THE LEGISLATURE STRIKES BACK: EXEMPTIONS, PART 2†

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† The first part of this article originally was published after the North Carolina legislature passed the 1981 Act. The site for the first part is Peeples, *New Intake for an Old Canoe: North Carolina's New Exemption Act*, 17 WAKE FOREST L. REV. 365 (1981).

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Introduction

Allowing debtors to protect various property from the judicial collection process is a long established practice in North Carolina.[1] As early as 1778, certain property of the debtor could be set aside from the reach of creditors.[2] Designating property as "exempt" ordinarily renders the property unavailable to judgment creditors acting pursuant to writs of execution, attachment, and garnishment.

One year after enacting sweeping changes to North Carolina's exemption laws,[3] the General Assembly on June 12, 1982 ratified House Bill 1453, entitled "An Act to Amend The Procedure For Granting Exemptions From Money Judgments."[4] These amendments substantially revised the 1981 Act. This article examines the 1982 changes in the context of state collection law and federal bankruptcy law.

I. Background

The basic purpose of exemption laws is to allow a debtor to retain an amount of property at least sufficient to provide him or her with the "necessities of life," thereby making eventual financial rehabilitation possible.[5]

An examination of North Carolina's exemptions law begins with article X of the State Constitution of 1868.[6] Section 1 of article X exempted

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1. 2 A. McIntosh, North Carolina Practice and Procedure § 2211, at 314-15 n.1 (2d ed. 1956); Aycock, *Homestead Exemption in North Carolina*, 29 N.C.L. Rev. 148, 148 (1951).

2. 2 A. McIntosh, North Carolina Practice and Procedure § 2211, at 314-15 n.1 (2d ed. 1956).

3. Act of June 2, 1981, ch. 403, § 1, 1981 N.C. Sess. Laws 751 (codified at N.C. Gen. Stat. §§ 1C-1601 to -1604 (Cum. Supp. 1981)) [hereinafter cited as the 1981 Act].

4. Act of June 12, 1982, ch. 1224, 1982 N.C. Sess. Laws ___, amending and recodifying N.C. Gen. Stat. §§ 1C-1601 to -1604 [hereinafter cited as the 1982 amendments].

5. Yukovich, *Debtors' Exemption Rights*, 62 Geo. L.J. 709, 709-30 (1974); Note, *Does North Carolina Really Have a Homestead Exemption?*, 2 Wake Forest Intra. L. Rev. 58, 58 (1966); and D. Epstein & J. Landers, Debtors and Creditors 107 (3d ed. 1986).

6. N.C. Const. of 1868 art. X.

personal property, as selected by the debtor, "to the value of five hundred dollars from execution."[7] Section 2 of article X exempted the debtor's homestead to a maximum value of $1,000.[8] Section 7 of article X exempted life insurance policies held by the debtor "for the sole use and benefit of his wife and children."[9] North Carolina General Statutes 1-369 through 1-392 and its predecessors provided the machinery for designating the exemptions of article X[10] and codified the $1,000 ceiling for the homestead and the $500 ceiling for personal property.[11]

In 1971 sections 1 and 2 of article X were amended. The $1,000 and $500 ceilings for real and personal property became floors, and the General Assembly was authorized to set higher limits if it so decided.[12] Ten years later the General Assembly indirectly exercised its right to raise the limits. By repealing sections 1-369 through 1-392 and making the new exemptions set forth in section 1C-1601[13] "optional," the legislature essentially circumvented article X. Thus, a debtor nominally was free to demand the article X exemptions, if he or she chose. Exercising this freedom was difficult, however, since the 1981 Act in repealing sections 1-369 through 1-392 eliminated the procedural mechanism for claiming exemptions under article X.[14]

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7. *Id.* § 1.
8. *Id.* § 2.
9. *Id.* § 7.
10. N.C. Gen. Stat. §§ 1-369 to -392 (1969 & Cum. Supp. 1979) (repealed 1981).
11. *Id.* § 1-369.
12. Sections 1 and 2 of the North Carolina Constitution provide:

Section 1. *Personal property exemptions.*

The personal property of any resident of this State, to a value fixed by the General Assembly but not less than $500, to be selected by the owner, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

Section 2. *Homestead exemptions.*

(1) *Exemption from sale; exceptions.* Every homestead and the dwellings and buildings used thereon, to 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 to the same value, owned and occupied by a resident of the State, shall be exempt from sale under execution or other final process obtained 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, having a widow but no children, the homestead shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she is the owner of a homestead in her own right.

N.C. Const. art. X, §§ 1, 2.

13. N.C. Gen. Stat. § 1C-1601(a) (Cum. Supp. 1981).
14. Act of June 2, 1981, ch. 690, § 2, 1981 N.C. Sess. Laws 779.

II. The 1981 Act

The 1981 Act provided both a new set of exemptions and a procedure for designating them. Subsection 1C-1601(a) entitled the property that a "debtor" may retain "free of the enforcement of the claims of his creditors."[15] Specific exemptions, expressed in terms of "interest in value," were provided for a residence, a motor vehicle, various personal property, and tools of the trade.[16] Life insurance as provided by the constitution, 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 also were protected.[17] Although the pattern of subsection 1C-1601(a) resembled the set of exemptions provided in subsection 522(d) of the Bankruptcy Code,[18] there were significant differences between the two laws.[19]

Of critical importance under the 1981 Act was the meaning of the phrase "interest in value." The impact of this phrase apparently was to allow the debtor to retain not the property described, but only the cash equivalent of the allowed "interest in value," when the value of the property exceeded the allowed amount of exemption. The 1982 amendment clarifies this concept by emphasizing that only the cash equivalent of the exempt property may be protected.

Subsection 1C-1601(c) of the 1981 Act allowed for a waiver of exemptions under limited circumstances.[20] Subsection 1C-1601(d) discouraged eve-of-insolvency conversions of property from nonexempt to exempt status, by making the exemptions of subsections 1C-1601(a)(1) through (a)(5) inapplicable to purchases of tangible personal property within ninety days of the initiation of judgment collection or bankruptcy proceedings.[21] Subsection 1C-1601(e) listed nine types of claims against which exemptions could not be asserted.[22] Subsection 1C-1601(f) denied to North Carolina residents the option of claiming in bankruptcy proceedings the exemptions provided by subsection 522(d) of the Bankruptcy Code.[23]

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15. N.C. Gen. Stat. § 1C-1601(a) (Cum. Supp. 1981).
16. *Id.*
17. *Id.*
18. 11 U.S.C. § 522(d) (Supp. IV 1980).
19. The § 1C-1601(a) exemptions are, with one or two exceptions, less generous than those provided by § 522(d). For example, up to a $1,200 interest in a motor vehicle is exempt under § 522(d)(2). The corresponding amount in § 1C-1601(a)(2) is $1,000. Jewelry, to an aggregate value of $500, is protected by § 522(d)(4); § 1C-1601(a) makes no express provision for jewelry. Other differences exist as well. See generally Peeples, *New Suits for an Old Chest: North Carolina's New Exemption Act*, 17 Wake Forest L. Rev. 865, 877-88, 898-910 (1981).
20. N.C. Gen. Stat. § 1C-1601(c) (Cum. Supp. 1981).
21. *Id.* § 1C-1601(d).
22. *Id.* § 1C-1601(e).
23. *Id.* § 1C-1601(f). Section 522(b) of the Bankruptcy Code 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(b), (d) (Supp. IV 1980). If, however, applicable state law expressly denies the debtor 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(b)(1) (Supp. IV

Section 1C-1602 gave debtors the choice between the exemption of article X and the exemptions contained in section 1C-1601.[21] The procedure for claiming section 1C-1601 exemptions (but not article X) was supplied by section 1C-1603.[22] Finally, section 1C-1604 defined the legal effect of designating property as exempt.[23]

Implementation of the 1981 Act revealed a number of problems. Ambiguous definitions and inconsistent use of terms and phrases made the 1981 Act difficult to understand and interpret. Both state and federal constitutional challenges seemed possible as well. In addition, due to the imprecise "fit" between the Act and the Bankruptcy Code, the possibility existed that the Act would be either fully or partially preempted in all bankruptcy cases.[24]

The 1982 amendments respond to these and other problems. These amendments, however, also may encounter considerable difficulty at both the state and federal levels.

III. The 1982 Amendments

A. In General

The primary changes in the 1982 amendments are concerned with terminology, waiver, exempted claims, and procedure. The list of exemptible property found in subsection 1C-1601(a),[25] the restriction of recent purchases of tangible personal property,[26] and the General Assembly's decision to "opt out" of the federal bankruptcy exemptions[27] all remain unchanged.

"Exemption swapping" is still authorized,[28] and section 1C-1604, which describes the effect of exemptions, remains unchanged.[29] Nor was subsection 1C-1600(g), dealing with modification of exemptions amended.[30] Like their 1981 predecessor, the 1982 amendments do not affect exemptions provided by North Carolina law other than article X or chapter 1C of the North Carolina General Statutes. Thus, payments made under the aid to families with dependent children program,[31] unem-

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1981].

21. N.C. Gen. Stat. § 1C-1600 (Cum. Supp. 1981).
22. *Id.* § 1C-1603.
23. *Id.* § 1C-1604.
24. *See generally* Douglas, *supra* note 19.
25. N.C. Gen. Stat. § 1C-1601(a) (Cum. Supp. 1981).
26. *Id.* § 1C-1601(b).
27. *Id.* § 1C-1600(f).
28. *Id.* § 1C-1635(c)(6), *as amended by* Act of June 19, 1982, ch. 1334, § 20, 1982 N.C. Sess. Laws — (codified at N.C. Gen. Stat. § 1C-1635(c)(11) (Interim Supp. 1982)). The law permits a debtor to retain property whose value exceeds the allowable exemption by making available to judgment creditors money or property not otherwise available to them in an amount equal to the "excess value" of the property to be retained.
29. N.C. Gen. Stat. § 1C-1604 (Cum. Supp. 1981).
30. *Id.* § 1C-1635(g).
31. *Id.* § 108A-36 (Cum. Supp. 1981).

ployment compensation,[35] aid to blind persons,[36] fraternal and society benefits,[37] group life insurance benefits,[38] firemen's pension benefits,[39] retirement workers' benefits for state, city, and county employees,[40] and workers' compensation[41] will remain exempt. Two substantial de facto exemptions also survive unscathed: virtual freedom from wage garnishment[42] and the availability of tenancy by the entirety.[43] Also, the exemptions remain available to every judgment debtor. There are no restrictions on joint cases. A husband and wife, for example, are each entitled to a full set of exemptions.

B. *Specific Changes*

1. *Terminology*

The 1982 Act was plagued by the inconsistent use of terms and ambiguous definitions.[44] The 1983 amendments remedy a substantial number of these difficulties. It is now clear that the principal official in an exemption proceeding will be the clerk of superior court.[45] The district court judge ordinarily will become involved only when a creditor objects to the debtor's claimed exemptions, or when an appeal is taken from the clerk's designation of exempt property.[46] In addition, sections 5, 19, and 20 of the 1982 amendments substitute the phrase "clerk or district court judge" for the word "court" in appropriate circumstances.[47]

a. Defining "value." Because the concept of "interest in value" looms large in the new exemption system, the definition of "value" is critical. The definition provided by subsection 1C-1601(b) of the 1981 Act was susceptible to two different readings.[48] This ambiguity is resolved by the 1982 amendments, which now define "value" as "fair market value of an individual's interest in property, less valid liens superior to the judg-

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35. *Id.* § 96-17(c) (Supp. 1981).
36. *Id.* § 111-18 (1978).
37. *Id.* § 58-850 (1979).
38. *Id.* § 58-213.
39. *Id.* § 118-49 (Supp. 1981).
40. *Id.* § 128-31 (1964).
41. *Id.* § 97-21 (1979).
42. *Id.* § 1-362 (1969). By protecting the debtor's normal earnings for the sixty days immediately preceding § 1-358 makes garnishment extremely impractical as long as it can be shown that such earnings are necessary for the support of a family.
43. North Carolina is one of approximately twenty states that do not permit the creditors of one spouse to levy on that spouse's interest in property held as tenants by the entirety. See 5 Thompson, Commentaries on the Modern Law of Real Property 210 n.18 (1979). Thus, tenancy by the entirety survives in North Carolina and elsewhere as a de facto exemption.
44. See Peoples, *supra* note 18, at 806-08.
45. N.C. Gen. Stat. § 1C-1601(e)(4)-(6) (Cumulative Supp. 1983) (amending N.C. Gen. Stat. § 1C-1601(e) (Cum. Supp. 1981)).
46. *Id.* § 1C-1601(e)(7)-(9) (Cumulative Supp. 1981).
47. Act of June 12, 1982, ch. 1224, §§ 5, 19, 20, 1982 N.C. Sess. Laws ___.
48. Section 1C-1601(b) defined "value" as "fair market value of an individual's interest in property, exclusive of valid liens." See Peoples, *supra* note 18, at 808-09, 815.

ment lien sought to be enforced.”[49] The resolution itself, however, raises additional questions. The new definition of "value" is not synonymous with the debtor's equity in the property, due to the adjectival phrase limiting the term "valid liens."

To illustrate, imagine a debtor owning a house with a fair market value of $50,000 but subject to a $30,000 first mortgage recorded January 1, 1981, a $15,000 judgment docketed on January 1, 1982, and a $4,000 judgment docketed on February 1, 1982. As against the first judgment lien creditor,[50] under amended subsection 1C-1601(b) the debtor has $20,000 of "value" in the house, of which amount $7,500 can be protected under subsection 1C-1601(a)(1). As against the second judgment lien creditor, the debtor has $6,000 of "value." That is not the way most debtors would view the situation. Most debtors (and prospective creditors) would define the debtor's interest in the house as $1,000, which is the "equity" in the property available after all valid liens are subtracted from fair market value.

Thus, the new definition of "value" ensures that the mere possibility that a judgment lien will be enforced will not consume the exemptible interest in the property and thereby deny the debtor any meaningful protection. An opposite result seemed likely under the 1981 Act;[51] but, under the new amendments, merely docketing a judgment will no longer automatically reduce *pro tanto* the debtor's "interest in value." Nonetheless, as the preceding hypothetical suggests, it will behoove the debtor to seek his residence exemption promptly since as against the second judgment lien creditor the debtor's "interest in value" is reduced by the amount of the first judgment lien.

Of course, the implementation of the new definition prompts new questions. The question of who will bear the loss occasioned by a claim of exemption continues to present problems. In the preceding hypothetical, although there is only $1,000 of equity in the property, the debtor has the right to exempt $7,500 as against the first judgment lien creditor, but only $5,000 as against the second judgment lien creditor. Thus, under the new definition of "value," the second judgment lien creditor who, after all, docketed his judgment after the first judgment lien creditor, and who therefore took with notice of the senior liens, would bear the loss.

