Estates by the Entirety in Bankruptcy

Frank J. Spivak
University of Michigan Law School

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The principal goals of federal bankruptcy law are inherently conflicting. On the one hand is the policy that liquidation and distribution of the debtor's assets should yield as much as possible to satisfy creditors' claims. On the other hand is the policy that the debtor should be protected from overreaching creditors and should retain enough of his assets to embark on a financial "fresh start." The Code's exemption provisions are intended to strike an equitable balance between these conflicting policy objectives.

Exemptions under the Bankruptcy Act of 1898 were determined solely by reference to state law. The Bankruptcy Reform Act of 1978 liberalized the Code's exemption provisions by allowing debtors to choose between two distinct exemption systems. Under the new Code a debtor may elect either (1) a set of uniform federal exemptions, or (2) the exemptions provided by

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3. See H.R. REP. No. 595, 95th Cong., 1st Sess. 126 (1977), reprinted in 1978 U.S. CODE Cong. & AD. NEWS 5963, 6087, and in App. 2 COLLIER ON BANKRUPTCY (15th ed. 1981) [hereinafter cited as H.R. REP. No. 595]; see also Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes'.") (quoting Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915)).


state law and federal nonbankruptcy law. Most state legislatures, pressed by claims that bankruptcy law had become too pro-debtor, have enacted laws which preclude their citizens from electing the relatively liberal federal exemptions. A debtor who chooses — or is restricted to — non-Code exemptions may exempt any interest in entirety property to the extent that it is exempt from process under applicable nonbankruptcy law. Where the estate by the entirety is still recognized, this exemption allows married couples to place beyond the reach of their individual creditors a virtually unlimited amount of property.

This Note argues that the exemption for entirety property should be abolished. Part I examines the treatment of entirety property under the Code and illustrates the conflict between the entirety exemption and federal bankruptcy policy. Part II discusses procedural devices that creditors employ to subject entirety property to bankruptcy distribution.

I. Entirety Property and Bankruptcy Policy

The estate by the entirety is based on the legal fiction that husband and wife are one, and that a conveyance of property to both of them creates one estate which is separate from each

9. Id. § 522(b)(2).
13. See infra notes 14-24 and accompanying text.

spouse's individual property. Married couples are unrestricted in the amount of entirety property they may hold or the length of time they may hold it, so long as they do not convert nonexempt assets into entirety property on the eve of bankruptcy.


15. Couples may hold entirety property until one of them dies or they divorce. 2 AMERICAN LAW OF PROPERTY, supra note 14, § 6.6, at 24.

16. The Code's legislative history states that purposeful conversion of nonexempt assets to exempt assets on the eve of bankruptcy is not fraudulent per se. "As under current law, the debtor will be permitted to convert nonexempted property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." H.R. REP. No. 595, supra note 3, at 361. It is equally clear, however, that such conversions are prohibited if they are done with fraudulent intent to shield assets from the reach of creditors. 3 COLLIER ON BANKRUPTCY ¶ 522.08(4), at 522-33 to -34 (15th ed. 1981). In most cases, it is not readily apparent from the facts of the case whether the conversion was actually fraudulent. A review of the cases reveals a high correlation between a finding of fraudulent intent and a significant increase in the debtor's exemptions immediately prior to filing. Compare Love v. Menick, 341 F.2d 680 (9th Cir. 1965) (permitting the debtor to retain additional $460 in exemptions when, on advice of counsel, he cashed a life insurance policy which was partially exempt under state law and deposited the funds in a federal savings and loan association, rendering them completely exempt), and Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971) (allowing exemption because no secured creditors were prejudiced — though general creditors might be — when, on advice of counsel, a couple refinanced their car, paid off a previous car loan, and deposited $800 in a savings and loan association), with Kangas v. Robie, 264 F. 92 (8th Cir. 1920) (disallowing exemption when, a short time before filing, debtor retained money from his business rather than depositing it daily in the bank, ceased paying trade obligations, and purchased property into which he moved his family with intent to claim a homestead exemption), and Peyton v. Farmers Nat'l Bank, 261 F. 326 (5th Cir. 1919) (disallowing exemption when debtor, who purchased a house and lot two days before filing a petition, did not occupy the house or secure possession, nor disclose his intent to obtain a homestead exemption). See also First Tex. Sav. Ass'n v. Reed (In re Reed), 11 Bankr. 683 (Bankr. N.D. Tex. 1981); First Nat'l Bank v. Johnson (In re Johnson), 8 Bankr. 650 (Bankr. D. S.D. 1981). The possibility that debtors would convert large amounts of assets disturbed many who were involved with the passage of the Bankruptcy Reform Act: "It may be that in some states of the union this is not much of a problem, where exemptions are small; but here in California the amount of assets that a person contemplating bankruptcy can hide from his creditors with the assistance of a smart attorney is astounding." House Hearings, supra note 13, pt. 3, at 1356 (letter of Bankruptcy Judge Aaron K. Phelps). The consensus is that, [the Code's position] will protect those who have only a small amount of assets. Such debtors would be left with possibly not even a minimal amount of assets after liquidation if their small amount of property was not converted into exempt property. Though some states are liberal in the exemptions that they allow, thus creating the possibility of abuse in "bankruptcy planning," it must be remembered that many states as well as section 522(d) of the Code establish minimal exemptions as a floor.
At common law, the right of survivorship was indestructible and neither spouse could convey the fee — and creditors could not levy on it — without the consent of the other. In the majority of the twenty-six jurisdictions that recognize the estate, creditors of only one spouse still may not reach entirety property.

An individual domiciled in one of these majority states may prevent the use of entirety property for distribution to individual creditors by preventing the use of nonexempt assets in these states will be closely watched. Cf. In re Pappa, (1979-1981 Transfer Binder) Bankr. L. Rep. (CCH) ¶ 67,249 (S.D.N.Y. Oct. 29, 1979) (finding debtor's conveyance of residence — originally held as a tenancy by the entirety — to his wife to be fraudulent); Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L. Rev. 615, 630 (1978). Numerous cases from courts in Michigan and other states have held that conversion of nonexempt property into entirety property is fraudulent. See, e.g., Glazer v. Beer, 343 Mich. 495, 72 N.W.2d 141 (1955); Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182 (1949); Brydges v. Emmendorfer, 311 Mich. 274, 18 N.W.2d 822 (1945); Annot., 7 A.L.R.2d 1104 (1949).

