



DATE DOWNLOADED: Mon Nov 20 12:47:43 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Ralph A. Peeples, *New Rules for an Old Game: North Carolina's New Exemption Act*, 17 WAKE Forest L. REV. 865 (1981).

ALWD 7th ed.

Ralph A. Peeples, *New Rules for an Old Game: North Carolina's New Exemption Act*, 17 Wake Forest L. Rev. 865 (1981).

APA 7th ed.

Peeples, R. A. (1981). *New rules for an old game: north carolina's new exemption act*. *Wake Forest Law Review*, 17(6), 865-910.

Chicago 17th ed.

Ralph A. Peeples, "New Rules for an Old Game: North Carolina's New Exemption Act," *Wake Forest Law Review* 17, no. 6 (December 1981): 865-910

McGill Guide 9th ed.

Ralph A. Peeples, "New Rules for an Old Game: North Carolina's New Exemption Act" (1981) 17:6 *Wake Forest L Rev* 865.

AGLC 4th ed.

Ralph A. Peeples, 'New Rules for an Old Game: North Carolina's New Exemption Act' (1981) 17(6) *Wake Forest Law Review* 865

MLA 9th ed.

Peeples, Ralph A. "New Rules for an Old Game: North Carolina's New Exemption Act." *Wake Forest Law Review*, vol. 17, no. 6, December 1981, pp. 865-910. HeinOnline.

OSCOLA 4th ed.

Ralph A. Peeples, 'New Rules for an Old Game: North Carolina's New Exemption Act' (1981) 17 *Wake Forest L Rev* 865
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

WAKE FOREST LAW REVIEW

VOLUME 17

DECEMBER 1981

NUMBER 8

NEW RULES FOR AN OLD GAME: NORTH CAROLINA'S NEW EXEMPTION ACT¹

Ralph A. Peoples*

| | |
|--|-----|
| INTRODUCTION | 868 |
| I. BACKGROUND | 867 |
| II. THE OLD LAW | 868 |
| III. THE NEW ACT | 870 |
| A. Overview | 870 |
| 1. Definitions and background | 870 |
| 2. An initial dilemma: forced sales | 874 |
| 3. Specific exemptions | 877 |
| a. Residence | 877 |
| b. Optional "wild card" exemption | 880 |
| c. Motor vehicle | 880 |
| d. Personal property | 881 |
| e. Tools of the trade | 882 |
| f. Life insurance | 882 |
| g. Health aids | 883 |
| h. Personal injury awards | 883 |
| 4. Exemptions under other statutory provisions | 883 |
| a. Wages | 883 |
| b. Other benefits | 883 |
| 5. Effect of exemptions | 884 |
| B. Procedure for Designating Exemptions | 884 |
| 1. Who may initiate exemption allocation proceedings | 885 |
| 2. Notice and hearing procedures | 886 |
| 3. Valuation of exempt property | 887 |
| C. Specific Substantive Provisions | 888 |

* B.A., Davidson College; J.D., New York University. Assistant Professor of Law, Wake Forest University.

| | |
|---|-----|
| 1. Methods of waiver | 888 |
| 2. Exemption swapping | 889 |
| 3. Preclusion of recent purchases from exemptions | 890 |
| 4. Claims to which exempt property is liable | 892 |
| D. Article X | 898 |
| E. Problems the Act Ignores | 894 |
| 1. Tenancy by the entirety | 894 |
| 2. Joint cases | 898 |
| F. Chapter 400 and the Bankruptcy Code | 896 |
| 1. Section 10-1601 | 897 |
| 2. Section 10-1602(e)(6) | 899 |
| 3. Waiver of exemptions | 899 |
| G. A Constitutional Problem | 900 |
| IV. Suggestions for Revision | 902 |
| A. Definitions and Terminology | 904 |
| B. Procedure | 905 |
| C. Substantive Provisions | 906 |
| D. Inconsistency with Bankruptcy Law | 908 |
| V. Conclusion | 906 |

INTRODUCTION

On June 2, 1981, the North Carolina General Assembly ratified chapter 400 of the 1981 Session Laws House Bill 918, entitled "An Act to Improve the Laws Relating to the Collection of Money Judgments and the Exemptions, Part 2, Exemptions."¹ As originally enacted, chapter 400 had an effective date of October 2, 1982.² On October 9, 1981, however, the General Assembly amended chapter 400 to postpone its effective date until January 1, 1982.³ The Act will affect state law proceedings to collect

1. Act of June 2, 1981, ch. 400, § 1, 1981 N.C. Adv. Legis. Serv. No. 5 at 16 (to be revised at N.C. GEN. STAT. §§ 10-1601 to -1604). Originally, a complete revision of North Carolina's money judgment collection laws was intended. Part 1, entitled "Machinery," was introduced as House Bill 954. It was referred to the Court's Commission for further study and was not ratified. Part 2 of the revision was to have revised North Carolina's garnishment of wages laws; however, no bill was introduced. Part 3, entitled "Tenancy by the Entirety," would have revised North Carolina law relating to curtesy property. It was introduced as House Bill 180, but failed several readings in the General Assembly. Part 5 was thus the sole survivor of the overall plan of revision.

2. Act of June 2, 1981, ch. 400, § 8, 1981 N.C. Adv. Legis. Serv. No. 5 at 62, as amended by Act of Oct. 9, 1981, ch. 1000, § 1, 1981 N.C. Adv. Legis. Serv. No. 9 at ____.

3. Act of Oct. 9, 1981, ch. 1000, § 1, 1981 N.C. Adv. Legis. Serv. No. 9 at ____ For a nine-day period between October 1 and October 9, 1981, chapter 400 was fully in force. Section 7 of chapter 1000 acknowledges this by providing that the amendment will not apply to any exemptions set aside by a court order during the interim period. In addition, debtors who filed bankruptcy petitions during the first nine days of October 1981 are restricted to choosing between the state law exemptions of chapter 400 and article X of the North Carolina Constitution. The original sponsor of House Bill 918, Representative Paul Falloy of Durham, received a one-year delay, to October 1, 1982, to permit further study of the Act, and the House initially agreed. The Senate, however, was unwilling to accept a one-year delay. The result was a three-month postponement to January 1, 1982. Durham, Mary-

money judgments as well as cases filed in federal bankruptcy courts. The Act repealed C.S. 1-269 through 1-322⁶ and substituted a detailed set of property exemptions available to "debtors" and a procedure for claiming exemptions, to be designated as chapter 1C, article 38 of the North Carolina General Statutes.⁷

This article is designed to familiarize North Carolina practitioners with the substantive and procedural provisions of chapter 480. The article discusses prior law and the changes wrought by chapter 480, compares operative provisions of federal bankruptcy law, and suggests the potential unconstitutionality of the new exemption act. Finally, revisions are suggested that may ease the ambiguities and other inadequacies of chapter 480.

I. BACKGROUND

Each of the fifty states, either by constitutional provision or by statute, exempts from the judgment collection process various property of the judgment debtor.⁸ These laws make specified property impervious to levy pursuant to writs of execution, garnishment, attachment, or other collection procedures and thus unavailable to creditors. Typically, provisions protect both the "homestead" (usually, the debtor's residence) and certain personal property, such as household goods, wearing apparel, and tools of the trade. Life insurance contracts are also commonly protected. Beyond these species of property, however, little generalization is possible, since the states vary enormously on the types and amounts of property that should be kept beyond the reach of creditors.⁹

The most commonly cited basis for exemption laws is that, by permitting a debtor to retain a minimum level of property, such as a home, clothing, and tools of his trade, the debtor and his or her family will not be completely destitute and thus burden society without means of financial rehabilitation.¹⁰ Nonetheless, exemption laws in general have been criticized as being both inadequate and outdated.¹¹ A rough compari-

¹ing Herald, Dec. 10, 1981, at 11, col. 4.

²C. N.C. GEN. STAT. §§ 1-269 to 1-322 (1980 & Cum. Supp. 1979) (repealed 1981).

³A. Act of June 2, 1980, ch. 480, § 1, 1980 N.C. ADV. LEGIS. SERV. NO. 6 at 10 (to be codified at N.C. GEN. STAT. §§ 1C-2601 to 1-304).

⁴R. D. BERTAK & J. LINDERS, DEBTORS AND CREDITORS 126 (1978); W. WALKER & R. HARRIS, DEBTOR-CREDITOR LAW 110 (3d ed. 1981); see Vukowich, Debtors' Exemption Rights, 82 GEN. L.J. 773, 780 (1974).

⁵T. Upton-Smith, For a New Exemptive Policy in Bankruptcy, 14 BENTON L. REV. 373, 381-82 (1969); Kadon, Exemption from Attachment, 38 BUS. LAW 1161 (1967); Vukowich, Debtors' Exemption Rights, 82 GEN. L.J. 773, 780 (1974).

⁶B. Vukowich, Debtors' Exemption Rights, 82 GEN. L.J. 773, 783-84 (1974); Note, Does North Carolina Really Have a Homestead Exemption?, 2 WAKE FOREST L. REV. L. REV. 50, 51 (1966); see D. BERTAK & J. LINDERS, DEBTORS AND CREDITORS 126 (1978).

⁷T. Upton-Smith, For a New Exemptive Policy in Bankruptcy, 14 BENTON L. REV. 373, 381-82 (1969); Vukowich, Debtors' Exemption Rights, 82 GEN. L.J. 773, 780 (1974); see REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, ILL. DR. NO. 101, pt. 3, 984 CONG. 1st SESS. 171 (1973).

son of general state exemption laws illustrates the disparity in treatment, as well as the somewhat dated nature, of many state exemption laws. For example, Texas provides a homestead exemption of up to 200 acres of rural property, including improvements and, alternatively, an exemption for a parcel of city land valued at \$10,000 or less, exclusive of improvements at the time of its designation.¹⁰ North Dakota exempts up to \$80,000 in value, over and above all liens and encumbrances, for homestead property.¹¹ Six states,¹² however, do not provide any homestead exemption, and many of the states that do provide a homestead exemption limit its value to \$5,000 or less.¹³ The exemptions for personal property are almost as diverse as those for the homestead. Generally, statutory personal property exemption provisions fall into two categories: those that list and exempt specific items of personal property, such as clothing, the family bible, family pictures, livestock, and wedding rings, and those that simply establish a maximum dollar limit on the amount of personal property that may be exempted, leaving the selection to the debtor.¹⁴

In 1976 the National Conference of Commissioners on Uniform State Laws proposed a Uniform Exemption Act,¹⁵ which was subsequently approved by the American Bar Association in 1977.¹⁶ The Uniform Exemption Act was drafted in response to the 1973 Report of the Bankruptcy Commission, which characterized most states' exemptions as "archaic" and "niggardly."¹⁷ The Uniform Act identifies specific categories of property, such as a residence, an automobile, clothing, and tools of the trade, and imposes maximum amounts exemptible, expressed in inflation adjusted dollars.¹⁸ Perhaps the most significant feature of the Uniform Act, however, is the provision that a creditor of one spouse ought to be able to satisfy his judgment out of the debtor's interest in tenancy by-the-whole property.¹⁹ Since its appearance in 1976, no state has adopted the Uniform Act, but its influence can be seen in section 522 of the Bankruptcy Reform Act of 1978.²⁰ In turn, section 522 of the Code provided

10. TEX. REV. CIV. STAT. ANN. art. 282d (Venue 1939).

11. N.D. CONST. Code § 17-18-04 (1973).

12. The six states are Connecticut, Delaware, Maryland, New Jersey, Pennsylvania, and Rhode Island. Note, *Bankruptcy Exemption Critique and Suggestions*, 60 *Vanderbilt L.J.* 1469, 1472 n.76 (1959).

13. Valutovich, *Debtors' Exemption Rights*, 62 *Georgetown L.J.* 379, 370 (1954).

14. *Id.* at 325-32; see *UNIFORM EXEMPTION ACT* § 2; D. ESKRICH & J. LEWIS, *DEBTS AND CREDITORS* 124 (1978); *UNIFORM ACT*, Code § 2-10-6 (Cum. Supp. 1981) (general exemption up to \$3,000 in value) with *ARIZ. REV. STAT. ANN.* § 20-1123, 1125 (Cum. Supp. 1981) (specific exemptions, e.g., one living room chair, one television set) and *N.Y. EXEC. PROB. LAW* § 502a (McKinney 1975 & Cum. Supp. 1981) (a set of pax in a place of public worship) and *VA. CODE* § 34-23 (1980) (six plates, 20 pounds bacon, 20 bushels potatoes).

15. *UNIFORM EXEMPTION ACT* §§ 1-25.

16. 18 *UNIFORM LAWS ANNOT.* 455 (1977).

17. *REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES*, H.R. Doc. No. 317, pt. 1, 93d Cong., 1st Sess. 171 (1973).

18. *UNIFORM EXEMPTION ACT* §§ 9-2.

19. *Id.* § 4.

20. 11 U.S.C. § 542 (Supp. III 1979); see H.R. REP. NO. 565, 95th Cong., 1st Sess. 261,

the basic framework for North Carolina's new Act.

II. THE OLD LAW

In North Carolina the practice of exempting various personal property from the collection process dates back at least to 1773.²¹ Between 1773 and the Civil War, on several occasions the General Assembly addressed the question of exemptions,²² usually designating specific items of personalty as exempt from levy.²³ Thus, the debtor's clothing, tools, bed, loom, bible, hymn book, prayer book, and school books were at various times protected from execution.²⁴ The concept of exempt property became firmly embedded in North Carolina law with the ratification of article X of the North Carolina Constitution of 1868.²⁵ Section 1 of article X exempted from execution personal property, as selected by the debtor, "to the value of five hundred dollars."²⁶ Section 2 of article X exempted the homestead "and the dwelling and buildings used therewith" to a maximum value of \$1,000.²⁷ North Carolina thus followed the lead of Texas, which had pioneered the practice of exempting from execution real property used as the debtor's homestead.²⁸ Section 7 of article X exempted life insurance policies held by the debtor "for the sole use and benefit of his wife and children."²⁹ Sections 1 and 2 of article X were implemented by G.S. 1-369 through 1-372 and its predecessors.³⁰ These statutes provided a procedure for designating a debtor's exempt property by requiring the clerk of superior court, upon the request of "any resident," to appoint three disinterested persons to "allot" the debtor's homestead by metes and bounds to a value of \$1,000 and to "set apart" personal property chosen by the debtor to a value of \$500.³¹ In the absence of a prior request by the debtor, the sheriff was required to appoint three "discreet persons" to appraise and allot the homestead as a prerequisite to levying upon real property owned by the debtor.³² Article X remained unchanged for over a hundred years.³³ In 1971, however, sections 1 and 2 were

Approved to (1972) L.S. Code Comm. & An. News 5960, 6315.

21. *Agriest, Homestead Exemption in North Carolina*, 39 N.C.L. REV. 142, 143 n1 (1951).

22. *Id.*, see S.A. McLESTER, *NORTH CAROLINA DEBTORS AND PROCEDURES* § 2513, at § 4-15 (2d ed. 1958).

23. S.A. McLESTER, *NORTH CAROLINA DEBTORS AND PROCEDURES* § 2511, at 314-55 (2d ed. 1958).

24. *Id.*

25. N.C. CONST. of 1868, art. X.

26. *Id.* § 1.

27. *Id.* § 2.

28. *Agriest, Homestead Exemption in North Carolina*, 39 N.C.L. REV. 142, 149 (1951); see S. RUSSELL, *CREDITORS' REMEDIES AND DEBTORS' PROCEDURES* 311 (2d ed. 1955).

29. N.C. CONST. of 1868, art. X, § 7.

30. N.C. GEN. STAT. §§ 1-369 to -372 (1969 & Cum. Supp. 1976) (repealed 1981).

31. *Id.* § 1-369 (Cum. Supp. 1976) (repealed 1981).

32. *Id.* §§ 1-375, -376 (1969 & Cum. Supp. 1976) (repealed 1981); cf. *id.* §§ 1-371, -372 (1969 & Cum. Supp. 1976) (repealed 1981).

33. *Swann Printing, Inc. v. Schindler*, 84 N.C. App. 627, 640, 258 S.E.2d 744, 746

amended.⁴⁴ The \$500 and \$1,000 ceilings on personal and real property became floors, and the General Assembly was expressly authorized to set higher limits if it so chose.⁴⁵ The invitation has gone unanswered for ten years. Even with the enactment of chapter 400, the legislature can at best be said to have obliquely responded by effectively bypassing article X altogether.