Now change the amount of the first judgment lien to $10,000, and make the second judgment lien a second mortgage, in the new amount of $9,000. When the first judgment lien creditor seeks to satisfy his claim, who should bear the loss? From the judgment lien creditor's viewpoint, the answer remains the same. The debtor has $20,000 "interest in value," and has a right to exempt $7,500 of that amount. Ten thousand dollars of

49. N.C. Gen. Stat. § 1C-1601(b) (Interim Supp. 1981) (amending N.C. Gen. Stat. § 1C-1601(b) (Cum. Supp. 1981)).

50. Pursuant to G.S. 1-234, 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.

51. *See* Peeples, *supra* note 19, at 516-20.

the remaining $12,500 should go to the judgment lien creditor, with the remaining $2,500 paid over to the second mortgagee. The second mortgagee thus will bear the $6,000 loss created by the debtor's residence exemption. The result can be justified by the fact that the second mortgagee took his interest with notice of both the first mortgage and the judgment lien. The junior mortgagee, however, might advance a different analysis. Under amended subsection 1C-1601(a)(6),[52] he has a claim for a "contractual security interest in the specific property affected." His claim is therefore an "excepted claim," against which the exemptions of subsection 1C-1601(a) are inapplicable. Why then, if the debtor-mortgagor could not assert an exemption against him directly, should the debtor-mortgagor prevail indirectly due to the introduction of another creditor?

Thus, the new definition of value leads to a three-horned dilemma. Although on balance the equities might favor denying the debtor any residence exemption in excess of $4,000, it may be a difficult result to reach since the statute unequivocally gives the debtor the right to exempt his "interest in value" in a residence, up to $7,500. The problem may be solved by amended section 1C-1604, which provides that "exempt property is free of the enforcement of the claims of creditors . . . other than claims excepted by G.S. 1C-1601(c)."[53] Thus, the second mortgagee could reach the cash equivalent of the debtor's exemption to satisfy his claim in full.

b. *Defining "judgment debtor."* Use of the phrase "judgment debtor" appears to be uniform throughout the exemptions statute, with the exception of subsection 1C-1601(a), which continues to use the term "debtor."[54] Nonetheless, in light of the 1982 amendments, it is clear that only judgment debtors may avail themselves of the protection provided by the statute.[55] The danger of such a limitation, however, has been lessened by the new definition of "value." As a result of this change, anticipatory claims of exemption (those in which no adverse judgment has yet been rendered) ordinarily will not improve the debtor's position.[56] Nonetheless, it remains true that the constitutional protection of article X by its terms is open to "residents," not residents who are also "judgment debtors."[57] Because amended section 1C-1603 provides the exclusive procedure for claiming the constitutional exemptions, and since that procedure is by its terms available only to judgment debtors,[58] technical constitutional problems still exist.[59]

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52. N.C. Gen. Stat. § 1C-1601(a)(6) (Cumulative Supp. 1981). The 1981 amendments deleted the § 1C-1601(a)(6) claims for the repair or improvement of property, and renumbered the § 1C-1601(a)(7) claims for contractual security interests.

53. *Id.* § 1C-1604(c).

54. *Id.* § 1C-1601(a) (Cum. Supp. 1981).

55. *Id.* § 1C-1603(b) (Interim Supp. 1982).

56. Such was not the case under the 1981 Act, since the docketing of a judgment had the automatic effect of reducing "value." *See* Peeples, *supra* note 19, at 855, 864.

57. N.C. Const. art. X, §§ 1, 2.

58. N.C. Gen. Stat. § 1C-1603 (Interim Supp. 1982).

59. *See* Peeples, *supra* note 19, at 861.

c. *Defining "judgment lien."* As noted above, "value" is defined by amended subsection 1C-1601(b) as "fair market value of an individual's interest in property, less valid liens superior to the judgment lien sought to be enforced."[80] The use of the phrase "judgment lien" in that definition is a bit curious since some judgments that creditors might seek to enforce do not give rise to judgment liens. Only when the debtor owns real property located in the county or counties where the judgment has been docketed is there a "judgment lien."[81] If the debtor owns no real property, there is no judgment lien. The presumption would be that "judgment" can be mentally substituted for "judgment lien" without doing violence to the intent of the statute.

2. *Waiver of exemptions*

The 1981 Act allowed waiver of exemption rights under certain narrowly specified circumstances. The three exclusive grounds for a finding of waiver under the 1981 Act included the transfer of exempt property, the execution of a written waiver approved by the court after judgment along with the court's determination that the waiver was knowingly and voluntarily made, and the failure to assert exemption rights after notice to do so from the court.[82] The third basis for establishing waiver was undermined substantially by the failure of the 1981 Act to specify what length of time after the court's notice constituted a "reasonable opportunity to assert the exemptions."[83] Further, all three grounds were qualified by the requirement that no waiver be permitted to the extent exempt property was "necessary to ensure the reasonable support needs of the judgment debtor's dependents."[84]

While the 1982 amendments retain the three basic grounds for a finding of waiver contained in the 1981 Act, the amendments do provide changes that will make waiver a more likely event. First, the 1982 amendments remove the limitation upon all three waiver grounds that the "reasonable support needs of the judgment debtor's dependents" be preserved. Additionally, the amendments provide that the failure to assert exemptions within twenty days after "service of the notice of rights"[85] or failure to appear at the exemption hearing[86] (if one is requested) will now constitute a waiver of exemption rights. Finally, the 1982 amendments cure the uncertainty surrounding the third basis for establishing waiver by repleading the "reasonable opportunity" provision with the twenty day limitation.[87]

The waiver provisions expressly are made applicable to the constitu-

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80. N.C. GEN. STAT. § 1C-1601(b) (Interim. Supp. 1982).
81. *Id.* § 1-234 (Cum. Supp. 1981).
82. *Id.* § 1C-1601(e).
83. *Id.* § 1C-1601(e)(3).
84. *Id.* § 1C-1601(e).
85. *Id.* § 1C-1601(e)(2) (Interim Supp. 1982).
86. *Id.*
87. *Id.* § 1C-1601(e)(2).

tional exemptions as well.[67] Waiver by transfer and waiver by inaction were both possible under pre-1981 law.[68] Since exemption rights under article X could be forfeited by inaction, *a fortiori*, execution of an instrument formally waiving these rights after judgment should pose no significant problems under the Constitution.[69]

The waiver provisions will be subject to modification in bankruptcy cases. For example, although a selective waiver in favor of a particular creditor is possible under the 1981 Act and the 1982 amendments, any such waiver will be unenforceable under the Bankruptcy Code.[70] Other types of waivers, however, are possible under both the Code and state law. For example, a general waiver for the benefit of all creditors,[71] a failure to assert exemption rights,[72] and an omission of particular property from the schedule of exemptions[73] can all function as waivers under both federal and state law.[74]

3. *Excepted claims*

The 1981 Act preserved and protected nine types of claims from attempted exemptions. The excepted claims included claims of the United States; claims of the state or other governmental unit for taxes or appearance bonds; claims of laborers, mechanics, and statutory lienors; claims for the repair or improvement of the specific property; claims for the purchase money of specific property; and claims for child support or alimony.[75] The list has been refined by the 1982 amendments. Eliminated are claims for the "repair or improvement of the specific property affected," presumably viewed as superfluous in light of the excepted status of laborers', mechanics', and statutory liens.[76] Claims for purchase money are now limited to purchases of real property, rather than of any prop-

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68. *Id.* § 1C-1601(c). The clerk or district court judge are empowered to relieve this type of waiver made by mistake, surprise, or excusable neglect, "to the extent that the rights of innocent third parties are not affected." *Id.*

68. *See* North Carolina Nat'l Bank v. Burgess, 49 N.C. App. 693, 272 S.E.2d 388 (1980) (homestead exemption waived by inaction); N.C. Gen. Stat. § 1-310 (Cum. Supp. 1979) (repealed 1981) (homestead exemption lost upon conveyance).

69. An agreement not to assert exemptions executed prior to judgment is unenforceable under article X. Mauldin v. Cochran, 39 N.C. App. 715, 245 S.E.2d 219, *appeal dismissed*, 295 N.C. 651, 248 S.E.2d 727 (1978). Likewise, chapter 10 does not authorize such exemption waivers.

70. 11 U.S.C. § 522(e) (Supp. IV 1980).

71. *Id.*; *see* 3 COLLIER ON BANKRUPTCY ¶ 522.07 (15th ed. 1979).

72. 11 U.S.C. § 522(l) (Supp. IV 1980).

73. Under § 522(l) it is the debtor's responsibility to affirmatively claim his exemptions by filing a schedule of exempt property. 11 U.S.C. § 522(l) (Supp. IV 1980). Omission of a particular item of exempt property from the schedule therefore would operate as a selective waiver unless a "party in interest" objects. See 3 COLLIER ON BANKRUPTCY ¶ 522.07 [15th ed. 1979].

74. *See* Peeples, *supra* note 12, at 288-301.

75. N.C. Gen. Stat. § 1C-1601(c) (Cum. Supp. 1981), *see supra* note 62.

76. N.C. Gen. Stat. §§ 1C-1601(c)(3), (1), (5) (Interim Supp. 1982).

erty, as was the case under the 1981 Act.[74] This limitation partially closes what had been a loophole of considerable size. Original subsection 1C-1601(e)(6) would have protected not only unsecured sellers on credit, but credit card issuers, such as MasterCard and Visa, as well.[75]

Finally, subsection 1C-1601(e)(2) has been amended to include claims on fiduciary bonds,[76] and subsection 1C-1601(e)(9) has been amended to add claims for distributive awards under chapter 50 of the North Carolina General Statutes.[77]

4. *Implementation of article X*

The 1981 Act made the use of section 1C-1601's exemptions optional.[78] Instead of using section 1C-1601's exemptions, the debtor could take the personal property and homestead exemptions provided in article X of the North Carolina Constitution. The 1981 Act, however, provided no substance for the statutory sections implementing article X, which it had repealed.[79] As amended, section 1C-1603 now makes the procedure set forth in section 1C-1603 applicable to both statutory and constitutional claims of exemption.[80]

The legislature, however, has done more than clarify a procedural quibble. While amended section 1C-1603 recognizes the debtor's entitlement to have his chosen constitutional exemptions excepted from sale under execution, it also indicates that, in the circumstance where a debtor claims an exemption in excess of his $1,000 homestead and $500 personal property exemption, the court can order the sale of the property.[81] The proceeds of this sale are then paid to the debtor in an amount sufficient to satisfy his exemption, with the excess being distributed as ordered.[82] This result contrasts sharply with pre-1981 practice. For over one hundred years, North Carolina courts consistently interpreted article X, section 2 to require a physical allotment, by metes and bounds, of $1,000 worth of homestead property chosen by the debtor. Property so allotted absolutely was immune from creditor process.[83] The approach now taken by the legislature when a debtor claims property with a value in excess of his exemption was unsuccessfully challenged in 1887 in *Oakley v. Von*

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74. *Id.* § 1C-1601(e)(6).

75. *Id.* § 1C-1601(e)(6) (Cum. Supp. 1981); *see* Peeples, *supra* note 18, at 867, *supra* note 38.

76. N.C. Gen. Stat. § 1C-1601(e)(2) (Interim Supp. 1982).

77. *Id.* § 1C-1601(e)(9).

78. *Id.* § 1C-1603 (Cum. Supp. 1981) (amended 1983).

79. *Id.* §§ 1-369 to -402 (1969) (repealed 1981).

80. *Id.* § 1C-1603 (Interim Supp. 1983).

81. *Id.*

82. *Id.*

83. Perhaps the clearest illustration of this rule is found in *Stevens Property, Inc. v. Schinhan*, 34 N.C. App. 687, 239 S.E.2d 744 (1977), *appeal dismissed*, 294 N.C. 443, 241 S.E.2d 844 (1978). In *Stevens Property* the debtor successfully received an exempt 75 square feet of hallway space located on the first floor of his two story residence valued at $78,000. 34 N.C. App. at 688, 239 S.E.2d at 745.

Noppen.[86] In *Oakley* the North Carolina Supreme Court held that a creditor could not satisfy article X's requirements by selling the debtor's residence at execution and paying over to him the first $1,000 of proceeds. The question now presented is whether the legislature may discard the court's long-standing interpretation of article X.

The question has practical significance. If a debtor may select the physical portion of homestead property to be allotted him, he has the power to prevent any execution sale of the balance.[87] No similar result is possible if the debtor's article X rights can be satisfied with $1,000 in cash.

Relevant cases are less than clear about the basis for the conclusion that an actual physical allotment is necessary. Language in the leading case of *Campbell v. White*[88] suggests that the implementing statutes, not the Constitution alone, required this result.[89] Nonetheless, by its own terms, article X contemplates actual selection by the debtor of the specific property that will serve as his homestead. Section 2 expressly states that "[e]very homestead and the dwellings and buildings used therewith . . . or in lieu thereof, at the option of the owner, any lot in a city or town with the dwellings and buildings used thereon [shall be exempt]."[90] A similar problem exists with the $500 personal property exemption, which exempts "personal property . . . to a value fixed by the General Assembly but not less than $500, to be selected by the resident."[91]

Of course, while it is common for the legislature to overrule a court's interpretation of a statute by rewriting that statute, it is quite another thing for the legislature to overrule a court's interpretation of a constitutional provision. In any event, the interpretation question will not be settled in the legislature. It will be the courts' decision whether or not to retain the long-standing rule of *Campbell* and *Oakley*, or to confirm the legislature's reinterpretation of article X's nebulous guarantees.

5. *Procedure for claiming exemptions*

The 1998 amendments thoroughly revise the 1981 Act's procedure for claiming exemptions. On balance, a smoother, more streamlined proce-

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86. 96 N.C. 337, 2 S.E. 660 (1887).

87. For a discussion of the debtor's ability to prevent a sale, see *supra* note 37 and accompanying text.

88. 95 N.C. 491 (1886). See generally Pringle, *supra* note 10, at 270.

89. The constitution exempts from sale, and process for the use of the debtor and his family, "any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars," and the statute requires the assignment by metes and bounds according to the applicant's direction, not to exceed one thousand dollars in value.

95 N.C. 491, 499 (1886). This statutory requirement contemplates the allotment of a specific and defined part of the land to severally, involving no community of interest between the ownership of that constituting the excess which at a sale the purchaser may acquire.

90. N.C. CONST. art. X, § 2.

91. *Id.* § 1.

dure should result. First, the circumstances that give rise to an exemption proceeding have been limited and redefined. Subsection 1C-1603(a)(2), which permitted a judgment creditor to initiate exemption proceedings, has been deleted.[94] Previously, subsection 1603(a)(1) allowed a "judgment debtor" to initiate exemption proceedings at virtually any stage of a lawsuit.[95] This section has been rewritten and shortened to permit exemption proceedings only after judgment has been entered against the "judgment debtor."[96] Although the terminology remains inconsistent (and technically incorrect),[97] the impact of amended subsection 1C-1603(a)(1) seems clear.

The judgment debtor requests exemptions by motion.[98] The motion must be accompanied by the debtor's completed schedule of assets and liabilities in the form prescribed by subsection 1C-1603(c).[99] The form has not been revised. It remains a highly detailed and lengthy document that will challenge the patience and tenacity of any lawyer or debtor not accustomed to the preparation of analogous documents, such as an IRS Form 1040 (with schedules) or an SEC registration statement.[100]

The clerk and the district court judge remain empowered to find that particular property is not exempt.[101] In situations in which such a finding is not possible, however, the clerk cannot issue a writ of execution until the debtor has been served with notice advising him of his exemption rights.[102] In addition the 1982 amendments hold the judgment creditor responsible for properly serving notice.[103]

Second, if the debtor initiated the proceedings, subsection 1C-1603(d) formerly required that all the debtor's creditors listed on the required schedule of assets and liabilities be given notice of the exemption hearing.[104] If, however, the proceedings were initiated by either the court or the judgment creditor, the notice was optional.[105] The 1982 amend-

94. N.C. GEN. STAT. § 1C-1603(a)(2) (Cum. Supp. 1981) (repealed 1982).

95. Id.

96. Id. § 1C-1603(a)(1) (Interim Supp. 1982).

97. A judgment debtor does not become such until after a judgment has been rendered against him. Read literally, § 1C-1603(a)(1) states substantively nonsense.

