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The Ostrich Approach to Bankruptcy — Court-Sanctioned State Denial of Debtors' Lien Avoidance Privilege Defeats the Intent of Congress

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COMMENT

THE OSTRICH APPROACH TO BANKRUPTCY—COURT-SANCTIONED STATE DENIAL OF DEBTORS' LIEN AVOIDANCE PRIVILEGE DEFEATS THE INTENT OF CONGRESS

I. INTRODUCTION

In 1970 Congress began an eight-year effort to overhaul the federal bankruptcy system.[1] Congress was concerned that the then operative bankruptcy system was not fair and uniform.[2] In effect the system did not always rehabilitate, but often would devastate, the bankrupt debtor, denying him or her any appreciable means with which to make a fresh start.[3] The congressional commission that was established to propose changes to the Bankruptcy Code reported[4] that rehabilitation of a bankrupt debtor was a primary goal of a bankruptcy system.[5] The commission believed that this goal could best be achieved through enactment of proposed section 4-503 (the predecessor of section 522)—the proposed exemption provision of the Bankruptcy Reform Act of 1978.[6]

Congress supported the commission's objective and, in enacting section 522(b)[7] and 522(f)[8] of the code, implemented a mechanism

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1. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

2. *Id.* The ideals embodied in the commission's report are expressions of this nation's judeo-christian heritage. *See, e.g., Matthew* 18:23–35.

3. H.R. REP. NO. 595, 95th Cong., 1st Sess. 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 6087 [hereinafter cited as HOUSE REPORT]. The report stated that:

> [Today's exemption statutes] are outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors. The historical purpose of these exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. The purpose has not changed, but neither have the level of exemptions in many states. Thus, the purpose has largely been defeated.

Id.

4. REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Part 1, H.R. DOC. NO. 137, 93d Cong., 1st. Sess. (1973) [hereinafter cited as COMMISSION REPORT].

5. *Id.* at 71.

6. *Id.*, Part II, at 125–27.

7. 11 U.S.C. § 522(b) (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 353. Section 522(b) provides as follows:

purportedly designed to rehabilitate bankrupt debtors.[9] However, the purpose of section 522 can be defeated[10] when states legislatively opt out—as they are allowed to do under section 522(b)(1)[11]—of the federal scheme of exemptions,[12] and then deny their respective citizens a corresponding level of exemption. This failure to comply with congressional intent has been exacerbated by recent court decisions.[13] These

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Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1), or in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

Id.

8. 11 U.S.C. § 522(f) (1982). Section 522(f) provides that:

Notwithstanding any waiver of exemptions, the debtor may 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 under subsection (b) of this section, if such lien is—

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) 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;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

Id. Section 101(27) of the act defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(27).

9. *See infra* notes 83–87 and accompanying text.

10. *See* Hertz, *Bankruptcy Code Exemptions: Notes on the Effect of State Law*, 54 AM. BANKR. L.J. 339 (1980).

11. 11 U.S.C. § 522(b)(1) (1982).

12. *See infra* notes 45–48 and accompanying text.

13. *See, e.g.*, Pine v. Credithrift of America, Inc., 717 F.2d 281 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1711 (1984); McManus v. Avco Financial Services, Inc., 681 F.2d 353 (5th Cir.

decisions hold that not only can a state deny its citizens use of the federal scheme of exemptions, but that a state can also deny its citizens key, rehabilitative, lien avoidance provisions which are statutorily separate from the federal scheme of exemptions.[14] This matter is of concern not only because these court rulings defeat the intent of Congress, but also because United States Circuit Courts of Appeals have developed conflicting positions on the issue of whether a state can deny lien avoidance power, as well as the federal scheme of exemptions, to its citizens.[15]

The purpose of this comment is to examine the development of section 522 of the Bankruptcy Reform Act of 1978, and to analyze current judicial interpretations of the viability of the section 522(f) lien avoidance provisions after a state has opted out of the federal scheme of exemptions. In making this evaluation, this comment will focus on the legislative intent behind, and the statutory construction of, the act as well as on how the courts have dealt with each of these.

Of special concern in this evaluation is the approach taken by the bankruptcy courts in Ohio, which have upheld the viability of section 522(f),[16] despite the existence of Ohio legislation denying the exemption.[17] Two United States Circuit Courts of Appeals have taken the opposite position, holding that the application of section 522(f) lien avoidances is nullified when a state has opted out of the federal scheme of exemptions.[18] This comment will analyze the conflicting authorities and ultimately conclude that the approach taken by the bankruptcy courts in Ohio is the correct approach.

1982) (both courts holding that state statute could overpower the lien avoidance provisions of section 522(f)).

14. *See supra* note 13.

15. *See supra* note 13. *See also* Maddox v. Southern Discount Co., 713 F.2d 1526, 1530 (11th Cir. 1983) (the court stating that if faced with the question, it might resolve the conflict between state opt-out and section 522(f) viability opposite to the *McManus* and *Pine* holdings).

16. *See, e.g.*, Flege v. Akron City Hosp., 17 Bankr. 690 (Bankr. N.D. Ohio 1982); Phillips v. Household Finance Corp., 13 Bankr. 811 (Bankr. N.D. Ohio 1981); *In re* Bowles, 8 Bankr. 394 (Bankr. S.D. Ohio 1981).

17. Section 2329.662 of the Ohio Revised Code provides as follows: "Pursuant to the 'Bankruptcy Reform Act of 1978,' 92 Stat. 2549, 11 U.S.C. 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the 'Bankruptcy Reform Act of 1978,' 92 Stat. 2549, 11 U.S.C. 522(d)." OHIO REV. CODE ANN. § 2329.662 (Page 1981).

Section 2329.661(C) of the Ohio Revised Code states that: "Section 2329.66 of the Revised Code does not affect or invalidate any sale, contract of sale, conditional sale, security interest, or pledge of any personal property, or any lien created thereby." OHIO REV. CODE ANN. § 2329.661(C) (Page 1981).

18. *See* cases cited *supra* note 13.

