NORTH CAROLINA LAW REVIEW

Volume 58 | Number 4 Article 5

4-1-1980

Debtors' Exemption Rights under the Bankruptcy Reform Act

William T. Vukowich

DEBTORS' EXEMPTION RIGHTS UNDER THE BANKRUPTCY REFORM ACT

WILLIAM T. VUKOWICH†

Section 522 of the Bankruptcy Reform Act of 1978[1] provides debtors with valuable exemption rights. Generally, debtors are entitled to the exemptions granted by the states of their residence[2] and by federal, nonbankruptcy laws.[3] Alternatively, debtors may select exemptions from a list of property contained in subsection 522(d),[4] unless the law of their states specifically denies them this alternative.[5] This rather convoluted scheme was the product of a compromise between members of the House and Senate, which will be discussed more fully below.[6]

Section 522, together with the new Act's discharge provision,[7] is central to the congressional scheme of providing debtors with a "fresh start."[8] Permitting debtors to retain part of their assets while relieving them of all or most of their debts puts them on the road to a new financial future without the necessity of assistance from the state, charities or friends. A direct byproduct of this debtor rehabilitation, however, is that creditors suffer. To the extent that debtors' assets are exempt, the assets are not available for liquidation and the payment of dividends to creditors.[9] Debts owed these creditors are therefore rele-

† Professor of Law, Georgetown University. A.B. 1965, Indiana University; J.D. 1968, University of California, Berkeley; J.S.D. 1976, Columbia University. I wish to thank my colleague, John Steadman, for his many helpful comments regarding an earlier draft of this article.

1. 11 U.S.C.A. § 522 (West 1979).
2. *See* text accompanying note 62 *infra.*
3. 11 U.S.C.A. § 522(b)(2)(A) (West 1979).
4. *Id.* § 522(b)(1).
5. *Id.*
6. *See* text accompanying notes 39-45 *infra.*
7. 11 U.S.C.A. § 727 (West 1979).
8. HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY LAW REVISION, H.R. REP. NO. 595, 95th Cong., 1st Sess. 125, 128, 176, 366 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963 [hereinafter cited as HOUSE REPORT]; SENATE COMM. ON THE JUDICIARY, BANKRUPTCY REFORM ACT of 1978, S. REP. NO. 989, 95th Cong., 2d Sess. 6, 76, 8! (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787 [hereinafter cited as SENATE REPORT]; *see* REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. 137, 93d Cong., 1st Sess., pt. 1, 169-70 (1973) [hereinafter cited as COMMISSION REPORT].
9. Often, in fact, creditors have little interest in the debtor's estate because it contains so few assets. Therefore, the beneficiary of a denial of exemptions is frequently the trustee. *See Bankruptcy Act Revision: Hearings on H.R. 31 & 32 Before the Subcomm. on Civil & Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st & 2d Sess., pt. 2, 767, 773, 786-88 (1975-1976) (statement of Professor Shuchman) [hereinafter cited as *House Hearings*].

gated to bad debt tax deductions. No doubt the exemption laws contribute significantly to the high percentage of cases in which no assets at all are available for distribution to creditors.[10] Congress seemed unconcerned with this consideration, however, because it did not consider seriously a bankruptcy scheme that would guarantee some minimal dividend to creditors as a condition to debtors receiving a "fresh start."[11]

Another general defect of exemption laws is that they tend to perpetuate our economic class structure. Those who have are allowed to keep; those who do not have are given nothing. This class perpetuation is most vivid when courts[12] and commentators[13] urge an application of the exemption laws that allows a debtor to "maintain a standard of living reasonably consistent with his occupation and previous history."[14] Congress' inclusion of debtors' interests in spendthrift trusts as property that the debtors may retain[15] also illustrates how the law tends to perpetuate economic class structure. Given the legal recognition of spendthrift trusts over the years and the reliance of many settlors of on these trusts in disposing of their property, Congress felt constrained not to upset that reliance,[16] even though many good policies argue against the continued recognition of spendthrift trusts. The result is an unjustified, albeit explicable, perpetuation of classes.

Notwithstanding these untoward effects of exemption laws, they are defensible because the only alternative—some form of welfare for debtors and their families[17]—is not reasonable. To allow creditors to reach all of a debtor's assets in bankruptcy would compel the debtor's reliance on welfare programs to provide immediate necessities and future support until the debtor was able to get back on his feet. Exemp-

10. *See generally* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 20-24 (1971); *House Hearings*, *supra* note 9, at 768-69 (statement of Professor Shuchman).

11. Previous bankruptcy acts have conditioned allowances of property to the debtor, *see* Bankruptcy Act of 1800 ch. 19, § 34, 2 Stat. 19, and the discharge of debts, *see* Bankruptcy Act of 1867 ch. 176, § 33, 14 Stat. 517, *as amended by* ch. 258, 15 Stat. 226 (1868), upon the debtor's assets being sufficient to pay 50% of debts owed.

12. *See, e.g.*, Newport Nat'l Bank v. Adair, 2 Cal. App. 3d 1043, 1046, 83 Cal. Rptr. 1, 3 (1969); Independence Bank v. Heller, 275 Cal. App. 2d 84, 87-88, 90, 79 Cal. Rptr. 868, 871, 872 (1969).

13. *E.g.*, D. STANLEY & M. GIRTH, *supra* note 10, at 206.

14. *Id.*

15. *See* text accompanying notes 71-75 *infra*.

16. "The bankruptcy of the beneficiary [of a spendthrift trust] should not be permitted to defeat the legitimate expectations of the settlor of the trust." HOUSE REPORT, *supra* note 8 at 176.

17. *See* Weistart, *The Costs of Bankruptcy*, 41:4 LAW & CONTEMP. PROB., 107, 119-22; Comment, 68 YALE L.J. 1459, 1497-502 (1959).

tion laws allow for a speedier rehabilitation of debtors. Furthermore, exemption laws reduce the likelihood that insolvents will remain on the welfare rolls for a long, possibly indefinite, period of time.

Transferring the costs of debtor rehabilitation from welfare—that is, the state—generally is not unfair to creditors. They have extended credit[18] aware of their debtors' financial situations and the exemption laws. In addition, losses caused by the exemption laws generally can[19] be passed on to society through higher costs for goods and services.

That a debtor who has substantial assets and is insolvent fares much better in the bankruptcy process due to the exemption laws than does a debtor who is on welfare and insolvent may seem unfair. Changing from an exemption system to a welfare system might remove this particular unfairness, but it would certainly not improve the lot of the debtors who are on welfare. Hence, while the unfairness might be obviated, nobody would gain by such a change and many—including society generally—would lose.

As a consequence, the class perpetuation effect of the exemption laws appears to be something we should resolve to accept notwithstanding its inequity. To say, however, that exemption laws are acceptable in principle is only a first step. Stating what the exemption laws should provide in detail is a more difficult task. As a guideline, exemptions should not exceed what is necessary for the support of debtors and their dependents and for debtors' rehabilitation. To grant greater exemptions would provide a windfall to debtors while denying creditors payments to which they are entitled. The reader should keep this general principle in mind throughout the following discussion.

The purpose of this Article is to provide a detailed analysis of the exemption provisions of the new Bankruptcy Code. The logical place to begin such an analysis, of course, is the legislative history of section 522. The first part of this Article will be devoted to that topic. In the second section of the Article, the nuts and bolts of section 522 will be explained, with a special emphasis on the ambiguities of the present statutory language. The final section of the Article offers a theoretical critique of section 522.

18. This does not apply to tort judgment creditors who have had no opportunity to evaluate their debtors' creditworthiness. I have elsewhere recommended that tort judgment creditors' claims be exceptions to the exemption laws for this reason. See Vukowich, *The Bankruptcy Commission's Proposals Regarding Bankrupts' Exemption Rights*, 63 CALIF. L. REV. 1439, 1474-77 (1975).

19. This is not true of tort judgment creditors and small contract creditors.

I. History of Section 522

The predecessor of section 522 was section 6 of the Bankruptcy Act of 1898.[20] Section 6 granted bankrupts the exemptions provided by federal nonbankruptcy laws and state laws.[21] Section 6's policy of deferring to the manifold state exemption laws was criticized severely,[22] although it had a few defenders.[23] Critics of section 6 correctly noted that bankrupts from different states were treated unequally because of the states' vastly different exemption laws.[24] To aggravate this inequality, most states have failed to keep their exemption laws contemporary.[25] Consequently, dollar limitations on exempt property established years ago have been rendered unrealistic by the passage of time and the pressures of inflation. For example, North Carolina's $1,000 homestead exemption provided meaningful debtor protection in 1868 when it was enacted;[26] however, that same $1,000 homestead exemption is insignificant if not meaningless today.[27] On the other hand, a one-half acre urban homestead may have been reasonable in 1868 when land was plentiful and settlers were needed.[28] Today, however, it seems clearly exorbitant.[29] Thus, for various reasons, state exemption

---

20. Bankruptcy Act § 6, 11 U.S.C. § 24 (1976) (repealed 1978).

21. *Id.*

22. *See, e.g.*, S. ENZER, R. DEBRIGARD & F. LAZAR, SOME CONSIDERATIONS CONCERNING BANKRUPTCY REFORM 194-95, 212-13 (1973); Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678 (1960); King, *Proposed Amendments to the Chandler Act*, 45 COM. L.J. 36, 40 (1940); Vukowich, *supra* note 18, at 1441-46; Comment, *supra* note 17.

23. *See* Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 446-53 (1960); Plumb, *The Recommendations of the Commission on the Bankruptcy Laws — Exempt and Immune Property*, 61 VA. L. REV. 1, 152 (1975). Presumably, Professor Kennedy has changed his views. *See House Hearings, supra* note 9, pt. I, at 169-70 (statement of Professor Kennedy).

24. *See* authorities cited note 22 *supra*.

25. *See, e.g.*, Joslin, *Debtors' Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959); HOUSE REPORT, *supra* note 8, at 126.

26. Law of April 8, 1869, ch. 137, §§ 7, 8, 1868 N.C. Sess. Laws 331 (codified as amended at N.C. GEN. STAT. § 1-386 (Cum. Supp. 1979)); *see* N.C. CONST. art. X, § 2.

27. In Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), *appeal dismissed*, 294 N.C. 442, 244 S.E.2d 844 (1978), a debtor challenged the state general assembly's failure to increase the state's homestead exemption. The $1,000 homestead is established as a minimum in the state constitution, but the general assembly has never increased the amount. The debtor introduced evidence of an economic historian that the $1,000 amount established by the state constitution in 1868 would equal $170,000 in 1976. The court conceded that the purpose of the homestead exemption "certainly cannot be attained so long as the value of the exemption is limited to $1,000," *id.* at 641, 239 S.E.2d at 747, but refused to grant the debtor any relief.

28. *See* Fla. CONST. art. 10, § 4(a)(1); IOWA CODE ANN. § 561.2 (1950); Wall, *Homestead and the Process of History: The Proposed Changes in Article X, Section 4*, 6 FLA. St. U.L. REV. 878, 897-99 (1978).

29. Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227, 252-53 & n.180 (1978); *see* O'Brien v. Johnson, 275 Minn. 305, 309-11, 148 N.W.2d 357, 360-61 (1967).

laws varied widely and resulted in disparate treatment of bankrupts.

When the Bankruptcy Act of 1898 was amended in 1938 by the Chandler Act,[30] section 6 was amended in minor ways,[31] but the policy of deferring to state exemption laws remained intact. Shortly thereafter, Lawrence King, Chairman of the National Bankruptcy Conference, remarked, "[T]here is no one thing which makes our uniform Bankruptcy Act more un-uniform than Section 6 . . . which recognizes state laws in the setting aside of exemptions."[32]

Prompted by these and other[33] criticisms of section 6, the Commission on the Bankruptcy Laws of the United States proposed a system of uniform bankruptcy exemptions that would be the exclusive exemption law in bankruptcy.[34] The Commisssion's proposed law generally followed the various state laws concerning the type of property to be exempt, and struck a balance between the more generous and the more niggardly state dollar limitations on the amount of the exemptions.[35] Shortly after the Commission's proposal was announced, the National Conference of Bankruptcy Judges came forward with its own proposal.[36] The Judges' proposal would have given bankrupts a choice between the exemptions under state and federal nonbankruptcy law and a list of exempt property that closely paralleled the Commission's proposal. Both the Commission's[37] and the Judges'[38] proposals were submitted as bills in the Ninety-Fourth Congress in 1975.

The various experts and representatives of interest groups who testified at congressional hearings on bankruptcy reform generally favored abandoning section 6's policy.[39] They differed, however, on

30. Pub. L. No. 696, 52 Stat. 840 (1938) (codified as amended in scattered sections of 11 U.S.C. (1976) (repealed 1978)).

31. *See* 1A COLLIER ON BANKRUPTCY ¶ 6.02 (14th ed. 1975).

32. King, *supra* note 23 at 40.

33. *See* COMMISSION REPORT, *supra* note 8, at 170-71.

34. *Id.; see* H.R. 31, 94th Cong., 1st Sess., § 4-503 (1975), *reprinted in House Hearings, supra* note 9, app. I, at 146-51.

35. *See* Plumb, *supra* note 22, at 15-17, 18-20, 27-29, 33-35, 40-42, 47-52, 69-72; Vukowich, *supra* note 18, at 1460-67.

36. *See* H.R. 32, 94th Cong., 1st Sess., § 4-503 (1975), *reprinted in House Hearings, supra* note 9, app. I, at 146-51.

37. H.R. 31, 94th Cong., 1st Sess., § 4-503 (1975), *reprinted in House Hearings, supra* note 9, app. I at 146-51.

38. H.R. 32, 94th Cong., 1st Sess., § 4-503 (1975), *reprinted in House Hearings, supra* note 9, app. I, at 146-51.

39. *See, e.g., House Hearings, supra* note 9, at 937 (statement of representative of National Consumer Law Center); 1025 (statement of representative of American Bankers Association); 1368-69 (statement of representative of National Consumer Finance Association).

whether the Commission's exclusive system of exemptions[40] or the Judges' alternative exemption scheme[41] was preferable. Notwithstanding the apparent lack of public support for the policy of section 6, the Senate favored retention of section 6 over either the Judges' or Commission's recommendation.[42] The House version was based on the Judges' bill and would have given debtors a choice between a uniform bankruptcy exemption and state and federal nonbankruptcy laws.[43]

Although no formal House-Senate conference committee was formed, discussions between members of both chambers led to a compromise in the form of section 522.[44] Each chamber's position became realizable, depending on the action of state legislatures. The Senate position would prevail in states that enacted legislation to deny their residents the alternative bankruptcy exemption. The House position would be realized in states that did not enact "opt out" legislation. To date, about a dozen states have considered legislation that would deny the federal bankruptcy exemption as an alternative to the state and federal nonbankruptcy exemptions; only five, however, actually have adopted the legislation.[45]

II. ANALYSIS OF THE EXEMPTION PROVISION

The Bankruptcy Reform Act of 1978 does more than merely provide debtors with certain exempt property. It additionally addresses substantive and procedural matters that under the 1898 Act often undermined the policy of the exemption laws and frustrated the administration of debtors' estates.[46] For example, waivers of exemptions are circumscribed carefully,[47] and the bankruptcy courts have jurisdiction to resolve disputes about and claims to exempt property.[48] These pro-

40. *See id.* at 1368 (statement of representative of National Consumer Finance Association); 1658 (representative of the Dallas Bar Association).

