South Carolina Law Review

Volume 30 | Issue 4 Article 1

1979

South Carolina's Statutory Exemptions and Consumer Bankruptcy

Phillip T. Lacy
University of South Carolina

SOUTH CAROLINA LAW REVIEW

VOLUME 30 1979 NUMBER 4

SOUTH CAROLINA'S STATUTORY EXEMPTIONS AND CONSUMER BANKRUPTCY

PHILIP T. LACY*

* Assistant Professor of Law, University of South Carolina School of Law. B.A., Duke University, 1969; LL.B., University of Virginia, 1972.

I. INTRODUCTION

Exemption statutes entitle a debtor to retain property free from the claims of his creditors[1] by providing that specified property cannot be subjected to judicial process to enforce the owner's debts.[2] Exemption statutes as originally drafted served two functions. First, the statutes allowed a debtor to retain property sufficient to prevent the debtor and his dependents from becoming destitute and public charges.[3] Thus, most statutes were drafted to insure that a debtor could retain property essential to maintaining a decent standard of living for himself and his dependents. Second, legislatures in some jurisdictions drafted exemption statutes to enable a debtor to rehabilitate himself. In these jurisdictions a debtor was entitled to retain not only property essential to his well being, but also income producing property.[4] Most jurisdictions originally enacted exemption statutes in the nineteenth century and many states have failed to update these statutes to reflect changes in social and economic conditions.[5] Thus, the exemption statutes are often inadequate to accomplish

1. *See generally* Vukowich, *Debtor's Exemption Rights*, 62 GEO. L.J. 779 (1974); Wall, *Homestead and the Process of History: The Proposed Changes in Article X, Section 4*, 6 FLA. ST. L. REV. 877, 878-95 (1978); Comment, *Personal Property Exemptions and the Uniform Exemption Act*, 1978 B.Y.U.L. REV. 462, 466-69.

2. *See, e.g.*, S.C. CODE ANN. § 15-41-10 to -460 (1976).

3. H.R. REP. No. 95-595, 95th Cong., 2d Sess. 126 (1978) *reprinted in full with original pagination at* [1978] 11C U.S. CODE CONG. & AD. NEWS 179.

4. *See* Vukowich, *supra* note 1, at 786. South Carolina's original homestead exemption statute, enacted in 1868, served this function by entitling a debtor to retain lands of sufficient value to generate funds to repay his creditors. 14 STATUTES AT LARGE OF SOUTH CAROLINA 19-20, Act. No. 16, § 1 (1868). *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 473, 486, 497-98 (1868) [hereinafter cited as 1868 PROCEEDINGS].

5. *See* H.R. REP. No. 95-595, *supra* note 3, at 126; Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678 (1960); Countryman, *Consumer Bankruptcy—Some Recent Changes and Some Proposals*, 19 U. KAN. L. REV. 165 (1971).

their intended purposes.[6] For example, in South Carolina the basic statutory exemption has remained unchanged since 1868.[7] This exemption, although adequate and perhaps liberal when originally enacted, appears inadequate in today's economy. That South Carolina's statutory exemptions may no longer accomplish their intended purposes would, in itself, justify an exploration of the need for reform.

State exemption statutes, however, are also functionally related to federal bankruptcy proceedings. This article, therefore, examines South Carolina's statutory exemptions, and the functional relationship between those exemptions and nonbusiness bankruptcies. It first reviews the historical background and judicial interpretation of South Carolina's exemptions to demonstrate that the power of the General Assembly to enact exemption statutes is limited by a provision[8] of the South Carolina constitution. The limited grant of legislative power to enact exemptions renders constitutionally suspect the validity of South Carolina's statutory exemptions of earnings for personal services. If these exemptions are declared unconstitutional, a significant portion of a debtor's earnings will be subject to judicial process. One consequence of voiding these statutory exemptions will be to create an incentive for debtors in South Carolina to file petitions for straight bankruptcy in order to retain their postbankruptcy earnings free from the claims of their prebankruptcy creditors.

The article then examines the potential impact of the exemption provision of the Bankruptcy Reform Act of 1978[9] upon consumer bankruptcies in South Carolina. The current Bankruptcy Act provides that a bankrupt is entitled to retain the property he owns on the date he files his petition that is exempt under the laws of the state in which he is domiciled.[10] Thus, a South Carolinian filing under the Bankruptcy Act is entitled to assert against the bankruptcy trustee those statutory exemptions he could assert against his creditors in state law collection actions. Title I of the Bankruptcy Reform Act of 1978 enacted the Bankruptcy

6. *See* sources cited in note 5 *supra.*

7. *Compare* 14 STATUTES AT LARGE OF SOUTH CAROLINA 19, Act No. 16 (1868) *with* S.C. CODE ANN. § 15-41-10 to -460 (1976).

8. S.C. CONST. art. III, § 28 (1895).

9. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) *reprinted in* [1978] 11C U.S. CODE CONG. & AD. NEWS.

10. Bankruptcy Act § 6, 11 U.S.C. § 24 (1976).

Code,[11] which will apply to all bankruptcy cases commenced after September 30, 1979.[12] The Bankruptcy Code potentially changes the Bankruptcy Act's policy of incorporating state law exemptions in bankruptcy proceedings. Section 522(b)(1) of the Bankruptcy Code entitles an individual debtor to elect to claim in bankruptcy proceedings the "federal exemptions" enumerated in section 522(d) in lieu of those provided under state law unless the state of the debtor's domicile enacts legislation specifically depriving debtors of the right to elect federal exemptions.[13] The federal exemptions are significantly larger than South Carolina's statutory exemptions.[14] Unless the General Assembly acts to deprive debtors of the right to claim the federal exemptions, an additional incentive for consumer debtors to file in bankruptcy will arise. This article considers the advisability of the General Assembly's enacting legislation to remove the right to claim the federal exemptions in bankruptcy proceedings.

Finally, this article proposes a course of constitutional and legislative reform of South Carolina's exemption law. The reforms suggested are designed to assure that the state's exemption statutes will be adequate to achieve their fundamental purposes and will not frustrate sound bankruptcy policy.

II. History of the South Carolina Exemptions: Constitutional Limitations

Prior to the adoption of the constitution of 1868 virtually all of a debtor's property was subject to judicial process for the satisfaction of his debt. The only exemption statute in effect at the time of the Constitutional Convention of 1868 was an act of 1823 that exempted a limited number of essential items of personal property from levy and sale.[15] In 1851 the General Assembly enacted a liberal homestead exemption under which the head of a family could exempt a dwelling house and fifty acres of land with a value not in excess of five hundred dollars provided that the real estate was not located in a city or incorporated town.[16] The home-

11. Bankruptcy Reform Act of 1978 § 101, Pub. L. No. 95-598, 92 Stat. 2549-2657 (1978) *reprinted in* [1978] 11C U.S. Code Cong. & Ad. News (to be codified at 11 U.S.C.) [hereinafter cited as Bankruptcy Code].

