Bankruptcy - Section 522(b)(2)(B) - Debtor May Not Exempt Pennsylvania Entireties Property Subject to an Existing Judgment against Both Debtor and Spouse on a Joint Debt

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BANKRUPTCY—SECTION 522(b)(2)(B)—DEBTOR MAY NOT EXEMPT PENNSYLVANIA ENTIRETIES PROPERTY SUBJECT TO AN EXISTING JUDGMENT AGAINST BOTH DEBTOR AND SPOUSE ON A JOINT DEBT

_Napotnik v. Equibank (In re Napotnik) (1982)_

On June 1, 1978, Equibank obtained a judgment by confession1 against Gary and Carol Napotnik, husband and wife, resulting in a lien against certain real property held by the Napotniks as tenants by the entirety.2 Gary Napotnik (Debtor) subsequently filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (Code)3 in the United States Bankruptcy Court for the Western District of Pennsylvania.4 Thereafter, Debtor sought to avoid Equibank's lien on the ground that section 522(b)(2)(B) of the Code5 exempted his individual interest in property held with his wife as tenants by the entirety, and that section 522(f) entitled him to avoid the lien because it impaired his claimed exemption.6 The bankruptcy court ruled

1. Napotnik v. Equibank (In re Napotnik), 679 F.2d 316, 318 (3d Cir. 1982). On May 26, 1978, Gary and Carol Napotnik, husband and wife, jointly executed a term loan note payable to Equibank upon which a confession of judgment was taken and filed a few days later. Id.

2. Id. at 317-18. Under Pennsylvania law, entry of a judgment by confession creates a lien on all real property of the debtor located in the county in which judgment is filed. Id. See 42 Pa. Cons. Stat. Ann. § 4303 (Purdon 1981). The debtor, together with his wife, owned three contiguous parcels of land valued at $180,000. 679 F.2d at 317.

3. 679 F.2d at 317. The petition was filed on July 11, 1980. Id. The procedure under Chapter 7 leads to an orderly distribution of the debtor's property among creditors and to the debtor's partial or total release from all joint and several obligations. See generally A. COHEN, BANKRUPTCY; SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS 46-48 (1981).


5. 11 U.S.C. § 522(b)(2)(B) (1979). Section 522(b) provides in pertinent part,

Notwithstanding section 541 of this title [11 U.S.C. § 541], an individual debtor may exempt from property of the estate...

(2)(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

Id. For the text of § 541, see note 11 infra.

6. 679 F.2d at 318-19. Section 522(f) provides,

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien...


The Third Circuit has held that judgments by confession are judicial liens for

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(655)
that Debtor's individual interest in the entireties property did not qualify as exempt to the extent that the property was encumbered by a judgment against both Debtor and his spouse on a joint debt.7

The Third Circuit affirmed the bankruptcy court's decision,8 holding that because a creditor in Pennsylvania with a judgment on a joint debt may levy upon the entireties property itself and thus upon the interests of both spouses, the debtor's individual interest is not "exempt from process" within the meaning of section 522(b)(2)(B). Napotnik v. Equibank, 679 F.2d 316 (3d Cir. 1982).

The Bankruptcy Reform Act of 1978 (Code) represents the culmination of a major legislative effort, initiated in the late 1960's, to revise the bankruptcy laws of the United States.9 A basic purpose of the Code is to guarantee the debtor who in good faith complies with its provisions an opportunity for a fresh start, free from creditor harassment and the pressures of excessive debt.10

Under section 541(a) of the Code "all legal or equitable interests of the debtor in property as of the commencement of the case,"11 become property of the debtor's bankruptcy estate, which is available for distribution among creditors.12 However, to further the Code's goal of giving the debtor a fresh

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8 In re Napotnik, No. 80-1069, (Bankr. W.D. Pa. June 26, 1981) (mem.). The bankruptcy court found that only the debtor's equity in the property over and above the amount of the judicial lien could be exempted under § 522(b)(2)(B). Id. The bankruptcy court's reasoning was disclosed in an opinion filed the same day, to which cross reference was made. See In re Cipa, 11 Bankr. 968 (Bankr. W.D. Pa. 1981).

9 See Kennedy, Forward: A Brief History of the Bankruptcy Reform Act, 58 N.C.L. Rev. 667, 669 (1980).


11 11 U.S.C. § 541(a) (Supp. IV 1979). Section 541(a) provides, in pertinent part:

The Commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

1. Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.


Section 70(a) of the Act and § 541(a) of the Code represent different approaches to the definition of the debtor's estate. The qualifying language of § 70(a) operated to exclude certain property interests which were not transferable, such as entireties interests. See note 22 and accompanying text infra. By comparison, § 541(a) of the Code is a broad and inclusive provision which sweeps in all interests in property, even
start, the debtor is entitled to exempt certain property from the estate, free from distribution to, or subsequent seizure and sale by, creditors. Most courts have found that the broad language of section 541(a) requires a finding that entireties property owned by the debtor becomes property of the estate. Section 522(b)(2)(B), however, provides that a debtor may exempt "an interest as a tenant by the entirety or joint tenant to the extent that such

those which are potentially exemptable, requiring the debtor to then seek exemptions under the applicable provisions. 11 U.S.C. §§ 522, 541 (Supp. IV 1979). See generally A. COHEN, supra note 3, ¶ 13-306.2, at 73 (1981).

The House and Senate reports on the bills from which the Code was derived both comment on the broad scope of the provision, emphasizing that it "includes all kinds of property . . . even that needed for a fresh start." S. REP. No. 898, 95th Cong., 2d Sess. 83 (1978); H.R. REP. No. 595, 95th Cong., 1st Sess. 126, 176 (1977). The House report discussed at length §§ 363(h), (i) and (j), which delineate the procedure for liquidation of co-tenancy properties:

With respect to other co-ownership interests, such as tenancies by the entirety, joint tenancies, and tenancies in common, the bill does not invalidate the rights, but provides a method by which the estate may realize on the value of the debtor's interest in the property while protecting the other rights . . . . The other interest is protected . . . by giving the spouse a right of first refusal at a sale of the property, and by requiring the trustee to pay over to the spouse the value of the spouse's interest in the property.

Id. at 126.

13. See 11 U.S.C. § 522 (Supp. IV 1979). See also 9 AM. JUR. 2D Bankruptcy § 302 (1980). A properly claimed exemption enjoys a presumption of validity and will be except unless a party in interest objects. 11 U.S.C. § 522(a) (Supp. IV 1979). The broad objectives of the exemption provisions have been stated as (1) protecting the debtor and the family from absolute poverty; (2) assisting the debtor's rehabilitation; and (3) shifting the burden of the debtor's welfare from the public to those creditors who deal with the debtor and may have contributed to his economic dilemma. 9 AM. JUR. 2D Bankruptcy § 302 (1980).