17. See 2 H. Tiffany, supra note 14, at §§ 434, 436; 2 American Law of Property, supra note 14, at § 6.6. The unity of marriage causes differences in the treatment of creditors. Because joint tenants own undivided moities of the whole with equal rights to enjoyment of the property, their rights of survivorship are destructible and they may destroy the tenancy, thus creating divided interests and enabling creditors to levy on those interests. 2 H. Tiffany, supra note 14, at § 425. In a tenancy by the entirety, however, the husband and wife each own the entire estate, not merely an undivided fractional interest, thus adding the element of indestructibility.

18. Delaware, the District of Columbia, Florida, Indiana, Maryland, Missouri, Ohio, Pennsylvania, Rhode Island, Vermont, Virgin Islands, Virginia, and Wyoming treat the estate by the entirety as follows:

The usufruct is divided equally between husband and wife. (The present interest in the usufruct may be either a divided or an undivided one-half interest of each in the whole.) Neither the husband nor the wife individually can sell his or her present interest. Neither the husband nor the wife can sell his or her right of survivorship. Neither the present interest nor the right of survivorship of either spouse may be levied upon by their individual creditors.

Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am. Bankr. L.J. 255, 258 (1974); In re Thomas, 14 Bankr. 423 (Bankr. N.D. Ohio 1981) (interpreting Ohio's new statute). As in the above states, Michigan and North Carolina also preclude individual creditors from reaching the estate by the entirety. These two states, however, otherwise treat this estate differently. Id. at 297-99. This Note considers only the treatment of entirety property in the majority states.

creditors in bankruptcy by choosing state exemptions pursuant to section 522(b). Only a creditor of both husband and wife can prevent such an exemption — either by utilizing the expanded jurisdiction of bankruptcy courts to obtain a sale of the property, or by obtaining a stay of the discharge in order to pursue the entirety property in state court. But few courts have utilized their expanded jurisdiction and few creditors appear aware of the stay of discharge. Consequently, if only individual creditors are involved, or if a joint creditor fails to obtain expanded jurisdiction or a stay, debtors often are able to exempt a substantial amount of entirety property.

Such liberal exemptions fail to implement bankruptcy policy and harm society by raising the cost of credit. Bankruptcy is costly to creditors because liquidation of a debtor's assets rarely yields enough to satisfy creditors' claims. The more property in the bankruptcy estate, the smaller creditors' losses will be. Thus,


20. See infra notes 49-65 and accompanying text.

21. See infra notes 66-84 and accompanying text; Ackerly, supra note 4, at 701 passim. Creditors of only one spouse will be referred to as individual creditors. Creditors of the debtor and the nonindebted spouse will be referred to as joint creditors. An example of a joint creditor is a creditor holding a guaranty of payment from both husband and wife.


24. Entirety property can include any or all of the debtor's most valuable assets, such as a house or, in some states, a car. This result has caused many commentators to question this form of property ownership. See 2 AMERICAN LAW OF PROPERTY, supra note 14, at § 6.6; Committee on Changes in Substantive Real Property Principles, Report, 1944 A.B.A. SEC. REAL PROP. PROB. & TR. L. REP. 82; Huber, Creditor's Rights in Tenancies by the Entireties, 1 B.C. INDUS. & COM. L. REV. 197, 206-07 (1960); Grilliot & Yocum, Tenancy by the Entirety: An Ancient Fiction Frustrates Modern Creditors, 17 AM. BUS. L.J. 341, 352-53 (1979); Wilkerson, Creditors' Rights Against Tenants by the Entirety, 11 TENN. L. REV. 139, 147-48 (1953). A limited statutory exemption could alleviate this potential inequity. See Comment, Entireties Property: The Effect of Bankruptcy on Creditors' Rights, 28 U. PITT. L. REV. 267, 291 (1966) [hereinafter cited as Comment, Creditors' Rights].

one bankruptcy policy is to maximize the property in the estate to lessen creditors' losses.\textsuperscript{26} A competing bankruptcy policy, though, is to ensure the economic rehabilitation of the debtor, leaving him free of debt with enough property to embark on a financial "fresh start."\textsuperscript{27} The Code fulfills this second policy by exempting certain property from the bankruptcy estate.

Bankruptcy law must strike the appropriate balance between maximizing the property available to creditors and maximizing the property available to the debtor. The unlimited exemption of entirety property upsets this balance. Because the sole purpose of the exemption provision is to aid the debtor's economic rehabilitation, it should be subject to maximum as well as minimum limits.\textsuperscript{28} If no maximum limitation exists, the policy of reducing creditors' losses is ignored.

Creditors pass their losses on to businesses and consumers in a variety of ways: higher interest rates, tighter controls on the availability of credit, or any number of methods by which such losses are channeled through the political-economic system.\textsuperscript{29} As the value of exemptions offered to debtors increases, others in the economic system suffer increased aggregate costs. Therefore, liberal exemptions without specified maximums increase the cost of credit and decrease credit availability.

To preserve the proper balance between the conflicting interests of debtors and creditors, a debtor's interest in entirety property should be included in the bankruptcy estate for distribution. The debtor's spouse should be compensated for his or her share of the proceeds from the sale of such property.\textsuperscript{30} The dominant policy consideration for retaining entirety property interests — protecting the family dwelling from the overreaching

\textsuperscript{26} See supra note 2.

\textsuperscript{27} See supra note 3.

\textsuperscript{28} This was the position adopted by the Commission. COMMISSION REPORT, supra note 2, at 171.

\textsuperscript{29} See Kennedy, Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start, 76 W. Va. L. Rev. 427, 428 (1974). If increased borrowing costs cause a contraction of credit, those in the high-risk class of consumers may suffer most.

\textsuperscript{30} This result could be accomplished through either state legislation or an amendment to the Code, though the latter would be more efficient. If the Code were amended to abolish the entirety exemption, estates by the entirety would be severed and sold under 11 U.S.C. § 363(h) (Supp. IV 1980), and a proportionate share of the proceeds from sale of the entirety property would be given to the nondebtor spouse, id. § 363(j). Authority for such legislation is found in the bankruptcy clause of the Constitution, U.S. CONST. art. I, § 8, cl. 4. See C. Warren, BANKRUPTCY IN UNITED STATES HISTORY 8-9 (1935); Martin, Substantive Regulation of Security Devices Under the Bankruptcy Power, 48 COLUM. L. REV. 62, 74 (1948); 10 Comment, Constitutional Law—Bankruptcy—Frazier—Lemke Amendment, S. CAL. L. REV. 474, 478-79 (1937).
of one spouse — is more suitably accomplished by homestead exemptions, which exist in most states.