The \$500 personal property and the \$1,000 homestead exemptions provided by article X were undoubtedly generous when they first appeared; in 1869, \$1,000 could buy a 200-acre farm complete with farm-house and outbuilding.⁴⁶ With the passage of time, the amount of property that a \$1,000 exemption could protect decreased as property values increased. The homestead exemption nonetheless developed into something much more substantial than a mere \$1,000 interest because of the construction given to it by the North Carolina Supreme Court. In 1886 it was established in *Campbell v. White*⁴⁷ that the execution sale of an undivided fractional interest in the homestead with a market value greater than \$1,000 was not possible under article X and its implementing legislation.⁴⁸ In plain language, the court indicated its reluctance to authorize any sort of procedure not expressly permitted by article X: "[A] sale of

(1977), cert. denied, 294 N.C. 412, 341 S.E.2d 844 (1978).

34. 34 N.C. App. 30 (1950), 239 S.E.2d 370.

35. N.C. CONST. art. X, § 12 provide:

Section 1. Personal property exemptions. The personal property of any resident of this State, in a value fixed by the General Assembly but not less than \$500, to be selected by the resident, is exempted from sale under execution or other legal process of any court, raised for the collection of any debt.

Section 2. Homestead exemptions.

(1) Exemption from sale; exemption. Every homestead and the dwellings and buildings used therewith, in a value fixed by the General Assembly but not less than \$1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city or town with the dwellings and buildings used thereon, and in the same value, owned and occupied by a resident of the State, shall be exempt from sale under execution or other legal process raised on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for its purchase.

(2) Exemption for benefit of children. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the owner's children, or any of them.

(3) Exemption for benefit of widow. If the owner of a homestead dies, leaving a widow but no children, the homestead shall be exempt from the debts of her husband, and the widow and her heirs shall have so her life during her widowhood, unless she is the owner of a homestead in her own right.

(4) Conveyance of homestead. Nothing contained in this Article shall operate to prevent the owner of a homestead from disposing of it by deed, but no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife.

36.

36. *Beemer Drinery, Inc. v. Seaborn*, 35 N.C. App. 601, 603, 238 S.E.2d 223, 245-46 (1977), cert. denied, 293 N.C. 412, 341 S.E.2d 844 (1978). According to testimony, \$1,000 in 1869 would have been worth \$170,000 in 1975. 34 N.C. App. at 680, 239 S.E.2d at 245-46.

37. 36 N.C. 191 (1880).

38. *Id.* at 484.

the entirety with a view to an appointment of the funds would defeat the primary object of the law, which seeks to reserve a home and shelter for the insolvent debtor and his family."³⁸ One year later, the court reiterated its reading of the homestead exemption in *Oakley v. Van Noppen*,³⁹ holding that a creditor may not satisfy the requirements of article X by having the property sold at execution and paying over the first \$1,000 of proceeds to the debtor.

In *Campbell* the court acknowledged the obvious problem with the homestead exemption: "What may a creditor do if the homestead is worth more than \$1,000?" According to the *Campbell* court, the only solution immediately available would be a forced partition of the property:

[W]e do not see why a portion of the house, containing rooms of sufficient value, may not be set apart, as in an allotment of dower. There are inconveniences readily anticipated in such a subdivision, but they are unavoidable in giving effect to the law and preserving the rights of both debtor and creditor.⁴⁰

The "inconveniences readily anticipated" were sharply illustrated in 1977 in *Seaman Fraternity, Inc. v. Schirmer*.⁴¹ When the judgment creditor obtained a writ of execution, the judgment debtor petitioned to have his homestead set aside. Since the value of the residence was well in excess of \$1,000,⁴² by statute the judgment debtor was permitted to choose the portion of the homestead, equal to \$1,000 in value, to be allotted to him.⁴³ At the debtor's request, the appraisers allotted him an area approximately five feet wide and fifteen feet long, which was located in the front hallway of his home.⁴⁴ Seeking to preserve the entire house, the debtor appealed the superior court's order confirming the allotment.⁴⁵ The court of appeals affirmed the superior court's decision that the judgment debtor was not entitled to have the entire residence included in his exemption, thus clearing the way for a sale at execution of the residence minus the seventy-five square feet of hallway space allotted to the debtor.⁴⁶ The opinion, echoing the *Campbell* decision, recognized the mutually unsatisfactory results produced by article X and the implementing statutes:

It may be conceded that the result reached in the present case is absurd and benefits neither the debtor nor his creditor. The debtor has his homestead in an area which is utterly useless to him, while the

38. *Id.*

39. 86 N.C. 247, 2 S.E. 602 (1887).

40. *Campbell v. White*, 56 N.C. 491, 484-85 (1815).

41. 72 N.C. 191.

42. 84 N.C. App. 301, 218 S.E.2d 761 (1977), *cert. denied*, 286 N.C. 512, 211 S.E.2d 844 (1978).

43. 81 N.C. App. at 304, 286 S.E.2d at 765. The property was valued at \$52,000.

44. *Id.* The procedure was authorized by N.C. Gen. Stat. § 1-272 (1969) (repealed 1981).

45. 81 N.C. App. at 316, 286 S.E.2d at 768.

46. 72 N.C. 191, 88 S.E.2d at 195.

47. *Id.* at 192, 88 S.E.2d at 197.

value of his remaining property from which his creditor must seek to collect his judgment has been substantially impaired.⁴⁵

This, then, was the state of affairs of the North Carolina homestead exemption prior to 1981—an arrangement that was the victim of legislative neglect, bound to satisfy neither debtor nor creditor. Substantial doubt persists regarding the significance of article X in the wake of chapter 480. It is less than clear whether the "inconveniences" of the homestead exemption recognized by the court in *Campbell v. White*⁴⁶ finally have been corrected.

It is, of course, entirely possible to provide a system of exemptions without protecting the "homestead," as six states presently do.⁴⁷ At least one commentator has suggested that, because today "living in rental units presents a reasonable alternative to home ownership," the homestead exemption unnecessarily prejudices collection efforts and should be abolished.⁴⁸ Thus, it may be that the critical flaw in North Carolina's homestead exemption is not that the \$1,000 value is too low, but that, because of the construction given article X, section 2 by the courts,⁴⁹ its effect and its harm to creditors is entirely out of proportion to its apparent purpose. Assuming that alternatives to home ownership are generally available, as long as a debtor's stream of income is protected against garnishment or other process so that he can meet rental obligations, it can be argued that a formal homestead exemption—at least in urban areas—is unnecessary.

The history of the \$500 personal property exemption is less tortured. Section 1 of article X permits the debtor to exempt personal property, chosen by him, to a value of \$500.⁵⁰ Early on, the court determined that section 1 constituted "a continual mandate . . . to leave so much of the debtor's personal estate untouched for his use."⁵¹ Thus, debtors had a right of replenishment, if necessary, in order to maintain a "personal estate" to a value of \$500.⁵² The \$500 exemption thus became a continuing guarantee that a minimum amount of personal property would always be protected from creditors.⁵³

As with the homestead exemption, a recent case illustrates the fallacy and oddities of the personal property exemption. In *Montford v. Groffman*⁵⁴ the North Carolina Court of Appeals, though conceding that an executory waiver of exemption rights is unenforceable, nonetheless

45. *Id.* at 691, 40 S.B.2d at 768.

46. 85 N.C. 481 (1856).

47. See text accompanying note 3 *supra*.

48. Vukowich, *Debtors' Exemption Rights*, 65 *Geo. L.J.* 773, 803 (1974).

49. E.g., *Campbell v. White*, 96 N.C. 407 (1858) (execution sale of exempted homestead property not possible under article X).

50. N.C. CONST. art. X, § 1.

51. *Campbell v. White*, 95 N.C. 344, 346 (1858).

52. *Id.*

53. See *Commissioner of Debits or rel. Goldberger Sav. & Trust Co. v. Yelverton*, 204 N.C. 167, 168 S.E. 606 (1932); Note, *Anti-Purchase Security Agreements as a Replenishment of the Personal Property Exemption*, 15 *Wake Forest L. Rev.* 109, 111 (1978).

54. 36 N.C. App. 703, 243 S.E.2d 270 (1978).

sanctioned a procedure leading to the same result—the use of a blanket nonpurchase money security interest in exempt property.⁵⁵ Thus, what could not be done directly could be done indirectly, thereby diminishing whatever small comfort article X, section 1 provided debtors.

III. THE NEW ACT

A. An Overview

1. Definitions and background

House Bill 311, ratified as chapter 495 of the 1981 Session Laws and amended by House Bill 1397, ratified as chapter 1001,⁵⁶ repealed G.S. 1-369 through 1-392⁵⁷ and added a new chapter 1C to the North Carolina General Statutes. Section 1C-1601 catalogs the property that "debtors" may designate as exempt.⁵⁸ Section 1C-1602 makes optional the exemptions provided by the Act⁵⁹ debtors may elect instead to take the exemptions provided by article X of the constitution.⁶⁰ Section 1C-1603 sets forth the procedure for claiming exempt property.⁶¹ Section 1C-1604 describes the legal effect of having property designated as exempt.⁶²

The exemptions are available to any individual who is a resident of North Carolina.⁶³ The term "debtor" is not defined in the Act. In most cases, however, "debtor" will mean "judgment debtor," since only "judgment debtors" are eligible under section 1C-1603(a)(2) to have their exempt property set aside, and only "judgment creditors" are eligible to request designation of the exempt property of the "debtor" under section 1C-1603(a)(2).⁶⁴ In fact, the only time a non-judgment "debtor" possibly would have recourse to the Act's protection would be in a bankruptcy case, though in practical terms the instances in which a "debtor" within the meaning of the Bankruptcy Reform Act⁶⁵ would not also be someone's "judgment debtor" would be rare.⁶⁶ "Exempt property" is indirectly de-

55. *Id.* at 777-86, 919 S.F.2d at 828-33. A more recent court of appeals decision held that the homestead exemption provided by article X, § 2 can be waived. *North Carolina Nat'l Bank v. Sharrow*, 61 N.C. App. 857, 358 S.F.2d 368 (1976).

56. Act of June 3, 1981, ch. 1001, §§ 1-3, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-22 (to be codified as N.C. Gen. Stat. §§ 1C-1301 to 1304), as amended by Act of Oct. 5, 1981, ch. 1001, § 1, 1981 N.C. Adv. Legis. Serv. No. 9 at . . .

57. Act of June 3, 1981, ch. 1001, § 2, 1981 N.C. Adv. Legis. Serv. No. 6 at 22.

58. *Id.*, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18 (to be codified as N.C. Gen. Stat. § 1C-1601).

59. *Id.* at 20 (to be codified as N.C. Gen. Stat. § 1C-1602).

60. See N.C. CONST. art. X.

61. Act of June 2, 1981, ch. 420, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 20 (to be codified as N.C. Gen. Stat. § 1C-1603).

62. *Id.* at 31 (to be codified as N.C. Gen. Stat. § 1C-1604).

63. *Id.* at 16 (to be codified as N.C. Gen. Stat. § 1C-1601).

64. *Id.* (to be codified as N.C. Gen. Stat. § 1C-1603(a)(1) (2)).

65. 11 U.S.C. § 101(19) (Supp. III 1978).

66. Section 101 of the Bankruptcy Reform Act defines "debtor" as a "person or municipality concerning which a case under this title has been commenced," and defines "creditor" as "creditor in a claim." 11 U.S.C. § 101(11) (12) (Supp. III 1978). Neither § 103

defined in section 1C-1601(a) as property that the debtor is entitled to retain "free of the enforcement of the claims of his creditors."⁷¹ The only term plainly defined in section 1C-1601 is "value," which is defined as the "fair market value of an individual's interest in property, exclusive of valid liens."⁷²

Specific exemptions are provided for a residence, a motor vehicle, personal property, tools of the debtor's trade, life insurance, health aids, and certain payments received as compensation for personal injury or for the death of an individual on whom the debtor depended for support.⁷³ This pattern of exemptions reflects the exemptions provided by section 522(d) of the Bankruptcy Code.⁷⁴ Although it is clear that section 522(e) served as a basic model for section 1C-1601, significant differences exist between the two laws. With one or two exceptions, the exemptions permitted under section 1C-1601 are less generous than those provided by section 522(e).⁷⁵

2. An initial dilemma: forced sales

Dollar limitations are imposed on the extent of the debtor's interest in the specific exemptions listed in section 1C-1601.⁷⁶ For example, the debtor's interest in a motor vehicle is limited to \$1,000 in value, and the debtor's interest in property used as a residence is limited to \$7,500 in value.⁷⁷ If the debtor has an interest in his automobile in excess of \$1,000 or in his home in excess of \$7,500, it appears that the Act will permit a forced sale of the property with the debtor receiving the first \$1,000 or \$7,500, respectively, of the proceeds, which represents his "cash-out" interest. The Act does not clearly state whether forced sales are authorized, nor does it provide a procedure for conducting them. The confusion is heightened by the fact that a number of states with similar value limitations do provide specific machinery for liquidating the exempt property and paying the debtor the cash value of the exemption.⁷⁸

The starting point for determining whether forced sales are author-

("Who may be a debtor?") § 801 ("Voluntary cases"), see § 808 ("Involuntary cases") requires a debtor to be a "judgment debtor" for a case to be commenced. 71 §§ 10a, 901, 902.

71. Act of June 2, 1951, ch. 480, § 1, 1951 N.C. Adv. Legis. Serv. No. 6 at 16-17 (to be codified at N.C. Gen. Stat. § 1C-1601(a)).

72. *Id.*

73. *Id.*

74. 11 C.F.R. § 622(h) (Supp. 10 1970).

75. Compare *id.* with Act of June 2, 1951, ch. 480, § 1, 1951 N.C. Adv. Legis. Serv. No. 6 at 16-17 (to be codified at N.C. Gen. Stat. § 1C-1601).

76. Act of June 2, 1951, ch. 480, § 1, 1951 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601).

77. *Id.*

78. See, e.g., Ala. Code § 6-10-30(b) (Cum. Supp. 1981); Conn. Rev. Stat. § 18-55-160 (1973); Fla. Ann. Stat. ch. 38, § 4 (Southwest Ann. Supp. 1971); Mich. Stat. Ann. § 27A.823 (1977); Minn. Stat. Ann. § 65B.41 (West 1977); Or. Rev. Stat. § 28.183(2) (1977). See also Volkovich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act of 1978*, 10 N.C.L. Inst. 763, 810 (1983).

ized is section 1C-1604(a), captioned "Effect of Exemption."⁷⁹ This section provides that "[p]roperty allocated to the debtor as exempt is free of the enforcement of the claims of creditors for indebtedness incurred before or after the exempt property is set aside . . . for so long as the debtor owns it."⁸⁰ What is the precise meaning of the phrase "property allocated"? In the context of a residence, for example, it is unclear whether "property allocated" refers to an undivided fractional interest in the house and lot itself or simply to the first \$7,500 of the debtor's equity in the house and lot. A similar problem exists with section 522 of the Bankruptcy Code, since it provides no express authorization to "cash out" the debtor's exemptible interest through a liquidation sale.⁸¹ Section 522 of the Bankruptcy Code is supplemented, however, by section 541 of the Code,⁸² for which there is no counterpart in the new Act. Section 541 brings into the debtor's estate all of his or her interests in property.⁸³ Under section 522, the debtor may then exempt out of the estate the property described in section 522(d), but only to the extent of the values stipulated.⁸⁴ The remaining interest in the property becomes property of the estate and thus is liable for liquidation and distribution to creditors.⁸⁵ Therefore, in bankruptcy the answer is clear: the \$7,500 "interest" in a residence, like the \$1,200 "interest" in an automobile, refers only to the debtor's equity, and not to the actual property itself.⁸⁶ For example, if the debtor's interest exceeds \$1,200 in the automobile to be sold, the debtor receives the first \$1,200 of proceeds.

It is unclear whether North Carolina's new Act would permit this type of sale. Because the new Act contains no provision comparable to section 541 of the Bankruptcy Code,⁸⁷ the conclusion that a forced sale of exempt property is permissible must be based on sections of the Act other than section 1C-1604.⁸⁸ First, the phrase "property allocated" as used in section 1C-1604⁸⁹ refers to the kinds of property described in section 1C-1601, which speaks solely in terms of exemptible interests and expresses them in dollar amounts.⁹⁰ This is in contrast to the traditional

79. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 30 (to be codified at N.C. Gen. Stat. § 1C-1604(a)).