Section 522(f) of the Code safeguards the debtor's exemption by allowing him to avoid any judicial lien against his property, to the extent that the lien impairs the debtor's exemption. 11 U.S.C. § 522(f) (Supp. IV 1979). For the text of § 522(f), see note 6 supra.


Interpretation of § 541 requires analysis of the law of tenancy by the entireties of the state in which the property is located. Peculiarities in certain states' common law has occasionally led to different results. For example, the District Court for the Northern District of Indiana held that property owned by the entireties in Indiana does not become property of the estate under § 541 of the Code. In re Jeffers, 3 Bankr. 49, 56 (Bankr. N.D. Ind. 1980). In Indiana, neither tenant has any legally recognized separable interest in the entireties estate, and therefore the Jeffers court concluded that the debtor had no property interest for purposes of § 541 of the Code. Id. at 53 (citing Sharpe v. Baker, 51 Ind. App. 547, 571, 96 N.E. 627 (1911)). Similarly, the District Court for the Western District of Missouri found that because Missouri law gave the individual spouse no legal or equitable right in entireties property, the prop-

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interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.\footnote{15} Analysis of the availability of this exemption to a particular debtor requires a review of the common law of tenancy by the entirety and of the judicial resolution of this issue under the prior act, the Bankruptcy Act of 1898 (Act).\footnote{16}

Under Pennsylvania law, the estate of tenancy by the entirety can exist only between husband and wife.\footnote{17} The estate is seen as being composed of indivisible parts; each spouse has a right to possess the whole property as well as an indestructible right of survivorship.\footnote{18} As a result, neither spouse can unilaterally transfer or encumber the property.\footnote{19} Entitilies property in

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15. 11 U.S.C. § 522(b)(2)(B) (1979). For the complete text of this section, see note 5 supra. In the absence of a federal definition, state property law defines a debtor's "legal and equitable interests" under § 541(a). \textit{4 Collier on Bankruptcy} ¶ 541.02, at 541-12 (15th ed. 1981). The appropriate state law to be applied is that of the situs of the property. See, e.g., Hayes v. Schaefer, 399 F.2d 300, 301 (6th Cir. 1968); Reid v. Richardson, 304 F.2d 351, 353 (4th Cir. 1962); Kerin v. Palumbo, 60 F.2d 480 (3d Cir. 1932); Dioguardi v. Curran, 35 F.2d 431, 432 (4th Cir. 1929). \textit{Ac- cord United States} v. Yazell, 382 U.S. 341, 354-55 (1966).


18. \textit{4 Thompson on Real Property} §§ 1777, 1784 (1979). Ownership is limited to husband and wife because the estate is founded on the four unities of joint tenancy: time, title, interest, and possession, plus the fifth unity of marriage. \textit{Id.} Under Pennsylvania law, "[a] conveyance to a husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit made up of divisible parts; that of husband and wife is also a unit; but is made up of indivisible parts." Stuckey v. Keefe's Ex'es, 26 Pa. 397, 399 (1856). In Pennsylvania, barring clear and convincing evidence to the contrary, a husband and wife take property as tenants by the entireties. \textit{In re} Barsotti, 7 Bankr. 205, 208 (Bankr. W.D. Pa. 1980) (citing Holmes Estate, 414 Pa. 403, 406, 200 A.2d 745, 747 (1964)); Shapiro v. Shapiro, 424 Pa. 120, 129, 224 A.2d 164, 169 (1966); Hoover v. Potter, 42 Pa. Super. 21 (1910).

When property is held by the entireties, husband and wife are said to be seized of the whole property, \textit{per tout et non per my}, not of a moiety or divisible share. \textit{In re} Gallagher Estate, 352 Pa. 476, 478, 43 A.2d 132, 133 (1945). When husband and wife hold property as tenants by the entirety, they are considered to be a single legal entity. \textit{4 Thompson on Real Property} ¶ 1784 (1979). See also Beihl v. Martin, 236 Pa. 519, 522, 84 A. 953, 954 (1912). The single legal entity, comprised of both spouses, continues to exist even after the death of one spouse. Stuckey v. Keefe's Executors, 26 Pa. 397, 399 (1856).

19. \textit{In re} Barsotti, 7 Bankr. 205, 208 (Bankr. W.D. Pa. 1980); C.I.T. Corp. v. Flint, 333 Pa. 350, 355, 5 A.2d 126, 128 (1939). Neither spouse can destroy the other's right of survivorship because neither can compel partition nor sever the estate by unilateral conveyance. Sterrett v. Sterrett, 401 Pa. 583, 585, 166 A.2d 1, 2 (1960). Because the property is controlled by the legal entity, the entireties, it can be con-
Pennsylvania, therefore, is not subject to lien or execution by the creditors of only one spouse while both spouses are living. However, joint creditors of both husband and wife may levy on the entireties property to satisfy a judgment that is against both spouses and thus, in effect, against the "entireties." 

Under the prior Bankruptcy Act, property owned by the entireties was not included in the debtor’s estate. Consequently, a creditor of both spouses who had reduced its claim to judgment prior to bankruptcy was not affected by the bankruptcy because the lien on the entireties property resulted.

20. Gasner v. Pierce, 286 Pa. 529, 532, 134 A. 494, 495 (1926); Beihl v. Martin, 236 Pa. 519, 523, 84 A. 953, 956 (1912). Under Pennsylvania law, creditors of one spouse may obtain a presently unenforceable lien on the debtor’s expectancy of survivorship subject to the non-debtor spouse’s rights. Id. at 525, 84 A. at 955-56. In some jurisdictions, the right of survivorship itself, despite its contingent nature, is freely alienable and subject to execution by creditors of one spouse. Covington v. Murray, 220 Tenn. 265, 416 S.W.2d 761 (1967); Hoffmann v. Newell, 249 Ky. 270, 60 S.W.2d 607 (1933).


22. See generally 4 COLLER ON BANKRUPTCY ¶ 541.07(b), at 541-35 (15th ed. 1981). This was due to the nature of the common law estate and operation of § 70(a)(5) of the Bankruptcy Act of 1898. See note 12 supra. Under § 70(a) of the prior Act the trustee of the bankrupt’s estate was vested with title of all property of the bankrupt, “which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered.” 11 U.S.C. § 110(a)(5) (1976) (repealed 1978).