12. *Id.* § 402(a).

13. Bankruptcy Code, *supra* note 11, § 522(b)(1).

14. *See* notes 199-217 and accompanying text *infra*.

15. 6 Statutes at Large of South Carolina 213, 214, Act No. 2315, § 4 (1823).

16. 12 Statutes at Large of South Carolina 77, Act No. 4041 (1851).

stead exemption of 1851, however, was short-lived. In 1857, the General Assembly repealed the statutory exemption.[17] The Constitutional Convention of 1868 thus set to work upon a legal system that had tolerated only inconsequential exemptions of property from the enforceability of obligations.

The provision for exemptions from liability for debts was one of the more hotly debated issues at the Constitutional Convention of 1868.[18] Most delegates to the convention agreed that the constitution should include a section entitling debtors to retain some property free from the claims of their creditors. There was, however, significant disagreement upon two points. The first and most substantial division of opinion concerned the retrospective application of the exemption provision. The proponents of retrospective exemptions argued that such a provision was essential to insure that the constitution would be ratified.[19] Their opponents argued that it was unlawful to exempt property from application toward the satisfaction of debts that arose prior to the adoption of the constitution.[20] After lengthy debate the delegates voted down a proposal that would have limited the exemption to prospective application.[21] The delegates then adopted exemption provisions that were silent on the point of retrospective application. The clear consensus of the convention, however, was that the exemptions should apply retrospectively, provided that such application did not violate the United States Constitution.[22] The delegates conceded that the constitutional issue would have to await resolution in the courts.[23]

The second point upon which the delegates disagreed was the extent of the exemptions. Various proposals were introduced to limit both the dollar value of exempt property and the types of property upon which the exemption could be claimed.[24] Even the

17. *Id.* at 575, Act No. 4383 (1857).

18. 1868 PROCEEDINGS, *supra* note 4, at 452 and *passim.*

19. *Id.* at 467-70.

20. *Id.* at 473.

21. *Id.* at 482.

22. *Id.* at 467-70.

23. *Id.* at 467-68. The South Carolina Supreme Court was quick to rule on the constitutional question and upheld the validity of a retrospective application of homestead exemptions. In re Kennedy, 2 S.C. 216 (1870). However, this interpretation was expressly overruled by the court in Cochran v. Darcy, 5 S.C. 125 (1873) on the authority of the United States Supreme Court's decision in Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872), which struck down as an unconstitutional impairment of contract retrospective aspects of the Georgia homestead exemption law.

24. 1868 PROCEEDINGS, *supra* note 4, at 452, 458-60, 865, 880-81, 888. A motion to

leading proponent of liberal retrospective exemptions argued that a reasonable maximum dollar limitation be placed upon the exemptions in order to insure that the courts would sustain the exemptions under a challenge asserting that the exemptions amounted to a repudiation of all debts.[25]

The placement and precise language of the exemption provisions adopted by the convention of 1868 must be carefully considered in view of the judicial interpretation subsequently placed upon them. The constitution of 1868 includes two provisions addressing the topic of exemptions. The first provision appears in article I of the constitution, the "Declaration of Rights." Article I, section 20 provides:

> No person shall be imprisoned for debt, except in cases of fraud; and a reasonable amount of property, as a homestead, shall be exempted from seizure or sale for the payment of any debts or liabilities, except for the payment of such obligations as are provided for in this Constitution.[26]

The second provision of the constitution of 1868 addressing exemptions appears in article II, the "Legislative Department."[27] Article II, section 32 set forth in precise detail the persons entitled to claim the exemption, the maximum value of property that could be claimed as exempt, the types or items of property to

---

amend to exempt debts contracted for labor was defeated, *id.* at 458-60, as was a motion to reduce the value of the exemption from $2000 to $1000, *id.* at 460. The substitute provision of the legislative committee to the convention included a homestead exemption of up to $1000 plus the yearly products thereof and a personal property exemption limit of $500. *Id.* at 865. In explaining the reduction of amount and the addition of the yearly products exemption, the committee reported that such action was taken in reliance that "yearly products" would amply offset the difference in amount, and in some instances would be more valuable. *Id.* at 888. Minor revisions in the types of personal property to be exempt were proposed, *id.* at 880-81, and adopted, *id.* at 888, but the section passed virtually as reported from committee.

25. *Id.* at 882. The proponent, C.P. Leslie of Barnwell, stated:

> If we propose to make a homestead for any other than charitable purposes, the courts will not sustain it. If we pass a sweeping homestead law to secure the debtor against his just debts, we will fail in our efforts. But if we pass a fair, reasonable law, that appears to be necessary, the courts will sustain it and uphold it. If we undertake, however, to cover up an unusual sum of money from the creditor, the courts cannot sustain it, and they will declare the homestead bill, a bill to repudiate debts, and it will be defeated. . . . [W]e must be moderate in our demands, or we will certainly lose all.

Leslie was such an ardent advocate of a retrospective homestead provision that while arguing in favor of the provision he was overcome with emotion and burst into tears. *Id.* at 474.

26. S.C. CONST. art. I, § 20 (1868).

27. *Id.* art. II, § 32 (1868).

which the exemption applied, and the types of obligations against which the exemption could not be asserted.[28] Article II, section 32 entitled the head of a family residing in South Carolina to exempt the family homestead from attachment, levy, or sale on any mesne or final process. The family homestead was defined as the debtor's "dwelling house, out-buildings and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof . . . ."[29] In addition, article II, section 32 provided that the head of any family was entitled to claim a five hundred dollar exemption in certain precisely enumerated types of personal property.[30] Finally, the section entitled the head of the household to exempt "all necessary wearing apparel."[31] Article II, section 32 concluded with the following mandate to the legislature: "It shall be the duty of the General Assembly, at their first session, to enforce the provisions of this Section by suitable legislation."[32]

The General Assembly responded to this mandate in 1868 by passing "An Act to Determine and Perpetuate the Homestead."[33] This statute limited the statutory exemptions to those provided in article II, section 32 of the constitution of 1868.[34] In 1870 the General Assembly adopted a statute, primarily to clarify the pro-