II. BACKGROUND AND HISTORICAL ANALYSIS

In 1970 Congress created the Commission on Bankruptcy Laws.[19] The commission was created to "study, analyze, evaluate, and recommend changes" in bankruptcy law.[20] In order to avoid arbitrary change, the commission first determined the purpose or function of the bankruptcy system and then recommended change.[21] From the commission's perspective, there are two coequal functions of the bankruptcy system: (1) to provide orderliness for both creditor and debtor in a modern, credit-based economy, and (2) to rehabilitate bankrupt debtors.[22] Thus, the goals of the bankruptcy system stress the importance of providing the debtor-creditor relationship with at least a quasi-standardized structure, and enabling debtors to survive a bankruptcy discharge.[23]

The bankruptcy system in effect at the time of the commission's investigation was that promulgated by the Bankruptcy Act of 1898,[24] as amended in 1938.[25] That system essentially left the determination of a bankrupt debtor's future in the hands of the states; the amended Bankruptcy Act did not preempt the states from controlling exemptions.[26] The commission determined that the Bankruptcy Act of 1898 (as amended) created nonuniformity of treatment of bankrupt debtors.[27] Differences in economic development and nonhomogeniety of na-

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19. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

20. *Id.*

21. COMMISSION REPORT, *supra* note 4.

22. *Id.* at 71. The commission stated that there were two key functions of the bankruptcy system:

> The *primary function* of the bankruptcy system is to continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness generally to pay his debts. Especially from creditors' perspectives, it is important to have rules that determine rights generally in the debtor's wealth, wherever situated, and thus guide conduct in the open credit economy, as well as the collective processes which effect such rules and permit creditors to realize on their claims. Especially from debtors' perspectives it is important to have sanctuary from the jungle of creditors' pursuit of their individualistic collection efforts, both under law and outside of the law. Relief by way of stay of collection may be all that is needed. It is equally important to be able to obtain authoritative relief, through discharge, from the hardship of unpaid debts. The *second function* of the bankruptcy process, on a par with the first, is to rehabilitate debtors for continued and more value-productive participation, i.e., to provide a meaningful "fresh start."

Id. (emphasis added).

23. *Id.*

24. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898), *amended by* Act of June 22, 1938 (Chandler Act), ch. 575, 52 Stat. 840 (repealed 1978).

25. Act of June 22, 1938 (Chandler Act), ch. 575, 52 Stat. 840 (repealed 1978).

26. *Id.*

27. COMMISSION REPORT, *supra* note 4 at 169. The 1938 amendment to the 1898 Act provided that:

> This Act shall not affect the allowance to bankrupts of the exemptions which are pre-

tionwide attitudes toward bankruptcy meant vast differences in each state's approach toward rehabilitating the bankrupt debtor.[28] Both creditors and debtors were unhappy with the system—dissatisfaction increased as the populace became more mobile and more aware of the differences between the states' approaches to exemption levels.[29]

The commission's analysis indicated that the goals of the bankruptcy system—orderliness in an open credit economy and rehabilitation of the bankrupt debtor—were not effectively being met by the bankruptcy system established by the 1898 Act.[30] Consequently, the commission proposed a system of exemptions for the bankrupt debtor which would be exclusively federal, centered upon those "kinds of property that traditionally have been treated as exempt by state governments [and limited by] appropriate federal maximums."[31] The uniformity proposed by the commission would effectively "level" the system of exemptions throughout the United States. Uniformity would reduce exemptions of those states which were, in the commission's opinion, excessively generous, and increase the exemption level of those states which were especially parsimonious.[32]

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scribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceeding the filing of the petition, or for a longer portion of such six months than in any other State . . . .

Act of June 22, 1938 (Chandler Act), ch. 575, § 6, 52 Stat. 840, 847 (repealed 1978).

28. COMMISSION REPORT, *supra* note 4, at 169. The report stated the following:

As a result of the present Act's deference to other federal and state law as to exemptions, there is no uniformity of treatment of creditors and debtors, and the exemptions available are not the result of reasoned policy but the happenstance of history and location. This is intolerable for what is supposed to be a national, uniform system and destructive to the goal of rehabilitation of individual debtors.

Id. It seems reasonable to conclude that the commission determined the bankruptcy system should be a uniform, national system based upon the power of Congress, under article 4, section 8, clause 4 of the United States Constitution, to make uniform laws regarding bankruptcy, as well as because of the demands of a modern society.

29. *Id.* at 171.

[The determination of] exemptions has worked unfairly; it has, contrary to the goals of federal bankruptcy legislation, allowed some creditors to be preferred over others and caused substantial nonuniformity. It has probably also been responsible for some of the dissatisfaction with the bankruptcy process. For example, in states where there are excessive exemptions, creditors have difficulty understanding a system that allows a debtor to retain property of a value of several hundred thousand dollars, while at the same time obtaining a discharge which precludes recovery of the creditors' claims. But it is not only creditors who are dissatisfied; since state procedures must be complied with to perfect exemptions, the right to an exemption is often lost through mistake or inadvertence. In such a case, it is understandable that the debtor might fault the system rather than himself.

Id.

30. *Id.* at 71.

31. *Id.* at 171.

32. *Id.*

As finally passed by Congress, the exemption provisions of section 522(b) reflected compromise. The House supported the commission's proposal,[33] but the Senate believed that the states should still play a role in determining exemptions.[34] The Senate's position led to the compromise "opt-out" provision.[35]

Commentators differ in their analyses of the effects of the compromise, but most conclude the result is bizarre. One commentator concluded that because of the differences in exemption schemes between states, the act did not establish an exemption policy.[36] The commentator further opined that Congress had "utterly failed to effectuate any '*Congressional* policy of a fresh start for a debtor.' "[37] The commentator reasoned that the idea of a fresh start is essentially a "joke" in states that choose to opt out and then are stingy in allowing exemptions.[38] Likewise, in states with very generous exemptory schemes, the debtor has a leg up, rather than just a fresh start.[39] This second result was the very issue which caused many senators to oppose the House bill in the first place.[40]

Another commentator reasoned that section 522(d)—the federal exemption list—and the opt-out provision are clearly not mutually supportive.[41] This conclusion rests on the presumption that Congress intended section 522(d) to be a "model" for state exemption schemes if the state chose to opt out.[42] If this was the intent of Congress, then the opt-out provision is inapposite to providing the debtor with a fresh start.[43] The opt-out provision allows the state to maintain an antiquarian system.[44]

When a state has opted out from the federal scheme of exemptions, the state controls the level of exemption. Therefore, if a debtor's state has opted out and has not updated its exemption schedule, the debtor will notice little change between the old and new federal bankruptcy systems. Under the 1978 Act, all of the debtor's property is first

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33. HOUSE REPORT, *supra* note 3.

34. *See infra* notes 67–69.

35. *See infra* notes 67–69.