98. Id. § 1C-1603(a)(1) (Interim Supp. 1982).

99. Id. § 1C-1603(c) (Cum. Supp. 1981).

100. One court form distributed to attorneys in Alamance County requires the following admonition in capital letters:

> DEBTOR BEAR CAREFULLY! THE CLERK OF SUPERIOR COURT IS PROHIBITED BY LAW FROM GIVING LEGAL ADVICE! IF YOU HAVE ANY QUESTIONS ABOUT THIS ARREST PROCEDURE, YOU SHOULD CONTACT AN ATTORNEY! IF YOU FEEL THIS PROCEDURE IS CUMBERSOME YOU SHOULD CONTACT YOUR REPRESENTATIVES IN THE LEGISLATURE AND MAKE YOUR CONCERNS KNOWN TO THEM. THEY ARE THE ONLY ONES WHO CAN PROPOSE CHANGES OR IMPROVEMENTS TO THE PRESENT STATUTES.

101. N.C. GEN. STAT. § 1C-1603(a)(3) (Interim Supp. 1982).

102. Id. § 1C-1603(a)(1).

103. Id.

104. Id. § 1C-1603(d)(2) (Cum. Supp. 1981) (amended 1982).

105. Id. § 1C-1603(d)(1).

ments dispense with this distinction. As amended, subsection 1C-1603(d) merely requires a debtor who has moved to designate his exemptions to serve a copy of his motion and schedule on the judgment creditor.[96] In practical application, some flexibility will be necessary. In many situations, the identity of the judgment creditor will be obvious; for instance, when he is the creditor who recently obtained a judgment and is now demanding a writ of execution. The debtor, however, may move to have his exemptions designated at any time after a judgment has been rendered against him.[97] Needless to say, debtors often have more than one judgment creditor. If the debtor decides to claim his exemptions after entry of a third money judgment, for example, the question arises whether the first and second judgment creditors or only the most recent judgment creditor should be served with the motion. Interestingly enough, the statute is cast in the singular. Whether a debtor would want to remind his other judgment creditors of his unpaid debt by serving them with a copy of his notice also should be considered.

In the interest of fairness, it is logical to require notice to all judgment creditors, not just the most recent one. The effect of an implied requirement, however, should be explored. To the extent that real property of the debtor is or may be available, in whole or in part, simultaneous notice to all judgment creditors will have little effect on their relative priority since priority as to real property is determined by the date the judgment is docketed.[98] As to personal property, however, simultaneous notice should presumably lead to shared and coequal priority among judgment creditors. Priority as to personalty is not established until levy pursuant to a writ of execution,[99] and no writ can be issued until exemption proceedings are concluded.[100] Although theoretically coequal priority seems unobjectionable it will nonetheless require restraint and good faith among competing judgment creditors as they wait for the clerk's "green light" to obtain and act on a writ of execution. Perhaps no inference this point is minor, but it illustrates a conceptual weakness in the two exemptions bills. The legislature seems unable to decide whether to encourage coordinated collective creditor action or to retain the traditional collection practice, which assumes one debtor and one judgment creditor acting alone.

Third, two separate hearings are provided under the 1982 amendments.[101] Neither, however, is mandatory. No longer requiring a hearing in every case carries obvious practical and administrative benefits. In many situations, a hearing is simply unnecessary; for example, it will often become obvious that the debtor has no nonexempt property. Fur-

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96. *Id.* § 1C-1603(d) (Interim Supp. 1982).
97. *Id.* § 1C-1601(a)(1).
98. *Id.* § 1-234 (Cum. Supp. 1981).
99. *Id.* § 1-313.
100. *Id.* § 1-305 (Interim Supp. 1982).
101. *Id.* § 1C-1603(a)(1) (hearing to designate exemptions); *Id.* § 1C-1603(a)(2) (hearing on objections to claimed exemptions).

thermore, the change is consistent with bankruptcy practice where "parties in interest" are simply entitled to notice and an opportunity for a hearing.[112]

Fourth, an exemption hearing now is available at the judgment debtor's request, in lieu of filing the schedule of assets and liabilities.[113] The judgment debtor, however, does not have the option of moving to have his exemptions designated without filing the schedule as well.[114] The only way that the judgment debtor can avoid filing the schedule is to wait until he receives his "notice of rights"[115] and then request a hearing.[116] This approach is not without risks, however. The "notice of rights" will not be sent to the judgment debtor until a judgment creditor has decided to execute.[117] Between the time that the debtor first became a "judgment debtor" and the time that the judgment creditor seeks execution, additional judgments may have been rendered and docketed against the debtor, thereby reducing his "interest in value" in any exemptible real property he owns. Thus, the longer the debtor waits, the less "interest in value" may be available to exempt. Moreover, this "notice of rights" presumably will advise the judgment debtor that he may request a hearing in lieu of filing the schedule, unamended subsection 1C-1603(a)(8) notwithstanding.[118] The entire form of notice should be rewritten to explain to the judgment debtor at least how he may "respond to the notice."

The initial exemption hearing is conducted by the clerk. The "judgment creditor," again in the singular number, is to receive notice of the hearing.[119] The purpose of the hearing is simply to allow the judgment debtor to claim his exemptions.[120] No express authority to disallow the claims at the hearing itself is accorded the clerk. In light of the parallel procedure for motion and schedule, this limitation seems appropriate.

Following the exemption hearing, the parallel procedures unite. The judgment creditor has ten days from service of the judgment debtor's motion and schedule, or from the date of the hearing, to file objections.[121] In light of the shortness of time allowed to object, it behooves the judgment

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112. 11 U.S.C. § 102(1) (Supp. IV 1980).

113. N.C. Gen. Stat. § 1C-1603(a)(1) (Interim Supp. 1982).

114. *Id.* § 1C-1603(c) (Interim Supp. 1981).

115. The form of "notice of rights" that must be sent to the debtor is set forth in § 1C-1603(a)(4).

116. N.C. Gen. Stat. § 1C-1603(a)(7) (Interim Supp. 1982).

117. *Id.* § 1C-1603(a)(4). The exception is unclear when, under § 1C-1603(c)(3), the clerk or district court judge determines that particular property is not exempt without a proceeding designating the exemption.

118. The proposed notice form does not specifically mention the right to a hearing. It only states that it is important to respond to the notice within 20 days or a valuable right may be waived. However, it is presumed that the debtor will consult either an attorney or the statutes to be advised of these valuable rights. *Id.* § 1C-1603(a)(4) (Interim Supp. 1981). The prescribed form of notice of rights was renumbered but not revised to reflect the 1982 amendments.

119. *Id.* § 1C-1603(d) (Interim Supp. 1982).

120. *Id.* § 1C-1603(e).

121. *Id.* § 1C-1603(a)(6).

creditor to attend the exemption hearing, if it is held. There is no requirement, however, that report of the hearing actually be sent to the judgment creditor.

If no objections are filed by the judgment creditor, the property claimed by the debtor becomes exempt. The clerk must enter an order designating the claimed property as exempt.[151] The clerk, however, apparently has limited authority to modify or deny claims of exemptions on his own motion. Only "property allowed by law" may be designated exempt.[152]

The meaning of "property allowed by law" must be addressed: Does this phrase mean that the clerk has the power to disagree with, and overrule, the "values" placed on the claimed property by the debtor? Or is the clerk limited to a review of the claimed property to ensure that every item listed can be fit into one of the subsection IC-1601(a) categories, and that no more than the allowed "interest in value" is claimed? Although no clear answer is provided by the statute, the better practice would be to limit the clerk's role to the latter function—that is review of the "property allowed by law." The "property allowed by law" listed and described in subsection IC-1601(a), includes a residence, a motor vehicle, and wearing apparel. If the values assigned to these items seem seriously disproportionate, then it should be the judgment creditor who challenges since the judgment creditor is the true "party in interest."

An objection by the judgment creditor triggers a hearing before the district court judge,[153] but the right to a jury is expressly denied.[154] The responsibility of the district court judge is to determine the value of the property.[155] An appraiser may be appointed by the judge to assist him in this task.[156] The 1982 amendments retain the 1981 Act's treatment of the appraiser's compensation as a first-priority court cost, to be advanced by "the person requesting the valuation."[157] Thus, a judgment creditor will want to be certain that the property in question has a value substantially higher than the value placed on it by the debtor before he requests an appraisal.[158] Further, since the judge may order an appraisal without being requested to do so, the judgment creditor may hesitate before objecting at all.[159]

The 1982 amendments do not define the scope of the district court's

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152. Id. § IC-1603(c)(6).
153. Id.
154. Id. § IC-1613(c)(7); id. § IC-1603(c)(6).
155. Id.
156. Id. § IC-1613(c)(8).
157. Id. The same provision appeared in § IC-1603(c)(8) (Cum. Supp. 1981) (amended).
158. Id.
159. Even if the judgment creditor can avoid advancing the appraiser's fee by convincing the court that the phrase "person requesting the valuation" should be read literally, there is still the fact that the fee is a first-priority court cost which reduces the amount of executable (i.e. non-exempt) assets.

inquiry. If, for example, the debtor schedules and undervalues both his residence and his car, but an objection is filed only as to the residence, may the district court judge resolve the car anyway? Nothing in the law expressly bars this result. Indeed, new subsection 1C-1603(e)(2) states that "the district court judge must determine the value of the property."[131] Thus, it is important to determine what constitutes "the property." It might be the particular item or items to which the judgment creditor has objected, or it might be the entire set of exemptions claimed by the debtor. In light of the emphasis that the 1982 amendments place on creditor initiative,[132] the wiser choice would be to conclude that the district court judge can consider only what is specifically brought to his attention.

Subsection 1C-1603(e)(10) enables the clerk to order that property with a value greater than the allowed exempt amount be sold at execution.[133] The judgment debtor's interest will then be reduced to cash and paid over to him. For example, an automobile worth $1,500, which the judgment debtor owns free and clear and for which the debtor claims a $1,000 exemption, may be ordered sold at execution. Payment to the debtor of $1,000 from the proceeds will satisfy his claim. In short, a claim of exemption carries no necessary possessory rights with it.

If the judgment debtor wishes, he can keep the car by making available "to judgment creditors" otherwise exemptible property equal in amount to the "excess value" in the car—in this case, $500.[134] The 1982 amendments thus retain the "exemption swapping" feature of the 1981 Act.[135] Again, however, inconsistent terminology plagues the amended statute. After consistent use of "judgment creditor" in the singular, the shift to the plural in subsection 1C-1603(e)(11) is a bit unsettling.[136] Surely, this is not a backhanded way of permitting preferential payments; it would be difficult to imagine a law that permitted a judgment debtor to deny the judgment creditor who initiates the proceedings any relief by making available to other judgment creditors property sufficient to exempt the value of the car in the preceding hypothetical in full. Again, the situation illustrates the statutory tension between the use of collective creditor norms and individual creditor initiative.[137] In any event, debtors may find subsection 1C-1603(e)(11) helpful in retaining property with a

131. Id. § 1C-1603(e)(2) (Interim Supp. 1983).

132. Section 1C-1603(e)(3) suggests that unless the judgment creditor objects, the debtor's proposed exemptions will be approved by the clerk. Id. § 1C-1603(e)(3). Section 1C-1603(e)(2), however, indicates that the district court judge can determine that particular property is not exempt even though no exemption proceedings were instituted. Id. § 1C-1603(e)(2).

133. Id. § 1C-1603(e)(10).

134. Id. § 1C-1603(e)(11).

135. Id. § 1C-1603(e)(3) (Cum. Supp. 1981) (amended 1982); see Peeples, supra note 38, at 985-90.

136. N.C. Gen. Stat. § 1C-1603(e)(11) (Interim Supp. 1982).

137. For a discussion of this statutory tension, see supra text accompanying notes 103-11.

relatively low resale value but with a relatively high replacement cost, such as an automobile.[138]

Retained in subsection 1C-1603(e)(11) is the somewhat baffling provision that "priorities of judgment creditors are the same in the substituted property as they are in the original property."[139] One can honestly ask, "What priorities?" The only way a judgment creditor can establish priority as to the judgment debtor's personal property is to levy on it pursuant to a writ of execution.[140] Under the 1985 amendments no writ of execution can be issued until exemptions have been designated.[141] In short, no exemption designation, no levy; no levy, no priority. The provision may be of some assistance with real property, when priorities are established by docketing, rather than by levy.[142] For example, a judgment debtor might wish to retain his residence, valued at $20,000 but subject to a judgment lien of $10,000 in favor of judgment creditor *A*, when confronted with exemption proceedings initiated by judgment creditor *B*. If the allowed exemption for the residence is $7,500 and the judgment debtor can produce property worth $12,500 "not otherwise available" to judgment creditors, he can retain his residence. By virtue of the last sentence of subsection 1C-1603(e)(11), judgment creditor *A*'s $10,000 claim will be paid first from the proceeds of the swapped property[143] and judgment creditor *B* will receive the remaining $2,500.

Under amended subsection 1C-1603(e)(11), the question remains open whether property not included in subsection 1C-1601(a) is exempted by surrendering exempt property of an equivalent value.[144] No prejudice to creditors necessarily would result from permitting this practice, so long as equivalent values are swapped. The logical conclusion of allowing the debtor to protect nonexempt property in this fashion, however, would be that the same result could be obtained with a much shorter statute—one which simply allowed the judgment debtor to exempt, say, $10,000 worth of any property of his choosing.

6. *Appeal and other changes*

Appeal provisions, lacking in the 1981 Act, are supplied by the 1982 amendments.[145] Appeal from the clerk is to the district court judge.[146]

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138. In general, § 1C-1601(a)(11) serves a function similar to that served by § 522 of the Bankruptcy Code, which authorizes an individual debtor to redeem certain tangible exempted personal property from a lien securing a dischargeable consumer debt by paying the lienholder the value of the collateral.

139. N.C. Gen. Stat. § 1C-1603(e)(11) (Interim Supp. 1982). The same provision appeared in id. § 1C-1603(e)(6) (Cum. Supp. 1981) (amended).

140. *Id.* § 1-313(1) (Cum. Supp. 1981).

141. *Id.* § 1-353(a) (Interim Supp. 1982).

142. *Id.* § 1-324 (Cum. Supp. 1981).

143. *Id.* § 1C-1603(g)(2)(1) (Interim Supp. 1982).

144. The corresponding 1981 provision was N.C. Gen. Stat. § 1C-1603(e)(6) (Cum. Supp. 1981); see People, *supra* note 19, at 882-83.