28. Article II, § 32 of the 1868 constitution provided:
The family homestead of the head of each family residing in this State, such homestead consisting of dwelling-house, out-buildings, and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court. To secure the full enjoyment of said homestead exemption to the person entitled thereto, or to the head of any family, the personal property of such person, of the following character, to-wit: household furniture, beds and bedding, family library, arms, carts, wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value, in the aggregate, the sum of five hundred dollars, shall be subject to like exemption as said homestead, and there shall be exempt, in addition thereto, all necessary wearing apparel: *Provided,* That no property shall be exempt from attachment, levy or sale, for taxes, or for payment of obligations contracted for the purchase of said homestead, or the erection of improvements thereon: *Provided, further,* That the yearly products of said homestead shall not be exempt from attachment, levy or sale, for the payment of obligations contracted in the production of the same. It shall be the duty of the General Assembly, at their first session, to enforce the provisions of this Section by suitable legislation.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. 14 STATUTES AT LARGE OF SOUTH CAROLINA 19, Act No. 16 (1868).
34. *Id.*

cedure by which a debtor could claim his personal property exemptions.[35] Section 2 of the Act, however, provided an exemption for all "the products of agricultural laborers, mechanics, artisans, and tradesmen. . . ."[36] This provision clearly granted a statutory exemption in personal property that was not expressly authorized in article II, section 32 of the constitution. In addition, the value of the property subject to the exemption could exceed the five hundred dollar limitation imposed by the constitution. In 1872 the General Assembly adopted an Act to reduce to a single statute all acts relating to the homestead exemption.[37] Included in the 1872 Act was a modified version of section 2 of the 1870 Act. Specifically section 9 of the 1872 Act provided, "That one-third of the annual products of agricultural laborers, mechanics, artisans and tradesmen of every description, without regard to valuation, character or condilion [sic] of products or earnings, shall be exempt from attachment, levy and sale, except to enforce the payment of taxes."[38]

The constitutional validity of this statutory exemption was challenged in *Duncan v. Barnett*.[39] In *Duncan* the judgment debtor was an agricultural laborer owning no lands and having personal property worth less than five hundred dollars. The sheriff had levied execution on two bales of cotton, some seed cotton, and corn. The judgment debtor claimed that these items were exempt under section 9 of the 1872 Act. As the total value of the judgment debtor's personal property, including that levied upon, was worth less than five hundred dollars the South Carolina Supreme Court was not forced to address the issue of whether the General Assembly had the broad power to increase the size of the personal property exemption granted in the constitution. Rather the issue as framed by the court was merely "whether the legislature could create new subjects of exemption in addition to those enumerated in the constitution."[40] The court concluded that the legislature had exceeded its power and held that since the products of agricultural laborers were not included in the classes of personal property delineated in article II, section 32 of the constitution the statutory exemption was unconstitutional and void. In

35. *Id.* at 380, Act No. 273 (1870).
36. *Id.* § 2.
37. 15 STATUTES AT LARGE OF SOUTH CAROLINA 229, Act No. 176 (1872).
38. *Id.* at 231-32, Act No. 176, § 9.
39. 11 S.C. 333 (1878).
40. *Id.* at 334.

reaching its decision the court started from the premise that the enforceability of obligations was a principle fundamental to the State's jurisprudence,[41] and that the excessive relaxation of laws for the enforcement of obligations "might unsettle the very corner-stone on which that jurisprudence rests. . . ."[42] From this premise the court reasoned that article II, section 32 of the constitution was intended to limit the power of the legislature to enact exemption statutes. The court concluded that "the exemptions allowed by the constitution cannot be extended or restricted by any act of the legislature."[43]

The South Carolina Supreme Court reaffirmed the principle of *Duncan v. Barnett* in *Norton v. Bradham.*[44] Writing for the court Justice McIver carefully analyzed the exemption provisions of the constitution of 1868. The court found it significant that the constitution contained two provisions relating to exemptions: the general right to a reasonable exemption set forth in article I, section 20; and the specific and detailed grant of legislative authority to enact exemption statutes set forth in article II, section 32.[45] In Justice McIver's words,

> If the framers of the constitution had contented themselves simply with the insertion of section 20 of Article I., then, clearly, the legislature would have had the power to enact any law upon the subject, not inconsistent with the general right thus guaranteed. They could have fixed the amount and character of property to be exempted and designated the persons entitled to claim such exemption, as well as the mode of proceeding by which such claim should be asserted. But when the people in their sovereign capacity, acting through a convention, went on and by section 32 of Article II., prescribed what should be the nature and character of the homestead and personal property exempted, describing what it should be, the particular kind of property, its amount and value, and to whose benefit it should enure, all these matters were placed beyond the domain of legislative power and nothing was left for the general assembly to do, except what was prescribed in the last clause of the section—pass the laws necessary and suitable "to enforce the provisions of this section." Hence, whenever the legislature under-

41. *Id.* at 335.
42. *Id.*
43. *Id.* at 336.
44. 21 S.C. 375 (1884).
45. *Id.* at 379-80.

takes to interpolate other provisions than those prescribed in that section, instead of simply confining themselves, as directed by the organic law, to the enactment of laws suitable for carrying into effect the provisions there prescribed, they are invading a province already fully occupied by the constitution, and transcending the limitation placed upon their powers by that instrument.[46]

The supreme court's interpretation of the 1868 constitution clearly established the principle that article II, section 32 was a limited grant of legislative power. Any statute granting an exemption beyond those specified in that section was unconstitutional and void.[47]

In 1880 the General Assembly ratified an amendment to article II, section 32 of the constitution of 1868.[48] Although the amendment completely reworded section 32, it altered the provision in only two respects. First, the specification of the types of personal property that a debtor could claim as exempt was de-

46. *Id.*

47. The Supreme Court of North Carolina imposed an identical interpretation upon the exemption provision in its reconstruction constitution. In Wharton v. Taylor, 88 N.C. 230 (1883), the court ruled upon the power of the legislature to establish homestead exemptions. The court held that the state constitution set limits upon the homestead and personal property exemptions and that any legislation that altered the value or duration of the exemptions was unconstitutional.

48. 17 STATUTES AT LARGE OF SOUTH CAROLINA 320, Act No. 263 (1880). The amendment was as follows:

> That Section 32, Article 2, of the Constitution of this State be, and is hereby, stricken out, and the following inserted in lieu thereof:
>
> The General Assembly shall enact such laws as will exempt from attachment and sale under any mesne or final process issued from any Court to the head of any family residing in this State a homestead in lands, whether held in fee or any lesser estate, not to exceed in value one thousand dollars, with the yearly products thereof; and every head of a family residing in this State, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars: *Provided*, That in case any woman having a separate estate shall be married to the head of a family who has not of his own sufficient property to constitute a homestead as hereinbefore provided, said married woman shall be entitled to a like exemption as provided for the head of a family: *Provided, Further*, That there shall not be an allowance of more than one thousand dollars worth of real estate and more than five hundred dollars worth of personal property to the husband and wife jointly: *Provided*, That no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon: *Provided, Further*, That the yearly products of said homestead shall not be exempt from attachment, levy or sale, for the payment of obligations contracted in the production of the same. It shall be the duty of the General Assembly at their first session to enforce the provisions of this Section by suitable legislation.

leted from the constitution.[49] The amendment entitled the head of a family to claim the five hundred dollar personal property exemption in any species of personal property. Second, the amendment clarified the right of a head of a family who did not own real estate, the homestead proper, to claim the exemption in personal property.[50] The General Assembly did not increase the value of the property that could be claimed as exempt. Indeed the amended article II, section 32 limited more emphatically the amount of the personal property exemption to five hundred dollars by deleting the exemption for wearing apparel.[51]

The current constitution of South Carolina, adopted in 1895, contains only one provision concerning exemptions, which is located in article III, entitled "Legislative Department."[52] Article

---

49. *Id.* Under the 1880 amendment, the homestead exemption could consist of any interest in lands. The requirement that the homestead consist of a "dwelling-house, outbuildings, and lands appurtenant" was deleted. The 1880 amendment also removed the enumeration of items of personal property that the head of family could claim as exempt.

