Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code

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PROTECTION OF A DEBTOR'S "FRESH START" UNDER THE NEW BANKRUPTCY CODE*

The Bankruptcy Reform Act of 1978 (Code)
1 signals a major shift in the traditional balance between debtors' and creditors' interests in bankruptcy. Traditionally, bankruptcy statutes have emphasized a maximal return for creditors.2 While the new Code preserves and strengthens the rights of creditors,3 its primary focus is to enable debtors to maintain their in-

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The Code became effective on October 1, 1979. Pub. L. No. 95-598, § 402(a), 92 Stat. 2549. Matters and proceedings initiated prior to October 1, 1979, are to be dealt with under the substantive provisions of the Bankruptcy Act of 1898. See Bankruptcy Code, supra, at § 403(a). The Code's provisions elevating the bankruptcy courts from their current status as departments of the United States District Courts to a position adjunct to those courts, exercising the unique "flow-through" jurisdiction described in 28 U.S.C.A. § 1471(b)-(c) (West Supp. 1979), will become effective on April 1, 1984. Bankruptcy Code, supra, at § 402(b). Until that date, the present system of bankruptcy courts will operate with the term of all sitting judges extended until March 31, 1984, or the date upon which a successor takes office. Id. § 404(a), (b). While the congressional extension of the terms of sitting judges may appear to infringe upon the separation of powers doctrine, it is clear that no judges are actually appointed by Congress under this system. Rather, an experimental program in which a United States Trustee will oversee the administration of cases arising under the Code went into effect on October 1, 1979. Id. § 402(a). A "sunset" clause will terminate the United States Trustee Program on April 1, 1984, unless the Congress and the President affirmatively act to continue it. Id. §§ 408(a)-(c).

2. See notes 24-31 infra.

3. As stated in the Report of the House Judiciary Committee, "the Bill codifies creditors' rights more clearly than the case law, which is in many ways just developing. It defines the protections to which a secured creditor is entitled, and the means through which the court may grant that protection." HOUSE COMM. ON THE JUDICIARY BANKRUPTCY LAW

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dependent economic existences after bankruptcy.\textsuperscript{4}

The importance of balancing the policies of maximizing creditors' returns and leaving the debtor as a viable economic entity has long been recognized in bankruptcy proceedings.\textsuperscript{5} Historically, states have determined what property may be retained by debtors\textsuperscript{6} by enacting exemption statutes to place certain enumerated forms of property beyond the reach of state execution mechanisms. The Bankruptcy Act of 1898 (Act), the immediate predecessor of the Code, explicitly incorporated these state exemption laws, thereby allowing debtors a minimum residue of property following their discharge in bankruptcy.\textsuperscript{7} By this means, bankrupts were afforded a "fresh start" in the hope that they would not become a burden upon society after bankruptcy.

As consumer credit expanded in the 1950's, however, the Act became outmoded.\textsuperscript{8} Creditors adopted techniques whereby consensual liens\textsuperscript{9} arose in a debtor's otherwise exempt property. The creation of security interests in property vital to the debtor's everyday existence, such as automobiles, also provided creditors with leverage far in excess of the liquidation value of the collateral.\textsuperscript{10} In addition, exemption statutes incorporated in the Act

\textsuperscript{4} Id. at 126 ("[T]he bill . . . enunciates a bankruptcy policy favoring a fresh start.").

\textsuperscript{5} The "fresh start" doctrine has been well documented in the courts. In Local Loan Co. v. Hunt, 292 U.S. 234 (1934), the Supreme Court stated that the purpose of bankruptcy was to give the debtor "a new opportunity in life and a clear field for future effort, unhindered by the pressure and discouragement of preexisting debt." Id. at 244. The Court in Williams v. United States Fidelity & Guar. Co., 236 U.S. 549 (1915), emphasized the need to permit debtors to "start afresh" after bankruptcy. Id. at 554-55. Outside of bankruptcy, exemption statutes have provided protection of debtors' livelihoods since the enactment of the Statute of Westminster II in 1285 which provided limited relief from creditor process. See S. Reisenfeld, Cases and Materials on Creditors' Remedies and Debtors' Protections 230 (1967).

\textsuperscript{6} See, e.g., Wis. Const. art. I, § 17 (providing that debtors should "enjoy the necessary comforts of life"). See generally 31 AM. JUR. 2d Exemptions §§ 33-119 (1967).

\textsuperscript{7} The quantity of property left to debtors was subject to local determination in light of local economic needs. Section 6 of the Act stated in pertinent part: "[T]his Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by . . . the State laws in force at the time of the filing of the petition . . . ." See also 3 H. REMINGTON, BANKRUPTCY § 1177 (rev. ed. 1957); 45 AM. BANKR. L.J. 115, 116 (1971).


\textsuperscript{9} Consensual liens are those interests in the property of another by contract. Security interests under article 9 of the Uniform Commercial Code fall within this category. Such interests are to be contrasted to interests in the property of another which are imposed by the operation of law, such as statutory mechanics' liens.

\textsuperscript{10} COMMISSION REPORT, PART I, supra note 8, at 169, 173-74.
varied tremendously from state to state. Many eastern states maintained statutes from the gaslight era which effectively denied bankrupts any meaningful protection while certain southern and western states enacted statutes remarkable for their liberality. This wide variation in the treatment of debtors under the ostensibly uniform bankruptcy laws led to disparate treatment and opened the way for extensive forum shopping by debtors.

In July of 1970, when these and other deficiencies of the Act came to the attention of Congress, the Commission on the Bankruptcy Laws of the United States was created to "study, analyze, evaluate and recommend changes..." in the Act of 1898. During the study period, the Commissioners on Uniform State Laws drafted the Uniform Exemptions Act which was designed for inclusion in the new Bankruptcy Code. In accordance with its finding that the Act's incorporation of diverse state statutes frequently led to the "frustration of the debtor's right to enjoy his exemptions," the Bankruptcy Commission recommended the enactment of such uniform exemptions to ensure debtors a realistic fresh start after bankruptcy.

11. See generally Countryman, For a New Exemption Policy in Bankruptcy, 14 Rutgers L. Rev. 678 (1960); Note, supra note 1.
12. See Countryman, supra note 11, at 681-84 (citing Maryland and Massachusetts exemption laws as examples of parsimony).
13. Id. (describing the extensive exemptions available under Texas law and the high average exemption claim in Florida proceedings).
14. U.S. Const. art. I, § 8 states: "Congress shall have the power... to establish... uniform Laws on the subject of Bankruptcy throughout the United States" (emphasis added). See also notes 43-44 infra.
15. The Bankruptcy Act did not actively prohibit forum shopping. Section 6 provided that a debtor could avail himself of the exemption laws of any state in which he had been domiciled for the majority of six months preceding the filing of his petition. See Bankruptcy Act, supra note 1, § 6.
18. The Commissioners' draft promulgates and records the enactment of model legislation concerning topics of state interest.
Following a vigorous examination of the Commission’s recommendations and an unusually stormy passage through the houses of Congress, the Code emerged with this uniform approach to exemptions substantially intact. This article will examine these exemptions and certain allied sections of the Code with regard to the impact of the Code on the debtor’s fresh start after bankruptcy.

