirs v. Detrick, 81 Va. 44, 56-57 (1885).


113. Additionally, the Virginia Code provides no procedure for claiming the exemption of the items enumerated in § 34-26. How the debtor may claim these exemptions is uncertain.
trust in Virginia today contains a waiver of the homestead exemption.\textsuperscript{115} Apparently, the inclusion of such contractual waivers is automatic with every lending institution. Even though the waiver itself must be clear and unequivocal, the statute does not require that the debtor waive his exemption knowingly and intelligently.\textsuperscript{116} The typical debtor is not in a position to refuse to sign a contract containing a waiver of exemption provision; if the debtor’s need is sufficient he will sign regardless of the waiver. Thus, the practical effect of the statute allowing for waiver of the homestead is the de facto abolition of the exemption for a great many debtors. Such a result is inconsistent with an exemption scheme that purports to offer the debtor a certain minimum allowance with which to meet his immediate needs.

**Availability of Exemptions Regardless of Need**

From the creditor’s point of view, the debtor should not be permitted certain exemptions without regard to his need. Indeed, if such a complaint is justified, it demonstrates the extent to which the statutory exemptions have deviated from their intended purposes. The life insurance exemption is illustrative. As noted above, the beneficiary of a life insurance policy takes the proceeds free of all claims of creditors.\textsuperscript{117} The statute does not limit its protection to any specific class of beneficiaries, such as the dependents of the insured debtor, but extends the protection to any lawful beneficiary or assignee of a beneficiary. If the primary justification for the life insurance exemption is to afford protection to the dependents of the insured,\textsuperscript{118} a provision that protects all beneficiaries cannot be justified on policy grounds. There is no apparent reason why every beneficiary should merit unlimited protection. To the con-

\textsuperscript{114} Id. § 34-22 (Repl. Vol. 1976); see notes 38-42 supra & accompanying text.

\textsuperscript{115} In a random sampling of numerous deed books in the Williamsburg-James City County Courthouse, every deed of trust contained the phrase “exemptions waived” or some equivalent. The Virginia Code provides the following:

The words “exemptions waived,” or words of like purport, shall be construed as if the deed set forth: “The grantor hereby waives the benefit of his exemptions as to the debt hereby secured and as to all other obligations which may be imposed upon him by the provisions of this deed of trust.”

Id. § 55-60(3) (Supp. 1979).

\textsuperscript{116} See notes 38-41 supra & accompanying text.

trary, the exemption should protect only those to whom the debtor owes some duty of support. More importantly, the exemption should protect the beneficiary only to the extent reasonably necessary for his needs. Likewise, the creditor will object to the provision that exempts up to $10,000 of the cash surrender value of the policy if the insured is a householder.\textsuperscript{119} The objection is not without merit; to keep this amount from the creditor is unfair, particularly if the protection such a policy affords exceeds the amount necessary to meet the needs of the debtor and his family.

Lastly, certain items enumerated in the Poor Debtor's Exemption\textsuperscript{120} create the potential for debtor abuse. A sophisticated debtor may insulate a substantial amount of his resources from the creditor's reach by investing in exempt items of unusual value such as Gutenberg Bibles or oriental rugs before judgment. Ostensibly, such items would qualify for the exemption even though the actual value is far in excess of the extrinsic value that the statutes intended to protect. In order to avoid the possibility of such abuse, the Poor Debtor's Exemption should be qualified by a requirement that the debtor have the burden of proof, when claiming the exemption, of showing that the items claimed comport with his needs.