When both spouses filed for bankruptcy under the Act, the courts in some cases consolidated the estates, in an effort to give the trustee access to entireties property. See In re Wetteroff, 453 F.2d 544 (8th Cir. 1972); In re Pennell, 15 F. Supp. 743 (W.D. Pa. 1935); In re Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933). These courts apparently reasoned that the existence of a joint judgment would have permitted levy and sale of the entireties property and thus the property was transferable within the meaning of § 70(a)(5). Craig, supra note 17, at 269 & n.57. However, a Maryland court proposed that since both spouses were bankrupt, the trustee should be looked upon as having the powers of a joint judgment creditor, which would entitle him to levy on the property. In re Utz, 7 F. Supp. 612, 613 (Bankr. D. Md. 1934). See also Craig, supra note 17, at 268 & n.55.
ing from the judgment survived the debtor's discharge. Conversely, if a creditor's claim had not been reduced to judgment no lien could attach to the property; the debt remained a personal liability of the debtor and as such was discharged. In many jurisdictions the debtor's discharge would prevent the creditor from obtaining the joint judgment needed to levy on the entireties property after the bankruptcy proceeding. The value of the entireties property was therefore unavailable to the joint creditor, either in a state proceeding or in the distribution from the bankruptcy estate because such property was not included in the estate.

There were varying judicial responses to the apparent inequity of depriving a joint creditor of its common law right to execute against entireties property. For example, in Phillips v. Krakower, a creditor held a note signed by both husband and wife, which had not been reduced to judgment

23. 1A Collier on Bankruptcy ¶ 17.29 (14th ed. 1978).
24. Id.
25. See Craig, supra note 17, at 284; Comment, supra note 21, at 286-88.
26. Comment, supra note 21, at 287-88. See notes 12 & 22 supra. While the joint creditor would receive a dividend from the estate alone with the other creditors, the value of the entireties property would not be included, because it was not property of the estate. Craig, supra note 17, at 284; Comment, supra note 21, at 287-88.
27. See Lockwood v. Exchange Bank, 190 U.S. 294 (1903). While Lockwood did not involve entireties property, it formed the basis for subsequent decisions permitting joint creditors to reach entireties property of bankrupt debtors in state court proceedings. The creditor in Lockwood had obtained the debtor's waiver of an exemption prior to the debtor's filing for bankruptcy. Id. at 295. Despite the waiver, the trustee determined that all of the debtor's assets were exempt from the bankruptcy estate under the state homestead exemption. The creditor sought relief in the bankruptcy court. Id. The Supreme Court ultimately found that the bankruptcy court had no jurisdiction to administer exempt property and that the creditor's only remedy was to prosecute the claim in state court. Id. at 299-300. The Court reasoned that the fact that the Act gave the bankruptcy courts authority to set aside exempt property "affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets." Id. The Supreme Court moved to protect the creditor, seen as having "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." Id. at 300.

28. See, e.g., Edwards & Chamberlin Hardware Co. v. Pethick, 250 Mich. 315, 230 N.W. 186 (1930). The Edwards court held that a bankruptcy discharge of either spouse would not bar a suit brought by a joint creditor seeking to reach entireties assets. Id. at 321, 230 N.W. at 188. The court viewed the action as quasi-in rem and therefore unaffected by a discharge of the debtor's personal liability. Id. at 320, 230 N.W. at 187. The court also seemed to rely heavily on a Michigan statute which abrogated the common law disability of a married woman and expressly provided that married women could be jointly liable on a debt with their husbands, and that joint creditors could execute on property held by the entireties to satisfy such judgments. Id. at 318-20 & n.1, 230 N.W. at 187 & n.1. The court stated "[t]he statute will be of no benefit to a creditor relying on it as a means of enforcing a joint obliga-
when the husband was adjudged bankrupt. The Fourth Circuit, in Krokower, granted a stay of the husband's discharge in order to permit the joint creditor to go outside of the bankruptcy proceedings and enforce its claim against the entireties property in state court. To do otherwise, the Krokower court said, would "result in a legal fraud," because the debtor's discharge would bar a creditor from subsequently obtaining the joint judgment necessary to execute against the entireties property.

The Indiana Supreme Court relied upon a different theory to protect a joint creditor, in First National Bank of Goodland v. Pothuisje, where a joint


28. Id.

29. 46 F.2d 764 (4th Cir. 1931). In Krokower, the Fourth Circuit adopted the rationale and approach of Lockwood v. Exchange Bank, 190 U.S. 294 (1905). For a discussion of Lockwood, see note 27 supra.

30. 46 F.2d at 765. The court expressed concern at the outcome in such a case: "[the] discharge of Phillips in bankruptcy not only will prevent judgment being obtained against him on the note, but will prevent also, during his lifetime, the property held by entireties being subjected to the satisfaction of any judgment which may be obtained against his wife." Id.

31. Id. at 766. The Krokower court relied heavily on Lockwood v. Exchange Bank finding "no difference in principle" between the two cases, and stated that, "The basis upon which relief is granted in either case... is... that an equity exists in favor of the creditor because he is entitled to subject property to the satisfaction of his claim and this right will be extinguished by the granting of the discharge." Id. (citing Lockwood v. Exchange Bank, 190 U.S. 294 (1903)). For a discussion of Lockwood, see note 27 supra.

32. 46 F.2d at 765. The legal fraud, as the court described it, would be, "the effectual withdrawing of the property from the reach of those entitled to subject it to their claims, for the beneficial ownership and possession of those who created the claims against it." Id. Relying upon the equitable nature of bankruptcy law, the court found it inconceivable that the Act should be used to "perpetuate fraud or to shield assets from creditors" especially under the guise of equity. Id. The court stated emphatically, "we cannot conceive that any court would lend its aid to the accomplishment of a result so shocking to the conscience." Id.


33. 46 F.2d at 765. A number of courts concur in the proposition that one spouse's discharge thereafter bars a creditor from obtaining a joint judgment against both spouses. See In re Bishop, 482 F.2d 381, 383 (4th Cir. 1973); Reid v. Richardson, 304 F.2d 351, 354 (4th Cir. 1962); In re Magee, 415 F. Supp. 521, 524 (D. Mo. 1976); In re Saunders, 365 F. Supp. 1351, 1353 (W.D. Va. 1973); Wharton v. Citizens' Bank, 233 Mo. App. 236, 15 S.W.2d 860, 863 (1929) (dictum); Ades v. Caplan, 132 Md. 66, 103 A. 94, 95 (1918); 1 Collier on Bankruptcy ¶ 16.06 at 1535 (14th ed. 1960). See also Harris v. Manufacturer's Nat'l Bank, 457 F.2d 631, 633 (6th Cir.), cert. denied, 409 U.S. 885 (1972) (Section 7 of Bankruptcy Act, 11 U.S.C. § 35 clearly requires that discharge releases bankrupt from all provable debts, and therefore from all joint liability). But see Roubih v. Michigan Bank, 345 F.2d 782, 783 (6th Cir. 1965); United States v. Hart, 382 F. Supp. 244, 246 (D.D.C. 1974); note 28 supra and notes 34-41 and accompanying text infra.