80. *Id.*

81. See 11 U.S.C. § 522 (Supp. III 1979); Valovick, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 95 N.C.L. Rev. 739, 672-73 (1969).

82. 11 U.S.C. § 541 (Supp. III 1979).

83. *Id.*

84. *Id.* § 522(d).

85. See *supra*, note 1, § 541(b).

86. See 3 COLLIER ON BANKRUPTCY 11 582.13, 582.11 (15th ed. 1977 & Cum. Supp. 1980). See also H.B. REP. NO. 819, 95th Cong., 1st Sess. 59C-21 (1977), reprinted in (1978) U.S. CONG. COMM. & AN. NEWS 1981, 8118; Valovick, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 95 N.C.L. Rev. 739, 672-73 (1969).

87. 11 U.S.C. § 541 (Supp. III 1979).

88. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 30 (to be codified at N.C. Gen. Stat. § 1C-1604).

89. *Id.*

90. *Id.* at 16 (to be codified at N.C. Gen. Stat. § 1C-1601).

approach of early exemption statutes, which simply catalogued various items of property as exempt without referring to value.⁹¹ To give any meaning at all to the "interest in value" approach used in section 1C-1601,⁹² one must conclude that the General Assembly contemplated a forced sale of exempt assets if their value exceeds the dollar limitations specified. To conclude otherwise leads to a windfall either for the debtor, by permitting him to retain property in which his interest exceeds the dollar limitations, or for the creditor, by permitting sale of any exemptible assets in which the debtor's interest exceeds the dollar limitations without payment of any proceeds to the debtor. The alternative—the forced sale of the exempt property subject to the debtor's interest—simply adapts and expands the illogic illustrated by *Seaman Printery, Inc. v. Schickel*.⁹³

Furthermore, permitting the practice of cashing out the debtor's interest is the only construction of the statute that would be consistent with the purpose of section 1C-1603(e)(3),⁹⁴ which permits a debtor to retain exempt property "having value in excess of the allowable exemption" if the debtor makes available to creditors "money or property not otherwise available . . . equivalent to the excess value."⁹⁵ Section 1C-1603(e)(3) thus implies that, unless the debtor surrenders "property not otherwise available,"⁹⁶ he has no right to retain property with a value greater than the allowable exemption.

Additionally, nothing in the new Act corresponds to the "allotment by notes and bonds" procedure of now-repealed G.S. 1-373.⁹⁷ That procedure may well have served as the basis for the rule developed by cases such as *Campbell v. White*,⁹⁸ *Osley v. Von Noppen*,⁹⁹ and *Seaman Printery, Inc. v. Schickel*,¹⁰⁰ which produced a forced sale.¹⁰¹ The mere exclusion of the "allotment" requirement, however, does not resolve whether a forced sale is authorized.

91. See text accompanying notes 8-10 *supra*.

92. Act of June 2, 1961, ch. 430, § 1, 1961 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601).

93. 34 N.C. App. 687, 239 S.E.2d 744 (1977), rev. denied, 294 N.C. 462, 241 S.E.2d 844 (1978).

94. Act of June 9, 1961, ch. 430, § 1, 1961 N.C. Adv. Legis. Serv. No. 6 at 30 (to be codified at N.C. Gen. Stat. § 1C-1603(e)(3)).

95. *Id.*

96. *Id.*

97. N.C. Gen. Stat. § 1-373 (1960) (repealed 1961) provided in relevant part:

Duty of appraisers; proceedings on return. The appraisers shall value the homestead with its dwelling and buildings thereon, and by or to the owner or to any agent or attorney, in his behalf, such portion as he desires and receiving in value not less than dollars, and must file and describe the same by notes and bonds.

Id.

98. 56 N.E. 401 (1888).

99. 26 N.C. 387, 3 S.E. 163 (1847).

100. 34 N.C. App. 687, 239 S.E.2d 744 (1977), rev. denied, 294 N.C. 462, 241 S.E.2d 844 (1978).

101. See text accompanying notes 95 & 96 *supra*.

The last sentence of section 1C-1603(c)(i)¹⁰² seemingly provides the solution to this dilemma: "The court may provide for the sale of property having excess value and appropriate distribution of the proceeds at a time and in a manner fixed by the order."¹⁰³ The significance of this provision is doubtful. First, its location is peculiar; it appears almost as an after-thought in a subsection permitting "exemption swapping," a procedure altogether different from forced sale of exempt property. Does it thus refer only to the subject matter of section 1C-1603(c)(i),¹⁰⁴ or is its intended application more general? Second, the permissive tone of the language is troublesome. Since section 1C-1601(a) indicates that the debtor is entitled to certain dollar-expressed "interests in value,"¹⁰⁵ should not the court be required to order a liquidation sale and be under a duty to pay first the dollar value of the exemption to the debtor? Finally, a single sentence seems inadequate for the task of describing how the competing interests of a debtor and a creditor in property with a value in excess of the exemption amount are to be resolved. It leaves unanswered questions such as how long the cash proceeds of a liquidation sale paid over to the debtor are exempt, and whether the proceeds must be immediately invested in exempt property. Simply put, the last sentence of section 1C-1603(a)(B)¹⁰⁶ raises at least as many questions as it answers.

3. Specific exemptions

a. *Residence.* The debtor's "aggregate interest" in real or personal property used as a residence by the debtor or a dependent of the debtor is exempt to a limit of \$7,500 in value.¹⁰⁷ The language of section 1C-1601(a),¹⁰⁸ which is borrowed verbatim from section 522(d)(1) of the Bankruptcy Code,¹⁰⁹ should resolve a number of questions that previously existed regarding the homestead exemption. The nature of the property, whether real or personal, is now irrelevant. Interests in mobile homes, condominiums, and cooperatives all fall within the meaning of section 1C-1601(a)(1).¹¹⁰ The critical inquiry is the use to which the property is put; under the new Act, the property must be used as a residence.¹¹¹ This approach thus resolves the question of "use" not addressed by the North Carolina Constitution.¹¹²

102. Act of June 3, 1981, ch. 480, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 90 (to be codified at N.C. Gen. Stat. § 1C-1603(a)(B)).

103. *Id.*

104. *Id.*

105. *Id.* at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(a)).

106. *Id.* at 35 (to be codified at N.C. Gen. Stat. § 1C-1603(a)(B)).

107. *Id.* at 16 (to be codified as N.C. Gen. Stat. § 1C-1601(a)(1)). Alternatively, a debtor may elect to have a burial plot protected from creditors. *Id.*

108. *Id.*

109. 11 U.S.C. § 522(d)(1) (Supp. III 1979).

110. Act of June 2, 1981, ch. 480, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(a)(1)).

111. *Id.*

112. N.C. Const. art. X, § 2; see *Watts v. Hughes*, 67 N.C. 300 (1843). See also *Ag-*

The most significant feature of section 1C-1601(a)(2)¹¹³ is that it permits a sale of the property claimed as a residence, with the first \$7,500 of "value" paid over to the debtor as his residence exemption, thus belatedly sanctioning the maneuver unsuccessfully attempted in *Oshtey v. Van Wagoner*¹¹⁴ and resolving the dilemma posed by *Seaman Printery, Inc. v. Schifano*.¹¹⁵ In these situations, the definition of "value" becomes critical. Since section 1C-1601(b) defines "value" as "fair market value . . . exclusive of valid liens," the \$7,500 exemption may be taken only out of the debtor's equity in the property.¹¹⁶ Difficulties arise, however, from the use of the term "liens." "Liens" may include not only purchase money mortgages, but also nonpurchase money mortgages, mechanics' liens, and judgment liens. Each lien reduces the amount to which a debtor may look to claim his residence exemption. It appears, therefore, that a judgment debtor whose creditor has had the good sense to ensure that his judgment has been docketed¹¹⁷ may find that there is nothing available in the way of an interest, exclusive of valid liens, from which to allow any residence exemption. Consequently, the value of this exemption is doubtful, and the method prescribed for computing "value" may serve to undercut the otherwise apparent purpose of the exemption: to provide basic shelter for the judgment debtor and his or her dependents. Basically, the problem is simply that the Act only stays the enforcement of money judgments against exempt property; it does not prevent the attachment of liens. Since attachment of a judgment lien has the automatic effect under section 1C-1601(b)¹¹⁸ of decreasing the debtor's equity, and thus his exemptable interest, the ban on enforcement of money judgments is meaningless. Any kind of lien will always be enforceable prior to designation of the residence exemption, since the lien will never reach exempt property due to the definition of "value." This result also may obtain if a lien arises after the debtor has had his residence exemption formally designated, since attachment has the automatic effect of reducing "value" and "equity," and thus the debtor's exemptable interest. The danger of post-designation enforcement of judgment liens is heightened by section 1C-1803(g), which states that an exemption may be modified due to a "sub-

ork, *Homestead Exemption in North Carolina*, 29 N.C.L. Rev. 143, 151 (1951); Note, *Does North Carolina Really Have A Homestead Exemption?*, 2 Wake Forest L. Rev. 69, 75 (1916).

113. Act of June 2, 1951, ch. 494, § 1, 1951 N.C. Adv. Legis. Serv. No. 8 at 26 (to be codified at N.C. Gen. Stat. § 1C-1601(a)(2)).

114. 85 N.C. 247, 2 S.E. 678 (1887).

115. 34 N.C. App. 637, 228 S.E.2d 741 (1977), cert. denied, 344 N.C. 142, 323 S.E.2d 1874.

116. Act of June 2, 1961, ch. 494, § 1, 1961 N.C. Adv. Legis. Serv. No. 6 at 26 (to be codified at N.C. Gen. Stat. § 1C-1601(b)).

117. Pursuant to N.C. Gen. Stat. § 1-403 (Comm. Supp. 1976), the docketing of a money judgment constitutes a lien on all real property of the debtor located in the county or counties where the judgment is docketed.

118. Act of June 2, 1961, ch. 494, § 1, 1961 N.C. Adv. Legis. Serv. No. 6 at 23 (to be codified at N.C. Gen. Stat. § 1C-1601(b)).

stantial change in value."¹¹⁹ Presumably, the attachment of a lien subsequent to exemption designation would constitute a "substantial change in value,"¹²⁰ thus allowing modification of the exemption.

The fact that section 1C-1603(a)¹²¹ provides a non-judgment debtor no right to have exempt property designated further suggests the illusory nature of the residence exemption. In short, at least the first judgment creditor who dockete will be able to enforce his claim against the residence. In stark contrast to prior law,¹²² the Act simply does not permit anticipatory measures by a potential judgment debtor to protect his \$7,500 of equity.

Under prior practice, allotment of the homestead operated as a stay of enforcement proceedings against the real property so designated; liens and security interests other than purchase money mortgages attached, but they were unenforceable so long as the property retained its homestead character.¹²³ Pursuant to G.S. 1-369, however, allotment of the homestead suspended the running of the statute of limitations on all judgments against the debtor for as long as the property remained his homestead.¹²⁴ Section 1C-1604 retains and extends this rule to all exempt property.¹²⁵ For real property, it would seem that this provision is now unnecessary because the debtor's exemptable interest is confined to "value," which the Act defines to be fair market value exclusive of valid liens.¹²⁶ Since the attachment of judgment liens is nowhere prohibited, it then follows that at least until the homestead exemption is formally designated, and perhaps even after such designation, the debtor's "interest" is subject to divestiture simply by docketing a judgment. For the portion of the value of the property subject to a "valid lien," there can be no exemption, and thus judgment lien creditors should be free to enforce their judgments against the debtor's real property at any time.

The difficulties outlined above can be attributed to the failure of the Act to distinguish between purchase money mortgages and mechanics' liens, which ought not to be subject to exemption rights, and all other liens that can arise on real property, which traditionally have been subject to exemption rights.¹²⁷

119. *Id.* at 31 (to be codified at N.C. Gen. Stat. § 1C-1603(c)).

120. *Id.*

121. *Id.* at 30 (to be codified at N.C. Gen. Stat. § 1C-1603(a)).

122. Prior to repeal of G.S. 1-285, any holder of the state credit petition for abatement of his homestead. Thus, a debtor was not forced to wait until a judgment had been entered against him before seeking an allotment of the homestead exemption. See N.C. Gen. Stat. § 1-285 (Gen. Supp. 1970) (repealed 1951).

123. *Agnew, Homestead Exemption in North Carolina*, 20 N.C.L. Rev. 143, 151 (1951). The issue over \$7,500 in value has of course always been vulnerable to sale to execution.

124. N.C. Gen. Stat. § 1-369 (1959) (repealed 1961).

125. Act of June 2, 1961, ch. 420, § 1, 1961 N.C. Adv. Legis. Serv. No. 6 at 31 (to be codified at N.C. Gen. Stat. § 1C-1604).

126. *Id.* at 30 (to be codified at N.C. Gen. Stat. § 1C-1601(c)).

127. The distinction between purchase money mortgages and mechanics' liens and other liens that can arise on real property historically has been recognized in North Carolina

b. *Optional "wild card" exemption.* One of the more innovative features of section 522 of the Bankruptcy Code is subsection (d)(5), which permits a debtor to exempt his or her interest in any property of his or her choosing to a value of \$400 plus any unused amount of the \$7,500 residence exemption.¹²⁸ Under section 522(d)(5), therefore, a debtor in effect begins with \$7,900 to allocate as he or she chooses, which equalizes the treatment of homeowners and renters for whom the \$7,500 residence exemption would ordinarily be useless.¹²⁹ The corresponding North Carolina provision, section 1C-1601(a)(2),¹³⁰ represents a retreat from this fairly generous provision. Further, North Carolina law in this area will continue to favor homeowners. Under section 1C-1601(a)(2), a debtor is permitted to exempt up to \$2,500 value in any property, tangible or intangible (this including savings or checking accounts), minus any amount used for the residence exemption.¹³¹ Thus, section 1C-1601(a)(2) comes into play only if less than \$2,500 in value is claimed for the residence exemption.¹³² It would therefore seem that a homeowner-debtor with relatively low (but unencumbered) equity in his or her home must make a difficult choice between the residence exemption or the "wild card" exemption.

c. *Motor vehicle.* Under § 1C-1601(a)(3), the debtor may exempt up to \$1,000 in value in a motor vehicle.¹³³ The provision is identical to that found in section 522(d)(2), except that the latter provision allows a \$1,200 exemption.¹³⁴ The debtor's "interest" in a motor vehicle is computed in the same manner as is his interest in a residence: fair market value minus

law. Article X, § 2 specifically provides that "no property shall be exempt from sale of taxes, or for payment of obligations contracted for its purchase" thus exempting encumbrances of purchase money mortgages from the operation of the homestead exemption. N.C. CONST. art. X, § 2. Article X, § 3, excepts mechanics' liens from the protection afforded by article X, §§ 1 and 2. In § 3. No such exception was ever provided for any other non-tax liens against the homestead. The problem conceivably could be avoided by an alternate reading of the definition of "value." The phrase "exclusive of valid liens" could be read to mean "net excluding valid liens," rather than "after subtracting valid liens." This reading, however, leads to problems. For example, if "valid liens" are not to be counted, then, by implication, unpaid liens would have to be counted, which makes no sense in the context of "value." Further, a debtor's "interest" in a home is invariably thought of as his "equity"—i.e., a debtor owning a \$75,000 home subject to a \$50,000 mortgage has a marketable interest of only \$25,000. Finally, this alternate reading of "value," since it disregards "valid liens," could lead to constitutional problems relating to deprivation of the property interest represented by such "valid liens."

128. 11 U.S.C. § 522(d)(5) (Supp. III 1978).

129. *Id.*

130. Act of June 3, 1981, ch. 390, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 15 (to be codified at N.C. GEN. STAT. § 1C-1601(a)(2)).

131. *Id.* (to be codified at N.C. GEN. STAT. § 1C-1601(a)(2)). (but not exemption provisions that do not provide essentially equalities for homeowners and non-homeowners is discriminatory).

132. Act of June 3, 1981, ch. 390, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 15 (to be codified at N.C. GEN. STAT. § 1C-1601(a)(2)).

133. *Id.* at 17 (to be codified at N.C. GEN. STAT. § 1C-1601(a)(3)).