36. Vukowich, *Debtor's Exemption Rights under the Bankruptcy Reform Act*, 58 N.C.L. REV. 769, 801–02 (1980) (emphasis in original).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Comment, *Protection of a Debtor's "Fresh Start" under the New Bankruptcy Code*, 29 CATH. U.L. REV. 843, 865 (1980).

42. *Id.*

43. *Id.*

44. *Id.*

placed into the bankruptcy estate.[45] Then, under section 522, property is exempted out in accordance with one of two different schemes[46]—property specified in section 522(d)[47] (the federal exemptory scheme), or alternatively, property specified by state and local law and any property which would be exempt under federal provisions other than section 522(d).[48]

Under the 1898 Act,[49] exempt property was never placed into the bankruptcy estate; the issue of exemption centered around what indeed was "exempt" property.[50] Exempt property under the 1898 Act was to be determined by the nonbankruptcy laws of the United States or of the respective state of domicile of the bankrupt debtor.[51] The plain wording of the 1898 Act stated that it did not affect what the states allowed as exemptions.[52] This provision effectively caused exempt property to be determined by the respective state, rather than the federal statute.

With respect to exemptions, there can be very little difference in result between the 1898 Act and the 1978 Act. Although section 522(b) of the 1978 Act could operate to increase the variety of exemption schedules available to bankrupts, the opt-out provision, if exercised, could operate to nullify any increased level of exemption found in the federal scheme but not in the state scheme.

Section 522(f) is unique in that it had no predecessor within the 1898 Act.[53] Section 522(f) is also unique in that through its operation the debtor can nullify certain secured interests of the debtor's secured creditors, thereby increasing the scope of exemption available to him or her.[54] The commission recognized that exemptions from the bankruptcy estate would of themselves not necessarily "insure that the debtor will be able to retain the basic means of survival."[55] This is because per-

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45. 11 U.S.C. § 541 (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 376.

46. 11 U.S.C. § 522(b) (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 353.

47. 11 U.S.C. § 522(d) (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 353.

48. 11 U.S.C. § 522(b)(2)(1) (1982).

49. Bankruptcy Act of 1898, 30 Stat. 544 (1898), *amended by* Act of June 22, 1938 (Chandler Act), ch. 575, 52 Stat. 840 (repealed 1978).

50. Hertz, *supra* note 10, at 340.

51. Bankruptcy Act of 1898, 30 Stat. 544 (1898), *amended by* Act of June 22, 1938 (Chandler Act), ch. 575, 52 Stat. 840 (repealed 1978). The 1898 Act stated that "this Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition . . . ." *Id.*

52. *Id.*

53. *Id.*

54. 11 U.S.C. § 522(f) (1982).

55. COMMISSION REPORT, *supra* note 4, at 169.

fected security interests would escape the bankruptcy estate hotchpot since the secured creditor is able to repossess the collateral from the debtor if payment is not made, and thus defeat the bankruptcy trustee.[56]

If the debtor's property is of a type that is basic to survival and rehabilitation as a productive member of society (*e.g.*, household goods, tools of trade, or wearing apparel), and this property is subject to a nonpossessory, nonpurchase-money security interest, then the exemption provisions of section 522 will not be adequate to provide the debtor with the means for a fresh start.[57] Therefore, the commission saw a clear need for a mechanism, such as section 522(f), designed to avoid certain secured interests which if otherwise allowed would deprive the debtor of the means for a fresh start.[58]

The scope[59] of section 522(f) is not excessively generous, nor does it promote exemptions which are contrary to the spirit of the general exemptory provision, section 522(d).[60] The debtor receives no exemptions beyond what he or she would have been entitled to, absent a judicial or nonpossessory, nonpurchase-money security interest of a creditor.[61]

Ohio is one of thirty-six states[62] which have decided to exercise[63] the opt-out provisions of section 522(b)(1) and provide its citizens with a state developed schedule of exemptions.[64] Generally, the Ohio exemption provisions have been updated to reflect a more realistic appraisal of what type and how much property a bankrupt needs to retain to get

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56. 11 U.S.C. § 541(a)(1) (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 376.

57. COMMISSION REPORT, *supra* note 4, at 169. The commission also believed that nonpossessory secured interests in items basic to survival were primarily used as threats to coerce payment, because the creditor rarely intends to take possession. *Id.*

58. *Id.*, Part II, at 130.

59. *See supra* note 8.

60. 11 U.S.C. § 522(d) (1982).

61. *Id.* § 522(f).

62. The following states have opted out of the federal scheme of exemptions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. 3 W. COLLIER, COLLIER ON BANKRUPTCY § 522.02, at 522—12 n.4a (15th ed. 1984).

63. OHIO REV. CODE ANN. § 2329.662 (Page 1981). Section 2329.662 of the Ohio Revised Code provides that "this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the 'Bankruptcy Reform Act of 1978'. . . ." *Id.* (This provision is to be repealed effective Jan. 1, 1986, unless extended by other legislation. 1984 Ohio Legis. Serv. 5-39 (Baldwin)).

64. OHIO REV. CODE ANN. § 2329.66 (Page Supp. 1981).

back on his or her feet.[65] The character and magnitude of exemptions allowed by section 2329.66 of the Ohio Revised Code are in keeping with the spirit of providing the debtor with the means for a fresh start. However, it appears Ohio places the secured creditor's interest in obtaining payment ahead of the state's interest in rehabilitating the bankrupt debtor. Section 2329.661(C) of the Ohio Revised Code does not allow avoidance of a lien by an exemption.[66] If valid, this provision negates the restorative provisions of section 522(f) of the Bankruptcy Code.

Thus the kernel of conflict emerges. The core issue is whether the Bankruptcy Reform Act of 1978 empowered the states to opt out from the restorative or avoidance provisions of section 522(f), as well as the federal scheme of exemptions provided in section 522(b).[67] It is clear from the legislative history of section 522 that a state cannot, in the extreme, opt out to the point of providing no exemptions and still fulfill the intent of Congress.[68] However, the extent to which a state may exercise its right to opt out still remains to be decided by a number of courts.

III. ANALYSIS

A. Intent of Congress

The background and history of the Bankruptcy Reform Act of 1978 make it clear that the intent of Congress in embarking on an overhaul of the Bankruptcy Act of 1898 was to promote uniformity in treatment of the bankrupt debtor and to align the treatment of the debtor with the social and economic thinking of the mid-twentieth cen-

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65. Note, *H.B. 674: Ohio Opts Out of the Federal Bankruptcy Exemptions and Revises Its Bankruptcy Laws*, 5 U. DAYTON L. REV. 461 (1980).