145. N.C. Gen. Stat. § 1C-1601(a)(12) (Interim Supp. 1982).

146. *Id.*

Appeal from the district court judge is to the court of appeals.[147] Decisions of the court of appeals on valuation of property are final,[148] and other questions may be appealed to the supreme court as provided by sections 7A-30[149] and 7A-31.[150]

Subsection 1C-1601(f) is amended to provide rules for exempt real property located in a county other than the county where the judgment was rendered.[151] Notice of exempt status must be sent to the clerk of the court of the situs county if the judgment has been docketed already in the situs county.[152] The clerk is directed to enter an appropriate notation on the judgment docket.[153]

IV. A Synthesis

The result of the 1982 amendments is a modest set of exemptions, listed in subsection 1C-1601(a), which assure virtually every "judgment debtor" of a $5,000 minimum exemption in virtually any personal property.[154] The minimum rises to $10,000 when the $7,500 residence exemption is claimed.[155] In spite of the fact that the subsection 1C-1601(a) list is only "optional," if the concept of "interest in value" constitutionally can be applied to article X, then the constitutional exemptions will rapidly become little more than historical artifacts.

No execution can issue until exemption rights have been addressed by exemption proceedings, waiver, or a finding by the clerk or district court judge that no exemption rights are involved in a particular action. Exemption proceedings can be initiated either by the judgment debtor upon motion at any time after judgment, or by the judgment creditor acting through the clerk of court. The judgment debtor's motion is to be accompanied by the prescribed schedule. Proceedings initiated by the judgment creditor will lead to waiver, a hearing, or a completed schedule. Following the hearing or receipt of the schedule, if no objections are filed, the scheduled property claimed by the debtor is designated exempt, subject to a limited review by the clerk.

If objections are filed, the proceedings shift to the district court. The district court judge decides valuation questions and so that end may appoint an appraiser. The appraiser's compensation is a first priority administrative expense and must be advanced by "the person requesting the valuation."

Property whose value exceeds the allowed exemptible value may be sold at execution. The judgment debtor will receive the cash equivalent of

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147. *Id.*
148. *Id.*; *see id.* § 7A-28 (1981).
149. *Id.* § 1C-1603(g)(12) (Interim Supp. 1983); *see id.* § 7A-30 (1981).
150. *Id.* § 7A-31 (Interim Supp. 1983).
151. *Id.* § 1C-1601(f).
152. *Id.*
153. *Id.*
154. *Id.* § 1C-1601(a)(2) (Cum. Supp. 1981); *id.* § 1C-1601(a)(1)(f)
155. *Id.* § 1C-1601(a)(1).

ble "interest in value."

Appeals from the clerk are to the district court judge. Appeals from the district court judge are to the court of appeals. Exemption swapping is permitted, but purchases of otherwise exemptible tangible personal property within ninety days of the initiation of collection proceedings are not.[156]

Claims of the United States; claims of the state or its subdivisions for taxes, appearance bonds, and fiduciary bonds; claims of laborers, mechanics, and statutory lienors; claims for the purchase money of real property; claims for contractual security interests, other than nonpossessory, nonpurchase money security interests; and claims for alimony, child support, or distributive award orders are excepted from the operation of the exemption laws.[157] Property designated as exempt is immune from the enforcement of all other claims for money. Although the current arrangement is cumbersome, the 1982 amendments represent a substantial improvement over the problems of application inherent in the 1981 Act.

V. Federal Bankruptcy Law, the United States Constitution, and North Carolina's Exemption Law

The 1982 amendments to North Carolina's exemption law did not alter the subsection 1C-1601(f) opt out provision authorized by subsection 522(b)(2) of the Bankruptcy Code.[158] North Carolina debtors thereby are precluded from claiming the federal exemptions listed in subsection 522(d) and must choose instead between those provided in subsection 1C-1601(a) of the amended Act or those allowed by article X of the North Carolina Constitution.[159] The newly amended state exemptions thus will

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156. *Id.* § 1C-1601(b).

157. *Id.* § 1C-1601(e) (Interim Supp. 1983).

158. At least 35 states have enacted "opt out" legislation. See ALA. CODE § 6-10-1 (Cum. Supp. 1982); 1982 Alaska Sess. Laws ch. 62 (to be codified at ALASKA STAT. § 09.38.032); ARIZ. REV. STAT. ANN. § 33-1133 (Cum. Supp. 1981); ARK. STAT. ANN. § 38-210 (Cum. Supp. 1981); DEL. CODE ANN. tit. 10, § 4914 (Interim Supp. 1981); FLA. STAT. ANN. § 222.20 (West Cum. Supp. 1982); GA. CODE ANN. § 51-1201 (Cum. Supp. 1982); IDAHO CODE § 11-605 (Cum. Supp. 1981); ILL. ANN. STAT. ch. 52, § 101 (Smith-Hurd Cum. Supp. 1982); IND. CODE ANN. § 34-2-28-0.5 (Burns Cum. Supp. 1982); IOWA CODE ANN. § 627.10 (West Cum. Supp. 1982); KAN. STAT. ANN. § 60-2312 (Cum. Supp. 1982); KY. REV. STAT. ANN. § 427.170 (Baldwin-Merrill Cum. Supp. 1982); LA. REV. STAT. ANN. § 13:3881(B) (West Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 14, § 1483 (Cum. Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(g) (Cum. Supp. 1982); MD. ANN. STAT. § 513.427 (Vernon Cum. Supp. 1982); MONT. CODE ANN. § 31-2-106 (1983); NEB. REV. STAT. §§ 25-15, -105 (Cum. Supp. 1980); NEV. REV. STAT. § 21.090 (1961); N.H. REV. STAT. ANN. § 511:2-(a) (Cum. Supp. 1981); 1982 N.Y. Laws ch. 540; N.C. GEN. STAT. § 1C-1601(f) (Cum. Supp. 1981); N.D. CENT. CODE § 28-22-17 (Cum. Supp. 1981); OHIO REV. CODE ANN. § 2329.662 (Page Supp. 1982); OKLA. STAT. ANN. tit. 31, § 1 (West Cum. Supp. 1981); ORE. REV. STAT. § 23.305 (1981); S.C. CODE ANN. § 15-41-30 (Law Co-op. Supp. 1982); S.D. COMPILED LAWS ANN. § 43-45-10 (Cum. Supp. 1981); TENN. CODE ANN. § 26-2-112 (1980); UTAH CODE ANN. § 78-23-15 (Cum. Supp. 1981); VA. CODE § 34-31 (Cum. Supp. 1981); W. VA. CODE § 38-10-4 (Cum. Supp. 1982); WIS. STAT. § 7.20.109 (Cum. Supp. 1981).

159. *In Re Snyder*, 22 Bankr. 291 (W.D.N.C. 1982), represents the first attempt of a

apply both to bankruptcy proceedings by North Carolina residents and judgment collections. The 1982 amendments, however, did not correct many of the disparities between the state and federal exemptions that were apparent prior to their calibration. In most instances debtors would still fare far better under the federal provisions.[180] Therefore, the amended Act appears ripe for challenge, and courts will have to measure its inconsistencies with federal bankruptcy law in evaluating its constitutional viability. Challenges to the Act are likely to take the form of direct attacks on the opt out authority granted to the states by the Bankruptcy Code, or of specific preemption assaults on particular provisions of the Act.

A. *Bankruptcy Clause and Uniformity*

The United States Constitution grants Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[181] A direct constitutional challenge to the state opt out authority granted by subsection 522(b)(1) based on this congressional power might survive if the uniformity that the act contemplates were a true or absolute uniformity permitting no application.[182] Since variation in exemption determinations could not then constitutionally stand.

A constitutional attack, however, has little likelihood of success. There is considerable and firmly settled case law holding that the Bankruptcy Clause requires only a geographically uniform application of the law and that disparity of outcome among the states is therefore constitutionally acceptable.[183] Yet, despite a gloomy prospect of success, the form a uniformity challenge is likely to take deserves analysis. A concluding case may be marshalled to support a uniformity challenge, and the chance that a court might find it persuasive cannot be overlooked.[184] More importantly, however, policy considerations can be gleaned from even an unsuccessful uniformity argument and will constitute useful elements both in attacking the power of Congress to delegate exemption authority to the states through opt out legislation,[185] and in arguing that specific

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North Carolina Bankruptcy Court to exercise section 1C-1601 of the North Carolina General Statutes, Section § 522(b)(2)(A) of the Code together with § 1C-1601(a); the court held that debtors who opt out of federal bankruptcy exemptions "could claim as exempt property under the North Carolina common law doctrine of tenancy by the entireties" *Id.* at 606.

180. *See* Peeples, *supra* note 19, at 898-900.

181. U.S. Const. art I, § 8, cl. 4.

182. *See generally* Comment, *Bankruptcy Exemptions: Whether Ultimately Use of the Federal "Opt Out" Provision Is Constitutional*, 1981 S. Ill. U. L.J. 83.

183. For a discussion of the history of geographic uniformity in bankruptcy, see *infra* notes 187-90 and accompanying text. *See generally* Note, *Controversy Surrounding Bankruptcy Uniformity: The Constitutional Provision of Section 522 of the New Bankruptcy Code*, 10 U. Tol. L. Rev. 1111 (1979).

184. For the delineation of a possible uniformity challenge, see *infra* notes 191-210 and accompanying text.

185. For a discussion of the possible connection between the uniformity and delegation of powers arguments, see *infra* notes 221-44 and accompanying text.

provisions of the North Carolina Act have been preempted by federal law.[166]

1. Bankruptcy History and Moyses

The argument against geographic uniformity is an historical one. It was not until 1902 in *Hanover National Bank v. Moyses*[167] that the United States Supreme Court held that the uniformity mandated by the Bankruptcy Clause was "geographical and not personal."[168] *Moyses* involved a creditor's challenge to section 6 of the Bankruptcy Act of 1898,[169] which adopted the exemption laws of the various states since the Federal Act had provided no other exemption mechanism.[170] The creditor unsuccessfully attacked the debtor's use of state exemptions on a nonuniformity theory.[171] To comprehend the use of geographic uniformity in *Moyses* and the subsequent entrenchment of the doctrine in bankruptcy law, it is necessary to understand the historical context from which uniformity emerged.[172]

a. The origins of uniformity. At least one commentator has outlined a persuasive argument that the framers of the Constitution intended the Bankruptcy Clause to require an absolute uniformity.[173] And indeed, the first Bankruptcy Act in 1800,[174] repealed in 1803, and the subsequent Act of 1841,[175] repealed in 1843, appeared to endorse this view. Both provided their own exemptions that applied uniformly throughout the country, ignoring state exemption mechanisms entirely. The Bankruptcy Act of 1867[176] signaled a change however. As well as prescribing federal and uniform exemptions, section 14 of the Act also allowed debtors to use other exemptions applicable in their state of domicile not to exceed the amount allowed in 1864.[177] In effect, the 1867 Act established

166. For a discussion of the possible connection between the uniformity and preemption arguments, see *infra* notes 201–22 and accompanying text.

167. 186 U.S. 181 (1902).

168. *Id.* at 188.

169. Act of 1898, ch. 541, § 6, 30 Stat. 548 (1898).

170. Section 6 provides that

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Id.

171. 186 U.S. 181 (1902).

172. For an excellent overview of the pertinent history of bankruptcy legislation, see Comment, *supra* note 165; Brief for Appellees at 8–36, *In re* Sullivan, 680 F.2d 1131 (7th Cir. 1982). These two sources provide much of the background for the uniformity issue appearing in this article.

173. Comment, *supra* note 165.

174. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800).

175. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (1841).

176. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867).

177. Section 14 provides that

> Provided, however, that there shall be exempted from the operation of the provi-

a federal floor and a federally adopted state-by-state ceiling on exemptions.[176] This deference to state policies was substantially extended in the Bankruptcy Act of 1898,[177] which remained virtually unchanged until the Bankruptcy Reform Act of 1978. The 1898 Act included no list of federal exemptions. Instead, section 6 adopted the state exemptions exclusively and provided no federal floor.[178]

The *Mayes* decision defeats a uniformity attack on section 6 of the 1898 Act. The *Mayes* Court was faced with a difficult choice. If it required absolute uniformity in bankruptcy proceedings and hence prohibited the use of state exemptions, debtors would be denied the use of any exemptions whatsoever because the Federal Act did not prescribe any.[179] Thus, the Court borrowed the concept of geographic uniformity, which had been developed within the distinguishable context of the federal taxing power,[180] and applied it to the bankruptcy area. To support this result the Court relied on two earlier lower court decisions, *In re Deckert*[181] and *In re Beckerford*.[182] Significantly, both of these opinions emerged during the tenure of section 24 of the 1867 Act, rather than the 1898 Act under consideration in *Mayes*.

b. *The Deckert and Beckerford rationale.* *Deckert* and *Beckerford* both involved a creditor's challenge to the section 14 allowance of the

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> sions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference to the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the necessary tools and appurtenances of any person who has been a soldier in the militia, or in the service of the United States, and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four. . . .

Id. § 14.

178. *See* Brief for Appellant at 30-34, In re Sullivan, 680 F.2d 1131 (9th Cir. 1982).

179. Act of 1898, ch. 541, 30 Stat. 544 (1898).

180. Act of 1898, ch. 541, § 6, 30 Stat. 548 (1898), quoted in *supra* note 176.

181. *See* Brief for Appellant at 40, In re Sullivan, 680 F.2d 1131 (9th Cir. 1982).

182. *See, e.g.*, Feldman v. United States, 181 U.S. 285 (1901) ("In laying duties, imposts & excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been discharged, and the principle of geographical uniformity consistently enforced."); Knowlton v. Moore, 178 U.S. 41 (1900) (tax on legacies measured by the amount of the legacy is uniform due to its general operation throughout the United States); Head Money Cases, 112 U.S. 580 (1884) (tax on head money of passengers from foreign countries into U.S. is uniform since in operation with the same effect in every part of the United States).

183. 7 F. Cas. 334 (E.D. Va. 1874) (No. 3,738).

184. 3 F. Cas. 28 (D. Md. 1870) (No. 1,505).

state exemption add on."[188] The *Beckerford* court reasoned, for example, that "[t]here is something so humane underlying [exemption laws], that courts will not interfere unless they violate a plain mandate of express law."[189] Accordingly, it held that because the state exemption law applied uniformly to debtors and creditors within the state, it did not violate the uniformity requirement.[190] The *Deckert* court used a similar rationale in considering another creditor's challenge to section 14. Reasoning that "every debt is contracted with reference to the rights of the parties thereto under existing exemption laws," the court held that "no creditor can reasonably complain if he gets his full share of all that the law . . . places at the disposal of creditors."[191] The expectations established by state law exemptions were seen as a restraint precluding creditors from attacking their use by debtors. In *Deckert* the court adopted the *Beckerford* rationale, which is designed to give debtors the benefit of every possible exemption.

It is understandable why the *Moyses* Court so readily adopted the position of *Beckerford* and *Deckert*. Although the Bankruptcy Acts of 1800, 1841, and 1867 all established uniform federal exemptions, the legislation was codified only for sixteen of ninety-eight years. During the interim periods between repeal of one and enactment of another, state exemption law controlled. By the passage of the 1898 Act, therefore, a history of reliance on state law governing the subject had developed.[192] The willingness of the *Moyses* Court to follow *Beckerford* and *Deckert* and to defer to the state legislatures is thus understandable, because by so doing all three courts furthered their underlying policy of favoring the debtor.[193]

2. *Was Moyses wrongly decided?*

As a result of ready acceptance of these earlier opinions, however, the *Moyses* Court failed to consider some crucial differences between section 14 of the 1867 Act, the issue in both *Beckerford* and *Deckert*, and section 6 of the 1898 Act, the issue in *Moyses*. First, the uniformity question regarding section 14 had never reached the United States Supreme Court before the 1867 Act was repealed in 1878. Consequently, whether that court would have endorsed the geographic uniformity sanctioned by *Beckerford* and *Deckert* is unknown[194] since the *Moyses* Court did not address the issue. Secondly, even if the Court had viewed the geographic uniformity implicit in section 14 as constitutionally acceptable, important

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188. Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517 (1867), *quoted in* supra note 177.

