

Articles

HOW FRESH A START?: WHAT ARE "HOUSEHOLD GOODS" FOR PURPOSES OF SECTION 522(f) (1) (B) (i) LIEN AVOIDANCE?

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I. INTRODUCTION

What do camcorders, walkman players, personal computers, stereo components, firearms, chain saws, lawn and garden tools, bicycles, and video game machines¹ have in common?

Well, they are all things one might find in the typical American home. Although not necessarily cheap to buy new, such items generally do not retain value over time. They frequently serve as collateral for nonpurchase money loans. In a bankruptcy context, they share another characteristic; courts have had to decide if they are household goods such that a debtor is able to avoid a nonpossessory, nonpurchase money security interest in them. Indeed, over 270 reported opinions have struggled with the issue.²

What is all the fuss about? Cosmically, it is a story about nonpurchase money secured creditors fighting to keep their leverage over debtors who want to keep their camcorders, VCRs, personal computers, firearms, etc., without reaffirming their debt to the creditor. Statutorily, it is about § 522(f)(1)(B) of the Bankruptcy Code.³

Section 522(f) is an innovation of the Bankruptcy Reform Act of 1978 (the "Code").⁴ It allows individual debtors to avoid certain liens and security interests in property to the extent they impair the debtor's exemption rights in that property. Specifically, § 522(f)(1)(B)(i) allows debtors to avoid nonpossessory, nonpurchase money security interests in "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry" to the extent the security interest impairs the debtor's exemption in them.

Firearms, camcorders, camping equipment, and other such property are clearly not wearing apparel, books, animals, crops, mu-

¹ The list could go on and on to include second, third, and fourth radios, televisions, VCRs, camping gear, golf clubs, tennis racquets, and other similar items.

² See *infra* part IV of this Article for a discussion of the holdings of courts that have dealt with this issue.

³ 11 U.S.C. § 522(f)(1)(B) (1994).

⁴ 11 U.S.C. §§ 101-1330.

sical instruments, or jewelry. The question is whether they are household furnishings, household goods, or appliances. If they are not, the debtor cannot avoid a creditor's security interest in them even though the creditor's security interest is nonpossessory and nonpurchase money, and the value of the goods to the creditor upon repossession is little to none because the collateral's resale value is de minimis.

If the debtor cannot avoid the security interest and wants to keep the collateral, the chapter 7 debtor must either redeem it by paying the creditor its value (highly unlikely) or "reaffirm" the debt or some portion thereof agreeable to the creditor. Needless to say, creditors like reaffirmation agreements. These agreements avoid losses that creditors would otherwise suffer as a result of a debtor's bankruptcy. But bankruptcy is a zero-sum game. The meaningfulness of the debtor's discharge is diminished to the extent a debtor reaffirms a debt otherwise dischargeable. The discharge is the principal reason individual debtors seek chapter 7 bankruptcy relief. In a chapter 13 proceeding, inability to avoid the security interest will mean the debtor will have to pay the creditor the replacement value of the goods plus interest over the life of the plan.⁵ That could preclude chapter 13 relief for many debtors.⁶

Avoidance or nonavoidance, and their significant ramifications, turns on whether the goods are household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry. Because courts assume that household furnishings and appliances are subsets of household goods, the issue posed in the case law is whether such goods are household goods. Unfortunately, Congress did not define "household goods" in § 522(f) or anywhere else in the Code. The legislative history is

⁵ See *Associates Comm. Corp. v. Rash*, 520 U.S. 953 (1997) (holding that a chapter 13 debtor who wishes to retain collateral subject to a security interest must pay "replacement value" rather than "foreclosure sale value").

⁶ A court can only confirm a chapter 13 plan if it is feasible. See 11 U.S.C. § 1325(a)(6). A plan is not feasible if the debtor cannot afford to make the required payments. A plan must pay the present value of all secured claims. See 11 U.S.C. § 1325(a)(4). The confirmation requirements regarding unsecured claims are different. A plan need only commit all the debtor's disposable income to the payment of unsecured claims. See 11 U.S.C. § 1325(a)(5)(B)(ii). The different requirements for the treatment of secured and unsecured claims could be the difference between a confirmable and a nonconfirmable plan. The court cannot confirm the plan if a debtor does not have sufficient regular income to pay the present value of all secured claims over the life of the plan.

sparse and ambiguous.⁷ Left to their own devices, courts have developed a variety of definitions. At one end of the spectrum, household goods only include those goods necessary to a debtor's survival. At the other end are *all* goods, unnecessary as well as necessary, if the debtor uses them for personal, family, or household purposes. The middle ground, rising to the level of constitutional jurisprudence, requires a "nexus" between the good and the household. Each approach has its deficiencies. Together they create uncertainty and the inevitable by-product of uncertainty, litigation.⁸

The litigation is unfortunate. It consumes scarce judicial resources and time that could be better spent elsewhere. The specter of litigation probably causes many debtors to cave in and reaffirm the debt. After all, debtors in bankruptcy are not exactly the best candidates to bankroll litigation.

The confusion, uncertainty, litigation, or its threats are unnecessary in most cases. The § 522(f) avoidance power is limited to liens and security interests *to the extent they impair an exemption* in the goods. Section 522(d)(3) describes a debtor's exemption rights regarding household goods. A debtor can exempt up to \$400 in value for any individual household good and no more than \$8,000 in the aggregate.⁹ Courts can finesse the "is this a household good?" question by interpreting the term broadly to include all goods used for personal, family, or household purposes (other than motor vehicles, jewelry, and mobile homes used as a residence), but limiting the debtor's lien avoidance power to protecting \$400 of value in the item. In most cases, a broad definition of household goods as all consumer goods other than motor vehicles, jewelry, and mobile homes used as a residence,¹⁰ in conjunction with a \$400 cap on the value of any individual item,¹¹ will avoid the need to litigate both the "household good" question and the valuation issue be-

⁷ See *infra* part II.D of this Article.

⁸ See *infra* part IV of this Article for a discussion of those cases.

⁹ See 11 U.S.C. § 522(d)(3). As of April 1, 1998, the dollar amounts in this section increased from \$400 to \$425 for a debtor's particularized interest in an item and from \$8,000 to \$8,625 for her aggregate interest. These increases reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor. See 11 U.S.C. § 104. However, for the purposes of this Article, the author uses the previous dollar amounts. This discrepancy does not affect the Article's analysis.

¹⁰ See *infra* part IV of this Article for case law interpreting the definition of "household goods."

¹¹ See 11 U.S.C. § 522(d)(3) (1994).

cause most used consumer goods (other than motor vehicles, jewelry, and mobile homes) have little value. Eliminating the need for litigation will simultaneously reduce reaffirmation agreements and protect a debtor's exemption rights. It will allow § 522(f)(1)(B)(i) to function according to Congress's original plan.

This Article is divided into five parts. Part II provides the historical backdrop. Part III analyzes the statutory text and the legislative history, such that it is. Part IV discusses and critiques the various case law approaches. Part V details the author's proposed solution to the current conflict in case law.

II. PRELUDE TO THE § 522(f) LIEN AVOIDANCE POWER

A. Introduction

Section 522(f) had no analogue in the Bankruptcy Act.¹² In fact, Judge Frank Koger described the debtor's opportunity to avoid liens in household goods as "one of the big changes" of the Bankruptcy Reform Act of 1978.¹³ Many of the proposals to reform the 1898 Act included some variant of that innovation. Understanding why Congress enacted § 522(f) requires understanding the pre-Code situation. That, in turn, involves examining several different strands of pre-Code bankruptcy law: the fresh start; the purpose of exemptions and their treatment under the Act; and the rules regarding a debtor's exemption rights in property subject to a creditor's security interest and the consequences of those rules.

Fresh start is a principal ingredient and goal of modern American bankruptcy law.¹⁴ It consists of two components: a debtor's ability to retain some property or property values even though that retention is at the expense of creditors (exemptions) and the discharge of personal liability on debt.¹⁵ Without the bankruptcy

¹² Bankruptcy Act of 1898, Pub. L. No. 696, 30 Stat. 544 (1898) (repealed 1978).

¹³ See *New NCBJ President Offers Views of Consumer Filings*, Chapter 12, BAPS, AM. BANKR. INST. J., Oct. 15, 1996, at 1, 2 [hereinafter *NCBJ President*].

¹⁴ See, e.g., Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549 (1995); F. H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDISCIPLINARY L.J. 67 (1995); Charles G. Hallinan, *The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49 (1986); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

¹⁵ See, e.g., *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become op-

discharge, debtors would remain subject to crushing debt burdens. Without exemptions, debtors would be stripped of all their possessions with no means to replace them. Without any possessions, debtors would be hard pressed to live or work. They could not join the ranks of productive society. Therefore, both exemptions and the discharge are essential for a meaningful fresh start.

B. Exemptions

The concept of exemptions is not unique to bankruptcy law. American debtor-creditor law, both in and out of bankruptcy, has historically recognized an individual debtor's¹⁶ right to retain some property or property values even if that means creditors will go unpaid.¹⁷ Exemption rights are generally limited to property used for personal rather than business purposes.¹⁸ Several considerations and forces shape exemption laws.¹⁹ The exemption laws promote such public policies as:

- (1) providing property needed for the debtor's physical survival; (2) protecting the debtor's dignity, culture and religious identity; (3) en-

pressive, and to permit him to have a fresh start."); *Traer v. Clews*, 115 U.S. 528, 541 (1885) ("The policy of the bankruptcy act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start.").

¹⁶ Only individual debtors, that is, human beings, are entitled to exemptions. See 11 U.S.C. § 522(b) ("[A]n individual debtor may exempt.") (emphasis added). So too, only individual debtors are entitled to a chapter 7 discharge. See 11 U.S.C. § 727(a)(1) ("The court shall grant the debtor a discharge, unless the debtor is not an individual . . .") (emphasis added). Business entities, e.g., corporations and partnerships, are not entitled to exemptions or discharge in chapter 7. See *id.* This makes sense and is totally consistent with the fresh start concept. After liquidation, a business entity no longer functions. After a chapter 7 bankruptcy proceeding, a human being continues to exist. Only individual debtors are entitled to a chapter 13 discharge under § 1328 of the Code because only individual debtors are eligible to file a chapter 13 petition. See 11 U.S.C. § 109(e).

¹⁷ The Statute of 4 Anne, ch. 17 (1705) (Eng.) seems to have been the first Anglo-American recognition of a debtor's exemption rights. See Vern Countryman, *Bankruptcy and the Individual Debtor—And A Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 813 (1983). For a detailed examination of the statute, see John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163 (1996).

¹⁸ The exemption for "tools of the trade" is an exception to that generalization. See 11 U.S.C. § 522(d)(6).

¹⁹ See, e.g., 11 U.S.C. § 522(d) (listing of property exempt under federal bankruptcy law); 26 C.F.R. § 301.6334-1 (1995) (listing of property exempt from levy by Internal Revenue Service).

sureing the financial rehabilitation of the debtor; (4) ensuring that the debtor's family does not become impoverished; and (5) shifting the burden of providing for the debtor and family from society to the creditor.²⁰

Lawmakers must make choices when they fashion exemption statutes. They have to decide which of the above policies or considerations are most important, the appropriate level or amount of exemptions, and whether the right to exemptions should be absolute or waiveable.

Historically, these policy choices were fought out at the state level where each state legislature enacted and amended exemption laws for its citizens. Before 1978, debtors who sought bankruptcy relief were limited to the exemption scheme enacted by their state.²¹ The "enormous variety"²² in protections provided by state exemption statutes presumably reflects the different choices the various state legislatures have made.

Despite their variety, all exemption statutes seek to achieve two interrelated goals: (1) the debtor's physical survival; and (2) the debtor's ability to provide for herself and her dependents so that they do not become public charges. Exemption laws seek to accomplish both by sheltering certain property or property values from the reach of judgment creditors. After all, naked debtors cannot report to work. Clothed but starving debtors may not have the energy to work and support their families. Sleeping under the stars makes it hard to be a productive, income-producing member of society. Thus, the ability to keep exempt property at the expense of creditors allows debtors to function in society and to provide for their own and their dependents' basic needs.

In line with this rationale, exemption statutes have traditionally allowed debtors to keep at least modest amounts of personal property including: clothing, bedding,²³ dishes, pots and pans, and

²⁰ Douglas E. Deutsch, *Exemption Reform: Examining the Proposals*, 3 AM. BANKR. INST. L. REV. 207, 207-08 (1995) (citing Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 621 (1978)).

²¹ See 11 U.S.C. § 24 (1976) (repealed 1978).

²² BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, at 10 (1973).

²³ These exemptions were often quite stingy. For example, until 1975, Massachusetts allowed debtors to keep no more than one bed for every two members of their household. See MASS. ANN. LAWS ch. 235, § 34 (repealed 1975). Today, the statute exempts "necessary . . . beds and bedding" for the debtor and her family. See MASS. ANN. LAWS

stoves. Exempt property generally has little intrinsic value to creditors.²⁴ Used consumer goods like bedding, pots, pans, and clothing typically have a low resale value. Were judgment creditors permitted to seize and sell such goods, they would realize little by way of debt reduction. Because judgment creditors would gain little economic benefit from seizure of such goods, and indigent debtors would find it difficult to function without them, legislatures presumably concluded that their exemption schemes provided an acceptable balance between a debtor's ability to function and a judgment creditor's ability to be paid.

So, too, many states traditionally exempted such things as specific amounts of livestock and foodstuffs.²⁵ Again, these exemptions helped debtors, in a literal sense, to survive. Similar policies support exempting property that allows a debtor to produce necessities, such as sewing machines;²⁶ and to earn money,²⁷ such as fishing boats.²⁸

ch. 235, § 34 (Law. Co-op. 1986).

²⁴ Although exemption laws generally protect only low-value property from seizure, some notable exceptions exist. For instance, Florida, Iowa, Kansas, South Dakota, and Texas have unlimited homestead exemptions. See FLA. STAT. ANN. § 222.01 (West 1998); IOWA CODE ANN. § 561.16 (West 1992); KAN. CONST. of 1861, art. XI, § 9 (1994); TEX. PROP. CODE ANN. § 41.002 (West 1984). Several farm states have unlimited tools of the trade exemptions. See, e.g., LA. REV. STAT. ANN. § 13:3881(A)(5)(a) (West 1991); OKLA. STAT. ANN. tit. 31 § 1(A)(4) (West 1982); TEX. PROP. CODE ANN. § 42.002(a)(1). More exotic exemptions also exist. Virginia allows all debtors to exempt one horse. See *In re Freedlander*, 93 B.R. 446, 450 (Bankr. E.D. Va. 1988). In *Freedlander*, the value of the horse was variously appraised at between \$640,000 and \$50,000 (the latter appraisal coming after the horse had lost several races). The court suggested that value is irrelevant when the statutory language granting the exemption is clear. See *id.*

²⁵ See, e.g., IDAHO CODE § 11-605(6) (1991) (exempting crops growing on 50 acres up to a maximum value of \$1,000); ME. REV. STAT. ANN. tit. 14, § 4422(7) (West Supp. 1997) (exempting food reasonably necessary for six months and seeds and tools reasonably necessary for raising and harvesting food); MICH. COMP. LAWS ANN. § 600.6023 (West 1987) (exempting six months' provisions and fuel for debtor and her family); OR. REV. STAT. § 23.160(1)(f) (Supp. 1996) (exempting 60 days' provisions and fuel for debtor and dependents); S.D. CODIFIED LAWS § 43-45-2(6) (Michie 1997) (exempting one year's provisions and fuel for debtor and dependents); UTAH CODE ANN. § 78-23-5(1)(g) (1996) (exempting three months' provisions).

²⁶ See, e.g., DEL. CODE ANN. tit. 10, § 4902(c) (1975) (exempting with no value limit); MASS. ANN. LAWS ch. 235 § 34 (exempting up to \$200 in value); N.H. REV. STAT. ANN. § 511:2 (1997) (exempting with no value limit); N.Y. C.P.L.R. 7B (McKinney 1995) (exempting with no value limit); 42 PA. CONS. STAT. ANN. § 8124(a)(4) (West 1982) (exempting with no value limit).

²⁷ So-called "tools of the trade" exemptions. See, e.g., 11 U.S.C. § 522(d)(5) (1994).

²⁸ See, e.g., ME. REV. STAT. ANN. tit. 14, § 4422(9) (exempting fishing boats not exceeding five tons and used primarily for commercial fishing); MASS. ANN. LAWS ch. 235 § 34

Exemption statutes go beyond assuring simple physical survival; they may also protect property whose primary value to the debtor is emotional. Such property would have no resale value to a creditor. Therefore, creditors could not rely on its sale to satisfy an indebtedness, but the threat of seizure could create enormous leverage for judgment creditors seeking to collect their judgments.²⁹ Debtors might take desperate measures in response to a judgment creditor's threat to seize such items as wedding rings, family photographs, or other keepsakes such as the family dog. They might borrow unwisely or liquidate essential assets. A few state exemption statutes seek to protect debtors from such *in terrorem* creditor tactics.³⁰

Over time, some states have broadened the scope of their exemptions statutes to include more than the debtor's *immediate* survival. More modern exemptions statutes may protect such things as alimony, child support and maintenance,³¹ annuities, IRAs and

(exempting fishing boats up to \$500 in value).

²⁹ The right to seize property really involves two separate rights: (1) the right to seize and sell the property and apply the proceeds to the indebtedness; and (2) the right to *threaten* to seize it. For property with emotional value only, the latter is more significant. Threat of seizure of such property prompts debtors to find the money. If they cannot, Professor Leff's observation becomes apt: "Even letting a turnip know that a pot of boiling water is inexorably in its future will not get any blood out of it, and actually boiling it will merely turn a viable plant into a short and mean meal." Arthur M. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 37 (1970).