66. OHIO REV. CODE ANN. § 2329.661(C) (Page 1981). Section 2329.661(C) of the Ohio Revised Code states that "[s]ection 2329.66 of the Revised Code does not affect or invalidate any sale, contract of sale, conditional sale, security interest, or pledge of any personal property or any lien created thereby." *Id.*

67. It should be noted that whether the states can opt out of using the federal scheme of exemptions is not at issue. That issue was addressed in *In re* Sullivan, 680 F.2d 1131 (7th Cir.), *cert. denied*, 459 U.S. 818 (1982). The debtor in *Sullivan* attacked the constitutionality of the opt-out provision of section 522(b)(1), and Illinois' action thereunder, on the basis of lack of uniformity, which is required by article 1, section 8, clause 4 of the United States Constitution, and on the basis of an unconstitutional delegation of congressional power to the states. *Id.* at 1131–32. The Seventh Circuit Court of Appeals stated that uniformity need only be geographical in nature and not "true" uniformity for each individual debtor. *Id.* at 1135. Addressing the petitioner's contention that section 522(b)(1) was an unconstitutional delegation of congressional power, the court stated that the congressional power to establish uniform bankruptcy laws was a power to be exercised or not exercised. *Id.* at 1137. Therefore, allowing the states to establish nonuniform laws of bankruptcy was not a delegation of power, but merely a refusal to exercise the power. *Id.* at 1137–38.

68. HOUSE REPORT, *supra* note 3.

tury.[69] Congress stated that the requirement for change was due to three factors: (1) bankruptcies had increased at the rate of 1000% per year for each of the last twenty years; (2) more than one-fourth of United States bankruptcy referees had difficulty in administering the current system and had made recommendations for improvement; and (3) the rapid increase in credit was complicating the administration of the bankruptcy system.[70] Congress understood that the federal government and commercial communities lacked the expertise to find the common philosophical thread which would tie together the issues buried in these three factors; therefore, the Commission on the Bankruptcy Laws of the United States was created.[71]

The commission's product—proposed changes to the Bankruptcy Act of 1898[72]—fulfilled the commission's charter to provide Congress with a strawman position,[73] and by definition was in tune with congressional intent. The commission also provided Congress with a philosophical justification for the position.[74] With regard to debtor exemptions, the commission proposed promoting the goals of uniformity and debtor rehabilitation through minimum, standard levels of exemption.[75] In a sense this proposal was a statement of "congressional intent."

The exemption provisions proposed by the commission were then modified by the House, and the House Judiciary Committee reported H.R. 8200 on September 8, 1977.[76] H.R. 8200 reflected an intent by the House to provide a federal floor for exemption, but also allowed the debtor to choose either the exemptions provided by federal or state nonbankruptcy law if these exemptions were more favorable to him or her.[77] When H.R. 6,[78] the predecessor to H.R. 8200, was introduced, a commission member told the House that a federal scheme of exemptions was needed because the states' schemes of exemptions were grossly out of tune with the times.[79] The House Report accompanying H.R. 8200 stated that "[this bill] enunciates a bankruptcy policy favoring a fresh start."[80] There was no provision in H.R. 8200 allowing the

69. *Id.*
70. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.
71. *Id.*
72. COMMISSION REPORT, *supra* note 4, at Part II.
73. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.
74. COMMISSION REPORT, *supra* note 4.
75. *Id.* at 170.
76. H.R. 8200, 95th Cong., 1st Sess. (1977).
77. *Id.*
78. H.R. 6, 95th Cong., 1st Sess. (1977).
79. 123 CONG. REC. 218 (1977) (statement of Rep. Edwards).
80. HOUSE REPORT, *supra* note 3, at 126.

states to opt out from the federal scheme of exemptions.[81] Therefore, when H.R. 8200 was reported from the House, "the intent of Congress" (the Senate had not yet expressed an intent) was to provide bankrupt debtors with a fresh start through a federal scheme of minimum exemptions. Debtors could elect exemptions controlled by nonbankruptcy law if they so desired.

In July 1978, the Senate Judiciary Committee reported S. 2266.[82] Unlike H.R. 8200, S. 2266 did not provide the bankrupt debtor with a minimum level of exemption, but provided that exemption would be governed by state law—no change from the 1898 Act.[83] The committee's report stated that allowing state determination of exemption levels would still provide the debtor with the means for a fresh start, but would avoid "instant affluence, as would be possible under the provisions of H.R. 8200."[84] Consequently, the "intent of Congress" with respect to exemption, as expressed in S. 2266 and accompanying legislative history, was to provide debtors with the means for a fresh start, while allowing the states the option of determining the scope of the means.

Section 522(b) is, therefore, a compromise between the schemes addressed in H.R. 8200 and S. 2266. The substance of the compromise was addressed in floor statements by congressmen who played a key role in developing the compromise. The statements made in the Senate acknowledge the obvious fact that the states will be able to determine exemption levels if they so choose.[85] But the statements also indicate an understanding that the compromise would result in states evaluating and upgrading their exemption schemes to be more generous than the federal exemption scheme, rather than less generous.[86] No statement

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81. *See supra* note 76.

82. S. 2266, 95th Cong., 2d Sess. (1978).

83. *Id.* § 522. This was despite strong appeal by many witnesses for a scheme of minimum federal exemptions. Attorney General Griffin Bell, the Commercial Law League of America, the National Consumer Finance Association, and the National Bankruptcy Conference all argued for a federal scheme of exemptions and were opposed to the opt-out provisions of S. 2266. *Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

84. S. REP. NO. 989, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5792 [hereinafter cited as SENATE REPORT]. Senator Thurmond stated in debate that "[t]he fairer way is to allow a fresh start, but on a limited basis." 124 CONG. REC. 28,260 (1978) (statement of Sen. Thurmond).

85. For example, Senator DeConcini made the following statement: "In the area of exemptions, it was agreed that a Federal exemption standard will be codified but the States could at any time reject them in which case the State exemption laws would continue to prevail." 124 CONG. REC. 33,990 (1978) (statement of Sen. DeConcini).