I. The Development of the Fresh Start Doctrine

The concept of granting debtors a “fresh start” following some sort of discharge of their obligations has been slow to develop. As recently as the nineteenth century, English debtors unable to meet their obligations were jailed in so-called “debtor’s prisons.” Although this practice provided creditors with a certain vicarious return, it proved inefficient in two respects. Creditors could not receive returns in excess of the debtor’s net worth at the moment of incarceration, and the state was burdened with the expense of maintaining the debtor-prisoner and his inevitably destitute dependents. Although various statutes were later enacted to protect the debtor from imprisonment, these statutes permitted such broad seizures of property by creditors that the debtor merely joined his family on the public dole. In the United States, the Constitution empowered Congress “to statute was designed to supplant completely state exemptions in the bankruptcy court. See Uniform Exemption Act § 4-503(a) [hereinafter cited as U.E.A.]. It included exemptions of fixed value for homesteads, livestock, wearing apparel, jewelry, household furnishings, tools of the trade or profession, motor vehicles, burial plots, cash, securities and receivables, and the cash surrender value of any life insurance policy payable to the debtor. Id. §4-503(b)-(d). Items exempted up to a “reasonably necessary” amount included life insurance proceeds where the debtor was the spouse or dependent of the insured, income from a retirement, annuity, profit sharing or similar plan, the debtor’s health aids, and an allowance for certain survivors of a deceased debtor. Id. § 4-503(c)(5)-(9), (e). The following items were declared exempted regardless of value: payments of alimony, support or separate maintenance, disability benefits, and proceeds, benefits, or other rights resulting from personal injury or unemployment. Id. § 4-503(c)(4), (7), (8).

22. For a detailed account of the tortuous path taken by the Code, see 1 Collier on Bankruptcy VI-XXV (15th ed. 1979) (Legislative History of the New Bankruptcy Act).


25. 8 W. Holdsworth, supra note 24, at 501. Aside from such motives, the power to imprison for debt was subject to procedural abuses whereby the allegation of a nonexistent debt was sufficient basis for incarceration. See 11 W. Holdsworth, supra note 24, at 596-97.

26. The cost of maintaining debtors in prison became so burdensome that acts were passed compelling creditors to make appropriate weekly support payments. Id. at 597.

27. In 1702, the Act of Anne, 1 Anne C. I, c.25 (1702), provided that debtors could be
establish ... uniform Laws on the subject of Bankruptcy throughout the United States,28 without specifying the character of the relief to be made available. While the Bankruptcy Act of 1800 contained certain uniform federal exemptions,29 neither it nor the three subsequent Bankruptcy Acts30 granted bankrupts substantially more than a discharge from prior liabilities.31 The last of these acts and the Code's immediate predecessor, the Bankruptcy Act of 1898, offered bankrupts a discharge coupled with the retention of any property exempted under the applicable state law.32 In 1938, the Chandler Act33 added the so-called "chapter proceedings"34 to the Bankruptcy Act. These amendments permitted those debtors with sufficient prospects for future earnings to strike an agreement with their creditors whereby the debtors would pay off their obligations pursuant to a plan approved by the court and a majority of their creditors while retaining use and control of their assets.35 Once the scheduled payments were completed, the debtors were granted a discharge as to any residuum of indebtedness.36 While the proceedings created by the Chandler Act prevented the seizure of certain debtors' assets, they applied only when the debtor could convince his creditors that a plan of payments would provide a higher yield than a straight liquidation under chapter VII of the Bankruptcy Act.37 Debtors unable to make such a showing were forced to ac-

released from prison upon stating under oath that they had no estate in excess of 10 pounds. For debtors under 40 years of age, this release was made conditional upon immediate enlistment in the army or the navy. Id. One of the earliest Anglo-American predecessors of the modern bankruptcy acts was the Statute of King Henry VIII. 34 & 35 Henry 8, c.4 (1543). See S. REISENFELD, supra note 5, at 387. That statute viewed insolvency as a fraudulent act and served as a liquidation tool without offering the debtor a discharge. The concept of a discharge did not arise in England until 1705. 1 F. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES §§ 3, 5 (5th ed. 1950).

28. See note 14 supra.
29. For a competent synopsis of these provisions, see Marier, Exemptions: A Full Circle Back to the Act of 1800, 53 CORNELL L.Q. 663 (1968).
30. See note 1 supra.
31. In fact, the discharge was not granted to honest debtors as of right until 1898. See generally Bankruptcy Act, supra note 1.
32. Bankruptcy Act, supra note 1, § 6.
34. The term "chapter proceedings" as applied in the Chandler Act differentiated its procedurally distinct mechanisms from the pure liquidation provisions contained in chapters I through VII of the Bankruptcy Act of 1898. See note 37 infra.
35. These revisions were adopted primarily to avoid the wholesale termination of businesses during the depression years. See Chandler, The Revised Bankruptcy Act of 1938, 24 A.B.A.J. 880, 881 (1938).
37. Liquidation of all but the debtor's exempt property is provided for by chapter VII of the Bankruptcy Act.
cept relief under chapter VII and face the loss of all property except that specifically exempted under the Act.

The Act's incorporation of state exemption laws in chapter VII proceedings caused the treatment of bankrupts to vary widely from state to state.\(^{38}\) In many jurisdictions, particularly in the northeast, exemption laws enacted at the turn of the century remained in force.\(^{39}\) Frequently, these laws protected property of a sort no longer held by debtors of this area\(^ {40}\) and failed to keep the exemption amounts in step with inflated prices of the day.\(^ {41}\) On the other hand, states such as California and Texas enacted exemption statutes so liberal as to include costly jewelry and extensive land holdings.\(^ {42}\) Although this patent disparity in state exemptions appeared to be an unconstitutional lack of national uniformity in the bankruptcy laws, the Supreme Court in *Hanover National Bank v. Moyes*\(^ {43}\) held that the requirement of "uniformity" was "geographical, and not personal."\(^ {44}\) Thus, only debtors of like residence were entitled to like treatment. This pronouncement was of little comfort to eastern debtors who lost virtually all of their possessions due to antiquated state exemption laws.

There were numerous other areas in which the Act provided less than adequate protection for debtors. During the expansion in consumer credit over the last thirty years, creditors adopted powerful new techniques to ensure payment of loans that might otherwise have been commercially unsound. One common technique involved taking blanket security interests in the debtor's household goods and furnishings.\(^ {45}\) Regardless of the debtor's need for such basic items and their exemption under even the most draconian state laws,\(^ {46}\) these blanket liens were enforceable because they were consensual agreements. Another common technique of creditors was to take security interests in a necessary item, such as the debtor's auto-

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39. For a discussion of these statutes' obsolescence in terms of exempted property and maximum dollar limits on exemptions, see Countryman, *supra* note 11, at 682-83.
40. See, e.g., D.C. CODE § 15-501(7) (1973) (providing for the exemption of "one horse or mule; one cart, wagon, or dray and harness..."); Va. CODE § 34-26(5) (1976) (exempting, *inter alia*, a spinning wheel, one pair of cards, and fifty bushels of shelled corn).
41. D.C. CODE § 15-501(7) (1973) (exemption of debtor's automobile limited to $500.00); Va. CODE § 34-26(5) (1976) (two hundred pounds of bacon not to exceed $25.00 and an oysterman's boat and tackle not to exceed $1,500.00).
42. See Countryman, *supra* note 11, at 682.
43. 186 U.S. 181 (1902) (addressing the incorporation of state exemptions by the Bankruptcy Act of 1898).
44. Id. at 188.
45. COMMISSION REPORT, PART I, *supra* note 8, at 10; Note, *supra* note 1, at 1470 n.78.
46. See generally 31 AM. JUR. 2d Exemptions § 125 (1967).
mobile, and then threaten to deprive the debtor of its use by repossession if the debtor failed to reaffirm his debt after bankruptcy. By taking such necessary collateral, creditors used security interests to obtain bargaining power far in excess of the liquidation value of that collateral.