50. *Id.*

51. *Id.* The amended provision deleted the exemption for "all necessary wearing apparel," that under the original article II, section 32 the head of a family could claim in addition to the five hundred dollar personal property exemption.

52. S.C. CONST. art. III, § 28 (1895) provides:

> The General Assembly shall enact such laws as will exempt from attachment, levy and sale under any mesne or final process issued from any Court, to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate, to the value of one thousand dollars, or so much thereof as the property is worth if its value is less than one thousand dollars, with the yearly products thereof, and to every head of a family residing in this State, whether entitled to a homestead exemption in lands or not, personal property to the value of five hundred dollars, or so much thereof as the property is worth if its value is less than five hundred dollars. The title to the homestead to be set off and assigned shall be absolute and be forever discharged from all debts of the said debtor then existing or thereafter contracted except as hereinafter provided: *Provided,* That in case any woman having a separate estate shall be married to the head of a family who has not of his own sufficient property to constitute a homestead as hereinbefore provided, said married woman shall be entitled to a like exemption as provided for the head of the family: *Provided, Further,* That there shall not be an allowance of more than one thousand dollars' worth of real estate and more than five hundred dollars' worth of personal property to the husband and wife jointly: *Provided, Further,* That no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of said homestead or personal property exemption or the erection or making of improvements or repairs thereon: *Provided, Further,* That the yearly products of said homestead shall not be exempt from attachment, levy or sale for the payment of obligations contracted in the production of the same: *Provided, Further,* That no waiver shall defeat the right of homestead before assignment except it be by deed of conveyance, or by mortgage, and only as against the mortgage debt; and no judgment creditor or other creditor whose lien does not bind the homestead shall have any right

III, section 28 is in most material aspects identical to article II, section 32 of the constitution of 1868 as amended.[53] The constitution of 1895 entitles a head of a family residing in South Carolina to a homestead exemption in an interest in land not to exceed one thousand dollars in value. The head of a family is also entitled to an exemption of personal property not to exceed five hundred dollars in value. The constitution of 1895 did, however, add a personal property exemption for an individual who is not the head of a family.[54] This exemption consists of "all necessary wearing apparel and tools and implements of trade, not to exceed in value the sum of three hundred dollars." Thus, the maximum value of personal property exempt from judicial process under the constitution of 1895 is five hundred dollars for the head of a family and three hundred dollars for a person who is not the head of a family.

The argument in support of the contention that article III, section 28 of the constitution of 1895 constitutes a limited and exclusive grant of legislative power to enact exemption statutes is twofold. First, article III, section 28 constitutes a substantial readoption of article II, section 32 of the constitution of 1868 which had been so interpreted. Second, although the constitution of 1895 includes a provision in article I, the "Declaration of Rights," prohibiting imprisonment for debt, this provision contains no grant of a right to reasonable exemptions.[55] In *Norton v. Bradham* the supreme court had asserted that the exemption provision of article I, section 20 of the 1868 constitution, if read in isolation, would constitute a broad grant of legislative authority to enact exemptions.[56] The omission of a similar provision from the constitution of 1895 supports the view that the current constitution grants the General Assembly the power to enact only those exemptions expressly provided for in article III, section 28.

The courts that have confronted the issue have held that

---

or equity to require that a lien which embraces the homestead and other property shall first exhaust the homestead: *Provided, Further,* That after a homestead in lands has been set off and recorded the same shall not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife, if both be living: *Provided, Further,* That any person not the head of a family shall be entitled to a like exemption as provided for the head of a family in all necessary wearing apparel and tools and implements of trade, not to exceed in value the sum of three hundred dollars.

53. *See* note 48 *supra.*

54. S.C. CONST. art. III, § 28 (1895).

55. *See id.* art. I, § 19.

56. See text at notes 44-47 *supra.*

article III, section 28 limits the power of the legislature to enact exemption statutes, and that statutes purporting to allow larger exemptions than those provided for in the constitution are unconstitutional and void. The litigation to date has involved the enforceability of South Carolina's life insurance exemption as it existed prior to its amendment in 1947.[57] The issue has arisen in bankruptcy actions when the trustee of an insured bankrupt sought to establish title to the cash surrender value of insurance policies on the insured life under section 70a(5) of the Federal Bankruptcy Act.[58] Section 70a(5) vests the trustee with the bankrupt's title to all the nonexempt property that the bankrupt owned on the date the bankruptcy petition was filed. Section 6 of the Bankruptcy Act incorporates state law exemptions.[59] Thus, if the cash surrender value is exempt under state law, the bankrupt is entitled to retain the policies free from the trustee's claim under section 70a(5).

The South Carolina statute was similar to the majority of life insurance exemption statutes enacted during the latter half of the nineteenth century.[60] The statute protected the proceeds of a life insurance policy payable to a married woman or her children from the claims of creditors of her husband.[61] Although such statutes did not specifically exempt the cash surrender value of such a

57. 15 STATUTES AT LARGE OF SOUTH CAROLINA 865, Act No. 694 (1875). The act provides:

> That a policy of insurance upon the life of any person which has already, or may hereafter, be taken out, in which it is expressed to be for the benefit of any married woman, or for the benefit of herself and her children, or for the benefit of herself and the children of her husband, whether procured by herself or her husband, shall inure to the use and benefit of the person or persons for whose use and benefit it is expressed to be taken out; and the sum or net amount of the insurance becoming due and payable by the terms of the policy shall be payable to the person or persons for whose use and benefit it shall be expressed to be taken, free and discharged from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through, or under him or them, or either of them: *Provided, However,* That if the premium paid in any one year, out of the property or funds of the husband, shall exceed the sum of five hundred dollars, the exemption from the claims of the creditors of the husband shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, or so much thereof as may be necessary, shall inure to the benefit of such creditors, if any: *Provided,* The same be necessary for their payment.

58. 11 U.S.C. § 110 (1976).

59. 11 U.S.C. § 24 (1976).

60. *See* Riesenfeld, *Life Insurance and Creditors' Remedies in the United States,* 4 U.C.L.A.L. REV. 583 (1957).