134. 11 U.S.C. § 522(d)(2) (Supp. III 1978).

the amount of valid liens, such as security interests. The remainder represents the debtor's exemptible interest.

d. *Personal property.* The debtor's "aggregate interest" in "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, and musical instruments" held primarily for personal or household use, to a maximum value of \$2,500, may be exempted under section 1C-1601(g)(4).¹³⁸ An additional \$500 in value for each dependent of the debtor, to a maximum of \$2,000, may also be claimed.¹³⁹ Although the description of eligible property is identical to that found in section 522(d)(3) of the Bankruptcy Code, the \$2,500 limitation of section 1C-1601(g)(4) indicates a rejection of the Bankruptcy Code's approach, which permits a debtor to exempt a \$200 interest per item without any aggregate dollar limitation.¹⁴⁰

The debtor will be able to choose the property he wishes to exempt, so long as it is property described by section 1C-1601(g)(4).¹⁴¹ This approach, of course, is consistent with prior practice under article X, section 1 of the constitution.¹⁴² Jewelry is not expressly included in section 1C-1601(g)(4) and is not mentioned in the Act.¹⁴³ Exempting jewelry in North Carolina will prove to be difficult; it would require a strained reading of the phrases "household goods" or "wearing apparel" to fit jewelry into the language of section 1C-1601(g)(4).¹⁴⁴ Since section 522(d), after which the language of section 1C-1601(a) was patterned, expressly sets jewelry apart in section 522(d)(4) as a category distinct from household goods and wearing apparel, the omission of any mention of jewelry must be taken as indicative of clear legislative intent.¹⁴⁵ Perhaps the only certain way to protect a watch, a ring, or an heirloom necklace would be to waive the \$7,500 residence exemption and thus qualify for the \$2,500 "wild card" exemption of section 1C-1601(a)(2).¹⁴⁶

A related portion of the Act, section 1C-1601(e)(7), expands the set of exemptible household goods for some debtors.¹⁴⁷ Specifically, a non-possessory, nonpurchase money security interest in exempt property may be ignored to the extent that it impairs an exemption in the debtor's

138. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(g)(4)).

139. *Id.*

139. Compare 11 U.S.C. § 541(c)(3) (Supp. III 1979) with Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(g)(4)).

138. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(g)(4)).

139. N.C. CONST. art. X, § 1.

140. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(g)(4)).

141. *Id.*

142. Compare 11 U.S.C. § 541(c) (Supp. III 1979) with Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(a)).

143. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(g)(2)).

144. *Id.* at 19 (to be codified at N.C. Gen. Stat. § 1C-1601(c)(7)).

"household goods."¹⁴⁵ Section 1C-1601(e)(7) expressly excludes these security interests from the list of claims to which otherwise exempt property would be subject.¹⁴⁶ Thus, a creditor holding a nonpurchase money security interest in "household goods" may not safely ignore the provisions of section 1C-1601(a)(1).¹⁴⁷ Presumably, section 1C-1601(e)(7) restricts only the enforcement of these security interests; the lien on the property will remain, enforceable upon waiver or conveyance.¹⁴⁸ Thus, under the Act's definition of "value," a sofa worth \$200 but subject to a nonpurchase money security interest for a debt of \$300 would not be included in computing the \$2,500 aggregate limit because the debtor has no "interest in value" in the property.

e. *Tools of the trade.* Section 1C-1601(u)(5) protects up to a \$500 interest in "implements, professional books, or tools of the trade of the debtor."¹⁴⁹ As with the motor vehicle exemption, the language parallels the Bankruptcy Code, the most significant difference being that the corresponding value in section 522(d)(6) is \$750.¹⁵⁰ Due to the omission of a comma in section 1C-1601(a)(5),¹⁵¹ a modest discrepancy exists between the two sets of "tools of the trade" exemptions. Section 522(d)(6) reads as follows: "The debtor's aggregate interest, not to exceed \$750 in value, in any implements, professional books, or tools of the trade of the debtor"¹⁵² Section 1C-1601(a)(5) provides: "The debtor's aggregate interest, not to exceed five hundred dollars (\$500) in value, in any implements, professional books, or tools of the trade of the debtor"¹⁵³ The lack of a comma after "tools" in section 1C-1601(a)(5) may suggest that the phrase "of the trade" modifies only the word "tools," and not "implements" and "professional books," thereby providing a bit more flexibility for a debtor possessed of "implements" or "professional books" that do not directly relate to his or her "trade."¹⁵⁴

f. *Life insurance.* Section 1C-1601(a)(6)¹⁵⁵ does not purport to alter the constitutional exemption for life insurance policies; the exemption remains as provided for by article X, section 5 of the North Carolina Constitution.¹⁵⁶

145. *Id.*

146. *Id.*

147. *Id.* at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(n)(1)).

148. See *id.* at 19 (to be codified at N.C. Gen. Stat. § 1C-1601(o)(7)).

149. *Id.* at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(u)(5)).

150. 11 U.S.C. § 522(d)(6) (Supp. III 1979).

151. Act of June 9, 1977, ch. 482, § 1, 1977 N.C. Adv. Legis. Serv. No. 8 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(a)(5)).

152. 11 U.S.C. § 522(d)(6) (Supp. III 1979).

153. Act of June 9, 1977, ch. 482, § 1, 1977 N.C. Adv. Legis. Serv. No. 8 at 17 (to be codified at N.C. Gen. Stat. § 1C-1601(a)(5)).

154. *Id.*

155. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1601(a)(6)).

156. Article X, § 5 provides:

The husband may insure his own life for the sole use and benefit of his wife or children or both, and upon his death the proceeds from the insurance shall be paid to or for the benefit of the wife or children or both, or to a guardian, free

g. *Health aids.* All professionally prescribed health aids are exempted by section 1C-1801(n)(7), which is identical to section 552(d)(R) of the Code.¹⁸⁷

h. *Personal injury awards.* Compensation for personal injury or for the death of a person upon whom the debtor was dependent for support is exempted by section 1C-1801(a)(6).¹⁸⁸ No dollar limit is imposed, but this compensation is not exempt from claims related to the event giving rise to the compensation, such as hospital and doctors' bills or lawyers' fees.¹⁸⁹ Since there are no other limitations, primary or otherwise, in this exemption, its scope is open for exploration; the nondischargeable provisions do impose limits on the amount exemptible.¹⁹⁰ For example, would a personal injury award that includes an amount allocated for pain and suffering or for loss of future earnings be exempted in full? May punitive damages be exempted? The answers will turn on the courts' construction of the term "compensation."

4. Exemptions under other statutory provisions

a. *Wages.* The new Act does not affect G.S. 1-382, which makes wage garnishment impractical and thus effectively exempts wages from the reach of creditors.¹⁹¹

b. *Other benefits.* Payments made under the aid to families with dependent children program,¹⁹² unemployment benefits,¹⁹³ and workers'

from all claims of the representatives or creditors of the insured or his estate. Any insurance policy which insures a life of a husband for the sole use and benefit of his wife or children or both shall not be subject to the claims of creditors of the insured during his lifetime, whether or not the policy reverts to the insured during his lifetime and to all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured.

N.C. Code Int. X, § 5.

187. Act of June 8, 1981, ch. 240, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 17 (to be coded at N.C. Gen. Stat. § 1C-1801(n)(7)).

188. To be codified at N.C. Gen. Stat. § 1C-1801(a)(6).

189. *Id.*

190. 11 U.S.C. § 541(c)(2) (Supp. II 1979) 687,690 (on personal injury payments in compensation for "actual pecuniary loss" or for pain and suffering are not exempt. *Id.* Section 541(d)(1)(B); exempt "payment in compensation of loss of future earnings," but only to the extent "reasonably necessary" for support. *Id.* § 541(d)(1)(A)).

191. The court or judge may order any property, whether subject or not to be sold, under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due the judgment debtor, to be applied toward the satisfaction of the judgment except that the earnings of the debtor for his personal services, at any time while such debt is pending, cannot be so applied when it appears by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

N.C. Gen. Stat. § 1-382 (1980).

192. *Id.* § 168-67 (1975).

193. *Id.* § 96-27(c) (1981).

compensation¹⁶⁴ are exempted under other sections of the North Carolina General Statutes; their status is unaffected by chapter 400. Applicable federal law will continue to insulate transfer payments, such as social security¹⁶⁵ and veterans' benefits,¹⁶⁶ from the reach of creditors.

5. Effect of exemptions

Section 1C-1804 provides that exempt property is "free of the encumbrances of the claims of creditors."¹⁶⁷ Thus, exempt property is immune from sale pursuant to a writ of execution, attachment, garnishment, or other process. Under this section, it is immaterial that a claim arises before or after the exempt property is alienated. For existing liens, the exemption of a particular item ceases when the property is conveyed. The significance of a "levy" on personal property must be noted. Although a judgment lien against real property attaches by unobscuring (and thus without a "levy"), the only way that a judgment creditor can obtain a lien on the debtor's personal property is by having the sheriff levy on it pursuant to a writ of execution.¹⁶⁸ Writ levies, both prior and subsequent to the designation of exempt property and solely for the purpose of establishing a lien and a priority position, are permitted under the Act. Nothing in section 1C-1804 prohibits such a novel procedure, though the anomaly of such a situation is easily seen. "Levy" generally means seizure, and thus loss of use by the debtor, which undercuts one of the presumed reasons for providing exemptions in the first place. Nonetheless, the question remains precisely because section 1C-1804 provides that the exemption ceases upon conveyance for liens that attached prior to the conveyance.¹⁶⁹

The debtor is free to encumber his or her interest in exempt property voluntarily, since "mention of a security interest does not constitute a conveyance within the meaning of . . . [section 1C-1804]."¹⁷⁰ Consistent with previous practice, the statute of limitations on judgments is suspended for the period during which the property is exempt.¹⁷¹ A debtor who conveys exempt property may substitute other property and have it designated as exempt.¹⁷²

B. Procedure for Designating Exemptions

Section 1C-1803 governs the procedure for setting aside exempt

164. *Id.* § 57-21 (1979).

165. 42 U.S.C. § 407 (1970).

166. 38 U.S.C. § 3101 (1972).

167. Act of June 2, 1981, ch. 420, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 31-38 (to be codified at N.C. Gen. Stat. § 1C-1804).

168. N.C. Gen. Stat. § 1-313 (Com. Supp. 1979).

169. Act of June 2, 1981, ch. 420, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 31-38 (to be codified at N.C. Gen. Stat. § 1C-1804).

170. *Id.* at 31 (to be codified at N.C. Gen. Stat. § 1C-1804(a)).

171. *Id.*

172. *Id.*

property.¹⁷³ The basic procedural technique employed is that of motion and hearing. The Act prescribes specific forms for notifying the "judgment debtor" of his or her exemption rights and for scheduling property claimed as exempt.¹⁷⁴

L. Who may initiate exemption allocation proceedings

Either the "judgment debtor," a "judgment creditor," or the court, if necessary, may initiate exemption allocation proceedings.¹⁷⁵ Terminology problems quickly arise. As discussed earlier, the shift from "debtor" in section 1C-1601 to "judgment debtor" in section 1C-1603 raises definitional problems: the consistent use of "judgment debtor" within section 1C-1603 itself is bound to raise further difficulties.¹⁷⁶ Section 1C-1603(a)(1) allows a "judgment debtor" to request an allocation of exempt property either in a separate action before the clerk of superior court or a district court judge, in a pending case, or in a judgment collection proceeding, such as execution.¹⁷⁷ Certainly the term "judgment debtor" makes sense in the third situation. With some effort, it can be read to make sense in the first situation, but it is inaccurate to use the term "judgment debtor" in the context of a pending case. Read literally, then, only individuals who have already lost a money judgment can invoke the protection of section 1C-1603.¹⁷⁸ Such a result represents a departure from past practice, which plainly permitted "any resident," whether a judgment debtor or not, to petition for allotment of exempt property at any time.¹⁷⁹

Under section 1C-1603(b)(2), a judgment creditor may also initiate the exemption process in the course of an enforcement proceeding.¹⁸⁰ The debtor must then be served with the form of notice prescribed by statute. The court must itself institute exemption proceedings under section 1C-1603(a)(4) if, in the course of an enforcement proceeding, "it appears . . . that exempt property may be affected and there has been no allocation of exempt property."¹⁸¹ The prescribed form of notice must then be served on the debtor.

Following receipt of notice, or contemporaneously with the debtor's petition if he initiates the exemption proceeding, the debtor must file a schedule of his assets, debts, creditors, and the property he seeks to have

173. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 20-21 (to be codified at N.C. Gen. Stat. 1C-1602).

174. *Id.* at 21-22 (to be codified at N.C. Gen. Stat. § 1C-1603(a)(4), (5)).

175. *Id.* at 22-23 (to be codified at N.C. Gen. Stat. § 1C-1603(a)(1), (2), (3)).

176. *Id.* at 18 (to be codified at N.C. Gen. Stat. § 1502); *id.* at 20 (to be codified at N.C. Gen. Stat. § 1623).

177. *Id.* at 23 (to be codified at N.C. Gen. Stat. § 1603(a)(1)).

178. *Id.*

179. N.C. Gen. Stat. § 1-826 (C.L.M. Supp. 1979) (repealed 1981).

180. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 21 (to be codified at N.C. Gen. Stat. § 1C-1603(b)(2)).

181. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1603(b)(4)).

exempted.¹⁰⁸ The highly detailed form of the required statement is set forth in section 1C-1803(e).¹⁰⁹ Based on the captions used in the statute for the statement and for the "notice to set off debtor's exempt property," it appears that the Act contemplates that exemption proceedings ordinarily will be conducted in the district court.¹¹⁰ Section 1C-1803(n)(1), however, indicates that the judgment debtor may also petition the clerk of superior court to have his exempt property designated.¹¹¹ In addition, section 1C-1803(h) authorizes the "clerk," as well as the district court judge, to make determinations in exemption proceedings.¹¹² Furthermore, enforcement proceedings or pending actions generally would be conducted in superior court. Presumably, a superior court judge in a pending action would not be required to stay the proceedings and direct all exemption matters to the district court for preliminary determination, though the Act is less than clear on this point.

2. Notice and hearing procedures

After the debtor has filed his exemption statement, section 1C-1803(e)(1) requires the court to hold a hearing for the determination of the exempt property.¹¹³ If the debtor initiated the exemption proceeding, notice of the hearing must be given to every creditor listed in the debtor's statement.¹¹⁴ If the debtor did not initiate the proceeding, notices of the hearing may be given "to any creditor" by either the debtor or the creditor.¹¹⁵ The incentive to notify all interested parties is provided by section 1C-1803(g), which states that the debtor's exemptions may be "modified . . . by anyone who did not receive notice of the exemption hearing."¹¹⁶ The net effect of these provisions will be greater awareness by creditors of their assumed debtor's plight, since the probability that enforcement proceedings instituted by a single creditor would remain unknown to other creditors has been greatly reduced.¹¹⁷ The result in many cases may be an increase in the number of involuntary bankruptcy petitions filed, since uninsured and unsecured creditors may become alarmed over the dan-

108. *Id.* ss 18 (to be codified at N.C. Gen. Stat. § 1C-1803(f)).

109. *Id.*

110. *Id.* ss 21-23 (to be codified at N.C. Gen. Stat. § 1C-1803(n)(4), (c)).

111. *Id.* ss 20 (to be codified at N.C. Gen. Stat. § 1C-1803(n)(3)).

112. *Id.* ss 31 (to be codified at N.C. Gen. Stat. § 1C-1803(h)).

113. *Id.* ss 25 (to be codified at N.C. Gen. Stat. § 1C-1803(e)(1)).

114. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1803(e)(2)).

115. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1803(e)(1)).

116. *Id.* ss 31 (to be codified at N.C. Gen. Stat. § 1C-1803(g)).

117. The only provision of former law that roughly corresponds to this notice requirement is N.C. Gen. Stat. § 1-287 (Cum. Supp. 1978) (repealed 1981), which required the clerk to advise the register's petition for a writ of execution. The requirements of § 1-287, however, were triggered only by a petition initiated by a "creditor," not necessarily a "debtor," pursuant to G.S. 1-284. Under G.S. 1-287, newspaper publication alone was sufficient, in contrast to the apparent requirement of actual notice under § 1C-1803(e)(2). Compare Act of June 2, 1981, ch. 380, § 1, 1981 Adv. Legis. Serv. No. 6 at 22 (to be codified at N.C. Gen. Stat. § 1803(d)(2)) with N.C. Gen. Stat. § 1-287 (Cum. Supp. 1978) (repealed 1981).

get of being left without executable assets to satisfy their claims.