Courts have not been insensitive to the possibility that such sophisticated collection techniques, coupled with antiquated state exemption laws, might deny debtors a fresh start under the Act by leaving them with a discharge and little else. This concern was manifested in a series of cases construing the language of section 70(a) of the Act, which provided that the trustee in bankruptcy was vested with title to all “non-exempt property” of the bankrupt. While it was clear that the title to exempt property remained in the bankrupt, the scope of the term “property” remained uncertain.

In Lines v. Frederick, the Supreme Court held that accrued but unpaid vacation pay was not within the definition of “property” passing from the bankrupt to the trustee under section 70(a). The Court reasoned that the term “property” was modified by both the exemption exclusion and the basic policy of the Act to provide the bankrupt with a fresh start “unhampered by the pressure and discouragement of preexisting debt.” The Court concluded that accrued vacation pay was so necessary to the bankrupt’s ability to make a fresh start that its relinquishment to the trustee would defeat the underlying policy of the Act. Although in In re Cedor, the Court of Appeals for the Ninth Circuit extended the Lines exception to tax refunds owing to the bankrupt at the time of filing, Cedor was later overruled by the Supreme Court in Kokoszka v. Belford.

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47. See Note, supra note 1, at 1470 n.78.
48. See COMMISSION REPORT, PART I, supra note 8, at 169.
49. Bankruptcy Act, supra note 1, § 70(a). See HOUSE REPORT, supra note 3, at 117; Note, supra note 1, at 1469-70.
52. Id. at 20. Section 70(a)(5) of the Bankruptcy Act provided for title to vest in the trustee as to certain property, including rights of action.
53. See note 50 supra.
54. 400 U.S. at 19 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244-45 (1934)).
55. 400 U.S. at 20. The analytical framework for this decision was first set out in Segal v. Rochelle, 382 U.S. 375 (1966), where loss carry-back tax refunds were deemed to be “property” on the basis that tax refunds were “rooted in the pre-bankruptcy past... [and were minimally]... entangled with the bankrupt’s ability to make an unencumbered fresh start...” Id. at 380. The result in Lines was criticized in a commentary by Judge Lee. See Lee, Leading Case Commentary, 45 AM. BANKR. L.J. 115 (1971).
56. 470 F.2d 996 (9th Cir. 1972). For a scathing criticism of this case, see Lee, Leading Case Commentary, 47 AM. BANKR. L.J. 239 (1973).
Court reasoned that "since a tax refund is not the weekly or other periodic income required by a wage earner for his basic support, to deprive him of it will not hinder his ability to make a fresh start unhampered by the pressure of preexisting debt." Therefore, the tax refund is section 70(a)(5) property which passes to the trustee.

The continual and somewhat artificial debate among courts concerning the scope of the term "property" has been viewed by some commentators as an attempt to create a federal common law exemption based directly upon the Act's fresh start policy. The clear implication of these cases is that the courts recognized that the Act, by its reference to state exemption laws, was insufficient to guarantee bankrupts such a fresh start. By virtue of its reference to nonuniform and frequently antiquated state laws, as well as its failure to guarantee even the limited benefits thereby conferred, the Act presented debtors with a dilemma: they could refrain from seeking relief in bankruptcy far beyond the time at which they might realistically be able to pay their obligations, or they could file in bankruptcy and obtain a discharge from past liabilities at the cost of losing even those basic items necessary to carry on a civilized existence. It was against this background that Congress enacted the Bankruptcy Reform Act of 1978.

II. THE DEBTOR'S PROTECTIONS UNDER THE CODE

The new Bankruptcy Code incorporates a number of mechanisms to create and preserve a pool of property to be retained by the debtor after bankruptcy. Together, they provide uniform definitions of the debtor's estate, the nature and extent of his exemptions, and the manner in which rights to those exemptions are preserved. Since these provisions were drafted as a whole, they form an interlocking network of protections capable of assuring debtors a fresh start.

A. The Debtor's Estate

The Code's policy of assuring the debtor's fresh start is evident from an
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examination of its provisions regarding the property to be contained in the debtor's estate. The Code has substantially altered the law as it existed in this area under the Act. Section 541(a)(1) of the Code provides that upon the filing of the petition in bankruptcy all interests of the debtor, whether legal or equitable, shall pass into the debtor's estate.\textsuperscript{64} Property claimed as exempt is then returned to the debtor, absent the objection of a party in interest.\textsuperscript{65} This language preempts the pre-Code case of \textit{Lockwood v. Exchange Bank},\textsuperscript{66} holding that title to exempt property remained in the bankrupt.\textsuperscript{67} By placing such a broad interpretation on the debtor's estate, the Code brings all of the debtor's assets before the court, thereby assuming full responsibility for determining the propriety of all exemptions claimed by the debtor\textsuperscript{68} and for providing the debtor with a fresh start.

By bringing substantially all of the debtor's property into the estate and providing for certain uniform exemptions,\textsuperscript{69} the Code also appears to undermine the efficacy of the \textit{Lines} decision and its progeny.\textsuperscript{70} Those decisions were based on the assumption that the bankrupt's fresh start was not always guaranteed by a literal application of the Act. They sought to secure this benefit by judicially "exempting" certain property from the administration of the bankrupt estate through the imposition of seemingly artificial constructions of the term "property." The Code, however, provides for the application of minimum federal exemptions to all the debtor's assets. This indicates a conscious congressional determination of the proper extent of the fresh start to be granted the debtor.\textsuperscript{71} Further efforts

\begin{footnotes}
\item[64] Bankruptcy Code, supra note 1, § 541(a)(1) provides: "The commencement of a case... creates an estate. Such estate is comprised of all the following property, wherever located: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case." This broad statement is limited only with respect to special powers of appointment and spendthrift trust benefits. \textit{Id.} § 541(b)-(c)(2).
\item[65] Bankruptcy Code, supra note 1, § 522(l) requires the debtor or a dependent to file a list of exempt property. If no objections to the list are forthcoming from creditors, the property claimed will become exempt.
\item[66] 190 U.S. 294 (1903). \textit{See} text accompanying note 50 supra.
\item[67] \textit{HOUSE REPORT, supra} note 3, at 368.
\item[68] \textit{Id.} The jurisdictional grants to the bankruptcy courts appear to be sufficiently broad to overrule \textit{Lockwood} on purely jurisdictional grounds. \textit{See} 28 U.S.C. § 1471(b)-(c) (1976).
\item[69] Section 522(d) of the Bankruptcy Code sets forth uniform federal exemptions. Bankruptcy Code, \textit{supra} note 1, § 522(d). The substance of these exemptions will be examined at text and accompanying notes 81-136 infra.
\item[70] \textit{See} notes 50-58 and accompanying text \textit{supra}.
\item[71] The fact that under § 522(b) the debtor may choose either federal or state exemptions does not undermine this proposition because the fresh start offered under the federal provisions may be freely chosen by the debtor. A more difficult problem is posed by § 522(b)(1), which provides that individual state exemption statutes may deny debtors access
\end{footnotes}
to unify the Code's interpretation in the several states were undertaken regarding the extent to which exempt property is actually free from creditor process.

