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I. Bankruptcy

I. BANKRUPTCY

The Homestead Exemption: Virginia's New Exemption for Personal Injury Claims

In 1978 Congress passed the Bankruptcy Reform Act (the Act).[1] Under the Act, the filing of a bankruptcy petition creates an estate consisting of all property of the debtor.[2] Chapter 7 of the Act calls for discharge of the debtor's debts following liquidation of the bankruptcy estate and disbursement of the liquidation proceeds to creditors.[3] To effectuate the long-standing bankruptcy policy of providing debtors with the opportunity for meaningful fresh start, the Act allows debtors to claim certain property as exempt[4] from

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1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-151326 (1982)) [hereinafter cited as the Act]. Congress initiated the process of bankruptcy reform in 1970 by creating the Commission on the Bankruptcy Laws of the United States to analyze and recommend changes in bankruptcy law. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970). The commission recognized the function of bankruptcy as providing debtors with relief from debt to effectuate a meaningful fresh start while protecting the position of creditors in an open credit economy. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93rd Cong., 1st Sess. pt. I at 71 (1973) [hereinafter cited as COMMISSION REPORT]; *see* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (goal of bankruptcy is to provide debtor new opportunity in life free from burden of pre-existing debt). The Commission developed a list of federal exemptions for use in bankruptcy to eliminate the use of diverse and generally archaic state law exemptions. COMMISSION REPORT, *supra*, pt. II at 127; *see* 3 COLLIER ON BANKRUPTCY ¶ 522.21 at 522-68 (15th ed. 1979) (wide disparity among states in nature and value of exemptions). The final version of the Senate bill allowed debtors to claim both federal nonbankruptcy exemptions and the exemptions of the debtor's state. S. 2366, 95th Cong., 2nd Sess. § 522 (1977). The final version of the House bill allowed debtors the choice of either a list of federal bankruptcy exemptions or the exemptions of the debtor's state. H.R. 8200, 95th Cong., 1st Sess. (1977). The Act as passed, by allowing states to opt out of the federal plan and restrict debtors to state and federal nonbankruptcy exemptions, represents a compromise between the House and the Senate on the exemption provisions. 124 CONG. REC. 32,398 (STATEMENT OF REP. DON EDWARDS), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6452-53; 124 CONG. REC. 33,998 (STATEMENT OF SEN. DECONCINI), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6521. *See generally* Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 OHIO STATE L. J. 335, 336-44 (1982) (discussing history and purposes of exemptions).

2. 11 U.S.C. § 541(a) (1982). Under the Act, title to the debtor's property vests in the estate and the trustee of the estate has the authority to dispose of the property. *Id.* §§ 363, 541; *see* 4 COLLIER, *supra* note 1, ¶ 541.02, at 541-14. To protect property from creditors, debtors must claim it as exempt after it has come into the estate. 4 COLLIER, *supra* note 1, ¶ 541.06, at 541-27.

3. *See* 11 U.S.C. § 727 (1982) (discharge of debts incurred prior to filing of bankruptcy petition); *id.* § 704 (trustee's duty to liquidate property of estate); *id.* § 726 (distribution in payment of debts); *see also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087 (brief explanation of Chapter 7 process).

4. *See* Pickens v. Pickens, 125 Tex. 410, 414, 83 S.W.2d 951, 954 (1935) (exemption is legally created right of debtor to protect portion of his property from claims of creditors). The purpose of exemptions is to leave a debtor with enough resources to support himself and his

their bankruptcy estates by listing the property in their exemption schedules.[5] The Act provides federal exemptions but allows the individual states to prohibit debtors from choosing these exemptions.[6] The Virginia legislature has chosen to opt out of the federal exemption scheme and allow Virginia debtors to claim only state law exemptions.[7] A primary issue concerning state law exemptions is whether debtors may claim state common law exemptions in addition to state statutory exemptions.[8] In *Tignor v. Parkinson*[9] the Fourth Circuit considered whether a debtor may amend his bankruptcy exemption schedule and the extent to which the proceeds of a personal injury settlement qualify for exemption under Virginia law.[10]

In *Tignor*, Henry Clay Tignor (the debtor) suffered injuries on November 9, 1978 while in the course of his employment and subsequently brought suit against his employer under the Federal Employer's Liability Act.[11] On August 18, 1980, the debtor filed a voluntary petition in bankruptcy under Chapter 7 of the Act but did not include his personal injury claim or the anticipated proceeds thereof in his exemption schedules.[12] On September 24, 1980, the

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dependants without public assistance. *See* Ulrich, *Virginia's Exemption Statutes—the Need for Reform and a Proposed Revision*, 37 WASH. & LEE L. REV. 127, 129-130 (1980). In addition to providing for debtor self-support, exemptions enhance the debtor's chance of financial rehabilitation. *Id.; see In re* Grindal, 30 B.R. 651, 653 (Bankr. D. Maine 1983) (goal of exemption statutes is to enable debtor to support himself and family); *Matter of* Hersch, 23 B.R. 42, 45 (Bankr. M.D. Fla. 1982) (purpose of exemption is to prevent family from becoming public charge).

5. *See* 11 U.S.C. § 522 (1982). A bankruptcy debtor must file a list of property he claims as exempt. *Id.* § 522(1). The property claimed on the debtor's exemption schedule becomes exempt absent an objection by a party in interest. *Id.; see* 3 COLLIER, *supra* note 1, ¶ 522.26, at 522-75 to 522-77 (explaining method of claiming exemptions).

6. 11 U.S.C. § 522 (1982). In states that prohibit debtors from choosing federal bankruptcy exemptions, debtors may claim federal nonbankruptcy exemptions and the exemptions of the debtor's state. *Id.* § 522(b)(2)(A). The Act specifically provides that a debtor may exempt his interest in property held as a tenant by the entirety or joint tenant to the extent such property is exempt from creditor process under nonbankruptcy law. *Id.* § 522(b)(2)(B); *see infra* notes 85-86 and accompanying text (implication of specific provision for tenant by entirety exemption). The Act imposes no explicit minimum exemptions in states that have opted out. *See* 3 COLLIER, *supra* note 1, ¶ 522.09, at 522-46.