\textit{Shortcomings of the Wage Exemption}

Virginia's wage exemption, adopted from the Consumer Credit Protection Act,\textsuperscript{121} also warrants reexamination. The exemption often may be inadequate. The National Commission on Consumer Finance has recommended an increase in the federal exemption by limiting garnishment of earnings to the lesser of twenty-five percent of disposable earnings per week or the amount by which disposable earnings exceed forty, rather than thirty, times the federal minimum hourly wage.\textsuperscript{122} Additionally, Virginia's wage exemption lacks flexibility because it limits garnishment without reference to the actual needs of the debtor. One commentator has suggested

\begin{footnotesize}
\textsuperscript{118} Vukowich, \textit{supra} note 1, at 810 comments that "[t]he major justification of the exemption is that life insurance affords protection to dependents of the insured." \\
\textsuperscript{119} Va. Code § 38.1-449 (Repl. Vol. 1976); see text accompanying notes 59-66 \textit{supra}. \\
\textsuperscript{120} Va. Code § 34-26. See note 44 \textit{supra}. \\
\textsuperscript{121} 15 U.S.C. §§ 1601-1681t (1974); see notes 67-69 \textit{supra} & accompanying text.
\end{footnotesize}
that the percentage of exemption be increased five percent for each dependent up to a maximum of three and that the multiple of the minimum hourly wage be increased by five for each dependent.\(^{123}\) By permitting flexibility in the wage exemption, the scheme would approximate more closely the needs of the debtor.

**Summary**

Virginia's statutory exemption scheme is unsuited to perform its proper function, the reconciliation of the interests of both debtor and creditor. Scattered throughout the Code, the exemptions are incapable of advancing any clear legislative policy or purpose. Many of the provisions are so outdated that mere amendment would be inadequate. Indeed, the occasional attempts at revision and piecemeal amendments are largely culpable for the current state of the exemption scheme. The amendments themselves frequently bear little relation to any legislative purpose; certain amendments appear to be no more than responses to pressures of particular interest groups.\(^{124}\) Many of the amendments appear to have been adopted in a casual if not careless manner. For example, as a result of the 1977 amendments, section 34-4 conflicts with section 34-13 regarding the amount of the homestead exemption which may be claimed in personal property.\(^{125}\)

Because further attempts at amending the existing statutes likely would compound rather than resolve these problems the current statutes should be repealed and replaced by a new exemption scheme. The legislature should undertake the task only after a thorough re-examination of the policies that underlie the exemption statutes and of how best to advance such policies.

The Uniform Exemptions Act\(^ {126}\) provides a well-reasoned alternative worthy of careful study by the Virginia legislature. Although a comprehensive examination of the Act is beyond the scope of this Note, some representative provisions illustrate its appeal as a

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124. See Note, *Bankruptcy Exemptions: Critiques and Suggestions*, 68 *Yale L.J.* 1459, 1466 (1959), wherein the author observes, “[M]any statutes operate unevenly, for legislatures have responded to particular interest groups by exempting specialized property.”

125. See note 13 *supra* & accompanying text.
starting point for revision. As a whole, the Uniform Exemptions Act represents a comprehensive plan of exemptions rather than a conglomeration of miscellaneous statutes. More importantly, its provisions were drafted in the context of today's modern, albeit inflationary, economy. For example, the value of exemptions are tied to the Consumer Price Index, thereby circumventing the problem posed by inflation. The homestead exemption is set at $10,000, an amount that more closely approximates the needs of a debtor and his family. Basic necessities that the Uniform Exemptions Act provides for the debtor, likewise reflect its more modern character. Exempt items include a health aids and welfare benefits, such as social security and unemployment compensation. Certain enumerated items of personal property, including a motor vehicle, also may be exempt provided the debtor's interest does not exceed a specified dollar amount. The section dealing with life insurance exempts up to $1,500 of accrued dividends and loan values on any unmatured policy owned by the debtor, effectively denying a windfall enjoyed by beneficiaries at the expense of the creditors in Virginia. Lastly, the Act bars waiver of the exemptions and provides minimum due process requirements.