B. Effect of Exemptions

Traditionally, the state exemption laws invoked under the Act have been less than an absolute shield for the property exempted. Certain classes of creditors have been permitted to execute against property, notwithstanding its exempt status. To provide a uniform interpretation of the effect of the Code exemptions, Congress enacted section 522(c). This section states that, subject to only four exceptions, exempt property is not subject to execution on account of any debt arising or deemed to have arisen before the commencement of the case.

The first exception, contained in section 522(c)(1), states that debts in the nature of nondischargeable taxes, alimony, maintenance, and support are collectable from exempt assets. To the extent that dischargeable tax obligations arising prior to filing are not specifically excepted, it appears that, contrary to pre-Code law, they may no longer be collected from exempt assets. Section 522(c)(2)(A) provides that prepetition liens not

to the federal provisions. If the states exercise this option, they will render nugatory the guarantee of a fresh start under § 522(d). It is conceivable that in states exercising this power, courts may resort to other analyses as artificial as that used in Lines, where state law fails to guarantee a fresh start equivalent to that available under federal law. To date, Virginia, Florida, Ohio, and Louisiana have affirmatively denied debtors recourse to the federal exemptions. See note 160 infra.

72. See Note, supra note 1, at 1146-70.

73. See Bankruptcy Code, supra note 1, § 502. Certain subsections of § 502 treat claims arising after the petition as if they arose prior to that date. Section 502(f) permits claims arising after the petition in the ordinary course of the debtor's business or financial affairs to be treated as prepetition claims in order to encourage creditors to deal with debtors in possession in involuntary cases. Sections 502(g) and (h) permit prepetition consideration of claims arising as a result of the exercise of certain powers of the trustee such as the rejection of executory contracts and leases or voiding of an improper set-off. Section 502(i) treats the recapture of an investment tax upon the transfer of property in the estate as a prepetition claim regardless of when it arose. See generally HOUSE REPORT, supra note 3, at 354-55.

74. Property deemed exempt under § 522(d) is not protected from any postpetition debts. Creditors holding these obligations will be constrained in execution upon them only by local exemption statutes.

75. Bankruptcy Code, supra note 1, § 522(c)(1). These qualifications for nondischargeability are set out in detail in § 523(a)(1) and (5) of the Code.

avoided by the trustee under the provisions of the Code may be satisfied from exempt property.\textsuperscript{77} Section 522(c)(2)(B) perpetuates the pre-Code rule that liens are valid against exempt property if they are not voided upon the challenge of an interested party.\textsuperscript{78} Finally, section 522(c)(2)(C) provides for the collection of certain avoided tax liens from exempt property.\textsuperscript{79}

Section 522(c) ensures that the federally mandated exemptions of the Code will not be rendered ineffective by state laws permitting a large class of creditors to execute against exempt property. In addition, because this section applies regardless of the debtor's choice of state or federal exemptions, it also defines the class of creditors against whom a state's own exemptions are effective.\textsuperscript{80} Thus, section 522(c) is another step toward a unified system of exemptions under which the debtor's fresh start may be guaranteed. At the core of that system are the uniform federal exemptions.

\textbf{C. The Federal Exemptions}

Section 522(d) of the Code contains the substantive provisions of the new federal exemptions, which are a substantial liberalization of the older state laws. For purposes of comparison, these exemptions will be discussed in light of the exemption statutes of Virginia,\textsuperscript{81} Maryland,\textsuperscript{82} and the District of Columbia.\textsuperscript{83} These jurisdictions are of particular interest because

\textsuperscript{77} The avoidance powers referred to in this section include the so-called "strong arm" and other powers under § 544, the ability to avoid statutory liens under § 545, the avoidance of preferences under § 547, the recovery of fraudulent conveyances under § 548, the recovery of certain postpetition transfers under § 549, and the avoidance of any liability for punitive or exemplary damages under § 724(a). Such actions may be instituted by the trustee in bankruptcy or the debtor by filing a complaint and thereby initiating an adversary proceeding. The debtor may wish to forego these remedies and reaffirm a debt where a continuing relationship with a creditor such as a family doctor is desired.

\textsuperscript{78} See Bankruptcy Code, supra note 1, § 506(d). This section permits liens to survive and remain effective after bankruptcy unless the claim upon which the lien is based is disallowed upon the challenge of the debtor or other interested party. House Report, supra note 3, at 357. This rule codifies the holding in Long v. Bullard, 117 U.S. 617 (1886), with respect to the enforcement of liens against exempt property. See also Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 582-83 (1935).

\textsuperscript{79} This is really an exception to the rule of § 522(c)(2)(A) that liens voided under § 545 may not be satisfied out of exempt property. Here, a tax lien voidable under § 545(2) but filed in proper form subsequent to the date of filing in bankruptcy appears to be a valid lien as to the exempt property.

\textsuperscript{80} Because § 522(c) refers to "property exempted under this section . . .," it clearly includes both the federal and state exemptions made available under § 522(b). See Bankruptcy Code, supra note 1, § 522(b). This provision is similar to the language of § 522(e) in the application of the antiwaiver provision. Id. § 522(e).

\textsuperscript{81} VA. CODE § 34 (1976).

\textsuperscript{82} MD. CTS. & JUD. PROC. CODE ANN. §§ 11-504, 11-505 (1974).

Virginia debtors are foreclosed from enjoying the federal provisions, and Maryland offers debtors exemptions that have been criticized as antiquated, and the District of Columbia is a federal compound, presumably reflecting some of the concerns and goals of Congress. In addition, they will be contrasted to the Uniform Exemptions Act (U.E.A.) from which they were derived.

The most expansive provision of the new Code is the $7,500.00 exemption for the debtor's residence. In the U.E.A., a similar provision allowed for an exemption of up to $10,000.00. While neither the District of Columbia nor Maryland recognizes such a homestead exemption, most states do provide debtors such protection. In Virginia, however, the $5,000.00 homestead exemption created for the benefit of a householder or head of a family is substantially lower than the federal exemption.

To complement this provision and grant equivalent treatment to debtors unable to claim homestead exemptions, section 522(d)(4) provides for an exemption of property of any kind in the amount of $400.00 plus any unused portion of the $7,500.00 allowance in section 522(d)(1). Virginia provides for a similar option but limits it to debtors not claiming under the homestead exemption.