In addition to the economic costs of the entirety exemption, other problems apparent under the old Act were left unresolved by Congress, if not made worse. One is the newfound ability of a debtor to retain entirety property in fee simple when his spouse dies during the administration of the case. Under the old Act, if the debtor's spouse died within six months after the debtor filed, all interest in the estate by the entirety vested in the trustee. Under the new Code, however, the estate includes only property that the debtor acquires by bequest, devise, inheritance, a property settlement agreement with the debtor's spouse, or as the beneficiary of a life insurance policy. Consequently, the Code does not automatically bring exempted entirety property into the estate if the debtor's spouse dies within 180 days of filing. The death of the debtor's spouse merely triggers the debtor's right of survivorship — which in the majority states may not be levied upon by creditors of one individual spouse — and yields the full fee simple.

31. See 2 AMERICAN LAW OF PROPERTY, supra note 14, § 6.6, at 32.
32. See 1 AMERICAN LAW OF PROPERTY, supra note 14, § 5.75, at 810.
33. This discussion assumes that state exemptions and federal nonbankruptcy exemptions have been chosen. If the debtor chooses Code exemptions, his interest in the estate by the entirety is brought into the estate under the broad reach of 11 U.S.C. § 541(a) (Supp. IV 1980). See Kennedy, supra note 13, at 1064.

The debtor's death during the case does not cause exempted entirety property to pass to the estate in the majority jurisdictions. As under the old Act, the nonindebted spouse takes the property in fee simple by virtue of the right of survivorship. See 2 H. TIFFANY, supra note 14, § 430, at 218.

34. The old Act provided:

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

Bankruptcy Act § 70a, 11 U.S.C. § 110a (1976) (repealed 1978). When the debtor's spouse dies, the debtor becomes vested with the whole of the estate by the entirety by virtue of the right of survivorship. This usually results in the vesting of a fee simple interest. See 2 H. TIFFANY, supra note 14, § 430, at 219. As the fee is transferable, this provision would bring the property into the estate under the old Act. See Craig, supra note 18, at 264-66.

36. See 2 AMERICAN LAW OF PROPERTY, supra note 14, § 6.6, at 29; 2 H. TIFFANY, supra note 14, § 430, at 218. Furthermore, the debtor's creditors cannot reach the debtor's interests in exempted property to satisfy a pre-petition debt. See 11 U.S.C. § 522(c) (Supp. IV 1980).

The congressional subcommittee considering the two bankruptcy bills in 1976 was
The sort of abuse most likely to occur as a result of this loophole is the filing of a bankruptcy petition in anticipation of the death of one's spouse. Congress might have been reluctant to compel a debtor to find a new home while suffering from the death of a spouse and the stigma of bankruptcy. More likely, however, Congress did not consider this eventuality. Sounder policy would treat all debtors equally. The enlargement of the debtor's interest in entirety property due to the death of the nonindebted spouse should be treated as if it were property acquired by inheritance, and thus brought into the estate. The debtor might argue that such inclusion would be inequitable because he would lose all exemptions in the former entirety property, whereas, had he chosen Code exemptions, some of this property would have remained exempt. However, in states which have not "opted out" of giving the debtor a choice of exemptions, the debtor could probably amend his schedule to obtain at least the minimum exemptions provided by the Code.

warned of this result. House Hearings, supra note 13, pt. 4, at 2052-53 (statement of William T. Plumb, Jr.). Despite this warning, § 541(a)(5) was not substantively altered from the section proposed by the Commission, § 4-601(a)(4). See COMMISSION REPORT, supra note 2, pt. 2, at 147. The Commission drafted § 4-601(a)(4) with the understanding that other sections of its draft included entirety property in the estate in all cases, thus precluding any problem with the right of survivorship. See id., pt. 1, at 195-96. However, when the proposal of the National Conference of Bankruptcy Judges to offer debtors a choice of exemptions was adopted, 11 U.S.C § 522(b) (Supp. IV 1980); see H.R. Rep. No. 595, supra note 3, at 126, the Commission's § 4-601(a)(4) was left unaltered, perhaps due to an oversight on the part of Congress. Thus, when the debtor has chosen state exemptions and the debtor's spouse dies within 180 days after the petition is filed, the Code is incapable in the majority states of bringing the resulting fee into the estate.

37. See Plumb, supra note 18, at 132-33.

38. See id.

39. The legislative history notes that the new bankruptcy rules will provide for this situation. H.R. Rep. No. 595, supra note 3, at 360-361. Until then, the old rules remain in effect. Under those rules, many bankruptcy courts have permitted debtors to amend their exemption schedules when circumstances warranted. See Fed. R. Bankr. P. 110; cf. PROPOSED FED. R. BANKR. P. 1009 (Mar. 1982) (permitting amendment as a matter of course). Because Congress intended the Code exemptions to serve as a floor in states that have not opted out, a debtor should not be forced to accept less as a result of an unfavorable ruling on a major exemption. See Kennedy, supra note 13, at 1063. Amendments to exemption schedules should be allowed when necessary to afford justice to the parties. See, e.g., Thompson v. Powell, 413 F.2d 276 (5th Cir. 1969); see also In re Skelton, 299 F. 606 (N.D. Ga. 1924) (granting amendment which did not prejudice creditors); In re Korff, 14 Bankr. 189 (Bankr. E.D. Mich. 1981) (denying amendment from state to Code exemptions after state exemption in entirety property disallowed because joint creditors could have proceeded against joint petitioners' entirety property); Central Kan. Credit Union v. Lyon (In re Lyon), 2 COLLIER BANKR. CAS. 2d (MB) 561 (Bankr. D. Kan. 1980) (disallowing amendment after exemptions had been determined and a party in interest had sought affirmative relief based upon that determination). But see In re Powers, 339 F. Supp. 1068 (W.D. Ark. 1972) (disallowing amendment where no error or mistake was made).
In three states which allow individual creditors to levy on the debtor's contingent right of survivorship, the result may differ.\textsuperscript{40} Because the debtor's right of survivorship is severable from the estate by the entirety, the trustee in those states collects the contingent right.\textsuperscript{41} Despite lacking the right of survivorship, the estate by the entirety does not become a joint tenancy\textsuperscript{42} and the undivided interest remains immune from levy by individual creditors.\textsuperscript{43} Nevertheless, under state law,\textsuperscript{44} if the nonindebted spouse dies, the entirety property vests in the trustee.\textsuperscript{45} This result seems equitable because the debtor had no expectation of retaining the entirety property before the death of the nonindebted spouse.