7. VA. CODE § 34-3.1 (1984 Rep. Vol.); *see In re* White, 11 B.R. 775, 776 (Bankr. E.D. Va. 1981) (upholding Virginia's opt out under § 522(b)). Virginia debtors in bankruptcy may claim federal nonbankruptcy exemptions in addition to state exemptions. 11 U.S.C. § 522(b)(2)(A) (1982). Federal nonbankruptcy exemptions include, *inter alia*, social security payments, civil service retirement benefits and veteran's benefits. *See* 3 COLLIER, *supra* note 1, ¶ 522.21, at 522-68 to 522-69.

8. *See infra* notes 71-86 and accompanying text (examining validity of common law exemptions in bankruptcy).

9. 729 F.2d 977 (4th Cir. 1984).

10. *Id.* at 978; *see infra* text accompanying notes 70-87 (discussion of exemptions under Virginia law).

11. 729 F.2d at 978.

12. *In re* Tignor, 21 B.R. 219, 219 (Bankr. E.D. Va. 1982). In *Tignor v. Parkinson*, the debtor listed debts in excess of $36,000. *Id.* Tignor claimed exemptions under Virginia Code

trustee of the bankrupt estate held the first creditors meeting.[13] The debtor settled his personal injury claim on June 5, 1981[14] and amended his bankruptcy schedules to exempt the settlement proceeds on October 20, 1981.[15] The trustee filed an objection to the debtor's amendments on October 30, 1981,[16] claiming that local rule 23(c) of the Bankruptcy Court for the Eastern District of Virginia precluded the debtor from amending his exemption schedules more than twenty days after the first creditor's meeting and that Virginia law did not provide an exemption for personal injury claims or the proceeds thereof.[17] The trustee also claimed that the debtor could not amend his exemption schedules to include the settlement proceeds because the trustee, in reliance on the debtor's failure to claim proceeds as exempt, had incurred expenses attempting to obtain the proceeds for the bankruptcy estate.[18]

The Bankruptcy Court for the Eastern District of Virginia rejected the trustee's objections and allowed the debtor to amend his exemption schedule.[19] The bankruptcy court held that the proceeds of the debtor's personal

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§34-4 and § 34-26 and § 522(b)(2)(B) of the Act. 729 F.2d at 978; *see* 11 U.S.C. § 522(b)(2)(B) (1982) (exemption for property held as tenant by entirety or joint tenant); VA. CODE § 34-26 (1984 Rep. Vol.) (enumerating articles debtor may exempt in addition to homestead property); VA. CODE § 34-4 (1984 Rep. Vol.) (householder or head of family may exempt up to $5,000 worth of real and personal property).

13. 729 F.2d at 978. Section 341(a) of the Act calls for a meeting of creditors within a reasonable time after the filing of a voluntary petition. 11 U.S.C. § 341(a) (1982). The primary purpose of creditors meetings is to provide a forum for creditors to elect a trustee, question the debtor to determine whether he has concealed or improperly disposed of assets, and offer advice on the administration of the estate. 2 COLLIER, *supra* note 1, ¶ 341.01, at 341-3; *see* FED. R. BANKR. 2003 (providing logistics of creditors meeting).

14. *Tignor*, 21 B.R. at 219. The debtor settled his claim for $150,000 but received only $105,000 since $45,000 went for attorney's fees. *Id.*

15. *Id.* at 220. In *Tignor*, the debtor claimed his settlement was exempt by a combination of § 522(b)(2)(A) of the Act and Virginia common law. 729 F.2d at 978. *See* 11 U.S.C. § 522(b)(2)(A) (allowing debtors to claim state law exemptions in bankruptcy); *see also In re* Musgrove 7 B.R. 892, 896 (Bankr. W.D. Va. 1981) (under Virginia common law personal injury claims exempt from creditors).

16. *Tignor*, 21 B.R. at 220.

17. 729 F.2d at 978-79. The trustee in *Tignor* argued that courts should not allow debtors to amend their exemption schedules more than 20 days after the creditors meeting. Brief for Appellant at 3-4, Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984) [hereinafter cited as Appellant's Brief]. The trustee urged that such a rule was necessary to insure that debtors would not receive improper exemptions because exemptions become effective absent objection and local rule 23(c) required objections within 20 days of the creditors meeting. *Id.* at 3-4; *see* BANKR. E.D. VA. R. 23(c) (20 days in which to object to debtor's exemptions).

18. 729 F.2d at 979, Appellant's Brief, *supra* note 17, at 8-9. The trustee argued that if the *Tignor* court did permit the amendment, the court should condition the amendment on the debtor paying the expenses the trustee incurred in pursuit of the settlement proceeds. Appellant's Brief, *supra* note 17, at 11; *see In re* Burgess, 1 B.R. 421, 426 (Bankr. M.D. Tenn. 1979) (court conditioned exemption schedule amendment on debtor's payment of trustee's expenses); *see also infra* notes 49-52 and accompanying text (discussion of *Tignor* court's treatment of prejudice claim).