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85. For a broadside on the Maryland exemption provisions, see Countryman, supra, note 11, at 680-84.
86. See note 21, supra.
87. HOUSE REPORT, supra note 3, at 361. The House bill, H.R. 8200, 95th Cong., 1st Sess. (1978), incorporated the Uniform Exemptions Act almost verbatim. In order to reach an acceptable compromise with the Senate, the dollar amounts of nearly all the exemptions were lowered. Id.
88. Bankruptcy Code, supra note 1, § 522(d)(1). This exemption applies to any residence or cooperative interest providing the debtor or his dependents with a residence or burial plot. Id. § 522(a)(1). It extends to realty or personalty, thus including mobile homes and cooperative share interests. It should also be noted that § 522(m) permits a husband and wife filing jointly to double the exemptions available to a single debtor under § 522(d) of the Code.
89. U.E.A. § 4(a).
90. In addition to the District of Columbia and Maryland, only four other states fail to provide a homestead exemption: Connecticut, Delaware, Pennsylvania, and Rhode Island. See Note, supra note 1, at 1469, n.76; Note, The Uniform Exemptions Act and Pennsylvania Law, 79 U. PITt. L. REV. 357, 362, n.31 (1977).
92. This is the so-called "cafeteria exemption" which can be used regardless of the nature of the property claimed. The U.E.A. contains a similar, but less potent, version of this provision in § 8(d). This allows for a $500.00 cafeteria exemption which is raised to $1,500.00 if the debtor does not claim the homestead exemption in § 4(a).
93. Va. Code, § 34-13 (1976). Note that the equalizing effect of this section is lost because the dollar amounts were not increased to match those in the amended § 4 of the Virginia Code. See note 91 supra.
lumbia has need for such an equalization provision, Maryland does permit any debtor to exempt $1,000.00 in cash. 94

The exemption for the debtor's automobile, fixed at $1,500.00 by the U.E.A., 95 has been reduced to $1,200.00 in the Code. 96 The District of Columbia permits the exemption of a motor vehicle in the amount of $500.00, 97 conditioned upon the vehicle's being used primarily in the debtor's trade or business. 98 Virginia law contains no exemption for automobiles but does permit the exemption of a horse and cart. 99 In some states, similar language has been construed to include the modern equivalents of such items. 100 Maryland has enacted no exemption dealing with automobiles.

The Code also adopts an exemption for household goods, wearing apparel, appliances, books, animals, crops, and musical instruments held by the debtor or a dependent primarily for personal, family, or household use. 101 This provision is unusual in that it limits each item to a value of $200.00 but places no limit on the total value of items exempted. 102 Maryland offers a limited exemption of household property which specifically enumerates the eligible items. 103 The law of Virginia both enumerates the items exempted and sets a maximum value on certain classes of items. 104 The District of Columbia also employs a dual approach under which both

95. U.E.A. § 8(c).
96. Bankruptcy Act, supra note 1, § 522(d)(2).
98. This condition is not satisfied when the debtor uses the vehicle for commuting to and from his place of employment. Id § 15-501(7).
100. See, e.g., Phillips v. C. Palmo & Sons, 270 F.2d 791 (5th Cir. 1959) (tractor-trailer valued at $16,000.00 exempt as if “two horses” and a “wagon”); Patten v. Sturgeon, 214 F. 65 (8th Cir. 1914) (automobile exempt as if a “carriage”). See also McMullan v. Shields, 96 Mont. 191, 29 P.2d 652 (1934). But see In re McEuen, 19 F. Supp. 389 (W.D. Wash. 1948) (automobile not exempt as if a “wagon”); Northern N.Y. Trust Co. v. Bano, 151 Misc. 684, 237 N.Y.S. 695 (Sup. Ct. 1934) (automobile not exempt as if a “wagon”). See generally Countryman, supra note 12, at 673; Note, supra note 1, at 1467 n.64.
101. Bankruptcy Code, supra note 1, § 522(d)(5).
102. Id. U.E.A. § 8(a) set the single item ceiling at $500.00 but required that such items be “reasonably held” for the proper use.
103. MD. CTS. & JUD. PROC. CODE ANN., § 11-505(a) (1974). This section permits exemption of only basic items, including, but not limited to: one stove, one washing machine, one refrigerator, kitchen utensils, one bed and mattress per family member, and one kitchen table and chairs.
104. See VA. CODE § 34-26(2) (Supp. 1978) (family library); id. § 34-26(4) (wearing apparel and appurtenances); id. § 34-26(5) (general household goods and provisions). In addition, if the debtor is engaged in agriculture, § 34-27 permits the exemption of certain farm items, not to exceed $1,000.00 in value.
the classes and the dollar amounts of exempted property are specified.\textsuperscript{105} Due to the severe limitations imposed upon household exemptions by these jurisdictions, debtors will be hard pressed to emerge from a bankruptcy action with sufficient property for day-to-day existence. Under the Code, however, the ability to exempt household goods is much broader. Not only is there no ceiling on aggregate value, but the $200.00 limit on the value of each item refers to the fair market value on the date the petition is filed rather than the replacement value or the debtor's basis in the item.\textsuperscript{106} Practically speaking, the fair market value of household items within this section will rarely exceed $200.00. Thus, the Code provides a substantial liberalization with respect to the exemption to household items.\textsuperscript{107}

The Code also offers expanded exemptions for jewelry. Section 522(d)(4) permits the debtor to exempt up to $500.00 worth of jewelry held for personal use. While the ceiling amount is $250.00 lower than that under the U.E.A.,\textsuperscript{108} there are no comparable exemptions available in any of the jurisdictions under consideration.

Tools of the debtor's trade and professional books are exempted by the Code up to an aggregate of $750.00.\textsuperscript{109} In Maryland, a more liberal provision allows the exemption of such items without regard to value.\textsuperscript{110} In Virginia, the debtor receives no special exemptions for this type of property,\textsuperscript{111} while in the District of Columbia, tools of the trade are exempt only up to $200.00\textsuperscript{112} and professional equipment is exempt up to an aggregate value of $300.00.\textsuperscript{113} Again, with the exception of Maryland, the state law appears to offer far less generous exemptions than does the

\textsuperscript{105} D.C. CODE § 15-501(1) (1973) (wearing apparel to $300.00 per person); \textit{id}. § 15-501(2) (household furnishings and cooking utensils to $300.00); and \textit{id}. § 15-501(8) (family library to $400.00).

\textsuperscript{106} Bankruptcy Code, \textit{supra} note 1, § 522(a)(2) defines "value" for the purposes of that section as fair market value.

\textsuperscript{107} While this provision may tempt attorneys to counsel their debtor-clients to acquire substantial numbers of $199.99 units and other personal items in anticipation of bankruptcy, it should be kept in mind that credit extended for the purpose of these purchases may well fall under the terms of § 523(a)(2) of the Code (nondischargeability of credit advanced on false pretenses).

\textsuperscript{108} U.E.A. § 8(b).

\textsuperscript{109} Bankruptcy Act, \textit{supra} note 1, § 522(d)(6). Section 8(c) of the U.E.A. provides a ceiling figure of $1,000.00.


\textsuperscript{111} The Virginia debtor must look to the enumerated household and agricultural exemptions to retain these items. VA. CODE §§ 34-26; 34-27 (1976).

\textsuperscript{112} D.C. CODE § 15-501(5) (1973). This section also provides for the exemption of $200.00 worth of stock or materials to aid the debtor's business.

\textsuperscript{113} \textit{id}. § 15-501(6).
In the area of insurance, the Code permits the exemption of unmatured term life insurance contracts to avoid the possibility that a trustee will surrender such contracts and thereby deprive the debtor and his family of the benefits of life insurance. The debtor is also permitted to exempt up to $4,000.00 worth of the accrued loan value on policies carrying a cash surrender value. Among the states under examination, only Maryland offers similar protection for the cash surrender value of insurance policies.

One unusual provision of the Code is the exemption granted for professionally prescribed health aids. While a similar exemption is created under the U.E.A., it appears nowhere in the laws of the states in question. Considering the rising costs of such items, this section represents a substantial measure of assistance to ailing debtors.

The final two categories of exemptions provided by the Code can be characterized as exemptions of benefits akin to future earnings and compensation of prior loss. Section 522(d)(10) of the Code exempts social security, unemployment, and local public assistance benefits without regard to amount. In addition, that section exempts payments for alimony, support, and separate maintenance, along with annuity and pension benefits. The latter are exempt only to the extent that they are "reasonably necessary" for the support of the debtor or a dependent. While the term "reasonably necessary" is undefined in the Code, other jurisdictions em-

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114. This is of particular importance to the Virginia debtor because that state has exercised its option to bar access to the federal exemptions. See note 160 infra.