34. 217 Ind. 1, 25 N.E.2d 436 (1940).
creditor brought suit after the discharge in bankruptcy of one spouse. The 
*Pothuisje* court found for the creditor on the theory that husband and wife, in 
addition to their joint and several liability, had incurred liability as the entire-
ties, a distinct legal entity. The court reasoned that discharge of one 
spouse's joint and several liabilities could have no effect on that "third 
dimension" of liability. The lower courts of Pennsylvania adopted the 
*Pothuisje* approach in *Bank of Erie v. LaJohn*. In *LaJohn*, the creditor ob-
tained a joint judgment prior to the husband's discharge in bankruptcy. 
The husband subsequently sought to open the judgment on the ground that 
his discharge had released him from that liability. The *LaJohn* court de-
nied the husband's request and held that "the discharge only affected the 
several liabilities aspect of the debt but afforded no relief against the distinct 
dimension of liability created by the husband and wife as a common-law 
unit."  

35. *Id.* at 4, 25 N.E.2d at 437. The husband had previously been discharged a 
bankrupt, while the wife had filed separately for bankruptcy but had not yet been 
discharged. *Id.* The spouses filed separate demurrers to the joint creditor's claim; the 
court dismissed the claim against the husband, but entered judgment against the 
wife. *Id.* The creditor appealed, seeking to have the court resolve the effect of the 
husband's discharge on the creditors' right to proceed against both spouses in state 
court. *Id.* at 5-6, 25 N.E.2d at 437-38. The Indiana Supreme Court reversed the 
lower court's ruling which sustained the husband's demurrer. *Id.* at 14, 25 N.E.2d at 
441.  

36. *Id.* at 12, 25 N.E.2d at 440.  
37. *Id.*  
Rubin, 44 D. & C.2d 390 (1968); Reserve Loan Co. v. Confer, 38 Pa. D. & C.2d 451 
39. 27 Pa. D. & C.2d at 706 (1962). The *LaJohn* court was faced with the ques-
tion of whether the obligee of a judgment note signed by both spouses could maintain 
the integrity of the judgment after one spouse had been discharged in bankruptcy. 
*Id.* at 706-07. The court found the answer to depend on the nature of the obligation 
and reasoned that the "immunities which accrue to a debtor by reason of a bank-
rupcy discharge must be measured by the limitations on the power of the bank-
rupcy court to administer his property and discharge his liabilities." *Id.* at 713.  
40. *Id.* Interpreting § 70(a) of the Act, the court said, "[I]t is obvious that in this 
. . . Commonwealth [the debtor] could not subject to bankruptcy administration 
any entireties property held by himself and his wife." *Id.* at 707. The court con-
cluded that the Act precluded the trustee from taking possession of the entireties 
property and turned to a determination of whether the debts themselves had been 
discharged, focusing on the nature of the obligations. *Id.* at 709.  
41. *Id.* at 713 (citing First Nat'l Bank of Goodland v. *Pothuisje*, 217 Ind. 1, 25 
N.E.2d 436 (1940); Edwards & Chamberlin Hardware Co. v. *Pethick*, 250 Mich. 315, 
230 N.E. 186 (1930)).  

The *LaJohn* court found that "the same qualities and incidents of a tenancy by 
the entireties also inhere to an obligation entered into by a husband and wife as a 
common undertaking." *Id.* at 710. The *LaJohn* court said that the nature of the 
entireties estate necessitated recognition of this third dimension of liability, 
"[o]therwise, entireties estates would have no firm foundation and would constitute 
nothing more than a refuge to which the spouses might run to escape a debt con-
tracted by the entirety itself." *Id.* at 709.
While the Krakower and Pothuisje approaches permitted creditor action against entireties property, in a few instances the Act was deemed to grant protection to the debtor's entireties property at the expense of the creditor.42 The District Court for the Eastern District of Pennsylvania came to this conclusion in In re Cantwell,43 where joint creditors of the debtor and his spouse requested a stay of the debtor's discharge44 in order to perfect a lien in state court against entireties property.45 In an order issued without opinion, the Bankruptcy Court for the Eastern District of Pennsylvania granted a stay of the debtor's discharge, permitting the joint creditors to proceed in state court against the entireties property.46 On appeal, the district court dissolved the stay, acknowledging that the debtor's discharge in bankruptcy would effectively shield the entireties property from creditor action and also from the reach of the bankruptcy court.47 The Cantwell court noted that Congress, well aware of the problem presented by entireties property, had chosen to provide only the limited relief that entireties property which becomes transferrable within six months after the bankruptcy becomes part of the debtor's estate.48 Rejecting the Krakower court's characterization of this result as a

42. See, e.g., Harris v. Manufacturer's Nat'l Bank, 457 F.2d 631 (6th Cir.), cert. denied, 409 U.S. 885 (1972). In Harris, the Sixth Circuit refused to apply the quasi-in rem rationale developed by the Michigan Supreme Court in Edwards & Chamberlin Hardware Co. v. Pethick, 250 Mich. 315, 230 N.W. 186 (1930), which enabled the creditor to reach entireties property after one spouse had been discharged in bankruptcy. 457 F.2d at 635. For a discussion of Edwards, see note 28 supra. The Harris court found the reasoning of the Edwards court to be in direct conflict with § 17 of the Bankruptcy Act which provided that a discharge released the bankrupt from all provable debts, including joint debts. 457 F.2d at 635. Moreover, the Sixth Circuit found Edwards to contravene the "overriding purpose of the Bankruptcy Act—that the bankrupt shall have 'a new opportunity in life and a clear field for future effort, unhindered by the pressure and discouragement of pre-existing debt.'" Id. (citing Perez v. Campbell, 402 U.S. 637, 648 (1971)). The Harris court concluded that federal law was controlling and that the husband's discharge effectively barred the creditor from thereafter obtaining a joint judgment against both spouses. Id. at 636. The court summarily rejected the Edwards court's quasi-in-rem rationale. Id. at 635-36 (citing with approval Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931)).


44. Only Mr. Cantwell filed for bankruptcy. Id.

45. Id. The Cantwell creditors were co-sureties on joint obligations and intervened in the state proceeding seeking contribution from the debtors for surety payments made. Id. at 2.


47. The Cantwell's entireties property was never subject to the control of the bankruptcy court because the case was decided under the prior Act and § 70(a) operated to exclude entireties property. See notes 12 & 22 supra.