19. *Tignor*, 21 B.R. at 220. The bankruptcy court in *Tignor* relied on bankruptcy rule

injury settlement were exempt from the bankruptcy estate pursuant to Virginia common law.[20] The trustee appealed the bankruptcy court's decision to the United States District Court for the Eastern District of Virginia and the district court summarily affirmed the bankruptcy court's decision.[21] The trustee then appealed the district court's decision to the Fourth Circuit.[22] The Fourth Circuit affirmed the district court's decision to allow the debtor to amend his exemption schedules[23] but reversed the district court's holding that exempted all of the settlement proceeds.[24] The Fourth Circuit remanded the case to the district court with instructions to allow the debtor to exempt his personal injury settlement only to the extent permitted under the Virginia homestead exemption statute.[25]

The Fourth Circuit upheld the debtor's exemption schedule amendment on the basis of bankruptcy rule 110, which provided that a debtor could amend his schedules as a matter of course before the close of a case.[26] The *Tignor* court stated that local rule 23(c), which required that all parties file objections to exemptions within twenty days of the first creditors' meeting, could not limit bankruptcy rule 110 by prohibiting debtors from amending their exemption schedules more than twenty days after the first creditors' meeting.[27] The *Tignor* court reasoned that bankruptcy rule 110 and local rule 23(c) were reconcilable to allow twenty days for objections to exemptions

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110, which provided that a debtor could amend his schedules as a matter of course before the close of a case. *Id.*; *see* FED. R. BANKR. 110; *infra* note 41 (cases allowing amendment of exemption schedules). The bankruptcy court observed that local rule of court 23(c), which provides that interested parties must file objections to the debtor's claimed exemptions within 20 days after the creditors meeting, could not limit the debtor's right to amend his bankruptcy schedules under bankruptcy rule 110. 21 B.R. at 220. The *Tignor* bankruptcy court noted that it possessed the equitable power to enlarge the time in which creditors must object to claimed exemptions in order to avoid prejudice to creditor's rights. 21 B.R. at 220; *see infra* notes 40-52 and accompanying text (other court's treatment of amendment and objections).

20. *Tignor*, 21 B.R. at 222. The *Tignor* bankruptcy court stated that debtors may claim both statutory and common law exemptions under state law and noted that "exempt" as used in § 522(b)(2)(A) of the Act means immune from creditor process. *Id.* at 220-21; *see infra* notes 71-86 and accompanying text (discussing common law exemptions). The bankruptcy court held that personal injury causes of action are exempt from creditors in bankruptcy proceedings because such causes of action are immune from creditor process under Virginia common law. *Tignor*, 21 B.R. at 222.

21. *Tignor*, 729 F.2d at 978.

22. *Id.*

23. *Id.*; *see infra* text accompanying notes 26-30 (*Tignor* court's rationale for allowing exemption schedule amendment).

24. *Tignor*, 729 F.2d at 978; *see infra* notes 31-39 and accompanying text (*Tignor* court's reasoning that personal injury claim exempt as part of $5,000 homestead exemption.)

25. 729 F.2d at 982; *see infra* notes 61-68 and accompanying text (*Tignor* court's construction of homestead exemption).

26. 729 F.2d at 979; *see* FED. R. BANKR. 110 (superseded by FED. R. BANKR. 1009 (1983)); *infra* note 41 (cases allowing amendment of exemption schedules).

27. 729 F.2d at 979; *see supra* note 17 (trustee's argument that local rule 23(c) precluded amendment).

claimed by amendment.[28] The Fourth Circuit also rejected the trustee's detrimental reliance objection to the debtor's amendment,[29] stating that the trustee's position had not changed as a result of the debtor's failure to claim the exemption earlier.[30]

In finding that the debtor's personal injury settlement was not entirely exempt, the Fourth Circuit first considered whether a personal injury settlement is part of a bankruptcy estate.[31] The *Tignor* court observed that under the Act all property of the debtor, including exempt property, becomes property of the estate.[32] The *Tignor* court observed further that proceeds of estate property are also estate property.[33] Viewing the debtor's personal injury claim as property of the bankruptcy estate and the settlement recovery

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28. 729 F.2d at 979. In deciding to allow the debtor to amend his exemption schedules the *Tignor* court followed the reasoning of the Tenth Circuit in *Redmond v. Tuttle. Id.*; *see* Redmond v. Tuttle, 698 F.2d 414 (10th Cir. 1983). In *Redmond*, the debtors filed a joint voluntary bankruptcy petition but failed to include their joint checking account balance in their bankruptcy schedules. 698 F.2d at 415. More than 15 days after the first creditors meeting, the trustee in *Redmond* learned of the debtors' checking account and recovered the account balance for the bankruptcy estate. *Id.* The debtors claimed they had been unaware of the money in the account and filed an amendment to their bankruptcy schedules to exempt the money. *Id.* The trustee objected to the debtor's amendment, claiming that local rule 4004, which provided that parties in interest must file objections to exemptions within 15 days of the first creditors meeting, precluded amendment of exemption schedules more than 15 days after the creditors meeting. *Id.* at 415-16. The trustee argued that to allow amendments to exemption schedules more than 15 days after the creditors meeting would enable debtors to claim and receive exemptions to which no one could object, because parties could not object to exemptions more than 15 days after the creditors meeting and exemptions become effective absent objection. *Id.* at 416. The Tenth Circuit rejected the trustee's argument holding that a debtor may claim newly discovered property as exempt as a matter of course before a case is closed and that interested parties have 15 days from the date of the amendment to object. *Id.* at 417 (*citing In re* Cobb, 3 B.R. 150, 151-52 (Bankr. N.D. Cal. 1980)) (fifteen day period for creditor to object to amendment runs from date of amendment). The *Redmond* court noted that its decision was consistent with proposed bankruptcy rule 4003. 698 F.2d at 417; *See* FED. R. BANKR. 4003(b) (1983) (allowing 30 days from either creditors meeting or amendment to object).

29. *See supra* text accompanying note 17 (trustee's claim of detrimental reliance in *Tignor*).

30. 729 F.2d at 979. The *Tignor* court noted that the debtor's failure to claim the personal injury exemption earlier did not affect the trustee's position because the trustee had not taken any action toward obtaining the settlement proceeds until the debtor had settled his claim. *Id.*; *see infra* notes 47-51 and accompanying text (analysis of *Tignor* court's decision on trustee's prejudice claim).

31. 729 F.2d at 979.