41. *See id.* at 1025 (representative of American Bankers Association); 937 (representative of National Consumer Law Center).

42. *See* S. 2266, 95th Cong., 2d Sess. § 522 (1977), *reprinted in* 14 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 97 (A. Resnick & E. Wypyski 1979).

43. *See* H.R. 8200, 95th Cong., 1st Sess. § 522 (1977), *reprinted in* 12 BANKRUPTCY REFORM ACT of 1978: A LEGISLATIVE HISTORY 86-87 (A. Resnick & E. Wypyski 1979).

44. *See* 124 CONG. REC. S17404 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

45. FLA. STAT. ANN. § 222.20 (West Cum Supp. 1979); LA. REV. STAT. ANN. § 13: 3881(B) (West Cum. Supp. 1980) OHIO REV. CODE ANN. § 2329.66.2 (Page Cum. Supp. 1979); VA. CODE § 34-31 (Cum. Supp. 1979). The Ohio exemption statute roughly parallels the new federal exemptions. OHIO REV. CODE ANN. § 2329.66 (Page Cum. Supp. 1979).

46. *See* COMMISSION REPORT, *supra* note 8, at 170, 173.

47. *See* text accompanying notes 204-211 *infra.*

48. *See* text accompanying notes 54-61 *infra.*

visions apparently are applicable to all exemptions, whether claimed from state and federal nonbankruptcy law or from the bankruptcy law itself.[49]

This part of the Article analyzes the provisions of the Act that grant and otherwise relate to exemptions. This analysis includes criticisms of technical provisions of the Act and suggestions for future revisions.

A. Jurisdiction Over Exempt Property

The 1978 Act departs sharply from the 1898 Act on the matter of jurisdiction over exempt property. Under section 70 of the 1898 Act, exempt property did not become part of the debtor's estate.[50] Hence, once it was determined that property was exempt,[51] a bankruptcy court lacked jurisdiction to resolve other disputes regarding it.[52] Because this resulted in confusion and inconvenience when creditors asserted that their claims were exceptions to the exemption laws, or that their debtors had waived exemption rights,[53] the Commission made a recommendation,[54] which Congress accepted,[55] that the bankruptcy courts have jurisdiction to resolve all disputes regarding exempt property. This goal is realized by first including exempt property as part of the debtor's estate.[56] Section 522 then allows debtors to "exempt *from property of the estate*" certain assets.[57] Congress also expanded the jurisdiction of the district courts and their adjuncts, the bankruptcy courts, to include "all civil proceedings arising under title 11 [Bankruptcy] or *arising in or related to* cases under title 11."[58] Moreover, the bankruptcy court is given "exclusive jurisdiction of all of the property,

49. *See* text accompanying note 204 *infra*.

50. 11 U.S.C. § 110(a) (1976) (repealed 1978). The section vested in the trustee the debtor's title to property "except insofar as it is property which is held to be exempt."

51. *Id.* § 2(11), 11 U.S.C. § 11(11) (1976) (repealed 1978).

52. Lockwood v. Exchange Bank, 190 U.S. 294 (1903); *see* V. COUNTRYMAN, DEBTOR & CREDITOR 539-42 (1974).

53. *See* Countryman, *supra* note 22, at 708-32; Kennedy, *supra* note 23, at 462-69. In the course of its opinion, the Court in *Lockwood v. Exchange Bank* recognized that "some inconvenience may arise from the construction" of the statute governing bankruptcy courts' jurisdiction of exempt property. Lockwood v. Exchange Bank, 190 U.S. 294, 300 (1903).

54. COMMISSION REPORT, *supra* note 8, at 91, 173.

55. *See* HOUSE REPORT, *supra* note 8, at 49, 445-46; SENATE REPORT, *supra* note 8, at 82, 153.

56. 11 U.S.C.A. § 541 (West 1979); *see* HOUSE REPORT, *supra* note 8, at 176, 368; SENATE REPORT, *supra* note 8, at 75-76, 82.

57. 11 U.S.C.A. § 522(b) (West 1979) (emphasis added).

58. 28 U.S.C.A. § 1471(b) (Cum. Supp. 1979) (emphasis added).

wherever located, of the debtor."[59] Accordingly, Congress has clearly provided that all matters relating to exempt property are to be adjudicated in the bankruptcy forum.[60] This should prevent the delay, inconvenience and unfairness[61] that were experienced under the 1898 Act and generally should result in the more efficient administration of debtors' estates.

B. Subsection 522(b): The Grant of Exemption Rights

Subsection 522(b) contains the basic exemption rights for debtors. As outlined above, the subsection provides for a choice between the exemptions under state and federal nonbankruptcy law or those under subsection 522(d)—the bankruptcy exemption provision—except in those states that specifically have denied the option of selecting the subsection 522(d) alternative. The determinative state law for these matters is the law of the state "in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place."[62] This state law is relevant in determining both the state exemptions that the debtor may select[63] and whether the debtor may elect exemptions under subsection 522(d) of the Act.[64]

If a debtor is domiciled in a state that has enacted a law denying its residents the alternative bankruptcy exemptions, the debtor is limited to property protected from creditors by state law, plus exemptions given by federal laws other than the federal bankruptcy law.[65] If a debtor's state has not enacted such a disqualifying law, the debtor, with the aid of his attorney, must select between property listed in subsection 522(d) and the property exempted by state and federal nonbankruptcy laws. The debtor generally will choose the alternative that most closely matches the types and amounts of assets that he or she owns in order to maximize his or her exemptions. In some cases, the ownership of a single asset might dictate the choice of one of the alternatives. For example, homestead[66] and life insurance[67] exemptions in some states

---

59. *Id.* § 1471(e).

60. *See* SENATE REPORT, *supra* note 8, at 82, 153; HOUSE REPORT, *supra* note 8, at 368, 445.

61. *See* COMMISSION REPORT, *supra* note 8, at 91.

62. 11 U.S.C. § 522(b)(2)(A) (West 1979).

63. *Id.* § 522(b)(2)(A).

64. *Id.* § 522(b)(1).

65. *Id.* § 522(b); *see* text accompanying notes 182-201 *infra*.

66. *See, e.g.*, CAL. CIV. CODE § 1260 (West Supp. 1978) ($40,000); FLA. CONST. art 10, § 4(a)(1) (no dollar limit; rural homesteads limited to 160 acres; urban homes limited to one-half

are very liberal and would allow debtors owning these assets to exempt far more than they could under the comparable exemptions in subsection 522(d).[68] A debtor who owns one of these assets might find that its value alone exceeds the value of additional exemptions provided in subsection 522(d) and therefore would elect the state exemptions.

Although subsection 522(b) contains the basic grant of exemption rights, debtors enjoy comparable rights under two other provisions of the Act. First, the Act expressly provides for the abandonment of property of the estate by the trustee.[69] Consequently, a debtor might be allowed to retain property that would net very little on sale, even though the property is not exempt.[70]

Second, a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable" under the new Act.[71] Accordingly, debtors in the roughly forty states[72] that variously protect beneficiaries' interests in some form of support or spendthrift trust from creditors' reach may benefit from this provision. Moreover, since this is not a part of the exemption law, this right is available to all debtors, including those who elect exemptions under subsection 522(d).

In deciding to grant a blanket immunity to debtors' interests in these trusts, Congress abandoned the more reasonable Commission recommendation, which would have limited the effectiveness of restrictions on transfers to support trusts and then "only to the extent of the income reasonably necessary for the support of the debtor and his dependents."[73] Congress's explanation for its position is that "[t]he bank-

acre); N.D. CENT. CODE § 47-18-01 (Supp. 1979) ($80,000); WIS. STAT. ANN. § 815.20 (West 1979) ($25,000).

67. Most states place no dollar value limit on a debtor's interest in a life insurance policy. *E.g.*, ALA. CODE § 6-10-8 (1975); FLA. STAT. ANN. § 222.14 (West Supp. 1979); MICH. COMP. LAWS ANN. § 500.2207 (1967); OHIO REV. CODE ANN. § 3911.10 (Page Supp. 1979); N.C. CONST. art. X, § 5; OR. REV. STAT. § 743.102(1) (1977); TEX. REV. CIV. STAT. ANN. art. 3836(a)(6) (Vernon Supp. 1980).

68. *See* text accompanying notes 89 & 132-137 *infra*.

69. 11 U.S.C.A. § 554 (West 1979).

70. Abandonment is common and represents a significant source of assets for debtors. Often, debtors will be required to pay the trustee a nominal sum for abandoned items. *See House Hearings, supra* note 9, at 781-84, 786 (statement of Professor Shuchman).

71. 11 U.S.C.A. § 541(c)(2) (West 1979).

72. *See* G. BOGERT & G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 151 n.27, 152 n.29 (1973).

73. H.R. 31, 94th Cong., 1st Sess., § 4-601(b) (1975), *reprinted in House Hearings, supra* note 9 app. I, at 165. The Senate agreed with the Commission's proposal. *See* S. 2266, 95th Cong., 2d Sess., § 541(c)(2) (1977), *reprinted in* 14 BANKRUPTCY REFORM ACT of 1978: A LEGISLATIVE HISTORY 111 (A. Resnick & E. Wypyski 1979). It conceded this point, however, in the final negotia-

ruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust."[74] In addition to the settlor's intent, however, the interests of the debtor-beneficiary's creditors certainly are relevant. The congressional position causes an unjustified and irrational diversion of assets from creditors to a debtor who has separate and generally ample exemption law protections, plus a discharge of debts.[75]

C. *Subsection 522(d): The Exempt Property Given By the New Act*

The types of property exempted by the new Act are fairly typical of those exempted by most state laws. The dollar amount limitations on the fair market value[76] of the debtor's interest[77] in the listed property falls about midway on the continuum of the limitations of the various state exemption laws,[78] with a few notable exceptions.[79] Wisely, Congress has created a system to protect against the erosion of these dollar amount limitations by inflation.[80] This system should mean that the federal bankruptcy exemption law will forego the plight of the many state exemption laws that have become outdated.[81] The Code provides that the Judicial Conference of the United States will recommend to Congress a "uniform percentage adjustment of each dollar amount,"[82] every six years beginning in 1985.[83] This provision differs from the automatic, administrative adjustment recommended by the Commission, which would have occurred every two years.[84] The Code instead requires "Congress . . . to take affirmative action, by passing a law amending the appropriate section, if it wishes to accomplish the

tions with the House. *See* 124 CONG. REC. S17,413 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

74. HOUSE REPORT, *supra* note 8, at 176.

75. *See* text accompanying notes 289-292 *infra*.

76. The new Act defines "value" to mean "fair market value as of the date of the filing of the petition." 11 U.S.C.A. § 522(a)(2) (West 1979).

77. *See* text accompanying notes 86-88 *infra*.

78. During negotiations the Senate prevailed upon the House to reduce the dollar value limitations that the House bill contained. *See* 124 CONG. REC. S17412 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

79. *See* text accompanying notes 108-11 & 129-140 *infra*.

80. Although hard to imagine in these times, during times of deflation the dollar amounts might also be reduced.

81. *See* Joslin, *supra* note 25, at 355-65; 6 CONN. L. REV. 142, 142-43, 149-52 (1973).

82. 11 U.S.C.A. § 104 (West 1979).

83. *Id.*

84. *See* H.R. 31, 94th Cong., 1st Sess. § 1-105 (1975), *reprinted in House Hearings, supra* note 9, app. I, at 24-5.

change."[85] While the Commission proposal seems preferable since it called for more frequent and automatic adjustments, the Code provision is acceptable because it ensures that Congress periodically will be made aware of inflation's eroding effect on the exemption provisions.

Many of the exemptions in subsection 522(d) refer to "the debtor's interest"[86] in property. The purpose of this phraseology is to indicate that only the debtor's equity[87] interest in the property should be considered when applying the dollar value limitations. Thus, if a debtor owns a one-half interest in property as a tenant in common, and the property has a fair market value of $20,000 and is subject to an $8,000 mortgage, the "debtor's interest" under subsection 522(d) is $6,000. This position accords with state laws on the topic[88] and is the accurate measure of the value of the property actually reserved to the debtor.

1. The $7,500 General Exemption

The Act allows a debtor to exempt his interest in a residence to the extent that the value of his interest does not exceed $7,500.[89] The Act properly extends the exemption to mobile homes and interests in cooperatives, as well as interests in real estate, thus recognizing these contemporary living styles.[90] The property, however, must be the residence of the debtor or a dependent of the debtor.[91] Part or all of this $7,500 also may be used to exempt a burial plot for the debtor or dependent.[92]

The $7,500 limitation on the residence exemption is quite small

85. *See* HOUSE REPORT, *supra* note 8, at 316. The House bill was changed after its Report was written, but the change did not affect this point. *See* 124 CONG. REC. S17407 (daily ed. Oct. 6, 1978).

86. 11 U.S.C.A. § 522(d)(2), (3) (West 1979). Other sections refer to "the debtor's aggregate interest" in property. *See id.* § 522(d)(1),(4),(5),(6),(8).

87. "Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the 'value' of the property for the purposes of exemption." HOUSE REPORT, *supra* note 8, at 360; SENATE REPORT, *supra* note 8, at 76.

88. *E.g.*, ARIZ. REV. STAT. ANN. § 33-1101(C) (Cum. Supp. 1978); CAL. CIV. CODE § 1260(1) (West Cum. Supp. 1978); *see* Samuels v. Delucchi, 286 F.2d 504 (9th Cir. 1961); Strangman v. Duke, 140 Cal. App. 2d 185, 295 P.2d 12 (1956); Erlinger v. Freed, 347 Ill. 588, 180 N.E. 400 (1932); France v. Hohnbaum, 73 Neb. 74, 104 N.W. 865 (1905); New Martinsville Grocery Co. v. Hannibal Store Co., 65 Ohio App. 50, 29 N.E.2d 226 (1940); Dallas Ceramic Co. v. Morgan, 560 P.2d 197 (Okla. 1977); Bank of Columbia v. Gibbes, 54 S.C. 579, 32 S.E. 690 (1899).

89. 11 U.S.C.A. § 522(d)(1) (West 1979).

90. *Id.; see* Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 798-99 (1974).

91. 11 U.S.C.A. § 522(d)(1) (West 1979). The Act defines "dependent" as including a "spouse, whether or not actually dependent." *Id.* § 522(a)(1).

92. *Id.* § 522(d)(1).

when compared to some state homestead exemptions,[93] but it is also more generous than many other states' laws,[94] particularly the six jurisdictions that grant no homestead exemption.[95] Assuming the desirability of an exemption for a debtor's residence,[96] the limitation will give a debtor a reasonable equity in a residence to begin a fresh start. As the Commission indicated, because the debtor's debts are being discharged, it would be inappropriate to grant an exemption that was much larger than this.[97]

To the extent that a debtor does not use the $7,500 residence or burial plot exemption—either because the debtor does not own such property or because his equity in the property is less than $7,500—the debtor may use the unused portion of the $7,500, together with $400, to exempt his interest in "any property."[98] For example, a debtor who owns no residence, or chooses not to exempt it, and has a $1,000 interest in a burial plot would be able to exempt the full interest in the burial plot[99] and have a total of $6,900 to apply to the exemption of any other property, including that not of the type listed in subsection 522(d).