Thus, in some states, section 541 precludes the availability of the entirety exemption upon the death of the debtor's spouse. The law in the majority states, however, offers its citizens this entirety exemption because it protects the right of survivorship. This loophole serves no purpose: the policy supporting the exemption could be fulfilled just as well by permitting the debtor to amend his schedule.\textsuperscript{46} The withholding of entirety property from the bankruptcy estate in this situation decreases the amount available for distribution to creditors and thus increases credit costs.\textsuperscript{47} Therefore, section 541(a)(5) should be amended to bring entirety property into the estate upon the death of the debtor's spouse.\textsuperscript{48} A debtor in this situation should be allowed to

\textsuperscript{40} The three states are Kentucky, Massachusetts, and Tennessee. In Massachusetts, only the husband's interest is leviable; in the other states, both spouses' interests are leviable. See Craig, supra note 18, at 258-59, 302; see also, e.g., Hoffman v. Newell, 249 Ky. 270, 60 S.W.2d 607 (1932) (holding the individual interests of a debtor in an estate by the entirety, including the right of survivorship, subject to judgment liens and execution for the debtor's individual debts).


\textsuperscript{42} See Craig, supra note 18, at 258-59.

\textsuperscript{43} Waldschmidt v. Shaw (In re Shaw), 5 Bankr. 107, 110 (Bankr. M.D. Tenn. 1980).

\textsuperscript{44} The trustee may sell the right of survivorship, but for such a sale by a trustee to proceed, the court must find that the benefit to the estate outweighs the detriment to the nonindebted spouse. See 11 U.S.C. § 363(h)(3) (Supp. IV 1980); Ray v. Dawson (In re Dawson), 10 Bankr. 680 (Bankr. E.D. Tenn.), aff'd, 14 Bankr. 822 (E.D. Tenn. 1981); Waldschmidt v. Shaw (In re Shaw), 5 Bankr. 107 (Bankr. M.D. Tenn. 1980).

\textsuperscript{45} State law determines whether a property interest such as a right of survivorship is leviable. See Segal v. Rochelle, 382 U.S. 375 (1966).

\textsuperscript{46} See 2 H. Tiffany, supra note 14, § 430, at 218.

\textsuperscript{47} See supra note 39 and accompanying text.

\textsuperscript{48} This could be effectuated by a transferability clause like that in § 70a of the old Act. See supra note 34.
amend his schedule to obtain the minimum exemptions provided by the Code. The preferred solution, however, is to abolish the entirety exemption completely.

II. PROCEDURAL DEVICES AVAILABLE TO JOINT CREDITORS TO RECOVER ENTIRETY PROPERTY

Until the entirety exemption is abolished, joint creditors should be made aware of three procedural devices that can be used to subject entirety property to bankruptcy distribution. These devices are (1) utilization of expanded bankruptcy jurisdiction, (2) the stay of discharge, a predischarge remedy, and (3) the reopening of the case, a postdischarge remedy. Courts, while retaining complete discretion in this area, are likely to invoke one of these.

A. Utilization of Expanded Bankruptcy Jurisdiction

The Bankruptcy Code revolutionizes jurisdiction of the bankruptcy courts. These courts now have original but not exclusive jurisdiction over all matters related to the bankruptcy proceeding, and exclusive jurisdiction over the debtor's property. Several bankruptcy courts have asserted jurisdiction over all joint creditors and entirety property pursuant to these new provisions. Under Code section 541(a), all of the debtor's interest in entirety property becomes property of the estate. If the court finds that joint creditors "could have obtained a joint judgment and satisfied the judgment out of entireties property," section 522(b) renders the property not exempt to the extent of the permissible levy. The trustee may then utilize section

49. For an example of the reach of the courts' jurisdiction, see, e.g., Note, Bankruptcy Court Jurisdiction To Modify Alimony Payments of Chapter 13 Debtors, 14 U. Mich. J.L. Rev. 587 (1981).
51. Id. § 1471(e).
54. In re Trickett, 14 Bankr. at 90; accord In re Cipa, 11 Bankr. at 973; In re Koeh-
363(h) to sell the entireties property, and distribute the proceeds to the joint creditors, the nonindebted spouse, and the debtor, as their respective interests dictate. The comprehensive procedure preempts the preferred procedure under the old Act, the stay of discharge, which required the joint creditor to stay the bankruptcy discharge and proceed in state court to obtain a judgment and execution on the entirety property. The expanded jurisdiction fulfills several goals of bankruptcy policy — it enables the debtor to obtain a fresh start in one courtroom, without being dragged through several proceedings; it provides for speedier and more orderly disposition of the bankruptcy case; it enables joint creditors to satisfy their claims from the entirety property without being foiled by the intricacies of several proceedings; and it fulfills congressional intent supporting more equitable bankruptcy proceedings.

Several bankruptcy courts, however, have failed to recognize their expanded jurisdiction and have granted a stay of discharge for joint creditors to pursue entirety property in state courts. The main reason may be that these courts feel more comfortable with the old procedures and have overlooked congressional in-

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55. This section provides:

[T]he trustee may sell both the estate's interest, . . . and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a . . . tenant by the entirety, only if

1. partition in kind of such property among the estate and such co-owners is impracticable;
2. sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
3. the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
4. such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h) (Supp. IV 1980); see In re Trickett, 14 Bankr. at 90-91; In re Cipa, 11 Bankr. at 971-73; In re Koehler, 6 Bankr. at 206.

56. See infra pt. II B.


58. See H. R. REP. No. 595, supra note 3, at 445.

59. See, e.g., In re Trickett, 14 Bankr. at 90.

60. See H.R. REP. No. 595, supra note 3, at 48-49, 52, 445.

tent. These courts, however, have rationalized their decisions by interpreting state exemption laws as rendering the debtor's interest in entirety property immune from the trustee's reach under section 363(h).

Regardless of this interpretation, the determination of a joint creditor's interest in entirety property is often the most crucial to a debtor's fresh start and therefore should be the responsibility of the bankruptcy court under its broad jurisdictional authority. The stay of discharge, however, must be examined so long as courts continue to use it as an equitable procedure available to creditors, and so long as bankruptcy courts retain the discretion to defer to state court proceedings.

62. See Bass v. Thacker, 5 Bankr. 592, 595 (Bankr. W.D. Va. 1980) ("There is nothing in the Legislative History of § 522 which would indicate that Congress intended to change prior law in [regard to immunity of entirety property]."); In re Ford, 3 Bankr. at 576 ("the ultimate effect of the Code on tenants by the entireties property in Maryland remains the same as it did under the Act").