189. 3 F. Cas. at 27.

190. *Id.*

191. 7 F. Cas. at 503.

192. *See* Countryman, *supra* note 102, at 81.

193. *See generally id.* at 84–86; Brief for Appellant at 40, *In re* Sullivan, 680 F.2d 1131 (9th Cir. 1982).

194. *See* Brief for Appellant at 31, *In re* Sullivan, 680 F.2d 1131 (9th Cir. 1982).

distinctions remained between that section and section 6 of the 1898 Act.[182] Section 14, for example, established a uniform exemption floor and various, fixed exemption options.[183] All debtors thus were assured of a uniform minimum exemption. Conversely, section 6 of the 1898 Act deferred completely to state law.[184] No federal uniformity of any kind existed and debtors were dependent upon the generosity of state assemblies. It is understandable that section 14 geographic variation may have been acceptable while the section 6 variety was not. Once again, however, the *Moyses* Court did not address this issue. As a result of these historical and theoretical judicial compromises, the doctrine of geographic uniformity became firmly entrenched as a bankruptcy concept. Thus, it is arguable that *Moyses* was wrongly decided, and that history and logic require an absolute rather than a geographic uniformity from the Bankruptcy Clause.

A debtor-appellant, in a recent Seventh Circuit case, *In re Sullivan*,[185] attempted a challenge to the opt out provision in subsection 522(b)(1) of the Code. Illinois had opted out of the federal exemptions and provided its resident debtors, including the debtor-appellant, a far less generous exemption provision than subsection 522(d).[186] Although the court found the argument based on the bankruptcy history surrounding *Moyses* to be "forceful," it refused to overrule a Supreme Court decision.[187] Indeed, the *Sullivan* court found no indication that the Supreme Court might be inclined to overrule the earlier decisions and to reject the doctrine of geographic uniformity.[188]

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182. *Id.* at 32-34.

183. For a discussion of the exemption floor and ceiling, see *supra* notes 177-79 and accompanying text.

184. For the language of § 6, see *supra* note 170.

185. 69 F.3d 1131 (7th Cir. 1995).

186. For a comparison of the Illinois and federal exemption provisions, see *id.* at 1132-33. See also Clarkson, *supra* note 152, at 67-70.

187. 69 F.3d at 1135.

188. *Id.* at 1136. The *Sullivan* court cited two Supreme Court decisions handed down within the past ten years that enforced geographic uniformity. *Id.* In Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), the Supreme Court scrutinized a railroad reorganization procedure that was geographically limited to the northeast and midwest regions of the country. The Court held that "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* at 160; see also Wright v. Vinton Branch, 300 U.S. 440, 470 n.9 (1937). Similarly, in Railway Labor Executives' Ass'n v. Gibbons, 105 S. Ct. 1158 (1985), the Supreme Court cited the *Moyses* decision with approval and declared that uniformity in bankruptcy "does not require the elimination of any differences among the States in their laws governing commercial transactions." *Id.* at 1164. Significantly, *Gibbons* was the first Supreme Court case to invalidate a bankruptcy law for lack of uniformity. *Id.* It did so because the coverage of the statute at issue was limited to a single railroad. Far from indicating an attitude of entrenchment regarding geographic uniformity, these cases signal how deeply entrenched the decision is in the Supreme Court's concept of bankruptcy.

As a result of such entrenchment, analogizing bankruptcy to other areas where absolute uniformity has been required is futile. See, e.g., Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (admiralty law); Nunez v. Immigration & Naturalization Serv., 947 F.2d 138

3. Is Moyses Inapplicable to subsection 522(b)(1)?

Given the entrenchment of geographic uniformity as represented by *Moyses* and its progeny, only the Supreme Court could overrule it. Nevertheless, the *Sullivan* court's assessment of the unlikelihood of such a ruling appears accurate. The present opt out provision of the 1978 Code may be so significantly different from section 6 of the 1898 Act that *Moyses* can be preserved while still holding subsection 522(b)(1) untenable. Had the *Moyses* Court invalidated section 6, debtors in bankruptcy would have been left without the benefit of exemptions. If the current opt out provision were to be overturned, however, debtors would be left with a generally far preferable "safe-harbor,"[192] the detailed and extensive federal exemptions of subsections 522(d). The policy of assuring debtors a rehabilitative fresh start, which motivated the *Beckerford*, *Deckert*, and *Moyses* courts[193] therefore would not only be satisfied by striking the current opt out approach, but it would also be significantly enhanced. Thus, the *Moyses* rationale is inapplicable to the Code.

The debtor-appellant in *Sullivan* argued the above analysis, but the Seventh Circuit found it unconvincing.[194] First, the court attributed no "safe harbor" rationale to the *Moyses* decision.[195] Concedingly that the distinction between section 6 and subsection 522(b)(1) was "correct," the court nonetheless was "not willing to ascribe to the *Moyses* Court a line of reasoning nowhere reflected in that opinion."[196] Secondly, and far more significantly, the *Sullivan* court refused to attribute a "fresh start" legislative intent to the Code.[197] Following a sketchy review of the legislative history surrounding the opt out provision, the court concluded that a policy of providing a fresh start could be attributed to only the House, and not the Senate.[198]

This view of the Senate's intent, however, is clearly erroneous. A cursory glance at Senate Report No. 95-989[199] demonstrates that the Senate

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[6th Cir. 1981) (unconstitutional laws). In areas such as these, there is no history of countenancing geographic uniformity.

192. Brief of Appellant at 40, *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982).

193. For a discussion of these cases, see *supra* notes 126-30 and accompanying text.

194. 680 F.2d at 1136.

195. *Id.*

196. *Id.* at 1136.

197. *Id.*

198. The court stated:

> We find from this history that the intention of providing a "fresh start" can be attributed only to the House. A resolve to let states determine the applicable exemptions must be attributed to the Senate. Congress did not resolve this difference. It settled on a "compromise" which in some cases may thwart the underlying purpose of the House. This court cannot look upon the motivation of the House as representative of the entire Congress when the enacted legislation clearly warrants a contrary conclusion. We do not find, therefore, that the Congressional intent underlying the Code makes the *Moyses* rule inapposite to the instant case.

Id. at 1136.

199. S. Rep. No. 95-989, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. Code Cong. &

unequivocally embraced the fresh start policy, and simply espoused different methods toward realizing it. The House proposal allowed debtors to choose between federal or state exemptions,[206] while the Senate proposal retained the approach of section 6 and deferred exclusively to the states the determination of applicable exemptions.[207] The Senate Report explained the rationale for its approach:

> Current law is unclear in the area of exempt property, which is properly that the debtor may retain after bankruptcy for a *fresh start* . . . The committee feels that *the policy of bankruptcy law is to provide a fresh start*, but not instant affluence, as would be possible under the provisions of H.R. 8200. Moreover, current law has allowed the several state legislatures flexibility to meet the needs and *fresh start* requirements of the debtors of those particular States.[208]

While the Senate wished to defer to state exemption law, it clearly did not abdicate the traditional bankruptcy policy of providing debtors with a fresh start. On this point, the *Sullivan* court was simply wrong. Indeed, in a 1980 bankruptcy opinion, the Seventh Circuit specifically ascribed a fresh start policy to Congress in enacting the Code.[209]

4. The outlook for uniformity

In light of bankruptcy history, courts other than the Seventh Circuit might be receptive to an argument distinguishing the statute at issue in *Moyses* from the present opt out provision, thus finding *Moyses* and the doctrine of geographic uniformity inapplicable to subsection 522(b)(1). Traditionally, the doctrine of geographic uniformity had been invoked to protect debtors. This holds true in *Dunbar*, *Rockerford*, and *Moyses*. *Sullivan*, however, is the first major decision in which the doctrine has been used to the detriment of debtors, and to the clear frustration of congressional fresh start policy. Even the bankruptcy court decisions cited in *Sullivan*, which approved the notion of geographic uniformity under the Code, were decisions ultimately decided in favor of the debtor on other grounds.[210] Their recognition of *Moyses* was dicta, representing only a perfunctory nod to Supreme Court precedent, and lacking any detailed or

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Ad. News 5787, 5788.

207. H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 359-67, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6319-26.

208. S. Rep. No. 95-989, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5792. The opt out of § 522(b)(1) is the result of a hasty compromise between the House and Senate proposals. No meaningful legislative history supports the provision. See 124 Cong. Rec. 32,412 (1978).

209. S. Rep. No. 95-989, 95th Cong., 2d Sess. 6 *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5792 (emphasis added).

210. *In re* Smith, 640 F.2d 258 (7th Cir. 1980) (fresh start policy inherent in § 522).

211. *In re* Sullivan, 680 F.2d 1131, 1138 n.8 (8th Cir. 1982) (pre-Code property exempt under § 522(b)(2)(B) because no common creditors of spouses) (citing *In re* Lausch, 16 Bankr. 162 (D.C.D. Pa. 1981)); *In re* Curry, 6 Bankr. 282 (N.D. Ohio 1980) (compromise; nonetheless money has avoidance of § 522(f) not within scope of opt out); *In re* Ambrose, 4 Bankr. 326 (N.D. Ohio 1980) (same as Curry).

insightful analysis of the issue.

In this light, it may be possible to mount a direct uniformity challenge to the opt out provision of the Code. In any event, this argument is supported by a clear history of a policy to protect debtors' emergence from bankruptcy with a fresh financial start. Although a Bankruptcy Clause attack might not succeed, it nevertheless opens a cache of policy considerations useful in a challenge of Congress' power to delegate exemption decisions to the states, and supports an argument that congressional policy preempts specific state exemption provisions. For, if not mandating a personal and absolute uniformity, certainly the Bankruptcy Clause, glossed by the history of bankruptcy legislation, at least requires that a consistent fresh start policy be honored in all states.

B. *Congressional Delegation of Authority*

Another direct constitutional challenge to the opt out provision would be based on the theory that the opt out represents an unconstitutional delegation of congressional authority to the states. Article I, section 1 of the United States Constitution reserves to the Congress all federal legislative power.[212] The Bankruptcy Clause clearly vests the power of bankruptcy legislation in Congress.[213] Thus, in permitting the transfer of exemption-making authority to the states, the opt out provision may violate the non-delegability principle; Congress has extended to the states a power to legislate expressly reserved to itself in the Constitution.

This argument, however, is problematic. For although the courts consistently have upheld the non-delegability doctrine, they likewise have recognized significant exceptions to it.[214]

1. *Concurrent jurisdiction*

First, it might be argued that the opt out provision does not necessarily constitute a delegation of powers. Chief Justice Marshall, for example, articulated the principle that Congress and the states exercise concurrent jurisdiction over the subject of bankruptcies. In *Sturges v. Crowninshield*[215] a creditor challenged the discharge of a debtor in accordance with a New York insolvency law. Although the law did not violate article X of the Constitution, which prohibits impairing the obligations of contracts, it was held not to violate the non-delegability provision.[216] Chief Justice Marshall explained:

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212. Article I, § 1 provides in part: "All legislative powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1.

213. The Bankruptcy Clause provides: "The Congress shall have power . . . to establish . . . laws on the subject of bankruptcies throughout the United States . . ." U.S. Const. art. I, § 8, cl. 4.

214. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). Chief Justice Marshall articulated the principle of non-delegability and at the same time held a delegation of powers to the federal courts permissible.

215. 17 U.S. (4 Wheat.) 122 (1819).

216. *Id.* at 196-98

> If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States.[217]

Thus, when Congress declines to act in an area of bankruptcy, the states have concurrent authority to enact legislation. The federal-state relationship generated by the exercise of a state's concurrent bankruptcy power traditionally has been described in either of two ways: adoption and consent, or absence of conflict.

a. *Adoption and consent.*[218] When the delegation of powers argument was raised in *Moyses*, the Court used an "adoption" theory to justify congressional incorporation of state exemption laws pursuant to section 6 of the 1898 Act.[219] Citing *In re Baker*,[220] the Court held that it could not "perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power."[221] In *In re Reiter*[222] the Court sustained federal legislation that imposed the liquor laws of a state on liquors imported into that state from other states or territories. The Court held that such legislation was not a delegation of congressional authority; rather, it constituted an adoption of state law.[223] Thus, having power to legislate in the area, Congress acted, not by articulating its own law, but by enacting as its own the laws of each state. Congress had not declined to exercise its power; instead, it exerted its authority by embracing state legislation.[224]

The Seventh Circuit, on the other hand, treated the delegation issue differently in *In re Sullivan*,[225] using a "consent" theory to justify the opt out provision of the Code.[226] The "consent" theory conforms strictly to Marshall's explanation of concurrent powers in *Sturges*.[227] Citing *Prudential Insurance Co. v. Benjamin*,[228] the *Sullivan* court held that the opt out provision constituted an express withholding of congressional power whenever a state chose to act independently in the exemption field.[229] Congress simply declined to act in these instances, thus, allowing the

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217. *Id.* at 185.

218. For a comprehensive discussion of these two theories, see Comment, *supra* note 182, at 69-82.

219. 185 U.S. at 190.

220. 140 U.S. 545 (1891).

221. 185 U.S. at 190.

222. 140 U.S. 545 (1891).

223. *Id.* at 560-61.

224. *Id.* For another case using the adoption theory, see United States v. Sharpnack, 355 U.S. 286 (1958) (Congress can adopt state criminal laws in federal enclaves).

225. 680 F.2d 1131 (7th Cir. 1982).

226. *Id.* at 1137.

227. 17 U.S. (4 Wheat.) 122 (1819).

228. 328 U.S. 408 (1946).

229. 680 F.2d at 1137.

states to exercise their permissible concurrent powers to fill the legislative vacuum. The Court in *Prudential Insurance Co.* sustained federal legislation, conceding to the states the power to regulate and tax insurance companies conducting interstate business within their boundaries even though the industry was subject to congressional commerce authority.[310] Congress, the Court held, was expressly withholding its power, and thus the states were free to exercise their coordinate authority since Congress had consented to the state legislation.[311]

b. Absence of conflict limitation. Should the opt out provision of the Code be held to be a valid congressional adoption of or consent to state legislation, there is, nonetheless, an important limitation placed upon the states' power to act. Their concurrent authority may be exercised only insofar as it does not conflict with already existing federal legislation.[312] This limitation was recognized early. As explained by the Supreme Court in *Stellwagen v. Clum*,[313] "it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, passed under its constitutional authority, on the subject of bankruptcies are suspended."[314] In *Sullivan* the Seventh Circuit recognized this principle, declaring that Congress could consent to state legislation "so long as the state law does not conflict with the federal bankruptcy laws."[315] Having erroneously refused to find a fresh start congressional policy underlying the Code's exemptions,[316] the *Sullivan* court likewise failed to find a potential conflict in the Illinois exemption law, which provided the debtor with a less than fresh beginning.[317] Presumably, then, were a court to locate in the federal statute an overriding fresh start policy, it might endorse the argument that the opt out provision is an invalid consent to or adoption of state law because the state legislation conflicts with or frustrates this congressional intent. This argument raises the issue of preemption, which is developed in the next section.