86. When introducing the bill in the Senate, Senator Wallop made the following comment concerning exemptions:

In the area of exemptions, we have won an important victory for the rights of States to

indicates that a state can nullify the effect of section 522(f) by opting out. On the contrary, after noting that a state may opt out, one congressman subsequently commented that the code allows a debtor to avoid liens on selected household goods.[87]

The floor statements indicate that the "fresh start" concept survived the compromise. Implicit in each statement is an acknowledgement that the debtor would always be entitled to some level of exemption. Furthermore, it is possible to read into the compromise the understanding of many members of Congress that state exemption levels would indeed be more generous than the federal scheme of exemptions if the state exercised the opt-out provision.[88]

Unlike section 522(b)(1), there was neither disagreement nor compromise between the House and Senate over the provisions of section 522(f). The commission recognized "that exemptions alone will not insure that the debtor will be able to retain the basic means of survival."[89] To increase the effectiveness of the exemption policy, the commission proposed that unsecured creditors not be allowed to enforce a waiver of a federal exemption.[90] The commission also proposed that exemptions of the necessities of rehabilitation (*e.g.*, household-type goods) should be allowed when the necessities of rehabilitation were encumbered by nonpossessory, nonpurchase-money security interests.[91]

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

124 CONG. REC. 33,992 (1978) (statement of Sen. Wallop) (emphasis added).

87. When introducing the bill in the House, Congressman Butler made the following statement:

In general, the individual debtor is given increased protection and afforded a meaningful fresh start. The [C]ode provides uniform Federal exemptions which may be selected by the debtor as an alternative to exemptions under State law unless state law forbids that choice. Strict limits are placed on reaffirmation of consumer debts and *the debtor may invalidate liens on certain household items.* Finally, the debtor may redeem collateral from a lien.

124 CONG. REC. 32,418 (1978) (statement of Rep. Butler) (emphasis added).

88. *In re* Neiheisel, 32 Bankr. 146, 162 (D. Utah 1983). The court in *Neiheisel* provides an excellent analysis of the development of section 522. The court made the following statement:

The exemptions compromise enacted by Section 522(b)(1) *was not the resolution of a battle between forces favoring and opposing a fresh start.* Both the House and the Senate recognized a fresh start as a desirable goal of bankruptcy law. Their disagreement centered on whether Congress or the states should possess authority to fix exemptions. The House feared state stinginess. The Senate feared state munificence. By permitting states to forbid federal exemptions, the compromise left decision making authority on types and amounts of exemptions with the states.

Id. (emphasis added).

89. COMMISSION REPORT, *supra* note 4, at 169.

90. *Id.* at 170.

91. *Id.*

Underlying section 522(f) was congressional concern that creditors often take a secured interest in all of the debtor's personal goods, the debtor waives any right to exemption he may have, and then the creditor uses threats of repossession to coerce payment.[92] The debtor's collateral usually has little resale value; consequently, creditors infrequently repossess.[93] However, the unsophisticated debtor does not know this and is at a disadvantage in dealing with the more knowledgeable creditor.[94] Section 522(f) was intended to ameliorate this problem.

The commission's proposal for section 522(f) was adopted by both the Senate and the House; their respective comments on section 522(f) are identical.[95] It is reasonable to conclude that both the Senate and the House agreed with the substance of section 522(f) because of their support for the goal section 522(f) was designed to achieve—that is, to insure the debtor has the bare necessities for a fresh start.

B. Goals of the Bankruptcy System Are Not Being Met

Of concern now is how the states and courts have pursued the goal—the intent of Congress—of ensuring that bankrupt debtors have the means for a fresh start. Thirty-six states have enacted opt-out provisions in accordance with section 522(b)(1).[96] This means that either there is conflict or the potential for conflict in thirty-six states with respect to the applicability of section 522(f). A review of the leading cases which have resolved the opt-out–section 522(f) conflict indicates there are a variety of different approaches to resolving the problem.

McManus v. Avco Financial Services, Inc.,[97] was the first decision rendered by a United States Circuit Court of Appeals which addressed the conflict between opt-out provisions and section 522(f). In *McManus*, the court heard consolidated appeals of two different United States District Court cases adversely ruling on the operative nature of

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92. HOUSE REPORT, *supra* note 3, at 127.

93. *Id.*

94. *Id.*

95. HOUSE REPORT, *supra* note 3, at 362; SENATE REPORT, *supra* note 84, at 76 (under subsection (e)). The House and Senate reports introducing their respective bills each stated the following:

> Subsection (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 judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. *The avoiding power is independent of any waiver of exemptions.*

Id. (emphasis added).

96. *See supra* note 62.

97. 681 F.2d 353 (5th Cir. 1982).

section 522(f),[98] in the face of Louisiana's election to opt out from the federal exemptory scheme and disallow exemption of household goods secured by chattel mortgages.[99] The *McManus* court found that the only liens a debtor could avoid were those that would deny an exemption allowed by section 522(b);[100] it also held that section 522(f) was not a separate exemption statute.[101] The court then reasoned that if the state has opted out from the federal scheme of exemptions and the state scheme does not allow an exemption of property secured by a nonpossessory, nonpurchase-money security interest, then section 522(f) cannot work to give the debtor an avoidance allowance.[102] The majority opinion in *McManus* concluded that section 522(f) does not survive after a state has opted out. The court further held that the state's approach to exemptions excludes those offered by section 522(f).[103]

The dissent in *McManus* presented a view that is more in keeping with the intent of Congress to provide the debtor with the means for a fresh start. Judge Dyer explained that the words "notwithstanding any waiver of exemptions" in section 522(f) should be given their plain English meaning, that is, to return the debtor to the position he or she enjoyed prior to the action of a waiver.[104] The judge also concluded that "any" waiver means just that. Therefore, waivers effected by operation of law, such as were at issue in *McManus*, could not deny a debtor an exemption to which he or she otherwise would have been entitled.[105]

The Sixth Circuit Court of Appeals adopted the *McManus* reasoning in evaluating an opt-out–section 522(f) conflict with respect to the

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98. *Id.*

99. LA. REV. STAT. ANN. § 13:3885 (West 1979).

100. *McManus*, 681 F.2d at 355.

101. *Id.*

102. *Id.* at 357.

103. *Id.*

104. *Id.* at 358. Judge Dyer further stated that:

> When the debtors entered the creditors' office they enjoyed an exemption under Louisiana law from seizure and sale of their household goods; and when they left the office they could no longer claim an exemption for those goods solely because they had improvidently granted a security interest to the creditors covering such goods. I fail to see how this could be characterized as anything but a waiver of exemptions, subject to the avoiding power found in § 522(f).
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> . . . .
>
> If the majority opinion correctly states the law, any state can by statute preclude a debtor from availing himself of the loan [sic] avoidance provisions found in § 522(f). I cannot conclude that Congress intended to allow states to do this.

Id.