63. A debtor's "individual undivided interest as a tenant by the entirety," which became property of the estate, "is available to the joint creditor" unless "joined with the interests of the co-tenant wife;" thus, such interest "is exempt from process under Maryland law" and therefore exempt from distribution. In re Ford, 3 Bankr. at 575-76; see also Ray v. Dawson (In re Dawson), 10 Bankr. 680 (Bankr. E.D. Tenn.), aff'd, 14 Bankr. 822 (E.D. Tenn. 1981). But see In re Trickett, 14 Bankr. at 89-90 ("[T]he entireties property comes into the bankruptcy estate by operation of 11 U.S.C. § 541, and may be claimed as exempt as to joint creditors who, under Michigan law, could have obtained a joint judgment and satisfied the judgment out of the entireties property only to the extent of the $3,500 homestead exemption."); In re Cipa, 11 Bankr. at 971-73 ("[T]he debtor's undivided interest in the whole of the entireties property becomes a part of the estate, [and] the entireties property itself becomes subject to administration;" because "a joint creditor of [the debtor] and her husband could have executed on the . . . entireties property, . . . only the ownership equity in the [entireties] property over and above the joint creditor's lien would be immune from process under Pennsylvania law."); In re Koehler, 6 Bankr. at 206 ("[T]here are joint creditors of both spouses who, under the applicable [Florida] law, could have levied on the properties in question;" therefore, the trustee can liquidate despite § 522(b)); Kosto v. Lausch (In re Lausch), 16 Bankr. 162, 165 (M.D. Fla. 1981) ("[A] debtor's interest in property held with his wife as tenants by the entirety is includable in the debtor's estate where the debtor and his wife have a common creditor who has a judgment on the property.").

64. See 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][e], at 3-48 (15th ed. 1981) ("It did strike one as odd that disputes which went to the very heart of the bankrupt's ability to make a fresh start were precisely those disputes over which the bankruptcy court had no jurisdiction and thus no control. This is no longer the case.").

B. PredischARGE Stays of Bankruptcy Proceedings

The stay of discharge postpones the debtor's discharge until the joint creditor is able to acquire and execute a judicial lien on the entirety property. The creditor must first obtain a state judgment against both spouses. Then, if the debtor's entirety property is located in one of the states in which a judgment does not constitute a lien, the creditor should obtain a lien; otherwise, the debtor's discharge will void the judgment. To be completely protected, the creditor must execute the lien. If the creditor fails to execute, the debtor may avoid the lien pursuant to section 522(f). Even if the debtor does not avoid the lien, the debtor's discharge is likely to preclude the joint creditor from executing upon the lien.


67. In Michigan, a joint judgment will not yield a lien for the joint creditor. See Mich. Comp. Laws § 557.53 (1979); see also Bauer v. Long, 147 Mich. 351, 110 N.W. 1059 (1907) (holding that a husband owning land by the entirety has no interest therein, or right of possession during his lifetime, to which a lien may attach under any contract not signed by the wife). This is also the rule in Kentucky and the New England states except Connecticut. See J. Moore, W. Phillips & R. d'Agostino, Debtors' and Creditors' Rights 5-8 (5th ed. 1979). The prevailing rule is that the judgment becomes a lien upon docketing or recording. Id.; see, e.g., Hulbert v. Hulbert, 216 N.Y. 430, 111 N.E. 70 (1916).


70. Code section 524(a)(2) reads: "A discharge . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor . . . ." 11 U.S.C. § 524(a)(2). The language of this section is not clear. The section must be read in light of § 522(c), which states that a lien may be
Even when a stay of discharge extends the proceedings beyond the statutorily set time frame for a discharge, it is normally granted with little question because it furthers the policy of achieving an equitable distribution of assets to the discharge of debts. Because the joint creditor would be unable to recover on a claim after the debtor is discharged, the stay will usually be deemed appropriate. Only if the claim of a joint creditor is enforced against exempt property provided that the lien was not avoided under the trustee's avoiding provisions in the Code or under § 506(d). See 3 COLLIER ON BANKRUPTCY ¶ 524.01, at 524-14 (15th ed. 1981). Section 522(c), however, covers only valid liens. H.R. REP. No. 595, supra note 3, at 361. The legislative history states that § 522(c) is based on Long v. Bullard, 117 U.S. 617 (1886). Id. That case protects only liens that attach prior to the filing of the bankruptcy petition. See 117 U.S. at 621. Therefore, § 522(c) does not protect postpetition liens, and § 524(a)(2) enjoins their enforcement against the debtor's property.

71. The bankruptcy rules require the court to grant a discharge within 90 days of the first meeting of creditors, subject to certain exceptions. FED. R. BANKR. P. 404(d); cf. PROPOSED FED. R. BANKR. P. 4004(c) (Mar. 1982) (discharge to be granted within 60 days of the first meeting of creditors, subject to certain exceptions). Section 522(c) of the Code can be interpreted as preventing the stay. See 11 U.S.C. § 522(c) (Supp. IV 1980). This section has proved to be no obstacle, however, to the approval of the stay in equity. See, e.g., Leonard v. Walter (In re Walter), 1 COLLIER BANKR. CAS. 2d (MB) 460 (Bankr. W.D. Mich. 1980); Ackerly, supra note 4, at 721-26. The first case to permit the stay of discharge in a case involving entirety property was Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931), in which the court declared that the purpose of the Bankruptcy Act was to distribute equitably the debtor's assets before discharge is granted. Dictum to this effect had already been given by the Supreme Court: "There [should] exist in favor of a creditor . . . an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor." Lockwood v. Exchange Bank, 190 U.S. 294, 300 (1903). In Lockwood, the possibility of obtaining such a stay was conceived by the Court to support its jurisdictional ruling that exempt property need not be brought into the estate. Although exempt property is now made part of the estate under § 541(a)(1), this change has no effect on the stay, which exists regardless of whether exempted property is subject to inclusion. See Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931).