2. Delegation

When the opt out provision is viewed as neither an adoption of nor consent to state legislation,[318] then it is indeed a delegation of congressional authority to the states. An analysis of its validity thus would turn on whether it was a constitutional delegation. The validity of a delegation

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310. 376 U.S. at 426.

311. *Id.* The Court in *Prudential* drew a distinction between congressional adoption of and consent to state legislation. *Id.* n.31.

312. *See Stellwagen v. Clum*, 245 U.S. 605 (1918).

313. 245 U.S. 605 (1918) (citing Marshall's opinion in *Sturges*).

314. *Id.* at 613.

315. 690 F.2d at 1137.

316. For a discussion of why the court's conclusion was erroneous, see *supra* notes 202-10 and accompanying text.

317. For sources of comparison of the Illinois and federal exemption schemes, see *supra* note 185.

318. For a detailed discussion of the argument that the opt out is neither an adoption of nor a consent to state legislation, see Comment, *supra* note 152, at 80-82.

could be challenged under two possible theories: the uniformity doctrine or the "intelligible principle" limitation.

a. *Uniformity and delegation.* The debtor in *Sullivan* argued that the delegation of authority represented by the opt out provision was impermissible because it was constrained by the principle of uniformity mandated by the Bankruptcy Clause.[239] He conceded the authority of Congress to delegate legislative authority within the federal government, as for example to the President, to executive departments, or to other agencies.[240] In addition, he conceded the authority of Congress to delegate to the states in the areas of their concurrent jurisdiction over commerce, including those delegations characterized elsewhere as an adoption of or consent to state legislation.[241] He argued, however, that permissible delegation is significantly different from the bankruptcy opt out delegation, for in none of the other areas in which delegation has been allowed is there the equivalent of the uniformity required by the Bankruptcy Clause.[242] Thus, once Congress has acted in an area of bankruptcy, for example by establishing a list of federal exemptions, the states are precluded from exercising their concurrent power by the uniformity mandate.[243]

This distinction is appealing and is certainly logically consistent with the complementary theory that the Bankruptcy Clause demands an absolute and personal uniformity.[244] The logic of this connection, however, is also the argument's greatest weakness. For once the principle of absolute uniformity is rejected, a delegation theory also collapses. The two theories are interdependent, and the delegation argument cannot survive the demise of the uniformity challenge.

b. *"Intelligible principle" limitation.* The second theory under which the delegation of authority, represented by the opt out, could be challenged appears to be the preferable alternative. It is based on the principle that in order for a delegation to be permissible, Congress must establish an "intelligible principle" against which the delegated authority can be measured.[245] In this way, Congress retains its legislative power by establishing the crucial standards and policy that control the delegated power. So too, in this way, courts are given a standard by which the exercise of delegated power can be evaluated.

The Supreme Court best stated the "intelligible principle" doctrine

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239. Brief for Appellant at 50-58, *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982).

240. Brief for Appellant at 54 (to executive departments); American Trucking Ass'n., Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (to independent agencies), reh'g denied, 388 U.S. 859 (1967).

241. Brief for Appellee at 55, *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982).

242. Brief for Appellee at 56-58, *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982). This same argument is advanced in Comment, *supra* note 186, at 90.

243. *See* Comment, *supra* note 186, at 90.

244. For a discussion of the Bankruptcy Clause and uniformity, see *supra* notes 181-211 and accompanying text.

245. *See* Hampton & Co. v. United States, 276 U.S. 394 (1928).

In *Hampton & Co. v. United States*,[246] in which the Supreme Court sustained a tariff act that delegated the decision to impose duties to the President because Congress had clearly articulated those principles that would justify the tariff imposition.[247] Thus, the President and his advisors acted merely as fact-finders. The Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[248]

Similarly, in both *Panama Refining Co. v. Ryan*[249] and *Schechter Poultry Corp. v. United States*[250] an industrial code established by presidential proclamation pursuant to the National Industrial Recovery Act was stricken as an impermissible delegation of authority. In neither case had Congress defined the policy considerations, standards, or findings of fact required to trigger executive action. The Court would not tolerate "[s]uch a sweeping delegation of legislative power."[251] The "intelligible principle" doctrine has continued to be invoked in recent years.[252]

In addition, several lower federal courts have specifically considered the "opt out" provisions of other statutes.[253] A series of cases, for example, construed the Housing and Rent Act of 1948, which allowed states to opt out of federal rent controls established pursuant to congressional war powers. In *United States v. Amory*,[254] a federal district court in California upheld the statute. Although the rationale regarding delegation is sketchy, the court clearly held the requirement that cities had to conduct "hearings" before opting out to be a crucial fact.[255] Thus, there is a vague suggestion that intelligible guidelines must prompt the opt out. On the other hand, in *Woods v. Shoreline Cooperative Apartments, Inc.*,[256] a federal district court in Illinois held that the opt out of rent control violated the non-delegability principle because "no authorized person is required to use any judgment and there is a grant of unbridled administra-

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246. 276 U.S. 394 (1928).

247. *Id.* at 404

248. *Id.*

249. 293 U.S. 388, 415 (1935).

250. 295 U.S. 495, 541, 542 (1935).

251. *Id.* at 538.

252. In *National Cable Television v. United States*, 415 U.S. 336 (1974), Justice Douglas cited *Hampton* with approval and quoted the passage reprinted earlier. *Id.* at 342. Likewise, in *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607 (1980) the Supreme Court reviewed the Occupational Safety and Health Administration Standards for acceptable exposure levels to benzene. It dealt with, approved both *Panama Refining Co.* and *Schechter Poultry Corp.* and, quoting from the latter opinion, termed each statute a "sweeping" and uncircumscribed delegation of legislative authority. *Id.* at 645.

253. For a more detailed examination of these cases, see Comment, *supra* note 162, at 52-56.

254. 81 F. Supp. 364 (S.D. Cal. 1949). The rationale of *Amory* was adopted in *United States v. Bass*, 86 F. Supp. 838 (D. Neb. 1949).

255. 81 F. Supp. at 365.

256. 54 F. Supp. 860 (N.D. Ill.), *rev'd per curiam sub nom.*, *United States v. Shoreline Cooperative Apartments, Inc.*, 324 U.S. 807 (1945).

tive discretion subject neither to reason nor findings of facts."[257] The Supreme Court reversed per curiam.[258] Even if the *Emery* or the *Woods* construction of the statute were improper, both agree that a key consideration in evaluating an opt out is whether intelligible standards guide its exercise.

Similarly, in *Nike v. United States*,[259] the Eighth Circuit considered a local opt out allowed by the Johnson Act, which prohibited the interstate transportation of gambling devices except to a state subdivision that had opted out of the Act's coverage.[260] The court held a delegation challenge unconvincing, however, because "Congress may legislate contingently upon the existence or non-existence of certain facts which will bring into force the declared policy of Congress."[261] The Eighth Circuit sustained the opt out because a guiding congressional policy justified its exercise.[262]

Thus, for the opt out of subsection 522(b)(1) to be sustained as a permissible delegation of congressional authority, its exercise by the states must be viewed as guided by a congressionally established "intelligible principle." Therefore, because subsection 522(b) provides a carte blanche to the states regarding exemptions, extending to them what has been characterized as a "veto" power over the federally established exemptions,[263] it could be argued that no such principle may be apparent. Since a strong presumption of validity operates in favor of congressional acts,[264] however, the courts will be reluctant to invalidate legislation, especially when an acceptable construction of the statutes can be extrapolated.

It is difficult to see how the list of subsection 522(d) exemptions establishes any standard whatsoever when states are allowed to completely negate them by opting out.[265] The logic of this idea is strained at best. The better analysis of the "intelligible principle" doctrine is that espoused in *In re Rhodes*[266] by a Bankruptcy Court of the Middle District of Tennessee. The court declared that "Congress obviously did not intend, and, in any event, was constitutionally prohibited from, delegating unfettered authority to the states to regulate bankruptcy exemptions. To

257. 64 F. Supp. at 864.

258. 335 U.S. 887 (1948). No explanation was given as to the per curiam opinion. However, the reversal arguably resulted because the district court invalidated the entire statute at issue despite a severability clause. See Comment, *supra* note 108, at 811.

259. 213 F.2d 116 (8th Cir.), cert. denied, 348 U.S. 825 (1954).

260. See 213 F.2d 118, 120 (8th Cir.), cert. denied, 348 U.S. 825 (1954).

261. 213 F.2d at 119.

262. *Id.* at 120.

263. 3 COLLIER ON BANKRUPTCY ¶ 522.06 (15th ed. 1979).

264. *See, e.g., United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963).

265. It could be argued that Congress did not intend to give the states authority to frustrate completely traditional bankruptcy policy. Such authority is a mere inadvertent result of the opt out. *See* Yukevich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 53 N.C.L. REV. 799, 801, 805 (1975); Comment, *supra* note 182, at 51. This argument, however, flies in the face of the plain meaning of § 522(b)(1).

266. 14 Bankr. 829 (M.D. Tenn. 1981).

do so would enable the states to frustrate totally the fresh start of many debtors."[297] Although this type of analysis was rejected by the Seventh Circuit in *Sullivan*, the rejection turned on the higher court's misreading of legislative history and the intentions of Congress regarding a fresh start policy.[298] Other courts, however, have found the *Rhodes* analysis persuasive."[299]

When a state exercises its opt out authority, therefore, the better view appears to be that it must exercise it in conformity with the "intelligible principle" represented by a fresh start policy. Otherwise, the opt out is an impermissible delegation of congressional power. The "intelligible principle" limitation on delegability, like the requirement mandating an absence of conflict under the adoption and consent principles, thus, shifts the emphasis of an attack on opt out legislation to preemption-like analysis—how to properly evaluate the conflicts with federal law, policy, and legislative intent that the opt out provision creates.

C. *Preemption and Fresh Start*

The starting point of any preemption analysis of the Code's opt out provision is the fresh start policy inherent in the Code. If the opt out provision is viewed as a valid adoption of or consent to state legislation, then it cannot conflict with this overriding policy in the bankruptcy Code.[300] Further, if the opt out is viewed as a permissible delegation of congressional authority, it must be guided by the same controlling "intel-

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297. *Id.* at 882. The court also cited Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). 17 Bankr. at 881.

298. For a discussion of the *Sullivan* opinion, see *supra* notes 201-10.

299. Prior to *Sullivan*, a bankruptcy court in Illinois, for example, in *In re Bolgiano*, 16 Bankr. 780 (B.D. Ill. 1982), held that the "intelligible principle" by which the Code opt out is governed is the fresh start policy inherent in the Code. *Id.* at 787. The court held that "The framework and principles of that section [522] are those Congress intended that the States use when acting under the authority delegated to them." *Id.* at 782. And as the court pointed out earlier, implicit in that section is "an overriding federal interest in providing debtors who go through bankruptcy with sufficient property after bankruptcy to have a fresh start." *Id.* It should be noted that the holding in *Sullivan* overrules the rationale in the Seventh Circuit.

Recently, bankruptcy courts in California and Maryland ruled on the constitutionality of the opt out legislation in those states. California's opt out provision offered debtors a choice between the federal and state exemptions but did not allow joint debtors to take advantage of both. *In re Fern*, 22 Bankr. 977 (B.D. Cal. 1982) the court held that the state's provision directly conflicts with § 522(m), which guarantees to each debtor in a joint case an election of the federal or state exemptions, and thereby thwarts congressional policy of a fresh start. Similarly, in *In re Tanguay*, 21 Bankr. 622 (D.C. Md. 1982), a bankruptcy court held the Maryland opt out provision unconstitutional because it conflicts with the federally adopted fresh start policy. The Maryland provision discriminated against homeowners by denying them an exemption comparable to that provided to homeowners. The court relied heavily upon *In re Davis*, 16 Bankr. 62 (D.C. Md. 1981). For an in-depth discussion of the Maryland cases, see *infra* 871-78 and accompanying text.

300. For a discussion of the conflict between state law and bankruptcy law, see *supra* notes 230-37 and accompanying text.

ligible principle."[271] This is especially true in light of the uniformity requirement of the Bankruptcy Clause because, as discussed above, if the Constitution does not demand an absolute uniformity in this area, it surely requires at least a consistency of policy within the variations that state laws embrace.[272] A fresh start policy is an overreaching concern in bankruptcy legislation, despite the misperceptions of *Sullivan*.[273] Although not specifically mentioned in the statutes, the fresh start policy is pervasive in bankruptcy case law,[274] legislative history,[275] and scholarly literature.[276] Before considering those specific areas of the North Carolina exemption law that appear particularly ripe for a preemption challenge, a brief overview of preemption theory is instructive.

1. *Preemption theory*

The preemption doctrine is grounded in the Supremacy Clause of the Constitution.[277] When a state law conflicts with a federal law, the former is preempted by the latter. Although simple to state, the application of this principle has had a protean history; the quantum of controversy necessary to invoke it successfully is difficult to define.

In recent years, the central preemption inquiry has been whether Congress intended to exclude state legislation from the field.[278] This intention can be manifested in a variety of ways. The intention is obvious, for example, when there is a direct conflict between state and federal legislation, as, for instance, when state law prohibits what federal law mandates.[279] It is similarly obvious, of course, when Congress expressly indicates in the statute its intention to occupy the field.[280] More difficult to determine, however, is when congressional intent to exclude state legislation is implied.

Generally, an intent may be implied when federal enactments are so comprehensive that it is logical to infer an intention to occupy the field,

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271. For a discussion of the "intelligible principle" limitation, see *supra* notes 235-38 and accompanying text.

272. For a discussion of uniformity and the bankruptcy clause, see *supra* notes 181-211 and accompanying text.

273. For a discussion of the misperceptions of *Sullivan*, see *supra* notes 215-19 and accompanying text.

274. *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

275. For a discussion of the legislative history, see *supra* notes 208-13 and accompanying text.

276. *See, e.g.*, Nordlinger, *The Bankruptcy Discharge: Toward a Fresh Start*, 38 N.C.L. Rev. 728 (1960).

277. The Supremacy Clause states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, § 2.

278. Illinois v. Lidderdale, 359 U.S. 846, 851-52 (1959) (federal statute not shown clearly and definitely to supercede or exclude state action in animal disease control).

279. *See generally* L. Tribe, American Constitutional Law § 6-28 (1978).

280. *Id.* § 6-25.

when the nature of the subject matter inherently dictates a uniform national policy, or when the policies and purposes of the federal statute are frustrated by the state legislation.[231] In recent years, however, there must be a rising "threshold of conflict between federal and state . . . laws which must be reached before federal pre-emption can be said to occur."[232]

Any attempt to argue that the opt out provision itself creates an impermissible conflict with the exemption scheme otherwise created by the Code is unrealistic because Congress expressly provided otherwise in subsection 522(b)(1).[233] It would likewise defy express language to assert that the comprehensiveness of subsection 522(d) precludes state legislation. In addition, given the history of congressional deference to state legislation in the exemption area and the entrenchment of geographic uniformity,[234] strong arguments that bankruptcy exemptions require nationally uniform action may exist. If it could be established, however, either that a particular provision of a state exemption law directly conflicted with a section 522 provision or that it frustrated the policies and objectives underlying the federal statute, then a preemption challenge could be asserted on a state by state basis. One of these two theories might provide the basis from which a preemption attack on particular provisions of North Carolina's exemption law may be mounted.