³⁰ Several states allow debtors to exempt wedding rings. See, e.g., ARIZ. REV. STAT. ANN. § 33-1125(4) (West 1990) (exempting all wedding and engagement rings, not to exceed an aggregate value of \$1,000); IOWA CODE ANN. § 627.6(1) (West Supp. 1998) (exempting wedding or engagement ring received on or before marriage); LA. REV. STAT. ANN. § 13:3881(A)(5) (West 1991) (exempting any wedding or engagement rings, not to exceed \$5,000 in value); N.Y. C.P.L.R. 7B (exempting wedding ring); VT. STAT. ANN. tit. 12, § 2740(3) (Supp. 1997) (exempting wedding ring); VA. CODE ANN. § 34-26(1a) (Michie 1996) (exempting wedding and engagement rings). Other states have more specific exemptions for other kinds of keepsakes. See, e.g., ALA. CODE § 6-10-6 (1993) (exempting family portraits and pictures); ALASKA STAT. § 09.38.020(a)(3) (Michie 1996) (exempting family portraits and heirlooms of "particular sentimental value"); LA. REV. STAT. ANN. § 13:3881(A)(4)(b) (exempting family portraits); MICH. COMP. LAWS ANN. § 600.023 (exempting all family pictures); NEV. REV. STAT. ANN. § 21.090(1)(a) (Michie 1998) (exempting all family pictures and keepsakes); N.D. CENT. CODE § 28-22-02(1) (1991) (exempting all family pictures); S.D. CODIFIED LAWS § 43-45-2(1) (1997) (exempting all family pictures); TENN. CODE ANN. § 26-2-103(2) (1980) (exempting all family portraits & pictures); UTAH CODE ANN. § 78-23-8(1)(d) (Supp. 1998) (exempting heirlooms or other items of sentimental value not exceeding \$500 in value); VA. CODE ANN. § 34-26(2) (exempting family portraits and family heirlooms not exceeding \$5,000 in value); WASH. REV. CODE ANN. § 6.15.010(2) (West 1995) (exempting all family pictures and keepsakes).

³¹ See, e.g., GA. CODE ANN. § 44-13-100(a)(2)(D) (1982); IOWA CODE ANN. § 627.6(8)(d); MO. ANN. STAT. § 513.430(10) (West 1993); OR. REV. STAT. § 23.160(1)(i);

other retirement funds,³² or the right to disability or unemployment benefits.³³ These exemptions attempt to protect a debtor's *future* ability to survive. They are based on the same concept as the more traditional exemptions, but recognize that today people are more likely to live longer and retire. If debtors cannot protect at least some of their retirement savings from the reach of creditors, they will likely become charges of the state when they retire. So, too, an exemption statute might shelter a debtor's life insurance policy³⁴ because it protects a dependent's ability to survive.

Exemption laws apply only to unsecured creditors who obtain a judgment against the debtor.³⁵ A sheriff cannot seize exempt property to satisfy a creditor's judgment. A secured creditor, assuming its property interest is valid and enforceable, can seize its collateral even though it is exempt according to state law. A debtor impliedly waives her exemption rights in property when she voluntarily grants a security interest in it.³⁶ At state law, then, a creditor's security interest in property trumps a debtor's exemption rights. If the creditor's claim exceeds the value of the property, the debtor loses her exemption rights.

So, for example, assume the debtor owns a dining room table worth \$400. A creditor holds a valid, enforceable security interest in

UTAH CODE ANN. § 78-23-5(1)(f); W. VA. CODE § 38-10-4(j)(4) (1997).

³² See, e.g., ALASKA STAT. § 09.38.017; ARK. CODE ANN. § 23-79-134 (Michie 1992); CAL. CIV. PROC. CODE § 704.115 (West Supp. 1998); COLO. REV. STAT. § 13-54-102(1)(s) (1997); GA. CODE ANN. § 18-4-22 (1991); IOWA CODE ANN. § 627.6(8)(e); MASS. ANN. LAWS ch. 235 § 34A; N.D. CENT. CODE § 28-22-03.1(3) (Supp. 1997); R.I. GEN. LAWS § 9-26-4(1) (1997); UTAH CODE ANN. § 78-23-5(1)(j) (1996); WASH. REV. CODE ANN. § 6.15.020 (West Supp. 1998); WIS. STAT. ANN. § 815.18(13)(h) (West 1994).

³³ See, e.g., ALASKA STAT. § 23.20.405(e); ARIZ. REV. STAT. ANN. § 33-1126(A)(3); ARK. CODE ANN. § 23-79-133; CAL. CIV. PROC. CODE § 704.130 (West 1987); CONN. GEN. STAT. § 31-272(c) (1997); D.C. CODE ANN. § 46-119(b)(1) (1996); GA. CODE ANN. § 44-13-100(a)(2)(E) (Supp. 1998); IDAHO CODE § 41-1835 (1991); IND. CODE ANN. § 22-4-33-3 (West 1997); KAN. STAT. ANN. § 44-718 (1993); ME. REV. STAT. ANN. tit. 14, § 4422(13) (West Supp. 1997); MO. ANN. STAT. § 288.380(10)(1); NEB. REV. STAT. § 48-647 (Supp. 1997); N.J. STAT. ANN. § 43:21-53 (West 1991); WIS. STAT. ANN. § 815.18(13)(j).

³⁴ See, e.g., ALASKA STAT. § 09.38.025; ARIZ. REV. STAT. ANN. § 33-1126(A)(5); FLA. STAT. ANN. § 222.13 (West 1998); GA. CODE ANN. § 44-13-100(a)(8); IDAHO CODE § 41-1835; KAN. STAT. ANN. § 40-414; ME. REV. STAT. ANN. tit. 14, § 4422(10), (11); MISS. CODE ANN. § 85-3-11 (Supp. 1996); N.M. STAT. ANN. § 42-10-3 (Michie 1997); N.D. CENT. CODE § 26.1-33-36 (1995); OHIO REV. CODE ANN. § 3911.10 (Anderson 1995); R.I. GEN. LAWS § 27-4-12 (1994); WYO. STAT. ANN. § 26-15-131 (Michie 1997).

³⁵ By definition, *unsecured* creditors have no specific right to, or interest in, any of a debtor's assets to satisfy an indebtedness.

³⁶ See, e.g., *United Bank of Bismark v. Selland*, 425 N.W.2d 921, 924-25 (N.D. 1988).

it to secure a \$600 indebtedness. The debtor, at state law, is entitled to exempt household furnishings up to \$2,000. Because the creditor's claim exceeds the value of the table, the creditor has a right to repossess the table if the debtor defaults on her loan. The creditor's security interest has priority over her exemption claim, and therefore, the debtor cannot exercise her exemption rights in the table.

Under the Bankruptcy Act, the same holds true. A properly perfected security interest that was valid at state law and could not be avoided in bankruptcy was enforceable, even if the collateral was otherwise exempt. This meant that a secured creditor was entitled to its collateral even though the collateral was deemed important to the debtor's subsistence and therefore defined as exempt. Under the Act, a debtor who wanted to retain "exempt" collateral had to negotiate a reaffirmation agreement with the creditor. Such reaffirmation represented the debtor's enforceable promise to pay the reaffirmed debt postbankruptcy. Although this permitted the debtor to retain collateral, it also potentially undermined the debtor's fresh start, especially if the debtor had to reaffirm for an amount significantly greater than the value of the property.³⁷ Absent reaffirmation, the debtor had to surrender the collateral to the creditor. The Act did not recognize a redemption right.³⁸

³⁷ This remains a problem today. See *In re Latanowich*, 207 B.R. 326 (Bankr. D. Mass. 1997). In *Latanowich*, the debtor reaffirmed a debt of \$1161 secured by property which the secured creditor, Sears, valued at under \$500. As the court noted, the property was probably worth considerably less than Sears's valuation. See *id.* at 335. In exchange for the debtor's agreement to pay the entire debt, Sears generously allowed the debtor to retain the property and gave him a credit line of \$1361, \$200 more than the debt he agreed to repay. See *id.* *Latanowich* was one of over 2,700 cases in the District of Massachusetts in which Sears did not file the reaffirmation agreement with the court as required by § 524(c). See *id.* at 336. Several class action suits, and a FTC investigation, followed.

³⁸ The Code now gives debtors the right to redeem exempt tangible personal property by paying the creditor its value:

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

11 U.S.C. § 722 (1994). Although the U.C.C. also gives debtors the right to redeem property subject to a creditor's security interest, that right is not very meaningful. A debtor may redeem only "by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale . . ." U.C.C. § 9-506 (1995) (emphasis

Under the Act, debtors who granted nonpossessory, nonpurchase money security interests in all their worldly possessions either had to relinquish possession of everything they owned, including wedding rings, and childrens' graduation pictures, or reaffirm their debts, usually for an amount significantly greater than the fair market value of the goods. Judge Koger describes his experiences under the Act:

One of my first jobs as a lawyer, years ago, was in representing finance companies. We showed up at bankruptcy court and asked the debtor and his lawyer out in the hallway, "when do you want us to pick up the household goods?" Of course, the debtor didn't want that to happen, so you had a deal cut right there where much of the debt was reaffirmed.³⁹

Under the Act, then, debtors who granted their creditors a blanket security interest in everything they owned to secure a loan or other indebtedness effectively forfeited one of two things: their exemptions or their discharge from debt. Loss of one or the other undermined the meaningfulness of their fresh start. It defeated the essential purpose of bankruptcy relief for individual debtors.

C. *The 1970 Bankruptcy Commission*

Under the Act, exempt property was not property of the estate.⁴⁰ Therefore, it was not available for distribution to the debtor's unsecured creditors. The Act did not create a separate federal exemption scheme. Instead, the state in which the debtor resided controlled the exemptions available in bankruptcy.⁴¹

In 1970, increasingly conscious of the inadequacies of the bankruptcy system, Congress decided it was time to revisit the Bankruptcy Act of 1898. To help it in its task, Congress created the Commission on the Bankruptcy Laws of the United States.⁴² Congress was concerned with the "rising tide" of bankruptcies that fol-

added). For debtors who owe more than the value of the collateral, this "right" to redeem is especially meaningless.

³⁹ *NCBJ President*, *supra* note 13, at 2.

⁴⁰ See 11 U.S.C. § 110(a) (1976) (repealed 1978).

⁴¹ See *id.* § 24.

⁴² See S.J. Res. 88, 91st Cong., 84 Stat. 468 (1970).

lowed the end of World War II.⁴³ It was also concerned with the inadequacy of the relief available to individual debtors.⁴⁴

Unlike Congress, the Commission did not consider the increase in consumer bankruptcies to be problematic in and of itself.⁴⁵ Instead, the Commission focused on the Act's failure to provide meaningful relief to individual debtors as well as the "[a]stonishing disparities" that existed in the Act's application among states, and even within some states.⁴⁶ In the area of exemptions, the Commission noted several flaws including the "enormous" variety of state exemption laws,⁴⁷ the widespread use of waivers of exemptions by creditors,⁴⁸ and limitations on the effectiveness of a debtor's discharge because of "the existence of security interests in essential property."⁴⁹

Of the three exemption-related issues it highlighted, the Commission was most concerned with the last—"the existence of security interests in essential property." Such security interests were undermining the debtor's fresh start. They were forcing debtors to reaffirm debts to keep "essential property." The Commission wrote:

When a creditor has security in the debtor's exempt property, he may enforce it notwithstanding the court's allowance of the property as exempt and notwithstanding the discharge of the debtor generally from his debts. The collateral is often less in value than the amount of the debt, but the effect of the discharge of the debtor . . . is neutralized by the secured creditor's act in obtaining a reaffirmation of the entire debt under a threat to repossess the collateral.⁵⁰

⁴³ See BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, pt. 1, at 2 (1973). Between Fiscal Year 1946 and Fiscal Year 1967, the number of bankruptcies rose from 10,196 to 208,329, of which more than 90% were consumer bankruptcies. See *id.* The number of bankruptcies continued to rise after the Bankruptcy Code came into effect. In 1980, 331,264 bankruptcies were filed, of which 86.8% (287,570) were consumer filings. By 1997, the number of bankruptcies had skyrocketed to 1,404,145, of which 96.15% (1,350,118) were consumer filings. See *Annual Filings U.S. 1980-1997* (visited Oct. 23, 1998) <<http://www.abiworld.org/stats/newstatsfront.html>>.

⁴⁴ See BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, pt. 1, at 3 (1973).

⁴⁵ See *id.* at 9 ("[T]he Commission has not found any reason to believe that the number of such petitions is too high or ought to be reduced.").

⁴⁶ See *id.*

⁴⁷ See *id.* at 10.

⁴⁸ See *id.*

⁴⁹ *Id.* at 3-4.

⁵⁰ *Id.* at 10.

The Commission's work culminated in the optimistically named "Bankruptcy Act of 1973."⁵¹ The Commission made several recommendations to ensure a meaningful fresh start for individual debtors, and the same fresh start regardless of where a debtor resided. First, it proposed a uniform federal exemption scheme that would preempt other federal and state exemption schemes.⁵² The Commission believed that some state exemption schemes were woefully inadequate. A federal exemption scheme would provide a modern and uniform statement regarding a debtor's basic needs. Second, it recommended making waivers of exemptions unenforceable against unsecured creditors.⁵³ It also gave debtors the right to avoid certain liens in their personal property,⁵⁴ and restricted a debtor's ability to reaffirm a debt secured by personal property to the property's fair market value.⁵⁵

Section 4-503 of the Commission's proposed Bankruptcy Act set forth a debtor's exemptions and, unlike previous law, provided that the federal rules would supersede state law.⁵⁶ Section 4-503 recognized a homestead exemption of \$5,000, plus an additional \$500 for each dependent. Debtors could apply any unused portion of their homestead exemption to their interest in personal property or a burial plot.⁵⁷ The Commission's proposed personal property exemption covered "livestock, wearing apparel, jewelry, household furnishings, tools of the trade or profession, and motor vehicles to the aggregate value of not more than \$1,000."⁵⁸ The debtor could also exempt a burial plot up to a value of \$2,500.⁵⁹ In addition, § 4-503 exempted health aids regardless of their value if they were "reasonably necessary to enable the debtor to work or to sustain his health."⁶⁰

The proposed act made nonpossessory, nonpurchase money security interests in certain exempt property unenforceable in bankruptcy. According to § 4-503(f), "with respect to wearing ap-

⁵¹ See BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, pt. 2 (1973).

⁵² See *id.* pt. 1, at 170.

⁵³ See *id.*

⁵⁴ See *id.* pt. 2, at 130, 142 (proposing §§ 4-504(a) and 4-507(a)).

⁵⁵ *Id.*

⁵⁶ See *id.* at 125 (proposing § 4-503(a)).

⁵⁷ See *id.* (proposing § 4-503(b)).

⁵⁸ *Id.* (proposing § 4-503(c)(1)).

⁵⁹ See *id.* (proposing § 4-503(c)(2)).

⁶⁰ *Id.* at 126 (proposing § 4-503(c)(9)).

parel, household goods, and health aids, any lien created by an agreement to give security other than for a purchase money obligation, is unenforceable against the property allowed to the debtor pursuant to this section as exempt⁶¹

The Commission's approach is noteworthy in several respects. First of all, subsection (f) automatically invalidated offending security interests. They were "unenforceable" rather than "avoidable." Section 4-503(f) did not require the debtor to take any affirmative action to invalidate the security interest. Presumably, the Commission wanted to give debtors effective protection. Avoiding a security interest requires litigation. If not avoided, an "avoidable" security interest is enforceable during and after bankruptcy. Bankrupt debtors are hardly in the best position to afford costly litigation. Thus, saddling debtors with the onus and expense of protecting their rights through litigation would not represent effective protection. By describing such security interests as "unenforceable," they were just that—unenforceable—without further ado.⁶²

Second, the Commission used different terms to describe the class of exempt personal property and the class of personal property in which nonpossessory, nonpurchase money security interests were unenforceable. According to subsection (f), only nonpossessory, nonpurchase money security interests in *household goods* were unenforceable.⁶³ Subsection (c)(1) allowed debtors to exempt *household furnishings*.⁶⁴ Nothing in the Commission's report indicates whether this was an oversight or whether the Commission consid-

⁶¹ *Id.* (proposing § 4-503(f)).

⁶² Unlike the Commission's proposal, § 522(f) of the Code makes certain security interests avoidable. Section 522(f)(1) speaks of the debtor's ability to "avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1) (1994) (emphasis added). Compare with § 522(e):

A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is *unenforceable* in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is *unenforceable* in a case under this title.

11 U.S.C. § 522(e) (emphasis added). This means that absent affirmative debtor action, the security interest remains enforceable.

⁶³ See BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, pt. 2, at 126 (1973) (proposing § 4-503(f)).

⁶⁴ See *id.* at 125 (proposing § 4-503(c)(1)).

ered the two terms interchangeable. Given the Commission's goals of protecting a debtor's exemptions and discharge, presumably it did not intend the phrase "household goods" to include less than the phrase "household furnishings." Subsection (f) also invalidated waivers of exemptions as well as judicial liens in any exempt property.⁶⁵ In those respects, § 4-503(f) tracks § 522(f) of the present Code.

D. *Congress's Reaction to the Commission Report*

Congress did not enact the Commission's proposed Bankruptcy Act. Instead, it spent the next five years holding many hearings to review the Commission's recommendations and evaluate reactions to them. By the late 1970s, there was substantial agreement on at least some of the Act's inadequacies. Many members of Congress agreed with the Commission that the Act had not "kept pace with the modern consumer credit society" and was no longer "designed to provide adequate relief for the consumer debtor."⁶⁶ The House Report echoes concerns voiced by the Commission. Bankruptcy relief for consumer debtors was stymied by "[o]verbroad security interests on all of consumer's household and personal goods, reaffirmations, limited State exemptions laws, and litigation over dischargeability of certain debts."⁶⁷ Moreover, because of these problems, debtors frequently emerged from bankruptcy "little better off."⁶⁸

The House of Representatives and the Senate fundamentally disagreed over which exemption laws should govern in bankruptcy. As noted, the Bankruptcy Commission had proposed a uniform set of federal exemptions in bankruptcy.⁶⁹ The House Bill permitted a debtor to choose between the newly-created federal exemptions and those of the debtor's state of domicile.⁷⁰ The Senate Bill rejected

⁶⁵ See *id.* at 126 (proposing § 4-503(f)).