48. Cantwell, slip op. at 5 (citing Harris v. Manufacturer's Nat'l Bank, 457 F.2d 631, 636 (6th Cir.), cert. denied, 409 U.S. 885 (1972)). The court relied upon § 70(a) which provided in pertinent part, "All property . . . which within six months after bankruptcy becomes transferrable in whole or in part . . . shall, to the extent that it becomes so transferrable, vest in the trustee . . . ." 11 U.S.C. § 110(a) (1976) (repealed 1978). The debtor in Cantwell was discharged, after the district court directed the bankruptcy court to dissolve the stay. Cantwell, slip op. at 1. The creditors ap-
"legal fraud" requiring the court's intercession to protect the creditor, the court stated that "federal courts may not, under the guise of equity, restrict the relief to which debtors are entitled under the Act." The Code presents the issue of joint creditors' rights with respect to entireties property in a somewhat different posture than the previous Act. The broad language of section 541(a) generally has been found to require inclusion of interests in property held as tenants by the entirety in the bankruptcy estate. Whether a particular debtor's interest is exempt from inclusion in the estate under the Code depends upon whether such an interest is immune from process under state law. Because the creditor of only one spouse has different rights from those of a joint creditor against entireties property, the cases have turned almost exclusively on whether the debtor was liable on a joint debt.

Where the objection to the exemption of entireties property is filed by a creditor of only one spouse, the courts usually grant the debtor's exemption. For example, the trustee in In re Thacker sought to have the automatic stay lifted in order to sell the entireties property of the debtor and his spouse. The Third Circuit held that the discharge rendered the case moot and dismissed the appeal. In re Cantwell, 639 F.2d 1050 (3d Cir. 1981). The Cantwell court acknowledged the fact that Harris dealt with an attempt to enforce a joint judgment after one spouse's discharge, whereas the Cantwell creditor sought to postpone the discharge until the joint judgment could be satisfied. Id. at 5. The district court, however, read Harris to reject the essential argument that by obtaining release in bankruptcy from a joint debt that could have been satisfied out of entireties property under state law, the debtor commits a "legal fraud" against his joint creditors. Id. at 5-6.

50. Cantwell, slip op. at 7. The district court definitively foreclosed the use of the Krakower doctrine in the Eastern District of Pennsylvania, stating, "By postponing the discharge, the bankruptcy court attempted to restrict the relief made available to [the debtor] by Congress under the Act. We find no 'legal fraud' in [the debtor's] quest for a remedy expressly authorized under the Bankruptcy Act." Id.

51. For a discussion of the scope of § 541, see notes 11, 12 & 14 supra.

52. 11 U.S.C. § 522(b)(2)(B) (1978). For the text of § 522, see note 5 supra. The exact nature and characteristics of a tenancy by the entirety vary in those states which retain the estate. See notes 19-21 supra. In a majority of the jurisdictions where the estate exists, real property held in tenancy by the entireties is immune from levy and execution by creditors of one spouse, but available to joint creditors of both spouses. See Comment, supra note 21, at 271. See In re Weiss, 4 Bankr. 327, 330 n.2 (Bankr. S.D.N.Y. 1980) (assembling a list of jurisdictions in this group).

53. For a discussion of tenancy by the entirety under state law, see notes 17-21 and accompanying text supra.


55. 5 Bankr. 592 (Bankr. W.D. Va. 1980).
wife, to satisfy the debtor’s individual creditors.\textsuperscript{56} Called upon to determine if the debtor’s individual interest was “exempt from process under applicable nonbankruptcy law,” the \textit{Thacker} court easily resolved the case in favor of the debtor on the ground that, under Virginia law, the interest of one spouse in entireties property was not subject to execution by the creditors of that spouse only.\textsuperscript{57}

A different situation is presented when a joint creditor of both husband and wife objects to the debtor’s exemption of entireties property. The only court of appeals to have evaluated a claimed exemption on these facts, prior to \textit{Napotnik}, was the Fourth Circuit in its review and adoption of the bankruptcy court’s opinion in \textit{In re Ford}.\textsuperscript{58} The \textit{Ford} court’s analysis of the issue is particularly significant because the common law of Maryland and Pennsylvania is identical with respect to entireties estates.\textsuperscript{59} In \textit{Ford}, the debtor argued that property in which he held an interest as a tenant by the entirety was not property of the estate under section 541, or if it was within the estate, it was exemptable under section 522(b)(2)(B).\textsuperscript{60} The \textit{Ford} court found that Congress intended that the estate should comprise all property in which the debtor had an interest at the commencement of the case, including an interest in entireties property.\textsuperscript{61} The \textit{Ford} court carefully framed its holding,

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 595. The \textit{Thacker} court found that under Virginia law, entireties property is immune from the claims of creditors of one spouse. \textit{Id.} The court also noted that such property interests had not been includable in the estate under § 70(a)(5) of the prior Act because they were not transferable or subject to levy and sale under judicial process. \textit{Id.} The court concluded,

There is nothing in the legislative history of § 522 which would indicate that Congress intended to change prior law in this regard . . . . It makes little sense to suggest that Congress intended, without explicitly stating so, to curtail these exemptions which had been previously allowed under the Act, especially since an examination of § 522 as a whole indicates an intent to liberalize the granting of exemptions to debtors.

\textit{Id.}

The \textit{Thacker} court construed the phrase “exempt from process” in § 522(b)(2)(B) to mean immune from execution. The court said that it must look to substance rather than form, and found that “[a] construction other than granting the entirety rights to the debtors in these cases would, in the view of the court, be a distortion of the intent of these legislative bodies.” \textit{Id.}

\textsuperscript{58} 3 Bankr. 559 (Bankr. D. Md. 1980), \textit{aff’d sub nom.} Greenblatt \textit{v.} Ford, 638 F.2d 14 (4th Cir. 1981). The \textit{Ford} opinion does not indicate whether joint creditors of Mr. and Mrs. Ford actually existed. The case arose as a result of the debtor’s objection to the trustee’s denial of the claimed exemption under § 522(b)(2)(B). \textit{Id.} at 563. Whether or not the facts required the court to reach the issue of joint creditor’s rights, the \textit{Ford} court explicitly concluded that Mr. Ford’s undivided, individual “interest alone is not subject to the claim of either individual creditors of Mr. Ford or joint creditors of both Mr. Ford and his wife.” \textit{Id.} at 575.

\textsuperscript{59} See \textit{Napotnik} \textit{v.} Equibank \textit{(In re Napotnik)}, 679 F.2d 316, 320 (3d Cir. 1982).

\textsuperscript{60} 3 Bankr. at 564. For the text of § 522(b)(2)(B), see note 5 supra.