105. *Id.*

bankruptcy statutes of Georgia[106] and Tennessee[107] in *Pine v. Creditthrift of America, Inc.*[108] The *Pine* court held that "debtors may avoid liens only on that property which the states have declared to be exempt."[109] The court found no ambiguity in section 522.[110] The court recognized that supporting the "fresh start" concept would lead to a different result;[111] however, it held that the clear language of the opt-out provision took precedence over any rehabilitative provisions of the code.[112] This court criticized the courts below which had relied on legislative history in determining that section 522(f) was still viable after a state had opted out from the federal scheme of exemptions.[113] The court took the position that the legislative history should not be consulted because the language of the statute was clear.[114]

The problem with the *Pine* line of reasoning is that the statute obviously is not clear. If it were clear, the frequency of litigation of this issue would certainly be less than what it has been. It is noteworthy, however, that the *McManus* court did acknowledge that the legislative history (if it were proper to consult legislative history) could support a different result.[115]

A view opposite to *McManus* and *Pine* was taken by the United States Court of Appeals for the Eleventh Circuit. In *Maddox v. Southern Discount Co.*,[116] the Eleventh Circuit Court of Appeals evaluated Georgia's bankruptcy statute. The court did not find, as did the *Pine* court, that Georgia's statute expressly denied the debtor the avoidance power of section 522(f).[117] Consequently, the court did not have to decide whether Georgia had the constitutional authority to deny its citizens use of section 522(f). However, the court did state that Judge Dyer's dissent in *McManus* was persuasive, and the court might adopt Judge Dyer's position if faced with the decision.[118]

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106. GA. CODE ANN. § 51-1601 (1980) (recodified as § 44-13-100 (1982)).
107. TENN. CODE ANN. § 26-2-112 (1980).
108. 717 F.2d 281 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1711 (1984).
109. *Id.* at 284.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* The *Pine* court stated that:

> The courts below erred because they placed almost exclusive emphasis on legislative history supporting the original version of § 522 as adopted by the House of Representatives. That version was not the law that was finally passed. The legislative history which supports the rejected version is not particularly persuasive on the meaning of the final version.

Id.
114. *Id.*
115. *McManus*, 681 F.2d at 357 n.7.
116. 713 F.2d 1526 (11th Cir. 1983).
117. *Id.*
118. *Id.* at 1530. It should be noted that Judge Dyer is an Eleventh Circuit judge who was

Numerous United States Bankruptcy Courts have also taken positions opposite to *McManus* and *Pine*.[119] These courts generally support Judge Dyer's position.[120] The cases and decisions which follow indicate that these bankruptcy courts have a better understanding of the intent of Congress in overhauling the bankruptcy system in 1978.

In *Locarno v. Sachs*,[121] the United States Bankruptcy Court for the District of Maryland evaluated the constitutionally acceptable extent to which Maryland could opt out from the federal scheme of exemptions. The court stated, in evaluating Maryland's bankruptcy law[122] after the state had opted out from the federal scheme of exemptions, that when Congress enacted the detailed list of exemptions of section 522(d), the states were "implicitly bound . . . to adopt a corresponding scheme of exemptions."[123] In holding that Maryland must enact an exemptory scheme similar to the federal scheme, the *Locarno* court went beyond implicitly stating that section 522(f) is operative after a state has opted out. If the state can opt out and then negate the federal policy of giving debtors the means for a fresh start, then there is little need for section 522.

In *Strain v. Valley Bank*,[124] the United States Bankruptcy Court for the District of Idaho evaluated whether Idaho law[125] could constitutionally nullify section 522(f) of the Bankruptcy Code. The court concluded that Idaho could not deny debtors the lien avoidance provisions of section 522(f) because to do so would be an usurpation of congressional power to make uniform bankruptcy laws.[126] The court further concluded that "the congressional intent in enacting 522(f) is so clear that direct conflict with federal law exists here."[127]

Even when bankruptcy courts are not evaluating a direct constitutional challenge to a state's nullification of section 522(f), the courts

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sitting on the *McManus* panel by assignment.

119. *See infra* note 138.

120. *See infra* note 138.

121. 23 Bankr. 622 (Bankr. D. Md. 1982).

122. MD. CTS. & JUD. PROC. CODE ANN. § 11-504 (1981).

123. *Locarno*, 23 Bankr. at 630.

124. 16 Bankr. 797 (Bankr. D. Idaho 1982).

125. IDAHO CODE § 11-607 (Supp. 1981).

126. *Strain*, 16 Bankr. at 798.

127. *Id.* at 799. *See also* Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983). North Carolina bankruptcy law denied the bankrupt debtor use of the federal "laundry list" of exemptions. The statute also stated that the debtor would waive his or her right to selected exemptions if certain filing procedures were not followed (this is a state statutory waiver). The *Berry* court held that the supremacy clause of the United States Constitution would prevent any state from enacting legislation to deprive a debtor of the lien avoidance provisions extended by section 522(f). *Id.* at 353.

have believed it important to comment on this issue.[128] An excellent example of a bankruptcy court's concern for the integrity of the bankruptcy system is contained in the decision in *Falck v. Household Finance Corp.*[129] In *Falck*, the United States Bankruptcy Court for the Central District of California evaluated whether a California statute allowing a nonpossessory, nonpurchase-money security interest to impair an exemption taken by the debtor under state law could be defeated by section 522(f) of the Bankruptcy Code.[130] The bankrupt husband in *Falck* claimed exemptions under the federal scheme, and the bankrupt wife claimed exemptions under the state scheme.[131] But unlike the Bankruptcy Code, California debtor-creditor law subordinates an exemption to enforcement of a valid lien.[132] The court supported the subordination, but only to the extent it impaired the wife's exemption under the state scheme.[133] The *Falck* court relied[134] on the analyses found in *In re Babcock*[135] and *Panesky v. CIT Financial Services*,[136] both holding that state law could preempt section 522(f) when a state had opted out of the federal scheme.[137] But the *Falck* court went on to conclude that in the instant case, there was no danger that section 522(f) would be completely overpowered, as the debtors had the option of selecting the federal or state scheme of exemptions.[138] In other words, the court agreed with the logic of *Babcock* and *Panesky*, but believed that it was important to not deny the operative "spirit" of section 522(f).