⁶⁶ H.R. REP. NO. 95-595, at 116-17 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6077.

⁶⁷ *Id.*

⁶⁸ *Id.* at 117.

⁶⁹ See *supra* note 52 and accompanying text.

⁷⁰ See H.R. REP. NO. 95-595, at 360, reprinted in 1978 U.S.C.C.A.N. at 6316. The House version also gave debtors choosing the state exemptions certain nonbankruptcy federal exemptions, including social security payments, and various federal retirement and disability benefits. See *id.*

this innovation, preferring that the state exemptions continue to apply in bankruptcy.⁷¹

To prevent deadlock on this critical issue, the two chambers agreed to a compromise. The core of this compromise is § 522(b), authorizing states to "opt out" of the federal exemptions provided by § 522(d).⁷² Residents of opt out states would be limited to the state exemption scheme. Residents of states that did not opt out could choose between the federal and state exemptions. The decision of a majority of states to opt out of § 522(d) led to significant collateral litigation, primarily over whether a state's ability to opt out of § 522(d) also allowed it to opt out of § 522(f). Creditors argued that, by allowing states to opt out of § 522(d), Congress had also allowed states to opt out of § 522(f). Although that interpretation effectively read § 522(f) out of the Bankruptcy Code, a number of courts agreed. The circuits split on the issue.⁷³

Although the Supreme Court never directly decided whether states may deny debtors the opportunity to avoid nonpossessory, nonpurchase money security interests in their household goods, the Court's decision in *Owen v. Owen*⁷⁴ renders it doubtful. In the wake

⁷¹ See S. REP. NO. 95-989, at 75 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5861. Like the House version, the Senate version also allowed debtors the same nonbankruptcy federal exemptions. See *id.*

⁷² See 11 U.S.C. § 522(b) (1994). For an extremely detailed discussion of the legislative history of § 522(b) and its relationship to the Code's fresh start policy, see *In re Neiheisel*, 32 B.R. 146 (Bankr. D. Utah 1983).

⁷³ See, e.g., *Giles v. Credithrift, Inc. (In re Pine)*, 717 F.2d 281 (6th Cir. 1983) (holding that states may opt out of § 522(f)); *McManus v. AVCO Fin. Servs. (In re McManus)*, 681 F.2d 353 (5th Cir. 1982) (holding that states may opt out of § 522(f)), overruled by *Tower Loan, Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347 (5th Cir. 1994). But see *Aetna Fin. Co. v. Leonard (In re Leonard)*, 866 F.2d 335 (10th Cir. 1989) (holding that states may not opt out of § 522(f)); *Finance One v. Bland (In re Bland)*, 793 F.2d 1172 (11th Cir. 1986) (en banc) (holding that states may not opt out of § 522(f)). The majority of reported bankruptcy opinions to examine the issue have concluded that states may not opt out of § 522(f).

⁷⁴ 500 U.S. 305 (1991). *Owen* concerned a debtor's attempt to avoid his ex-wife's judgment lien under what is now § 522(f)(1)(A). *Owen v. Owen (In re Owen)*, 877 F.2d 44 (11th Cir. 1989), rev'd, 500 U.S. 305 (1991), on remand, 961 F.2d 170 (11th Cir. 1992). Holding that the judgment lien had attached before the debtor's condominium had become exempt property, the bankruptcy court denied his motion to avoid the judgment lien. See *id.* at 46. The Eleventh Circuit affirmed, holding that because the judgment lien had attached before the property had attained homestead status, the judgment lien had not "impaired" the debtor's homestead exemption. See *id.* at 47. The court summarily rejected the debtor's argument that § 522(f) gave him "a federal exemption greater than that protected by state law where the exemption is created by state law." See *id.*

The Supreme Court reversed, focusing on Congress's use of the subjunctive tense in § 522(f). See *Owen*, 500 U.S. 305. The Court concluded that:

of *Owen*, most courts have concluded that states cannot opt out of § 522(f). They can only define what property is exempt.⁷⁵

The two bills *did* agree on several of the Bankruptcy Commission's recommendations. Both houses gave debtors the ability to avoid both judicial liens in exempt property and some nonpossessory, nonpurchase money security interests.⁷⁶ Both versions also made waivers of exemptions unenforceable as well as waivers of the power to avoid liens.⁷⁷ The reform process *finally* culminated in the passage of the Bankruptcy Reform Act of 1978.

III. SECTION 522(f)

A. Section 522 Generally

Section 522 of the Code is captioned "Exemptions." Its thirteen subsections provide a comprehensive federal bankruptcy exemption scheme. As noted, subsection (b) authorizes states to "opt out" of the federal exemptions described in § 522(d).⁷⁸ This restricts residents of opt out states to their state's exemption scheme. Residents of states that do not opt out can choose between the fed-

[T]he baseline, against which impairment is to be measured, [is] not an exemption to which the debtor "is entitled," but one to which he "would have been entitled." The latter phrase denotes a state of affairs that is conceived or hypothetical, rather than actual, and requires the reader to disregard some element of reality. "Would have been" *but for what?* The answer given, with respect to the federal exemptions, has been *but for the lien at issue*, and that seems to us correct.

Id. at 311. The Court then examined whether the result should be different when state law created the exemption and concluded that it should not. "We do not see how that could be possible. Nothing in the text of § 522(f) remotely justifies treating the two categories of exemptions differently." *Id.* at 313.

⁷⁵ See, e.g., *Tower Loan, Inc. v. Maddox* (*In re Maddox*), 15 F.3d 1347 (5th Cir. 1994), *overruling* *McManus v. AVCO Fin. Servs.* (*In re McManus*), 681 F.2d 353 (5th Cir. 1982); *Barkley v. Tower Loan, Inc.* (*In re Kennedy*), 139 B.R. 389 (Bankr. N.D. Miss. 1992).

⁷⁶ See H.R. REP. NO. 95-595, at 362 (1978) (§ 522(f) in the House version), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6318; S. REP. NO. 95-989, at 76 (1978) (§ 522(e) in the Senate version), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862. The final version is 11 U.S.C. § 522(f) (1994).

⁷⁷ See H.R. REP. NO. 95-595, at 362 (§ 522(e) in the House version), *reprinted in* 1978 U.S.C.C.A.N. at 6318; S. REP. NO. 95-989, at 76 (1978) (§ 522(d) in the Senate version), *reprinted in* U.S.C.C.A.N. at 5862. The final version is 11 U.S.C. § 522(e).

⁷⁸ See 11 U.S.C. § 522(b).

eral and state exemptions. Spouses filing a joint petition must both choose one or the other. Thirty-nine states have opted out.⁷⁹

Subsection (c) insulates exempt property from most prepetition claims,⁸⁰ except that prepetition creditors with valid, unavoided liens in exempt property retain their *in rem* rights despite the debtor's discharge.⁸¹ Subsection (d) states the property or property values debtors may exempt if they are free to, and in fact do, choose the federal exemption scheme.⁸² According to subsection (e), a debtor's prepetition waiver of exemption in favor of an unsecured creditor is unenforceable, as is a waiver of the right to avoid liens or other transfers.

B. Section 522(f) Avoidance Powers

Section 522(f) itself does not create any exemption rights. Instead, it seeks to protect the debtor's existing exemptions, the debtor's discharge, and thus, the debtor's fresh start. It does so by permitting debtors to avoid certain liens and security interests in exempt property. Section 522(f)(1) describes two different debtor avoidance powers. Subsection (f)(1)(A) allows debtors to avoid *judicial* liens in any exempt property to the extent the lien impairs their exemption.⁸³ The subsection (f)(1)(B) avoidance power is considerably narrower. A debtor can avoid a *nonpossessory, non-purchase money security interest* to the extent it impairs an exemption in:

- (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
- (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
- (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.⁸⁴

⁷⁹ See NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS* 299-301 (1997).

⁸⁰ See 11 U.S.C. § 522(c)(1)-(3).

⁸¹ This codifies the rule of *Long v. Bullard*, 117 U.S. 617 (1886).

⁸² See 11 U.S.C. § 522(d).

⁸³ The debtor may not, however, avoid liens that secure alimony or maintenance, or support obligations to children or current or former spouses. See 11 U.S.C. § 522(f)(1)(A)(i).

⁸⁴ 11 U.S.C. § 522(f)(1)(B).

To protect the debtor's avoidance powers, § 522(e) makes them independent of any waiver of exemption,⁸⁵ or any waiver of the avoidance powers themselves.⁸⁶ Other Code provisions help to implement the debtor's § 522(f) avoidance powers.⁸⁷

C. *Application of § 522(f)(1)(B)(i): An Overview*

A debtor can successfully exercise § 522(f)(1)(B)(i) avoidance power if: (1) the lien is a nonpossessory, nonpurchase money security interest; (2) the property subject to that security interest is described by § 522(f)(1)(B)(i); and (3) the security interest impairs the debtor's exemption in that property.⁸⁸ Each element has generated more than its fair share of litigation.

1. *Purchase Money Security Interest*

The Bankruptcy Code nowhere defines "purchase money" or "nonpurchase money" security interest. When interpreting those terms, bankruptcy courts turn to the Uniform Commercial Code (UCC) which defines a security interest as "purchase money" to the extent that it is:

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.⁸⁹

⁸⁵ See 11 U.S.C. § 522(e).

⁸⁶ See *id.*

⁸⁷ Once a debtor avoids a lien under § 522(f), § 522(i)(1) gives the debtor the same power as the trustee to recover transferred property or its value and to exempt any property so recovered under § 522(f). See 11 U.S.C. § 522(i)(1). The Code defines "transfer" broadly to mean "every mode . . . of disposing of or parting with property or with an interest in property, including retention of title as a security interest . . ." 11 U.S.C. § 101(54). On the other hand, if the court dismisses the case, any transfer avoided under § 522 or preserved under § 522(i)(2) is reinstated, unless the court orders otherwise. See 11 U.S.C. § 349(b)(1)(B). Section 522(i)(2) also provides that, to the extent a debtor can exempt property under § 522(i)(1), a transfer avoided under § 522(f) will be preserved for the benefit of the debtor. See 11 U.S.C. § 522(i)(2). Finally, § 502(d) disallows the claim of a creditor who fails to turn over property subject to an avoided lien. See 11 U.S.C. § 502(d).

⁸⁸ See 11 U.S.C. § 522(f)(1).

⁸⁹ U.C.C. § 9-107 (1995); see also *Billings v. Avco Colo. Indus. Bank (In re Billings)*, 838

If a debtor borrows money and uses existing property as collateral to secure the loan, the nonpurchase money nature of the security interest is not in doubt. The issue becomes more complicated when a debtor refinances purchase money debt with the same creditor, either by adding new items, as with a revolving charge card, or by changing the terms of the original contract by borrowing additional money, extending the term of the loan, or both. In analyzing this situation, several courts have adopted the so-called "transformation rule," which holds that refinancing purchase money debt "transforms" the security interest securing the refinanced debt into a nonpurchase money security interest.⁹⁰ This "transformation" subjects the security interest to avoidance in bankruptcy if and to the extent that it impairs a debtor's exemption.

2. Nonpossessory Security Interest

Some creative creditors seeking to fend off a § 522(f)(1)(B)(i) avoidance action have argued that repossession of the collateral makes their security interest possessory and therefore not subject to avoidance. Most courts have held that the possessory or nonposses-

F.2d 405, 406-07 (10th Cir. 1988); *Bond's Jewelers, Inc. v. Linklater* (*In re Linklater*), 48 B.R. 916, 918 (Bankr. D. Nev. 1985).

⁹⁰ See, e.g., *Matthews v. Transamerica Fin. Servs.* (*In re Matthews*), 724 F.2d 798 (9th Cir. 1984); *Rosen v. Associates Fin. Servs. Co.* (*In re Rosen*), 17 B.R. 436 (D.S.C. 1982); *In re Gonzales*, 206 B.R. 133 (Bankr. N.D. Tex. 1997); *In re Hillard*, 198 B.R. 620 (Bankr. N.D. Ala. 1996); *Lee v. Davis/McGraw, Inc.* (*In re Lee*), 169 B.R. 790 (Bankr. S.D. Ga. 1994). But see *Pristas v. Landaus of Plymouth, Inc.* (*In re Pristas*), 742 F.2d 797 (3rd Cir. 1984); *In re Carter*, 180 B.R. 321 (Bankr. M.D. Ga. 1995); *In re Ganders*, 176 B.R. 581 (Bankr. N.D. Okla. 1995); *In re Leftwich*, 174 B.R. 54 (Bankr. W.D. Va. 1994); *In re Krueger*, 172 B.R. 572 (Bankr. N.D. Ohio 1994). See also, Ann E. Conaway Stilson, *The "Overloaded" PMSI in Bankruptcy: a Problem in Search of a Resolution*, 60 TEMP. L.Q. 1 (1987) (approving transformation rule); Raymond B. Check, Note, *The Transformation Rule under Section 522 of the Bankruptcy Code of 1978*, 84 MICH. L. REV. 109 (1986) (opposing transformation rule).

The transformation rule is a judicially-created doctrine whose provenance is readily apparent. To the extent that a security interest is nonpurchase money, it is avoidable under § 522(f). Courts created the rule to protect a debtor's exemption rights.

The rule may not work as conceived. Secured creditors asked to refinance or consolidate existing loans secured by purchase money security interests may, and indeed should, refuse to do so given their possible fate in bankruptcy. Rather than protect debtors, the transformation rule may force more debtors into bankruptcy to the extent its existence makes creditors unwilling to work with them outside bankruptcy.

The Article Nine Drafting Committee proposes to abolish the transformation rule, but only as it applies to business collateral. See AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE REVISED ARTICLE 9 SECURED TRANSACTIONS § 9-104(i) (Proposed Final Draft, April 15, 1998).

sory character of a security interest depends on the parties' intent at the time the security interest was created. A security interest does not become possessory, and therefore, is not beyond the scope of § 522(f)(1)(B)(i) simply because the creditor repossessed the collateral in the wake of a debtor's default.⁹¹

3. *The Security Interest Must Impair an Exemption*

Even if the security interest is nonpossessory and nonpurchase money, § 522(f) permits its avoidance only if and to the extent it impairs a debtor's exemption.⁹² If the debtor can exempt the entire property, a security interest in that property always and completely impairs the debtor's exemption. Thus, a debtor can always totally avoid a nonpossessory, nonpurchase money security interest in professionally prescribed health aids because Congress did not impose any value limits on their exemption.⁹³ If the debtor's exemption right is limited to a specific dollar amount, the security interest may not impair the exemption. When the value of the collateral is sufficient to satisfy both the exemption amount and the creditor's security interest, the security interest does not impair the debtor's exemption. So, for instance, assume the debtor has a bureau worth \$1,000. Her creditor holds a nonpossessory, nonpurchase money security interest in the bureau to secure a \$500 claim. According to § 522(d)(3), she can claim a \$400 exemption in the bureau. Because the value of the bureau exceeds the sum of the security interest and her exemption, the security interest will not impair her ex-

⁹¹ See *Meadows v. Farmers & Merchants Nat'l Bank* (*In re Meadows*), 75 B.R. 357, 360 (W.D. Va. 1987). *Meadows* was a pyrrhic victory for the debtor because the court also concluded that dairy cattle were not "implements or tools of the trade" for lien avoidance purposes. See *id.* at 362; see also *In re White*, 203 B.R. 613 (Bankr. N.D. Tex. 1996); *In re Kinemore*, 181 B.R. 516 (Bankr. D. Idaho 1995); *In re Schultz*, 101 B.R. 68 (Bankr. N.D. Iowa 1989); *In re Challinor*, 79 B.R. 19 (Bankr. D. Mont. 1987). But see *In re Vann*, 166 B.R. 167 (Bankr. D. Kan. 1994) (holding that once a creditor has lawfully repossessed collateral, lien avoidance is no longer permitted), *rev'd*, 177 B.R. 704 (D. Kan. 1995); *In re Shepler*, 78 B.R. 217 (Bankr. W.D. Wis. 1987) (holding that once a creditor has lawfully repossessed collateral, lien avoidance is no longer permitted); *In re Sanders*, 61 B.R. 381 (Bankr. D. Kan. 1986) (holding that once creditor has lawfully repossessed collateral, lien avoidance is no longer permitted).

⁹² See 11 U.S.C. § 522(f)(1)(B). A debtor may avoid a lien only "to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)." 11 U.S.C. § 522(f)(1).

⁹³ See 11 U.S.C. § 522(d)(9).

emption.⁹⁴ This unlikely scenario will typically result in a sale of the property. The trustee will distribute \$400 to the debtor, \$500 to the secured creditor, and keep the remaining \$100 for the estate and distribution to the unsecured creditors.⁹⁵

Section 522(f) speaks of avoiding a lien "to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section."⁹⁶ How would § 522(f) apply if the bureau were worth only \$500, the amount of the exemption were \$400, and the debt secured by the potentially avoidable lien were \$1,000? As a matter of plain meaning, presumably subsection (f)(1) limits lien avoidance to the amount of the debtor's exemption—in this hypothetical, \$400, leaving \$100 of lien intact.⁹⁷ Nevertheless, in the context of avoiding judicial liens, some courts have allowed the debtor to avoid the lien totally, even though it only partially impaired the debtor's exemption rights.⁹⁸

The question of partial or total lien avoidance has not arisen in the reported case law involving § 522(f)(1)(B)(i). Presumably, this is because most household goods encumbered by a potentially avoidable security interest are worth less than the amount of the exemption. If the value of the goods is less than the exemption, any security interest in the goods impairs the exemption. For instance, returning to the bureau, if it had a value of \$200, a lien securing any amount would impair the debtor's right to exempt up to \$400 of value under § 522(d)(3). Therefore, in avoiding the creditor's nonpossessory, nonpurchase money security interest, the entire value of the property, and hence, the property itself, would become exempt. The debtor could keep the bureau.

⁹⁴ See 11 U.S.C. § 522(f)(2)(A).