\textsuperscript{61} 3 Bankr. at 566. The \textit{Ford} court reviewed the House and Senate reports which accompanied the competing bills from which the Code was derived. Both reports comment on the broad scope of § 541(a). \textit{See note 12 supra.}

The court also cited portions of the floor statements in Congress which indicate
however, stating that "only . . . [the debtors] interest in entireties property is property of the estate under section 541(a)(1)."62 In so doing, the court pointedly distinguished between the debtor's interest in the entireties property and the property itself. The Ford court read section 522(b)(2)(B) to require the same distinction, and turned to a consideration of whether joint creditors could levy on the debtor's individual interest under the common law of Maryland.63 The Ford court held that the debtor's undivided interest, as distinguished from the property itself, was unavailable to either individual or joint creditors and thus granted the exemption.64 Despite its construction of the Code, the Ford court relied upon its equitable powers to guarantee the rights of joint creditors in this instance, by sanctioning the doctrine of Phillips v. Krakower.65 The court concluded,

[T]he Code, as construed by this decision, in no way affects the right of a joint creditor of both spouses as those rights existed under the Act. As in the past, a joint creditor may, prior to the discharge of the bankrupt spouse . . . and upon the lifting of the stay, proceed to obtain judgment, execute or foreclose upon property owned by both the bankrupt and nonbankrupt spouse as tenants by the

that the legislators clearly intended that such interests become part of the debtor's estate. Senator DeConcini and Representative Edwards delivered identical statements regarding § 541(a)(1) stating, "[t]he addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition . . . . However, only the debtor's interest in such property becomes property of the estate." 125 CONG. REC. S17403, S17413 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); 124 CONG. REC. H11047, H11096 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

62. 3 Bankr. at 575.

63. Id. at 576. The plain language of § 522(b)(2)(B) refers to the debtor's interest in property. For the text of § 522(b)(2)(B), see note 5 supra. The court found that With regard to joint creditors of both Mr. Ford and his wife, they could have levied upon and sold only the entireties property consisting of the entire, combined, and unsevered interests, as a unity, of both Mr. and Mrs. Ford, but could not have levied upon or sold either Mrs. Ford's individual undivided interest or Mr. Ford's individual undivided interest.

Id. at 576. The difference in the choice of language used in subsections 522(b)(2)(B) and 522(b)(2)(A) supports the distinction drawn by the Ford court. Section 522 provides in pertinent part:

(b) notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate

. . . .


The statements of Senator DeConcini and Representative Edwards, note 61 supra, also point to Congressional awareness of the distinction between the entireties property and one spouse's interest in the property.

64. 3 Bankr. at 576.

65. Id. For a discussion of the Krakower doctrine, see notes 29-33 and accompanying text supra.
entireties.66

Courts that concur in the Ford court's conclusion that the debtor's individual interest, as distinct from the property itself, is exempt even from the reach of joint creditors, have also found that the equities militate in favor of retaining the Krakower doctrine.67 Other courts decline to read section 522 so precisely and have found the existence of joint creditors and the fact that the entireties property itself was amenable to process by such creditors, sufficient to deny the exemption.68

Against this background, the Third Circuit was called upon to review the bankruptcy court's decision69 that a debtor's interest in entireties property was not immune from process by a joint creditor under Pennsylvania law and therefore not exemptable under section 522(b)(2)(B).

The Napotnik court first addressed the question of whether the debtor's interest in the entireties property became property of the estate under section 541 of the Code.70 The court found the expansive language of the section and the structure of the exemption provisions to require a finding that a debtor's individual interest in property held by the entireties is included in the bankruptcy estate.71

The Napotnik court next recognized that section 522(b)(2)(B) required an examination of the entireties estate as it exists under Pennsylvania law.72 Before turning to state law however, the Third Circuit clarified the operative language of section 522(b)(2)(B), concluding that the phrase "exempt from process" was synonymous with "immune from process" and included immunities granted by state common law as well as statute.73

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66. 3 Bankr. at 576.
70. 679 F.2d at 318. For the text of 11 U.S.C. § 541(a), see note 11 supra.
71. 679 F.2d at 318. The court reasoned that the fact that § 522(b)(2)(B) provided for the exemption of entireties interests indicated that Congress must have intended that they come into the estate initially. Id. Despite the inclusive language of § 541, the Napotnik court was explicit in its finding that the debtor's individual interest in the entireties property, rather than the property itself, became part of the estate. Id.
72. Id. at 319.

Appellee suggested that the meaning of "process" could be inferred from the definition of a judicial lien in 11 U.S.C. § 101(27). Brief for Appellee at 17, Napotnik. Section 101(27) provides: "'judicial lien' means lien obtained by judgment, levy, se-
The court then turned to Pennsylvania’s common law of tenancy by the entirety. The *Napotnik* court noted that it was undisputed law in Pennsylvania that a creditor of one spouse may not acquire an enforceable lien on entireties property while both spouses are living. The court observed that this characteristic of the estate has been said to “exempt it from the ordinary legal process to which all other estates are subject.”

The court next briefly reviewed the treatment of entireties property under the prior Act, finding that entireties property was excluded from the estate precisely because the debtor’s creditors could not sell it under judicial process. Ultimately, the *Napotnik* court found that to the extent that the property was subject to execution by joint judgment creditors, it was not “exempt from process” under section 522 of the Code.

quostration, or other legal or equitable process or proceedings.” 11 U.S.C. § 101(27) (Supp. IV 1979).

74. 679 F.2d at 319. The *Napotnik* court noted that when spouses hold property by the entireties, each is seized of the undivided whole, not of a moiety. *Id.* The result, as described by the court, is that neither spouse can unilaterally convey or encumber the property, or in any way burden the survivorship interest of the other spouse, as long as the marriage is intact. *Id.* (citing Shapiro v. Shapiro, 424 Pa. 120, 224 A.2d 1 (1966); Madden v. Mellon Savings & Trust Co., 331 Pa. 476, 200 A. 624 (1938); Biehl v. Martin, 236 Pa. 519, 84 A. 953 (1912)). For further discussion of tenancy by the entireties in Pennsylvania, see notes 17-21 and accompanying text supra.

75. 679 F.2d at 319. The court stated that, “[a]t most, a creditor of either spouse may obtain a presently unenforceable lien upon that spouse’s expectancy of survivorship—a lien that becomes enforceable only when the other spouse dies.” *Id.* This is in contrast to such states as Tennessee and Kentucky, where the right of survivorship is separable and alienable during coverture. *See note 20 supra.*

76. 679 F.2d at 319 (quoting Biehl v. Martin, 236 Pa. 519, 522, 84 A. 953, 954 (1912)).

77. *Id.* at 319-20 (citing Wylie v. Zimmer, 98 F. Supp. 298 (E.D. Pa. 1951)).

The *Napotnik* court then noted that Pennsylvania courts had permitted entireties property to pass to the estate, where both spouses had been adjudicated bankrupt, and their cases consolidated. *Id.* at 320 (citing In re Pennell, 15 F. Supp. 743 (W.D. Pa. 1935); In re Carpenter, 5 F. Supp. 101 (M.D. Pa. 1933)). For a discussion of *Pennell and Carpenter,* see note 22 supra. These courts apparently relied on the existence of joint debts which would have warranted levy and sale of the property, making it “subject to process” and therefore property of the estate under the Act. *Id.*

The Third Circuit noted that the *Carpenter* court reasoned that because the joint debts, evidenced by jointly confessed judgments, would have permitted sale of the entireties property absent bankruptcy, the trustee could take title to the property. *Id.*

The Third Circuit observed that those circumstances making the property “subject to process” were relied upon by the *Napotnik* bankruptcy court. *Id.* at 320. The *Napotnik* court noted that “in Pennsylvania entirety property may be reached by creditors to satisfy the joint debts of husband and wife.” *Id.*

78. *Id.* at 321. The court found no error in the bankruptcy court’s reasoning that only the debtor’s equity above the amount of judicial liens could qualify for exemption. *Id.* Despite strenuous argument by both parties and the amici curiae, the court declined to consider whether § 522(b)(2)(B) would apply in a case where there were no actual creditors on a joint debt, i.e. whether the court should consider immunity from hypothetical joint creditors. *Id.* at 321 n.12.