32. *Id.* at 980; *see* Shirkey v. Leake, 715 F.2d 859, 863 (4th Cir. 1983) (exempt property included in estate); *In re* Mucelli, 21 B.R. 601, 604 (Bankr. S.D.N.Y. 1982) (personal injury claim property of estate until exempted); 11 U.S.C. § 541(a) (1982) (all legal or equitable interests of debtor become part of estate). The *Tignor* court cited the legislative history of § 541, which states that the debtor's estate includes all property of the debtor, even that needed for a fresh start. 729 F.2d at 980; *see* 11 U.S.C. § 541 (1982); H.R. REP. No. 595, 95th Cong., 1st Sess. 125 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5868 (estate includes property needed for fresh start); *see also* 4 COLLIER, *supra* note 1, ¶ 541.10, at 541-64 (personal injury actions are property of estate).

33. 729 F.2d at 980; *see In re* Mucelli, 21 B.R. 601, 604 (Bankr. S.D.N.Y. 1982) (future proceeds of personal injury claims are proceeds in context of § 541); 11 U.S.C. § 541(a)(6) (1982) (proceeds of estate property are estate property); 4 COLLIER, *supra* note 1, ¶ 541.19, at

as a proceed of the claim, the Fourth Circuit found that the settlement was property of the estate.[34]

Having found the debtor's settlement proceeds to be part of the bankruptcy estate, the *Tignor* court considered the extent to which the debtor could exempt the proceeds from the bankruptcy estate.[35] The Fourth Circuit reasoned that the debtor could exempt the proceeds only to the extent that Virginia law would permit because Virginia had opted out of the federal exemption scheme, thereby limiting Virginia debtors to state law exemptions.[36] Noting that debtors may claim only statutorily created exemptions, as opposed to common law exemptions, the *Tignor* court decided that the Virginia homestead exemption statute[37] provides an exemption not to exceed 5,000 dollars for real and personal property, including unintentional tort claims.[38] The Fourth Circuit concluded, therefore, that the debtor could exempt his personal injury settlement proceeds only as part of the 5,000 dollar Virginia homestead exemption.[39]

While the Fourth Circuit overruled the *Tignor* bankruptcy court concerning the scope of the debtor's personal injury exemption, both courts agreed that a debtor may amend his exemption schedules when such amendment is not prejudicial to adverse parties.[40] Other federal circuit courts, as well as bankruptcy courts in other circuits, are in accord with the Fourth Circuit in *Tignor* and allow amendment of exemption schedules absent prejudice to adverse parties.[41] In *In re Vest*, for example, the Bankruptcy

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541-94 (proceeds intended as broad term encompassing all proceeds of estate property).

34. 729 F.2d at 981. The *Tignor* court noted that the provision in the federal exemptions for personal injury claims indicates that such claims are included in the estate. *Id.* at 980; *see* 11 U.S.C. § 522(d)(11)(D) (1982) ($7,500 exemption for proceeds of personal injury claims).

35. 729 F.2d at 981; *see infra* notes 58-86 and accompanying text (discussing extent of personal injury exemption).

36. 729 F.2d at 981; *see supra* note 6 (effect of state's opting out).

37. *See* VA. CODE § 34-4 (1984). The Virginia homestead exemption states:

> Exemption created. —Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under §§ 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000. The word "debt," as used in this title shall be construed to include a liability incurred as the result of an unintentional tort.

id.; cf. notes 72-86 and accompanying text (discussing existence of common law exemptions in bankruptcy).

38. 729 F.2d at 981; *see* VA. CODE § 34-4 (1984) ($5,000 homestead exemption); *infra* notes 58-72 and accompanying text (discussing Fourth Circuit's interpretation of §34-4 and common law exemptions in bankruptcy).

39. 729 F.2d at 982.

40. *See supra* note 19 and accompanying text (discussing *Tignor* bankruptcy court's decision to permit amendment); notes 29-30 and accompanying text (discussing Fourth Circuit's reasoning on amendment).

41. *See* Doan v. Hudgins, 672 F.2d 831, 833 (11th Cir. 1982). The Eleventh Circuit in

Court for the District of New Mexico allowed a debtor to amend his exemption schedules to include a television set when the trustee had taken no action to recover the television.[42] The *Vest* court stated that amendment would not adversely affect any party to the action because no party had expended time or money to recover the property for the estate.[43] Courts agree, however, that debtors may not amend their exemption schedules to exempt property after the trustee has expended time or money to recover that property for the bankruptcy estate.[44] In *In re Selman*, for example, the Bankruptcy Court for the District of New Mexico denied the debtors' attempt to amend their exemption schedules to protect real estate that the trustee already had sold on behalf of the bankruptcy estate.[45] The *Selman* court noted that approval of the amendment would be unfair to the trustee because he already had expended effort to sell the property.[46]

Although the *Tignor* court purported to follow the rule that courts should allow amendments to exemption schedules only in the absence of prejudice to adverse parties,[47] the court considered the wrong time period in rejecting the trustee's claim that amendment would be prejudicial to him.[48] The *Tignor* court observed that the trustee had taken no action to recover the personal injury claim for the estate until the debtor settled the claim on

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Doan allowed the debtors to amend their exemption schedule to exempt a tax refund eleven months after the initial creditors meeting. *Id.* at 832. The *Doan* court held that courts had no discretion to deny debtors' amendments before the close of a case except in instances of debtor bad faith or prejudice to creditors. *Id.* at 833; *accord* Redmond v. Tuttle, 698 F.2d 414, 416-17 (10th Cir. 1983) (court permitted amendment of exemption schedule to include newly discovered assets before case closed); Andermahr v. Barrus, 30 B.R. 532, 534 (Bankr. 9th Cir. 1983) (court must allow amendment absent prejudice to other parties); *In re* Davis 38 B.R. 585, 586-87 (Bankr. M.D. Tenn. 1984) (overwhelming weight of authority allows amendment before close of case); *In re* Kochell, 23 B.R. 191, 192 (Bankr. W.D. Wis. 1982) (same); *In re* McQueen, 21 B.R. 736, 738 (Bankr. D. Vt. 1982) (courts should allow amendment absent detrimental reliance or prejudice to adverse parties); *In re* Brock, 10 B.R. 67, 69 (Bankr. W.D. Mich. 1981) (courts should allow amendment where no detrimental reliance by adverse parties); *see also In re* Gershenbaum, 598 F.2d 779, 781 (3d Cir. 1979) (court has no discretion to deny amendment).