"clearly invalid" under state law will a court deny a motion for a
stay. 76 Otherwise, courts have granted a stay in a variety of cir-
cumstances: where a joint creditor files his motion for a stay af-
ter the expiration of the period set by the court for objecting to
a discharge; 76 where a home, rather than investment property, is
sought; 77 and where the joint judgment against the husband and
wife is for a tort, rather than a contractual obligation. 78 A court
may, however, condition the stay. 79 For example, it may limit
the time for completion of the state proceeding. 80 Extensions are
possible after notice and a hearing are given to the debtor and
the creditor shows good cause. 81

While the stay of discharge seems readily available, some com-
mentators have raised objections to it. It has been argued that
this equitable remedy should not override the policy which calls
for swift administration of the case. 82 But the stay should rarely
cause a substantial delay, because the case may proceed with
the stay in effect — the stay merely prevents the granting of a dis-
charge. A second objection is that the stay might confer upon a
joint creditor a preference, contrary to the policy of treating all
creditors in the same class equally and uniformly. All joint credi-
tors, however, may take advantage of the stay of discharge. 83 A

Note that a motion for stay of discharge must ask for relief from the automatic stay as
75. Roanoke Indus. Loan & Thrift Corp. v. Bishop (In re Bishop), 482 F.2d 381, 384
(4th Cir. 1973).
76. See Rensenhouse Elec. Supply Co. v. Magee (In re Magee), 415 F. Supp. 521
(W.D. Mo. 1976). The court came to this conclusion despite rule 906(b)(2), which re-
quires "excusable neglect" after the expiration of the specified period for objecting to
the discharge. FED. R. BANKR. P. 906(b)(2). But see id. 404(c) ("The court may for cause,
on its own initiative or on application of any party in interest, extend the time for filing a
complaint objecting to discharge.").
77. See Leonard v. Walter (In re Walter), 1 COLLIER BANKR. CAS. 2d (MB) 460, 462
78. See id. at 462-63.
79. See id. at 464.
80. See Old Kent Bank & Trust Co. v. Black (In re Black), 14 COLLIER BANKR. CAS.
(MB) 481, 488 (Bankr. W.D. Mich. 1977). Magee allowed a stay until prosecution of the
state claim was complete. In re Magee, 415 F. Supp. at 530.
81. See In re Black, 14 COLLIER BANKR. CAS. at 481; see also In re Leonard, 1 COL-
LIER BANKR. CAS. 2d (MB) at 464.
82. See Kennedy, Limitation of Exemptions in Bankruptcy, 45 IOWA L. REV. 445, 462-67 (1960); Comment, Bankruptcy Exemptions: Critique and Suggestions, 68 YALE
83. Notice to "all creditors" is required by FED. R. BANKR. P. 203(a). One bankruptcy
court has wisely required the joint creditor to join the debtor's other joint creditors in
the state proceeding. See Waldrop v. Phillos (In re Phillos), 14 Bankr. 781 (Bankr. W.D.

It seems reasonable to separate joint creditors from unsecured creditors due to the
expectation of greater security provided by the liability of two persons.
third argument — that the stay is inconsistent with the debtor's power to avoid liens on exempt property — is countered by pointing out that the entirety property is no longer exempt once the judicial lien is obtained and executed. Additionally, the arguments supporting abolition of the entirety exemption also warrant making the stay readily available to joint creditors. If, however, a stay cannot be obtained, a joint creditor may resort to other procedural devices to reach entirety property.

C. Postdischarge Reopening of the Bankruptcy Case

Creditors can also bring entirety property into the bankruptcy estate through postdischarge reopening of the case. Before 1938, an estate could be reopened only for the purpose of discovering

85. See supra text accompanying notes 25-29.
86. Creditors also have the option of bringing the nonindebted spouse into the case by filing an involuntary petition if the nonindebted spouse is not meeting his or her debts as they become due. See 11 U.S.C. § 303 (Supp. IV 1980). A consolidation is then possible. Fed. R. Bankr. P. 117(b); see Proposed Fed. R. Bankr. P. 1015(b) (Mar. 1982). The conditions set forth in Code §§ 303(b), (f), and (h) strike a compromise between allowing creditors to obtain entirety property and the separate property of the nonindebted spouse in all cases where one spouse is in bankruptcy, and limiting the access of creditors to what they can obtain by a stay of discharge. Section 303(b) conditions the involuntary petition upon the creditors' having a sufficient amount of outstanding claims at stake. If 12 or more creditors hold claims, then 3 or more holders of claims (or indenture trustees representing such holders) may file the involuntary petition. Also, the creditors who file must have claims aggregating "at least $5,000 more than the value of any lien on property of the debtor securing such claims." 11 U.S.C. § 303(b)(1). If there are fewer than 12 holders of claims, only 1 or more of them need hold at least $5,000 of claims in the aggregate. Id. § 303(b)(2). Also, the debtor may remain in possession of the property during the proceedings, id. § 303(f), except to the extent that the court orders otherwise due to a fraudulent transfer or some other deception of the joint creditor. These conditions, and others, ameliorate the possible damage a debtor might suffer from an involuntary petition. Furthermore, once one spouse is in bankruptcy, consolidation is desirable for joint creditors if the debtor's spouse is unlikely to meet the couple's joint and several debts. The § 303 conditions, therefore, should protect the nonindebted spouse from overzealous joint creditors.

On the other hand, making the § 303 conditions more strict would be undesirable. The joint creditor may become remediless if the nonindebted spouse is able to meet his or her debts until enough time has passed so that a court would not reopen the debtor's case. Nevertheless, a joint creditor should not be allowed to obtain a consolidation via an involuntary petition merely because the nonindebted spouse may file a bankruptcy petition in the future. Because consolidation is an equitable remedy, it should be limited to those cases in which the joint creditor is actually harmed by a bad debt loss. Anticipation of harm would yield inappropriate results. Also, if the good faith of the nonindebted spouse is a consideration in granting consolidation, such subjective determinations may lead to the abuse of the joint creditors' remedies. The § 303 conditions provide for the benefits of consolidation when entirety property is involved while protecting the spouse who is subjected to an involuntary bankruptcy.
unadministered assets. The Chandler Act amended section 2a(8) of the old Bankruptcy Act to allow reopening “for cause shown.” This expanded remedy is carried over in the Code, which permits reopening “to administer assets, to accord relief to the debtor, or for other cause.” Courts have allowed within this expanded remedy the amendment of creditor lists, the repayment of excess fees withdrawn in violation of orders of the district court, and the investigation of alleged fraudulent transfers.

Several factors are weighed in determining what constitutes sufficient cause to reopen. The most important is the length of time between the discharge and the reopening of the case; courts have usually allowed the defense of laches. Another important factor is whether the creditor could have sought a stay of discharge had he been diligent. Given the prevalence of the stay, this factor may more readily warrant the denial of a petition to reopen. The condition of the debtor's assets may also affect a court's decision. If property bought on credit has been substantially improved, the court may be less inclined to resubject it to bankruptcy, especially if the debtor has made substantial payments on the debt and the property has increased in value.  