⁹⁵ The debtor may also:

[R]edeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

11 U.S.C. § 722.

⁹⁶ 11 U.S.C. § 522(f)(1) (emphasis added).

⁹⁷ See, e.g., *East Cambridge Sav. Bank v. Silveira* (*In re Silveira*), 141 F.3d 34 (1st Cir. 1998); *In re Finn*, 211 B.R. 780 (B.A.P. 1st Cir. 1997); *In re Corson*, 206 B.R. 17 (Bankr. D. Conn. 1997); *In re Moe*, 199 B.R. 737 (Bankr. D. Mont. 1995).

⁹⁸ See, e.g., *Jones v. Mellon Bank* (*In re Jones*), 183 B.R. 93 (Bankr. W.D. Pa. 1995); *In re Thomsen*, 181 B.R. 1013 (Bankr. M.D. Ga. 1995).

4. "Household Goods"—the \$64,000 Question

Exactly what property is subject to the § 522(f)(1)(B)(i) avoidance power has proved the greatest source of litigation. By way of example, assume the debtor owns a camcorder worth \$300, subject to a nonpossessory, nonpurchase money security interest that secures a \$500 debt. If the debtor can show the camcorder is "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor,"⁹⁹ she can avoid the security interest and thereby keep the camcorder. Avoidance will leave the creditor with a \$500 unsecured claim that will be discharged to the extent it is not satisfied from the proceeds of the trustee's liquidation of the debtor's estate. On the other hand, if the camcorder does not qualify as a household furnishing, household good, wearing apparel, appliance, book, animal, crop, musical instrument, or jewelry; the debtor has three choices, all equally unpalatable. She can exercise her § 722 right to redeem the camcorder for its present value, i.e., she can pay the creditor \$300, but that course of action assumes she has \$300 available for that purpose.¹⁰⁰ In addition, she can reaffirm the debt, i.e., promise to pay the creditor \$500 (or something less if the creditor is agreeable), but that undermines the effectiveness of her discharge. Every penny of reaffirmed debt is a penny less that is discharged, and a penny more of debt that burdens the debtor postbankruptcy. Finally, she can surrender the camcorder to the creditor. She will receive a discharge of any amounts still owed to the creditor, but she will also lose the property.

Section 522(f)(1)(B)(i) appears to define the property subject to its avoidance power both by type and use. So interpreted, the debtor could only avoid the security interest if: (1) the camcorder qualified as household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry, and (2) the debtor held it for "personal, family or household use." Let's assume she holds it for "personal, family, or household use,"¹⁰¹ i.e., the camcorder qualifies under the use aspect of the

⁹⁹ 11 U.S.C. § 522(f)(1)(B)(i).

¹⁰⁰ See 11 U.S.C. § 722.

¹⁰¹ If she uses it to generate income, the camcorder would probably be a tool of the

§ 522(f)(1)(B)(i) definition. In fact, the “use” prong of the definition corresponds exactly with the Article 9 definition of “consumer goods.” According to Article 9, goods are “consumer goods” if they are “used or bought for use primarily for personal, family or household purposes.”¹⁰² Does the camcorder also qualify as one of the types of goods described by § 522(f)(1)(B)(ii)? It is clearly not wearing apparel, books, animals, crops, musical instruments, or jewelry. According to the case law, it is also probably not an appliance.¹⁰³ That leaves “household furnishings” and “household goods.” And that leaves us nowhere.

The Bankruptcy Code does not define either “household furnishings” or “household goods.” Dictionary definitions provide little more by way of enlightenment. “Goods” are “tangible personal property.”¹⁰⁴ “Furnishings” are things “necessary or useful for comfort or convenience,” “furniture, appliances, or other moveable articles in a home or office,” or “wearing apparel or accessories.”¹⁰⁵ What does the adjective “household” add to “household furnishings” or “household goods”? Not much, perhaps it eliminates clothing and accessories, such as jewelry worn outside the house, and office furniture, office appliances, etc. These dictionary definitions underscore a serious drafting deficiency in § 522(f)(1)(B)(i). Several of the section’s purported types or categories of goods overlap. Thus, “furnishings” and “goods” potentially include all seven of the other types of listed goods if they are held for personal, family, or household use. And, adding insult to injury, “goods” includes “furnishings” which means that everything that qualifies as a “furnishing” under the dictionary definition would also qualify as a “good.” Furniture, appliances, and other moveable articles are all tangible personal property. Presumably, everything that qualifies as a moveable article in the home, such as a home furnishing, would also qualify as a household good, i.e., tangible personal property in

trade, and the security interest would be avoidable under § 522(f)(1)(B)(ii). See 11 U.S.C. § 522(f)(1)(B)(ii).

¹⁰² U.C.C. § 9-109(1) (1995).

¹⁰³ None of the opinions examining whether televisions, camcorders, stereo systems, or other electronic goods come within the reach of § 522(f)(1)(B)(i) assumes that these goods might be appliances. See *infra* part IV of this Article for a discussion of the case law involving the statute.

¹⁰⁴ AMERICAN HERITAGE DICTIONARY 567 (2d College ed. 1985).

¹⁰⁵ *Id.* at 540.

the home.¹⁰⁶ According to their dictionary definitions then, household goods and household furnishings describe the same universe of goods. They are redundant rather than discrete categories of goods.

What was Congress saying? It is anyone's guess or, as the case has been, it's what a judge has said Congress was saying if the judge has ruled on the issue. Maybe Congress intended to create two subcategories of exemptible consumer goods—"household goods," i.e., goods debtors use primarily in or near their homes, plus some other limited categories of consumer goods even if debtors use them primarily outside their households, such as clothing and jewelry. Under that translation, the statute would effectively read: "household goods, including but not limited to household furnishings and appliances, as well as wearing apparel, books, animals, crops, musical instruments, or jewelry."

But interpreting "household goods" as a catchall category that subsumes "household furnishings" and "appliances" is problematic. First, the statute's syntax does not support that interpretation. Subsection (f)(1)(B)(i) appears to enumerate nine separate (and discrete) categories.¹⁰⁷ Household goods is not the first in that string of listed categories, implying that it is not a catchall. Rather, the statute's phraseology suggests that "household furnishings, household goods . . . [and] appliances" are three separate, mutually exclusive categories of goods. Structurally then, subsection (f)(1)(B)(i) appears to describe or identify nine discrete categories of exempt consumer goods. But substantively, those nine categories are neither discrete nor mutually exclusive.

Focusing on the "use" aspect of the definition produces equally ambiguous conclusions. Requiring that the debtor hold the goods "primarily for personal, family, or household use" could narrow the nine categories of goods or it could suggest that the class of consumer goods is broader than the nine enumerated types of goods. Under the "narrowing" interpretation, a sofa used in a dentist's waiting room would not fall within § 522(f)'s ambit, even though it is a household good or furnishing, because the debtor did not hold it for personal, family or household use. But a dentist's sofa would

¹⁰⁶ A laptop used for work but brought home at night would not qualify, nor would other tangible personal property used in business, but brought home or stored at home while not in use.

¹⁰⁷ See 11 U.S.C. § 522(f)(1)(B)(i) (1994).

not be subject to § 522(f)(1)(B)(i) in any event because the debtor could not exempt it under § 522(d)(3). Under the alternative interpretation which would hold that the class of consumer goods is greater than the class of goods encompassed by the nine itemized categories, a camcorder might not qualify because, even though it is held for personal use, it is not a household furnishing, household good, wearing apparel, appliance, book, animal, crop, musical instrument, or jewelry. Yet, a camcorder *is* a good (tangible personal property) and it is found in homes. It is easy to see why § 522(f)(1)(B)(i) has spawned so much litigation. It provides no guidance to courts when the property in question does not fall squarely and easily into one of the nine listed types of property.

5. *The § 522(d) Connection*

As a threshold matter, § 522(f)(1)(B)(i) lien avoidance power is only available to protect a debtor's exemptions. Therefore, presumably, § 522(d) should shed some light on what property Congress intended § 522(f)(1)(B) to cover. As noted, § 522(d) states the Code's exemption scheme.¹⁰⁸ It allows debtors to claim exemptions in a variety of tangible and intangible property. Two of its subsections are relevant here. Section 522(d)(3) allows a debtor to exempt her:

[I]nterest, not to exceed \$400 in value in any particular item or \$8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.¹⁰⁹

Section 522(d)(4) allows a debtor to exempt her "aggregate interest, not to exceed \$1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor."¹¹⁰ These two subsections of § 522(d), along with the motor vehicle exemption,¹¹¹ the health aid exemption,¹¹² and the

¹⁰⁸ See 11 U.S.C. § 522(d).

¹⁰⁹ 11 U.S.C. § 522(d)(3).

¹¹⁰ 11 U.S.C. § 522(d)(4).

¹¹¹ See 11 U.S.C. § 522(d)(2) (exempting the "debtor's interest, not to exceed \$2,400 in value, in one motor vehicle").

¹¹² See 11 U.S.C. § 522(d)(9) (exempting "[p]rofessionally prescribed health aids for the

"wildcard" exemption,¹¹³ state all the bankruptcy exemptions available in nonbusiness,¹¹⁴ tangible, personal property. The House Report noted a "Federal interest" in ensuring that a debtor emerges from bankruptcy "with adequate possessions" for her fresh start.¹¹⁵ The § 522(d) personal property exemptions reflect Congress's view of what a debtor's "adequate possessions" should be. They also describe the property subject to the § 522(f)(1)(B)(i) avoidance power because a debtor can only avoid a nonpossessory, nonpurchase money security interest to the extent it impairs an exemption.

What light, if any, do §§ 522(d)(3) and (d)(4) shed on what property is subject to the § 522(f)(1)(B)(i) avoidance power? The language used in the two subsections tracks exactly the language used in subsection (f)(1)(B)(i). Like subsection (f)(1)(B)(i), subsections (d)(3) and (d)(4) require that the property be consumer goods, i.e., that the property is held primarily for the debtor's "personal, family, or household use."¹¹⁶ Except for jewelry, covered by subsection (d)(4), subsection (d)(3) lists the same categories of property as subsection (f)(1)(B)(i), and lists them in the same identical order.

Without more, subsection (d)(3) would bring us no closer to enlightenment. But in addition to echoing § 522(f)(1)(B)(i), §§ 522(d)(3) and (d)(4) place a cap on the value of the debtor's exemption in the property. For all covered property (other than jewelry for which a debtor can exempt up to \$1,000 in value), the debtor's exemption right may not exceed \$400 in any given item, and the aggregate value of the debtor's interest in subsection (d)(3) property may not exceed \$8,000.

Reading § 522(f)(1)(B)(i) in light of § 522(d), arguably Congress intended to describe low value consumer goods in subsection (f). In drafting § 522(d), Congress wanted to make sure that debtors emerged from bankruptcy with adequate possessions. If the

debtor or a dependent of the debtor").

¹¹³ See 11 U.S.C. § 522(d)(5) (exempting the "debtor's aggregate interest in any property, not to exceed in value \$800 plus up to \$7,500 of any unused amount of the exemption provided under paragraph (1) [debtor's homestead] of this subsection").

¹¹⁴ See 11 U.S.C. § 522(d)(6) (providing that a debtor may exempt her "aggregate interest, not to exceed \$1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor").

¹¹⁵ H. REP. NO. 95-595, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6087.

¹¹⁶ See, e.g., U.C.C. § 9-109(1) (1995) ("Goods are 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes.").

value of property exceeds a debtor's exemption right in it, the debtor does not get to keep the property. The chapter 7 trustee will sell it, give the debtor cash representing her exemption right, and distribute the remainder to the unsecured creditors. It looks like Congress assumed that most goods described by § 522(d)(3) would have a low value, i.e., under \$200 per item in 1978 or \$400 today. If so, exercise of the avoidance power with respect to nonpossessory, nonpurchase money security interests in that property would enable the debtor to keep the property, not just receive \$200 or \$400 in cash from the trustee. Therefore, § 522(f) would protect the debtor's ability to keep the property without the need to reaffirm the debt. Unfortunately, § 522(d), like § 522(f)(1)(B)(i), does not reveal whether Congress meant *any and all* consumer goods or only certain kinds of consumer goods, i.e., household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry.

The legislative history is not particularly helpful either. Only the House Report contains any discussion of the reach of § 522(f). Its "extensive" discussion consists of less than two pages. It briefly notes that the Act did not provide "adequate relief to the consumer debtor" in part because of "overbroad security interests in all a debtor's *household* and *personal* goods."¹¹⁷ It also contains a two-and-one-half paragraph discussion of the House Bill's exemption provisions that were designed to curb this creditor overreaching:

The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have.¹¹⁸

Finally, in the Report's discussion of the new power of debtors to redeem exempt property from security interests,¹¹⁹ the House noted that:

¹¹⁷ H.R. REP. NO. 95-595, at 116-17, *reprinted in* 1978 U.S.C.C.A.N. at 6077 (emphasis added).

¹¹⁸ *Id.* at 127, *reprinted in* 1978 U.S.C.C.A.N. at 6088.

¹¹⁹ Section 722 of the Code provides:

An individual debtor may, whether or not the debtor has waived the right to re-

In practical effect, this provision will permit the average consumer debtor to redeem his car from a nonpurchase-money security interest or judicial lien to the extent that the car would be exempt (\$1,500), because most other personal effects that are exempt may not be made subject to a nonpurchase-money security interest or judicial lien. It would also permit the debtor to redeem from a purchase-money security interest or from a statutory lien household goods, furnishings, clothes, musical instruments, pets, health aids, jewelry, again, to a limited amount, the limit prescribed for each such item in the list of exemptions.¹²⁰

This snippet of legislative history raises more questions than it answers. It suggests that the House Bill did not provide for avoidance of judicial liens that impaired a debtor's exemption in a car. That is incorrect.¹²¹ It also describes as unenforceable, rather than avoidable, judicial liens and nonpurchase money security interests that impair "most other personal effects." One assumes the House was endorsing or adopting § 4-503(f) of the Commission's proposed Act.¹²² More importantly, the phrase "most other personal effects" is highly imprecise. It could be interpreted to be significantly broader than "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry" which the Report used in the same sentence. On the other hand, the House may have meant "most other personal effects" to be synonymous with "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry."

Nowhere did the House Report define what specific classes of property were exemptible or subject to lien avoidance. The Senate Report gives even less detail. It briefly summarizes § 522(f)

deem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

11 U.S.C. § 722.

¹²⁰ H.R. REP. NO. 95-595, at 127-28, *reprinted in* 1978 U.S.C.C.A.N. at 6088-89.

¹²¹ Section 522(f)(1)(A) allows debtors to avoid judicial liens to the extent they impair a debtor's exemption. In 1994, Congress excepted from avoidance certain liens supporting spousal obligations. *See* 11 U.S.C. § 522(f)(1)(A).

¹²² This made nonpurchase money security interests in exempt property unenforceable. *See* BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, pt. 2, at 130, 142 (1973) (proposing § 4-503(f)).

(§ 522(e) in the Senate version) without any analysis.¹²³ In sum, the statute and its legislative history fail to provide any real guidance as to what property is encompassed by the language "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments."

IV. THE CASE LAW INTERPRETING § 522(f)(1)(B)(i)

Congress neither defined the goods it desired to exempt in § 522(d)(3) nor did it define the goods subject to lien avoidance in § 522(f)(1)(B)(i). The legislative history of both sections provides few clues. Perhaps Congress thought the meaning of household goods was self-evident. If so, it should have known better, given what was at stake—well-heeled and well-represented creditors facing loss of their security interests and their leverage to extract reaffirmation agreements. Creditors faced with such threats tend to fight back—fiercely. On the other hand, maybe Congress deliberately left it up to the courts to decide.

Even though the Bankruptcy Code does not define "household goods," other federal law does. In 1984, the Federal Trade Commission (FTC) promulgated regulations¹²⁴ making it an unfair credit practice, among other things, to obtain a nonpossessory, nonpurchase money security interest in "household goods."¹²⁵ The regulations define "household goods" as:

Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included within the scope of the term "household goods":

- (1) Works of art;
- (2) Electronic entertainment equipment (except one television and one radio);
- (3) Items acquired as antiques; and
- (4) Jewelry (except wedding rings).¹²⁶

¹²³ See S. REP. NO. 95-989, at 76 (1978), *reprinted in* 1978 U.S.C.A.N. 5787, 5862.

¹²⁴ See Trade Regulation Rules; Credit Practices, 49 Fed. Reg. 7740, 7789 (March 1, 1984) (codified at 16 C.F.R. pt. 444).

¹²⁵ 16 C.F.R. § 444.2(a)(4) (1997).

¹²⁶ 16 C.F.R. § 444.1(i).

These regulations, twelve years in the making,¹²⁷ sprang from the same concerns about creditor overreaching¹²⁸ that motivated the Bankruptcy Commission's proposal invalidating certain nonpurchase money security interests.

As compared to § 522(d)(3), the FTC regulations describe a much narrower universe of property.¹²⁹ Many goods, such as VCRs and multiple radios and televisions, are *not* household goods under the FTC regulations even though they are ubiquitous in most modern American homes and of little value used. Although the defined class of protected goods is significantly narrower than that of § 522(d)(3), the overall category of "household goods" includes items such as clothing and personal effects—items individuals may use far beyond the boundaries of their homes.

The FTC definition of "household goods" is significantly narrower than even the stingiest judicial interpretation of "household goods" under § 522 of the Bankruptcy Code. Had courts adopted the FTC definition, presumably that would have put an end to the § 522(f)(1)(B)(i) litigation. After 1984, no law-abiding *commercial* creditor should have had a nonpossessory, nonpurchase money security interest in household goods.¹³⁰ If it did, it would be guilty of a prohibited trade practice. If no nonpossessory, nonpurchase money security interests existed in household goods, debtors would not need to avoid them under § 522(f)(1)(B)(i).

Given the cramped nature of the FTC definition of "household goods," it is curious that so few creditors have asked courts to apply it when construing the meaning of § 522(f)(1)(B)(i). In fact, only six published opinions have even considered using the FTC defini-

¹²⁷ For a detailed review of the background to the 1984 regulations, see American Financial Services, Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985). See also Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349 (1988); Michael J. Herbert, *Straining the Gnat: A Critique of the 1984 Federal Trade Commission Consumer Credit Regulations*, 38 S.C. L. REV. 329 (1987).