Objections raised at the exemption hearing will be the triggering mechanism for determining the debtor's exempt property.¹⁹² If no objections are made to the debtor's requested exemptions, section 1C-1603(c)(2) empowers the "judge" (either of superior or district court, apparently, though the Act does not say) to enter an order designating the property scheduled by the debtor as exempt property "if he finds it appropriate."¹⁹³ This approach is similar to that found in section 522(f) of the Bankruptcy Code, which provides that, unless a party in interest objects, the property claimed by the debtor becomes exempt.¹⁹⁴ The North Carolina system, however, will provide the reviewing official a limited amount of discretion to modify, or even deny, a debtor's schedule of exemptions.¹⁹⁵

Once again, the Act's imprecise terminology surfaces. Only in section 1C-1603(e)(2) is the term "judge," rather than "court," used.¹⁹⁶ With a little imagination, one can read the term "court" to mean either the district court judge, the superior court judge, or the clerk of superior court, as the context requires. Nonetheless, the notion that "judge" can include the clerk of superior court is semantically a bit more difficult to accept. What, then, can be concluded about section 1C-1603(c)(2)'s use of "judge" instead of "court"? One must conclude either that the use is due to the drafters' oversight or that, in uncontested cases, the clerk is without authority to enter an order designating exempt property. The latter conclusion raises a further anomaly, since if objections are raised, the clerk, acting as "the court," is empowered to determine the property's value.¹⁹⁷ Such a result makes little sense: why deny the clerk ministerial authority, but grant him considerable discretionary powers?¹⁹⁸

3. Valuation of exempt property

Section 1C-1603(e)(3) requires the court to determine the value of the property if an objection is made.¹⁹⁹ Presumably, objections also may

192. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 20 (to be codified at N.C. Gen. Stat. § 1C-1603(c)(2)).

193. *Id.*

194. "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 B.R.C. § 522(f) (Supp. III 1979).

195. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 20 (to be codified at N.C. Gen. Stat. § 1C-1603(c)(2)).

196. *Id.*

197. *Id.* at 21 (to be codified at N.C. Gen. Stat. § 1C-1603(h)).

198. The precise role of the clerk of superior court under the Act is far from clear. The duties and responsibilities of the clerk in this area have been enlarged compared to prior practice, but the extent of these duties and responsibilities was the cause of much concern to the clerks at the time of the Act's amendment in October 1981. *Dasham-Manning Herald*, O.R.L. 8, 1981, at 12A, col. 2.

199. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 20-21 (to be codified at N.C. Gen. Stat. § 1C-1603(f)(3)).

be made concerning whether certain property is exemptible at all. The court would then be expected and empowered to rule on questions such as whether a garden tractor fits within the meaning of "household goods." The determination of value under section 1C-1803(a)(3) may be assigned to a "qualified person," such as an appraiser.²⁰⁰ The Act thus departs from the procedure for allotment by three "discreet persons" established in former sections 1-371, 1-378, and 1-383 of the General Statutes.²⁰¹

The cost of an appraisal must be advanced "by the person requesting the valuation."²⁰² As an administrative expense, it becomes a court cost "having priority over the claim."²⁰³ Since the cost of an appraisal will initially be borne by the person requesting it, routine or speculative objections will be inhibited. A creditor may be forced to rely either on the court's (and indirectly the debtor's) determination of value or be fairly certain that the disputed property is worth substantially more than the debtor has suggested in his statement. Since the court may, on its own motion, appoint an appraiser and since the expense will be taxed as costs anyway,²⁰⁴ thus reducing the available pool of assets, creditors may wish to think twice before objecting at all.

Upon receiving the appraiser's report, the court will determine the value of the property and must enter an order designating the exempt property.²⁰⁵ Modifications to the original order are authorized under section 1C-1803(g) if all interested parties were not notified or if changed circumstances exist, such as a "substantial change in value."²⁰⁶

Appeal from determinations made by the district court judge or the clerk is not mentioned. Appeal therefore should be as generally provided by North Carolina law: to the court of appeals from decisions of the district court, and to the superior court judge from decisions of the clerk.²⁰⁷

C. Specific Substantive Provisions

1. Methods of waiver

Section 1C-1601(e) deals with waivers of exemptions.²⁰⁸ Waivers are permitted under the following specific circumstances: (1) by transferring property designated as exempt;²⁰⁹ (2) by executing a written waiver after

²⁰⁰ *Id.*

²⁰¹ See N.C. Gen. Stat. §§ 1-371, -378, -383 (1983) & Cum. Supp. 1979) repealed 1981).

²⁰² Act of June 2, 1981, ch. 402, § 1, 1981 N.C. Acts, Legis. Serv. No. 1 at 28 80 (to be codified as N.C. Gen. Stat. § 1C-1803(a)).

²⁰³ *Id.* at 30 (to be codified as N.C. Gen. Stat. § 1C-1803(a)(3)).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 30 (to be codified as N.C. Gen. Stat. § 1C-1803(a)(4)).

²⁰⁶ *Id.* at 31 (to be codified as N.C. Gen. Stat. § 1C-1803(g)).

²⁰⁷ N.C. Gen. Stat. §§ 1-372, -377 (Cum. Supp. 1979).

²⁰⁸ Act of June 2, 1981, ch. 402, § 1, 1981 N.C. Acts, Legis. Serv. No. 6 at 13 (to be codified as N.C. Gen. Stat. § 1C-1601(e)).

²⁰⁹ *Id.* (to be codified as N.C. Gen. Stat. § 1C-1601(e)(1)). Transfer of exempt property operates as a selective waiver of the transferred property.

judgment;²¹⁰ and (3) by failing to assert exemptions after notice (in the form prescribed) to do so.²¹¹

The first and third methods have roots in previous law and practice;²¹² the second method is new. Although not specifically mentioned, a failure to list a particular item of otherwise exemptible property in the debtor's statement also would ordinarily function as a selective waiver.²¹³ Nonetheless, the circumstances described in section 1C-1601(c) must be taken to be exclusive; thus, a general waiver of exemptions prior to judgment will be unenforceable.²¹⁴

The above circumstances notwithstanding, section 1C-1601(c) prohibits any waiver of exemptions "to the extent the exemptions are necessary to ensure the reasonable support needs of the judgment debtor's dependents."²¹⁵ This prohibition may in time conflict with the implied requirements of the prescribed form of notice to the debtor in section 1C-1603(a)(4), which warns the debtor that failure to respond within twenty days will result in the loss of "valuable rights."²¹⁶

2. Exemption swapping

Section 1C-1603(e)(6)²¹⁷ introduces a level of flexibility for debtors unknown under both pre-existing law and the Bankruptcy Code. This subsection allows a debtor, with court approval, to trade away dollar value in exempt property deemed expendable in order to completely protect property otherwise exemptible only in part.²¹⁸ For example, a debtor owning outright a 1978 automobile valued at \$3,000 stands to lose that car, receiving in return \$1,000 in cash, which represents his statutorily granted motor vehicle exemption.²¹⁹ If the debtor wishes to retain his car, section 1C-1603(e)(6) will permit him to do so if he makes available \$2,000 worth of property to creditors "not otherwise available to them"—i.e., exempt or exemptible property.²²⁰ This option is consistent with the policy of the Act to allow all debtors a "floor" of \$5,000 in virtually any non-business property of their choosing.²²¹ Section 1C-1603(e)(6)

210. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1601(c)(2)). The court must review written waivers to ensure that they are informed and voluntary.

211. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1601(c)(3)).

212. See North Carolina Nat'l Bank v. Shrage, 19 N.C. App. 681, 298 S.E.2d 296 (1980) (homestead exemption waived by intestacy); N.C. Gen. Stat. § 1-273 (U.S. Supp. 1979) (repealed 1981) (homestead exemption lost upon foreclosure).

213. See Act of June 8, 1961, ch. 49, § 1, 1961 N.C. Adv. Legis. Serv. No. 1 at 18 (to be codified at N.C. Gen. Stat. § 1C-1601(c)(1)).

214. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1601(c)).

215. *Id.*

216. *Id.* at 19 (to be codified at N.C. Gen. Stat. § 1C-1603(a)(4)).

217. *Id.* at 20 (to be codified at N.C. Gen. Stat. § 1C-1603(e)(6)).

218. *Id.*

219. *Id.* at 17 (to be codified at N.C. Gen. Stat. § 1C-1603(b)(2)).

220. *Id.* at 20 (to be codified at N.C. Gen. Stat. § 1C-1603(e)(6)).

221. Section 1C-1603(d)(1) clearly sets a \$2,500 ceiling on necessary personal property that most people own to some extent including furniture, appliances, etc. *Id.* at 19 (to be codified at N.C. Gen. Stat. § 1C-1603(d)(1)). Section 1C-1603(c)(2) clearly guarantees that

is not clear on whether the property sought to be retained, and for which the debtor "swaps," must itself be exemptible.²²⁴ Could, for example, an item of jewelry be protected in this manner, or is section 1C-1601(a)(2)²²⁵ the only way to preserve completely nonexempt property? Section 1C-1603(e)(6) simply speaks in terms of "property."²²⁶ The term is modified, however, by the phrase "having a value in excess of the allowable exemption."²²⁷ For nonexempt property, of course, there is no "allowable exemption." Thus a strict reading of the section would suggest that only property otherwise exemptible can be "swapped." The conclusion is only a tentative one. If in fact, the policy of the Act is to allow the debtor considerable leeway in choosing the property he wishes to protect, there would seem to be little reason to confine the type of property that can be "swapped" to exemptible property. In terms of net dollar values available, prejudice to creditors would not necessarily result from reading section 1C-1603(e)(6) to allow "swapping" of nonexempt property.²²⁸

A. Exclusion of recent purchases from exemption

The new Act introduces an entirely new variation on a very old theme in the form of a prohibition on "fraudulent acquisition" of exempt property. Section 1C-1601(d) provides that no exemption will be available with respect to "tangible personal property purchased by the debtor" less than ninety days before initiation of either collection proceedings under state law or the filing of a bankruptcy petition.²²⁹ The apparent purpose of section 1C-1601(d) is to discourage the practice of hurriedly converting nonexempt assets into exempt property. Although the concern is understandable, the subsection raises a number of problems, particularly in bankruptcy cases.

First, the perceived loophole only partially has been patched. Since section 1C-1601(d) applies only to "tangible personal property," nothing in the Act bars the last-minute purchase of exemptible real property or life insurance, though the prejudice to creditors is the same.

Second, debtors are not the only ones who can file bankruptcy peti-

224. Debtor will be able to protect an additional \$2,500 worth of jewelry, thereby establishing with section 1C-1601(a)(4) a maximum of \$5,000 for jewelry, *id.* at 1C-17 (to be codified at N.C. Gen. Stats. § 1C-1601(a)(2), (4)). A homeowner with equity at least equal to \$7,500 can, of course, protect no less \$10,000 worth of property by invoking § 1C-1601(a)(1) and (4), *id.* (to be codified at N.C. Gen. Stats. § 1C-1601(a)(1), (4)).

225. Section 1C-1503(1)(b) provides in relevant part: "The court may permit a particular item of property having value in excess of the allowable exemption to be retained by the debtor upon his making available to creditors money or property not otherwise available to them in an amount equivalent to the excess value." *Id.* at 1C-10 (to be codified at N.C. Gen. Stats. § 1C-1503(b)).

226. *Id.* at 11 (to be codified at N.C. Gen. Stats. § 1C-1601(a)(2)).

227. *Id.* at 20 (to be codified at N.C. Gen. Stats. § 1C-1603(a)(2)).

228. *Id.*

229. *Id.*

230. *Id.* at 13-14 (to be codified at N.C. Gen. Stats. § 1C-1601(d)).

creditors obviously have that ability as well.²²⁸ Further, debtors do not initiate proceedings to enforce money judgments; judgment creditors do. The debtor may or may not be surprised by news of an involuntary bankruptcy petition filed against him or of the commencement of enforcement proceedings, but the timing of these events rarely is within the control or knowledge of the debtor. If it does come as a surprise, the possibility of harsh treatment arises, since section 1C-1601(d) sets up an irrebuttable presumption of fraudulent intent for any acquisition of exemptible tangible personal property for the ninety days preceding either enforcement proceedings or the filing of an involuntary petition.²²⁹ This "objective" approach is the more peculiar in light of North Carolina's law regarding fraudulent conveyances,²³⁰ the closest cousin to the behavior addressed by section 1C-1601(d),²³¹ which always has required some degree of proof of "intent." In contrast, section 1C-1601(d) requires no proof of intent.²³² The approach of section 1C-1601(d) somewhat resembles the objective test of the Bankruptcy Code regarding preferences,²³³ but what is condemned here can hardly be called a "preference." Indeed, the very practice that section 1C-1601(d) seeks to prevent is permissible under the Bankruptcy Code.²³⁴

Finally, the "fraudulent acquisition" rule of section 1C-1601(d)²³⁵ has few, if any, counterparts in other states' exemption laws. In the words of one commentator, it is a "universal rule" that "the debtor's acquisitions of exempt assets with nonexempt assets are permissible and not a fraud on creditors, provided that the nonexempt assets were not acquired fraudulently."²³⁶

228. See 11 U.S.C. § 508 (1978) (voluntary petitions).

229. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-19 (to be codified at N.C. Gen. Stat. § 1C-1601(d)).

230. N.C. Gen. Stat. §§ 85-15 to -28 (1979). North Carolina's law of fraudulent conveyances varies only slightly from the original formulation accepted in 1670 by the Statute of Elizabeth, Chapter 5 (1570). By its terms, the North Carolina law requires a proof of intent to defraud creditors. Proof is generally accessed by reference to the "badges of fraud," first described in *Tyone's Case*, 78 Reg. Rec. 503 (1661). The usual "badges of fraud" include such things as secrecy of the conveyance, retention of possession by the transferor, creation of a second trust, and the timing of the conveyance. See generally *Amann v. Walker*, 185 N.C. 282, 51 S.E. 189 (1914); Note, *The Law of Fraudulent Conveyances in North Carolina*, 50 N.C.L. Rev. 371 (1978).

231. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-19 (to be codified at N.C. Gen. Stat. § 1C-1601(d)).

232. See *id.*

233. Compare *id.* with 11 U.S.C. § 547 (Supp. III 1979).

234. See 3 *COMMERCE IN BANKRUPTCY* 7-622,62(4) (3d ed. 1979).

235. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-19 (to be codified at N.C. Gen. Stat. § 1C-1601(d)).

236. *Yankovich, Debtors' Exemption Rights*, 32 Geo. L.J. 679, 680 (1974). See also *Yankovich, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets To Purchase or Improve Exempt Property On the Eve of Bankruptcy*, 81 KENNEDY L. REV. 615, 545-58 (1975). North Carolina has, however, been joined in proscribing the exemption of recent purchases by Maine, which has enacted a similar but somewhat milder provision. Act of June 5, 1981, ch. 491, § 2, 1981 Me. Legis. Serv. No. 8 at 888 (to be codified at Me. Rev.

4. Claims to which exempt property is liable

Section 7C-1601(e) of the new Act provides that certain claims that are reduced to judgment are not subject to the debtor's right to exempt property.²³⁷ These include claims of the United States, of the State or other governmental unit for taxes or appearance bonds, of statutory lienors, including laborers', mechanics', and artisans', claims for the purchase money of specific property, claims for contractual security interests in specific property, and claims for child support or alimony.²³⁸ Little in section 7C-1601(e) represents a significant departure from past practice, with the exception of section 7C-1601(e)(7), which, after accepting claims for contractual security interests, states that "the exemptions shall apply to the debtor's household goods notwithstanding any contract for a non-purchase money security interest in any such goods."²³⁹ In rough fashion, this provision resembles the policy underlying section 522(f) of the Bankruptcy Code, which permits a debtor to avoid a non-purchase money security interest in certain exempt property "to the extent that such lien impairs an exemption to which the debtor would have been entitled."²⁴⁰ In effect, section 7C-1601(e)(7) overrules *Mortford v. Grobman*,²⁴¹ which sanctioned the use of a blanket non-purchase money security interest in exempt property, by enabling the debtor to ignore most nonpurchase money security interests in otherwise exemptable property.²⁴² Questions may be raised, however, regarding the constitutionality of any retroactive application of section 7C-1601(e)(7).²⁴³ To the extent that security interests created prior to ratification of the Act are disregarded, a deprivation of a property interest in violation of the fourteenth amendment²⁴⁴ may arise. This issue has been litigated extensively in bankruptcy cases concerning section 522(f),²⁴⁵ and though not uniform in result, the cases plainly indicate that the problem is a genuine

Stat. Ann. § 7-147(1).