2. *Direct conflict*

When there is a direct conflict between state and federal bankruptcy law, preemption occurs. In *International Shoe Co. v. Pinkus*[235] the Supreme Court held that an Arkansas insolvency law providing for discharge and distribution was preempted by the Federal Act: "The general rule is that an intention wholly to exclude state action will not be implied unless, when fairly interpreted, an act of Congress is plainly in conflict with state regulation of the same subject."[236] In the exemption context, this type of direct conflict is likely to occur when a state enacts an exemption provision, presumably pursuant to its opt out authority, only to have it determined later that the provision is beyond the scope of the opt out and in conflict with another subsection of section 522 that is binding on the state. The difficulty, then, is to determine the parameters of opt out authorization. A comparison of two recent circuit court opinions,

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231. *See* City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) (Federal Aviation Act preempts city ordinance controlling flight schedules); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (Federal Warehouse Act supersedes state involvement in areas specifically addressed by Act).

232. Kaplanes v. Sullivan, 552 F.2d 2, 11 (1977).

233. For a discussion of § 522(b)(1), see *supra* note 28.

234. For a discussion of geographic uniformity, see *supra* notes 187-94 and accompanying text.

235. 278 U.S. 261 (1928).

236. *Id.* at 265.

Chesseman v. Nachman[287] and *In re McManus*[288] helps to illustrate this preemption problem.

In *Chesseman* the Fourth Circuit considered a provision of the Virginia exemption law enacted under its opt out authority.[289] The law allowed a homestead exemption only to a "householder," and the state courts had construed the term as applicable to only one of both spouses in a joint exemption filing.[290] The Fourth Circuit held that such a construction conflicted with subsection 522(m) of the Code, which states that the bankruptcy exemptions "shall apply separately with respect to each debtor in a joint case."[291] In order to resolve the conflict, the court insisted on a liberal and somewhat tortured construction of the term "householder," thus consistently aligning the state and federal provisions.[292] In its discussion, the court cited *Hinkus* and relied on a preemption analysis.[293] Finding a fresh start policy inherent in subsection 522(m), the court held that "the states should [not] be left free to classify which bankrupt debtors should be entitled to exemptions when the classification conflicts with federal law."[294] In effect, the court viewed the opt out authority of subsection 522(b) as strictly limited to subsection 522(d), and it thus viewed subsection 522(m) as operating independently of subsection 522(b).[295] The court held that subsection 522(m) preempted the Virginia provision that overreached the scope of its opt out authority.[296]

In *McManus*[297] the Fifth Circuit considered a similar problem but reached a different result. Pursuant to its opt out authority, the Louisiana legislature had provided in its exemption law that household goods and furnishings subject to a chattel mortgage could not be exempted from the bankruptcy estate.[298] The debtor wished to claim such an exemption under the authority of subsection 522(f) of the Code, which enables the debtor to avoid "a nonpossessory, nonpurchase money security interest" to the extent "that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section."[299] The

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287. 692 F.2d 60 (4th Cir. 1982).
288. 681 F.2d 385 (5th Cir. 1982).
289. 692 F.2d 61 (4th Cir. 1982).
290. *Id.*
291. 11 U.S.C. § 522(m) (Supp. IV 1980).
292. 692 F.2d at 63.
293. *Id.*
294. *Id.* at 64.
295. But a lower court decision using a similar analysis see *In re Morgan*, 16 Bankr. 699 (E.D. Va. 1981).
296. The court stated:

> If we were to permit a construction of Virginia law that allows only one householder per residence, the construction would be inconsistent with section 522(m) of the Act which we interpret as allowing each debtor in a joint case to take some exemptions, whether the amount is determined by state or federal law.

692 F.2d at 64.
297. 681 F.2d 385 (5th Cir. 1982).
298. *See id.*
299. 11 U.S.C. § 522(f) (Supp. IV 1980).

majority held that "the invocation of section 522(f) is dependent upon whether a debtor may be legally entitled to an exemption under section 522(b)."[300] Thus, Louisiana, which previously decided that chattel mortgages could impair exemptions under subsection 522(b), held that subsection 522(f) was simply not applicable in the state. In effect, under the *McManus* analysis, the opt out authorization is much broader than subsection 522(d). Although not citing *Cheeseman*, the court clearly rejected the Fourth Circuit's analysis. Indeed, it specifically indicated that the independent operation of subsection 522(f) could not be buttressed by the rehabilitative policy underpinning the federal provision, and thus a preemption analysis simply was inappropriate.[301]

The key difference distinguishing the viewpoint adopted by the Fourth Circuit in *Cheeseman* from the Fifth Circuit's majority opinion in *McManus* is their perception of the strength of overriding federal policy. Is the concern with providing debtors a fresh start sufficiently overreaching to grant a status independent of opt out authority to subsections 522(m) and 522(f) and thus to establish a preemptive conflict when state law provides otherwise? *Cheeseman* draws support from long-standing fresh start policies,[302] commentators,[303] and the judiciary.[304] Indeed, even the Seventh Circuit in *Sullivan*[305] conceded that *Cheeseman* had appropriately applied the preemption analysis. It distinguished its own failure to allow a preemption challenge based on subsection 522(d) from the Fourth Circuit's contrary holding regarding subsection 522(m): "section 522(b)(1) gives the states only a limited power to nullify the effect of the Code. A state is specifically permitted to displace the exemption provisions of section 522(d); it is not, however, given the clear power to abrogate section 522(m)."[306] Thus, the weight of authority as well as the more persuasive reasoning supports the *Cheeseman* analysis.[307]

In the final analysis, the *Cheeseman* decision to restrict the grant of opt out authority strictly to the subsection 522(d) list of exemptions is undeniably persuasive. The practical effect of applying the Fourth Cir-

300. 681 F.2d at 355.

301. *Id.* at 357 n.7. The dissent, on the other hand, argued that preemption had occurred: "any conflict between the state lien conservation provision and the federal lien avoidance provision must be constitutionally resolved in favor of federal law." *Id.* at 358 (Tate, J., dissenting). To support this view, the dissent relied on the fresh start policy motivating the avoidance mechanism of § 522(f). The section was designed, the dissent urged, to ameliorate creditor practices which "frustrate the rehabilitative nature of the bankruptcy laws by effectively denying the debtor his 'fresh start.'" *Id.* In sum, § 522(f) operated independently of a state's opt out authority.

302. *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *see also supra* notes 215-19 and accompanying text.

303. *See, e.g.*, 3 Collier on Bankruptcy ¶ 522.29 (15th ed. 1979) (lien avoidance of § 522(f) operates independently of opt out).

304. *See, e.g.*, *In re* Curry, 5 Bankr. 282 (N.D. Ohio 1980) (lien avoidance of § 522(f) operates independently of opt out); *In re* Jackson, 4 Bankr. 816 (N.D. Ohio 1980) (same).

305. 680 F.2d 1131 (7th Cir. 1982).

306. *Id.* at 1137.

307. *But see* Zimmerman v. Morgan, 689 F.2d 471 (4th Cir. 1982).

code's reasoning to several sections of North Carolina's amended exemption law is to highlight their present ripeness for preemption challenge.

a. *Ninety-day recapture.* Subsection 1C-1601(a) of the North Carolina law provides that no exemptions shall be available to "tangible personal property purchased by the debtor less than 90 days preceding . . . the filing of a petition for bankruptcy."[318] The subsection is apparently intended to discourage the fraudulent acquisition of exemptible property on the eve of bankruptcy. It establishes a completely objective and incontrovertible presumption of fraud regarding tangible personal property though inexplicably not real property, life insurance, or intangible personal property acquired during the ninety days prior to bankruptcy filing.[319]

This ninety-day recapture prohibits what the federal Code clearly allows—exemption planning. There is no counterpart to subsection 1C-1601(d) in the federal legislation.[320] Indeed, legislative history indicates a congressional intent to endorse eleventh hour exemption planning. Both the House and Senate Reports contain the following statement: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law."[321] Although the current law does not condone fraudulent conveyances,[322] the

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318. N.C. Gen. Stat. § 1C-1601(d) (Cum. Supp. 1981).

319. *See generally*, Treglia, *supra* note 18, at 380-91.

320. Three states, however, have adopted similar provisions. Me. Rev. Stat. Ann. tit. 14, § 4425 (Cum. Supp. 1982) provides:

> Notwithstanding section 4422, if within 90 days of the attachment, or in a proceeding under the United States Code, Title 11, the date of the filing of the petition, the debtor transfers his nonexempt property and as a result acquires, improves, or increases in value property otherwise exempt under section 4422, his interest shall not be exempt to the extent that the acquisition, improvement or increase in value exceeds the reasonable needs of the debtor or his dependents.

Ark. Ins. Ann. Stat. ch. 62, § 18 (Smith-Hurd Cum. Supp. 1982) ("property acquired within six months of the filing of the petition for bankruptcy shall be presumed to have been acquired in contemplation of bankruptcy"); Tex. Rev. Civ. Stat. Ann. art. 3836(7)(b) (Vernon Cum. Supp. 1982). The Texas statute provides:

> (b) The use of any property not exempt from attachment, execution and every type of forced sale for the payment of debts to acquire property described in Subsection (a) of this article, or any interest therein, or to pay indebtedness thereon with the intent to defraud, delay or hinder a creditor or other interested person from obtaining that to which he is or may become entitled shall not cause the property or interest so acquired, or improvements made to be exempt from seizure for the satisfaction of liabilities under Subsection (a) of this article.

Id.; *see also In re Rose*, 11 Bankr. 682 (N.D. Tex. 1981).

321. S.R. Rep. No. 95-989, 95th Cong., 2d Sess. 361, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5847; H. Rep. No. 95-595, 95th Cong., 1st Sess. 70, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5862.

322. *See* Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Act*, 52 N.C.L. Rev. 709, 809-10 (1980).

Code discourages this conduct through other means.[313]

It is important to note that subsection 1C-1601(d) also may operate to deny North Carolina debtors the use of subsection 522(f) of the Bankruptcy Code. Imagine, for example, that a debtor purchases for cash a refrigerator worth $500 on January 1. On February 1, the debtor borrows $1000 from a finance company that takes and perfects a security interest in the refrigerator. Finally, on March 1, the debtor files a bankruptcy petition. In the absence of subsection 1C-1601(d), the debtor could invoke subsection 522(f)(2) to avoid the security interest in full by resorting to subsection 1C-1601(e)(4).[314] Since the refrigerator is tangible personal property purchased by the debtor within ninety days of the filing of a bankruptcy petition, however, no claim of exemption for the refrigerator is available. Since the nonpossessory, nonpurchase money security interest does not "impair an exemption to which the debtor would have been entitled" under subsection 522(b) of the Code, subsection 522(f) does not apply, and the debtor has been deprived of the use of one of the major consumer protection provisions of the Bankruptcy Code.

The absence of this provision in the Code was motivated by an intent to allow debtors the "full use" of available exemptions in order to further their fresh start. The North Carolina prescription frustrates this objective and conflicts with congressional policy. Thus, there is a direct conflict between federal law and the North Carolina Act regarding the ninety-day recapture.[315] It is possible to imagine a situation in which a debtor, surprised by involuntary proceedings, loses the benefit of virtually all exemptions because of recent purchases of tangible personal property. This harsh result could be avoided by applying the reasoning of *Chrysemon*, under which it could be established that the fraudulent acquisitions provision is outside the permissible scope of opt out authority. Then, a preemption argument based on a direct conflict of the statutes may prove successful.

b. *Exemption swapping.* Subsection 1C-1803(e)(11) of the amended Act[316] allows the debtor to swap exemptions, a procedure not provided for in the Code. Thus, the Act allows what the Code does not mandate. This direct inconsistency again suggests the possibility of preemption. Yet, a challenge is unlikely since neither debtor nor creditor would wish to bring it. The provision allows for flexibility by allowing debtors an exemption floor of $5,000 in almost any property of their choosing.[317] Thus, it does not operate to the frustration of a debtor's fresh start. Similarly, a credi-

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313. *See generally* Peeples, *supra* note 19, at 893-94.

314. N.C. GEN. STAT. § 1C-1601(e)(4) (Cum. Supp. 1987).

315. *See In re McManus*, 821 F.2d 254 (5th Cir. 1987). For a discussion of *McManus*, see *supra* notes 207-211 and accompanying text. In *In re Hallman*, 28 Bankr. 28 (W.D.N.C. 1982), Judge Whitney interpreted the sole purpose of § 1C-1601(d) to be the prevention of "bankruptcy planning" by debtors. This construction of the "spirit" of § 1C-1601(d) represents an interpretation of the federal exemption scheme delineated in § 522(d).

316. *Id.* § 1C-1803(e)(11) (Cum. Supp. 1987), as amended by Act of June 16, 1988, ch. 1224, § 13 (codified at N.C. GEN. STAT. § 1C-1803(e)(11) (Interim Supp. 1989)).

317. *See* Peeples, *supra* note 19, at 893-94.

lor is not likely to be prejudiced by it. The total value of the assets available to the bankruptcy estate is not diminished, and the Act specifically provides that priorities, if any exist, are to remain unaffected. Secondly, despite the theoretical conflict, the provision appears to be within the scope of opt out authority.[318] Subsection 522(b)(1) clearly is broad enough to include a state's simply replacing the subsection 522(d) enumerated properties list with a dollar amount ceiling. Therefore, a preemption in such a context is dubious.

c. *Excepted claims.* Subsection 1C-1601(e)[319] of the North Carolina Act enumerates exceptions to which the exemptions prescribed in section 1C-1601(a)[320] are inapplicable. The Code covers the same subject matter differently.[321] As well as creating considerable confusion regarding the interplay and applicability of the disparate state and federal provisions, the conflict raises the possibility of preemption. Presumably, if *Ohavenian* is followed, the subsections of section 522 operate independently of a state's opt out decision. The inconsistencies that exist between the North Carolina Act and the Code, should be resolved in favor of the federal law.[322] The North Carolina exceptions generally are more generous to creditors than their federal counterpart. Subsections 1C-1601(e)(1) and (2),[323] for example, inclusively except all claims of national and state governmental units. Under section 523[324] of the Code, on the other hand, only a limited range of governmental claims are non-dischargeable. More troublesome inconsistencies, however, plague the interplay of these two provisions.

Subsection 1C-1601(e)(5) of the amended Act excepts claims "[f]or payment of obligations contracted for the purchase of the specific real property affected."[325] This provision seems intended to limit the applicability of the subsection 1C-1601(a)(1)[326] homestead exemption. It is difficult to imagine the kind of contractual "purchase" that subsection 1C-1601(e)(5) contemplates. It does not refer to a mere "agreement to purchase," for in that arrangement there is no possessory interest that is significant enough to satisfy the residential use requirement of subsection 1C-1601(a)(1). Similarly, it does not refer to installment land contracts, for in these arrangements title, and hence "interest" under subsection

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318. *See* Peeples, *supra* note 10, at 849.

319. N.C. GEN. STAT. § 1C-1601(e) (Cum. Supp. 1981), as amended by Act of June 18, 1982, ch. 1226 (codified at N.C. GEN. STAT. § 1C-1601(e) (Interim Supp. 1982)).