¹²⁸ David H. Williams, an attorney with the FTC, presented a statement to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. See H.R. REP. NO. 95-595, at 166-73, reprinted in 1978 U.S.C.C.A.N. 5963, 6127-34 (discussing, inter alia, the proposed FTC rule banning nonpossessory, nonpurchase money security interests in certain household goods).

¹²⁹ The narrowness of the FTC definition and judicial refusal to adopt it explain why litigation persists under § 522(f)(1)(B)(i).

¹³⁰ One creditor's financing statement listed covered collateral as: "Consumer Goods—consisting of personal property of all kinds and types located on or about Debtor's residence stated above BUT NOT INCLUDING HOUSEHOLD GOODS as defined in FTC Rule, Code of Fed. Regs. § 444.1(i)." *In re Boykins*, 120 B.R. 71, 72 (Bankr. N.D. Miss. 1990).

tion to identify the class of goods subject to § 522(f)(1)(B)(i) lien avoidance.¹³¹ Courts asked to apply it have universally declined the invitation, refusing to be bound by a definition created by an independent administrative agency¹³² in the absence of congressional clarification of the meaning of "household goods."¹³³ These deci-

¹³¹ See *Barrick v. Avco Consumer Discount Co.* (*In re Barrick*), 95 B.R. 310 (Bankr. M.D. Pa. 1989); *Lanzoni v. ITT Fin. Servs.* (*In re Lanzoni*), 67 B.R. 58 (Bankr. W.D. Mo. 1986); *In re Miller*, 65 B.R. 263 (Bankr. W.D. Mo. 1986); *In re Vaughn*, 64 B.R. 213 (Bankr. S.D. Ind. 1986); *Boyer v. ITT Fin. Servs.* (*In re Boyer*), 63 B.R. 153 (Bankr. E.D. Mo. 1986); *Smith v. Norwest Fin.* (*In re Smith*), 57 B.R. 330 (Bankr. N.D. Ga. 1986).

¹³² See, e.g., *Smith*, 57 B.R. at 331.

¹³³ Although courts have not adopted the FTC definition, congressional "reformers" attempted to incorporate it into the Code during the 105th Congress. On June 10, 1998, the House passed H.R. 3150, the "Bankruptcy Reform Act of 1998." The bill included the following provision:

Section 101 of title 11, United States Code, is amended by inserting after paragraph (27) the following: "(27A) 'household goods' has the meaning given such term in the Trade Regulation Rule on Credit Practices promulgated by the Federal Trade Commission (16 C.F.R. 444.1(i)), as in effect on the effective date of this paragraph; except that the term shall also include any tangible personal property reasonably necessary for the maintenance and support of a dependent child"

H.R. 3150, 105th Cong. § 122 (1998) ("Definition of household goods and antiques").

On September 23, 1998, the Senate passed a similar bill, S. 1301, the "Consumer Bankruptcy Reform Act of 1998." It contained the following language:

Not later than 180 days after the date of enactment of this Act, the Federal Trade Commission shall promulgate regulations defining "household goods" under section 522(c)(3) in a manner suitable and appropriate for cases under title 11 of the United States Code. If new regulations are not effective within 180 days of enactment of this Act, then "household goods" under section 522(c)(3) shall have the meaning given that term in section 444.1(i) of title 16, of the Code of Federal Regulations, except that the term shall also include any tangible personal property reasonably necessary for the maintenance or support of a dependent child.

S. 1301, 105th Cong. § 317 (1998) ("Definition of household goods and antiques").

The Conference Report, issued October 7, 1998, essentially adopted the House version, spelling out the FTC regulations, but applying it only to lien avoidance under § 522(f)(1)(B). It contained the following language:

"[H]ousehold goods" shall mean for the purposes of this subparagraph (B) clothing; furniture; appliances; one radio; one television; one VCR; linens; china; crockery; kitchenware; educational materials and educational equipment primarily for the use of minor dependent children of the debtor, but only one personal computer only if used primarily for the education or entertainment of such minor children; medical equipment and supplies; furniture exclusively for the use of minor children, elderly or disabled dependents of the debtor; and personal effects (including wedding rings and the toys and hobby equipment of minor dependent children) of the debtor and his or her dependents; Provided, that the following are not included within the scope of the term "household goods":

(aa) works of art (unless by or of the debtor or his or her dependents);

(bb) electronic entertainment equipment (except one television, one radio, and one VCR);

sions may reflect more than judicial reluctance to use an administrative regulation to interpret a statute. Although they have not explicitly stated, the courts seem troubled by the narrowness of the protection given by the regulation.¹³⁴

Beyond the judicial consensus that the FTC definition is too narrow, judicial interpretation is splintered regarding what constitutes a "household good" for purposes of § 522(f)(1)(B)(i). One exasperated court noted that "one can find authority in the bankruptcy courts in the three federal judicial districts of Oklahoma in support of virtually any position with regard to the household and kitchen furniture exemption."¹³⁵ This is not surprising given an uncooperative statute and significant stakes for creditors. In deciding whether a particular item is a household good, some courts apply no analytic scheme at all. Instead, they proceed on a case-by-case, item-by-item basis.¹³⁶ Other courts simply assume the property qualifies as household goods.¹³⁷ Occasionally, a court will ignore § 522(f)(1)(B)(i)'s language and avoid a nonpurchase money security interest simply because it impairs an exemption. For example, one court avoided a nonpossessory, nonpurchase money security interest in a debtor's mobile home because it impaired the debtor's homestead exemption.¹³⁸ The court read § 522(f) as if it permitted

(cc) items acquired as antiques;

(dd) jewelry (except wedding rings);

(ee) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

H.R. 3150, 105th Cong. § 148 (1998) ("Definition of household goods and antiques"). The House passed the revised bill on October 9, 1998. The Senate did not vote on it, and the bill died with the adjournment of Congress. For a discussion of the significance of these attempted changes, see *infra* Postscript.

¹³⁴ See, e.g., *Lanzoni v. ITT Fin. Servs.* (*In re Lanzoni*), 67 B.R. 58 (Bankr. W.D. Mo. 1986); *In re Miller*, 65 B.R. 263 (Bankr. W.D. Mo. 1986); *In re Vaughn*, 64 B.R. 213 (Bankr. S.D. Ind. 1986); *Boyer v. ITT Fin. Servs.* (*In re Boyer*), 63 B.R. 153 (Bankr. E.D. Mo. 1986).

¹³⁵ *In re Davis*, 134 B.R. 34, 39-40 (Bankr. W.D. Okla. 1991) (holding that goods are household goods if they are "reasonably necessary to the maintenance of a modern household").

¹³⁶ See, e.g., *Caruthers v. Fleet Fin., Inc.* (*In re Caruthers*), 87 B.R. 723 (Bankr. N.D. Ga. 1988) (finding a 25" television and a stereo system to be household goods); *Smith v. Norwest Fin.* (*In re Smith*), 57 B.R. 330, 331 (Bankr. N.D. Ga. 1986) (declining to adopt FTC definition of household goods).

¹³⁷ See, e.g., *In re Lozano*, 84 B.R. 634 (Bankr. W.D. Mo. 1988) (holding that two watches, a television, a clarinet, a camera, stereo, an unspecified number of gold locket, and two diamond rings were all exempt household goods).

¹³⁸ See *Goad v. Patrick Henry Nat'l Bank* (*In re Goad*), 161 B.R. 161, 164 (Bankr. W.D.

avoidance of *all* nonpossessory, nonpurchase money security interests. In effect, it stopped reading the statute just before the phrase "if such lien is" Section 522(f)(1)(B) only allows avoidance of nonpossessory, nonpurchase money security interests to the extent they impair a debtor's exemptions in *certain* exempt personal goods, i.e., "household goods,"¹³⁹ "jewelry,"¹⁴⁰ "tools of the trade,"¹⁴¹ or "health aids."¹⁴² Congress did *not* include the homestead¹⁴³ or "motor vehicle"¹⁴⁴ exemptions in the § 522(f)(1)(B) avoidance power.

Generally speaking, courts have developed three main approaches to determine whether a debtor may avoid nonpossessory, nonpurchase money security interests in specific personal property. Under the most restrictive approach, courts focus on whether the goods are essential to the needs of the debtors or their dependents.¹⁴⁵ Some courts add that the goods must also be of little value.¹⁴⁶ Goods only qualify if they are "found and used in or around a debtor's home and [they] are necessary to a debtor's fresh start after bankruptcy."¹⁴⁷

*In re Psick*¹⁴⁸ demonstrates the shortcomings of the "necessity" approach. The debtors sought to avoid a nonpossessory, nonpurchase money security interest in a roto-tiller, a dirt bike, and a tractor-loader.¹⁴⁹ The court concluded that the security interests were

Va. 1993).

¹³⁹ 11 U.S.C. § 522(d)(3) (1994).

¹⁴⁰ 11 U.S.C. § 522(d)(4).

¹⁴¹ 11 U.S.C. § 522(d)(6).

¹⁴² 11 U.S.C. § 522(d)(9).

¹⁴³ 11 U.S.C. § 522(d)(1).

¹⁴⁴ 11 U.S.C. § 522(d)(2).

¹⁴⁵ See, e.g., *General Fin. Corp. v. Ruppe* (*In re Ruppe*), 3 B.R. 60, 61 (Bankr. D. Colo. 1980) (holding that "definition of household goods must be given a narrow construction").

¹⁴⁶ See, e.g., *In re Thompson*, 750 F.2d 628, 631 (8th Cir. 1984) (finding that 210 hogs were not household goods); *In re McCain*, 114 B.R. 652 (Bankr. E.D. Mo. 1990) (two firearms and a camera did not qualify).

¹⁴⁷ *McGreevy v. ITT Fin. Servs.* (*In re McGreevy*) 955 F.2d 957, 959 (4th Cir. 1992) (emphasis added).

¹⁴⁸ 61 B.R. 308 (Bankr. D. Minn. 1985).

¹⁴⁹ The debtors also attempted to avoid a nonpurchase money, nonpossessory security interest in their car. The court rejected this claim. The court reasoned that Congress had specifically exempted "motor vehicles" under § 522(d)(2). Therefore, the debtors could not avoid the security interest in their car even though it was nonpossessory and nonpurchase money. See *id.* at 313. In effect, the court limited the § 522(f)(1)(B)(i) avoidance power to the tangible personal property listed in § 522(d)(3), (4). In this regard, the court followed

indeed nonpurchase money and "subject to the applicable value limitations," and ruled that debtors could claim these items as exempt under §§ 522(d)(3) and (d)(5).¹⁵⁰ Nevertheless, the debtors could not avoid the liens because the goods were not "household goods" within the meaning of § 522(f)! According to the court, the debtors:

[M]ust still prove that the property encumbered by the liens which they seek to avoid falls into the categories under § 522(f)(2)(A) [§ 522(f)(1)(B)(i)].¹⁵¹ That statute creates and delineates the debtor's lien avoidance remedy, applicable only to a protected class of specific types of property. In general, the class includes property which Congress deemed to be essential to a debtor's fresh start, which is, by its nature, of more significant value to a penurious debtor than to a repossessing secured creditor This class is narrower in its scope than the class of property protected under the exemption statutes from the claims of unsecured creditors in the liquidation process. Simply stated, not all property which may be claimed as exempt under § 522(d) may be freed from encumbering liens under § 522(f).¹⁵²

The *Psick* court interpreted § 522(f)(1)(B)(i) property as a subset of § 522(d) exempt property. The court read into § 522(f)(1)(B)(i) an additional requirement that the goods be "essential" to the debtor's fresh start, even though the categories of goods described in that section are identical to those listed in §§ 522(d)(3) and (d)(4). To support its "reading" of the statute, the court cited the Code's legislative history,¹⁵³ but the House Report never used the term "essential" to refer to the category of goods described by § 522(f). The Report's brief discussion of ex-

every reported case to deal with the issue. See, e.g., *In re Dettman*, 96 B.R. 899 (Bankr. S.D. Iowa 1988); *In re Colbert*, 57 B.R. 600 (Bankr. D.D.C. 1986); *In re Weiss*, 51 B.R. 224 (D. Colo. 1985); *Redding v. Signal Consumer Discount Co.* (*In re Redding*), 34 B.R. 971 (Bankr. M.D. Pa. 1983); *Eldridge v. Commercial Credit Corp.* (*In re Eldridge*), 22 B.R. 218 (Bankr. D. Me. 1982); *Moore v. Household Fin. Corp.* (*In re Moore*), 5 B.R. 669 (Bankr. S.D. Ohio 1980); *Abt v. Household Fin. Co.* (*In re Abt*), 2 B.R. 323 (Bankr. E.D. Pa. 1980).

¹⁵⁰ *Psick*, 61 B.R. at 313.

¹⁵¹ This is the same provision as the current § 522(f)(1)(B)(i). In 1994, Congress substantially amended § 522 to add new material and also renumbered its subsections.

¹⁵² *Psick*, 61 B.R. at 313.

¹⁵³ See H.R. REP. NO. 95-595, at 127 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6088 (This is an interpellation from the actual, and confusing, cite in the case: "H.R. REP. NO. 595, 95th Cong. 2d Sess. 127-27 (1977), U.S. Code Cong. & Admin. News 1978, p. 5787.").

emption policy does speak of the need to provide a debtor with "the basic necessities of life."¹⁵⁴ In the same breath, though, it also notes a "federal interest" that a debtor have "adequate possessions to begin his fresh start."¹⁵⁵ Nowhere in this brief discussion of the federal exemption scheme or the new lien avoidance power does the Report state or reasonably imply a congressional intent to define the category of protected property more narrowly under § 522(f) than under § 522(d).

Moreover, even assuming the *Psick* court properly injected a necessity requirement into § 522(f)(1)(B)(i) goods, it went on to hold, without analysis, that the property was *not* necessary for the debtors.¹⁵⁶ Perhaps such a *per se* conclusion was valid regarding the dirt bike.¹⁵⁷ The roto-tiller and the tractor, however, are another matter, especially given the court's acknowledgment that the debtors used "these items in their daily household activities."¹⁵⁸ For the debtor who uses such items to produce food, they might be more necessary than televisions, radios, etc., items more commonly found in a typical American household and universally considered to be household goods. Other cases applying the necessity standard employ little more analysis to hold that particular property is not essential.¹⁵⁹

Finally, the line between luxury and necessity is hardly clear. In *In re Gray*,¹⁶⁰ the court concluded that guns, an above-ground swimming pool, and sporting knives, were "not necessary for Debtors' fresh start"¹⁶¹ because they were purely recreational. But the court allowed the debtor to avoid liens in two televisions, a VCR, a computer, a stereo, a CB radio base, various tools and lawn equipment, luggage, a BBQ grill, hobby equipment, a phone, a swing set,

¹⁵⁴ *Id.* at 126, reprinted in 1978 U.S.C.C.A.N. at 6087.

¹⁵⁵ *Id.*

¹⁵⁶ See *Psick*, 61 B.R. at 313.

¹⁵⁷ Although an individual debtor might prefer to relax by riding a dirt bike rather than watching television, *Psick* would deny debtors the choice between keeping their dirt bike or their television.

¹⁵⁸ *Psick*, 61 B.R. at 313.

¹⁵⁹ See, e.g., *In re McCain*, 114 B.R. 652, 654 (Bankr. E.D. Mo. 1990) (finding that a camera was "necessary to the Debtors' new beginning," however, guns were not); *General Fin. Corp. v. Ruppe* (*In re Ruppe*), 3 B.R. 60, 61 (Bankr. D. Colo. 1980) (holding that movie cameras and projectors were "not necessary to the functioning of the household").

¹⁶⁰ 87 B.R. 591 (Bankr. W.D. Mo. 1988).

¹⁶¹ *Id.* at 593.

and auto repair equipment.¹⁶² Faced with a similar list of personal property, another court opined that "[e]ven the Debtor would be hard pressed to make an argument that fishing rods, sleeping bags, tents, tools, and a camera are household goods."¹⁶³ Neither court supported its conclusion with any analysis.

In fact, some, if not most of the courts that have adopted the necessity approach, employ it against debtors who seem to be using lien avoidance to get a "head start" rather than a "fresh start."¹⁶⁴ For instance, in *In re Thompson*,¹⁶⁵ the debtor sought to avoid a lien in 210 hogs valued at \$4,500. The bankruptcy court agreed that the debtor could exempt the hogs under Iowa law. It also concluded that § 522(f) was available to Iowa debtors even though Iowa had opted out of § 522(d).¹⁶⁶ Nevertheless, it denied lien avoidance because the hogs were a "capital business venture, financed as such,"¹⁶⁷ and therefore could not be household goods. The opinion would have been unexceptional had the court stopped there. A debtor's business inventory of 210 hogs is not household goods under any reasonable definition. Because business inventory, by definition, is not a consumer good, it is not exempt under § 522(d). Therefore, the § 522(f) (1) (B) (i) avoidance power would have no application at all.

But the court did not stop there. Instead, like many other courts that narrowly construe § 522(f) (1) (B) (i)'s language, the court went on to buttress its conclusion by quoting from the legislative history of § 522(f).¹⁶⁸ The court's use of the section's legislative history was dictum. Moreover, although the court quoted the Report's complete discussion of the rationale underlying § 522(f), that discussion only stresses in general terms Congress's intent to eliminate the unfair advantage held by some overreaching creditors.¹⁶⁹

¹⁶² See *id.*

¹⁶³ *In re Wheeler*, 140 B.R. 445, 446 (Bankr. N.D. Ohio 1992).

¹⁶⁴ This phrase, now almost a bankruptcy cliché, seems to have appeared first in *Albuquerque Nat'l Bank v. Zouhar (In re Zouhar)*, 10 B.R. 154, 156 (Bankr. D.N.M. 1981) (finding that "the debtor here did not want a mere fresh start, he wanted a head start").