Additionally, the "any property" exemption apparently may be used to exempt the value of subsection 522(d) property in excess of the dollar value limitation of the specific exemption applicable to that property. For example, the debtor might use part of the $6,900 to exempt an automobile with a value of $3,000; the Act itself exempts an automobile up to $1,200,[100] and the additional $1,800 needed to exempt it completely could come from the $6,900. Although this result is not stated specifically in the Act or the legislative history, three reasons support it. First, the Commission recommended to Congress that debtors be allowed to use any surplus from their residence exemption only

93. *E.g.*, CAL. CIV. CODE § 1260 (West Supp. 1978) ($40,000); FLA. CONST. art. 10, § 4(a)(1) (no dollar limit; rural homesteads limited in size to 160 acres; urban residential lots to one-half acre); N.D. CENT. CODE § 47-18-01 (1978) ($60,000); WIS. STAT. ANN. § 815.20 (West 1977) ($25,000).

94. *E.g.*, ALA. CODE § 6-10-2 (1975) ($2,000); IND. CODE ANN. § 34-2-28-1 (Burns Supp. 1979) ($5,000); NEB. REV. STAT. § 40-101 (1974) ($4,000); N.C. GEN. STAT. § 1-372 (1969) ($1,000); OHIO REV. CODE ANN. § 2329.73 (Page 1953) ($1,000); TENN. CODE ANN. § 26-301 (Supp. 1979) ($5,000); VA. CODE § 34-4 (Supp. 1979) ($5,000).

95. The jurisdictions are Connecticut, Delaware, the District of Columbia, Maryland, New Jersey, and Pennsylvania. *See* UNIFORM EXEMPTIONS ACT, Prefatory note. (1979).

96. *See* Vukowich, *supra* note 90, at 805-07.

97. *See* COMMISSION REPORT, *supra* note 8, at 171.

98. 11 U.S.C.A. § 522(d)(5) (West 1979).

99. *Id.* § 522(d)(1).

100. *Id.* § 522(d)(2).

to exempt certain items of property specifically listed elsewhere in the exemption provision.[101] Congress took a more liberal view by providing that debtors could apply the surplus of the $7,500 residence exemption to "any property,"[102] including listed property. Second, the list of property in subsection 522(d) is so comprehensive of the types of property that are designed to fulfill the policy goals of the exemption laws that it would undermine the purpose of the subsection to require debtors to select unlisted property. Third, Congress allowed the surplus to be taken from "any property" "in order not to discriminate against the nonhomeowner."[103] Surely Congress would not otherwise discriminate against those debtors who owned only assets listed in subsection 522(d)—presumably those best suited to debtor rehabilitation—by denying them all or part of the $7,500 while giving it to debtors who owned assets not listed in that subsection.

Allowing debtors to select as exempt "any property" in the amount of $400 plus the surplus from the $7,500 residence and burial plot exemption is sound. Some commentators have recommended that exemption laws contain *only* this type of provision. They argue that exemption laws should not place any restrictions on the types of property a debtor might select; rather, the debtor should be free to choose from his assets within a prescribed cash amount.[104] While such a scheme has its virtues, it poses practical problems,[105] and the new Act accomplishes many of the same goals by providing broad and numerous categories of assets from which debtors may select their exempt property. Furthermore, the provision allowing for the selection of "any property" to the value of $400 plus the surplus from the $7,500 exemption permits the debtor to retain sufficient amounts of unlisted items and of listed items in excess of their dollar value limitation.

An important function of the "any property" exemption will be to exempt cash, earned but unpaid wages, savings and vacation pay. These assets become part of the estate[106] and are not otherwise ex-

101. *See* COMMISSION REPORT, *supra* note 8, at 171; H.R. 31 94th Cong., 1st Sess. § 4-503(b)(2) (1975), *reprinted in House Hearings*, *supra* note 9, app. I, at 146-47.

102. 11 U.S.C.A. § 522(d)(5) (West 1979); *see* HOUSE REPORT, *supra* note 8, at 361.

103. HOUSE REPORT, *supra* note 8, at 361; *see* COMMISSION REPORT, *supra* note 8, at 171. This factor is very important since most debtors do not own their own homes, and Congress was aware of this fact. *See* COMMISSION REPORT, *supra* note 8, at 43-44; *House Hearings*, *supra* note 9 at 774 n.26, 780 (statement of Professor Shuchman).

104. *See* Countryman, *supra* note 22, at 746-48; Comment, *supra* note 17, at 1507-13; Note, 53 CORNELL L. REV. 663, 671-81 (1968).

105. *See* Vukowich, *supra* note 18, at 1460.

106. *See* 11 U.S.C.A. § 541(a) (West 1979); HOUSE REPORT, *supra* note 8, at 367-68.

empted by subsection 522(d). Thus, by using the "any property" exemption to exempt some cash, the debtor will be able to pay rent, buy food and meet other day-to-day expenses.

As a practical matter, most debtors will take the $7,500 exemption via the "any property" exemption since most debtors in bankruptcy do not own a residence.[107] Consequently, for the average debtor, there will be a general exemption of $7,900, which can be used to exempt "any property."

2. Personal and Household Items

Subsection 522(d) contains a variety of exemptions that relate to personal and household items. These are all subject to some dollar value limitation, but as explained above, a debtor may use the "any property" exemption to effectively raise the dollar value limitation on a specific item of exempt property.

First, the debtor's interest in an automobile[108] is exempted to the extent the interest does not exceed $1200 in value.[109] This provision is more liberal than many state exemptions because it does not require that the vehicle be used in the debtor's employment.[110] In addition, the $1,200 limit is higher than limitations in some states,[111] and many states do not exempt debtors' interests in automobiles at all.[112]

Debtors may also exempt a total of $500 worth of personal and family jewelry.[113] Occupational tools and related items are exempt to the total value of $750,[114] and professionally prescribed health aids are exempt with no dollar value limitation.[115]

---

107. *See* COMMISSION REPORT, *supra* note 8, at 43-44 ("only a small percentage [of debtors] were purchasing their own home"); *see also House Hearings, supra* note 9, at 774 n.26, 780.

108. More precisely, the Act exempts the debtor's interest in "one motor vehicle." 11 U.S.C.A. § 522(d)(2) (West 1979). This could include a truck, tractor or motorcycle as well as a car.

109. *Id.*

110. *See, e.g.*, ALASKA STAT. § 09.35.080(4) (1973); COLO. REV. STAT. 13-54-102(1)(j) (1973); IOWA CODE ANN. § 627.6(18) (1950); KY. REV. STAT. §§ 427.010(1), .030, .040 (1970); MICH. STAT. ANN. § 27A. 6023(a)(5) (1977); UTAH CODE ANN. § 78-23-1(6) (1953); *see* Lopp v. Lopp, 118 Cal. Rptr. 338 (Dist. Ct. App. 1961); Kelly v. Degelau, 244 Iowa 873, 58 N.W.2d 374 (1953).

111. *See* CAL. CIV. PROC. CODE § 690.2(a) (West Supp. 1979) ($500); COLO. REV. STAT. § 13-54-102(1)(j) (1973) (5); NEV. REV. STAT. § 21.090(1)(f) (1977) ($1,000); OR. REV. STAT. § 23.160(1)(d) (Supp. 1977) ($800).

112. *E.g.*, DEL. CODE tit.10 § 4902 (1975); MD. CTS. & JUD. PROC. CODE ANN. §§ 11-504, 505 (1980); N.J. STAT. ANN. § 2A:17-17 (West Supp. 1979); 42 PA. CONS. STAT. ANN. §§ 8121-8127 (Purdon Supp. 1979); WASH. REV. CODE ANN. § 6.16.020 (Supp. 1978).

113. 11 U.S.C.A. § 522(d)(4) (West 1979).

114. *Id.* § 522(d)(6).

115. *Id.* § 522(d)(9).

Another exemption deals with personal belongings and household items. Unfortunately, the language of this provision is ambiguous. It provides for the exemption of

> [t]he debtor's interest, not to exceed $200 in value *in any particular item*, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.[116]

The ambiguity exists because of uncertainty about the referent of the word "item." The term could refer to items *within* the categories that are listed—for example, refrigerators, kitchen tables, sofas, toasters and suits. Alternatively, "item" could refer to the categories themselves—for example, one "item" would be "household furnishings," and another would be "wearing apparel." If "item" refers to the various types of property within the listed categories, a very broad exemption is granted. Subject to a $200 *per item* limitation, and the requirement that the items be "primarily for the personal, family, or household use of the debtor or a dependent of the debtor," debtors could exempt an unlimited number of items from the various categories. Considering that the $200 limitation is measured by the debtor's equity in the items' fair market values on the date the petition is filed,[117] and that the value of personal and household items depreciates considerably once the goods are removed from stores, this exemption will encompass most of a debtor's personal and household goods. On the other hand, if "item" refers to each of the categories, the exemption is much less significant.

The legislative history sheds some light on the issue. The provision originally was drafted by the House. The Commission had recommended the exemption of "livestock, wearing apparel, jewelry, household furnishings, tools of the trade or profession, and motor vehicles, *to the aggregate value* of not more than $1,000."[118] In rewriting this provision, the House obviously intended to enlarge on the Commission's recommendation, since some of the items listed in the commission's recommendation were given separate, large exemptions,[119] and the remaining household and personal goods were supplemented and given the "$200 in value in any particular item" exemption.[120] The

116. *Id.* § 522(d)(3) (emphasis added).

117. *Id.* § 522(a)(2), (d)(3).

118. H.R. 31, 94th Cong., 1st Sess. § 4-503(c)(1) (1975), *reprinted in House Hearings, supra* note 9, app. I, at 147; *see* COMMISSION REPORT, *supra* note 8, at 171.

119. *See* 11 U.S.C. § 522(d)(2), (4), (6) (West 1979).

120. *Id.* § 522(d)(4).

House Report states,

> [T]he debtor may exempt household goods, furnishings, clothing, and *similar household items*, held primarily for the personal, family, or household use of the debtor or a dependent of the debtor . . . . The limitation for third category items is $300 on any particular item.[121]

The italicized "items" seems to indicate that the House was using "items" to refer to the various categories because of the reference back to those categories through the use of the word "similar."

The more likely intention, however, was that the $200 limitation should apply to items *within* the categories. First, the word "particular" indicates this; if "item" was to refer to the broad categories, there would be no need to modify it with the word "particular". Moreover, "particular" connotes in this context the breaking down of the categories into parts.[122] Second, the various categories overlap.[123] This indicates that the categories were not being listed for purposes of precise measurement of the exemption but rather to describe as broadly and thoroughly as possible the types of property to be allowed as exempt. Third, subsection 522(d) uses the phrase "the debtor's interest" when the dollar value limitation is to be applied to single items.[124] In contrast, when the dollar value limitation is to be applied to a number of items within a subsection, the phrase is always "the debtor's *aggregate* interest."[125] Because the draftsmen differentiated carefully in this regard throughout subsection 522(d), and because the subsection in question uses the phrase "the debtor's interest," it is reasonable to assume that the $200 value limitation was meant to apply to the different items within the categories.

Of course, the suggested construction does result in a potentially huge exemption. This construction would allow debtors to exempt most of their household goods and personal effects except items such as antique or unusually expensive furniture, color televisions, pianos and works of art. This result is consistent, however, with the House's manifested intention to increase substantially a similar exemption recom-

121. HOUSE REPORT, *supra* note 8, at 361 (emphasis added). The $300 amount in the House bill was reduced to $200 after negotiations with the Senate. *See* 124 CONG. REC. S17412 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

122. *Webster's* defines "particular" as "relating to or being a single definite . . . thing as distinguished from some or all others." 2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1646 (15th ed. 1971). Moreover, use of the very word "item" buttresses this interpretation.

123. For example, "household goods" certainly would include "appliances."

124. *See* 11 U.S.C.A. § 522(d)(2) (West 1979) (interest in one motor vehicle).

125. *See id.* §§ 522(d)(1), (4)-(6), (8).

mended by the Commission. Moreover, the property covered by this particular exemption normally nets a return on sale that is far below the value of the property to its owners.[126] Indeed, this factor has been recognized on the state level as a reason for exempting personal property and clothing.[127] Consequently, application of the $200 dollar value limitation to each particular item of furniture, clothing and the like is not only consistent with the clear intention of making the exemption broad, but is also supported by sound practical considerations.

One problem with this construction, however, is how to determine what an "item" is. The problem arises when household goods, such as stereo systems and furniture, are claimed as exemptions. For example, is a dining room set—buffet, table and chairs—an "item," which might very well exceed the $200 limit, or are the "items" the individual parts of the set? Taking this construction literally, each particular or individual item should be valued. This interpretation also would make administration easier since it obviates the problem of determining what a "set" is. This construction, however, raises a problem of its own. If a table in a dining room set has a value in excess of $200 but each chair's value is under $200, should the table alone be sold? Debtors should handle these rare situations by using a part of their "any property" exemption[128] to retain items that are part of sets, but have values in excess of $200.

3. Life Insurance

In a sharp departure from most states' positions regarding life insurance exemptions, Congress's bankruptcy exemption for life insurance is quite conservative. Subject to certain conditions,[129] states exempt all interests in life insurance polices, including cash surrender values,[130] or a substantial dollar amount of the policies' values.[131]

126. *See* COMMISSION REPORT, *supra* note 8, at 180; HOUSE REPORT, *supra* note 8, at 127.

127. *See* Vukowich, *supra* note 90, at 787-88 & nn.47 & 50.

128. *See* text accompanying notes 98-107 *supra.*

129. The usual condition is that the policy beneficiary be a dependent or relative of the insured. *See* Vukowich, *supra* note 90, at 808-809.

130. *E.g.*, ALA. CODE § 6-10-8 (1975); ARK. STAT. ANN. § 30-208 (1962); FLA. STAT. ANN. § 222.14 (West 1977); IOWA CODE ANN. § 511.37 (West 1949); KAN. STAT. ANN. § 40-414(a) (1964); MICH. STAT. ANN. § 24.1 2207 (1972); MISS. CODE ANN. § 85-3-11 (1973); N.M. STAT. ANN. § 42-10-3 (1978); OR. REV. STAT. § 743.102(1) (1977); TEX. REV. CIV. STAT. ANN. art. 3836(a)(6) (Vernon Supp. 1980).

131. *E.g.*, ARIZ. REV. STAT. ANN. § 33-1126(1) (Supp. 1979) ($10,000); COLO. REV. STAT. ANN. § 13-54-102(1)(*l*) (1973) ($5,000); MISS. CODE ANN. § 85-3-11 (1973) ($50,000). Other jurisdictions limit the exemption by reference to the annual premium. *See* CAL. CIV. PROC. CODE

Congress followed the Commission's general recommendation that these large state exemptions should be curtailed in the bankruptcy exemption.[132]

The new Act has two provisions regarding life insurance. One exempts "any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract."[133] As explained in the House Report, this

> [the quoted phrase] refers to the life insurance contract itself. It does not encompass any other rights under the contract, such as the right to borrow out the loan value. Because of this provision, the trustee may not surrender a life insurance contract, which remains property of the debtor if he chooses the Federal exemptions.[134]

This provision continues in a different manner the protection of the 1898 Act against forfeiture of life insurance policies.[135] It protects debtors against having to find new insurance at a higher rate or at a time when they may be uninsurable. Life insurance policies with no loan or cash surrender value would be completely exempt under this provision.