320. N.C. GEN. STAT. § 1C-1601(a) (Cum. Supp. 1981).

321. *See, e.g.*, 11 U.S.C. § 522 (Supp. IV 1980) (allowance of claims and objection to proof); *id.* § 507 (priorities of claims and expenses); *id.* § 523 (claims not dischargeable).

322. The conflict between state exemptions and similar federal provisions resulting from the opt out has elicited some significant scholarly commentary. *See, e.g.*, Stern, *State Exemption Laws in Bankruptcy: The Escaped Creditor as a Medium for Appraising Aspects of Bankruptcy Reform*, 38 BUFFALO L. REV. 71 (1990).

323. N.C. GEN. STAT. § 1C-1601(e)(1), (2) (Interim Supp. 1982).

324. 11 U.S.C. § 523 (Supp. IV 1980).

325. N.C. GEN. STAT. § 1C-1601(e)(5) (Interim Supp. 1982).

326. *Id.* § 1C-1601(a)(1) (Cum. Supp. 1981).

1601(a)(1), is generally not acquired until after the final payment is made.[327] Thus, the type of transaction apparently contemplated is one in which a note and title have been exchanged but in which no mortgage secures the agreement.[328] The provision thus seems to protect creditors in transactions that at best are extremely unlikely to occur. No corresponding limitation, however, exists in the Code. In bankruptcy proceedings, therefore, a Chessman analysis suggests that the exception would not apply.

A similar conflict exists between subsection 1C-1601(e)(6),[329] as renumbered, and the Code. The state provision excepts claims "[f]or contractual security interests in the specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods."[330] There are two apparent conflicts. First, the provision protects all "security interests," whether unperfected or perfected. The Code, however, protects by exception only the interests that are perfected.[331] Secondly, the effect of the provision denying the exception to nonpossessory, nonpurchase money security interests differs from the operation of Code subsection 522(f), which is designed to offer debtors similar protection.[332] Under subsection 522(f), for example, when a nonpossessory, nonpurchase money security interest is avoided, it becomes extinct. Under subsection 1C-1601(e)(6), however, this interest is merely suspended, to be revived again upon transfer of the property. Subsection 1C-1601(e)(f),[333] for instance, provides that a transfer of exempted property operates as a waiver of exemptions. Section 1C-1804 likewise provides that exemptions protect the property of debtors from the enforcement of claims only "for so long as the *debtor* owns it."[334] Thus, once subsection 522(f) is successfully invoked under the federal system, the security interest securing the claim is completely dead. Under the North Carolina scheme, however, a claim is resurrected upon transfer, and presumably the transferee takes subject to the dismissed interest. The direct conflict in the operation and effect of these federal and state provisions again raises the specter of preemption.

d. *Waiver.* Subsection 1C-1601(c)[335] of the North Carolina Act provides for the waiver of exemptions. In most respects this provision does not markedly differ from the Code waiver provisions in subsection

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327. *See* Shamrock v. Fletcher, 271 N.C. 85, 155 S.E.2d 303 (1967); Manes, Installment Land Contracts in North Carolina, 3 Campbell L. Rev. 29 (1981).

328. Under such a construction, § 1601(e)(6), which obviously covers mortgage transactions, is rendered superfluous. It is doubtful this was the intended result.

329. N.C. Gen. Stat. § 1C-1601(e)(6) (Interim Supp. 1983).

330. *Id.*

331. Sec. 11 U.S.C. § 544 (Supp. IV 1980).

332. 11 U.S.C. § 522(f) (Supp. IV 1980).

333. N.C. Gen. Stat. § 1C-1601(e)(f) (Interim Supp. 1983).

334. *Id.* § 1C-1804 (Cum. Supp. 1981).

335. *Id.* § 1C-1601(c) (Interim Supp. 1983).

522(e).[339] In two specific areas, however, the waiver sections do conflict. First, subsection 1C-1601(c)(2) allows for "[w]ritten waiver, after judgment" if it is approved by the court and done knowingly and voluntarily.[340] Subsection 522(e) of the Code prohibits this type of waiver, not permitting a waiver "executed in favor of a creditor that holds an unsecured claim."[341] According to the Cheeseman preemption analysis, therefore, this North Carolina waiver provision would be inapplicable in bankruptcy proceedings.

A similar conflict arises regarding the subsection 1C-1601(c)(3) provision of waiver by "failure to assert [exemptions] after notice."[342] The conflict arises as a result of the 1992 amendments. Subsection 1C-1601(e)(2) requires that exemptions be scheduled or that a hearing be held within twenty days after the service of right is served.[343] Beyond the twenty day limitation, exemptions are deemed waived.[344] Although the Code provides for waiver by inaction in subsection 522(e),[345] it contains no corresponding time limitation. In any event, the twenty-day state requirement could not be enforced in bankruptcy if found, under Cheesman, to be beyond the scope of opt out authority.

3. *Frustration of policy*

When a state law frustrates the objectives and policies of a federal statute, preemption occurs. The United States Supreme Court clearly enunciated this principle in *Hines v. Davidowitz*.[346] In overturning Pennsylvania's alien registration law, the Court explained the preemption principle.[347] The question is, the court said, whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[348] Thirty years later the Court enlarged the principle in the bankruptcy context in *Perez v. Campbell*.[349] The Court cited *Hines* approvingly when invalidating an Arizona financial responsibility law that suspended the driver's license of a debtor who was unable to satisfy an unfavorable personal injury debt even though she had been discharged in bankruptcy.[350] Because it "frustrated Congress' policy of giving debtors a new start" the law was held preempted.[351]

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339. 11 U.S.C. § 522(e) (Supp. IV 1992).
340. N.C. Gen. Stat. § 1C-1601(c)(2) (Interim Supp. 1992).
341. 11 U.S.C. § 522(e) (Supp. IV 1992).
342. N.C. Gen. Stat. § 1C-1601(c)(3) (Interim Supp. 1992).
343. *Id.* § 1C-1601(e)(2) (Interim Supp. 1992).
344. *Id.*
345. 11 U.S.C. § 522(e) (Supp. IV 1992).
346. 312 U.S. 52 (1941).
347. *Id.*
348. *Id.* at 67.
349. 402 U.S. 637 (1971).
350. *Id.* at 648-49.
351. *Id.* For a 1987 Central States Supreme Court case citing *Perez* and *Hines* with approval, see Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).

In the exemption context, preemption is likely to occur when the state exemption is presumptively within the scope of opt out authority yet nonetheless frustrates the bankruptcy policy of providing debtors with a fresh start. North Carolina's exemption law is vulnerable to a preemption challenge on this issue. An attack could be mounted against North Carolina's entire exemption scheme enacted under its opt out authority or against particular exemption provisions.

a. Preemption of subsection 1C-1601(a). The Seventh Circuit in *In re Sullivan*[349] rejected a preemption challenge to the entire exemption scheme that Illinois had enacted. The decision, however, turned on the court's refusal to attribute a fresh start policy to Congress.[350] Seeing no such policy as motivating the Code provision, no policy existed for Illinois law to frustrate. Therefore, because it plainly fell within opt out authority, the state scheme was allowed to stand.[351] If a North Carolina bankruptcy court adopted the argument that the fresh start policy is an overriding congressional concern, North Carolina's entire exemption scheme could be attacked as preempted.

The argument, however, would be of dubious value since it would be difficult to establish that North Carolina's law provides debtors with less than a fresh start. First, the North Carolina legislature significantly revised and updated exemption values in most categories.[352] Any argument that the provisions are stale or anachronistic thus is precluded. In addition, some sections, such as the exemption swapping provisions, provide the debtor with great flexibility and some deference in his attempt to emerge from bankruptcy with financial maneuverability.[353] Finally, Congress clearly did intend to defer to state legislatures in determining what constituted a fresh start in their particular geographic location.[354] Thus, to argue that North Carolina's scheme as a whole is unacceptable is unrealistic. A preemption challenge based on frustration of the fresh start policy would be more effectively directed against particular exemption provisions—the most likely candidates being those provisions that apparently discriminate between homeowners and non-homeowners.

b. Preemption of subsection 1C-1601(a)(1), (2), and (4). North Carolina's exemption law establishes, in effect, certain exemption floors. These minimums, however, are significantly different for homeowners and renters. Using the subsection 1C-1601(a)(1) $7,500 homestead exemption[355] together with the subsection 1C-1601(a)(4) household goods ex-

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349. 890 F.2d 1151 (7th Cir. 1989).

350. For a discussion of the court's refusal to accept the fresh start policy, see supra notes 308-10 and accompanying text.

351. 890 F.2d at 1156; see also supra notes 306-10 and accompanying text.

352. See generally Peeples, supra note 19.

353. For a discussion of exemption swapping, see supra notes 315-19 and accompanying text.

354. See, e.g., S. Rep. No. 95-989, 95th Cong., 2d Sess. 8, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5792.

355. N.C. Gen. Stat. § 1C-1601(a)(1) (Cum. Supp. 1991).

emption,[386] a homeowner is guaranteed a $10,000 exemption floor provided he has a $7,500 interest in the value of the homestead.[387] A renter, on the other hand, not having the benefit of subsection 1C-1601(a)(1), can only establish a $5,001 floor by combining the subsection 1C-1601(a)(2) $2,500 "wild card" exemption[388] with the $2,500 personal property exemption of section 1C-1601(a)(4).[389] Yet, under the federal scheme of subsection 522(d), both homeowners and renters are assured of an equivalent floor. The subsection 522(d)(5) "wild card" exemption[390] allows any debtor to exempt a $400 interest in any property plus any unused amount of the $7,500 homestead exemption of subsection 522(d)(1). In effect, both homeowners and renters thus are assured of a $7,900 exemption minimum.[391] Furthermore, as the Seventh Circuit declared in *In re Smith*,[392] the intention of Congress in enacting the "wild card" exemption was "to insure that there was no discrimination between homeowners and non-homeowners" in achieving its fresh start goal.[393] As a result, one may argue that state provisions that do so discriminate, such as North Carolina's, are preempted by the Federal Code.

The above preemption argument was unsuccessful in the Bankruptcy Courts in Tennessee, Illinois, and Maryland. In *In re Rhodes*[394] a Tennessee debtor claimed a $4,000 interest in a Florida condominium under subsection 522(d)(1). According to Tennessee law enacted under the opt out, he was only entitled to a $5,000 homestead exemption if it involved real property and constituted his principal place of residence. The court decided that the Tennessee law discriminated against non-homeowners in violation of congressional fresh start policy and held the Tennessee law preempted.[395] In Illinois, the case of *In re Hedgemann*,[396] involved a similar set of facts. The Illinois exemptions, also enacted under the opt out, allowed a $14,000 homestead exemption only to those debtors who qualified as homebuilders.[397] Other debtors, who were neither homeowners nor heads of households, were allowed exemptions as low as $300 in personal property.[398] Citing *In re Smith* and holding that subsection 522(d) indicated a congressional intention "to ensure that homeowners and non-homeowners would have equal fresh starts," the court struck down the Illinois law because it "directly conflict[ed] with the policies of

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386. *Id.* § 1C-1601(a)(4).
387. *See generally* Peeples, *supra* note 28, at 880.
388. N.C. GEN. STAT. § 1C-1601(a)(2) (Cum. Supp. 1981).
389. *Id.* § 1C-1601(a)(4).
390. 11 U.S.C. § 522(d)(5) (Supp. IV 1980).
391. *See generally* Peeples, *supra* note 28, at 880.
392. 640 F.2d 845 (7th Cir. 1980).
393. *Id.* at 851.
394. 14 BANKR. 639 (BKR. TENN. 1981).
395. *Id.* at 641-45.
396. 18 BANKR. 780 (BKR. D.C. 1982).
397. *Id.*
398. *Id.* at 782-83.

Congress."[369]

Most recently, in *In re Locarno*[370] the Bankruptcy Court in Maryland presented a persuasive, coherent argument to hold unconstitutional a similar state statute that also unfairly discriminated against non-homeowners. While affirming the *Sullivan* decision to the extent that it found subsection 522(b)(1) to be a "constitutional delegation of power to the states,"[371] the *Locarno* court refused to adopt the *Sullivan* position that subsection 522(b)(1) represents an unlimited delegation of that power.[372] Instead, the court relied on the *Cheesemon* analysis to hold that although Congress delegated the authority to set the level of exemptions, it did not intend for the states to embark on an unbridled classification scheme that designates "which bankruptcy debtors should be entitled to exemptions when the classification conflicts with federal law."[373] Citing *In re Davis*,[374] the *Locarno* court severed the objectionable Maryland section as conflicting with the federally adopted fresh start policy and concluded that the true effect of the decision allowed Maryland debtors to elect either state or federal exemptions.[375]

The preemption argument, then, is certainly sensible in North Carolina though the probability of its success is less. First, the discrimination in both Tennessee and Illinois was far more severe than that in North Carolina. In North Carolina, every debtor is assured of at least a $5,000 floor.[376] Further, the North Carolina provisions may represent a policy determination by the General Assembly that $5,000 is sufficient to establish a fresh start. The additional minimum secured to homeowners, then, is merely an "add-on" designed to further other state policies, such as encouraging and stabilizing homeownership. Although the possibility of a preemption argument succeeding in North Carolina is a closer call than in some other jurisdictions, there is clearly ample authority supporting such a challenge.

VI. Conclusion

The 1982 amendments to North Carolina's exemption law clarify many of the ambiguities of the 1981 Act. When put together, the 1981 and the 1982 legislation represent an honest (and productive) effort at providing an exemption system that accommodates the interests of both debtors and creditors. The procedure for claiming exemptions, though cumbersome, is workable. Problems of interpretation and application still remain, though out of the magnitude of the ones engendered by the 1981

369. *Id.*
370. 38 Bankr. 822 (D.C. Md. 1984).
371. *Id.* at 824.
372. *Id.*
373. *Id.* (citing with approval *Cheesemon v. Matthews*, 656 F.2d 93, 94 (4th Cir.)).
374. 18 Bankr. 88 (D.C. Md. 1981).
375. 38 Bankr. at 822.
376. For a discussion of North Carolina's exemption floor, see *supra* notes 335-38 and accompanying text.

Act.

Nonetheless, the law as amended is not without some conceptual difficulties. Throughout the statute, one can detect a tension between conflicting policies: between encouraging collective, cooperative creditor action on the one hand, and rewarding individual creditor initiative on the other. This theoretical tension is manifested in practical questions relating to the meaning of the law's procedural provisions.

Furthermore, the statute, for all its length and detail, is not comprehensive. Left unaddressed are the two most significant exemptions provided by North Carolina law: remains by the entireties and virtual freedom from wage garnishment. The legislative decision to ignore those two exemptions deprives creditors of two of the most easily reached types of debtor property, and results in needless over-emphasis on the traditional collection process. One might reasonably wonder if the new law can support the added strain.

State law exemptions are inevitably and intricately related to bankruptcy practice. Nowhere is the connection more apparent than in section 522(b) of the Bankruptcy Code, which permits the states to "opt out" of the exemptions provided by section 522(d). The constitutionality of this authorization is itself not entirely free from doubt. Further, the decision of the legislature to deny North Carolina debtors the choice of the federal bankruptcy exemptions raises difficult questions of conflict and preemption, due to the prohibitive nature of the new exemption law. The new law's attack on use of bankruptcy acquisitions of personal property, its long list of "excepted claims," its waiver provisions, and its disparate treatment of renters and homeowners all seem susceptible to challenge under the Supremacy Clause of the Constitution.