87. See Kinder v. Scharff, 231 U.S. 517 (1913); In re Schreiber, 23 F.2d 428 (2d Cir. 1928); In re Chapman, 55 F.2d 965 (N.D.N.Y. 1931).
89. 11 U.S.C. § 350(b) (Supp. IV 1980).
91. See Ehrhorn v. International Match Realization Co. (In re International Match Corp.), 190 F.2d 458 (2d Cir. 1951).
94. See Kavanagh v. Kayes (In re Fair Creamery Co.), 193 F.2d 5, 7-8 (6th Cir. 1951) (holding that delay of seven years and the lack of available assets militated against reopening); Brust v. Irving Trust Co., 129 F. Supp. 462 (S.D.N.Y. 1955) (barring reopening where petitioners knew of the possibility of a fraudulent transfer action for two years); Waldschmidt v. Shaw (In re Shaw), 5 Bankr. 107 (Bankr. M.D. Tenn. 1980) (refusing reopening where four years had elapsed); see also In re United Brick & Tile Co., 94 F. Supp. 269 (D. Del. 1950) (holding that a court may limit the time for reopening a case).

Because laches is an equitable defense, however, a court may deny it if the debtor has acted in such a way that permitting the defense would be inequitable. See In re Thomas, 204 F.2d 788, 794 (7th Cir. 1953) (denying laches defense where the debtor failed to furnish complete and accurate schedules of assets).
95. See Waldschmidt v. Shaw (In re Shaw), 5 Bankr. 107, 112 (Bankr. M.D. Tenn. 1980). Relevant here is the length of time between filing and discharge, rather than between discharge and reopening. But see Maryland Hotel Supply Co. v. Seats (In re Seats), 537 F.2d 1176, 1177 (4th Cir. 1976) (holding that the lack of diligence by the joint creditor's attorney did not prejudice the joint creditor's claim).
96. See supra notes 71-81 and accompanying text.
97. See In re Shaw, 5 Bankr. at 111.
Balanced against these factors is the resulting delay of the debtor's fresh start. The discharged debtor begins his fresh start on the filing date, subject to any successful objections by a creditor or the trustee during a period fixed by the bankruptcy court.98 Once creditors have been allowed to object to the discharge and have not done so, the court must grant a discharge to inaugurate the debtor's fresh start.99 Creditors' opportunity to object after discharge should be limited. Accordingly, courts are less willing to reopen a case than to grant a stay of the discharge.100 However, if circumstances warrant delaying the debtor's fresh start to further administer assets or for other cause, courts will reopen cases.101

Courts are most likely to reopen a case when one spouse files in bankruptcy soon after the discharge of the other spouse. If a couple files jointly,102 the trustee obtains the full entirety estate by virtue of holding each spouse's interests.103 Even if a couple

100. See Reid v. Richardson, 304 F.2d 351, 355 (4th Cir. 1962) ("an exercise of the power to re-open an estate is a much more drastic remedy than an exercise of the power to temporarily delay a discharge").
103. See, e.g., In re Korff, 14 Bankr. 189, 193 (Bankr. E.D. Mich. 1981); Ragsdale v. Genesco (In re Ragsdale), 9 Bankr. 991 (Bankr. E.D. Va. 1981). Before the Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1978), courts attempted to create a legal basis for permitting a trustee, who had forged a consolidation of a couple's separate cases and thereby obtained both spouses' interests, to merge the interests into a fee simple for administration of the entirety property in bankruptcy. Under one theory, utilizing § 70c of the old Act (the predecessor of Code section 544(a)), a trustee was a judgment creditor for both the husband and the wife, from which he derived the status of a joint lien creditor, enabling him to take entirety property. See In re Utz, 7 F. Supp. 612 (D. Md. 1934). Courts and commentators, however, rejected this theory because "a creditor is only able to pursue the entirety if he has obtained a joint judgment against both spouses at the same time." Craig, supra note 18, at 269 (emphasis added). Courts derived a second theory from the trustee's power under § 70a(5), 11 U.S.C. § 110(a)(5) (1976) (repealed 1978), to take property which became transferable within six months of filing. The theory was that, because both spouses were in bankruptcy, both could have transferred the property together and, therefore, the trustee took all. See In re Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933). In order for the trustee to have gained title to the property under § 70a(5), however, the debtor must have been able to transfer the property "prior to the filing of the petition." 11 U.S.C. § 110a(5) (1976) (repealed 1978). The issue
files separately and simultaneously, a consolidation is easily obtained with the same result. 104 But if one spouse files soon after the other spouse has obtained a discharge and had his case closed, consolidation is not available without reopening the discharged spouse's case.

Finding separate administration to constitute "legal fraud," courts have reopened the discharged spouse's case for consolidation. 106

Courts may be more reluctant to reopen a case to allow a joint creditor to pursue his claim against entirety property in state court. The joint creditor cannot plead "legal fraud" in such cases. Nevertheless, the only court to have considered the issue as of this writing permitted reopening. 107 While that opinion was resolved in Roberts v. Henry V. Dick & Co., 275 F.2d 943 (4th Cir. 1960). Citing both Utz and Carpenter, the court opted for an equitable solution, stating that it "would be unreasonable to attach the significance contended for by the [debtors] to the fact that the husband and wife filed separate petitions." Id. at 945.

104. See Fed. R. Bankr. P. 117(b); Proposed Fed. R. Bankr. P. 1015(b) (Mar. 1982). Once a couple's cases are consolidated, the trustee may administer the couple's joint assets.

105. See Fed. R. Bankr. P. 117(b) (consolidation applies when the petitions "are pending in the same court"); accord Proposed Fed. R. Bankr. P. 1015(b) (Mar. 1982).


That the creditors who sought a reopening in these cases were unsecured may be relevant in determining how the newly obtained property should be distributed. See infra note 110.


The procedural device for reopening a case escaped the attention of creditors in Harris v. Manufacturers Nat'l Bank, 457 F.2d 631 (6th Cir. 1972). In Harris, a creditor was enjoined from subjecting entirety property to the satisfaction of a joint judgment because the husband's debts had been discharged in bankruptcy. The creditor did not petition the bankruptcy court to stay the discharge, although the state court proceeding began before discharge, because substantial state precedent existed giving creditors a joint judgment against married couples despite one spouse's prior discharge. See Kolakowski v. Cyman, 285 Mich. 585, 281 N.W. 332 (1938); Edwards & Chamberlin Hardware Co. v. Pethick, 250 Mich. 315, 230 N.W. 186 (1930). Creditors (and courts) in Michigan at the time of the Harris proceedings were not familiar with stays of discharge and petitions to reopen. Interview with staff of General Counsel's Office, Manufacturers Nat'l Bank of Detroit, Detroit, Mich. (March 9, 1981).