237. Act of June 2, 1981, ch. 480, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 7C-1601(e)).

238. *Id.*

239. *Id.* (to be codified at N.C. GEN. STAT. § 7C-1601(e)(7)).

240. 11 U.S.C. § 522(f) (Supp. III 1979). The reach of § 522(f) is broader than that of § 7C-1601(e)(7). Section 522(f) applies not only to "household goods," but also, *inter alia*, to household furnishings, wearing apparel, books, tools of the trade, and health aids as well. Section 522(f) can also be used to avoid a judicial lien on any exempt property to the extent that it impairs an exemption.

241. 36 N.C. App. 750, 245 S.W.2d 238 (1974); see text accompanying notes 51 & 52 *supra*.

242. A transfer of otherwise exempt property operates to waive the exemption Act of June 2, 1981, ch. 480, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18 (to be codified at N.C. Gen. Stat. § 7C-1601(e)).

243. *Id.* at 19 (to be codified at N.C. Gen. Stat. § 7C-1601(e)(7)).

244. The fourteenth amendment provides in relevant part "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

245. 11 U.S.C. § 522(f) (Supp. III 1979).

one, in *Rodriguez v. Security Industrial Bank*²⁸⁶ the Tenth Circuit became the first appellate court to consider the issue of retroactive application of section 522(f) and held that section 522(f) cannot be applied to security interests created prior to the enactment of the Bankruptcy Reform Act.²⁸⁷ A similar fate may await section 1C-1601(a)(1) unless the reviewing court can be persuaded that making a nonpossessory security interest temporarily unenforceable is not as serious a sin as sanctioning the "avoidance" of such a lien retroactively—and therefore is not a deprivation of a property interest.

D Article X

Sections 1 and 2 of article X of the North Carolina Constitution remain the starting point for determining exemptions.²⁸⁸ These sections establish minimum amounts of \$500 and \$1,000 for personal and real property, respectively, but authorize the General Assembly to set higher limits.²⁸⁹ Chapter 490, however, represents a radical shift in approach to exemptions; under section 1C-1601(a)(1), for example, a debtor is entitled not to any particular portion of homestead property, but only to an "interest" of \$7,500.²⁹⁰ Unlike former G.S. 1-328 through 1-332,²⁹¹ the new Act provides no allotment procedure. Recognizing that the exemption philosophy of the new Act is fundamentally inconsistent with that of article X, section 1C-1602 of the new Act permits debtors to choose between the two.²⁹² Because of the constitutional status of article X, the General Assembly had little choice but to provide this option. Nonetheless, by repealing G.S. 1-360 through 1-392, the General Assembly has stripped away the procedural machinery that implemented the guarantees of article X.²⁹³ In its place will be the notice and hearing provisions of sections 1C-1603,²⁹⁴ which raises problems. For the homestead exemption, for example, the allotment by metes and bounds procedure formerly required by G.S. 1-372 is no longer authorized, but article X, section 2 obviously remains in force. Does this mean that the rule of cases such as *Campbell v. White*,²⁹⁵ *Casley v. Van Noppen*,²⁹⁶ and *Securities Printery, Inc. v.*

286. 649 F.2d 1100 (10th Cir. 1981).

287. *Id.* at 1137; accord, *in re Osborne*, 21 B.R. 510 (District D.C. 1981). *See* also *in re Barnes*, 11 B.R. 948 (District, E.D.N.C. 1981) (debtor may avoid a nonpossessory, nonpurchase money security interest in household goods created prior to act's passage).

288. See N.C. Const. art. X, §§ 1, 2.

289. *Id.*

290. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 18 (to be codified at N.C. Gen. Stat. § 1C-1601(a)).

291. N.C. Gen. Stat. §§ 1-328 to -332 (1969 & Cum. Supp. 1978) (repealed 1981).

292. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 25 (to be codified at N.C. Gen. Stat. § 1C-1602).

293. See N.C. Gen. Stat. §§ 1-360 to -392 (1969 & Cum. Supp. 1978) (repealed 1981).

294. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 8 at 20 (to be codified at N.C. Gen. Stat. § 1C-1603).

295. 85 N.C. 101 (1895).

296. 96 N.C. 287, 2 S.W. 563 (1897).

*Sekintun*²⁵⁷ still obtains? Does the decisional baggage remain with article X, or may it now be discarded along with G.S. 1-372? The opinions in each of these cases are unclear as to the statutory basis for the results reached.²⁵⁸ A fair reading of them suggests that none of the three courts saw the need to isolate either the constitution or the implementing statute as the sole foundation of its rationale. The question has practical significance. It is unclear whether a judgment debtor, in the wake of the Act, may frustrate the collection efforts of his creditor by demanding an allotment of seventy-five square feet of hallway space as did the debtor in *Seaman Printery*.²⁵⁹ It is a matter that can be resolved only by amendment of the constitution or by decisions of the North Carolina Supreme Court. The court, if confronted with the question, will have to choose between overruling the ancient rule of *Campbell and Oakley*, thereby necessarily interpreting article X's ambiguous guarantees in a way completely different from the practice of the last 200 years, or condoning the result in *Seaman Printery*. Neither alternative is particularly inviting. The former course would find modest support in *Campbell v. White*²⁶⁰ for the proposition that the statute, not the constitution, produced the anomalous result in that case. The latter course, however, would find somewhat more substantial support in the language of section 2 of article X, which expressly states that the debtor may choose the property he wishes to exempt as his homestead.²⁶¹ This language suggests that article X permits only an allotment of real property, and not a cash payment in lieu thereof. Of course, to the extent that the other exemptions provided by the Act are perceived as more attractive, the practical significance of this issue should recede, since debtors are more likely to choose the statutory, rather than the constitutional, exemptions.

B. Problems the Act Ignores

1. Tenancy by the entirety

North Carolina is one of approximately twenty states that does not

257. 34 N.C. App. 187, 289 S.E.2d 744 (1977), cert. denied, 289 N.C. 618, 301 S.E.2d 544 (1978).

258. The difficulty is that article X provides no procedure for designating the homestead. See N.C. CONST. art. X, § 2. The distinction between the constitutional provision and the enabling statute simply is not recognized in any of the cases. Even in *Campbell v. White*, however, hints ably suggest that the basis for the results reached was statutory. After stating that the only remedy available to a judgment creditor would be a sale of the property, minus the allotted homestead area, the court remarked: "The course suggested would seem alone to be open, in conformity with the statute, until some legislation shall solve the problem, which the Constitution will allow." 83 N.C. at 436. The court tacitly reserved the question of whether any legislation could provide for sale with upset/bid of the surplus due amount to the debtor and not run afoul of article X. See text accompanying notes 22-25 *supra*.

259. *Seaman Printery, Inc. v. Blinnick*, 34 N.C. App. 237, 289 S.E.2d 744 (1977), cert. denied, 289 N.C. 618, 301 S.E.2d 544 (1978).

260. 26 N.C. 481 (1855).

261. N.C. CONST. art. X, § 2.

permit the creditors of one spouse to levy on that spouse's interest in property held as tenants by the entirety.²⁵² Tenancy by the entirety thus serves in this state and elsewhere as a *de facto* exemption. The new Act does not alter this situation. In fact, separate legislation designed to limit the use of tenancy by the entirety as a *de facto* exemption was introduced in the 1981 session of the General Assembly, but failed on second reading.²⁵³ In contrast, section 522 of the Bankruptcy Code does, under certain conditions, contemplate the sale of one spouse's interest in entirely property.²⁵⁴ Section 522 has a counterpart that section 10-1631(a) completely lacks, section 853, captioned "Use, sale or lease of property."²⁵⁵ Specifically, section 853(h) permits the sale of entirely property if certain conditions designed to protect the nonbankrupt spouse are met.²⁵⁶

2. Joint cases

The Act does not address cases in which a husband and wife both petition to have their exempt property set aside. Instead, the Act consistently refers to the "debtor" or the "judgment debtor" in the singular. For example, section 10-1602(a) begins: "Each individual, resident of this State, who is a debtor . . ."²⁵⁷ Thus it appears that each spouse may petition for exemption individually without limitation. This ability makes possible a modest level of "exemption planning"; for example, nothing in the Act prohibits a husband from taking the full \$7,500 residence exemp-

252. 12 January 1980, Act 216 (1980), 206 S. PAPERBORN, *CRIMINAL RECORDS AND COURT OF PUNISHMENT* 810 n.16 (1979).

253. See H.R. 130, 1981 N.C. General Assembly.

254. Under § 541(c)(2)(B), the exempt status of entirely property for the debts of one spouse is recognized in bankruptcy if (1) the applicable state law exempts it, and (2) the federal exemptions are not taken by the debtor. 11 U.S.C. § 522(c)(2)(B) (Supp. III 1978). See, e.g., *In re York*, 3 B.R. 339 (District D. Va. 1980), aff'd, 635 F.2d 14 (4th Cir. 1981).

255. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 82 (to be codified at N.C. Gen. Stat. § 10-1631(f)).

256. Section 853(c) provides:

Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest under subsection (f) or (g) of this section, and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property less of the interests of such co-owner;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the distresses, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of atomic or synthetic gas for heat, light, or power.

11 U.S.C. § 541(c) (Supp. III 1978).

257. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18 (to be codified at N.C. Gen. Stat. § 10-1602(a)).

tion while his wife takes advantage of section 10-1801(a)(2)'s \$2,500 exemption for any property, such as a checking account.²⁴⁹ Furthermore, nothing in the Act prevents one spouse from electing section 10-1801's exemptions while the other spouse chooses article X's exemptions.²⁵⁰ Regardless of whether a debtor chooses the statutory or the constitutional exemptions, for bankruptcy cases it is clear that each spouse will be entitled to a full set of exemptions.²⁵¹

b. Chapter 489 and the Bankruptcy Code

By virtue of section 10-1801(f),²⁵² North Carolina debtors in bankruptcy no longer will have the option of choosing the federal exemptions provided in section 522(d) of the Bankruptcy Code.²⁵³ Instead, debtors simply will choose between the exemptions set forth in section 10-1801(a) and the exemptions provided by article X of the North Carolina Constitution.²⁵⁴ North Carolina thus joins twenty other states that have "opted out" of the federal exemptions since enactment of the Bankruptcy Reform Act.²⁵⁵ In choosing to remodel its exemption laws along the lines of section 522(d), however, North Carolina is in a distinct minority of these states.²⁵⁶

249. *Id.* (to be codified at N.C. GEN. STAT. § 10-1801(a)(2)).

250. *See id.* (to be codified at N.C. GEN. STAT. § 10-1801).

251. Section 522(e) provides "This section shall apply separately with respect to each debtor in a joint case." 11 U.S.C. § 522(e) (Supp. III 1978); see *Chesapeake v. Medeiros*, 636 F.2d 60 (4th Cir. 1981).

252. Act of June 2, 1981, ch. 370, § 1, 1981 N.C. ADV. LEGIS. SERV. NO. 6 at 25 (to be codified at N.C. GEN. STAT. § 10-1801(f)).

253. Section 522(e) permits a debtor to choose between the exemptions provided by applicable state law and the federal exemptions set forth in § 522(d). 11 U.S.C. § 522(e) (2) (Supp. III 1978). If, however, applicable state law does not authorize such a choice, then the debtor is limited to the exemptions provided by state law and federal non-bankruptcy law. 11 U.S.C. § 522(h)(1) (Supp. III 1978).

254. Act of June 2, 1981, ch. 370, § 1, 1981 N.C. ADV. LEGIS. SERV. NO. 6 at 18 (to be codified at N.C. GEN. STAT. § 10-1801); *see* N.C. CONST. art. X.

255. *See* ALA. CODE § 4-10-1 (Cum. Supp. 1981); ARIZ. REV. STAT. ANN. § 98-1325 (Cum. Supp. 1980); FLA. STAT. ANN. § 201.50 (West Cum. Supp. 1981); GA. CONST. art. § 51-1601 (Cum. Supp. 1981); ILL. ANN. STAT. ch. 52, § 151 (Standard Cum. Supp. 1981); IOWA CONST. art. § 34-7-28-36 (Iowa Cum. Supp. 1981); Act of May 11, 1981, § 2, 1981 IOWA LEGIS. SERV. NO. 2 at 802 (to be codified at IOWA CONST. ch. 32 (3)); KAN. STAT. ANN. § 60-2128 (Cum. Supp. 1981); LA. REV. STAT. ANN. § 18A921(b) (Cum. Supp. 1981); MINN. CONST. art. § 11-455(g) (Cum. Supp. 1981); Act of June 3, 1981, ch. 481, § 2, 1981 N.C. LEGIS. SERV. NO. 6 at 256 (to be codified at ILL. STAT. ANN. § 7-1481); MO. ANN. STAT. § 410.487 (Verdon Cum. Supp. 1981); H.B. 495, 1981 MISS. LEGIS. (effective Oct. 1, 1981); MINN. REV. STAT. §§ 85-15, -105 (Cum. Supp. 1980); Act of June 2, 1981, ch. 495, § 1, 1981 N.C. ADV. LEGIS. SERV. NO. 6 at 80 (to be codified at N.C. GEN. STAT. § 10-1801(f)); OHIO REV. CODE ANN. § 2921.682 (Ohio Supp. 1980); H.D. UTAH CONST. art. § 49-45-18 (Cum. Supp. 1981); IOWA CONST. art. § 32-2-119 (1980); VA. CODE § 34-3.1 (Cum. Supp. 1981); WASH. CONST. art. § 1-80-108 (Cum. Supp. 1981).

256. None of the "opt out" states have adopted § 522(c) in its entirety, which is understandable. Section 522's influence can be discerned, however, in the new exemption laws of Georgia, Indiana, Kansas, Ohio, and Tennessee. Alabama, Illinois, Iowa, and Kentucky mirrored their respective exemption laws after passage of the Bankruptcy Reform Act, but

Although section 522 of the Code²²³ clearly served as a model for the new Act, the fit between the two laws is less than well-tailored. The bankruptcy courts will early on be forced to resolve several problems concerning the interplay between the Bankruptcy Code and the Act. It may be, of course, that it is unwise to have the same set of exemptions apply to state law collection and bankruptcy. At least one commentator has suggested that state exemption laws and bankruptcy serve differing objectives and respond to different situations.²²⁴ One purpose of state exemption laws, after all, is to avoid bankruptcy proceedings.²²⁵ Since most debtors can expect a discharge from most of their debts in bankruptcy, it may make more sense to provide greater exemptions by state law, since debtors cannot expect a fresh start.²²⁶ Nonetheless, one set of exemptions will apply to North Carolina debtors both in and out of bankruptcy.

1. Section 10-1001

The Act's denial of exempt status to any tangible personal property purchased by the debtor within ninety days of the filing of a bankruptcy petition²²⁷ raises federal preemption questions. In fact, the applicability of this provision to bankruptcy proceedings in general is doubtful. Section 522(b)(1) says only that if a state "opts out" of the federal exemptions of section 522(d), then a debtor may exempt from the estate any property "that is exempt under state or local law."²²⁸ Section 10-1001(a) now lists that property in detail,²²⁹ but imposition of a ninety-day "fraudulent acquisition" period may constitute an unwarranted intrusion into substantive bankruptcy law. It is clear that the behavior condemned by section 10-1001(e) is permissible under the Code,²³⁰ thus, the specter of preemption arises.

Conflict between the Bankruptcy Code and the Act on this point is likely. By categorically denying all North Carolina debtors the use of all otherwise exemptible tangible personal property acquired within ninety days prior to a bankruptcy filing,²³¹ the Act undermines the "fresh start"

In addition there are exceptions to § 522. The remaining "opt out" states did not amend their exemption laws following passage of the Bankruptcy Reform Act.

223. 11 U.S.C. § 522 (Supp. III 1979).