For life insurance policies that do have a loan value, a separate provision allows debtors to exempt up to $4,000 "in any accrued dividend or interest under or loan value" of the policies.[136] The debtor must own the life insurance contract and either the debtor or a person of whom the debtor is a dependent must be the insured to qualify for the exemption.[137] Loan value, rather than cash surrender value,[138] is used to measure the exemption's limit because it assumes that policies will remain in force until the next premium anniversary; a determination of surrender value, on the other hand, normally assumes that the

§ 690.9 (West Supp. 1980); MONT. REV. CODES ANN. § 93-5814(7) (1964); NEV. REV. STAT. § 21.090(1)(*l*) (1977); UTAH CODE ANN. § 78-23-1(8) (1953).

132. *See* COMMISSION REPORT, *supra* note 8, at 183 Plumb, *supra* note 23, at 61-72; Vukowich, *supra* note 18, 1462-67.

133. 11 U.S.C.A. § 522(d)(7) (West 1979).

134. HOUSE REPORT, *supra* note 8, at 361.

135. *See* Bankruptcy Act § 70(a)(5), 11 U.S.C. § 110(a)(5) (1976) (repealed 1978).

136. 11 U.S.C.A. § 522(d)(8) (West 1979). Subtracted from the $4,000 would be automatic payments from loan value on behalf of the debtor to an insurance company to pay a premium or to carry out a nonforfeiture option after the date of bankruptcy. *Id.*; *see id.* § 542(d).

137. *Id.* § 522(d)(8).

138. The Commission's proposal was that $1,500 in cash surrender value be exempt. This was changed by the House, apparently at the suggestion of the American Life Insurance Association, to $5,000 in *loan* value. *See House Hearings, supra* note 9, at 1585-86; H.R. 8200, 95th Cong., 1st Sess. § 522(d)(8) (1977), *reprinted in* 12 BANKRUPTCY REFORM ACT of 1978: A LEGISLATIVE HISTORY 397 (A. Resnick & E. Wypyski 1979).

policy will be surrendered and the insurance terminated.[139] If the loan values of a debtor's life insurance exceed the $4,000, the trustee will be entitled to the excess for distribution to creditors.[140]

The new Act's life insurance exemption is reasonable. It preserves debtors' life insurance policies while not allowing them to be harbors of wealth at the expense of creditors.

4. Current and Future Income Sources

Debtors' rights to receive a variety of public benefits are preserved by the new Act.[141] Most of these benefits also are exempt under state[142] and other federal laws[143] if debtors decline to elect the federal bankruptcy exemptions. These include social security benefits,[144] unemployment compensation,[145] local public assistance benefits,[146] veterans' benefits,[147] and disability, illness, or unemployment benefits.[148] Additionally, a debtor may exempt rights to receive alimony, support and separate maintenance payments to the extent that these are reasonably necessary for the support of the debtor and his or her dependents.[149] The Act fails to exempt rights under a property settlement agreement and, instead, expressly indicates that these rights are property of the estate.[150] This result is justified when the property settlement is just that and nothing more. Often, however, rights in the nature of support may be provided in a property settlement agreement.[151] The courts should not be bound by the labels that the spouses or their attorneys use, but should scrutinize the settlement and alimony arrangements, and exempt the property and rights that actually represent future support.[152]

Finally, the right to receive payments under a qualifying "stock

139. *See House Hearings, supra* note 9, pt. 3, at 1585 n.3.

140. *See* HOUSE REPORT, *supra* note 8, at 361; COMMISSION REPORT, *supra* note 8, at 172.

141. 11 U.S.C.A. § 522(d)(10) (West 1979).

142. *See* Vukowich, *supra* note 90, at 820-24.

143. *See id.*

144. 11 U.S.C.A. § 522(d)(10)(A) (West 1979).

145. *Id.*

146. *Id.*

147. *Id.* § 522(d)(10)(B).

148. *Id.* § 522(d)(10)(C).

149. *Id.* § 522(d)(10)(D). For a discussion of the phrase "reasonably necessary for the support of the debtor and any dependent of the debtor," see text accompanying notes 334-345 *infra.*

150. 11 U.S.C.A. § 541(a)(5)(B) (West 1979).

151. *See* Loiseaux, *Domestic Obligations in Bankruptcy*, 41 N.C.L. REV. 27 (1962).

152. *See* 11 U.S.C.A. § 522(d)(10)(D) (West 1979).

bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service" is exempt to the extent reasonably necessary for the support of the debtor and his dependents.[153]

The exemption of these various support items seems to apply only to the "right to receive"[154] them in the future.[155] Consequently, if payments from these sources have been made prior to the filing of the petition,[156] and are held as cash or in a bank account, they should be property of the estate and not exempt. Another part of subsection 522(d) extends the exemption of some parts of the estate to both "the debtor's right to receive, *or property that is traceable to*" various sources.[157] The absence of similar language in the future income section clearly indicates Congress's intent. Although this result has been criticized,[158] debtors can find relief in the "any property" exemption[159] and protect these funds in that way.

A further question arises concerning payments from these income sources that were due but unpaid at the time the petition was filed. This is especially relevant regarding the alimony and support exemption.[160] On the one hand, at the time of bankruptcy the debtor does have the "right to receive"[161] such payments, and this literal compliance with the statute might indicate that the unpaid monies are exempt. It seems more reasonable, however, that these unpaid monies should be available to creditors. Congress's purpose apparently was to preserve only that which is due the debtor after the petition was filed[162] and to give to creditors that which was part of the estate prior to bankruptcy. In some cases, the nonpayment—for example, of alimony—may be the cause of, or a contributing factor to, the debtor's bankruptcy; it seems fair and consonant with the congressional intent that payments that are

153. *Id.* § 522(d)(10)(E). Certain plans or contracts must qualify under I.R.C. §§ 401(a), 403(a), 403(b), 408 or 409. The original House provision was expanded to include plans qualifying under additional sections of the Internal Revenue Code. *See House Hearings, supra* note 91, at 1585.

154. *Id.* § 522(d)(10).

155. "Paragraph (10) exempts certain benefits that are akin to *future* earnings of the debtor." HOUSE REPORT, *supra* note 8, at 362 (emphasis added).

156. 11 U.S.C.A. §§ 301, 303(b) (West 1979).

157. *Id.* § 522(d)(11).

158. Dunham, *Tracing the Proceeds of Exempt Assets in Bankruptcy & Nonbankruptcy Cases*, [1978] S. ILL. U.L.J. 317, 343.

159. *See* text accompanying notes 98-107 *supra.*

160. *See* 11 U.S.C.A. § 522(d)(10)(D) (West 1979).

161. *Id.* § 522(d)(10).

162. *See* HOUSE REPORT, *supra* note 8 at 362, *quoted at* note 155 *supra.*

recovered should be made available to creditors. Moreover, once a payment to the debtor has become due, the debtor has a cause of action for the payment; accordingly, this cause of action would pass to the estate as of the date the petition was filed.[163] Therefore, it appears that the right in these cases is a present one and not the right to future income that Congress sought to protect in subsection 522(d)(10).

5. Loss Compensation

A final exemption protects compensation for a variety of losses. The exemption extends to "the right to receive" the compensation as well as to property that is "traceable to" the compensation.[164] One type of compensation that is protected is "an award under a crime victim's reparation law."[165] A related exemption covers, to a maximum of $7,500, payments "on account of personal bodily injury" of the debtor or a person of whom the debtor is a dependent.[166] This specific provision, however, is rather confusingly qualified; compensation for "pain and suffering or . . . actual pecuniary loss" is excluded from the exemption.[167] The House Report elaborates:

> This provision . . . is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings. Those items are handled separately by the bill.[168]

This provision, and the House's explanation for it, are troubling. With the exclusions of loss of earnings, pain and suffering, and medical payments, there appears to be nothing for the $7,500 to cover.[169] Presumably, Congress intended the $7,500 to apply to the loss of enjoyment of life that is caused by the bodily injury since this is the only type of loss that does not clearly fall within the excluded categories of losses.[170] Another problem is that, contrary to the statement of the House Report, the excluded losses are *not* all covered by other exemptions. Pain and suffering damages are exempt; medical payments might

---

163. *See* 11 U.S.C.A. § 541 (West 1979).

164. *Id.* § 522(d)(11).

165. *Id.* § 522(d)(11)(A).

166. *Id.* § 522(d)(11)(D).

167. *Id.*

168. HOUSE REPORT, *supra* note 8, at 362.

169. *See* D. DOBBS, REMEDIES 540-51 (1973) (three types of personal injury damages are for earnings, medical and related expenses, and pain and suffering).

170. *See id.* 548-49. Some courts have not recognized this separate type of loss, and others include it as a type of suffering. *Id.*

be, depending on the circumstances.[171] Compensation for lost future earnings of the debtor or a person of whom the debtor is a dependent are given a separate exemption,[172] which applies to the extent the compensation is reasonably necessary for the support of the debtor and his dependents.[173]

Failure to exempt payments for medical payments is unwise and, in fact, may have been a legislative oversight. The Commission had recommended a complete exemption of compensation for personal injuries.[174] The House reorganized the Commission's recommended provision and rewrote substantial parts of it. Possibly, the draftsmen erroneously believed that they had included medical expense compensation elsewhere.[175] This would explain the Report's erroneous statement that "[t]hose items are handled separately by the bill,"[176] and another statement in the Report that "certain tort judgments" are exempt.[177] Alternatively, the House Report may have mistakenly identified "medical payments" as one of the items excluded by the statute's phrase "actual pecuniary loss."[178] Medical liabilities incurred by a person arguably are not comprehended by this phrase; "actual pecuniary loss" may refer only to gains—in the form of profits or earnings—that have been prevented or lost by the injury. In any event, Congress should address this matter. Allowing creditors to reach compensation for medical care seems unjustified.

Two other types of compensation are exempted. If a person of whom the debtor was a dependent dies, payments under a life insurance contract[179] or on account of wrongful death[180] are exempt. Again, the exemption applies only to the extent that the payments are reasonably necessary for the support of the debtor and her dependents.[181]

---

171. *See* 11 U.S.C.A. §§ 522(d)(10)(A), (C), (11)(A), (B) (West 1979).

172. *Id.* § 522(d)(11)(E).

173. *Id.* For a discussion of "reasonably necessary," see text accompanying notes 334-45 *infra.*

174. *See* H.R. 31, 94th Cong., 1st Sess. § 4-503(C)(8) (1975) *reprinted in House Hearings, supra* note 9, app. I, at 148; COMMISSION REPORT, *supra* note 8, at 172.

175. The Commission's complete exemption of compensation for personal injury was in the same provision as unemployment compensation. *See id.* The House did continue the complete exemption of unemployment compensation, *see* 11 U.S.C.A. § 522(d)(10)(A) (West 1979), but omitted personal injury compensation.

176. HOUSE REPORT, *supra* note 8, at 362, *quoted at* text accompanying note 168 *supra.*

177. HOUSE REPORT, *supra* note 8, at 126.

178. 11 U.S.C.A. § 522(d)(11)(D) (West 1979).

179. *Id.* § 522(d)(11)(C) (West 1979).

180. *Id.* § 522(d)(11)(B).

181. *Id.* § 522(d)(11)(B), (C). For a discussion of this limitation on the exemption, see text accompanying notes 334-345 *infra.*

D. *State and Nonbankruptcy Federal Exemptions*

All debtors have the right to elect the exemptions given by the laws of their state of residence and those allowed under federal, nonbankruptcy law. State exemption laws vary considerably. The federal exemptions include such assets as social security benefits,[182] veterans' benefits,[183] civil servants' retirement income,[184] railroaders' unemployment[185] and retirement[186] benefits, compensation and benefits under the Longshoremen's and Harbor Workers' Compensation Act,[187] and foreign service retirement and disability benefits.[188] The Supreme Court's decision in *Kokoszka v. Belford*,[189] however, has been construed by lower courts to mean that the restriction on garnishment in Title III of the Federal Consumer Credit Protection Act[190] is not a federal "exemption."[191] Although this construction of *Kokoszka* does not seem warranted,[192] it would continue to deny debtors' claims of exemp-

182. *See* 42 U.S.C. § 407 (1976).
183. 38 U.S.C. § 3101(a) (1976).
184. 5 U.S.C. § 8346(a) (1976).
185. 45 U.S.C. § 352(e) (1976).
186. *Id.* § 231(m) (1976).
187. 33 U.S.C. § 916 (1976).
188. 22 U.S.C. § 1104 (1976).
189. 417 U.S. 642 (1974).
190. 15 U.S.C. §§ 1671-1677 (1976).
191. *E.g.*, Usery v. First Nat'l Bank, 586 F.2d 107 (9th Cir. 1978); Dunlop v. First Nat'l Bank, 399 F. Supp. 855 (D. Ariz. 1975); Miller v. Monrean, 507 P.2d 771 (Alas. 1973); *see also In re* Brissette, 561 F.2d 779 (9th Cir. 1977).
192. *Kokoszka* involved the narrow issues of whether an income tax refund is property of a debtor's estate and, if so, whether it was exempt under Title III of the Consumer Credit Protection Act. The Court correctly concluded that the refund was property of the estate since it was not necessary for a fresh start. The Court next correctly decided that the tax refund was not exempt. Although some language of the opinion intimates that Title III was not designed to apply *in* bankruptcy, but was only designed to *prevent* bankruptcy, *see* 417 U.S. at 650-51, the Court concluded that "if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act." *Id.* at 651. The Court noted that the Bankruptcy Act, "provides that the [Bankruptcy] Act 'shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States,'" *id.* at 649 (quoting Bankruptcy Act § 6, 11 U.S.C. § 24 (1976) (repealed 1978)). The Court then went on to agree with the court of appeals that a tax refund did not come under title III's protection of "earnings" or "disposable earnings." 417 U.S. at 651-52. That result is justified since the debtor will have current earnings to protect with the exemption; tax refunds seem unrelated to what Congress was striving to protect.

To interpret *Kokoszka* as holding that title III is not an exemption under federal law *at all*, as courts recently have been doing, *see* cases cited note 191 *supra*, is unwarranted. In the first place, if *it* is not an exemption law, it is difficult to say *what is*. Indeed, it appears to be a paradigm of an exemption law, given the traditional goals of exemption laws. Second, *Kokoszka* must be interpreted in light of its facts; so interpreted it merely means that income tax refunds are not "earnings" within title III. Third, because Congress made title III preemptive of all state laws that were less protective of debtors, *see* 15 U.S.C. §§ 1673(c), 1675, 1677 (1976), many states amended their laws to conform to title III. If these state laws—which supplanted wage *exemptions*—are now held to be something less than exemptions, in line with recent court interpretations of *Kokoszka*,

tions of earnings under the federal law. Their state laws, however, might provide an exemption for earnings.[193]

In addition to the exempt property provided by state and federal nonbankruptcy laws, debtors may exempt their interests as joint tenants[194] or tenants by the entirety to the extent that these interests are "exempt from process under applicable nonbankruptcy law."[195] The congressional intent seems clear. Under the 1898 Act, a bankrupt's interest in tenancy by the entirety property did not pass to his trustee under section 70 if, as was often the case,[196] that interest was not transferrable by the bankrupt or reachable by his creditors.[197] The new Act, however, provides that these interests become part of the estate.[198] Hence, the exemption of these interests by the new Act was designed to leave undisturbed the results reached with respect to tenancy by the entirety property under the 1898 Act.