42. *In re* Vest, 18 B.R. 241, 242 (Bankr. D.N.M. 1980).

43. *Id.*

44. *See infra* notes 45-46 and accompanying text (discussing cases that disallowed amendment because of probable prejudice to trustee).

45. *In re* Selman, 7 B.R. 889, 890 (Bankr. D.N.M. 1980). The debtors in *Selman* claimed a state exemption for their house in Albuquerque in their original bankruptcy petition. *Id.* at 889; *see* N.M. STAT. ANN. § 42-10-9 (1978) (New Mexico homestead exemption). Five months after the debtors in *Selman* made their initial exemption election and after the trustee had sold the debtors' unprotected Utah real estate, the debtors attempted to change their exemption claim from state to federal and exempt the Utah property under § 522(d) of the Act. 7 B.R. at 889; *see* 11 U.S.C. § 522(d) (1982) (federal bankruptcy exemptions).

46. 7 B.R. at 890. The *Selman* court noted that § 326 of the Act would prohibit the trustee from receiving any compensation for his efforts in selling the Utah property if the court were to allow the debtor's amendment. *Id.*; *see* 11 U.S.C. § 326 (1982) (trustee not entitled to compensation for liquidating exempt property).

47. 729 F.2d at 979.

48. *See infra* text accompanying notes 49-51 (discussing *Tignor* court's treatment of trustee's detrimental reliance claim).

June 5, 1981.[49] The debtor, however, did not amend his exemption schedule until October 21, 1981.[50] Thus, the *Tignor* court ignored a nearly five month period during which the trustee may have expended effort to recover the settlement proceeds for the bankruptcy estate.[51]

Regardless of whether the Fourth Circuit correctly determined that the exemption schedule amendment would not be prejudicial to the trustee, the *Tignor* court's decision to allow the amendment appears to be in direct violation of Virginia statutory law.[52] Prior to *Tignor*, the Fourth Circuit held in *Zimmerman v. Morgan* that a debtor in bankruptcy proceedings must comply with state law procedures to claim state exemptions.[53] Virginia Code section 34-17 provides that a debtor may not claim property as exempt under the homestead exemption[54] after he files his voluntary petition in bankruptcy.[55] Because the *Tignor* court held that the debtor's personal injury

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49. 729 F.2d at 979.

50. *Id.* at 980.

51. *See supra* text accompanying notes 49-50 (time period *Tignor* court considered). On August 26, 1981, the *Tignor* bankruptcy court approved the trustee's employment of counsel to obtain the personal injury settlement proceeds for the bankruptcy estate. Appellant's Brief, *supra* note 17, at 2. The trustee in *Tignor* asserted that the estate incurred legal fees by engaging in negotiations for the proceeds of the personal injury settlement. *Id.* at 9. The debtor asserted that the record in *Tignor* did not indicate that the trustee took action to assert the bankruptcy estate's claim to the settlement proceeds or that negotiations took place. Brief for Appellee at 1, Tignor v. Parkinson 729 F.2d 977 (4th Cir. 1984). The suggestion that the trustee failed to include evidence of prejudice to his position in the record does not alter the fact that the Fourth Circuit considered the wrong time period in evaluating the trustee's detrimental reliance claim.

52. *See infra* notes 54-57 and accompanying text (discussing VA. CODE § 34-17).

53. *See* Zimmerman v. Morgan, 689 F.2d 471 (4th Cir. 1982). The debtor in *Zimmerman* filed a voluntary petition in bankruptcy and recorded a description of the property he claimed as exempt in order to claim the Virginia homestead exemption. *Id.* at 472. The debtor mistakenly recorded the description in the wrong county. *Id.* The Fourth Circuit held that when a debtor claims state law exemptions in bankruptcy he must comply with state law exemption procedures and the debtor's failure to satisfy Virginia's procedural requirements precluded him from claiming the homestead exemption. *Id.*; *see* White v. Stump, 266 U.S. 310, 314 (1924) (Idaho debtor denied homestead exemption in bankruptcy for failure to comply with procedure of state statute); *In re* Norton, 30 B.R. 713, 715 (Bankr. E.D. Tenn. 1983) (debtor's failure to satisfy procedure of Tennessee law precluded debtor's claim of exemption).

54. VA. CODE § 34-4 (1984); *see supra* note 37 (text of § 34-4).

55. VA. CODE § 34-17 (1984). Virginia Code § 34-17 states:

> When the exception may be set apart. — The real or personal estate which a householder 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, 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 schedule. (*emphasis added*).

Id.

In *In re* Collins, the debtors attempted to amend their exemption schedule to include anticipated income tax refunds. 24 B.R. 485, 486 (Bankr. E.D. Va. 1982). The bankruptcy

settlement qualified for exemption only under the Virginia homestead exemption,[56] section 34-17 should have applied to bar the debtor's attempt to amend his exemption schedules after he filed his voluntary petition in bankruptcy.[57]

One commentator has speculated that, despite the command of section 34-17, fairness dictated allowing the debtor to amend his exemption schedule because *Tignor* stated a novel doctrine of law concerning the exempt status of personal injury causes of action.[58] Since the *Tignor* court held that section 34-4 of the Virginia Code provides the only exemption for personal injury claims, denial of the amendment would have precluded the debtor from protecting any of his settlement proceeds.[59] By granting the exemption, the purpose of which is to promote a fresh start, the *Tignor* court furthered the fresh start policy of the Bankruptcy Code.[60]

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court in *Collins* adopted the reasoning of the Fourth Circuit in *Zimmerman v. Morgan* and held that Virginia Code § 34-17 precludes debtors from amending their homestead exemption deeds after the debtor files a voluntary petition in bankruptcy. *Id.* at 487; *see supra* note 53 (discussing *Zimmerman*).