Bankruptcy Exemptions and Their Effect Upon Virginia Law

On November 6, 1978 pursuant to the authority granted expressly by the Constitution, Congress passed the Bankruptcy Reform Act of 1978 which enumerates specific exemptions to which a bankrupt is entitled. A consideration of the effects of the new bankruptcy law is essential to an understanding of the current status of Virginia's statutory exemption plan. The relationship between the state and federal exemption plans must be balanced del-

126. Uniform Exemptions Act §§ 1 to 25.
127. Id. § 2(a).
128. Id. § 4(a).
131. Id. § 7.
132. Id. § 12.
133. Id. § 14.
134. The Constitution gives Congress the power to enact "uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. art. 1, § 8, cl. 4.
icately, lest unnatural incentives for bankruptcy arise. The Bankruptcy Reform Act effectively overrules any conflicting state statutes.

The exemption provisions of the Bankruptcy Reform Act resemble closely the exemptions available in the Uniform Exemptions Act. This is because the Uniform Exemptions Act was written in anticipation of a new bankruptcy law and several persons active in drafting it also contributed to the Commission on the Bankruptcy Laws. When the new bankruptcy law first was enacted it appeared that, at least in a bankruptcy context, the Virginia debtor would have the benefit of a new, modernized exemption scheme. The original optimism, however, proved premature.

A provision in the Bankruptcy Reform Act states that the debtor may exempt either (1) property that is specified under the 1978 Act “unless the State law that is applicable to the debtor specifically does not so authorize” or (2) property that is exempt under other federal law and under the law of his state. This provision is unfortunate because, by giving the states the freedom to opt out of the federal exemption scheme, it thwarts the goal of uniformity, one of the primary purposes of bankruptcy law.

The Virginia legislature responded quickly to the opportunity afforded by the Bankruptcy Reform Act. On January 22, 1979, less than three months after the 1978 Act was passed, a bill was offered in the Virginia House of Delegates declaring that Virginia would opt out of the federal exemption plan. Although no hearings

136. If a significant difference exists between an individual state’s exemption laws and those permitted in bankruptcy, the incentive to apply for relief in bankruptcy is enhanced. For example, if the federal exemptions are more generous, the debtor is more likely to petition for voluntary bankruptcy in order to obtain the greater exemptions. Conversely, when the state exemptions offer more to the debtor, the creditor would petition for involuntary bankruptcy in order to reach property that would be exempt under state law. See Uniform Exemptions Act, at iv.
137. See notes 127-33 supra.
138. The committee that drafted the Uniform Exemptions Act began its work in the year immediately after the Report of the Commission on the Bankruptcy Laws was submitted to the Congress. Mr. Frank Kennedy, a member of the Special Committee on the Uniform Exemptions Act, was also Executive Director of the Commission on the Bankruptcy Laws of the United States.
139. 11 U.S.C.A. § 522(b) (Supp. 1979) (emphasis supplied). If the debtor chooses the latter alternative he also may exempt an interest in property in which the debtor has an
were held and no witnesses called to testify, the bill passed by a unanimous vote of the House of Delegates on February 1, 1979, and by a unanimous vote of the Senate on February 16, 1979. The Governor signed the bill into law on March 31, 1979.

The action of the legislature was ill-advised. It is a mystery why a bill of such import would be adopted so quickly and without the benefit of the views of those with expertise in the field, many of whom were unaware of the legislation until after it was signed into law. The rationale of the bill is not entirely clear; however, the fact that the Virginia Bankers' Association was actively lobbying for its enactment may provide some clue to the intent of the legislation. The bill is a windfall to creditors because Virginia will retain the present exemption plan, with all its shortcomings, rather than allow the bankrupt the benefit of the more generous exemptions provided in the Bankruptcy Reform Act.141

If in enacting the amendment the legislature intended to maintain the status quo in Virginia debtor-creditor relations, it has failed. Under the Bankruptcy Reform Act, the commencement of a bankruptcy case creates an estate. The estate includes all property of the debtor, even that which the debtor may claim as exempt. Only after all property has come into the estate is the debtor interest as a tenant by the entirety or joint tenant to the extent that interest would have been exempt from process under relevant nonbankruptcy law. Id. See notes 146-49 infra & accompanying text.