This congressional deference to nuances of state property law is unjustified.[199] Moreover, allowing the exemption without any limitation seems unwise. Most other exemptions are subject to some dollar value limitations,[200] and to the further requirement that the exempt property must be helpful to or necessary for family support. Unlike property exempted under homestead laws,[201] exempt tenancy by the entirety property does not have to be used as a residence. Thus, a debtor and his or her spouse could hold investment property as tenants by the entirety and claim it as exempt. Similarly, in about one-third of the states that recognize tenancies by the entirety in personal prop-

---

protection of debtors' wages will be lost in bankruptcy although state legislatures clearly had no such intent.

193. *See, e.g.*, ALA. CODE § 6-10-7 (1975); CAL. CIV. PROC.CODE § 723.050-.052 (West Supp. 1980); ILL. ANN. STAT. ch. 62, § 73 (Smith-Hurd Supp. 1979); MICH. STAT. ANN. § 27A. 4031 (1980); WASH. REV. CODE § 6.16.020 (Supp. 1978); *see also In re* Brissette, 561 F.2d 779, 785-87 (9th Cir. 1977).

194. Apparently, in most jurisdictions state law does not prevent creditors from collecting against joint tenancy property. *See* S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 113 (3d ed. 1979).

195. 11 U.S.C.A. § 522(b)(2)(B) (West 1979).

196. *See* S. RIESENFELD, *supra* note 194, at 114, 570-71.

197. Bankruptcy Act § 70(a)(5), 11 U.S.C. § 110(a)(5) (1976) (repealed 1978). *See* Plumb, *supra* note 23, 126-29; S. RIESENFELD, *supra* note 194, at 570-71.

198. 11 U.S.C.A. § 541(a)(1) (West 1979); *see id.* § 363(h); SENATE REPORT, *supra* note 8, at 56-67, 82-83.

199. *See* text accompanying notes 289-92 *infra*.

200. *See* text accompanying notes 89, 109, 113 & 114 *supra*.

201. The new Act exempts property that the "debtor uses as a residence," 11 U.S.C.A. § 522(d)(1) (West 1979), subject to a $7,500 limitation. State homestead laws require that the homestead be used as the debtor's residence. *See* Vukowich, *supra* note 90, at 804-05.

erty,[202] debtors might hold large sums in bank accounts[203] and claim them as exempt. Such a result seems indefensible given the exemptions already provided to debtors and the discharge of debts.

E. Provisions to Ensure the Realization of Exemption Goals

Two provisions of the new Act are designed to ensure that the protections given debtors by the exemption laws are not improvidently lost. These provisions apply whether the debtor elects exemptions under subsection 522(d) or under state and other federal exemption laws.[204] First the Act renders unenforceable waivers of exemptions given to creditors who hold unsecured[205] claims.[206] Furthermore, creditors with nonpossessory, nonpurchase money secured claims and waivers will not be able to enforce their rights against exempt household and personal items,[207] occupational items[208] or health aids.[209] These provisions were recommended by the Commission[210] and adopted by Congress.[211]

---

202. *See* Annot., 64 A.L.R.2d 8 (1959).

203. *See, e.g.*, Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925); *In re* Estate of O'Neal, 409 S.W.2d 85 (Mo. 1966).

204. Both § 522(e) and § 522(f) refer to exemptions "under subsection (b) of this section." Subsection (b) contains both the § 522(d) alternative and that of state and federal nonbankruptcy laws. *See* HOUSE REPORT, *supra* note 8, at 362. Problems arise, however, when a debtor has chosen state law exemptions, and the state law differs from the Act's provisions with respect to waivers and nonpurchase money security interests in exempt property. *See* text accompanying notes 312-17 *infra.*

205. *See* 11 U.S.C.A. § 506 (West 1979) (determining secured claims).

206. *Id.* § 522(e).

207. *Id.* § 522(f)(2)(A).

208. *Id.* § 522(f)(2)(B).

209. *Id.* § 522(f)(2)(C).

210. *See* COMMISSION REPORT, *supra* note 8, at 182-84.

211. The House Report explains the reasons for the provisions:

> Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment.
>
> In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement costs of the goods are generally high. Thus, creditors rarely repossess, and debtors, ignorant of the creditors' true intentions, are coerced into payments they simply cannot afford to make.
>
> The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have.

Nonpurchase money security interests will be valid with respect to other exempt assets such as homes[212] and automobiles. Creditors taking security interests in these more substantial assets will know that they are secure even if bankruptcy should intervene. This frees the more substantial assets of debtors, which are more realistically taken as collateral. Consequently, debtors may use these more substantial assets to obtain credit,[213] while those assets which are more essential to the family and which are often taken as collateral only as a device to coerce payment[214] are protected.[215]

In addition to nonpurchase money security interests, the Act allows debtors to avoid judicial liens[216] on exempt property.[217] Unfortunately, this provision appears to conflict with another provision of the Act that specifically recognizes the enforceability of nonvoidable liens[218] against exempt property. The legislative history sheds some light on the conflict but is also a bit confusing. Taken literally, the section allows debtors to "avoid a judicial lien on *any* property to the extent that the property could have been exempted in the absence of the lien."[219] This would allow for the avoidance of, for example, a judgment lien that arose five years before bankruptcy on real estate that is being claimed as exempt.[220] Subsection 522(c)(2), however, ex-

---

HOUSE REPORT, *supra* note 8, at 127 (footnotes omitted). For a very recent North Carolina case depicting facts similar to those described in the House Report, see Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219 (1978).

The last paragraph of the House Report is misleading because it implies that only the effects of "contracts of adhesion, signed in ignorance" may be avoided by debtors. The Act, however, invalidates all nonpurchase money security interests in the listed items and renders unenforceable all waivers regardless of the nature of the contract or conditions under which it was signed. 11 U.S.C.A. § 522(f) (West 1979).

212. Waivers of the homestead exemption generally are upheld under state laws. *See, e.g.*, Agronaut Ins. Co. v. Cooper, 261 N.W.2d 743 (Minn. 1978); *see also* ALA. CODE § 6-10-120 (1976); ARIZ. REV. STAT. ANN. § 33-1103(A)(1) (1956); ILL. ANN. STAT. ch. 52, § 4 (Smith-Hurd Cum. Supp. 1979).

213. *See* COMMISSION REPORT, *supra* note 8, at 173.

214. *See* note 211 *supra*.

215. The new Act generally conforms to state laws on these matters, *see* Vukowich, *supra* note 18, at 1469; Annot., 94 A.L.R.2d 967 (1964), although it appears to be somewhat more protective of debtors, *see, e.g.*, Broadway v. Household Fin. Corp., 351 So. 2d 1373 (Ala. Civ. App.), *cert. denied*, 351 So. 2d 1378 (Ala. 1977); Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, *appeal dismissed*, 295 N.C. 551, 248 S.E.2d 727 (1978) (although state law prohibits waiver of exemptions, lender's security interest in all of debtor's possessions enforceable).

216. The new Act defines "judicial lien" to mean "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C.A. 101(27) (West 1979).

217. *Id.* § 522(f).

218. *Id.* § 522(c)(2). The nonvoidability has reference to the trustee's various voiding powers and not to § 522(f).

219. HOUSE REPORT, *supra* note 8, at 362; SENATE REPORT, *supra* note 8, at 76.

220. It would also seem to apply to a lien that existed when the debtor purchased the property.

pressly recognizes the enforceability of such a lien against exempt property,[221] and the legislative history of that section states, "The rule of *Long v. Bullard* . . . is accepted with respect to the enforcement of valid liens on nonexempt property *as well as on exempt property*."[222] While *Long v. Bullard* involved a "lien created by contract,"[223] a judgment lien is nonetheless a "valid lien." Moreover, the legislative history is especially confusing in light of the separate provision, discussed above in this subsection,[224] that renders unenforceable nonpossessory, nonpurchase money security interests in items of exempt personal property.

To further confound matters, at one point the House Report indicates that the avoidance of judicial liens on exempt property is designed to allow "the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. . . . If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions."[225] This explanation is unconvincing. First, the provision does not limit the right of avoidance to any time period before bankruptcy. Second, other provisions allow debtors to exempt property free from judicial liens that were obtained within a short period before bankruptcy.[226] Consequently, the congressional intention remains obscure due to the unclear legislative history and conflicting statutory framework.

Until the matter is resolved by Congress, the courts should refuse to enforce nonpossessory, nonpurchase money interests in exempt household and personal items, in occupational items and in health aids. They should recognize, however, the enforceability of those security interests in other exempt items such as the home and automobiles. Congress's intent on these matters seems rather clear.[227] Judgment and other nonconsensual liens should, however, be enforceable unless they

The implication of the House and Senate Reports is that the debtor could free his newly acquired property from the preexisting lien by a claim of exemption. Such a result seems manifestly unfair to the lien creditor.

221. 11 U.S.C.A. § 522(c)(2) (West 1979). This section is discussed in more detail at text accompanying notes 250-53 *infra*.

222. HOUSE REPORT, *supra* note 8, at 361 (citing Long v. Bullard, 117 U.S. 617 (1886)) (emphasis added).

223. 117 U.S. at 621.

224. 11 U.S.C.A. § 522(f)(2) (West 1979); *see* text accompanying notes 205-13 *supra*.

225. HOUSE REPORT, *supra* note 8, at 126-27.

226. *See* 11 U.S.C.A. § 522(g)-(i), (j) (West 1979).

227. *See* text accompanying notes 212-15 *supra*.

are otherwise voidable under other provisions of the Act.[228] This result seems consistent with the thrust of the legislative history in that it recognizes creditors' legitimate interests in debtors' property under state law[229] and yet allows for the avoidance of those liens that are otherwise voidable under provisions of the Act.

F. Debts and Liens Enforceable Against Exempt Property

The exemption provisions ensure that the exempt property will not be liquidated for the purpose of paying dividends to creditors.[230] The Act goes further and provides that the exempt property also is protected "after the case."[231] This ensures that the exempt property is protected against creditors whose claims are nondischargeable.[232] These general rules, however, are expressly qualified by two categories of exceptions. First, otherwise exempt property is liable both during and after the case to satisfy nondischargeable tax claims and family support claims.[233] Second, exempt property remains subject to tax and other nonvoidable liens.[234] These debts and liens are, then, exceptions to the exemption policy of the Act. The exceptions apply whether the debtor elects exemptions under subsection 522(d) or under state and federal nonbankruptcy laws.[235]

The provision that nondischargeable[236] tax debts are collectible against exempt property is an example of the Treasury Department's

228. *See* 11 U.S.C.A. § 522(g)-(i), (j) (West 1979).

229. *See* text accompanying notes 221-23 *supra.*

230. The exemption of property also may result in less or no payment to the trustee. *See House Hearings, supra* note 9, at 768-69, 773.

231. 11 U.S.C.A. § 522(c) (West 1979).

232. *See id.* § 523(a); Vukowich, *supra* note 18, at 1453-54.

233. 11 U.S.C.A. § 522(c)(1) (West 1979).

234. *Id.* § 522(c)(2).

235. The subsection refers to "property exempted under this section," and both alternative sets of exemptions are provided for under subsection b of the section. Unlike subsections (e) and (f), however, no express reference is made to subsection (b). This is most likely an insignificant variation in drafting. For reasons discussed later, however, *see* text accompanying notes 301-11 *infra,* numerous problems arise when state exemption laws' own exceptions are considered. This might indicate that Congress intended its list of exceptions to apply only if exemptions were being elected under § 522(d).

236. The Senate's bill would have permitted all tax claims to be enforceable against exempt property. *See* S. 2266, 95th Cong., 2d Sess., § 522(c)(3) (1977), *reprinted in,* 14 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 97-98 (A. Resnick & E. Wypyski 1979); SENATE REPORT, *supra* note 8, at 76. The Senate subsequently conceded to limit the exception to nondischargeable tax claims under § 523(a)(1). *See* 124 CONG. REC. S17412 (daily ed., Oct. 6, 1978) (remarks of Sen. DeConcini).

tenacity in protecting the national purse.[237] The Treasury, qua tax collector, already enjoys numerous advantages over other creditors. Tax claims constitute a complete exception to the federal restriction on garnishment,[238] and state exemption laws are inapplicable when federal tax claims are being collected.[239] A separate, very niggardly exemption is provided debtor-taxpayers in the Internal Revenue Code;[240] fortunately, while considering the bankruptcy legislation, Congress has become aware of this sorry and archaic Code provision and has indicated its intention of "increasing the exemptions to more realistic levels."[241] Given the federal government's favored creditor status, the exception for nondischargeable tax claims is unwarranted. The federal government should be willing to subordinate its interest as creditor to the federal bankruptcy goal of ensuring fresh starts for debtors. The priority status given tax claims by the Act[242] and the nondischargeability of tax claims[243] are more than enough protection for the federal purse.[244]

The exception of family support obligations, such as alimony, maintenance, and child support, is common to the federal restriction on garnishment[245] and many state exemption statutes.[246] Even without an express statutory exception, courts have frequently allowed family support claims to be enforceable against exempt property on the ground that a basic goal of the exemption laws is to protect debtors' families.[247]

237. *See The Economics of Bankruptcy Reform*, LAW & CONTEMP. PROB., Autumn 1977, at 166 (comments of Professor Shuchman).

238. 15 U.S.C.A. § 1673(b)(1)(C) (West Cum. Supp. 1979).

239. *E.g.*, Kyle v. McGuirk, 82 F.2d 212, 213 (3d Cir. 1936); Cannon v. Nicholas, 80 F.2d 934, 936 (10th Cir. 1935); Knox v. Great W. Life Assurance Co., 109 F. Supp. 207, 211-12 (E.D. Mich. 1952), *aff'd per curiam*, 212 F.2d 784 (6th Cir. 1954); Birch v. Dodt, 2 Ariz. App. 228, 229-30, 407 P.2d 417, 418-19 (1965).

240. I.R.C. § 6334(a), (c).

241. 124 CONG. REC. H11113 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); *see* 124 CONG. REC. S17430 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

242. 11 U.S.C.A. § 507(a)(6) (West 1979).

243. *Id.* § 523(a)(1).

244. The Commission's proposal excluded tax claims as exceptions to its exemption law. *See* H.R. 31, 94th Cong., 1st Sess. § 4-503(a) (1975), *reprinted in House Hearings, supra* note 9, app. I, at 146.

245. 15 U.S.C.A. § 1673(b)(1)(A), (2) (West Cum. Supp. 1979).

246. *E.g.*, IDAHO CODE § 11-207(2) (1979) (personal earnings); KY. REV. STAT. § 427.010(3)(a) (1970) (earnings); MASS. ANN. LAWS ch. 188, § 1(4) (Law. Co-op Supp. 1980) (homestead); MO. ANN. STAT. § 452.140 (Vernon 1977) (no property exempt); OHIO REV. CODE ANN. § 3113.21(A) (Page 1980) (personal earnings).