56. 729 F.2d at 982.

57. *See supra* note 55 (text of § 34-17); *see also In re* Sutphin, 24 B.R. 149, 150 (Bankr. E.D. Va. 1982) (§ 34-17 precluded debtor from amending homestead deed to exempt previously unmentioned tax refund); *In re* Burns, 23 B.R. 987, 987 (Bankr. E.D. Va. 1982) (§ 34-17 precluded debtor from amending bankruptcy schedules after filing voluntary petition). The Fourth Circuit's decision in *Shirkey v. Leake* does not alter the concluion that § 34-17 bars amendment of a homestead deed to include previously unclaimed property. *See* Shirkey v. Leake, 715 F.2d 859 (4th Cir. 1983). In *Shirkey*, the debtor mistakenly claimed his 1980 income tax refunds on his homestead deed as 1978 refunds. 715 F.2d at 860; *see* VA. CODE § 34-14 (1984) (debtor must file homestead deed to claim exemptions). The Fourth Circuit in *Shirkey*, noting that the date of the refunds served no critical purpose, allowed the debtor to amend his homestead deed to correct the date of the refunds. 715 F.2d at 863. The *Shirkey* court stated that § 34-17 does not prohibit amendments that clarify exemptions the debtor already has claimed. *Id.* Judge Widener concurred in *Shirkey* on the ground that the debtor's initial description had described the exemption adequately. *Id.* at 864 (Widener, C.J., concurring). In contrast to the facts in *Shirkey*, the debtor in *Tignor* attempted to exempt his personal injury settlement for the first time by amending his exemption schedules. 729 F.2d at 978.

58. *See* Ulrich, *How Bankruptcy Exemptions Work: Virginia as an Illustration of Why the "Opt Out" Clause was a Bad Idea,* GEO. MASON L. REV. (1985) (in depth criticism of *Tignor* court's interpretation of § 34-4); *see infra* notes 61-86 and accompanying text (discussing *Tignor* court's novel treatment of exempt status of personal injury claims).

59. 729 F.2d at 981. The debtor in *Tignor* claimed the homestead exemption but did not include any of his personal injury claim as part of the exemption. *Id.* at 978. In light of the fact that no other court had extended § 34-4 to personal injury recoveries it would have been unreasonable for the *Tignor* court to expect the debtor to claim his personal injury cause of action as part of his homestead exemption. *See infra* notes 69-70 and accompanying text (other courts' interpretations of § 34-4).

60. *See Tignor*, 729 F.2d 977. Since the goal of exemption statutes is to permit debtors to protect certain property, allowing amendment to protect that property serves the goal. *See supra* note 4 (goal of exemptions); *see also* Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C.L.REV. 769, 800 (1980) (debtors should not lose exemptions for failure to claim them). Allowing debtors to amend their exemption schedules absent prejudice to adverse parties also is consistent with the almost universally accepted rule that courts should construe exemption statutes liberally for the benefit of the debtor. *See In re* Smith, 640 F.2d

After deciding to allow the debtor to amend his exemption schedule, the *Tignor* court reached the unprecedented conclusion that Virginia debtors may protect their personal injury claims only as part of the 5,000 dollar Virginia homestead exemption.[61] In 1978, the Virginia legislature amended the Virginia homestead exemption by adding a definition of the word "debt."[62] The amendment defines debt as including a "liability incurred as the result of an unintentional tort."[63] The word "debt" appears twice in the section, first as "debt" and then as "debts."[64] In the first instance debt refers to creditor's claims against the debtor against which the debtor may assert the homestead exemption.[65] In the second instance "debts due him" refers to payments third parties owe to the debtor which the homestead exemption protects from the claims of the debtor's creditors.[66] The *Tignor* court stated that the 1978 amendment applied to both the word "debt" and the word "debts" in section 34-4.[67] The *Tignor* court's interpretation of section 34-4 is awkward because it contemplates a bankruptcy petitioner protecting "liabilities incurred as the result of an unintentional tort due him."[68]

The *Tignor* court's interpretation of section 34-4, in addition to being awkward, is inconsistent with the holdings of other courts in the Fourth Circuit.[69] In *In re Musgrove*, for example, the Bankruptcy Court for the

888, 891 (7th Cir. 1981) (construe exemption statutes liberally); Murray v. Zuke, 408 F.2d 483, 487 (8th Cir. 1969) (liberally construe exemption statutes for relief of debtor and family); Elliott v. Ostman, 340 F.2d 581, 583 (9th Cir. 1965) (construe exemption statute liberally).

61. 729 F.2d at 982; *see infra* notes 69-70 and accompanying text (other courts' interpretation of § 34-4). *See generally* Ulrich, *supra* note 58 (in depth criticism of *Tignor* court's interpretation of § 34-4).

62. *See* VA. CODE § 34-4 (1984).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. 729 F.2d at 981.

68. *See* VA. CODE § 34-4 (1984). An alternative interpretation of §34-4 would apply the definition of debt to the word as it first appears in the section but not in the second instance. Such an interpretation would read more naturally, because it would contemplate debtors protecting $5,000 of their property from their creditors' demands, including demands against the debtor for his unintentional torts. While Professor Ulrich concedes that the *Tignor* court's interpretation of § 34-4 is possible he emphasizes that it is not idiomatic. Ulrich, *supra* note 58.