¹⁶⁵ 46 B.R. 1 (Bankr. S.D. Iowa), *aff'd*, 750 F.2d 628 (8th Cir. 1984).

¹⁶⁶ See *id.* at 2.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* (quoting H.R. REP. NO. 95-595, at 126-27 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6087-88).

¹⁶⁹ See *Thompson*, 46 B.R. at 2.

In affirming the holding of the bankruptcy court in *Thompson*, the Eighth Circuit also went substantially beyond where it needed to go. It agreed with the bankruptcy court that the hogs were business rather than consumer goods. It concluded by saying that it "concur[red] with the bankruptcy judge that the Thompsons' pigs were not the sort of low value personal goods in which 'adhesion contract' security interests are taken."¹⁷⁰ In fact, the bankruptcy court had made no such finding. Moreover, the concept of adhesion contracts typically applies in a consumer context, and both courts agreed the hogs were business collateral. The Eighth Circuit also announced that "only those personal goods necessary to the debtor's new beginning and of little resale value fit the federal bankruptcy philosophy embodied in § 522(f)(2)."¹⁷¹ Unlike the bankruptcy court, the Eighth Circuit did not even cite to the section's legislative history to support its startling holding. One subsequent court, relying on *Thompson*, concluded that Congress intended to allow debtors to avoid liens only in a reduced category of household goods.¹⁷²

In fact, nothing in § 522(f)(1)(B)(i)'s language or its scant legislative history¹⁷³ supports such a crabbed reading. The House Report noted a "Federal interest" in ensuring that debtors emerge from bankruptcy "with adequate possessions" for their fresh start.¹⁷⁴ "Adequate possessions" are not the same thing as personal goods that are necessary to the debtor's new beginning and of little resale value. In addition, the "adequate possessions" language comes from the section of the Report discussing *exemption* policy. Presumably, what the House meant by "adequate possessions" is reflected in its proposed federal exemption scheme. In the original version of the House bill, debtors were allowed to exempt up to \$750 of jewelry and household goods up to a value of \$300 per item.¹⁷⁵ In its sec-

¹⁷⁰ *In re Thompson*, 750 F.2d 628, 631 (8th Cir. 1984).

¹⁷¹ *Id.*

¹⁷² *See In re Psick*, 61 B.R. 308, 313 (Bankr. D. Minn. 1985).

¹⁷³ Only the House Report contained any discussion of the reach of § 522(f), and that was only a two-and-a-half paragraph discussion regarding the need to curb creditor over-reaching. See H.R. REP. NO. 95-595, at 127 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6088. The Senate Report only briefly summarized § 522(f) (§ 522(e) in the Senate version) without any analysis. See S. REP. NO. 95-989, at 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862.

¹⁷⁴ H.R. REP. NO. 95-595, at 126, reprinted in 1978 U.S.C.C.A.N. at 6087.

¹⁷⁵ *See id.* at 361, reprinted in 1978 U.S.C.C.A.N. at 6317. In the final version of the Bankruptcy Reform Act, the value of the exemption was reduced to \$500 for personal jewelry

tion-by-section analysis of the bill, the House Report summarized § 522(f) as protecting "the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid . . . a nonpurchase-money security interest in certain household and personal goods."¹⁷⁶ The House Report suggests a direct link between property defined as exempt under § 522(d) and property subject to the § 522(f)(1)(B)(i) avoidance power. By allowing debtors to avoid nonpossessory, nonpurchase money security interests in exempt property, § 522(f)(1)(B)(i) protects a debtor's ability to exempt them. The avoidance power enables debtors to keep adequate possessions for their postbankruptcy lives.

By limiting § 522(f)(1)(B)(i) lien avoidance to only those goods *necessary* to a debtor's fresh start, the "necessity" approach misreads § 522(f). The property subject to § 522(f)(1)(B)(i) tracks the property described in §§ 522(d)(3) and (d)(4). Section 522(f)(1)(B)(i) allows a debtor to avoid liens in *all* exempt household goods (not all exempt *necessary* household goods) held primarily for personal, family, or household use. In enacting § 522(d)(3) and (d)(4), Congress decided that all such goods were important to a debtor's fresh start. Section 522(f)(1)(B)(i) would protect the fresh start by allowing debtors to avoid nonpossessory, nonpurchase money security in such goods.

Moreover, Congress was and is quite capable of writing "necessary" or "reasonably necessary" into its exemption scheme. In fact, it did so with respect to a debtor's exemption rights regarding alimony, support, and separate maintenance,¹⁷⁷ pensions and annui-

and \$200 for each household good item. See 11 U.S.C. § 522(d) (1978). The Bankruptcy Reform Act of 1994 doubled those amounts. See Pub. L. No. 103-394, §108(d)(3)(A), 108 Stat. 4106, 4112 (1994). In 1984, Congress added an aggregate limit of \$4,000 for exemptible household goods. See Pub. L. No. 98-353, § 306(b), 98 Stat. 333, 353 (1984). In 1994, Congress also doubled that amount. See Pub. L. No. 103-394, §108(d)(3)(B), 108 Stat. 4106, 4112 (1994). Cases like *Wahl* may have motivated Congress to add that aggregate limit. See *In re Wahl*, 14 B.R. 153 (Bankr. E. D. Wis. 1981). In *Wahl*, the debtors successfully exempted a sterling silver flatware set worth over \$6,000. The court accepted their argument that each individual knife, fork or spoon was a separate "item," and because each "item" was worth less than \$200, the entire set was exempt household goods. See *id.* at 156.

¹⁷⁶ H.R. REP. NO. 95-595, at 362, reprinted in 1978 U.S.C.C.A.N. at 6318. The Senate Report's section-by-section analysis used identical language. See S. REP. NO. 95-989, at 76, reprinted in 1978 U.S.C.C.A.N. at 5862 (appearing as § 522(e) in the Senate version).

¹⁷⁷ See 11 U.S.C. § 522(d)(10)(D) (1994).

ties,¹⁷⁸ wrongful death recoveries,¹⁷⁹ life insurance,¹⁸⁰ and compensations for loss of future income.¹⁸¹ Those exemptions are limited to amounts "reasonably necessary for the support of the debtor"¹⁸² and the debtor's dependents. Congress's failure to write such limiting language into § 522(d)(3) indicates that it did not intend to limit a debtor's personal property exemptions to the barest minimum necessary to ensure survival. Moreover, § 522(f)(1)(B)(i) does not contain such limiting language, and that makes sense given that Congress enacted § 522(f) to protect a debtor's ability to claim exemptions.

Even in the Eighth Circuit, the leading proponent of the "necessity" approach, some courts have chafed at its unduly restrictive nature. For instance, in *Boyer v. ITT Financial Services (In re Boyer)*,¹⁸³ the court acknowledged *Thompson*, saying that "[f]rom the standpoint of lien avoidance, 'only those personal goods necessary to the debtor's new beginning and of little resale value fit the federal bankruptcy philosophy embodied in § 522(f)(2).'"¹⁸⁴ But the court's acknowledgment was only lip service. In applying the *Thompson* standard, the *Boyer* court defined "necessary" household goods to "include more than those items that are indispensable to the bare existence of a debtor and his family."¹⁸⁵ And, under the guise of following mandatory circuit precedent, the court allowed the debtors to avoid liens in a lawn mower, two gold chains, gold earrings, diamond earrings, a gold diamond ring, a camera, two clock/radio telephones, a 19" color portable TV, and a combination TV-stereo system. According to *Boyer*, a debtor could avoid security interests in goods that were "convenient or useful to a reasonable existence," so long as they were not luxuries and were "of little value."¹⁸⁶

In *In re Ray*,¹⁸⁷ another bankruptcy court in the Eastern District of Missouri defined "household goods" as goods that were: (1)

¹⁷⁸ See 11 U.S.C. § 522(d)(10)(E).

¹⁷⁹ See 11 U.S.C. § 522(d)(11)(B).

¹⁸⁰ See 11 U.S.C. § 522(d)(11)(C).

¹⁸¹ See 11 U.S.C. § 522(d)(11)(E).

¹⁸² 11 U.S.C. § 522(d)(10)(D), (10)(E), (11)(B), (11)(C) (emphasis added).

¹⁸³ 63 B.R. 153 (Bankr. E.D. Mo. 1986).

¹⁸⁴ *Id.* at 159 (quoting *In re Thompson*, 750 F.2d 628, 631 (8th Cir. 1984)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 83 B.R. 670 (Bankr. E.D. Mo. 1988).

"convenient or useful to a reasonable existence"; and (2) "personal property found in [the] debtor's residence, which is necessary to the functioning of a household or is normally used by and found in the residence of a debtor."¹⁸⁸ Applying that definition, the court allowed the debtor to avoid a security interest in a set of weights, five bicycles, a power mower, a lawn edger, thirteen firearms, and camping equipment (including tents, sleeping bags, cots and stoves) because they all fell "squarely within the realm of objects 'convenient or useful to a reasonable existence.'"¹⁸⁹ Although *Ray* cited *Boyer*, it failed to cite *Thompson*. It also left off the "of little value" aspect of the *Boyer* test.¹⁹⁰

Other courts have created even more expansive tests that expressly encompass recreational items and property debtors are likely to use away from their homes. Thus, the court in *In re Bandy*¹⁹¹ allowed a debtor to avoid security interests in four televisions, a VCR, a home computer, an answering machine, a video game, stereo equipment, golf clubs and other exercise equipment, power tools, hand and garden tools, and various items of jewelry. The court defined "household goods" to include:

[P]ersonal property which is normally used by and found in the residence of a debtor and his dependents or at or upon the curtilage of said residence. This definition also includes personal property that enables the debtor and his dependents to live in a usual convenient and comfortable manner or that has entertainment or recreational value and even though it is used away from the residence or its curtilage.¹⁹²

The court in *Lucas v. ITT Financial Services (In re Lucas)*¹⁹³ went even further, concluding that items like paintings, golf clubs, camera equipment, an exercise bike, beer steins, and decorative Hummel figurines were household goods. In deciding what property was "necessary and should be exempted from execution," the court focused on the debtor's "station in life . . . and the manner of

¹⁸⁸ *Id.* at 673.

¹⁸⁹ *Id.* (quoting *Boyer*, 63 B.R. at 159).

¹⁹⁰ The actual value of the goods is unclear, but the court avoided liens totaling \$5,682.40. See *id.*

¹⁹¹ 62 B.R. 437 (Bankr. E.D. Cal. 1986).

¹⁹² *Id.* at 439.

¹⁹³ 77 B.R. 242 (B.A.P. 9th Cir. 1987).

comfortable living to which he has become accustomed."¹⁹⁴ Another court, "reluctantly" considering itself bound by *Lucas*, exempted a whole range of recreational equipment, but also noted that, because California law set a monetary cap on the value of exempt property, an evidentiary hearing was necessary to determine the value of the collateral.¹⁹⁵

This Article will refer to the *Bandy-Lucas* approach as the "expansive"¹⁹⁶ approach. Unlike the "necessity" courts, courts that adopt the "expansive" approach effectively redefine "household goods" to be co-extensive with "consumer goods."¹⁹⁷ In doing so, they do not transpose into § 522(f)(1)(B)(i) the value limitations imposed by §§ 522(d)(3) and (d)(4). As a result, and to the consternation of some, "expansive" courts allow debtors to avoid liens *in toto* in expensive items. High-end televisions and stereo systems are the most common examples,¹⁹⁸ but debtors with home computers have also benefitted.¹⁹⁹

The "expansive" approach allows debtors to decide what goods are most necessary or important to them for their fresh start. This seems to be more consistent with congressional intent. Section 522(d)(3)'s reference to "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments" seems broad rather than narrow. The "expansive" approach interprets the "use" aspect of the definition of the class of goods subject to the avoidance power to modify the "type of goods"

¹⁹⁴ *Id.* at 245.

¹⁹⁵ See *In re Eveland*, 87 B.R. 117, 121-22 (Bankr. E.D. Cal. 1988) (exempting bicycles, cameras, snow skis, poles, boots, binoculars, camping equipment, fishing equipment, personal computers, rifles, shotguns, handguns, and exercise equipment where several debtors were involved).

¹⁹⁶ One court characterized this approach as the "proximity" approach because, the court believed, it focuses on property which debtors are likely to have in or near their homes. See *McGreedy v. ITT Fin. Servs. (In re McGreedy)*, 955 F.2d 957, 960-61 (4th Cir. 1992).

¹⁹⁷ See *Thurman v. CIT Fin. Servs. (In re Thurman)*, 20 B.R. 978 (Bankr. W.D. Tenn. 1982), *aff'd sub nom.*; *Transouth Fin. Corp. v. Paris*, 26 B.R. 184 (W.D. Tenn. 1982) (using "consumer goods" synonymously with "household goods").

¹⁹⁸ See *Caruthers v. Fleet Fin., Inc. (In re Caruthers)*, 87 B.R. 723, 728 (Bankr. N.D. Ga. 1988) (finding 25" TV and stereo system to be household goods). The court stated that "[i]n our complex society, items that were once regarded as luxuries in past years, particularly home entertainment items such as televisions and stereo systems, are now commonplace and are viewed as necessities to the well-being of the family unit." *Id.*

¹⁹⁹ See *In re Ratliff*, 209 B.R. 534 (Bankr. E.D. Okla. 1997) (qualifying personal computer and printer as household goods because debtor and two children used them for school assignments).

aspect. As a matter of statutory construction, that is a reasonable interpretation, albeit not the only one possible. The problem with the expansive approach is not how it defines household goods, rather, the problem is its failure to import into § 522(f) the congressionally mandated caps on value stated in § 522(d). A debtor is only entitled to exempt up to \$400 in value in any household good, with an overall cap of \$8,000.²⁰⁰ To the extent the "expansive" courts ignore the § 522(d)(3) cap, they are substituting their own judgment for that of Congress. Allowing debtors to avoid nonpossessory, nonpurchase money security interests in disregard of the § 522(d)(3) value limitations fuels the perception that bankruptcy gives too many debtors a "head start" instead of a "fresh start."²⁰¹ That, in turn, may encourage more traditional courts to provide unnecessarily parsimonious relief to debtors before them.

Noting the need to strike a balance "between making debtors totally comfortable and requiring them to sell apples on the street in order to survive,"²⁰² several courts have adopted an intermediate approach. One version modifies the "necessity" approach by allowing debtors to exempt property that is "reasonably necessary" to the debtor's fresh start²⁰³ or "convenient or useful to a reasonable existence."²⁰⁴

Other courts, while agreeing to the need for an intermediate standard, have found the "reasonably necessary" standard too vague. The leading case to set forth an intermediate standard is *McGreevy v. ITT Financial Services (In re McGreevy)*.²⁰⁵ In *McGreevy*, the debtors sought to avoid ITT's lien in, among other property, two firearms. The bankruptcy court denied the motion.

In affirming the bankruptcy court's decision, the district court defined "household goods" as "items of personal property reasonably necessary for the day-to-day existence of people in the context of

²⁰⁰ 11 U.S.C. § 522(d)(3) (1994).

²⁰¹ See *supra* note 164.

²⁰² *In re Larson*, 203 B.R. 176, 180 (Bankr. W.D. Okla. 1996) ("Appropriate interpretation of provisions of the Bankruptcy Code should lie somewhere between making debtors totally comfortable and requiring them to sell apples on the street in order to survive.").

²⁰³ See *id.* at 181 (holding that personal computer is not "reasonably necessary" for maintaining household today). The court analogized a PC today to a TV in the early 1950s, suggesting it might treat PCs as exempt property in the future. See *id.*

²⁰⁴ *In re Vale*, 110 B.R. 396, 407-08 (Bankr. N.D. Ind. 1989).

²⁰⁵ 955 F.2d 957 (4th Cir. 1992).

their homes.²⁰⁶ It then applied a two-step inquiry. As a threshold matter, the debtor had to show that the goods were "household goods."²⁰⁷ She then had to show that they were held for "personal, family or household use."²⁰⁸ Failure to demonstrate that particular goods were household goods would defeat the debtor's attempt to avoid the lien even if she could show that she held the goods for personal, family or household use. The court noted that any other conclusion would allow debtors to avoid nonpossessory, nonpurchase money security interests in any consumer goods.²⁰⁹ As the court reasoned, had Congress intended "lien avoidance to have such a broad and sweeping application, it would have permitted lien avoidance in all goods 'held primarily for the personal, family or household use of the debtor or dependent of the debtor.'"²¹⁰ The court clearly thought the *type* aspect of the definition limited its *use* aspect. Its conclusion in that regard is the exact opposite of that of the "expansive" approach courts. On the merits, the *McGreevy* court held that, as a matter of law, firearms could not be household goods and therefore, the debtors' use was irrelevant.²¹¹

Although the Fourth Circuit affirmed, it rejected both the district court's application of the "necessity" standard²¹² and its holding that firearms could never be household goods.²¹³ Following a close examination in which it evaluated and found wanting both the "necessity" approach²¹⁴ and the "expansive" approach,²¹⁵ it announced a new definition "more faithful to congressional intent as evidenced in the language of § 522(f)."²¹⁶

²⁰⁶ *McGreevy v. ITT Fin. Servs. (In re McGreevy)*, 130 B.R. 200, 203 (D. Md. 1991), *aff'd*, 955 F.2d 957 (4th Cir. 1992) (quoting *Barnes v. ITT Fin. Servs. (In re Barnes)*, 117 B.R. 842, 847 (Bankr. D. Md. 1990)).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *See id.* at 204.

²¹² The Fourth Circuit characterized the lower courts as having applied the "necessity" standard. *See McGreevy v. ITT Fin. Servs.*, 955 F.2d 957 (4th Cir. 1992). However, both the district court in *McGreevy* and the bankruptcy court in *Barnes*, the opinion on which the district court relied in *McGreevy*, defined exempt property as that *reasonably* necessary for a debtor's fresh start. *See McGreevy*, 130 B.R. at 203; *Barnes*, 117 B.R. at 847.

²¹³ *See McGreevy*, 955 F.2d at 962.

²¹⁴ *See id.* at 959-60 & nn.6-7.