Because the *Napotnik* court held that the debtor’s interest was not exemptable, the court also did not reach the question of whether Equibank’s lien would have
The Third Circuit next considered appellant's argument that under the Code, the proper inquiry was not whether the entireties property was subject to process, but whether the debtor's individual interest in the property could be reached by creditors. The court prefaced its response by stating that if creditors on a joint debt may execute against the property itself, it seems to follow that each spouse's interest in the property is subject to process. The Napotnik court acknowledged that the appellant's argument had been accepted in In re Ford, but made no attempt to distinguish the contrary conclusion reached by the Fourth Circuit. While admitting that the indivisible character of entireties property might in fact preclude any creditor, including a joint creditor, from reaching the debtor's individual interest, the Napotnik court surmised that "[t]here would seem to be no reason why such a creditor would want to levy upon the interest of only one spouse when levy and sale may be had with respect to both." The court reasoned that because joint creditors may levy on entireties property in Pennsylvania, the interests of both spouses are accessible to those creditors; therefore, the debtor's individual interest is available and not exempt from process when joint creditors exist.

It is submitted that Congress could not have intended that one spouse be allowed to shield all entireties assets from joint creditors of both spouses. Rather, it is suggested that Congress intended to accord debtors the immunity traditionally enjoyed under state law, which in states such as Pennsylvania means that the property would be immune from claims by creditors impaired that exemption. Id. at 321-22. Equibank argued that the debtor's only separable interest was the debtor's right of survivorship and that, as an in futuro interest, was not presently impaired by Equibank's lien, so that even had the court granted Napotnik's exemption, the lien could not be avoided under § 522(f). Appellee's Brief at 26, In re Napotnik, 679 F.2d 316 (3d Cir. 1982).

79. 679 F.2d at 320. The debtor in Napotnik was apparently arguing for the approach adopted by the Fourth Circuit in Ford. For a discussion of Ford, see notes 58-66 and accompanying text supra.

80. 679 F.2d at 320.

81. Id. For a discussion of the court's reasoning in In re Ford, see notes 58-66 and accompanying text supra. The analysis and holding of Napotnik clearly represent an implicit rejection of the Ford rationale. 679 F.2d at 320-21.

82. 679 F.2d at 321. The court stated that it was unaware of any case in Pennsylvania in which a joint creditor of husband and wife had sought to levy on the interest of only one spouse. Id. at 321 n.10.

83. Id. at 321. The Napotnik court carefully limited its holding to cases where actual joint creditors exist. Id. at 321 n.12. See also note 78 supra.

Finally, the Napotnik court considered the argument put forth by the amici curiae that a 1980 proposed amendment to § 522 clarified the congressional intent behind § 522(b)(2)(B). This amendment seemingly would have allowed a debtor to exempt an interest in entireties property, regardless of the existence of joint creditors. 679 F.2d at 321. The proposed 1980 amendment would have altered the relevant portion of § 522(b)(2)(B) to permit exemption of an interest in property to the extent it was "not subject to levy by a creditor, of only the debtor." 126 CONG. REC. S15163 (daily ed. Dec. 1, 1980); 126 CONG. REC. H9293 (daily ed. Sept. 22, 1980). The court summarily concluded that it was constrained to give effect to the language actually enacted. 679 F.2d at 321 (citing Holy Trinity v. United States, 143 U.S. 457 (1892)).
of one spouse but accessible to joint creditors of both spouses. The *Napotnik* court's pragmatic construction of the Code and common law gives effect to this rational interpretation of Congressional intent.

Confronted with similar facts, applying identical state and federal law, the courts in *Napotnik* and *Ford* reached opposite conclusions as to the availability of a section 522(b)(2)(B) exemption. Both the *Ford* and *Napotnik* courts concluded that the debtor's individual interest in entireties property becomes part of the debtor's estate under section 541(a). The plain language of the statute, in its reference to "all legal or equitable interests of the debtor in property," seemingly compels that construction.

However, in their interpretation of the interaction of section 522(b)(2)(B) and the common law of tenancy by the entirety, the two courts parted company.

It is instructive to focus on the exact point at which the courts' analyses diverge. On a first reading, it would appear that the two courts merely came to different conclusions in their interpretations of the rights of creditors against the common law estate of tenancy by the entirety. However, it is

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84. For a discussion of the estate of tenancy by the entirety in Pennsylvania, see notes 17-21 and accompanying text supra.  
85. See notes 71-83 and accompanying text supra.  
86. Although it is unclear if *Ford* involved actual joint creditors, the *Ford* court definitively addressed the situation where joint creditors exist, as in *Napotnik*. See note 58 supra.  
89. 11 U.S.C. § 541(a)(1) (1979). For the full text of this section, see note 11 supra. Virtually all jurisdictions that have construed § 541(a) have read it as a broad inclusive provision which sweeps in all property interests, even those which are potentially exemptible. See note 14 and accompanying text supra.  
90. The *Ford* court interpreted the § 522 exemption to be coextensive with the immunity from process accorded the debtor's individual interest in the entireties property under common law. The court found that under Maryland law such interest is unavailable even to joint creditors and is therefore exempt under § 522. *3 Bankr.* at 575. The *Ford* court focused in its analysis on the distinction between the debtor's individual interest in the property and the property itself. *Id.* at 575-76. The court stated that under Maryland law (identical to Pennsylvania law in this respect), even joint creditors could only levy upon the "entire, combined and unsevered interests" of both spouses, but not upon either's individual, undivided interest in the estate. *Id.* at 576. The fact that the *Ford* court read § 522 to refer to the immunity of the debtor's individual interest in the property was dispositive of the exemption issue, in light of the court's interpretation of common law. For further discussion of *Ford*, see notes 58-66 and accompanying text supra.

The *Napotnik* court acknowledged that § 522(b)(2)(B) referred to "exemption of the debtor's own interest as a tenant by the entirety to the extent that 'such' interest is immune from process," but concluded that because the interests of both spouses were available to joint creditors, the debtor's individual interest was available and consequently not exemptible under § 522. 679 F.2d at 316, 320-21.
submitted, first, that the contrary interpretations of state law were dictated by the need to reach a common equitable result working with fundamentally different case law in the two circuits, and second, that while not apparent on its face, section 522(b)(2)(B) is ambiguous in its application\(^91\) and it is that imprecision which is responsible for the split in the circuits.