116. The trustee's power to reject an executory contract is found in § 365(a) of the Code. Va. Code § 38.1-482 (1976) protects certain group life insurance policy contracts from attacks by creditors.

117. Bankruptcy Code, supra note 1, § 522(d)(8). The maximum exemption set forth by the U.E.A. was only $1,500.00. U.E.A. § 7. Note that the amount of any automatic premium loan permitted under § 542(d) to avoid forfeiture of the policy will be deducted from the $4,000.00 exemption to the debtor. House Report, supra note 3, at 361-62.


119. Bankruptcy Code, supra note 1, § 522(d)(9).

120. U.E.A. § 5(2).

121. Bankruptcy Code, supra note 1, § 522(d)(10).

122. Id. § 522(d)(11).

123. Id. § 522(d)(10)(A), (B) & (C). See generally, U.E.A. § 5(3), (5).

ploying similar language have placed greater emphasis upon the "reasonable" component than upon the "necessary."125 In Maryland, certain disability payments are specifically exempted.126 Virginia has a similar provision127, while the District of Columbia exempts substantially all unemployment, disability, public assistance, and teachers' annuity benefits.128 The fragmented state exemption laws in this area are, of course, augmented by nonbankruptcy federal laws which provide for a substantial group of additional exemptions.129

In order to preserve compensatory income to the debtor, section 522(d)(11) of the Code exempts crime victim reparation, certain wrongful death awards, life insurance proceeds, payments up to $7,500.00 for personal injury, and compensation for the loss of earnings of one upon whom the debtor was dependent.130 State provisions in this area abound, with Maryland,131 Virginia,132 and the District of Columbia133 all offering substantial exemptions in addition to the applicable federal nonbankruptcy allowances.134

Beyond the specific allowances in section 522(d), the Code guarantees equivalent treatment for future debtors by requiring periodic adjustments of the dollar amounts specified in its text.135 This review will occur every six years and has no analogue in the jurisdictions surveyed.

128. D.C. Code § 46-318(b) (1973) (unemployment compensation); id. § 35-717 (disability insurance); id. § 3-215 (public assistance); and id. § 31-718 (teachers' annuities).
129. See note 155 infra.
130. The exemptions as to wrongful death awards, life insurance proceeds, and support loss are all limited to those reasonably necessary to the support of the debtor and his dependents. See generally note 125 and accompanying text supra.
133. D.C. Code, § 35-718 (1973) (exempting proceeds of group life insurance); id. § 30-213 (exempting life insurance proceeds generally); and id. § 16-2703 (exempting wrongful death awards).
134. See note 155 and accompanying text infra.
From this overview, it is apparent that the exemptions offered by section 522(d) are almost uniformly more generous in kind and amount than the state provisions examined. It is particularly striking that the laws of the District of Columbia, with its historically intimate ties to Congress, do not better reflect the policies of the Code. The federal allowances address the material needs of contemporary debtors far more directly than do their counterparts in the states examined, thus fulfilling their stated purpose of providing a fresh start. Adequate exemption standing alone, however, would be of dubious value in the face of creditors' sophisticated collection techniques.

D. Protection of the Debtor's Right to Exempt Property

Several new sections appear in the Code with the goal of ensuring that the debtor will receive the full benefit of the new and carefully crafted exemptions in section 522(d). One of the most potent of these provisions is section 522(e), which precludes unsecured creditors from enforcing any waiver of the rights or exemptions provided in section 522. This antiwaiver language applies equally to federal and state exemptions asserted in bankruptcy because it applies to all exemptions claimed under subsection (b). Since many states specifically recognize the debtor's right to waive certain exemption protections, this new section in the Code represents a substantial change in the law. In relation to the federal exemptions, this section ensures that those minimum protections are preserved for the benefit of even imprudent debtors.

Of nearly equal importance is section 522(f), which permits the debtor to

136. In fact, the principal provisions of the District of Columbia exemption law have not been revised since their enactment in 1901. See D.C. Code, § 15-501 (1973) (legislative history).

137. While secured creditors are excepted from the provisions of § 522(e) and may generally enforce valid prepetition liens against exempt property under the terms of §§ 522(c)(2)(A) & (B), certain specific kinds of exempt property are placed beyond even their extensive reach by § 522(f). See notes 141-43 and accompanying text infra.

138. Bankruptcy Code, supra note 1, § 522(b) provides for exemptions under either federal or state law and thus brings the administration of the state exemptions within the purview of the Code. See House Report, supra note 3, at 360-62.


140. Since the Code is a federal enactment, provisions such as § 522(f) which affect extant contractual agreements do not facially violate the "contracts clause" of the United States Constitution. U.S. Const. art. I, § 10. This clause explicitly refers to state action only. Id. See also Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (recognizing that the federal ability to grant a discharge in bankruptcy is grounded on this reading of the clause).
avoid certain rights of creditors in exempt property. By its terms, the
debtor may avoid all judicial liens on exempt property. Perhaps more
significant from a policy standpoint is the provision allowing the debtor to
avoid any nonpossessory, nonpurchase money security interest in other-
wise exempt household goods, tools of the trade, and health aids. This
provision neutralizes the increasingly common practice of consumer credi-
tors of taking security interests in items critical to the debtor's mainte-
nance to secure unrelated advances of credit. Creditors employing this tactic
gain leverage beyond the resale value of the collateral because the con-
sumer debtor may be induced to continue payments to avoid the
threatened repossession of household necessities. The Code discourages
this practice by permitting the debtor to avoid such interests once bank-
ruptcy proceedings have been initiated.

Section 722 complements this provision by supplying a debtor with the
means to redeem exempt or abandoned property subject to a lien securing
a dischargeable consumer debt. By paying the secured creditor the value
of the collateral, a debtor may now remove a purchase money security
interest from necessary property such as an automobile. This redeem-
vention extends to the entire property rather than just to the exempt interest.
Thus, if the debtor's interest in the item is within the allowed exemption,
he may pay the creditor secured by that property the market value of the
property and redeem its full value. This is the case even where the full
value of the property exceeds the amount of the appropriate exemption.

141. Bankruptcy Code, supra note 1, § 522(f)(1).
142. Id. § 522(f)(2). While the categories of property listed conform to the exemptions
provided in § 522(d)(3), (6), (9), the right to avoid such liens is equally effective where state
exemptions are elected, to the extent that exemptions of such property are provided by the
144. While the nature of the redemption payment contemplated by the Code is unde-
defined, it is apparent that state redemption practices will serve as rough templates for both
bench and bar. In accord with such local law, redemption will be viewed as a lump sum
payment to be due within perhaps 30 days of the court's authorizing order, rather than a
series of partial payments amounting to a judicial refinancing of the debtor's obligation.
This will permit minimum interference with the bargain between the parties consistent with
the option of redemption. Interview with Judge Roger M. Whelan, Bankruptcy Judge,
United States Bankruptcy Court for the District of Columbia (Feb. 6, 1980). See also H.R.
145. Creditors enjoy secured status under the Code only to the extent of their collateral.
Bankruptcy Code, supra note 1, § 506(a). Because the value of the collateral is determined
in light of its proposed disposition, a creditor entitled to repossess and sell collateral is se-
cured only to the fair market value of the collateral. Thus, a debtor must pay the creditor
this amount to remove a security interest in the property.
146. For a description of this process, see House Report, supra note 3, at 381. Note
This section will allow debtors to enjoy the full extent of their exemptions while giving creditors the full value of their security.