61. *See* note 57 *supra.*

policy from the claims of the husband's creditors, in order to preserve the benefits of the policy for the wife and children of the insured many courts interpreting such statutes did extend the exemption to cover the cash surrender value.[62]

Sanders v. Aetna Life Insurance Co.,[63] was the first case in which the validity of the South Carolina exemption was called into question. In *Sanders* the bankrupt owned a life insurance policy payable to his wife. On the date of bankruptcy the insurance policy had no cash surrender value. The bankrupt, however, died prior to the conclusion of the bankruptcy proceedings. The trustee asserted that title to the policy vested in him on the date of bankruptcy and accordingly that he was entitled to the proceeds of the policy. A majority of the court held that because the insurance policy lacked a cash surrender value it did not constitute property that passed to the trustee under section 70a.[64] Justice Woods dissented from the opinion of the court. He asserted that because the bankrupt had retained the right to change the beneficiary of the policy, that right passed to the trustee.[65] From this he apparently reasoned that the trustee acquired the right to designate himself as the beneficiary of the policy. Justice Woods was thus forced to confront the contention that the insurance policy was exempt from the claims of the insured's creditors under the South Carolina exemption statute. Justice Woods rebutted this contention by asserting that the life insurance exemption statute was unconstitutional. He stated that the statutory exemption argument

> would be sound if the Constitution of this state did not expressly forbid that the constitutional exemption to the husband and wife jointly should not exceed $1,000.00 real estate and $500.00 personal property, which exemption was claimed and allowed. But for this provision of the Constitution, it would have been within the legislative power to extend the Constitutional exemption to include life insurance policies.[66]

---

62. *See* Riesenfeld, *supra* note 60, at 596-97. *See, e.g.*, Murphy v. Casey, 150 Minn. 107, 184 N.W. 783 (1921); Dawson v. National Life Ins. Co., 156 Tenn. 306, 300 S.W. 567 (1927). The South Carolina Supreme Court refused to follow the majority trend and sidestepped a constitutional attack by holding that the statute exempting the payment of benefits due under a life insurance policy to a married woman from claims of her husband's creditors was inapplicable to the cash surrender value of the policy. Wilson v. Mutual Benefit Life Ins. Co., 182 S.C. 131, 188 S.E. 803 (1936).

63. 95 S.C. 36, 78 S.E. 532 (1913).

64. *Id.* at 41, 78 S.E. at 534.

65. *Id.* at 46, 78 S.E. at 535.

66. *Id.* (citation omitted).

The issue avoided by the majority in *Sanders* was presented directly to the United States District Court for the Eastern District of South Carolina in *In re Cunningham.*[67] The bankrupt in *Cunningham* claimed his five hundred dollar personal property exemption in his stock of goods and fixtures. Relying upon the South Carolina statutory exemption the bankrupt also attempted to exempt certain life insurance policies naming his wife as beneficiary. Unlike the situation in *Sanders,* the life insurance policies in issue in *Cunningham* had a cash surrender value on the date of bankruptcy. In addressing the issue of whether the bankrupt could retain the policies free from the claims of the trustee, the court construed the statute as exempting the cash surrender value of the policies from the claims of the insured's creditors.[68] The court, however, then found that the statute as interpreted was in direct conflict with article III, section 28 of the constitution because it granted an exemption in personal property in excess of five hundred dollars.[69] Therefore, the court held the life insurance exemption statute unconstitutional and unenforceable to protect the cash surrender value of the policies from the claim of the trustee.[70] In reaching its decision the court relied upon the South Carolina Supreme Court's interpretation of article II, section 32 of the constitution of 1868 as set forth in *Duncan v. Barnett* and *Norton v. Bradham.*[71] The court recognized that specifics of the exemption provisions of the 1868 constitution differed from those of the provision in the 1895 constitution. Nevertheless, the court held that these differences did not affect the basic nature of the grant of legislative power. The court asserted, "[T]he point is that under both Constitutions the constitutional provision occupied the whole field or domain of exemptions, and left nothing to legislative discretion. . . ."[72]

Thus, article III, section 28 of the constitution of South Carolina limits the power of the General Assembly to enact exemption statutes. Specifically, any statute that has the effect of entitling a debtor to exempt personal property with a value in excess of five hundred dollars is unconstitutional and unenforceable.

67. 15 F.2d 700 (E.D.S.C. 1926).
68. *Id.* at 703.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

III. The Exemption of Earnings for Personal Services

A. *The Validity of the Exemption*

In 1974 the General Assembly enacted statutes that effectively exempt a debtor's "earnings for personal services" from postjudgment judicial process in all actions[73] and from prejudgment judicial process in actions brought to enforce consumer credit obligations.[74] The issue presented in this section is whether these 1974 statutes are unconstitutional under the doctrine of *Duncan v. Barnett.* The first step in resolving this issue is to determine whether earnings for personal services are "personal property" of a debtor that, in the absence of the 1974 statutes, would be subject to judicial process. Unless earnings for personal services are property of the debtor that could be subjected to judicial process, a statute placing earnings beyond the reach of creditors cannot be an unconstitutional exemption statute.

1. *The Scope of "Earnings For Personal Services."*—The term "earnings for personal services" is broad enough to include two distinct rights of a debtor. First, the term applies to the debtor's right to receive earned but unpaid compensation for previously rendered personal services. Second, the term can be read to include a debtor's right under an existing employment contract to receive compensation for services to be rendered in the future. As discussed below, decisions of the South Carolina Supreme Court establish that a debtor's right to receive earned but unpaid compensation for personal services is "property" of the debtor that, in the absence of an exemption statute, would be subject to a prejudgment attachment[75] and a postjudgment order in supplementary proceedings.[76] Statutes exempting this species of "earnings for personal services" are therefore constitutionally suspect. A debtor's right under an existing employment contract to receive compensation to be earned in the future is analytically different from earned but unpaid compensation. Potential rights to future earnings under an employment contract may be deemed a chose in action.[77] Although the supreme court has held that

73. 1974 S.C. Acts 2879, No. 1241, § 3 (codified at S.C. Code Ann. § 15-39-410 (1976)).

74. *Id.* § 1-5.104 (codified at S.C. Code Ann. § 37-5-104 (1976)).

75. McKelvay v. South Carolina R.R., 6 S.C. 446 (1876). *See* text at notes 82-85 *infra.*

76. Union Bank v. Northrop, 19 S.C. 473 (1883). *See* text at notes 94-96 *infra.*

77. *Cf.* Lynn v. International Bhd. of Firemen and Oilers, 228 S.C. 357, 90 S.E.2d 204 (1955) (dues payable to parent union are chose in action). *See* note 96 and accompanying text *infra.*

certain choses in action are subject to judicial process,[78] the court might well hold that a debtor's right to receive future compensation under an executory employment contract is too contingent to constitute property subject to an attachment or an order in supplementary proceedings.[79] The court could conclude that future earnings would be subject to judicial process only if the General Assembly reenacts a wage garnishment statute. The constitutionality of statutes exempting future earnings therefore will depend upon the court's characterization of this employment contract right.