²¹⁵ *See id.* at 960-61 & n.8.

²¹⁶ *Id.* at 959.

The Fourth Circuit rejected the "necessity" approach for two reasons. It had no statutory basis and it was underinclusive.²¹⁷ The court criticized the "necessity" courts for improperly extrapolating the necessity requirement from a passage in the House Report recognizing a "[f]ederal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start."²¹⁸ According to the court, § 522(f)(1)(B)²¹⁹ allows a debtor to avoid liens in *all* household goods, not just those necessary to her fresh start. The court concluded that the breadth of the statutory language meant that Congress had considered all household goods of a debtor to be important to her fresh start.²²⁰

Although acknowledging that the "expansive" approach was "grounded at least generally in the statutory text,"²²¹ *McGreevy* rejected it because it was overinclusive.²²² To exercise the § 522(f)(1)(B)(i) avoidance power, a debtor had to do more than show that she used the property in or near her home. According to the court, she also had to show a "functional nexus between the good and the household," with the goods being "used to support and facilitate daily life within the house."²²³ To illustrate its holding, the court noted that pots and pans were household goods, unlike a model car collection. Pots and pans "support[ed] and facilitate[d] daily household living."²²⁴ A model car collection did not.²²⁵

This emphasis on "supporting and facilitating daily household living" is central to the Fourth Circuit's attempt to create a middle ground. Although one could question the court's assertion that a model car collection would not satisfy that standard,²²⁶ the real diffi-

²¹⁷ See *id.* at 961.

²¹⁸ *Id.* (quoting H.R. REP. NO. 95-595, at 126, (1978), reprinted in 1978 U.S.C.A.N. 5963, 6087).

²¹⁹ Section 522(f)(2)(A) at the time of the opinion.

²²⁰ See *McGreevy*, 955 F.2d at 960. To paraphrase the thrust of a comment by Judge William Hillman: "what part of ALL don't you understand?"; *In re Legal Data Sys., Inc.*, 135 B.R. 199, 201 & n.1 (Bankr. D. Mass. 1991).

²²¹ *McGreevy*, 955 F.2d at 961.

²²² See *id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *id.*

²²⁶ Imagine the following scenario. A debtor who resides in the Fourth Circuit files for bankruptcy relief. Some time before bankruptcy, he gives Finance Company a nonpossessory, nonpurchase money security interest in all his personal property. Among his assets is a matchbook car collection he laboriously amassed during his childhood. He allows his 5-year-

culty with the *McGreevy* approach is best illustrated by applying the standard to the property at issue in the case, the debtors' firearms. In applying the "support and facilitate daily household living" standard to a shotgun and rifle, the Fourth Circuit focused on the debtors' use of the firearms. The court noted that the McGreevys lived in a townhouse, Mr. McGreevy used the rifle primarily to hunt deer in Maryland, Pennsylvania, and West Virginia, and he used both the rifle and the shotgun for target practice.²²⁷ Although one of the debtors testified that the firearms were also available to protect them and their home, the court dismissed this as "an afterthought."²²⁸ The court concluded the firearms were not household goods because the McGreevys "usually, if not exclusively" used the firearms away from home, and did not use them "to support or facilitate their day-to-day household living."²²⁹

The *McGreevy* court's conclusion is less "evident" than it would have us believe. First of all, Mr. McGreevy's hunting probably put food on the table, which certainly "support[ed] or facilitate[d] [the McGreevys'] daily household living." Similarly, whether an "afterthought" or not, having firearms available for self-defense also "support[s] or facilitate[s] [one's] daily household living." Moreover, like the courts that adopt the "necessity" approach, the *McGreevy* approach substitutes the judge's values and judgment for the debtor's values and judgment. A judge who hunted, or who was concerned with personal safety, might quickly conclude the firearms were household goods under *any* approach.

The *McGreevy* standard, currently in vogue with other courts,²³⁰ poses several problems. First of all, it seems no more rooted in the

old daughter to play with it, although he has never formally given her title to it. (had he done so, the collection would probably be safe from his creditors). See *In re Biancavilla*, 173 B.R. 930, 932 (Bankr. D. Idaho 1994) (holding that toys and video games debtors bought for minor son are not part of bankruptcy estate). Under the Fourth Circuit's test, Finance Company's lien is unavoidable and the chapter 7 trustee will take the collection and sell it at auction unless debtor (or debtor's daughter) redeems it. See 11 U.S.C. § 521(2) (1994). Doesn't playing with that collection "support and facilitate" the daughter's "daily household living"?

²²⁷ See *McGreevy*, 955 F.2d at 962.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See, e.g., *Fraley v. Commercial Credit (In re Fraley)*, 189 B.R. 398 (W.D. Ky. 1995); *In re Cottingham*, No. 95-32441-B, 1996 WL 288393 (Bankr. W.D. Tenn. Apr. 25, 1996); *In re French*, 177 B.R. 568 (Bankr. E.D. Tenn. 1995); *In re Farson*, 172 B.R. 17 (Bankr. N.D. Ohio 1994); *In re Raines*, 161 B.R. 548 (Bankr. N.D. Ga. 1993); *In re Keeton*, 161 B.R. 410 (Bankr. S.D. Ohio 1993).

language of §§ 522(d)(3) or (d)(f) than the "necessity" test. The court buttressed its position by citing to a Social Security Administration regulation that defined "household goods" as:

[H]ousehold furniture, furnishings and equipment which are commonly found in or about a house and are used in connection with the operation, maintenance and occupancy of the home. Household goods would also include the furniture, furnishings and equipment which are used in the functions and activities of home and family life as well as those items which are for comfort and accommodation.²³¹

Given the Fourth Circuit's insistence that the relevant inquiry is to determine the meaning of *congressional* language,²³² its own reliance on an administrative agency's definition is questionable. Certainly it does not advance the inquiry into congressional intent. As noted, the FTC has also promulgated a definition of household goods.²³³ Courts have refused to adopt that definition in interpreting the scope of § 522(f)(1)(B)(i).²³⁴

²³¹ 20 C.F.R. § 416.1216 (1994). The regulation also defines "personal effects" as "clothing, jewelry, items of personal care, individual education and recreational items such as books, musical instruments, and hobbies." *Id.*

²³² See *McGreevy*, 955 F.2d at 960.

²³³ The FTC defines "household goods" as:

(i) Household goods. Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included within the scope of the term "household goods":

(1) Works of art;

(2) Electronic entertainment equipment (except one television and one radio);

(3) Items acquired as antiques; and

(4) Jewelry (except wedding rings).

(j) Antique. Any item over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character.

16 C.F.R. § 444.1 (1997). Under the FTC regulations, a creditor who takes a nonpossessory, nonpurchase money security interest in household goods has committed an unfair trade practice. See 16 C.F.R. § 444.2.

²³⁴ See *Smith v. Norwest Fin. (In re Smith)*, 57 B.R. 330, 331 (Bankr. N.D. Ga. 1986) ("[T]his Court will not be bound by the rulings of an agency unless directed by Congress to follow same . . ."); see also *Barrick v. Avco Consumer Discount Co. (In re Barrick)*, 95 B.R. 310, 312 (Bankr. M.D. Pa. 1989); *Lanzoni v. ITT Fin. Servs. (In re Lanzoni)*, 67 B.R. 58, 60 (Bankr. W.D. Mo. 1986); *In re Miller*, 65 B.R. 263, 265 (Bankr. W.D. Mo. 1986); *In re Vaughn*, 64 B.R. 213, 216 (Bankr. S.D. Ind. 1986); *Boyer v. ITT Fin. Servs. (In re Boyer)*, 63 B.R. 153, 159 (Bankr. E.D. Mo. 1986).

Although courts are increasingly adopting the *McGreevy* test,²³⁵ the millennium has not occurred. Courts continue to reach conflicting results. And so, applying the *McGreevy* test, the court in *In re Farson*²³⁶ concluded that the debtors could avoid the creditor's security interest in a VCR and an air conditioner used for their son's asthma, but not in another air conditioner and a video camera.²³⁷ But in *Fraley v. Commercial Credit (In re Fraley)*,²³⁸ the court relied on *McGreevy* to allow the debtor to avoid the creditor's security interest in a camcorder, a stereo set, and an aquarium.²³⁹ One court allowed the debtors to avoid a lien in a 35" television, reasoning that the "television set, although a second one, presumably provides entertainment and enlightenment to the debtor, her family and guests in a different part of the residence from the first set. This makes it a household good subject to lien avoidance," even though the family had another.²⁴⁰ In practically the same breath, the court declined to allow the debtors to avoid a lien in a bicycle.²⁴¹ Some courts applying the *McGreevy* test have avoided liens in water softeners,²⁴² handguns,²⁴³ cameras and accessories,²⁴⁴ and stereos.²⁴⁵ Applying the same test, courts have declined to allow lien avoidance in chain saws,²⁴⁶ bicycles,²⁴⁷ and firearms of various sorts.²⁴⁸ And, one supposes, so it will continue.

All courts agree that bankruptcy should not leave debtors destitute.²⁴⁹ Debtors should not have "to sell apples on the street in order to survive."²⁵⁰ Courts disagree on where to draw the line. For

²³⁵ See sources cited *supra* note 230.

²³⁶ 172 B.R. 17 (Bankr. N.D. Ohio 1994).

²³⁷ See *id.* at 19.

²³⁸ 189 B.R. 398 (W.D. Ky. 1995).

²³⁹ See *id.*

²⁴⁰ *In re Elst*, 210 B.R. 790, 793 (Bankr. E.D. Wis. 1997).

²⁴¹ See *id.*

²⁴² See *In re Keeton*, 161 B.R. 410 (Bankr. S.D. Ohio 1993).

²⁴³ See *In re Raines*, 161 B.R. 548 (Bankr. N.D. Ga. 1993).

²⁴⁴ See *In re French*, 177 B.R. 568 (Bankr. E.D. Tenn. 1995).

²⁴⁵ See *In re Cottingham*, 1996 WL 288393, No. 95-32441-B (Bankr. W.D. Tenn. Apr. 25, 1996).

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See *id.* (denying lien avoidance of handgun); *In re French*, 177 B.R. 568 (Bankr. E.D. Tenn. 1995) (denying lien avoidance of handgun and shotgun).

²⁴⁹ See *In re Latham*, 182 B.R. 479, 481 (Bankr. W.D. Va. 1995).

²⁵⁰ *In re Larson*, 203 B.R. 176, 180 (Bankr. W.D. Okla. 1996).

some courts, camcorders, VCRs, lawnmowers, cameras, multiple televisions and radios, camping equipment, guns, and so forth, are hardly necessary to protect a debtor from destitution. They are nice, but unlike beds, stoves, refrigerators, clothing, etc., they are not critical for daily living. Other courts take an expansive approach and, in the process, irk those in the opposing camp for giving debtors a head start. The "more than spartan but less than all consumer goods" courts struggle to find a middle ground. The absence of congressional definition or guidance is regrettable. It has required courts to dedicate considerable resources to answer the unanswerable—which goods are household goods for purposes of § 522(f)(1)(B)(i) lien avoidance?

Each of the three basic judicial approaches to lien avoidance has deficiencies. All three appear to reflect differing judicial attitudes toward the question of how "fresh" a debtor's fresh start should be. The "necessity" and *McGreevy* approaches allow judges to impose their own view of which property a debtor should have when she emerges from bankruptcy. The "necessity" approach fails to give debtors the "adequate possessions" that Congress had intended. It rewrites the statute to add a "necessity" requirement. The *McGreevy* approach ignores the statutory language. Sections 522(d)(3) and 522(f)(1)(B)(i) both describe goods held for *personal and family* use as well as goods held for household use.²⁵¹ Goods held for personal and family use are also potentially exempt and, hence, potentially covered by § 522(f)(1)(B)(i).

Neither the "necessity" nor the *McGreevy* approaches are particularly helpful in determining whether any specific item of property is subject to § 522(f)(1)(B). Because neither approach creates a bright line test for lien avoidance, each creates the possibility of significant litigation. Debtors in bankruptcy cannot afford litigation.²⁵² The specter of litigation and its costs encourage settlement, be it reaffirmation of the debt or surrender of the collateral, the very evils which Congress sought to avoid in enacting § 522(f)(1)(B)(i). Ironically, the uncertainty surrounding the proper definition of "household goods" has undermined its intended effect.

²⁵¹ See 11 U.S.C. § 522(d)(3), (f)(1)(B)(i) (1994).

²⁵² Because of the high volume, low cost nature of chapter 7 practice, debtors generally do not retain counsel beyond the § 341 meeting with creditors. Any lien avoidance motion will therefore add significantly to the cost of their bankruptcy.

Unlike the "necessity" and *McGreevy* approaches, the "expansive" approach does not substitute the judge's view of which property a debtor should be able to keep. The "expansive" approach leaves that call to debtors. They know better than a judge which goods are most important to them and their new beginning. Moreover, a broad interpretation of what goods are covered is a reasonable interpretation of the statutory language *as written*. It does not add words or create complicated nexus requirements. Although never articulated as such, it construes the "use" aspect of the definition to modify its "type" aspect. A chair or sofa, although a household good, is only covered if the debtor holds the sofa or chair for personal, family, or household use.

The problem with the "expansive" approach is not its broad reading of which goods are covered. Its flaw is its failure to acknowledge the importance of the monetary cap in § 522(d)(3). "Expansive" courts allow the breadth of the goods covered to spill over into and affect the breadth of the avoidance power itself. The "expansive" approach may give relatively prosperous debtors a "head start." Congress intended debtors to emerge from bankruptcy with a limited quantity of goods or money. It stated those limits in §§ 522(d)(3) and (d)(4).

V. THE SOLUTION

In a 1977 statement to the Senate Judiciary Committee, Beneficial Corporation set forth some of the consumer credit industry's concerns about the proposed Bankruptcy Code.²⁵³ Although Beneficial saw some positive aspects of the Senate Bill over the House Bill, it also complained that the Senate Bill "propose[d] far-reaching, radical changes in the bankruptcy law."²⁵⁴ One such objectionable change was making security interests in certain personal property unenforceable. Beneficial thought the proposed language potentially would invalidate nonpossessory, nonpurchase money security interests in all consumer goods. It stated:

²⁵³ See *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Judiciary*, 95th Cong., S. 2266, 2276-81 (1978), reprinted in A&P Hearings S. 2266 at 1204-09 [hereinafter *Hearings*].

²⁵⁴ *Id.* at 2278, reprinted in A&P Hearings S. 2266 at 1206.

Section 522(e)²⁵⁵ of new Title 11 would render unenforceable any non-purchase money security interest in household goods, appliances or jewelry to the extent of a bankrupt's exemptions. In practical terms, this would mean that consumer lenders could no longer rely on security interests in various household goods and furnishings as collateral for their loans in the event of bankruptcy.

We submit that the language of section 522(e)(2)(A) [522(f)(1)(B)(i)] is so broad and uncertain as to invite abuse. It will operate to deny credit to those very groups who often need it most. As presently drafted, "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor," *would encompass almost all personal property*. Clearly, jewelry, musical instruments, certain luxury appliances, and luxury items of wearing apparel are not "necessities" or "essentials" of life. This provision will permit certain individuals to maintain a self-indulgent life style and yet disregard their proper role as responsible members of society. While we would prefer that this prohibition be entirely stricken from the bill, we urge, at a minimum, that it be narrowed to apply only to items which are, in fact, necessities or essentials of life.²⁵⁶

Thus, publicly at least, a significant player in the consumer credit industry argued to Congress that the primary flaw of the proposed lien avoidance power was the breadth of its coverage. The proposed power would allow debtors to avoid nonpossessory, nonpurchase money security interests in *almost all personal property*.

That charge did not cause Congress to recoil in horror or to scurry back to the drawing boards. Congress did not tinker at all with the language nor did it explain in any of its Reports that it intended to limit the lien avoidance power to property that was necessary or essential to life.²⁵⁷ Rather, Congress enacted into law the very same language that had caused Beneficial to wail. The "expansive" approach courts might take comfort in knowing a leading creditor representative agrees with their interpretation of the statute!

So how *should* courts interpret "household goods" for purposes of § 522(f)(1)(B)(i)? We know the statute is malleable. It has al-

²⁵⁵ This became § 522(f) when Congress finally enacted the Code.

²⁵⁶ *Hearings*, *supra* note 253 at 2279-88, reprinted in A&P Hearings S. 2266 at 1207-08 (emphasis added).

²⁵⁷ See *supra* part II.D of this Article.

lowed courts to reach conflicting conclusions under various tests, and sometimes even under the same test.²⁵⁸ Therefore, statutory interpretation alone will not provide a satisfactory answer. Perhaps a better approach is to ask what evil Congress sought to control with § 522(f)(1)(B)(ii)? To the extent the legislative history tells us anything, it tells us that Congress wanted to make sure that debtors had a meaningful fresh start.²⁵⁹ In part, that meant protecting a debtor's ability to keep reasonable amounts of personal property. In other part, it meant reducing the need for reaffirmation agreements to do so. Along those lines, Congress wanted to minimize, if not eliminate, the leverage that nonpurchase money secured creditors enjoyed under the Act regarding otherwise exempt property.²⁶⁰ Indeed, one driving purpose behind § 522(f)(1)(B)(i) was to readjust the balance between those secured creditors and their debtors.²⁶¹ That readjustment would protect a debtor's exemption rights without the need to reaffirm debts. It would thereby protect the meaningfulness of bankruptcy relief.

Courts that narrowly define § 522(f)(1)(B)(i)'s reach deny debtors the full measure of protection Congress intended in § 522(d). They keep the balance tilted heavily in favor of nonpurchase money secured creditors. For items that are not "bare necessities," nonpurchase money creditors still enjoy the leverage to extract reaffirmation agreements by insisting on surrender of the collateral. Indeed, under the "necessity" approach, debtors who have given nonpossessory, nonpurchase money security interests in all of their worldly goods may fare little better than they would have under the Act.