The decisions for and against section 522(f) viability do not bear a direct relationship to geographical location and seem to be varied throughout the country. Bankruptcy courts, which are closest to understanding and implementing the bankruptcy system, have predominately supported the survival of section 522(f) after states opt out.[139] Most

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128. *See infra* notes 129 & 138 and accompanying text.
129. 12 Bankr. 835 (Bankr. C.D. Cal. 1981).
130. *Id.*
131. *Id.* at 836.
132. CAL. CIV. PROC. CODE § 690.1 (West 1980) (repealed 1983).
133. *Falck*, 12 Bankr. at 838.
134. *Id.*
135. 9 Bankr. 475 (Bankr. W.D. La. 1981).
136. 5 Bankr. 201 (Bankr. N.D. Ohio 1980).
137. *Babcock*, 9 Bankr. 475; *Panesky*, 5 Bankr. 201.
138. *Falck*, 12 Bankr. at 838. *See also In re* Parrish, 19 Bankr. 331 (Bankr. D. Colo. 1982) The *Parrish* court evaluated whether the exemptions allowed by Colorado law were constitutionally in keeping with the Bankruptcy Code. The court held that Colorado insolvency law does not void the exemption of nonpossessory, nonpurchase-money security interests. Consequently, there was no conflict between § 522(f) and Colorado's policy of denying its bankrupts the exemptions contained in § 522(d). On the contrary, the court stated that if a state chooses to opt out of the federal scheme of exemptions, it must provide its citizens with a similar scheme of exemptions.
139. Representative cases supporting the survival of section 522(f) following state decisions

bankruptcy courts in Ohio have held that section 522(f) cannot be overpowered by Ohio opting out and specifically denying a debtor his or her exemption of nonpossessory, nonpurchase-money security interests.[140] The rationale has routinely been that to hold otherwise would be inconsistent with congressional intent and the supremacy clause of the United States Constitution.[141]

However, a fairly recent Ohio bankruptcy court decision, *Morelock v. All-Phase Electric Supply Co.*,[142] seems to put distance between itself and the broad statements made about the viability of section 522(f) in previous decisions.[143] *Morelock* involved an attempt by the debtor to exempt real estate from a judicial lien, as provided by section 522(f)(1).[144] Rather than decide the issue by stating that an Ohio statute could not overpower section 522(f), as previous courts had done,[145] the *Morelock* court found that Ohio had not attempted to impair exemption for property encumbered by judicial lien,[146] because section 2329.66 of the Ohio Revised Code does not address judicial liens.[147] Therefore, there was no question about the viability of section 522(f). This decision appears to be an effort to align with the position taken by the Sixth Circuit Court of Appeals decision in *Pine*.

C. *The* McManus *Decision Is Incorrect*

There are at least three ways for a court to resolve statutory ambiguity.[148] First, it can declare that there is no statutory ambiguity.[149] This was the approach taken by the *McManus* court.[150] Second, after finding ambiguity, a court can look to the decisions on each side of an

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to opt out include: *Maddox*, 713 F.2d 1526; *Berry*, 33 Bankr. 351; *Locarno*, 23 Bankr. 622; *Strain*, 16 Bankr. 797; *Falck*, 12 Bankr. 835; *In re* Snellings, 10 Bankr. 949 (Bankr. W.D. Va. 1981); Giles v. Credithrift of America Corp., 9 Bankr. 135 (Bankr. E.D. Tenn. 1981); Cox v. Blazer Financial Servs., Inc., 4 Bankr. 240 (Bankr. S.D. Ohio 1980). Representative cases holding that § 522(f) does not survive state opt-out decisions include: *Pine*, 717 F.2d 281; *McManus*, 681 F.2d 353; *Babcock*, 9 Bankr. 475; *Panesky*, 5 Bankr. 201.

140. *See, e.g.*, Flege v. Akron City Hosp., 17 Bankr. 690 (Bankr. N.D. Ohio 1982); Phillips v. Household Finance Corp., 13 Bankr. 811 (Bankr. N.D. Ohio 1981); *In re* Bowles, 8 Bankr. 394 (Bankr. S.D. Ohio 1981); Storer v. Thorp Credit Inc., 13 Bankr. 1 (Bankr. S.D. Ohio 1980); Fisher v. Liberty Loan Corp., 6 Bankr. 206 (Bankr. N.D. Ohio 1980).

141. *See* cases cited *supra* note 140.

142. 35 Bankr. 518 (Bankr. N.D. Ohio 1983).

143. *Id.* at 520.

144. *Id.* at 518.

145. *See supra* note 140.

146. *Morelock*, 35 Bankr. at 520.

147. OHIO REV. CODE ANN. § 2329.66 (Page 1981).

148. *See infra* notes 149–52.

149. *McManus*, 681 F.2d 353.

150. *Id.* at 355.

issue, and declare the majority position to be the most correct.[151] Courts seldom openly acknowledge support for this approach. Third, it can analyze the legislative history of the statute and attempt to determine what the legislature intended when the statute was enacted.[152] The bankruptcy courts have consistently taken this approach;[153] it has logical appeal.

The evidence is certainly sufficient to establish that both the House and the Senate were concerned that bankrupt debtors be provided with the means for a fresh start. This concern clearly pervades the language of the House report introducing H.R. 8200,[154] as well as the Senate Judiciary Committee report accompanying S. 2266.[155] Indeed, the Senate Judiciary Committee was not alone in supporting a "fresh start" concept.[156] One senator commented in the Senate Finance Committee report accompanying S. 2266 that the objective of the bill is "to give the debtor a less encumbered 'fresh start' after bankruptcy."[157] In quashing the challenge that the Bankruptcy Code's opt-out provision was an unconstitutional delegation of power, the Seventh Circuit Court of Appeals in *In re Sullivan*[158] stated that "the intention of providing a 'fresh start' can only be attributed to the House."[159] This statement is simply not supported. What is supported is that the Senate believed it to be important that the states retain the right to set exemption levels if they so choose.[160] Allowing the states to set exemption levels, and the goal of providing a debtor with the means for a fresh start, theoretically are not mutually exclusive concepts. However, under selective conditions, they have turned out to be so in practice.[161]

It may well be asked why there should be such extensive emphasis on the intent of Congress. If it can be rationalized that the Bankruptcy Reform Act of 1978 was not intended to ensure that debtors have the means to rehabilitate themselves, then there is no problem with supporting the creditor's position over the debtor's. With this view of congressional intent, the ambiguity in the statute can be acknowledged and

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151. *See generally* 17 Am. Jur. 2d *Statutes* § 166 (1974).

152. *See generally id.* § 145–46.

153. *See supra* note 139.

154. HOUSE REPORT, *supra* note 3.

155. SENATE REPORT, *supra* note 84.

156. *See* CONG. REC., *supra* note 84; *id.*, *supra* note 86; *id.*, *supra* note 87.