While it is uncertain whether a petition to reopen would have been successful, the Harris court did not consider the factors relevant to a reopening. Instead, Harris adopted a narrow interpretation of the effect of a discharge, citing Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934), as holding that the "overriding" purpose of the Bankruptcy Act is to provide the debtor with a fresh start. Actually, the Supreme Court said that this is "one of the primary purposes of the bankruptcy act." Id. (emphasis added). A second and equally important purpose of bankruptcy is to distribute equitably the assets of debtors among their creditors. See Kokoszka v. Belford, 417 U.S. 642, 645-46 (1974); Commission Report, supra note 2, at 71. If the Harris court had considered both purposes, it would have been compelled to consider the propriety of reopening the case.
failed to articulate the reasons justifying the result, a court should logically consider two factors. First, it should determine the propriety of reopening the case. Relevant factors include the time elapsed between the discharge and the petition to reopen, and whether the joint creditor was unable initially to stay the discharge due to internal delays or ignorance about such procedures. Second, there is little reason to deny a timely and equitable motion to reopen a case for modification of the discharge if consolidation is unavailable and the joint creditor could not otherwise satisfy his claim. The debtor's spouse, for instance, may not be severally liable, or may be severally liable but unable to pay the debt. The debtor's fresh start, though delayed, should not be harmed, because the debtor has no legitimate expectation of retaining entirety property claimed by a joint creditor. If the debtor loses the entirety property, he should be allowed to amend his petition to claim the minimum Code exemptions.

Reopening cases in the proper circumstances can be an effective tool for ensuring the equitable distribution of assets. The court in Maryland Hotel Supply Co. v. Seats (In re Seats), 537 F.2d 1176 (4th Cir. 1976), allowed reopening on facts very similar to those in Harris. In each case, creditors sought a joint judgment in state court soon after the debtor filed a petition in bankruptcy. Neither case involved a significant lapse of time between the debtor's discharge and the joint creditor's attempt to remedy his predicament. In Seats, the joint creditor's attorney objected to the discharge, pursuant to 11 U.S.C. § 727(a) (Supp. IV 1980), 18 days after it was granted. (Rather than objecting to the discharge, the proper procedure would have been to move for a reopening of the bankruptcy case, if it has been closed, and for a modification of the discharge.) In Harris, the debtor's discharge was granted on November 2, 1970, and the creditor's objection was raised on March 11, 1971, when the debtor initiated an action in the district court to enjoin the creditor's state proceeding. 457 F.2d at 632.

108. See supra notes 93-97. In Seats, the joint creditor's attorney knew of the entirety property and was 18 days late but the court decided that the attorney's lack of diligence should not prejudice his client. See 537 F.2d at 1177.

109. While most states provide that joint debts are to be treated as joint and several, this is not true in some states. See 4 A. Corbin, Contracts § 930, at 728 (1951). Reopening to modify the discharge should be available in states where joint creditors are not severally liable. Virginia law, which governed in Seats, holds joint debtors severally liable. Va. Code §§ 8.01-.30, 8.55-2.35 (1950). The Seats opinion does not disclose, however, the extent to which the debtor's spouse was able to satisfy the joint debt. Consequently, it is not clear whether Seats was decided correctly. Even if it was not, such a reopening should be available in other circumstances.

110. A consequent problem is deciding whether the assets should be distributed to satisfy the claims of all creditors, only individual creditors, or only joint creditors. The commentators disagree. Compare Ackerly, supra note 4, at 706 n.23 (joint creditors should be satisfied first), and Plumb, supra note 18, at 127-28 (same), with Craig, supra note 18, at 271 (all creditors should share equally), and Bienenfeld, supra note 14, at 114 (same), and Comment, Creditors' Rights, supra note 24, at 283 (same). One case on point held that the creditors must share equally. In re Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933). The Code, however, provides that claims against the community in states
ure to reopen the case permits debtors to use the unlimited entirety exemption to the detriment of bankruptcy policy and the credit system. In the absence of clear standards to be applied and considering the difficulty of balancing the complex and multifarious interests of the debtor and joint creditors, judges should be granted considerable discretion to reopen cases. In this way, a debtor may retain his fresh start once laches or other equitable circumstances so warrant, while creditors are treated equitably rather than subjected to an absolute and irrevocable discharge.

CONCLUSION

Congress should not have included the entirety exemption in the Bankruptcy Reform Act of 1978. The Code does take a step in the right direction by severing the entirety estate if Code exemptions are chosen, but its solution is unsatisfactory. It places no maximum limit on the amount of entirety exemptions if a debtor chooses the state exemptions. Though individual creditors have no recourse to plug this loophole, joint creditors can resort to various procedural devices to distribute or levy and execute upon entirety property. Despite strong arguments favoring distribution of entirety property, however, no procedural device is certain to be available. Furthermore, no creditor can forestall the loophole which permits debtors to retain all entirety property if the debtor’s spouse dies within six months of the filing of the bankruptcy petition. Because it is inequitable and

which have community property are satisfied first from the community property that may be applied to the debts of both spouses, and then property liable for the debtor’s debts is used. 11 U.S.C. § 726(c)(2) (Supp. IV 1980).

111. This broad discretion has, however, not been accompanied by sufficient procedural safeguards. As of this writing, the precedent remains that notice to a discharged debtor is unnecessary to reopen his estate. See In re Carlucci Stone Co., 269 F. 795 (M.D. Pa. 1920). This decision came at a time when reopening was allowed only when some of the debtor’s assets had not been administered. Today, a creditor may reopen on much broader grounds. See supra notes 90-92 and accompanying text. Such a deprivation of property certainly warrants procedural due process. See 61 MICH. L. REV. 1351, 1354 (1963).

The issue of balancing is a matter of federal law; conflicting state laws are subordinate. See Perez v. Campbell, 402 U.S. 637, 649 (1971) (declaring that a state statute is an unconstitutional infringement on federal supremacy if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

112. It has long been suggested that Congress remove the privileged status of entirety property in bankruptcy. See, e.g., Note, The Effect of Bankruptcy on Estates by Entireties, 89 U. PA. L. REV. 1073, 1081 (1941).
harmful to the open credit system, the entirety exemption should be repealed.

—Frank J. Spivak