2. *Prejudgment Attachment of Earnings.*—In addition to determining whether earnings for personal services are "property" within the scope of article III, section 28, effective analysis requires that a distinction be drawn between prejudgment and postjudgment subjection of earnings to judicial process. Prior to 1974 South Carolina had no statutory provision specifically regulating prejudgment judicial process against earnings for personal services. In 1966 the attorney general issued an opinion asserting that attachment of wages was not authorized under the garnishment law in effect from 1961 through 1974.[80] This opinion is accurate in that garnishment law was a postjudgment collection remedy.[81] Nevertheless, the opinion is misleading in that it implies that a debtor's earnings are not subject to attachment. In *McKelvay v. South Carolina Railroad*[82] the supreme court held that a debtor's earned but unpaid wages were subject to attachment.[83] The *McKelvay* decision is significant because the court expressly found that earned but unpaid compensation for personal services was property within the meaning of the attachment statute.[84] The court has not addressed the issue of whether a debtor's contingent right to receive future earnings under an existing executory employment contract is a property interest subject to attachment.[85] Thus, prior to 1974 a creditor could attach

78. *Id.* at 363, 90 S.E.2d at 207.

79. *See* notes 85 and 96 *infra.*

80. OP. NO. 1969-C, [1966] S.C. OP. ATT'Y GEN. 361.

81. *See* notes 97-102 and accompanying text *infra.*

82. 6 S.C. 446 (1876).

83. *Id.* at 447.

84. *Id. See* S.C. CODE ANN. § 15-19-220 (1976) (property subject to attachment).

85. The majority rule is that a debtor's potential right to receive unearned compensation is too contingent to be subject to attachment. *See, e.g.,* Senna v. Kennedy, 68 Vt. 172, 34 A. 691 (1896); Foster v. Singer, 69 Wis. 392, 34 N.W. 395 (1887). The South Carolina Supreme Court, however, has given an expansive reading to the term "property"

a debtor's earned but unpaid compensation, and possibly could attach a debtor's right under an existing employment contract to receive compensation for future services.

In 1974 the General Assembly enacted the South Carolina Consumer Protection Code.[86] The Act contains a provision captioned "No garnishment" that is now codified at section 37-5-104.[87] That section provides that, "[w]ith respect to a debt arising from a consumer credit sale, a consumer lease, or a consumer loan, . . . the creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings."[88] This statute operates to exempt a debtor's earnings for personal services from judicial process prior to judgment in actions brought to enforce consumer credit obligations. The effect of the statute is to exempt personal property of a debtor that would otherwise be subject to attachment under the holding in *McKelvay*. Presumably, the statute allows a debtor to claim this exemption of earnings in addition to the maximum five hundred dollar exemption granted by article III, section 28 of the constitution.[89]

3. *Postjudgment Applications of Earnings.*—Since 1870 South Carolina has regulated by statute the application of earnings for personal services toward satisfaction of a judgment.[90] This statutory regulation has had the effect of providing at least a partial exemption of earnings for personal service from postjudgment judicial process. Significantly, the provision enacted in 1870 was not an exemption statute. Rather, the provision was included in South Carolina's adoption of the Field Code as the "Code of Procedure for South Carolina."[91] The provision defined the property of a judgment debtor that a judge in a supplementary proceeding could order to be applied toward satisfaction of a judgment.[92] Specifically, the provision precluded a judge from order-

---

in section 15-19-220 of the attachment statute. *See, e.g.*, Charles R. Allen, Inc. v. Rhode Is. Ins. Co., 217 S.C. 296, 60 S.E.2d 609 (1950); Williamson v. Eastern Bldg. & Loan Ass'n, 54 S.C. 582, 32 S.E. 765 (1898). Therefore, it is not inconceivable that the court would find that a debtor's right under an executory employment contract to receive compensation for future services constitutes property subject to attachment.

86. 1974 S.C. Acts 2879, No. 1241 (codified at tit. 37, S.C. CODE ANN. (1976)).

87. *Id.* § 1-5.104 (codified at S.C. CODE ANN. § 37-5-104 (1976)).

88. S.C. CODE ANN. § 35-5-104 (1976).

89. *See* Lanahan & Sons v. Bailey, 53 S.C. 489, 495, 31 S.E. 332, 334 (1898) (Jones, J., concurring) (exemption referred to in the attachment statute is the homestead exemption).

90. 14 STATUTES AT LARGE OF SOUTH CAROLINA 494, Act No. 300, § 323 (1870).

91. *See generally* H. LIGHTSEY, JR., SOUTH CAROLINA CODE PLEADING 10 (1976).

92. 14 STATUTES AT LARGE OF SOUTH CAROLINA 494, Act No. 300, § 323 (1870) provided:

ing the judgment debtor's earnings for personal services to be applied toward satisfaction of a judgment if the judgment debtor could establish two prerequisites.[93] First, the judgment debtor had to establish that the earnings were earned within sixty days prior to the order in supplementary proceedings. Second, the judgment debtor had to establish that the earnings were necessary for the use of a family supported by his labor. Unless the judgment debtor was able to establish both of these prerequisites, the judge was required to order the application of the judgment debtor's unpaid earnings for personal services toward satisfaction of the judgment. In *Union Bank v. Northrop*[94] the supreme court held that an unpaid fee for personal services that the judgment debtor earned more than sixty days prior to the issuance of an order in supplementary proceedings could be applied toward satisfaction of the judgment.[95] Although the judgment creditor in *Union Bank* did not challenge the validity of the limited statutory exemption of earnings for personal services, the decision is significant because it establishes that earned but unpaid compensation for personal services is property of a judgment debtor subject to postjudgment judicial process. Although the court has not considered the propriety of an order in supplementary proceedings applying a judgment debtor's rights under an executory employment contract toward satisfaction of a judgment, an argument can be advanced that the debtor's rights under such a contract are property that a judgment creditor can reach in supplementary proceedings.[96] In any event, earned but unpaid compensation for

---

The Judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor.

93. *Id.*

94. 19 S.C. 473 (1883).

95. *Id.* at 476.

96. In Lynn v. International Bhd. of Firemen and Oilers, 228 S.C. 357, 90 S.E.2d 204 (1955), a creditor recovered a judgment against a parent union. A local of the parent was operating in South Carolina. Under the constitution of the parent union the local was under a standing obligation to transfer a portion of each member's monthly dues to the parent union. The judgment creditor sought an order in supplementary proceedings requiring the local to pay over to the judgment creditor that portion of the dues collected by the local that the parent was entitled to receive. The supreme court asserted that the local's obligation to make monthly payments to the parent was a chose in action and property of the parent union. Therefore, the court held that the judgment creditor was

personal services clearly constitutes property that, in the absence of an exemption statute, could be applied toward satisfaction of a judgment.