The Ford court's conclusion with respect to joint creditors was based on a strict construction of the Code and the common law.\(^92\) It is submitted, however, that the Ford court was free to give literal effect to the language of the Code because it could rely on the doctrine of Phillips v. Krakower to guarantee the rights of joint creditors.\(^93\)

It is submitted that the Napotnik court faced a dilemma created by the imprecise drafting of section 522(b)(2)(B). A strict interpretation of the section and common law would permit the inequitable result that one spouse in bankruptcy could shield all assets held by the entireties from creditors of both the bankrupt and nonbankrupt spouse. Because the Krakower doctrine has never been accepted in the Third Circuit,\(^94\) the Napotnik court could not rely on that procedure to protect the rights of the joint creditor in the case.\(^95\)

It is contended that the Napotnik court correctly employed a generous read-

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\(^91\) The problem is that the section refers to the extent to which the debtor's interest in the entireties property is exempt from process under state law. A reasonable, albeit strict, interpretation of the common law estate may result in a court, as in Ford, concluding that the debtor's individual interest is never subject to process, due to the indivisible nature of the estate and therefore is always exempt under the Code.

It is suggested that the section should be altered to entitle an exemption, "except to the extent that such property is not exempt from process under applicable nonbankruptcy law by any creditor of the debtor who has filed a claim under § 501." This would remove the semantic stumbling block responsible for the split in the appellate courts' construction of the section. In states with common law similar to Pennsylvania, the entireties property is not subject to process by creditors of one spouse. The property, however, is clearly subject to process by joint creditors. See notes 17, 20 & 21 and accompanying text supra. If the Ford court had been faced with a question of the accessibility of the property itself to joint creditors, rather than the debtor's individual interest, the court would undoubtedly have reached the same result as the Napotnik court. See In re Ford, 3 Bankr. 559 (Bankr. D. Md. 1980). The Ford court opined: "[w]ith regard to joint creditors . . . , they could have levied upon and sold only the entireties property consisting of the entire, combined, and unsevered interests, as a unity of both Mr. and Mrs. Ford . . . ." Id. at 576.

\(^92\) For a discussion of the approach taken by the Ford court, see notes 58-66 and accompanying text supra.

\(^93\) For a discussion of the Phillips v. Krakower doctrine, see notes 29-33 and accompanying text supra.

\(^94\) See, e.g., In re Cantwell, No. 78-918, (Bankr. E.D. Pa. April 22, 1980), appeal dismissed as moot, 639 F.2d 1050 (3d Cir. 1981). See the discussion of In re Cantwell in notes 43-50 and the accompanying text supra. For a discussion of the prevailing rationale in Pennsylvania under the Act, for protecting joint creditor's rights in cases where one spouse was discharged bankrupt, see Bank of Erie v. LaJohn, 27 Pa. D. & C.2d 705 (1962). The argument presented in LaJohn was that in addition to joint and several liability, tenants by the entirety were subject to a third liability, as the "entireties," which was not discharged in bankruptcy. Id. at 713.

\(^95\) A question arises as to the continued validity of the "entity" liability approach articulated in First National Bank of Goodland v. Pothuisje, 217 Ind. 1, 25 N.E.2d 436 (1940), which was adopted by the lower Pennsylvania courts in Bank of
ing of both the Code and the common law, to deny the exemption, based on
the rational assumption that Congress did not intend to frustrate joint cred-
itors’ legitimate claims to entireties property that were sanctioned under state
common law.96

It is important at this point to examine the impact of the two decisions
which at first appears to be the same, despite the contrary holdings. It is
clear that the common law principle that entireties property is not subject to
lien or levy by the creditors of one spouse, will continue to protect the
debtor’s interest from claims of the individual creditor.97 When a judicial
lien exists prior to the bankruptcy, joint creditors will be free to execute on
the entireties property, whether through state proceedings pursuant to a stay
of discharge in the Fourth Circuit or as secured creditors in the context of
the bankruptcy proceeding in the Third Circuit.

If no judicial lien exists, however, the results in the two circuits might be
strikingly different. The literal language of the Krakower approach, san-
tioned in the Fourth Circuit, would seem to allow the joint creditor to go
outside of the bankruptcy proceedings and perfect a lien against the entire-
ties property,98 recovering the entire value of the property. Under the
Napotnik approach, however, the lien could not be perfected and presum-
ably, in the absence of an existing lien, a creditor in the Third Circuit would
receive only a pro rata share of the distribution from the estate.99

It may be that the Fourth Circuit would not support such a disparate
result. Indeed, such a result would be inconsistent with the Code’s prefer-
ence provisions.100 It is suggested, however, that Congressional clarifica-
tion of the conundrum created by section 522(b)(2)(B) would enable courts sit-

96. The Napotnik decision may be somewhat vulnerable in that it rests on a very
liberal interpretation of the state common law. It is conceivable that a Pennsylvania
court, confronted with a joint creditor seeking to levy on one spouse’s interest in
totalities property, might well find, as did the court in Ford, that the essential char-
ter of the common law estate precluded even a joint creditor from reaching anything
but the joined, unitary interest of both spouses. This would clearly undermine the
approach taken by the Napotnik court.

97. See, e.g., In re Thacker, 5 Bankr. 592 (Bankr. W.D. Va. 1980). For a discus-
sion of Thacker, see notes 55-57 and accompanying text supra.

98. See text accompanying note 66 supra.

99. See 679 F.2d at 321. Note that the Napotnik court carefully limited its hold-
ing denying the exemption to cases where joint creditors actually exist, refusing to
consider the rights of hypothetical joint creditors. Id. at 321 n.12. See note 78 supra.

ting in states with similar common law, to achieve equitable and consistent results.  

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101. In 1982, the Pennsylvania Joint State Government Commission considered the problem of tenancies by the entirety with respect to bankruptcy exemptions under the Code. Shirk, Bankruptcy Exemptions, PENNSYLVANIA BAR ASSOCIATION REAL PROP., PROB. AND TRUST L. NEWSLETTER 3 (spring 1982). One proposal was reported to involve an attempt to destroy the present unit of a tenancy by the entireties, at least with respect to bankruptcies. Id. At present, however, the committee has decided not to alter the common law estate in Pennsylvania. GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA: JOINT STATE GOVERNMENT COMMISSION, BANKRUPTCY EXCEPTIONS: A PROPOSED REVISION at 2 (April 1982).

It would seem more appropriate and efficacious for Congress to clarify the intent of 11 U.S.C. § 522(b)(2)(B) than for each jurisdiction to amend its common law in order to promote a rational result under the section.