The remaining section pertaining to exemptions under the Code grants debtors the right to exempt property recovered by the trustee and to stand in the trustee's stead to recover such property on his own behalf. Under section 522(g), a debtor who has transferred exempt property involuntarily and without bad faith may claim any such property recovered by the trustee.\textsuperscript{147} Moreover, the debtor may employ this section to recover property when execution has previously occurred on a lien otherwise avoidable under section 522(f)(2).\textsuperscript{148} Section 522(h) permits the debtor to avoid certain transfers\textsuperscript{149} when the trustee fails to exercise his power to do so.\textsuperscript{150}

Viewed as a whole, these satellite sections protect the Code's exemption section from erosion by state laws. By invalidating waivers of these exemptions, permitting avoidance of nonpossessory, nonpurchase money security interests in household goods, and recognizing the debtor's right to redeem collateral for its market value, the Code has created a new system of contract law. While these provisions do not affect the daily nonbankruptcy transactions of debtors and creditors, they operate to protect the debtor's fresh start once bankruptcy occurs. Since they apply regardless of whether the debtor chooses state or federal exemptions, these protections apply in all straight liquidating bankruptcies. As a result, credit practices that had frequently overburdened debtors under the Act are now effectively controlled. The new choice-of-exemptions provision does, however, raise basic questions concerning the underlying policies of the Code.

\textit{E. Choice of Exemptions}

Recourse to the federal exemptions previously described is only one alternative available to the debtor. While section 6 of the old Act limited the

\begin{itemize}
  \item That the exemption ceilings used in the example ($1,500) are higher than those ultimately enacted in \S 522(d)(2) ($1,200).
  \item That the trustee's powers to which the section refers are contained in the following sections: Bankruptcy Code, \textit{supra} note 1, \S 510(c)(2) (lien for subordinated claim); \textit{id.} \S 542 (property of the estate); \textit{id.} \S 543 (turnover of property or the proceeds thereof held by a custodian); \textit{id.} \S 551 (the panoply of powers contained in \S\S 522, 544, 545, 547, 548, 549, 724(a)); \textit{id.} \S 551 (preservation of transfer for the benefit of the estate); and \textit{id.} \S 553 (set-off).
  \item That this provision is significant in order to protect the debtor's rights under \S 522(f)(2) where attachment precedes the invocation of the stay under \S 362(a). \textit{Id.} \S\S 522(f)(2) and 362(a).
  \item That for a brief summary of the powers to which this section gives the debtor access, see note 77 \textit{supra}. Also included here is the right to avoid an improper set-off in \S 553.
  \item That the legislative history of this section makes it clear that the debtor is granted only the right the trustee could have exercised and not an opportunity to challenge a transaction a second time. \textit{House Report, supra note 3, at 362-63.}
\end{itemize}
debtor's exemptions to those state provisions available under bankruptcy law,\textsuperscript{151} section 522(b) of the Code permits the debtor to choose between the state\textsuperscript{152} and the newly enacted federal exemptions.\textsuperscript{153} Specifically, the debtor's choice lies between the federal provisions contained in section 522(d) of the Code and the exemptions of the state in which the debtor was a domiciliary for 91 of the 180 days preceding bankruptcy.\textsuperscript{154} Moreover, a debtor choosing to exercise his state exemptions is also granted the benefit of all nonbankruptcy federal exemption statutes.\textsuperscript{155} While these provisions are not available to a debtor claiming under federal exemptions, the benefits of these acts are substantially incorporated in section 522(d).\textsuperscript{156}

Regardless of which set of exemptions a debtor selects, it appears from the legislative history of the Code that the doctrine of \textit{In re White},\textsuperscript{157} allowing a debtor to convert nonexempt property into exempt property prior to the filing of the petition, will be honored.\textsuperscript{158}

While the Code provides the debtor with a choice of exemption laws, it also empowers the state to deny access to federal provisions. Section 522(b)(1) permits the invocation of federal exemptions except where "the

\begin{footnotes}
\item[151] See note 32 supra.
\item[152] Where the Act permitted a bankrupt to claim the exemptions of the state in which he was a domiciliary for the majority of the six months immediately preceding bankruptcy, the Code substitutes a 180-day period in the interest of more accurate computation of the period.
\item[153] See notes 81-136 and accompanying text supra. The original House bill, H.R. 8200, included this "choice of law" provision, while the Senate bill, S. 2266, permitted only the use of state exemptions. The U.E.A. permitted the more limited choice between Act exemptions and state constitutional exemptions. U.E.A. § 19.
\item[154] See note 152 supra.
\item[156] The substantive federal exemption provisions of § 522(d) cover, in broader terms, the retirement, injury, and disability assets protected under the federal nonbankruptcy exemptions. If anything, because of their greater scope, the provisions of § 522(d) are more comprehensive than their counterparts.
\item[157] 221 F. Supp. 64, 67 (N.D. Cal. 1963) (bankrupt may convert existing nonexempt property to exempt property prior to filing).
\item[158] HOUSE REPORT, supra note 3, at 361. The historical limitation on this privilege denying a debtor the right to acquire exempt property by applying for fresh credit appears to be viable under the Code as well. See 221 F. Supp. at 67.
\end{footnotes}
[s]tate law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize." 159 Thus, where a state incorporates an explicit disavowal of the federal exemptions into its exemption statute, the federal provisions will become unavailable to debtors of that state. To date, Virginia, Florida, Ohio, and Louisiana have enacted such statutes. 160 The inclusion of this "opt-out" provision resulted from a series of compromise amendments drafted in an attempt to produce a bill satisfactory to both houses of Congress. 161 While the legislative history is silent on this point, it appears that the provision was an attempt by the Senate to preserve a measure of autonomy to the states in the matter of debtor-creditor relations. 162

Even where both are available, the choice between the federal and state exemptions requires a more complex analysis than merely comparing the dollar values offered by the statutes. Section 522(b)(2)(B) permits a debtor claiming state exemptions to employ any state laws exempting property held by a tenant by the entirety from execution by a creditor of only one spouse. On the other hand, election of the federal exemptions triggers section 363(h) which permits the sale of such property to satisfy the debts of either spouse. 163 Section 363(h) states that the interest of a co-owner of the debtor's property may be sold along with that of the debtor in cases where the following four conditions are met: 164 where partition in kind would be impracticable; 165 where the sale of the debtor's undivided interest would realize significantly less than the sale of the property as a

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159. Later amendments to the Code changed the language of this section to read "[the applicable state law] specifically prohibits application of such subsection (d)." S. 658, 95th Cong., 1st Sess. 67 (1979).
160. 1979 Fla. Sess. Law Serv. 79-363 (to be codified at FLA. STAT. § 222.20); 15 LA. REV. STAT. ANN. § 3881(B) (1979); 1979 Ohio Laws, File 116 (to be codified at OHIO REV. CODE ANN. § 2329.662 (Page)); VA. CODE § 34-3.1 (Supp. 1979). Numerous states currently have similar legislation under consideration.
162. Professor Kennedy argues forcefully against federal disruption of state exemption policies on the ground that only the states are capable of striking a debtor-creditor balance reflective of local economic needs. See Kennedy, Limitation of Exemptions in Bankruptcy, 45 IOWA L. REV. 445, 449-53, 485-86 (1960).
163. Bankruptcy Code, supra note 1, § 363(i) grants the debtor's spouse or co-owner the right of first refusal once a sale price has been fixed. Section 363(j) provides for the return of proceeds of the sale to the debtor's spouse or co-owner proportionate to that party's interest in the property. Id. § 363(j).
164. The power of the trustee to sell the debtor's interest in property is provided in § 363(b) & (c).
165. Id. § 363(h)(1). See generally HOUSE REPORT, supra note 3, at 346.
whole;\textsuperscript{166} where the benefit to creditors outweighs the detriment to the co-owner;\textsuperscript{167} and where the property is not used in the operation of any utility.\textsuperscript{168} Thus, assuming the existence of these conditions, a debtor filing under the federal exemptions would be subject to the sale of any property held as a tenant by the entirety and the loss of his interest therein.