In 1960 and 1961 the General Assembly amended the supplementary proceedings provision to allow limited postjudgment wage garnishment.[97] Under the statute in effect from 1961 through 1974, a creditor holding a judgment for the balance due upon food, fuel, or medical accounts could obtain an order garnishing the debtor's "wages, salary, fees, or commissions due or to become due under any existing contract of employment. . . ."[98] The amount that could be garnished could not exceed fifteen percent of the judgment debtor's earnings.[99] Furthermore, the maximum amount that could be garnished to enforce a judgment was limited to one hundred dollars.[100] Two aspects of South Carolina's garnishment law are significant. First, under the garnishment law a debtor's right under an existing employment contract to earn and receive future compensation was subjected to judicial process. Second, unlike the 1870 statute, under the garnishment law a judgment creditor could reach earned but unpaid compensation that was earned within the sixty-day period preceding the issuance of the order in supplementary proceedings.

Section 2 of the 1974 Act creating the South Carolina Consumer Protection Code amended the supplementary proceedings

---

entitled to the order he requested. The rationale of *Lynn* could be applied to the right to receive future earnings under an executory employment contract if the court is willing to treat the right as a chose in action. It should be noted, however, that the court in *Lynn* stressed that the obligation of the local to the parent union was "not dependent upon any contingency." *Id.* at 363, 90 S.E.2d at 207. The obligation was, however, contingent upon the local having dues-paying members. Nevertheless, this contingency is perhaps significantly smaller than the contingency that an employee will continue to work under an employment contract that may be terminable at will. Therefore, although a case can be made for extending the *Lynn* rationale to a judgment debtor's right to receive future compensation under an existing employment contract, the court's willingness to adopt such an extension is debatable.

97. 1961 S.C. Acts 450, No. 265 (repealed 1974); 1960 S.C. Acts 1716, No. 737 (repealed 1961). The 1960 amendment allowed the judge, in his discretion, to order an amount not exceeding fifteen percent of the debtor's wages be applied to judgments for balance due on food, fuel or medicine accounts, but no more than one hundred dollars could be so applied. These provisions were specifically stated as being inapplicable to judgments for mortgages or for monies lent. The sixty day moratorium period was deleted. However, in 1961, this provision was reinserted by amendment and those provisions regarding judgments for mortgages or monies lent were deleted.

98. 1961 S.C. Acts 450, No. 265 (repealed 1974).

99. *Id.*

100. *Id.*

provision to preclude absolutely the application of a judgment debtor's earnings for personal services toward satisfaction of a judgment.[101] Section 15-39-410 now allows a judgment debtor to withhold from satisfaction of a judgment property that is "exempt from execution" *plus* his earnings for personal services.[102] Thus, the 1974 Act allows a judgment debtor to claim, in addition to the five hundred dollar personal property exemption provided in article III, section 28 of the constitution, the exemption of all earnings for personal services from application toward satisfaction of a judgment.

4. *Constitutionality of the Exemption of Earnings.*— Although the supreme court has not ruled on the validity of the 1974 statutes exempting a debtor's earnings for personal services from judicial process, the statutes cannot pass constitutional muster under the doctrine of *Duncan v. Barnett.*[103] Decisions of the supreme court establish that a debtor's earned but unpaid compensation is property of the debtor that would be subject to judicial process in the absence of a statutory exemption.[104] Furthermore, under the case law an argument can be made that a debtor's right to receive compensation under an executory employment contract is also property subject to judicial process.[105] The 1974 statutes allow a debtor to exempt his unpaid earnings for personal services from attachment in actions to enforce consumer credit obligations and from postjudgment orders in supplementary proceedings. Thus, the 1974 statutes grant debtors exemptions in personal property that are in addition to the maximum five hundred dollar personal property exemption available under article III, section 28 of the constitution. Since the supreme court has consistently held that the General Assembly lacks the authority to enact exemptions in excess of those provided for in the constitution,[106] the 1974 statutes, at least

101. 1974 S.C. Acts 2879, No. 1241, § 3.

102. S.C. CODE ANN. § 15-39-410 (1976) provides:

> The judge may order any property of the judgment debtor, not exempt from execution, in the hand of either himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except earnings of the debtor for his personal services cannot be so applied.

103. *See* text at notes 39-47 *supra.*

104. Union Bank v. Northrop, 19 S.C. 473 (1883); McKelvay v. South Carolina R.R., 6 S.C. 446 (1876).

105. *See* Lynn v. International Bhd. of Firemen and Oilers, 228 S.C. 357, 90 S.E.2d 204 (1955); Charles R. Allen, Inc. v. Rhode Is. Ins. Co., 217 S.C. 296, 60 S.E.2d 609 (1950). *See* note 96 *supra.*

106. *See* notes 39-47 and accompanying text *supra.*

to the extent they exempt unpaid earnings for personal services from judicial process, are unconstitutional and void.

B. *The Impact of Voiding the Statutes that Exempt Earnings for Personal Services*

1. *Upon State Collection Remedies.*—A conclusive decision holding unconstitutional the South Carolina statutes that exempt a debtor's earnings for personal services would not subject the entire amount of a debtor's earnings to judicial process. Federal law provides substantial protection to the debtor. The Federal Consumer Credit Protection Act of 1968[107] limits the amount of a debtor's earnings for personal services that a creditor can reach through judicial process to the lesser of twenty-five percent of the debtor's weekly "disposable earnings"[108] or the amount by which the debtor's disposable earnings exceed thirty times the federal minimum wage.[109] In effect, this limitation entitles a debtor to exempt a minimum of $87.00 per week from the reach of his creditors. When the debtor's disposable earnings exceed $116.00 per week the debtor is entitled to exempt seventy-five percent of that amount.[110] The limitations imposed by the Federal Consumer Credit Protection Act apply to both prejudgment collection remedies, such as attachment, and to postjudgment remedies such as orders in supplementary proceedings.[111] Furthermore, the limitations apply to actions to enforce all debts except court orders for support, court orders under Chapter 13 of the new Bankruptcy Code, and debts for any state or federal

107. 15 U.S.C.A. §§ 1601-1693r (1974 & Cum. Supp. 1979).

108. Disposable earnings are defined at 15 U.S.C. § 1672(b) (1976); "The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." Earnings, in turn, are defined at *id.* § 1672(a): "The term 'earnings' means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." Although the term "earnings" includes pay checks issued to an employee that are in the possession of his employer, Hodgson v. Christopher, 365 F. Supp. 583 (D.N.D. 1973), the term does not include compensation that an employee has received and deposited in his bank account. Dunlap v. First National Bank of Arizona, 399 F. Supp. 855 (D. Ariz. 1975). *See* Comment, 9 CREIGHTON L. REV. 761 (1976).

109. 15 U.S.C. § 1673(a) (1976).

110. These computations are based upon the federal minimum wage for 1979 of $2.90 per hour. 29 U.S.C.A. § 206(a)(1) (1978).

111. The statute imposes limitations upon "garnishment." 15 U.S.C. § 1673(a) (1976). Garnishment is defined at 15 U.S.C. § 1672(c): "The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

tax.[112] Thus, even if the South Carolina statutory exemptions are declared unconstitutional and void, in most actions debtors will be entitled to exempt a substantial portion of their earnings for personal services.