247. *E.g.*, AT&T v. Merry, 592 F.2d 118 (2d Cir. 1979); Cody v. Riecker, 594 F.2d 314 (2d Cir. 1979); Senco of Florida, Inc. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979); Cartledge v. Miller, 457 F. Supp. 1146 & n.42 (S.D.N.Y. 1978); Hilltop Auto Salvage, Inc. v. Mason, 132 Ga. App. 746, 209 S.E.2d 25 (1974); Pope v. Pope, 283 Md. 531, 390 A.2d 1128 (1978); Hirko v. Hirko, 166 N.J. Super. 111, 398 A.2d 1353 (Ch. Div. 1979); Brown v. Brown, 32 Ohio App. 2d 139, 140-41, 288

These statutory and judicial positions regarding family support claims are generally sound. Granting an unlimited exception to debtors' exemption rights in bankruptcy, however, goes too far. Theoretically, a debtor could be deprived of all his exempt assets because of tax and family support debts. Recently, Congress changed the federal restriction on garnishment to limit the amount of earnings that could be garnished by family support claimants.[248] This same sensitivity to debtors' needs should be reflected in the exceptions to exemptions in bankruptcy. Given the variety in both kind and amount of property involved in bankruptcy, a precise formula such as the one in the federal restriction on garnishment[249] would be inappropriate. The bankruptcy courts, however, could be charged with making an equitable distribution of assets according to the relative needs of the debtor and his new family, if any, and the support claimants.

A final group of exceptions is created in favor of liens that are not avoided by the trustee's various powers.[250] This exception recognizes the validity of real estate mortgages and purchase money security interests in personal property.[251] In addition, nonpurchase money security interests in more substantial exempt assets such as automobiles are valid.[252] As previously discussed,[253] however, the validity of nonvoidable judicial liens on exempt property is unclear.

Because the Act singles out creditors who can enforce their claims against exempt property, the question of whether marshaling is appropriate arises. For example, if a creditor with liens on both exempt and nonexempt property is involved in a case and has priority over other creditors who have liens on the nonexempt property, can those other creditors invoke the doctrine of marshaling to force him to satisfy his claim first from the exempt property?[254] And, should marshaling require the government's tax claims to be satisfied from exempt assets so

N.E.2d 852, 853-54 (1972); Huskey v. Batts, 530 P.2d 1375 (Okla. App. 1974); Calvin v. Calvin, 6 Or. App. 572, 487 P.2d 1164 (1971); Commonwealth *ex rel.* Magrini v. Magrini, 398 A.2d 179 (Pa. Super. 1979). *Contra*, Miller v. Superior Ct., 69 Cal. 2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968); York v. York, 249 S.W.2d 870 (Mo. App. 1952); Fowler v. Fowler, 116 N.H. 446, 362 A.2d 204 (1976).

248. See 15 U.S.C.A. § 1673(b)(2) (West Cum. Supp. 1979).

249. *Id.*

250. 11 U.S.C.A. § 522(c)(2) (West 1979). In addition, a tax lien, notice of which has been filed but which is avoided because invalid against bona fide purchasers under *id.* § 545(2), *see* 26 U.S.C. § 6323(b), (1976), is also an excepted lien.

251. *See* HOUSE REPORT, *supra* note 8, at 361.

252. *See* text accompanying notes 212-215 *supra.*

253. *See* text accompanying notes 216-226 *supra.*

254. It is also an issue in cases in which a lien creditor has a lien on both exempt and nonex-

that they do not consume part or all of the nonexempt assets by virtue of their priority status?[255] The answer to both questions should be "no." Indeed, the doctrine of marshaling should only be available to the *debtor* to require creditors whose debts are exceptions or who have liens on both exempt and nonexempt assets to exhaust nonexempt assets before seeking satisfaction from exempt assets.[256] Cases have long recognized an exception to the doctrine of marshaling when one creditor may collect against alternate funds and one of those funds is exempt.[257] In line with these cases, the Supreme Court has refused to invoke the doctrine of marshaling when to do so would have frustrated the policy of the exemption laws.[258] Allowing the debtor to invoke the doctrine to force a creditor to seek satisfaction from nonexempt assets might seem contrary to the creditor's rights.[259] The creditor, however, will still be paid in full, and this should be his only concern. The very purpose of the exemption laws is to protect debtors to the prejudice of their creditors. To allow marshaling to the detriment of general creditors is perfectly compatible, therefore, with the basic legislative policy in having exemptions.[260] Consequently, the courts now recognize the debtor's right to force the creditor to seek satisfaction from nonexempt assets.[261] The same rule should be followed under the new bankruptcy law.

G. *Procedures for Claiming Exemptions*

A separate provision of the Act provides that the debtor shall file a list of property that is being claimed as exempt.[262] If the debtor does not file the list, a dependent may do so on the debtor's behalf.[263] These

---

empt property. May the general creditors invoke marshaling to force the lien creditor to satisfy his claim from the exempt property?

255. *See* 11 U.S.C.A. § 507(a)(6) (West 1979).

256. *See generally* Vernon, *Marshalling of Real Security Interests*, 1 How. L.J. 172, 180-81 (1955).

257. *E.g., In re* Bailey, 176 F. 990 (D. Utah 1910); Sims v. McFadden, 217 Ark. 810, 233 S.W.2d 375 (1950); Nolan v. Nolan, 155 Cal. 476, 101 P. 520 (1909); People's Bank v. O'Shields, 167 S.C. 296, 166 S.E. 351 (1932); Aisenbrey v. Hensley, 70 S.D. 294, 17 N.W.2d 267 (1945); Wileman v. Federal Farm Mortgage Corp., 169 S.W.2d 1013 (Tex. Civ. App. 1943); *see* S. RIESENFELD, *supra* note 194, at 325-26.

258. Meyer v. United States, 375 U.S. 233 (1963); *see* First Nat'l City Bank v. Phoenix Mut. Life Ins. Co., 364 F. Supp. 390 (S.D.N.Y. 1973).

259. *See* Sowell v. Federal Res. Bank, 268 U.S. 449, 457 (1925); Vernon, *supra* note 256, at 179.

260. Vernon, *supra* note 256, at 180-81.

261. *See* authorities cited note 257 *supra.*

262. 11 U.S.C.A. § 522(*l*) (West 1979).

263. *Id. See* SENATE REPORT, *supra* note 8, at 77; HOUSE REPORT, *supra* note 8, at 363.

provisions are about the same as those under the most recent rules for the 1898 Act.[264] Unfortunately, they do not go as far as the Commission's recommended provision that "the exemptions shall not be denied because of a failure to claim them."[265] Presumably, the Commission would have had the exempt property set aside to the nonclaiming debtor by the court or an administrator.[266] The Commission must have been aware that some bankrupts had lost their exemptions by a failure to claim them[267] or by a failure to comply with technical bankruptcy procedures.[268] No reasons for abandoning the sensible recommendation of the Commission are offered in the legislative history.

Under the new Act, debtors who elect exemptions under state law will continue to be plagued by state law procedures that require declarations of exemptions.[269] Failure to comply with these procedures may result in the loss of exemption rights.[270]

Because the new Act gives debtors a choice of exemption schemes, debtors might elect one scheme believing that it maximizes the property that they may retain. If the selection of property within one of these schemes is successfully challenged and it then appears that the other exemption scheme would be more beneficial, Congress planned that the bankruptcy rules would accommodate the debtor and allow for a change of exemption schemes.[271]

III. CRITICISMS OF THE NEW ACT'S EXEMPTION LAW

The preceding sections contain criticisms of some of the minor and technical provisions of the new Act. This section focuses on some of the broader policy issues raised by the new Act and some of the issues that were not, but should have been, addressed by Congress.

---

264. FED. BANKR. R. 403(f).

265. *See* H.R. 31, 94th Cong., 1st Sess., § 4-503(j) (1975), *reprinted in House Hearings, supra* note 9, app. I, at 151.

266. *Id.*; COMMISSION REPORT, *supra* note 8, pt. I at 170.

267. *See* D. STANLEY & M. GIRTH, *supra* note 10, at 83.

268. *See In re* VanAllsberg, 14 F.2d 672 (W.D. Mich. 1926).

269. *See, e.g.*, Finn v. Gilbert, 307 F.2d 380 (9th Cir. 1962); Pekola v. Strand, 25 Wash. 2d 98, 168 P.2d 407 (1946).

270. White v. Stump, 266 U.S. 310 (1924); *see* Myers v. Matley, 318 U.S. 622 (1943); Schultz v. Mastrangelo, 333 F.2d 278 (9th Cir. 1964).

271. "The [Bankruptcy] Rules [of Procedure] will provide for the situation where the debtor's choice of exemption, Federal or State, was improvident and should be changed, for example, where the court has ruled against the debtor with respect to a major exemption." HOUSE REPORT, *supra* note 8, at 360.

A. Congressional Policy of "Fresh Start" Frustrated by New Act's Exemption Provision

The use of state and federal nonbankruptcy laws to determine debtors' exemption rights undermines "the Congressional policy of a fresh start for a debtor."[272] This fresh start objective is basic to the bankruptcy law of the United States and is dependent upon two key federal policies:[273] the discharge policy[274] and the exemption policy. To ensure the effectiveness of federal discharges, Congress has meticulously circumscribed state laws and actions that might dilute the discharge policy.[275] In other words, not only has Congress itself carefully established the discharge policy as a federal policy, it has prevented the states from interfering with it.

Contrariwise and inexplicably, the Act's exemption provision allows the states to regulate the exemption policy *completely*. Considering the tremendous variances in the state exemption laws, there is not *an* exemption policy, but rather numerous, significantly different exemption policies incorporated into the new Act. Because of the significant variances in the exemption policies, Congress has utterly failed to effectuate any "*Congressional* policy of a fresh start for a debtor."[276] Moreover, these variances are "contrary to a general bankruptcy policy to have a uniform law."[277]

For debtors in states that have both laws that deny the alternative bankruptcy exemption scheme to their residents as well as laws that provide niggardly exemptions, the "fresh start" concept borders on the meaningless.[278] On the other hand, for debtors in the many states with

272. *See* HOUSE REPORT, *supra* note 8, at 366; SENATE REPORT, *supra* note 8, at 81.

273. "The two most important aspects of the fresh start available under the Bankruptcy laws are *the provision of adequate property* for a return to normal life, and the discharge, with the release from creditor collection attempts." HOUSE REPORT, *supra* note 8, at 125 (emphasis added). *See also id.* at 176 ("The exemption section will permit an individual debtor to take out of the estate that property that is necessary for a fresh start . . . ."); SENATE REPORT, *supra* note 8, at 76 ("Subsection (e) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property."); COMMISSION REPORT, *supra* note 8, at 169.

274. *See* 11 U.S.C.A. §§ 523-525 (West 1979).

275. *See id.* §§ 524, 525; HOUSE REPORT, *supra* note 8, at 128, 165, 365-67, 445; SENATE REPORT, *supra* note 8, at 80-81.

276. HOUSE REPORT, *supra* note 9, at 366; SENATE REPORT, *supra* note 8, at 81 (emphasis added).

277. HOUSE REPORT, *supra* note 8, at 188.

278. "Most [state exemption laws] are outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors." HOUSE REPORT, *supra* note 8, at 126.

Professor Lacy recommends the enactment of legislation that would deny residents of South Carolina the exemptions in § 522(d), Lacy, *South Carolina's Statutory Exemptions in Consumer*

very liberal exemptions, a "head start" rather than a "fresh start" will be the policy. Ironically, this latter result is one that the Senate—the stronger proponent of "state rights" on the exemption issue[279]—expressly sought to avoid.[280]

As discussed elsewhere,[281] a number of cogent reasons make incorporation of state exemption laws into a federal bankruptcy scheme inappropriate. Besides undermining the achievement of the bankruptcy goal of a "fresh start," state exemptions are designed to deal with situations that differ significantly from bankruptcy. First, nonbankruptcy exemption laws apply to debtors and against creditors during the creditors' continuing collection efforts. Bankruptcy, on the other hand, ensures debtors creditor-free futures. Consequently, it may be wise to give greater or different protection to debtors who are both supporting families and attempting to reduce their debts than to persons who are debt free. Second, state and federal nonbankruptcy exemption laws are in part designed to *prevent bankruptcy*. The prevention of bankruptcy is expressly a goal of the federal restriction on garnishment[282] and an effect or goal of state laws.[283] But clearly this goal is inapposite to any exemption law *in bankruptcy*. Third, unlike state collection laws, bankruptcy causes the liquidation of a debtor's estate.[284] This allows for the entire estate to be considered when exemptions are being decided. State exemptions cannot do this because they must be concerned with the individual pieces of property that creditors are attempting to levy

Bankruptcy, 30 S.C.L. REV. 643, 689 (1979), notwithstanding his observation that South Carolina's exemptions "are antiquated and inadequate to provide even minimal protection to the modern consumer." *Id.* at 688.

279. *See* 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978), *quoted at* text accompanying note 287 *infra*.

280. "The committee feels that the policy of the bankruptcy law is to provide a fresh start, but not instant affluence, as would be possible under the [exemption] provisions of H.R. 8200." SENATE REPORT, *supra* note 8, at 6; *see* 124 CONG. REC. S14721-22 (daily ed. Sept. 7, 1978) (remarks of Sen. Thurmond); *see also id.* S17412 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

281. *See* COMMISSION REPORT, *supra* note 8, at 170-73; D. STANLEY & M. GIRTH, *supra* note 10, at 81-84; Vukowich, *supra* note 18, at 1441-46.

282. *See* 15 U.S.C. § 1671(a)(1)-(3), (b) (1976); H.R. REP. NO. 1040, 90th Cong., 1st Sess. 7, 20-21 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1962, 1962-63, 1978-79; *see also* Kokoszka v. Belford, 417 U.S. 642, 650-51 (1974).

283. *See* Vukowich, *supra* note 90, at 786-87, 867; *cf.* Martin v. Buswell, 108 Me. 263, 264, 80 A. 828, 829 (1911) (purpose of state exemption of farming tools is to enable farmer to support himself and his family); Denzer v. Prendergast, 267 Minn. 212, 216, 218, 126 N.W.2d 440, 443, 444 (1964) (purpose of state homestead exemption is to give debtor a stable place of abode); Cleveland Arcade Co. v. Talcott, 22 Ohio App. 516, 517, 154 N.E. 62, 63 (1926) (purpose of state exemption of tools and implements necessary for carrying on business, trade or profession is to protect debtor's means of supporting himself and his family).

284. *See* Countryman, *supra* note 22, at 681.

upon and sell. In sum, incorporation of the manifold state exemption laws not only defeats a fundamental federal policy objective, it results in the employment of tools that were not designed for the task at hand.

The House provision would have given debtors a choice between the bankruptcy exemption and state and other federal exemptions. This, the House Report reasons, "continues to recognize the States' interest in regulating credit within the states, but enunciates a bankruptcy policy favoring a fresh start."[285] The House Report seems to concede that inclusion of the various state exemption laws as an alternative to the bankruptcy exemptions undermines the fresh start policy; their provision merely "enunciates" a fresh start policy but falls short of establishing it. Additionally, the recognition of states' interests in regulating credit is a questionable justification for the House provision. First, outside the area of usury, credit regulation is increasingly becoming a matter of federal law.[286] Second, and more importantly, the states' interest in the regulation of credit is subordinate, if not irrelevant, to the bankruptcy law's policies.

The final compromise struck by the House and Senate makes even less sense than the original House provision. But then compromises often lead to capricious concoctions. The compromise was described and defended by Senator Wallop on the Senate floor:

> In the area of exemptions, we [the Senate] have won an important victory for the rights of States to determine exemptions for the debtors of their States[.] Reduced Federal exemptions will be provided by the law but States by legislation may elect not to have them apply [to] their debtors. This option is most important since many States, such as my own, Wyoming, have been responsive to the needs of debtors and have liberalized exemptions frequently in recent years.[287]

In making this statement, the Senator must have been confused, and he most certainly was oblivious to the role of the federal exemption provision. If the Senator's concern was to ensure that debtors have modern, liberal exemptions, the compromise is a rather poor vehicle for accomplishing that goal. Under the compromise, debtors from states that deny the federal exemption in bankruptcy and have niggardly, out-of-date exemptions will suffer. Moreover, the Senator offers no reasons for giving the states the right to determine exemptions. This "victory

285. HOUSE REPORT, *supra* note 8, at 126.

286. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (West 1974 & Supp. 1979); 18 U.S.C. §§ 891-896 (1976)); FTC Holder-in-due-Course Regs., 16 C.F.R., pt. 433 (1979).