224. Yakowich, *Debtor's Exemption Rights Under the Bankruptcy Reform Act*, 20 N.U.L. REV. 765, 802 (1973).

225. See Yakowich, *Debtor's Exemption Rights*, 82 GEO. L.J. 773, 782-85 (1974).

226. *Id.*

227. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 12-19 (to be codified at N.C. GEN. STAT. § 10-1001(d)).

228. 11 U.S.C. § 522(b)(1) (Supp. III 1979).

229. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. GEN. STAT. § 10-1001(a)).

230. J. COHEN & R. BARNETT, *FEDERAL BANKRUPTCY LAWS* 113th ed. 1979; see text accompanying notes 227-28 *supra*.

231. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 12-19 (to be codified at N.C. GEN. STAT. § 10-1001(d)).

policy of the Code.²⁸⁵ This categorical denial goes a significant step further in this regard than does the Code's acquiescence to state law exemptions generally in states that have affirmatively "opted out" of the federal exemptions. Section 1C-1601(d) instead will require bankruptcy courts to rely more heavily on state law, contravening one of the avowed goals of the Code's draftsmen.²⁸⁶ Furthermore, the behavior that section 1C-1601(d) addresses is fraudulent conduct;²⁸⁷ in the judgment of the General Assembly, less-nobles conversions of nonexempt property into exemptable tangible personal property work a fraud on creditors of the debtor. The Bankruptcy Code addresses this behavior already in ways that North Carolina law does not. Sections of the Code are designed to function together to discourage debtor conduct that is prejudicial or unfair to creditors.²⁸⁸ The draftsmen saw no need to add the sort of protection that section 1C-1601(d) purports to provide. In short, section 1C-1601(d) is misplaced; in theory and in practice it has a closer kinship to fraudulent conveyance law than to the law of exemptions.²⁸⁹ Merely inserting the provision in an exemption statute cannot, by itself, compel a bankruptcy court to treat it as part of the set of exemptions provided by North Carolina law for bankruptcy purposes.

Similarly, a bankruptcy court should not be bound by section 1C-1601(e)'s list of "excepted claims."²⁹⁰ Allowance of claims and the priority and dischargeability of those claims are addressed by appropriate sections of the Code without any need to resort to state law.²⁹¹ Imposing a second, state-required set of excepted claims would promote confusion and conflict while severely compromising the uniform effect of federal bankruptcy law among the states.

The excepted claims listed in section 1C-1601(e) are not tailored to the list of nondischargeable debts found in section 523 of the Code.²⁹² For example, sections 1C-1601(e)(1) and (2) except all tax claims of all governmental units, while section 523(n)(1) excepts less than all tax claims.²⁹³

285. See *Wolowitz, Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 W.C.L. Rev. 799, 808 (1980).

286. 4 COLLEGE ON BANKRUPTCY 9 (ALCOE) (1974, ed. 1975); see H.R. REP. NO. 595, 96th Cong., 1st Sess. (1979) (1977), reprinted in (1970) U.S. CODE CONG. & AD. NEWS 597, 6167; REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 187, 93d Cong., 1st Sess. 171 (1973).

287. Act of June 2, 1978, ch. 495, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-28 (to be codified at N.C. GEN. STAT. § 1C-1601(d)).

288. 11 U.S.C. § 546 (Supp. III 1979) (trustee as lien creditor); id. § 547 (preferences); id. § 548 (fraudulent transfers); id. § 557(a) (conditions for discharge).

289. See text accompanying notes 223-29 *supra*.

290. Act of June 2, 1978, ch. 495, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-20 (to be codified at N.C. GEN. STAT. § 1C-1601(e)).

291. See 11 U.S.C. § 502 (Supp. III 1979) (allowance of claims and objection by party); id. § 507 (priorities of claims and expenses); id. § 523 (claims not dischargeable).

292. Congress Act of June 2, 1978, ch. 495, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18-20 (to be codified at N.C. GEN. STAT. § 1C-1601(e)) with 11 U.S.C. § 523 (Supp. III 1979).

293. Congress Act of June 2, 1978, ch. 495, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 18 (to be codified at N.C. GEN. STAT. § 1C-1601(e)(1), (2)) with 11 U.S.C. § 523(e)(1) (Supp.

Nothing in section 523 corresponds to section 10-1601(c)(5)'s exception "for payment of obligations incurred for the purchase of the specific property affected."²⁹⁴ Furthermore, section 523(c)(1) of the Code states that exempt property is not liable for any debts, dischargeable or not, after the case is concluded, except for certain tax and alimony claims.²⁹⁵ To permit the enforcement of a claim after discharge for purchase money obligations against the "specific property affected" under section 10-1601(c)(5)²⁹⁶ ignores the plain congressional purpose of providing debtors with a "fresh start."²⁹⁷

2. Section 10-1603(c)(6)

Nothing in the Code implicitly or explicitly sanctions the exemption swapping authorized by section 10-1603(c)(6).²⁹⁸ Again, presumption problems arise, but in reverse; the state is permitting what the Bankruptcy Code does not allow. The case for presumption, however, is a difficult one. Under section 522(b), a state is free to enact an exemption law that simply sets a dollar-value ceiling on exempt property, leaving the choice of assets to the debtor.²⁹⁹ In this light, section 10-1603(c)(6) is unobjectionable.

3. Waiver of exemptions

Section 10-1601(c) specifies the various circumstances and conditions under which a waiver will be enforced.³⁰⁰ Nonetheless, in bankruptcy cases the starting point for waiver questions will continue to be section 523(e),³⁰¹ which provides that a waiver of exemptions executed in favor of an unsecured creditor is unenforceable.³⁰² As a result, though a selective waiver in favor of a particular unsecured creditor is possible under the Act, it will be of no value in bankruptcy.³⁰³ Other sorts of waivers are

III 1979)

294. Act of June 2, 1981, ch. 493, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 10-1601(c)(5)).

295. 11 U.S.C. § 523(c)(1) (Supp. III 1979).

296. Act of June 2, 1981, ch. 493, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 10-1601(c)(5)).

297. See Finkelsch, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 68 N.C.L. Rev. 599, 208 (1980).

298. Act of June 2, 1981, ch. 493, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 10-1603(c)(6)).

299. See 11 U.S.C. § 522(b) (Supp. III 1979).

300. Act of June 2, 1981, ch. 493, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 10-1601(c)).

301. 11 U.S.C. § 523(e) (Supp. III 1979).

302. *Id.*

303. For example, under § 10-1601(c)(5), a judgment could form the basis for a written waiver of exemptions in favor of the prevailing judgment creditor. Act of June 2, 1981, ch. 493, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 10-1601(c)(5)). The judgment creditor would nonetheless be an unsecured creditor under § 523(e), 11 U.S.C. § 523(e) (Supp. III 1979). The waiver would be unenforceable under § 523(e), *id.*

possible, however, that are consistent with both the Code and the Act. For example, a general waiver of exemptions executed for the benefit of all creditors is not prohibited by the Code.³⁰⁴ A failure to timely assert available exemptions can form the basis for waiver under both the Code³⁰⁵ and the Act.³⁰⁶ In addition, under both the Code and the Act, an omission of particular property from the schedule of exemptions may also function as a selective waiver of the exemption for that property.³⁰⁷

Like section 522(a), the operation of sections 522(f) and 522(m) do not depend on applicable state law regarding exemptions; these sections operate independently of any "opt out" decision by a particular state.³⁰⁸

G. A Constitutional Problem

The new Act radically alters North Carolina's system of exemptions. In many cases, invoking the Act will result in significantly increasing the dollar value of exempt property.³⁰⁹ To the extent that the Act thus reduces the pool of executable assets previously available, collection proceeds for claims of creditors in existence at the time of the Act's ratification accordingly have been decreased. Therefore, pre-existing creditors might be able to make an impairment-of-contracts challenge under article I, section 10 of the Federal Constitution.³¹⁰ Exacerbating the situation is the Act's effective date. Although the nominal effective date is January 1, 1982, the Act expressly applies to "actions and proceedings initiated before and after that date."³¹¹

Recent cases in the federal courts suggest that the impairment-of-contracts problem is a serious one. In *Aliant Structural Steel, Inc. v.*

304. See § COMMENT ON BANKRUPTCY § 522.07 (5th ed. 1978).

305. 11 U.S.C. § 542(f) (Supp. III 1978); see § COMMENT ON BANKRUPTCY § 522.07 (5th ed. 1978).

306. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 87 (to be codified at N.C. GEN. STAT. § 10-1303(a)).

307. Under § 522(f), it is the debtor's responsibility to affirmatively claim his exemptions by filing a schedule of exempt property. 11 U.S.C. § 522(f) (Supp. III 1978). Omission of a particular item of exempt property from the schedule therefore would operate as a selective waiver of the omitted property unless a "party in interest" objects. See § COMMENT ON BANKRUPTCY § 522.07 (5th ed. 1978). Under § 10-1301(c), a debtor's failure to assert an exemption either notice may operate as a waiver. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. at 18 (to be codified at N.C. GEN. STAT. 10-1301(c)).

308. 11 U.S.C. § 522(a), (f), (m) (Supp. III 1978); § COMMENT ON BANKRUPTCY ¶¶ 522-528 (5th ed. 1978); Vukobrat, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 65 N.C.L. REV. 759, 793-94 (1978). As to § 522(m)'s applicability regardless of a state's definition of "real estate," see *Chasemeyer v. Nachman*, 846 F.2d 40 (4th Cir. 1981).

309. Under §§ 1 and 2 of article X, a maximum of \$1,500 of property could be exempted. N.C. CONST. art. X, §§ 1-2. Sections 10-1301(a)(2) and (a)(4) increase all debtors a minimum of \$5,000 in value for exempt property. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 10-17 (to be codified at N.C. GEN. STAT. § 10-1301(a)(2), (4)); see note 221 *supra*.

310. "No state shall . . . [enact any] law impairing the obligations of contracts . . ." U.S. CONST. art. I, § 10, cl. 1.

311. Act of June 2, 1981, ch. 490, § 2, 1981 N.C. Adv. Legis. Serv. No. 6 at 82, as amended by Act of Oct. 9, 1981, ch. 1091, § 1, 1981 N.C. Adv. Legis. Serv. No. 9 at . . .

*Spannors*²¹² the United States Supreme Court struck down a Minnesota law that imposed a "pension funding charge" on employers who closed plants or offices in Minnesota, holding that the law impaired without countervailing justification the existing contractual relationship between employer and employee. The Court thus affirmed the continuing vitality of the contract clause, noting that it imposes real limits on the legislative power of the states.²¹³

As applied by two subsequent decisions of the Fourth and Ninth Circuits,²¹⁴ contract clause analysis in light of *Allied Structural Steel* requires, first, an assessment of the level of impairment caused by the challenged statute and, second, a determination of the "reasonableness and necessity" of the statute's impairment in light of its apparent purpose.²¹⁵

Several recent cases indicate that legislatively provided increases in exemptions substantially impair contracts of existing creditors. Most notable among these decisions is *In re LaFortune*.²¹⁶ In *LaFortune* the Ninth Circuit applied the criteria provided in *Allied Structural Steel* to a California law that created an automatic exemption for the homestead, but had previously required a timely declaration.²¹⁷ The Court held that the California statute violated the contract clause, finding that the "benevolent purpose" of the exemption did not justify the impairment of contractual obligations created prior to the law's enactment.²¹⁸ In similar fashion, the bankruptcy court in *In re Eschewer*²¹⁹ found that the Idaho legislature's decision to increase the homestead exemption from \$10,000 to \$25,000 could not be applied retroactively to pre-existing creditors under the contract clause.

This approach to increases in exemptions is entirely consistent with earlier authority. In *Kearney v. Edwards*,²²⁰ for example, the United States Supreme Court found article X, sections 1 and 2 of the North Carolina Constitution of 1868 in violation of the contract clause²²¹ as applied to obligations incurred prior to the constitution's effective date of April 24, 1868, since the effect of article X was to increase the amount of exemptions available to debtors. The court noted that "the remedy . . . is a part of . . . [the contract's] obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution . . ."²²² In

212. 482 U.S. 254 (1978).

213. *Id.* at 249.

214. *In re LaFortune*, 672 F.2d 842 (9th Cir. 1981); *Carrie v. Humber Ind. Co.*, 830 F.2d 1001 (4th Cir. 1987).

215. *In re LaFortune*, 672 F.2d 842, 845 (9th Cir. 1981); *Carrie v. Humber Ind. Co.*, 830 F.2d 1001, 1006 (4th Cir. 1987).

216. 659 F.2d 828 (9th Cir. 1981).

217. *Id.* at 848-51.

218. *Id.* at 842.

219. 2 B.R. 215 (Bankr. Ct. Idaho 1980).

220. 36 U.S. 385 (1875).

221. 118. Const. art. X § 10, cl. 1.

222. 36 U.S. at 387.

similar fashion, in 1984 the Court in *Worthen v. Thomas*³²³ struck down an Arkansas statute creating an exemption for life insurance policies in the face of a challenge from a creditor who had acquired a lien on the debtor's beneficial interest in a life insurance policy immediately before enactment of the exemption.

Assuming on the basis of such case authority that North Carolina's exemptions do in fact impair existing contractual obligations, the pivotal issue will become the "reasonableness and necessity" of the new exemption law.³²⁴ Since there is no strong tradition of judicial deference to the judgment of the legislature in this area,³²⁵ predictions of the outcome seem particularly hazardous. A reviewing court may resort to the standards for assessing "reasonableness and necessity" first articulated in *Home Building & Loan v. Blaisdell*,³²⁶ rearticulated in *Allied Structural Steel, Inc. v. Spearman*,³²⁷ and applied by the Fourth Circuit in *Garris v. Hanover Insurance Co.*³²⁸ The standards for evaluating the legislation are: "(1) its . . . [the challenged legislation's] emergency nature; (2) its purpose to protect a broad societal interest, not a favored group; (3) the tailoring of its remedial effect to its emergency cause; (4) the reasonableness of its basic features; and (5) its limited effect on temporal terms."³²⁹

The principal difficulty with the Act is in identifying and describing the "emergency" involved. If such can be done—perhaps by establishing the obsolescence of previous exemptions—problems with standards (2) and (5), and perhaps (4), will still exist. Certainly from the perspective of existing creditors, the Act's failure to provide any such of grace or transition period or to distinguish between existing and future creditors underscores its vulnerability. The broad application and reach of chapter 490³³⁰ indicate serious trouble with the contract clause.³³¹ A judicially mandated restriction solely to prospective application seems likely.³³²

IV. SUGGESTIONS FOR REVISION

Chapter 490³³³ is a product of political compromise—and it shows.

323. 382 U.S. 426 (1964).

324. See *Leach v. DeFrance*, 628 F.2d 842, 846 (4th Cir. 1981); *Manis v. Hanover Ins. Co.*, 610 F.2d 1001, 1005 (4th Cir. 1980).

325. *Allied Structural Steel, Inc. v. Spearman*, 406 U.S. 904, 909 (1972) (citing *United States Trust Co. v. New Jersey*, 401 U.S. 1, 22 (1971)).

326. 390 U.S. 391, 416-48 (1968).

327. 485 U.S. 284 (1978).

328. 685 F.2d 1001, 1003 (4th Cir. 1981).

329. *Id.*

330. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 of 16 (to be codified at N.C. Gen. Stat. §§ 10-1501 to 1604).

331. U.S. CONST. art. I, § 10, cl. 1.

332. See *State v. State Exemption Law in Bankruptcy: The Exempted Creditor*, 82 *MINNESOTA L. REV.* 75, 91 (1966); *Yakovitch, Debtors' Exemption Rights*, 82 *CAN. L.J.* 759, 864-65 (1971).

333. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 of 16 (to be codified at N.C. Gen. Stat. §§ 10-1601 to 1606).

The October 1981 amendment delaying the Act's effective date⁴⁸⁴ underscores this fact and suggests that the General Assembly was uneasy with what it had wrought. The most apparent problems with the Act can be summarized as follows: (1) inconsistent use of terminology; (2) the lack of an unambiguous "wash out" mechanism to be used when the debtor's interest in property exceeds the statutory dollar limit; (3) the uncertain new role of the clerk of superior court; (4) the built-in obsolescence of the Act's exemptions; and (5) the uneven fit between the Act and federal bankruptcy law.