69. *See Tignor*, 21 B.R. at 221 (no Virginia statute explicitly exempts personal injury claims). In *In re* Eanes, which arose after the amendment to § 34-4, the Bankruptcy Court for the Western District of Virginia stated that title 34 of the Virginia Code provides no exemption for personal injury claims and therefore held the debtor could not exempt his personal injury claim. *In re* Eanes, No. 682-00157-C, slip op. at 3 (Bankr. W.D. Va. 1982). In *Eanes v. Shepherd*, the District Court for the Western District of Virginia reversed the bankruptcy court and held that personal injury claims are exempt under Virginia common law. Eanes v. Shepherd, 33 B.R. 984, 987 (W.D. Va. 1983). Unlike the Fourth Circuit in *Tignor*, neither the *Eanes* bankruptcy court nor the *Eanes* district court applied § 34-4 to the debtor's personal injury exemption claim. Following the *Tignor* decision, however, the Fourth Circuit reversed the *Eanes* decision. 735 F.2d 1354 (4th Cir. 1984). *See also* Woodward, *supra* note 1, (listing Virginia among states having no statutory personal injury exemption).

Western District of Virginia relied on Virginia common law to determine the existence of an exemption for personal injury claims.[70] The *Musgrove* court's reliance on the common law rather than section 34-4 implies that, unlike the *Tignor* court, the *Musgrove* court did not believe section 34-4 applied to debtor's personal injury claims.

The *Tignor* court, in support of its interpretation of section 34-4, stated that exemptions are strictly statutory.[71] Other courts are not in agreement over whether debtors may claim only statutorily created exemptions in bankruptcy.[72] The *Tignor* court's statement conflicts, for example, with the recent decision of the Bankruptcy Court for the Eastern District of Wisconsin in *Matter of Brandstaetter*.[73] The *Brandstaetter* court held that despite the absence of a statutory exemption, personal injury claims are exempt in bankruptcy under Wisconsin common law.[74] The *Brandstaetter* court stated that debtors may claim common law exemptions in bankruptcy under section 522(b)(2)(A) of the Act.[75] The decision of the *Musgrove* court is also in conflict with the *Tignor* court's statement that exemptions are strictly statutory.[76] In *Musgrove*, the bankruptcy court found that the entirety of a debtor's unliquidated personal injury claim constituted exempt property.[77]

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70. *In re* Musgrove 7 B.R. 892, 896 (Bankr. W.D. Va. 1981). In *Musgrove*, the bankruptcy court found that the entirety of a debtor's unliquidated personal injury claim constituted exempt property. *Id.* at 896. The *Musgrove* court relied on Virginia common law, which provided that unliquidated claims are exempt because they are neither assignable nor subject to creditor process. *Id.*; *see* Ruebush v. Funk, 63 F.2d 170, 173 (4th Cir. 1933) (personal injury claim not assignable); City of Richmond v. Hanes, 203 Va. 102, 105, 122 S.E.2d 895, 898 (1961) (personal injury claim not transferable). Although the *Tignor* bankruptcy court followed the *Musgrove* decision, the Fourth Circuit in *Tignor* did not address the significance of *Musgrove*. *See* 21 B.R. 219, 222-23 (*Tignor* bankruptcy court followed Musgrove); *see also* 729 F.2d 977 (holding that common law exemptions are inapplicable).

71. 729 F.2d at 981-82.

72. *See infra* notes 73-81 and accompanying text (discussing sources of exemption). Courts often state that exemptions are strictly statutory, without providing any explanation for the rule. *See, e.g.*, Nohinek v. Logsdon, 6 Kan. App. 2d 342, 343, 628 P.2d 257, 258 (1981) (exemptions are not common law rights but are creations of statutes and constitutions); Richman v. Pratt, 174 N.J. Super. 1, 414 A.2d 1371, 1372 (N.J. Super. Ct. App. Div. 1980) (general rule is that exemptions are created by statute or constitution); State v. Caldwell, 181 Tenn. 74, 85, 178 S.W.2d 624, 628 (1944) (exemption must appear in constitution or statute); *In re* Yoder's Estate, 341 Pa. 81, 82, 19 A.2d 139, 140 (1941) (exemption must be statutory); Medical Finance Ass'n. v. Short, 36 Cal. App. 2d Supp. 745, 746, 92 P.2d 961, 962 (Cal. 1969) (exemption must be statutory).

73. 36 B.R. 369 (Bankr. E.D. Wis. 1984). In *In re Brandstaetter*, the debtors claimed Wisconsin common law exemptions for personal injury claims on which they had not yet filed suit. *Id.* at 369. The *Brandstaetter* court, without giving any reason, simply agreed with the debtor's claim that state common law exemptions are effective in bankruptcy. *Id.* at 369-70.

74. *Id.* at 370.

75. *Id.*

76. *See Musgrove*, 7 B.R. 892. *See infra* notes 77-78 and accompanying text (*Musgrove* court's application of common law exemptions in bankruptcy).

77. 7 B.R. at 896.

The *Musgrove* court stated that under Virginia common law personal injury causes of action are immune from creditor process and therefore are exempt in bankruptcy pursuant to section 522(b)(2)(A) of the Act.[78]

The Fourth Circuit's view that exemptions are strictly statutory is in accord, however, with the holding of the Bankruptcy Court for the Western District of Virginia in *In re Dummit*.[79] The debtor in *Dummit* attempted to exempt his automobile under section 34-26 of the Virginia Code, which provides that a mechanic may exempt the tools of his trade.[80] While the *Dummit* court noted that the debtor's automobile was essential to his work as a travelling salesman, the court held that a debtor may only exempt items the Virginia Code expressly permits and since a travelling salesman's automobile is not literally the tool of a mechanic's trade, the exemption did not apply.[81] The *Dummit* court's decision, therefore, is consistent with the *Tignor* court's statement that exemptions are strictly statutory.