From a planning standpoint, this section gives rise to two concerns. First, where a debtor contemplating bankruptcy has substantial equity in jointly held property,\textsuperscript{169} it may be more advantageous to opt for the less liberal state exemptions in order to protect such interests under existing state law. Second, where the jointly owned property is of a type that would be irreplaceable by the debtor, its preservation may be of paramount importance. Where the property is a family residence, for example, the debtor may choose the protection of the state laws rather than the more liberal federal provisions that might require the liquidation of the home.\textsuperscript{170}

The "opt-out" provision of section 522(b)(1), on the other hand, raises serious theoretical and policy questions concerning the basic goals embodied in the Code. While the other mechanisms created by section 522 seem to have the uniform aim of imposing a systematic law of exemptions within bankruptcy proceedings,\textsuperscript{171} section 522(b)(1) permits states to avoid entirely the liberalized federal exemptions in favor of their own adequate or inadequate provisions. This option was clearly the product of a political compromise between the houses of Congress on the issue of a state's right to determine the nature of debtor-creditor relationships within its borders.

\textsuperscript{166} Bankruptcy Code, supra note 1, § 363(h)(2). \textit{See generally} House Report, supra note 3, at 346.

\textsuperscript{167} Bankruptcy Code, supra note 1, § 363(h)(3). \textit{See generally} House Report, supra note 3, at 346.

\textsuperscript{168} Bankruptcy Code, supra note 1, § 363(h)(4). This condition was intended to protect public utility facilities, which are commonly held jointly by several utility companies, from being sold upon the bankruptcy of one joint owner. The addition of this provision to the original House bill represents a compromise in favor of the Senate. \textit{See} House Report, supra note 3, at 557. 124 Cong. Rec. S17409 (daily ed. Oct. 6, 1978); 124 Cong. Rec. H11093 (daily ed. Sept. 28, 1978).

\textsuperscript{169} That the debtor's equity is a measure of the value of his exemptions is clear from the Code's legislative history. House Report, supra note 3, at 360-61.

\textsuperscript{170} Inventive counsel would be well-advised to resist the temptation to manipulate the time of filing of husband and wife claims in order to preserve tenancy by the entirety property under the state law option of § 522(b). In Reid v. Richardson, 304 F.2d 351 (4th Cir. 1962), the court affirmed the reopening and consolidation of the cases where the spouses shared an identity of assets, there was a short time between the filing of the spouses, and the parties intended to commit a "legal fraud." \textit{Id. at} 355. The court, however, stated that caution should be used in reopening such cases, lest the purpose of the Bankruptcy provisions be frustrated. \textit{Id.}

\textsuperscript{171} \textit{See} notes 60-150 supra.
In support of its inclusion, it may be noted that respected commentators on the bankruptcy laws have urged that exemption policy be left for local determination in light of local economic needs.\textsuperscript{172} On the other hand, the "opt-out" provision appears to retreat from the total commitment to the preservation of the debtor's fresh start manifested by the rest of the Code.

The degree to which this option conflicts with the basic policies of the Code is, however, unclear. If Congress enacted section 522(d) merely for the purpose of releasing debtors from reliance on antiquated state statutes, the option and Code policies are in total harmony. By requiring states affirmatively to deny debtors access to the federal exemptions, the Congress has ensured that states exercising the option will reexamine their own exemption statutes and make a conscious choice between the two provisions. If the only goal of the Code were to alleviate the hardship suffered by debtors solely because of local legislative neglect in maintaining and reviewing state exemption laws, the "opt-out" provision is a success.

If, in the alternative, the Code were intended to go beyond this limited goal, it is clear that the "opt-out" provision detracts from its policy objectives. By granting states the opportunity to maintain their antiquated exemption statutes, the option undeniably reduces, in some measure, the amount of property that certain debtors will retain following bankruptcy. Beyond this observation, however, it is apparent that the major protections of section 522 will still operate to the debtor's benefit regardless of the state's position on the quantum of property to be exempt. Waiver of exemptions, however meager, will be ineffective in bankruptcy. Blanket liens on household goods and furnishings will be avoidable. The debtor will be permitted to redeem exempt property subject to a purchase money security interest for the fair market value of the collateral.

It might be argued that these protections are ineffective when applied in conjunction with a state's parsimonious exemption statute. Of what benefit is it to protect exempt property when that property consists of no more than a few beds and chairs? While this criticism is valid to an extent, it fails to account for the more subtle attacks upon a debtor's interest that the Code was intended to remedy. Notwithstanding the value of a debtor's exempt household furnishings, if a creditor may impose a blanket nonpurchase money security interest upon those items, pressure may be brought to bear upon the debtor to reaffirm other debts against his better interest. Section 522(f)(2) puts an end to this practice by permitting the debtor to avoid such liens. Furthermore, regardless of the value of a debtor's car and other personalty, a creditor holding a purchase money security interest

\textsuperscript{172} See, e.g., Kennedy, supra note 162.
in that property may gain increased leverage in negotiations with the
debsor by threatening to repossess the property. Section 722 limits the
creditor's interest in the collateral to its fair market value. Thus, these
protective provisions operate to protect debtors from overbearing and un-
conscionable contract provisions regardless of the exemption law applied.
The "opt-out" provision is, therefore, only a limited blow to the concept
of the debtor's fresh start under the Code. While it removes one source of
protection, it leaves unaffected the Code's prohibition of certain pervasive
and unsound creditor practices.

III. Conclusion

The Bankruptcy Reform Act of 1978 creates an updated exemption law
uniformly applicable to the states. That law grants two separate classes of
protection of a debtor's right to a fresh start after bankruptcy. The federal
exemptions themselves serve to grant a uniform and contemporary formu-
lation of the quantum and nature of property to be retained by the debtor.
The protective provisions free the debtor from the effects of certain credi-
tor practices which limit or totally deny him the protection of the Bank-
ruptcy Court. With concurrent application of these protections, the Code
will effectively guarantee a fresh start for all honest debtors.

Concern over the "opt-out" provision's effect upon this scheme may be
overstated. While it does permit states to offer substantially less generous
exemptions than are available under the Code, it does not alter the
debsor's ability to neutralize overburdensome creditor interests in prop-
erty. It may be observed that Congress granted the states a right to choose
as to an issue of lesser importance while absolutely imposing a standard of
creditor conduct more central to the proper operation of the Code. In to-
tal, it appears that the Code is successful in addressing the issue of the
debsor's right to a fresh start and is admirable in the subtlety with which
that goal is achieved.

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