Moreover, the uncertainty of it all invites litigation, but most consumer debtors cannot afford to litigate. Too many of them barely manage to scrape together the filing fee and a retainer for their attorneys. Many high volume chapter 7 attorneys charge relatively low fees and may be reluctant to prosecute a lien avoidance

²⁵⁸ See *supra* part IV of this Article.

²⁵⁹ Section 522(f) protects "the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid . . . a nonpurchase money security interest in certain household and personal goods." H.R. REP. NO. 95-595, at 362 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6318. The Senate Report's section-by-section analysis used identical language. See S. REP. NO. 95-989, at 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862 (the Senate version labeled this § 522(e)).

²⁶⁰ See *supra* part II.D of this Article.

²⁶¹ See *supra* part II.D of this Article.

action, especially in a "necessity" jurisdiction. Thus, as under the Act, many debtors who have given nonpurchase money security interests have just two choices: reaffirm the debt or abandon the property to the creditor. This, too, undermines the congressional game plan to provide a meaningful fresh start—adequate possessions as defined by § 522(d) and the discharge of all dischargeable debt.

The best solution to the current problem is congressional action. Congress should amend § 522(d)(3) to allow debtors to exempt all consumer goods (as defined by Article Nine) that are not already exempt under other subsections of § 522(d), i.e., all consumer goods other than jewelry, motor vehicles, health aids, and mobile homes used as residences. To prevent debtors from getting a "head start," § 522(d)(3)'s existing monetary cap should continue to apply. In addition, Congress should amend § 522(f)(1)(B)(i) to make clear that its avoidance power is aimed at protecting a debtor's exemption rights under § 522(d)(3). Rather than restate the property subject to the avoidance power, § 522(f)(1)(B) should authorize a debtor to avoid a nonpossessory, nonpurchase money security interest to the extent that it impairs *an exemption right as described in § 522(d)(3) or (d)(4)*. That would establish beyond a doubt that the value limitations stated in § 522(d) apply in § 522(f) avoidance actions. This approach would allow debtors, rather than the court, to choose what property is most important for their fresh start, not their head start.

This solution corresponds with one of the recent Bankruptcy Review Commission's most important recommendations: "With respect to property of the estate not otherwise exempt by other provisions, a debtor *should be permitted to retain up to \$20,000 in value in any form*. A debtor who claims no homestead exemption should be permitted to exempt an additional \$15,000 of property in any form."²⁶² The Commission actually goes further than my proposal in two respects. First, it allows debtors to exempt *any* property not specifically exempted in another provision, i.e., it does not limit the exemption to tangible personal property. Second, it places a higher cap on the value of the property—\$20,000 or \$35,000 if the debtor does not claim a homestead exemption.

²⁶² *Supra* note 79, at 133 (emphasis added).

In fact, in another proposal, the Bankruptcy Review Commission has recommended a more aggressive, one might even say "radical," solution to the problem identified by its predecessor Commission. It wants to invalidate *purchase money security interests* in exempt goods whose value is less than \$500. According to the Commission:

Section 522(f) should provide that a creditor claiming a purchase money security interest in exempt property held for personal or household use of the debtor or a dependent of the debtor in household furnishings, wearing apparel, appliances, books, animals, crops, musical instruments, jewelry, implements, professional books, tools of the trade or professionally prescribed health aids for the debtor or a member of the debtor's household must petition the bankruptcy court for continued recognition of the security interest. The court shall hold a hearing to value each item covered by the creditor's petition. If the value of the item is less than \$500, the petition shall not be granted; if the value is \$500 or greater, the security interest would be recognized and treated as a secured loan in Chapter 7 or Chapter 13.²⁶³

In effect, the recent Commission has expanded (considerably) on a thought begun by the 1970 Bankruptcy Commission.²⁶⁴

Assuming Congress is unlikely to desert its friends in the consumer credit industry, a judicial solution is possible. Courts should take Congress at its word. Section 522(f) was intended to protect a debtor's exemption rights from overreaching creditors. To achieve that goal, courts should read § 522(f)(1)(B)(i) in conjunction with §§ 522(d)(3), (d)(4), and (d)(5).²⁶⁵ In effect, debtors should be

²⁶³ *Id.* at 169.

²⁶⁴ Although superficially attractive, especially because it shifts the burden of proof to the creditor, this recommendation would probably not end the current litigation over whether a security interest will survive in a particular item of property. In fact, it may actually encourage more litigation, especially in jurisdictions that follow the "necessity" approach. The recommendation eliminates the current symmetry between § 522(d)(3) and § 522(f)(1)(B)(i).

²⁶⁵ Section 522(d)(3)-(5) provides:

(d) The following property may be exempted under subsection (b)(1) of this section:

....

(3) The debtor's interest, not to exceed \$400 in value in any particular item or \$8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments,

able to exempt all tangible personal property except cars and mobile homes up to the stated values so long as they hold that property for personal, family or household use. Similarly, they should be able to avoid nonpossessory, nonpurchase money security interests in that property to the extent the security interest impairs their exemption. The overall value of a debtor's exempt property, including property in which a lien has been avoided, should not exceed the limits set forth in § 522(d). To the extent it does, the debtor will have to abandon the property to the trustee or the creditor, depending on the circumstances.

This modified version of the "expansive" approach would allow debtors to take full advantage of their exemptions under § 522(d). They would not be stymied by the limitations imposed by "necessity" courts. Moreover, it would eliminate the need for courts to ponder whether something is necessary, reasonably necessary, or has a nexus to the household. It would also eliminate judicial paternalism in deciding what goods a debtor should be entitled to keep. Finally, limiting lien avoidance to a maximum of \$400 per item²⁶⁶ would silence the cries of "head start."

For goods worth less than \$400, creditors might even agree to forsake their liens without litigation. If a debtor could exempt all consumer goods under \$400 per item subject to an \$8,000 aggregate value, the only remaining issue would be the debtor's use. In most cases, use is obvious and creditor litigation is therefore futile, if not frivolous and sanctionable. A broad view of what "household goods" encompasses would also create predictability and certainty and thereby facilitate counseling of debtors. Such certainty with a corresponding decrease in litigation would serve Congress's other policy goal in enacting § 522(f)(1)(B)(i): reducing the potential leverage of creditors holding nonpossessory, nonpurchase money security interests in personal property of little value. Certainty

that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed \$1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value \$800 plus up to \$7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

11 U.S.C. § 522(d) (1994).

²⁶⁶ See 11 U.S.C. § 522(d)(3).

would also prevent many reaffirmations and thereby protect the meaningfulness of the discharge.

This proposed solution is not perfect. No solution ever is. It would not eliminate all § 522(f)(1)(B)(i) litigation. The value of particular consumer goods may exceed \$400. If so, the creditor might insist on a valuation. If the court determines that the value does exceed \$400, the question of partial or total lien avoidance, until now mercifully absent from § 522(f)(1)(B)(i) litigation, will arise.²⁶⁷ Given that most consumer goods, other than cars, jewelry, and mobile homes, are of low value, this is a small price to pay.

How would this proposal work for states that have opted out? Debtors would be bound by the value limits of consumer goods as set by the relevant state statute. These are generally lower than those stated in § 522(d).²⁶⁸ If the state exemption statute gives an unlimited household goods exemption,²⁶⁹ then debtors in those states should be able to avoid all nonpurchase money security interests in that property. The situation will resemble that regarding lien avoidance in tools of the trade before 1994.²⁷⁰ If that leads to absurd

²⁶⁷ See *supra* part IV of this Article for a discussion of the holdings involving § 522(f)(1)(B)(i).

²⁶⁸ Thus, although Georgia has opted out of the federal bankruptcy exemption scheme, its exemption statute substantially tracks § 522(d), but limits the value of the exempt goods. So, in Georgia, a debtor may exempt her interest in "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor" but only to a cap of \$200 per item, or \$3,500 total. See GA. CODE ANN. § 44-13-100(a)(4) (1991). Maine similarly allows an exemption in "[t]he debtor's interest, not to exceed \$200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor." ME. REV. STAT. ANN. tit. 14, § 4422(3) (West Supp. 1997). As for jewelry, Maine allows exemption of "[t]he debtor's aggregate interest, not to exceed \$750 in value, in jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor and the debtor's interest in a wedding ring and an engagement ring." title 14, § 4422(4).

²⁶⁹ Although no state has an unlimited exemption in household goods as such, several states have unlimited exemptions in some categories of household goods. See, e.g., N.H. REV. STAT. ANN. § 511:2(I)-(II) (1997); N.Y. C.P.L.R. 5205(a)(1) (McKinney 1997); S.D. CODIFIED LAWS § 43-45-2(1), (5) (Michie 1997); UTAH CODE ANN. § 78-23-5(1)(g)-(j) (1996).

²⁷⁰ Some states do not put a value limit on their tools of the trade exemptions. Not surprisingly, after 1978, debtors took advantage of § 522(f) to avoid nonpossessory, nonpurchase money security interests in such collateral. See, e.g., *Rainier Equip. Fin., Inc. v. Taylor* (*In re Taylor*), 73 B.R. 149 (B.A.P. 9th Cir. 1987), *aff'd*, 861 F.2d 550 (9th Cir. 1988) (allowing debtor to avoid nonpurchase money security interest in logging truck worth \$52,000); *In re Dykstra*, 80 B.R. 128 (Bankr. N.D. Iowa 1987) (permitting debtor to avoid nonpurchase money security interest in farm equipment worth \$20,000). In 1994, Congress amended

results, the legislatures of those states must share the blame with Congress.

Someone, either Congress or the courts, needs to put an end to this wasteful, harmful, and ultimately silly litigation. Courts have better things to do than to decide whether a camcorder is necessary to life, merely useful, or so supports and facilitates daily life within the house that a nexus is formed between it and the household.

POSTSCRIPT

Apparently, great minds think alike, at least on the need to define "household goods." Fueled by consumer credit industry lobbying expenditures in excess of forty million dollars,²⁷¹ the 105th Congress nearly passed the most significant changes in consumer bankruptcy law since 1978.²⁷² The proposed changes included a definition of "household goods" for purposes of § 522(f) lien avoidance. Without going into all the gory details of the different proposals bandied back and forth, the final Conference Report proposed to amend § 522(f)(1)(B) by adding the following definition as subsection (ii):

"[H]ousehold goods" shall mean for the purposes of this subparagraph (B) [§ 522(f)(1)(B)] clothing; furniture; appliances; one radio; one television; one VCR; linens; china; crockery; kitchenware; educational materials and educational equipment primarily for the use of minor dependent children of the debtor, but only one personal computer only if used primarily for the education or entertainment of such minor children; medical equipment and supplies; furniture exclusively for the use of minor children, elderly or disabled

§ 522(f) to limit lien avoidance in tools of the trade. The actual statutory language is impenetrable. For a discussion of the 1994 amendments to lien avoidance powers for tools of the trade, see David Gray Carlson, *Security Interests on Exempt Property after the 1994 Amendments to the Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 57, 76-83 (1996) and Margaret Howard, *Avoiding Powers and the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 259, 279-81 (1995).

²⁷¹ See Katharine Q. Seelye, *Republicans Agree to New Limits on Consumer Bankruptcy Filings*, N.Y. TIMES, Oct. 8, 1998, at A1, A21.

²⁷² The House passed H.R. 3150, the "Bankruptcy Reform Act of 1998," on June 10, 1998. The Senate passed a similar bill, S. 1301, the "Consumer Bankruptcy Reform Act of 1998," on September 23, 1998. A House-Senate Conference Committee reconciled the two bills as H.R. 3150, the "Bankruptcy Reform Act of 1998." See H.R. REP. NO. 105-794 (1998). See also *supra* note 133. Although the House approved the revised bill on October 9, 1998, the Senate did not act on it, and the bill died with the adjournment of Congress.

dependents of the debtor; and personal effects (including wedding rings and the toys and hobby equipment of minor dependent children) of the debtor and his or her dependents: Provided, that, the following are not included within the scope of the term "household goods":

- (aa) works of art (unless by or of the debtor or his or her dependents);
- (bb) electronic entertainment equipment (except one television, one radio, and one VCR);
- (cc) items acquired as antiques;
- (dd) jewelry (except wedding rings);
- (ee) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.²⁷³

With some modifications, this definition adopts the FTC definition of household goods, a definition courts have steadfastly declined to adopt, presumably because it is too narrow.²⁷⁴

Although a definition would be nice in the abstract, no definition at all is preferable to the one proposed. It is deeply flawed. If enacted, it will severely weaken the § 522(f)(1)(B) avoidance power. That, in turn, will constrict a debtor's ability to claim exemptions. The inability to exercise their exemption rights will push more debtors into ill-considered reaffirmations. In short, the proposed definition will undermine many a debtor's fresh start. In addition, the definition's reference to "personal effects" will prompt litigation on a new front.

In analyzing the proposed definition's potential impact, it is important to recall § 522(f)(1)(B)'s primary purpose. Congress wanted to protect a debtor's ability to claim exemptions and thereby protect the debtor's fresh start. The § 522(f)(1)(B) avoidance

²⁷³ H.R. 3150, 105th Cong. § 148 (1998) ("Definition of household goods and antiques") (emphasis added). See also *supra* note 133.

²⁷⁴ See *supra* notes 124-34 and accompanying text for a discussion of the FTC regulations. The Conference Committee definition differs significantly from similar provisions in both the House and Senate Bills. The relevant section in the final House Bill used a less restrictive version of the FTC definition. See H.R. 3150, 105th Cong. § 122 ("Definition of household goods and antiques"). The final Senate Bill delegated the task of defining household goods to the FTC. See S. 1301, 105th Cong. § 317 (1998) ("Definition of household goods and antiques"). Finally, unlike the Conference bill, the House and Senate versions applied their definitions to § 522(d)(3) as well as to § 522(f)(1)(B).

power is directed at precisely the same class of goods described by the § 522(d)(3) and (d)(4) tangible personal property exemptions. Congress wanted to allow debtors to exempt low value, used consumer goods. An enforceable, i.e., unavoidable security interest in such goods would prevent that. Congress enacted § 522(f)(1)(B) to allow debtors to avoid security interests that creditors took solely for their hostage value: the ability to extract reaffirmations from the debtors.

Defining "household goods" only for § 522(f) purposes will sever the connection between goods a debtor can exempt under § 522(d) and goods in which a debtor can avoid a nonpossessory, nonpurchase money security interest. Limiting the § 522(f) avoidance power to a narrower class of goods effectively limits a debtor's exemption, because an enforceable security interest in goods trumps a debtor's exemption rights in them. Presumably, creditors will take a security interest in all consumer goods not covered by the definition and thereby defeat a debtor's ability to claim exemptions in them. For instance, § 522(d)(3) would continue to allow debtors to exempt low-value second TVs or radios. But the exemption would be illusory if the second TV or radio were subject to a nonpossessory, nonpurchase money security interest, because the debtor could not avoid the security interest in it.

Who would be hurt by such a result? Probably not the middle class debtors. Unlike poorer debtors, middle class debtors rarely borrow from finance companies. Therefore, they rarely grant blanket security interests in their personal property. They are much more likely to overextend themselves on their gold or platinum cards. As a result, they would be able to claim § 522(d) exemptions in their second TVs, radios, etc., because those goods would not be subject to a security interest.

The proposed definition would hurt debtors who had to borrow from finance companies and grant blanket security interests in their goods in exchange. The proposed definition would give such finance companies considerable leverage in their debtors' bankruptcies. The scenario Congress sought to eliminate in 1978 would recur. Attorneys for such creditors would once again meet debtors in the courthouse hall to ask, "When do you want us to pick up the second TV (or radio, or CD player, etc.)?"²⁷⁵ Unable to avoid the

²⁷⁵ See *supra* note 39 and accompanying text (discussing how this was common practice under the Act).

security interest, debtors would have to choose among abandoning the property, reaffirming the debt, or, least likely, redeeming the property from the security interest.²⁷⁶

The proposed definition would have other negative effects, in addition to encouraging abusive reaffirmations. It certainly would not decrease litigation, the purpose behind this Article's call for a definition. Although the proposed definition excludes certain property from the category of household goods, it does not restructure § 522(d)(3) or § 522(f)(1)(B). It therefore leaves open such questions as whether the category of "household goods" is only one of a string of subcategories or constitutes the primary category of goods. Moreover, the proposed definition adds a new category of undefined goods, "personal effects," whatever *that* encompasses.

Ironically, the proposed definition does nothing to resolve the principal issues that have divided the courts. It does not decide whether goods like firearms, tools, and recreational equipment are household goods. Often such goods are substantially more valuable than the electronic entertainment equipment that aroused the ire of the consumer credit industry. And thus, the definition would not quell the litigation. Indeed, it could backfire if courts seek to protect debtors from ill-considered legislation.

The definition raises other problems as well. For example, it excludes jewelry (except wedding rings) from the definition of household goods. Yet § 522(d)(4) states a separate exemption status for jewelry, and the proposal does not touch a debtor's § 522(f)(1)(B) right to avoid a nonpossessory, nonpurchase money

²⁷⁶ The Conference Committee bill contained another unpleasant surprise intended to further strengthen secured creditor leverage. The bill proposed to amend § 506(a) to value an allowed secured claim in consumer goods at the retail price a merchant would charge for such goods:

Section 506(a) of title 11, United States Code, is amended by adding at the end the following:

In the case of an individual debtor under chapters 7 and 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of filing the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purpose, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

H.R. 3150, 105th Cong. § 125 (1998) ("Fair valuation of collateral"). Although this section's clear intent is to increase the value of goods if a debtor either reaffirms the debt or redeems the collateral, it is hard to see how this section would operate in practice. Most retail merchants do not have a used goods department.

security interest in jewelry. Defining "household goods" to exclude jewelry is therefore either meaningless or intended *sub silentio* to modify § 522(d)(4) by eliminating § 522(f)(1)(B)'s protection for jewelry. Neither interpretation says much for the care with which the 105th Congress approached bankruptcy "reform."

In short, the proposed definition would raise many more problems than it solves. It moves in the opposite direction from the spirit which animated § 522(f)'s initial enactment. Perhaps evenhandedness is too much to expect, but let us hope that the next Congress approaches exemption reform in a more informed and careful way.