157. S. REP. NO. 1106, 95th Cong., 2d Sess. 1 (1978) (statement of Sen. Long).

158. 680 F.2d 1131 (7th Cir. 1982).

159. *Id.* at 1136.

160. SENATE REPORT, *supra* note 84.

161. *See, e.g.*, *Pine*, 717 F.2d 281; *McManus*, 681 F.2d 353; *Babcock*, 9 Bankr. 475; *Panesky*, 5 Bankr. 201 (all denying the debtor lien avoidance power after the respective state had opted out of the federal scheme of exemptions).

resolved in favor of the creditor. But as has been noted, this view does not make sense because it merely preserves the status quo.[162] This view is a non sequitur which, if accepted, means there was no reason to enact section 522. To adopt this position would be to acknowledge that—to use the vernacular—the House was had. There is no support for the extreme position of "zero" exemptions, which would seem to be a result allowed under the *McManus* holding. Statutory construction which allows this result is surely out of step with what Congress intended.

Additional argument for the survival of section 522(f) after a state opts out can be found in *Cheeseman v. Nachman.*[163] The court in *Cheeseman* held that although a state had opted out from the federal scheme of exemptions, the state's homestead exemption law[164] could not defeat the exemption provisions of section 522(m) of the Bankruptcy Code.[165] Specifically, section 522(m) allows *both* parties in a joint bankruptcy to claim exemptions whether the exemptions are determined by state or federal law.[166] The conflicting Virginia law[167] was construed by the bankruptcy trustee to limit the state homestead exemption to one for each household.[168] The *Cheeseman* court held that the statutory construction proposed by the trustee would conflict with section 522(m) and frustrate the intent of Congress.[169]

The holding in *Cheeseman* was relied upon by the appellant in *Sullivan*[170] in challenging the constitutionality of Illinois' exercise of the section 522 opt-out power. The court in *Sullivan,* however, held that section 522(b)(1) specifically gives a state the power to preempt the federal scheme of exemptions.[171] *Cheeseman* was readily distinguished because that case addressed state defeat of a section of the code—section 522(m)—separate from and not addressed in section 522(b)(1) opt-out language.[172] However, the *Sullivan* court did comment that section 522(b)(1) did not give a state the power to "abrogate section 522(m)."[173] Common sense indicates that if a state cannot frus-

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162. *See, e.g.,* Vukowich, *supra* note 36; Comment, *supra* note 41, at 865.

163. 656 F.2d 60 (4th Cir. 1981).

164. VA. CODE § 34-4 (Supp. 1980).

165. *Cheeseman,* 656 F.2d at 64.

166. 11 U.S.C. § 522(m) (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 353.

167. VA. CODE § 34-4 (Supp. 1980).

168. *Cheeseman,* 656 F.2d 60.

169. *Id.* at 63–64.

170. *Sullivan,* 680 F.2d 1131.

171. *Id.* at 1137.

172. *Id.* at 1136–37.

173. *Id.* at 1137.

trate the intent of Congress with respect to section 522(m), then a state should not be able to do so with respect to section 522(f).

It has been postulated that one motive for Senate opposition to H.R. 8200 was concern that H.R. 8200 gave debtors a "head start" rather than a "fresh start."[174] Some may argue that this concern should be the controlling factor in determining the intent of Congress buried in the compromise and resulting statute. Even if this concern were controlling, it strains the imagination to envision the debtor attaining "instant affluence" because the section 522(f) lien avoidance provisions are allowed to overpower a state's penurious denial of those protections.

The decisions in *McManus* and *Pine* are incorrect. These decisions ignore the ambiguity in the Bankruptcy Code which surfaces when a state opts out under section 522(b)(1) and concurrently attempts to deny to its citizens the restorative lien avoidance provisions of section 522(f). By failing to find ambiguity, those courts foreclosed any inquiry into the legislative history to determine just what Congress intended when these two sections were enacted. Consequently, the *McManus* holding allows a state to defeat the clear and well-documented intent of *both* the House and Senate to ensure that the bankrupt debtor has a fresh start after discharge from bankruptcy.

IV. CONCLUSION

The Bankruptcy Reform Act of 1978 was the first major overhaul of the nation's bankruptcy code in forty years. The overhaul was undertaken because bankruptcy laws had not kept pace with the development of a modern, urban, nonagrarian society. Formerly, the future of a bankrupt debtor was placed in the hands of the debtor's respective state insolvency laws; consequently, the nation's bankruptcy system was especially nonuniform.

The Bankruptcy Reform Act of 1978 was the product of detailed study, analysis, and proposal by some of the best and most knowledgeable minds on the subject in the country. Pervasive throughout the entire study, proposal, and bill drafting process was the idea that the new act would ensure that bankrupt debtors would be left, after discharge, with the bare necessities for making a fresh start. The concern was to get bankrupts back on their feet as productive members of society.

Ultimate compromise between the Senate and House allowing the states to set their own exemption levels by opting out from the federal exemptory scheme did not destroy the idea of providing the bankrupt with the means for a fresh start. In fact, the idea was preserved to

174. Vukowich, *supra* note 36.

some extent by the enactment of section 522(f)—a provision which allows the debtor to nullify certain liens which would otherwise impair exemption of fresh start necessities. However, the compromise resulted in ambiguity in the statute. The statutory language did not prevent the possibility that a state, through the exercise of its opt-out power, could nullify section 522 in its entirety. The leading case of *McManus v. Avco Financial Services, Inc.*[175] permits this undesirable result. *McManus* denies the existence of any ambiguity in the statute, and consequently, finds no necessity to explore legislative intent. This ostrich-like approach resolves nothing.

Section 522(f) can also be read as overpowering any negative effects of state law on lien avoidance resulting from state opt-out. This better reasoned approach was expressed by the dissent in *McManus* and by many of the bankruptcy courts, most especially the bankruptcy courts in Ohio. These courts have concluded that the statute is ambiguous; therefore, they have analyzed legislative history in detail to determine legislative intent and a statutory construction which supports this intent.

When a given statutory construction of an ambiguous statute will support clearly defined legislative intent, it is only common sense to apply that statutory construction. To do otherwise is to usurp the legislative function. In circuits which have not adopted the *McManus* holding, courts should evaluate and apply the better reasoned construction developed by the dissent in *McManus* and provide bankrupt debtors with the means for the "fresh start" mandated by Congress.

Arnold D. Patchin

175. 681 F.2d 353 (5th Cir. 1982).