140. The bill, which emanated from the Committee on Corporations, Insurance and Banking, amends the Code of Virginia by adding § 34-3.1. The section reads as follows: "No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in [Section 522] subsection d of the Bankruptcy Reform Act except as may otherwise be expressly permitted under this title." Va. Code § 34-3.1 (Cum. Supp. 1979).


141. In a telephone conversation with the author of this Note, counsel to the Virginia Bankers Association stated that he drafted the bill.

142. See 11 U.S.C.A. § 522(d) (West Supp. 1979). The exemptions include a $7,500 homestead, $1,200 interest in one automobile, $200 of household goods, $500 worth of jewelry, $750 of professional or trade goods, unmatured life insurance, $4,000 of the loan value in a life insurance contract, social welfare benefits, support payments owing to the debtor or his dependents. Id.
entitled to claim his exemptions. Now that the debtor can "exempt out" of the enlarged bankruptcy estate only those exemptions provided for under the Virginia scheme, the bankruptcy estate will include certain assets that the debtor did not surrender under the former bankruptcy law. Because Virginia does not expressly provide for the exemption of such assets, they now will be lost to the bankrupt altogether. Far from maintaining the status quo, the amendment to Virginia's Code effectively worsens the position of the debtor.

This conclusion is subject to one potentially major qualification. The 1978 Bankruptcy Act provides that when the state and local exemptions are applicable, as is now the law of Virginia, the debtor, in addition to those exemptions, also may exempt any interest in property held as a tenant by the entirety or joint tenant to the same extent that interest would be exempt from process under state law. In Virginia, property owned as tenants by the entirety and as joint tenancy is insulated from the claims of creditors of an individual cotenant. This provision allows a bankrupt to exempt all such property regardless of its value. Because most homes and automobiles of married persons are owned by both spouses, the exemption provides a potential windfall for the bankrupt.

The amendment may have other unintended effects. For instance, the 1978 Bankruptcy Reform Act declares unenforceable any waiver of the debtor's exemptions if the debtor executed the waiver in favor of a creditor with an unsecured claim. This provision clearly overrules the Virginia Code section that permits a

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148. See Ackerly, Tenants by the Entirety and the Bankruptcy Reform Act, supra this issue.
waiver of the debtor's homestead exemption,\textsuperscript{150} insofar as it allows a waiver of homestead exemptions in a bankruptcy case. A waiver is still permissible, however, in a state collection proceeding. Thus, a debtor who has executed a waiver of exemptions has a significant incentive to confront his creditors in the bankruptcy forum where the waiver is unenforceable. The introduction of such artificial inducements to bankruptcy is not conducive to healthy debtor-creditor relationships.

\textbf{Conclusion}

The recent amendment adopted by the Virginia General Assembly demonstrates its rigid adherence to an exemption plan that is intentionally inconsistent, grossly outdated, and inequitable. Strong consideration should be given to the repeal of this amendment and a complete examination of the current statutory exemptions. No purpose is served by permitting one set of antiquated exemptions to be applied in two distinct contexts, the bankruptcy forum and the forum of a state collection procedure. By repealing the recently enacted amendment, Virginia wisely would allow the exemptions available under the Bankruptcy Reform Act to prevail in a bankruptcy proceeding. In determining what exemptions ought to be available in the state's collection procedure, the Virginia legislature should consider carefully the recently proposed Uniform Exemptions Act. The adoption of the Act by Virginia would establish an exemption plan that is internally consistent, modern, and equitable, and that is balanced carefully with exemptions available under the bankruptcy law.\textsuperscript{151}

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\begin{footnotesize}
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\item 149. 11 U.S.C.A. § 522(e) (West Supp. 1979).
\item 151. This is essential in order to ensure that no unnatural incentives to bankruptcy arise because of a disparity between the state and bankruptcy exemption schemes. See note 136 supra.
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