From a theoretical point of view, perhaps the best remedy would be to start from scratch with the objective being a shortened and simplified set of exemptions implemented by a coherent and straightforward procedure. With a fresh start, the drafters might choose to address the topic of exemptions in a more comprehensive manner. It is no small irony that for many debtors the most important kinds of exemptions provided by North Carolina law, such as protection of wages from garnishment⁴⁸⁵ and real property held in the entirety,⁴⁸⁶ are not even mentioned in chapter 480. The Act does not alter existing law on either of these two *de facto* exemptions. Under a new exemption scheme, the General Assembly might plausibly conclude that a person's wages should not be subject to garnishment and thus leave G.S. 1-363 on the books.⁴⁸⁷ But in so doing, the legislature should realize the effect of such a determination. Denying creditors access to a debtor's income simply forces more attention to and reliance on the traditional remedy of execution upon tangible assets. In short, if wages cannot be garnished, the availability of executable property held by the debtor becomes more important. The importance to creditors of exemption statutes such as chapter 480, which directly affect the availability of executable property, is unduly emphasized. Further, it is unrealistic to ponder the homestead exemption without acknowledging the absence of a more common *de facto* residence exemption: tenancy by the entirety.⁴⁸⁸ Until this topic is addressed by the legislature, isolated considerations of the "residence exemption" will be little more than an academic exercise. The point here is a simple one. A workable exemption law requires choices to balance the rights of debtors and creditors. These choices have consequences that, if not recognized, simply lead to a mish-mash of statutory and decisional law. Avoiding these choices by addressing the subject of exemptions on a piecemeal basis through legislative amendment likely will not provide a satisfactory accommodation of the competing interests of protection for debtors and reassurance for creditors.

Legislative amendment, however, seems more likely than a complete

484. Act of Oct. 9, 1981, ch. 1031, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at ____.

485. N.C. Gen. Stat. § 1-363 (1979).

486. Under North Carolina law, the individual creditors of either the husband or the wife cannot execute upon entirety property. *Hodge v. Hodge*, 12 N.C. App. 676, 182 S.E.2d 250 (1971); see J. Wainwright, *Real Estate Law in North Carolina* § 116, at 122 (1973).

487. N.C. Gen. Stat. § 1-363 (1979).

488. *Hodge v. Hodge*, 12 N.C. App. 674, 182 S.E.2d 250 (1971).

rewriting of chapter 490. Outlined below are specific suggestions for amendment. These changes are proposed as the minimum revisions necessary to ensure a workable statute. They will not solve all of the problems outlined above. Only a complete revision can hope to accomplish that.

A. Definitions and Terminology

One of the Act's more serious problems is the inconsistent use of key terms and phrases. The use of "debtor" and "judgment debtor," the shifting meanings of "court" and "judge," and the definition of "value" all require attention.

Although section 1C-1801 provides that any resident of North Carolina who is a "debtor" is entitled to exempt the property listed in section 1C-1801(a),³⁸⁰ section 1C-1803(a) indicates that in practice only "judgment debtors" can avail themselves of the Act's benefits since only "judgment debtors" are eligible to designate exempt property.³⁸¹ The two terms are, of course, not synonymous.³⁸² In light of section 1C-1804(n)'s³⁸³ unqualified guarantee, section 1C-1803(a)³⁸⁴ should be amended to allow nonjudgment debtors the opportunity to protect exemptible property prior to judgment. In fact, because article X's protection is afforded to "residents,"³⁸⁵ an amendment may be necessary to withstand constitutional challenge. An amendment such as this also would mitigate the otherwise potentially harsh effect of the statute on the residence exemption, since it would curtail the ability of judgment creditors to reduce the debtor's "interest in value" in residence property by simply declaring their judgments.³⁸⁶ In addition, amending the Act so that each provision applies to "debtor" would make the Act more consistent, since the term "debtor" appears throughout the Act with much more frequency than does the term "judgment debtor."

The terms "court," "judge," and "deed" all appear throughout chapter 490, but there is no discernible pattern to their use. In the context of the procedural steps required for designating exempt property, the terms

380. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 16 (to be codified at N.C. Gen. Stat. § 1C-1801).

381. *Id.* at 20 (to be codified at N.C. Gen. Stat. § 1C-1803(a)(1)).

382. Under prior practice, "any resident" could petition to have property designated as exempt, whether or not a judgment had been entered against him. See N.C. Gen. Stat. § 1-285 (1929, Supp. 1979) (repealed 1981). Under the new Act, apparently one who is not subject to a judgment may not seek to have his exempt property designated. See Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 25 (to be codified at N.C. Gen. Stat. § 1C-1803(a)(1)). Thus, a potential judgment debtor is powerless to protect otherwise exemptible property.

383. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 21 (to be codified at N.C. Gen. Stat. § 1C-1804).

384. *Id.* at 20 (to be codified at N.C. Gen. Stat. § 1C-1803(a)(1)).

385. See N.C. CONST. art. X.

386. See Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 19 (to be codified at N.C. Gen. Stat. § 1C-1801(b)); text accompanying notes 18-23 *supra*.

"court" and "judge" are used interchangeably.³⁴⁶ By itself, this variety would not necessarily be troublesome. The Act, however, apparently contemplates that the clerk of superior court, in addition to the district court judge, may supervise exemption proceedings. Compare, for example, the following provisions: (1) "A judgment debtor may have his exempt property designated in a separate action before the clerk or a district court judge"³⁴⁷ (2) "The court must hold a hearing for the determination of the exempt property."³⁴⁸ (3) "If at the time for the hearing no objection has been made by a creditor or other interested person the judge may, if he finds it appropriate, enter an order"³⁴⁹ and (4) "A notation of the order setting aside exempt property must be entered by the clerk of court on the judgment docket"³⁵⁰

There is simply no way to harmonize these procedural provisions. At the very least, therefore, either the term "court" should be unambiguously defined to include the clerk (and the word "court" substituted for the word "judge" in section 1C-1608(a)(2)), or section 1C-1608 should be amended to divest anyone other than a district court or superior court judge of authority to designate exempt property.

Finally, the term "value" ought to be redefined; the Act presently provides that "value" is "fair market value . . . exclusive of valid liens."³⁵¹ The existing definition is capable of at least two constructions: it could be read to mean either "not counting valid liens" or "after subtracting valid liens." The ambiguity could be resolved by substituting the word "minus" for the word "exclusive" in section 1C-1601(b).³⁵² Alternatively, "value" could be defined to mean fair market value, regardless of liens. This meaning, however, would require additional changes in the text of the Act.³⁵³

II. Procedure

A detailed procedure governing the sale of property having a value in excess of the exemptable limits is needed to replace the Delphic guidance now provided by the last sentence of section 1C-1603(e)(8).³⁵⁴ This provision merely states that "[t]he court may provide for the sale of property . . . and the appropriate distribution of the proceeds"³⁵⁵ Permissible sale techniques, disposition of sale proceeds, and the exempt nature of proceeds paid to the debtor should be addressed. Several statutory mod-

346. Sec. 402 of June 2, 1981, ch. 250, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 80 (to be codified at N.C. Gen. Stat. § 1C-1603).

347. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1608(a)(1)).

348. *Id.* at 25 (to be codified at N.C. Gen. Stat. § 1C-1608(a)(2)).

349. *Id.* (to be codified at N.C. Gen. Stat. § 1C-1608(a)(3)).

350. *Id.* at 26 (to be codified at N.C. Gen. Stat. § 1C-1608(a)).

351. *Id.*

352. *Id.*

353. See text accompanying notes 115-16 & 126-27 *supra*.

354. Art. of June 2, 1981, ch. 250, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 80 (to be codified at N.C. Gen. Stat. § 1C-1603(e)(8)).

355. *Id.*

ed from other states are available as a starting point for drafting a new procedure.³⁵⁶

Other clarifications also would be helpful. The judicial officer primarily responsible for designating exemptions should be identified. This could be accomplished in large part by ensuring that the terms "court" and "judge" as used in the Act are defined and used consistently.³⁵⁷ If the responsible officer is to be the clerk of superior court, then the scope of his or her duties and discretion ought to be described with precision and care. An appellate procedure could be added as well.

The schedule of assets and liabilities required of debtors, in the form prescribed by the Act, is detailed and demanding.³⁵⁸ Coupled with the prescribed form of notice to the debtor, which warns him that "valuable rights" are at stake,³⁵⁹ in section 10-1601(c)'s structure that the court may not permit waivers of exemptions "to the extent the exemptions are necessary to ensure the reasonable support needs of the judgment debtor's dependents."³⁶⁰ The statute's prescribed schedule of assets and liabilities will mean that someone will have to bear the burden of extensive debtor education. That someone will, in some cases, turn out to be the debtor's attorney. In many cases, however, it will be the responsible court officer—most likely the clerk of court. In light of this new and significant duty, the clerk ought to be given as much assistance and guidance in the Act as possible.

C. Substantive Provisions

Chapter 480 in its present form may render the residence exemption meaningless by allowing liens to so reduce the debtor's equity that he effectively has no interest from which to allow any residence exemption.³⁶¹ Although policy arguments exist for abolishing the homestead,³⁶² it does not appear that such a result was actually intended. The problem can be resolved in one of two ways. First, the Act could provide that homesteaded property is never subject to the enforcement of liens, other than purchase money mortgages and construction liens, regardless of when such liens attached, until the full amount of the exemption has been designated and secured. Alternatively, all "residents" of the state could be given the right, as was available under prior law,³⁶³ to have the residence exemption designated at any time, regardless of their status as

356. See, e.g., Ala. Code §§ 6-10-34, -35(b) (Cum. Supp. 1991); Conn. Rev. Stat. § 31-65-61 (1977).

357. See text accompanying notes 325-30 *supra*.

358. See Act of June 2, 1987, ch. 480, § 1, 1987 N.C. Adv. Legis. Serv. No. 6 to 20 (to be codified at N.C. Gen. Stat. § 10-1601(c)).

359. *Id.* at 21 (to be codified at N.C. Gen. Stat. § 10-1601(b)(4)).

360. *Id.* at 18 (to be codified at N.C. Gen. Stat. § 10-1601(c)).

361. See text accompanying notes 215-20 *supra*.

362. One commentator contends that the homestead exemption is unnecessary because the debtor has the option to rent, rather than purchase, a home. *Valuable Debtors' Exemption Rights*, 42 Geo. L.J. 771, 805 (1974); see text accompanying notes 61 & 62 *supra*.

363. See N.C. Gen. Stat. §§ 1-219 to -226 (1987 & Cum. Supp. 1979) (repealed 1987).

"debtors" or "judgment debtors." In short, the inexorable arithmetic of "value" decreased as each lien attaches, should be interrupted.

Section 1C-1601(e), which lists eight categories of claims against which the Act's exemptions are inapplicable, also requires attention.³⁶⁴ Surgery is indicated; the list could be reduced greatly with little prejudice to anyone. For example, laborers' liens, mechanics' liens, claims for repair or improvement of property, and statutory liens all describe the same sort of claim.³⁶⁵ With the arguable exception of claims for repair or improvement of property,³⁶⁶ all of these claims fit within provisions allowing claims for statutory liens. One is hard pressed to decipher what additional protection provisions excepting claims for laborers' or mechanics' liens provide creditors. In fact, if the claim is for a statutory lien, the debtor's potentially exemptible interest is automatically reduced by the lien amount, given the statute's definition of "value."³⁶⁷ It is therefore arguable that none of these four categories is necessary.

Section 1C-1601(e)(5) excepts claims "for payment of obligations contracted for the purchase of the specific property affected."³⁶⁸ Read liberally, the scope of this subsection is impressive. It would apply to any credit sale agreement in which the seller (or third-party lender) does not take back a security interest in the property sold. Thus, a credit card issuer could assert that any property purchased with its credit card is not exempt, as against the lender, until the property is completely paid for. One wonders whether the drafters truly intended to provide such a large exception to the general system of exemptions provided by the Act.³⁶⁹ One must further wonder if the likely additional administrative costs required to enforce this exception can justify its existence.

Finally, the drafters might reconsider the wisdom of the built-in sub-exemptions of the exemptions section 1C-1601(n) provides.³⁷⁰ A \$1,000 interest in an automobile or a \$2,500 interest in household goods may make

364. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Acts, Legis. Serv. Vol. 8 at 19 (to be codified at N.C. Gen. Stat. § 1C-1601(e)).

365. *Id.* to be codified at N.C. Gen. Stat. § 1C-1601(e)(5).

366. *Id.* to be codified at N.C. Gen. Stat. § 1C-150 (a)(10). This provision conceivably could be read to do away with the need for "possession" to give rise to a statutory lien.

367. *Id.* at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(b)); see text accompanying notes 116-18 & 186-87 *supra*.

368. Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Acts, Legis. Serv. Vol. 8 at 18 (to be codified at N.C. Gen. Stat. § 1C-1601(e)(5)).

369. Read in conjunction with § 1C-1601(d), this exception may produce some unexpected results. Imagine, for example, that a debtor purchases a new washing machine with a credit card on January 2. If on May 2 collection proceedings are initiated, under § 1C-1601(e)(5) the washing machine could be exempted—except as against the credit card issuer. But if, instead, collection proceedings are initiated on March 8 (i.e., within 80 days of the purchase), then the washing machine is not exemptible at all and thus benefits all the secured creditors. Thus, a credit card issuer's collector program may actually improve if the debtor does not pay promptly.

370. See Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Acts, Legis. Serv. Vol. 8 at 16 (to be codified at N.C. Gen. Stat. § 1C-1601(n)).

sense in 1981.³⁷¹ With the passage of time, however, these dollar values may shortly become meaningless. Given the legislature's historical reluctance to address the topic of exemptions, it would be wise to consider indexing the dollar values listed in section 1C-1801(a) to adjust for inflation.³⁷²

D. Inconsistency with Bankruptcy Law

Chapter 490³⁷³ and the Federal Bankruptcy Code³⁷⁴ collide at several points, most notably the exempted claims provisions of section 1C-1601(a),³⁷⁵ the ninety-day reprieve period provisions of section 1C-1601(d),³⁷⁶ and the exemption-swapping provision permitted by section 1C-1608(b)(6).³⁷⁷ All of these provisions apply, of course, in state law proceedings; in one way or another, they simply represent policy determinations by the legislature. The issue for bankruptcy purposes, however, is presumption, a matter that likely will be resolved by the bankruptcy courts in the next future. Perhaps the only way to avoid substantial litigation on this issue would be to amend chapter 490 to provide that sections 1C-1601(d) and (e) will not apply in bankruptcy cases.

V. CONCLUSIONS

The new North Carolina exemption set represents an ineffective legislative attempt to accommodate the competing interests of debtors and creditors. The Act is not only difficult to interpret and apply, but also may be subject to challenge under both the North Carolina and Federal Constitutions. Difficulty of interpretation and application stem from inconsistent use of terms such as "clerk," "judge," and "court" and unclear definition of key terms such as "value."

The constitutionality of the Act is called into question by its apparent violation of the contract clause and by its arguable intrusion into a field preoccupied by federal legislation. Moreover, although the Act preserves article X's exemption provisions, by repealing the mechanisms to implement them, it is questionable whether the constitutional exemptions will provide debtors with a practical alternative to the statutory exemptions.

To remedy the deficiencies of the new Act, significant revision is necessary. Probably the most effective course would be to draft a new

371. *Id.*

372. Section 3 of the Uniform Exemptions Act might serve as a model here; it provides for biennial adjustment of dollar amounts indexed to changes in the Consumer Price Index. See BUSINESS RESTRUCTURING ACT § 2.

373. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. ADV. LEGIS. SERV. NO. 6 at 18 (to be codified at N.C. GEN. STAT. §§ 1C-1601 to -1609).

374. 11 U.S.C. §§ 151-1607 (Supp. III 1979).

375. Act of June 3, 1981, ch. 490, § 1, 1981 N.C. ADV. LEGIS. SERV. NO. 6 at 19 (to be codified at N.C. GEN. STAT. § 1C-1601(a)).

376. *Id.* at 18-19 (to be codified at N.C. GEN. STAT. § 1C-1601(d)).

377. *Id.* at 20 (to be codified at N.C. GEN. STAT. § 1C-1608(a)(6)).

substance of exemptions. At the minimum, the Act's definitions, terminology, and procedure should be clarified, and the Act's substantive provisions should be amended to be consistent with state and federal constitutional provisions. Failure to make these changes may ensure that the rights of both debtors and creditors are inadequately protected, as well as provide a fertile new area for litigation.