Similar to the conflict among the courts, commentators also do not agree whether debtors may claim common law exemptions in bankruptcy.[82] One commentator specifically disagrees with the *Tignor* court's statement that exemptions are strictly statutory, noting that the phrase "state or local law" generally includes both statutory and common law.[83] Another commentator, however, has stated that the status of common law exemptions in bankruptcy is unclear.[84] Professor Woodward notes that the Bankruptcy Act's specific provision of exemptions for tenancy by entirety property and spendthrift trusts, which are often immune from creditor process under state common law, implies that state common law exemptions do not apply in bankruptcy.[85]

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78. *Id.* The Fourth Circuit's treatment of both the *Tignor* and *Eanes* cases indicates that the Fourth Circuit does not follow the *Musgrove* decision. *See* 729 F.2d 977 (*Tignor* decision); 735 F.2d 1354 (*Eanes* decision).

79. *In re* Dummit, 2 B.R. 136 (Bankr. W.D. Va. 1980); *see infra* text accompanying notes 80-81 (*Dummit* court's reasoning that debtor may claim only statutory exemptions).

80. *Dummit*, 2 B.R. at 137; *see* VA. CODE § 34-26 (1984) (exemption for mechanic's tools of trade).

81. *Dummit*, 2 B.R. at 137. The *Dummit* court held that Virginia's opt out statute required that debtors claim only those exemptions specified in title 34 of the Virginia Code. *Id.*; *see* VA. CODE § 34-3.1 (Virginia's opt out statute); Woodward, *supra* note 69, at 346 (listing Virginia among states having opt out statutes which restrict debtors to statutory exemptions).

82. *See infra* notes 83-86 and accompanying text (discussing commentator's different views).

83. *See* Ulrich, *supra* note 58. Professor Ulrich cites *Erie Railroad v. Thompson*, in which the Supreme Court held that in the absence of federal constitutional or statutory law federal courts must apply state law, whether statutorily or judicially created. *Id. see* Erie Railroad v. Thompson, 304 U.S. 64, 78 (1938). While the legislative history of § 522(B)(2)(A) is silent on the meaning of "state or local law," Congress must have been aware of the general understanding of the phrase.

84. *See* Woodward, *supra* note 69, at 350; *see infra* text accompanying notes 85-86 (discussing implication of Bankruptcy Reform Act's specific provisions for tenant by entirety and spendthrift trust exemptions).

85. Woodward, *supra* note 69, at 351; *see* 11 U.S.C. § 522(b)(2)(B) (1982) (tenancy by entirety exemption); *id.* § 541(c)(2) (spendthrift trust exemptions).

If the reference to state or local law in section 522(b)(2)(A) of the Act included state common law exemptions, then specific provisions for these two types of exemptions would be unnecessary because both these types of property would already be exempt under section 522(b)(2)(A).[86]

In view of the Fourth Circuit's belief that debtors may claim only statutory exemptions in bankruptcy the *Tignor* court's interpretation of section 34-4 of the Virginia Code served to promote the debtor's fresh start by allowing the debtor to protect at least part of his settlement recovery.[87] In light of the disagreement among courts and commentators on the status of common law exemptions in bankruptcy, however, the *Tignor* court's belief that debtors may claim only statutory exemptions appears debatable.[88] To the extent, therefore, that the Fourth Circuit's belief that exemptions are strictly statutory influenced the *Tignor* court's unprecedented[89] and awkward interpretation of the Virginia homestead exemption, that interpretation is subject to question.[90]

While the *Tignor* court allowed the debtor to amend his exemption schedules, practitioners should remain aware that the clear mandate of section 34-17 probably will bar Virginia debtors from amending their exemption schedules in the future.[91] The *Tignor* decision also should alert practitioners

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86. Woodward, *supra* note 69, at 351. *But see* Ulrich, *supra* note 58 (Act's provision of common law tenancy by entirety exemption does not imply inapplicability of other common law exemptions).

87. *See Tignor*, 729 F.2d at 981. Had the *Tignor* court interpreted § 34-4 as not including personal injury recoveries, the debtor could not have protected any of the proceeds of his settlement. *Id.* at 982. In addition to promoting a fresh start the Fourth Circuit's decision in *Tignor* also served the goal of the Virginia opt out statute by enabling the debtor to protect the same property in bankruptcy as he would have been able to protect under purely state proceedings. *See* Woodward, *supra* note 69, at 346 (apparent intent of opt out statutes is to leave debtors with same property after bankruptcy as they would have retained after state debt collection proceedings); Ulrich, *supra* note 58 (*Tignor* result possibly correct in giving exemption claim same treatment in bankruptcy as claim would get in state creditor proceedings); *see also* VA. CODE § 34-3.1 (1984) (Virginia's opt out statute). State common law personal injury claim exemptions are effective only while the claims remain unliquidated because once the debtor recovers on the claim the proceeds are assignable and thus subject to creditor process except to the extent that the debtor can protect the proceeds under an exemption statute. When bankruptcy courts allow these common law exemptions in bankruptcy, however, the exemptions become final via the debtor's discharge. *See supra* note 3 and accompanying text (explanation of Chapter 7 bankruptcy procedures). Therefore, by permitting the debtor to except his personal injury claim proceeds only under a statutory exemption the *Tignor* court allowed the debtor to protect the same property in bankruptcy as he could have protected under state proceedings.

88. *See supra* notes 72-86 and accompanying text (discussing unsettled status of common law exemptions in bankruptcy). Had the *Tignor* court held that common law exemptions do apply in bankruptcy the court would have provided the debtor with a much more meaningful fresh start by enabling the debtor to retain all $105,000 of his settlement rather than just part of the settlement not to exceed $5,000. *See In re* Musgrove, 7 B.R. 892, 896 (Bankr. W.D. Va. 1981) (debtor may exempt entire unliquidated personal injury claim under common law).

89. *See supra* notes 69-70 and accompanying text (no other court has interpreted § 34-4 as applying to personal injury claims).

90. *See supra* notes 62-68 and accompanying text (discussing *Tignor* court's awkward interpretation of § 34-4).

91. *See* Ulrich, *supra* note 58. Because the *Tignor* decision serves as a warning that § 34-4