287. 124 CONG. REC. S17406 (daily ed. Oct. 6, 1978).

for the rights of States," therefore, was won only at the expense of a "Congressional policy of a fresh start for a debtor."[288]

In addition to the unwise incorporation of state exemption laws, the practical exemption of interests in spendthrift trusts and the express exemption of tenancies by the entirety, to the extent state laws protect these property rights from creditors, are major deficiencies of the new Act.[289] They allow some debtors to retain "very substantial amounts of property"[290] while further undermining the concept of a congressional policy of a fresh start. Moreover, these property interests have been justifiably discredited by eminent authorities over the years.[291] Finally, Congress' incorporation of state exemption laws is at least tenuously justified on the ground that state legislatures have presumably weighed what property debtors should be allowed to retain. Protection of tenancies by the entirety and spendthrift trusts, however, evolved from property law principles and is not part of a thoughtful legislative debtor exemption scheme.[292]

B. Clash of State and Federal Provisions on Exceptions and Waivers

The bankruptcy exemption provisions that recognize certain claims as enforceable against exempt property[293] and the provisions that invalidate waivers of exemptions and certain liens on exempt property[294] raise problems that the Act does not resolve. The problems arise if a debtor has elected or is required to take state and federal nonbankruptcy exemptions. Because the Senate bill contained provi-

---

288. SENATE REPORT, *supra* note 8, at 81; *see id.* at 6, 76.

289. *See* text accompanying notes 71-75 & 194-220, *supra.*

290. SENATE REPORT, *supra* note 8, at 6.

291. "Much valid criticism has been leveled against the estate by the entirety. It is an anachronism. . . . It affords too great an opportunity to frustrate the rights of . . . creditors. . . . The social undesirability of the consequences attendant upon the estate by the entirety are readily apparent." 2 AMERICAN LAW OF PROPERTY § 6.6, at 32 (A. J. Casner ed. 1952); *see* E. GRISWOLD, SPENDTHRIFT TRUSTS §§ 105-06 (2d ed. 1947); J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY vi-xi (2d ed. 1895); Plumb, *supra* note 23 at 95-96, 136-37.

292. In some states debtors' interests in trusts are specifically exempted by legislation. *See* N.Y. CIV. PRAC. LAW § 5205(c)(d)(1) (McKinney 1963); *In re* Dollard, 275 F. Supp. 1001 (C.D. Cal. 1967) (N.Y. law). In addition, although no evidence has been found to support it, there exists the possibility that some state legislatures have relied upon the existence of tenancies by the entirety as a reason for not creating a homestead exemption or, if they already have one, for not increasing its amount. The reason that such a possibility is doubtful is that tenancy by the entirety is not exempt when a creditor has a claim against both husband and wife; such a creditor could not enforce his claim against homestead property unless the spouses also both gave a waiver of their homestead rights. *See* Gilmer v. Freeman, 336 So. 2d 717 (Miss. 1976); Norman v. First Bank & Trust, 557 S.W.2d 797 (Tex. Civ. App. 1977); Vukowich, *supra* note 90, at 848-49.

293. 11 U.S.C.A. § 522(c) (West 1979); *see* text accompanying notes 233-35 *supra.*

294. 11 U.S.C.A. § 522(f) (West 1979); *see* text accompanying notes 205-29 *supra.*

sions similar to these three exception and waiver provisions[295] while limiting debtors to state and federal nonbankruptcy exemptions, it is clear that Congress intended these provisions to apply even when nonbankruptcy exemptions were used by the debtor.[296] In addition to the federal provisions regarding exceptions to exemptions and waivers of and liens on exempt property, however, state laws contain their own lists of debts that are exceptions to exemptions as well as provisions regarding waivers of and liens on exempt property. When these state laws differ from the federal law, which should prevail?

This problem arises because the provisions in the federal law were recommended by the Commission in the context of a single, federal exemption scheme.[297] When the House made the state and federal nonbankruptcy exemptions an alternative to a federal bankruptcy exemption[298] and the Senate made state and federal nonbankruptcy laws the sole source of exemptions,[299] they, nevertheless, retained the Commission's general proposals on these other matters.[300]

1. Exceptions

The federal exemption law allows nondischargeable tax and family support claims[301] as well as nonvoidable liens[302] to be enforced against exempt property. State laws generally, although not always,[303] recognize these exceptions[304] and usually have additional ones. The most common additional exceptions are debts owed laborers,[305] debts

295. S. 2266, 95th Cong., 2d Sess. § 522(c), (d), (e) (1977), *reprinted in* 14 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 97 (A. Resnick & E. Wypyski 1979); *see* SENATE REPORT, *supra* note 8, at 76.

296. *See also* note 204 *supra.*

297. *See* H.R. 31, 94th Cong., 1st Sess. § 4-503 (1975); *reprinted in House Hearings supra* note 10, app. I, at 146-51; COMMISSION REPORT, *supra* note 8, at 170-73.

298. *See* H.R. 8200, 95th CONG., 1st Sess. § 522(b) (1977), *reprinted in* 12 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 394-95 (A. Resnick & E. Wypyski 1979).

299. *See* S. 2266, 95th CONG., 2d Sess. § 522(b) (1977), *reprinted in* 14 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 97 (A. Resnick & E. Wypyski 1979).

300. *Id.* § 522(d), (e); H.R. 8200, 95th CONG., 1st Sess. § 522(e), (f) (1977), *reprinted in* 12 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 399-400 (A. Resnick & E. Wypyski 1979).

301. 11 U.S.C.A. § 522(c)(1) (West 1979).

302. *Id.* § 522(c)(2).

303. *See* Vukowich, *supra* note 90, at 853, 860.

304. *Id.* at 853-54, 859-60.

305. *E.g.*, ALA. CONST. art. 10, § 207; CAL. CODE CIV. PROC. § 723.051 (West Supp. 1980); N.Y. CIV. PRAC. LAW § 5205(a) (McKinney 1978); OHIO REV. CODE ANN. § 1311.34 (Page Supp. 1980); 42 PA. CONS. STAT. ANN. § 8123(b)(4) (Purdon Supp. 1979) (judgments over $100); TEX. REV. CIV. STAT. ANN. § 3839(3) (Vernon 1966); VT. STAT. ANN. tit. 12, § 2740 (1973); *see* United States v. Hershberger, 475 F.2d 677, 681 (10th Cir. 1973); Miles Homes, Inc. v. Muhs, 184 Neb.

for necessaries,[306] and tort liabilities.[307] May creditors with these state-excepted claims enforce them in bankruptcy against the assets exempted by state law? To answer affirmatively is to expand upon the exceptions that Congress resolutely included in the Act. Indeed, an affirmative answer might find a clear contravention of congressional intent in the context of tax claims. Many state laws create exceptions for all state and federal tax claims without regard to the nature of the tax.[308] Congress, however, pointedly narrowed the bankruptcy law's exception to *nondischargeable*[309] tax claims.[310]

On the other hand, to answer negatively is to frustrate the exemption schemes developed by state legislatures. They might not have given certain or such large exemptions without the exceptions.

Although it is unlikely that Congress actually considered this problem, the better resolution of it would be to allow only those exceptions provided in the bankruptcy law to be enforced against exempt property. Congress appears to have singled out certain exceptions to the exclusion of others. The incidental frustration of state exemption schemes is less damaging than a failure to follow a congressional directive.[311]

617, 619, 169 N.W.2d 691, 692 (1969); Brookline Sav. & Trust Co. v. Barnett, 243 S.C. 481, 134 S.E.2d 569 (1964).

306. *E.g.*, ALASKA STAT. § 23.20.405(c) (1979) (unemployment compensation); COLO. REV. STAT. § 10-8-114 (1973); MICH. STAT. ANN. § 27A.6023-(a)(6) (1977) (life and health insurance); NEB. REV. STAT. § 25-1557 (1975) (property valued over $500); WASH. REV. CODE ANN. § 30.30.120 (1961) (trust income or vested remainder); *see* CAL. CIV. PROC. CODE § 723.051 (West Supp. 1979) (income necessary to support family).

307. ALA. CONST. art. 10, § 204; ALA. CODE § 6-10-6 (1975), *construed in* Brown Shoe Co. v. Schaefer, 242 Ala. 310, 314, 6 So. 2d 405, 408 (1942); ARK. CONST. art. 9, §§ 1-3, *construed in* Hill v. Bush, 192 Ark. 181, 187-88, 90 S.W.2d 490, 494 (1936).

308. *E.g.*, ILL. ANN. STAT. ch. 52, § 3 (Smith-Hurd Supp. 1979); MO. ANN. STAT. § 513.465 (Vernon 1952); N.C. CONST. art. X, § 2(1); WIS. STAT. ANN. § 812.18(2)(b)(3) (1977).

309. 11 U.S.C.A. § 523(a)(1) (West 1979).

310. The Senate's bill would have created an exception for all tax claims, whether or not dischargeable. *See* S. 2266, 95th CONG., 2d Sess. § 522(c)(3) (1977) *reprinted in* 14 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY 98 (A. Resnick & E. Wypyski 1979). In negotiations with members of the House, this point was conceded, and the new Act's exception is limited to nondischargeable tax claims. *See* 124 CONG. REC. S17412, S17430 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); *id.* H11113 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

311. Another problem raised by the differences in the state law and bankruptcy law exceptions is less troublesome. If state law does *not* except one of the claims or liens that Congress *has* excepted, the congressional exception should be recognized. Congress appears to have resolved that the interests of creditors with nondischargeable tax claims, family support claims, and nonavoidable liens outweigh debtor's interests in exempt property. Although I have criticized this judgment, *see* text accompanying notes 246-48 *supra*, the intent seems to be clear.

2. Waiver and Security Interests

Analogous problems arise with waivers of exemptions and nonpurchase money security interests in exempt property. These two devices for defeating debtors' exemption rights are generally more circumscribed by the Bankruptcy Act's exemption provisions than by state laws. The congressional intent seems clear that these devices should be unenforceable in bankruptcy if they fall within the Bankruptcy Act's proscription,[312] even if state law would have enforced the waiver or security interest.

If, on the other hand, a waiver or security interest is enforceable under the bankruptcy exemption law but *unenforceable under state law*,[313] *the state law should be deferred to* and the waiver or security interest held unenforceable. Unlike the comparable issue in the context of exceptions to exemptions,[314] there is no congressional intent to favor creditors who have received waivers or security interests in contravention of state law. On the contrary, Congress went further than most states in protecting debtors' exemptions. Its intent was expansive to the end that the goals of the exemption laws—either state or federal bankruptcy—not be frustrated.[315] Moreover, because such a waiver or security interest in unenforceable under state law, the debtor's trustee should be able to avoid it.[316] Because the property is exempt and the trustee might not seek to assert this right, however, the debtor should be allowed to do so.[317] It would be unjust to allow creditors to enforce

312. *See* HOUSE REPORT, *supra* note 8, at 362; SENATE REPORT, *supra* note 8, at 76.

313. Because bankruptcy law protections are generally broader than state law protections, this would be a relatively rare occurrence. However, with state legislatures taking a more active role in the area of debtor protection, it might develop into a more serious problem in the future. Currently, it might arise because a few state laws do give greater protection than bankruptcy law. *See* UNIFORM CONSUMER CREDIT CODE §§ 2.307(1) (security interest in land unenforceable in supervised loans under $1,000; bankruptcy law would allow this); § 3.301-302 (no nonpurchase money security interest in goods) (1974). Another situation that might arise involves the homestead. Under the bankruptcy law, a mortgage of the homestead by the debtor-owner would be enforceable. *See* text accompanying notes 212-215 *supra*. Some state laws, however, require that the nonowner-spouse join in the execution of the mortgage. *E.g.*, ILL. ANN. STAT. ch. 52, § 4 (Smith-Hurd Cum. Supp. 1979); MO. ANN. STAT. § 513.475.2 (Vernon Cum. Supp. 1979); *see* Marr v. Bradley, 239 Minn. 503, 59 N.W.2d 331 (1953); Gilmer v. Freeman, 336 So. 2d 717 (Miss. 1976); Miles Homes, Inc. v. Muhs, 184 Neb. 617, 169 N.W.2d 691 (1969); Grenard v. McMahan, 441 P.2d 950 (Okla. 1968); Norman v. First Bank & Trust, 557 S.W.2d 797 (Tex. Civ. App. 1977). Consequently, a mortgage given only by the owner-spouse would be invalid in such states although valid under bankruptcy law.

314. *See* note 311 *supra*.

315. *See* HOUSE REPORT, *supra* note 8, at 126, 362.

316. 11 U.S.C.A. § 541(e) (West 1979).

317. The bankruptcy exemption provision does allow the debtor to avoid certain transfers regarding exempt property based upon the trustee's avoiding powers. *See id.* § 522(h). These are

waivers or security interests that they could not have enforced had bankruptcy not intervened.

C. *Possible Double Exemption Regarding Nondischarged Debts*

A debtor who elects the exemptions given in subsection 522(d) of the new Act may enjoy double exemptions regarding nondischarged debts, other than tax and family support claims. The Act extends the protection of its exemptions to "after the case" for debts that arose before the commencement of the case.[318] Consequently, after bankruptcy, a creditor with a nondischarged debt may be faced with two separate sets of exemptions: those under subsection 522(d) and those the debtor enjoys under state law. Because nondischargeable claims should, if anything, be favored,[319] this result is incongruous. Congress no doubt extended the protection of its exemptions to after the case because without such an extension creditors could enforce nondischarged claims against property that the Act exempted but that state law did not exempt.[320] In fairness to creditors and debtors alike, creditors with nondischarged claims should be allowed to enforce their claims subject only to the Act's exemptions; state exemptions should not apply. The federal interest in these cases seems strong since it is the bankruptcy law that determines that these creditors' claims are nondischargeable and, by hypothesis, the debtors have elected the federal bankruptcy exemption scheme.

D. *Creation of Exemptions on Eve of Bankruptcy*

A great deal of concern has been voiced about debtors who maximize their exemptions by using nonexempt assets to purchase or improve exempt property immediately before bankruptcy.[321] Although one study found "no such activity,"[322] the practice, guided by debtors' attorneys, is widespread in certain parts of the country.[323] Careful ex-

---

inapposite, however, to the situation being discussed because either a waiver or a security interest will have been a "voluntary transfer" by the debtor. *See id.* §§ 522(g)(1), (h).

318. *Id.* § 522(c).

319. *See, e.g.*, COMMISSION REPORT, *supra* note 8, at 78.

320. *See* Vukowich, *supra* note 18, at 1451-53.

321. *E.g.*, Davis, *Letting Affected Parties Communicate Standards—Exempt Property*, 53 IOWA L. REV. 366, 383-88 (1967); Glenn, *Property Exempt from Creditors' Rights of Realization*, 26 VA. L. REV. 127, 141-42 (1939); Kennedy, *supra* note 23, at 476; *see* Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 648-49 n.201 (1978).

322. *House Hearings*, *supra* note 9, at 771-72 (statement of Professor Shuchman).

323. *Id.* 1350-51, 1355-58; *see In re* Wudrick, 305 F. Supp. 1123, 1125 (C.D. Cal. 1969), *aff'd in*

emption planning can undoubtedly be effective in the case of some debtors. With the new Act's right to elect between state and federal exemptions, attorneys will likely become more aware of the prospect of creating exemptions on the eve of bankruptcy; because they will be comparing their clients' fates under the state and federal alternatives, changes in the property owned by debtors will more readily be suggested. Under state law[324] and the 1898 Bankruptcy Act,[325] the acquisition of exempt assets with nonexempt assets is generally permissible. If the nonexempt assets were themselves acquired fraudulently, however, both state[326] and federal courts[327] deny the exemption.

The new Act does not directly address the issue. It was raised at hearings[328] and discussed in one of the original bankruptcy reform bills before Congress.[329] The Commission's proposal did not contain a specific statutory recommendation regarding the issue, but a note accompanying its recommended statute stated, "The exemption is available as to the property specified regardless of when acquired or the source of the consideration paid for the property claimed."[330] This statement is broader than the case law and is unjust to the extent that it allows an exemption in property that was acquired fraudulently.

Congress evidently intended that the judicially developed rules on this issue should be carried over under the new Act. The House[331] and Senate[332] reports state: "*As under current law*, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and

---

part, rev'd in part sub nom. Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Karol, *Effective Insolvency Planning for the Consumer Bankrupt in California*, 52 L.A.B.J. 376 (1977).

324. *E.g.*, First Nat'l Bank v. Pope, 274 Ala. 395, 404-05, 149 So. 2d 781, 790-91 (1963); Metz v. Williams, 149 Kan. 647, 650-51, 88 P. 1093, 1095 (1939); Hunter v. Griffith, 12 Okla. 436, 440-49, 72 P. 361, 362-65 (1903).

325. *E.g.*, Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Love v. Menick, 341 F.2d 680 (9th Cir. 1965); *In re* Dudley, 72 F. Supp. 942 (D. Cal. 1947), *aff'd per curiam sub nom.* Goggin v. Dudley, 166 F.2d 1023 (9th Cir. 1948).

326. *See* Schoenfeld v. Norberg, 267 Cal. App. 2d 496, 498, 72 Cal. Rptr. 924, 926 (Dist. Ct. App. 1968); Metz v. Williams, 149 Kan. 647, 649-51, 88 P.2d 1093, 1094-95 (1939); Baucum v. Texam Oil. Corp., 423 S.W.2d 434, 442 (Tex. Civ. App. 1967); Tabish v. Smith, 572 P.2d 378 (Utah 1977); Webster v. Rodrick, 64 Wash. 2d 814, 818-19, 394 P.2d 689, 692 (1964).

327. *See In re* White, 221 F. Supp. 64 (N.D. Cal. 1963). *Cf.* Miguel v. Walsh, 447 F.2d 724 (9th Cir. 1971) (nonexempt assets fraudulently converted); Mott v. Groves, 428 F.2d 1208 (9th Cir. 1970) (same); Kangas v. Robie, 264 F.2d 92 (8th Cir. 1920) (same).

328. *See House Hearings*, *supra* note 9, at 1350-58.

329. *See* H.R. 32, 94th CONG., 1st Sess. § 4-503(f) (1975), *reprinted in House Hearings*, *supra* note 9, app. I, at 148 (bill proposed by bankruptcy judges).

330. COMMISSION REPORT, *supra* note 8, pt. II, at § 4-128 n.2 (proposed § 4-503).

331. HOUSE REPORT, *supra* note 8, at 361 (emphasis added) (citation omitted).

332. SENATE REPORT, *supra* note 8, at 76 (emphasis added).

permits the debtor to make full use of the exemptions to which he is entitled under the law." This statement seems to presuppose that the debtor has not defrauded creditors in order to acquire the nonexempt assets that are converted into exempt assets; so interpreted, it is consistent with "current law."[333]

E. Need for Explanation of Terms

Two phrases in the new Act's exemption provision are undefined and consequently likely to raise problems. On five occasions the Act limits exemptions by the phrase "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[334] The items so limited are rights to family support,[335] payments under pension and related plans,[336] wrongful death payments,[337] life insurance death benefits,[338]and compensation for loss of future earnings.[339] Unfortunately, neither the Act nor its legislative history clarify the meaning of this crucial phrase. A similar concept is used in many state exemption laws and has had a varied interpretation.[340]

California courts have construed the "reasonably necessary" standard subjectively, in terms of the debtor's customary standard of living and social class.[341] Although this view has received support from a few commentators,[342] it should be rejected in favor of a standard that does not discriminate based upon debtors' socio-economic classes. A fairer interpretation would hold that the phrase means "reasonably needed by an average and reasonable person and his or her dependents."[343] This objective standard finds support in the Senate's position that the exemption law "provide a fresh start, but not instant affluence."[344] Furthermore, application of the "reasonably necessary" standard should take into account all the exempt assets owned by the debtor, as

333. *See* notes 324-27 and accompanying text *supra.*

334. 11 U.S.C.A. § 522(d)(10)(D)-(E), (11)(B)-(C), (E) (West 1979).

335. *Id.* § 522(d)(10)(D).

336. *Id.* § 522(d)(10)(E).

337. *Id.* § 522(d)(11)(B).

338. *Id.* § 522(d)(11)(C).

339. *Id.* § 522(d)(11)(E).

340. *See generally* Annot., 41 A.L.R.3d 607 (1972).

341. Newport Nat'l Bank v. Adair, 2 Cal. App. 3d 1043, 1046, 83 Cal. Rptr. 1, 3 (1969); Independence Bank v. Heller, 275 Cal. App. 2d 84, 87-88, 90, 79 Cal. Rptr. 868, 871, 872 (1969).

342. *E.g.*, D. STANLEY & M. GIRTH, *supra* note 10, at 206.

343. *See* Vukowich, *supra* note 90, at 847-48.

344. SENATE REPORT, *supra* note 8, at 6.

well as future income, rather than consider each asset in isolation.[345]

Another troublesome phrase is found in the exemption of certain forms of compensation under subsection 522(d)(11).[346] Here the trouble lies in the extension of the exemption to "property that is *traceable to*" the monies paid as compensation.[347] In the past, courts have struggled with the "tracing" aspect of state and federal exemption laws.[348] Conflicting decisions have been common.[349] The bankruptcy statute obviates one problem—determining whether tracing should be allowed at all. The drafting technique employed unambiguously indicates that tracing should be allowed for the kinds of compensation listed in the subsection; by implication,[350] tracing should not be allowed for the other exemptions.

Though tracing is definitely required, a major problem nonetheless remains: how do the courts know when property is "traceable to" the exempt types of compensation? If exempt compensation is received by a debtor, does the exemption continue to protect securities and paintings that were purchased with the exempt compensation, or a trust fund that was established with the exempt compensation?

Supreme Court precedent concerning veterans' disability compensation payments[351] and disability insurance benefits under the Social Security Act[352] has extended a similar exemption to protect these benefits while on deposit in savings and bank accounts. The Court seems to have established a standard that requires that the compensation be held by the debtor in such a way that it is "readily available as needed for support and maintenance," retaining the "qualities of moneys."[353] The cases imply that the exemption would be lost if the compensation was

345. *See* UNIFORM EXEMPTION ACT § 6(b); IDAHO CODE § 11-604(2) (1979).

346. 11 U.S.C.A. § 522(d)(11) (West 1979).

347. *Id.* (emphasis added).

348. *See generally* Dunham, *supra* note 158.

349. *Compare, e.g.*, Pease v. North Am. Fin. Corp., 244 N.W.2d 400 (Mich. App. 1976) (AFDC payments deposited in account exempt), *and* Goodyear Serv. Store v. Speck, 48 Ohio App. 2d 115, 355 N.E.2d 886 (1976) (same), *with* Holmes v. Blazer Fin. Serv., Inc., 369 So. 2d 987 (Fla. App. 1979) (wages deposited in checking account lose exempt status); McCabe v. Fee, 568 P.2d 661 (Or. 1977) (workmen's compensation loses exempt status once deposited in account), *and* John O. Melby & Co. Bank v. Anderson, 276 N.W.2d 274 (Wis. 1979) (wages not protected by title III of Consumer Credit Protection Act once deposited in account).

350. *See, e.g.*, Glickstein v. U.S., 222 U.S. 139 (1911).

351. *See* Porter v. Aetna Cas. & Sur. Co., 370 U.S. 159 (1962).

352. Philpott v. Essex County Welfare Bd., 409 U.S. 413 (1973).

353. Porter v. Aetna Cas. & Sur. Co., 370 U.S. 159, 162 (1962); *see* Philpott v. Essex County Welfare Bd., 409 U.S. 413, 416 (1973).

"converted into permanent investments."[354] These Supreme Court decisions are in accord with the legislative intent since the compensation in those cases was in the form of support payments; once the compensation lost its support characteristic, as by permanent investment, the exemption terminated.

The precedent might not apply to the bankruptcy exemption in all instances, however, since some of the compensation in the bankruptcy exemption differs significantly from the support payments considered in those cases. For example, the exemptions for payments "on account of the wrongful death of an individual of whom the debtor was a dependent"[355] and payments "under a life insurance contract that insured the life of an individual of whom the debtor was a dependent"[356] seem to contemplate the possibility that these payments will not be used solely to supply present support, but also to ensure support in the future. In other words, Congress's intent with respect to some of the "traceable to" assets seems to be to exempt *investment assets* that will be used as sources of debtors' future support. Consequently, if a debtor can show that investment assets are traceable to exempt compensation and are necessary for support, the assets should be exempted.[357] Not only does this comport with the congressional intention, it makes good financial sense. Allowing dependents to use the proceeds of life insurance or a wrongful death settlement to establish a trust fund or invest in securities might generate more support than if held in a savings or bank account.

F. Application of the Dollar Limitations

The new Act does not specify what should be done if an item of exempt property exceeds the dollar value limitation. For example, if a debtor owns an automobile with a fair market value[358] of $3,000 and has exhausted his $7,900 "any property" exemption,[359] the automobile cannot be claimed as exempt because its value exceeds the $1,200 limitation.[360] Upon sale, does the estate retain the full $3,000, or does the debtor receive $1,200, leaving the estate with only $1,800? A few states

354. *Id.*; Dunham, *supra* note 158, at 324-25.
355. 11 U.S.C.A. § 522(d)(11)(B) (West 1979).
356. *Id.* § 522(d)(11)(C).
357. *Cf.* Dunham, *supra* note 158, at 343-44 (suggesting that what is necessary for support will require some fine line drawing).
358. *See* text accompanying notes 76, 77 & 86-88 *supra.*
359. 11 U.S.C.A. § 522(d)(1), (5) (West 1979); *see* text accompanying notes 98-100 *supra.*
360. 11 U.S.C. § 522(d)(2) (West 1979).

have statutes that clearly indicate that the debtor is entitled to receive cash in the amount of the exemption limitation.[361] Absent such a statute, bankruptcy[362] and state[363] courts have split on the issue.

The appropriate resolution under the new Act is not free from doubt. The legislative history omits any direct reference to this problem.[364] The most reasonable resolution is to allow the debtor to retain from the proceeds of the sale an amount equal to the dollar value limitation.[365] This is fair to creditors and consistent with Congress's policy in granting the exemption. It is fair to creditors since they would receive nothing from the exempt item if its actual value equalled or was less than the dollar value limitation; their interest thus corresponds to the surplus over the dollar value limitation. For example, a $1,200 used automobile would be completely exempt.[366] To deny totally the exemption if a used automobile has a value of $1,250 would give creditors a windfall of $1,200.

Allowing debtors to retain cash in the amount of the dollar value limitation is consistent with Congress's policy of allowing debtors to retain the type of property listed in subsection 522(d) so long as the value is modest. If a debtor owns an item that exceeds the statutory limit, allowing him cash in the statutory amount will allow him to purchase a less expensive substitute. The congressional goal of debtor protection within reasonable limits will thus be realized.[367]

361. *See, e.g.*, ALA. CODE § 6-10-38(b) (1975) (homestead); COLO. REV. STAT. ANN. § 13-55-109 (1973) (personalty); ILL. ANN. STAT. ch. 52, § 8 (Smith-Hurd Cum. Supp. 1979) (homestead); MICH. STAT. ANN. § 27A.6033 (Callaghan 1977) (any exempt property); MINN. STAT. ANN. § 550.41 (West 1947) (personalty); OR. REV. STAT. § 23.160(2) (1977) (personalty).

362. *Compare* Levin v. Mauro, 425 F. Supp. 205 (D. Mass. 1977), *with In re* Fox, 16 F. Supp. 320 (S.D. Cal. 1936).

363. *Compare* Gutterman v. First Nat'l Bank, 597 P.2d 969 (Alaska 1979), and Maschke v. O'Brien, 142 Pa. Super. 559, 17 A.2d 923 (1941), *with* Perkins v. McGonagle, 342 A.2d 187 (Me. 1975).

364. A reference in the House Report to the Uniform Exemptions Act might indicate the House's intention to incorporate that Act's treatment of the problem. The Report states, "[The Federal exemptions] are derived in large part from the Uniform Exemptions Act . . . ." HOUSE REPORT, *supra* note 8 at 361. The Uniform Exemptions Act's draftsmen intended for debtors to be given an exemption up to the dollar value limitation when property exceeds the limitation. *See* UNIFORM EXEMPTIONS ACT § 8, Comment 3.

365. *See* Levin v. Mauro, 425 F. Supp. 205 (D. Mass. 1977); Gutterman v. First Nat'l Bank, 597 P.2d 969 (Alaska 1979); Maschke v. O'Brien, 142 Pa. Super. 559 17 A.2d 923 (1941).

366. 11 U.S.C.A. § 522(d)(2) (West 1979).

367. Another solution to the problem in some cases would be to allow the debtor to borrow the amount of the surplus and turn that over to the estate. However, this will not always be possible.

IV. CONCLUSION

The exemption scheme of the Bankruptcy Reform Act of 1978 leaves one with a feeling of ambivalence. Certainly there are many meritorious aspects to the new law. Overall, the exemption scheme in subsection 522(d) appears to be both reasonable and fair.[368] The property exempted is generally necessary for family support, and the dollar amount limitations are modest. Certainly the treatment of life insurance exemptions should be lauded. Moreover, the various provisions designed to ensure the effectiveness of the exemptions were much needed.

On the other hand, Congress's incorporation of state and nonbankruptcy federal laws as an alternative or, at the states' options, the exclusive source of exemptions is unwarranted. In those states with parsimonious exemptions, the goals of family protection and debtor rehabilitation cannot be efficiently realized. And in those states with very generous exemptions, debtors are able to retain property in excess of that needed for family protection and rehabilitation while being freed from their debts. Congress has unfortunately and unwisely undermined the realization of the beneficent policy that is the cornerstone of the American bankruptcy law—the fresh start for debtors.

This Article has pointed out some areas in which technical amendments are needed. In addition to these technical problems, Congress should reconsider some of the broader policy issues behind the bankruptcy laws and improve the exemption provision to reflect a single and uniform congressional policy regarding the property that debtors should be allowed to retain for their fresh starts.

368. *But see* Vukowich, *supra* note 90, at 805-07.