The procedures invoked to reach the nonexempt portion of a debtor's earnings must also conform to the mandates of federal law. This requirement poses a substantial problem when a creditor seeks to reach a debtor's earnings prior to judgment. In *Sniadach v. Family Finance Corp.*[113] the Supreme Court of the United States held that under the due process clause of the fourteenth amendment a debtor could not be deprived of the temporary use of her wages without prior notice and the opportunity for a hearing.[114] Although the majority opinion in *Sniadach* did not discuss the scope of the required hearing, the concurring opinion asserted that at the hearing the creditor must be required to establish at least the probable validity of his underlying claim.[115] Although the Supreme Court has retreated from the due process standard of prior notice and an opportunity for a hearing announced in *Sniadach* for prejudgment collection remedies generally,[116] that standard remains valid when the property subjected to process consists of the debtor's earnings.[117]

---

112. *Id.* § 1673(b). For general discussions of garnishment under the Federal Consumer Credit Protection Act, see Note, *Garnishment Under the Consumer Credit Protection Act and the Uniform Consumer Credit Code,* 38 U. CIN. L. REV. 338 (1969); Note, *Wage Garnishment Under the Consumer Credit Protection Act: An Examinaton of the Effects on Existing State Law,* 12 WM. & MARY L. REV. 357 (1970); Comment, *The Effect of the Garnishment Provisions of the Consumer Protection Act Upon State Garnishment Laws,* 9 HOUS. L. REV. 537 (1972).

In 1977 Congress amended 11 U.S.C. § 1673(b) to impose limitations upon the percentage of debtors' disposable earnings that could be garnished to enforce an order for support. Pub. L. No. 95-30, Title V, § 501(e), 91 Stat. 161, 162 (1977). When the debtor is supporting his spouse or dependent child, the maximum part of his weekly disposable earnings that can be garnished is fifty percent. 15 U.S.C.A. § 1673(b)(2)(A) (Cum. Supp. 1979). When the debtor is not supporting his spouse or dependent child, sixty percent of his weekly disposable earnings is subject to garnishment. *Id.* § 1673(b)(2)(B). These limitations are increased to fifty-five percent and sixty-five percent respectively when the support order is with respect to a period more than twelve weeks prior to commencement of the workweek for which garnishment is sought.

113. 395 U.S. 337 (1969).

114. *Id.* at 339.

115. *Id.* at 342-43 (Harlan, J., concurring).

116. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

117. In both *North Georgia* and *Mitchell* the Court distinguished rather than overruled *Sniadach.* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 605-07 (1975); Mitchell v. W.T. Grant Co., 416 U.S. at 614-20 (1974).

The South Carolina Supreme Court has held a creditor may reach a debtor's unpaid earnings under the attachment statutes.[118] The attachment statute, however, makes no provision for affording the debtor notice and an opportunity for a hearing before he is deprived of the use of his property.[119] Thus an application of the attachment statute to reach a debtor's earnings would violate the due process clause.[120] A creditor might be able to circumvent the due process problems by serving the debtor with an order to show cause why his earnings should not be attached at the same time he served his summons and complaint. Under a show cause procedure the debtor could obtain a probable validity hearing before the attachment of his earnings could become effective. In *Rogoski v. Hammond*[121] a Washington appellate court endorsed a trial court's use of the show cause procedure to compensate for the omission from the State's attachment statute of a provision for a preseizure hearing.[122] In *Rogoski* the court was aided in making its decision by a Washington statute that authorized the trial court to adopt any mode of proceeding that appears to conform best to the spirit of the laws when the course of proceeding is not specified by statute.[123] Since South Carolina does not have a statute similar to Washington's, the adoption of a show cause procedure by the South Carolina courts appears doubtful. If applied as written the South Carolina attachment statute does not allow a constitutional attachment of a debtor's

118. McKelvay v. South Carolina R.R., 6 S.C. 446 (1876).

119. S.C. CODE ANN. §§ 15-19-10 to -560 (1976). Section 15-19-110 provides for issuance of a warrant of attachment upon the filing of an affidavit, *id.* §§ 15-19-50, -60 and bond, *id.* §§ 15-19-80, -90.

120. The South Carolina attachment statute may be unconstitutional as applied to *any* type of property. In both *Mitchell* and *North Georgia* the majority opinions imply that the issuance of the writ by a judge is a prerequisite to finding constitutional a state prejudgment collection remedy that does not afford the debtor an opportunity for a preseizure hearing. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 606; Mitchell v. W.T. Grant, 416 U.S. at 606-07. The South Carolina attachment statute authorizes a clerk of court to issue the writ of attachment. S.C. CODE ANN. § 15-19-40 (1976). Two United States courts of appeals decisions have held attachment statutes unconstitutional on the ground that the writ was issued by a clerk of court rather than a judge. Johnson v. American Credit Co., 581 F.2d 526, 533-34 (5th Cir. 1978); Guzman v. Western State Bank, 516 F.2d 125, 130-31, 133 (8th Cir. 1975). No reported decision has yet considered such an attack on South Carolina's attachment statute. *But see* Harrison v. Morris, 370 F. Supp. 142 (D.S.C. 1974) (upheld constitutionality of the attachment statute by distinguishing *Fuentes* and *Sniadach* through a novel interpretation of takings under the due process clause).

121. 9 Wash. App. 500, 513 P.2d 285 (1973).

122. *Id.* at 504-13, 513 P.2d at 288-93.

123. WASH. REV. CODE ANN. § 2.28.150 (1961).

nonexempt earnings. Thus, although a portion of a debtor's earnings may not be legally exempt from prejudgment collection remedies, the debtor may *in fact* enjoy an absolute exemption prior to judgment because no procedure is available to a creditor under which he can reach a debtor's earnings.

For postjudgment collection remedies, there is no due process requirement that would interfere with a court's power in supplementary proceedings to order an employer to turn over the nonexempt portion of a judgment debtor's earned but unpaid compensation to the judgment creditor.[124] Furthermore, a court could accept the rationale suggested by the South Carolina Supreme Court in *Lynn v. International Brotherhood of Firemen and Oilers*[125] and hold that the judgment debtor's right under his employment contract to receive nonexempt earnings is intangible property that may be applied toward satisfaction of a judgment.[126] The court could then order that the proceeds of this right be turned over to the judgment creditor. The effect of adopting the rationale of *Lynn* would be to impose wage garnishment. The order in supplementary proceedings would effectively grant the judgment creditor a lien upon all after-acquired nonexempt earnings of the debtor in an amount equal to the judgment debt. The judgment creditor's lien would attach to future compensation when it was earned and would be enforced when the compensation became payable to the debtor. If the South Carolina courts refuse to adopt the procedure suggested in *Lynn,* a judgment creditor would have to make repeated requests for orders immediately prior to the end of each pay period of the debtor requiring the debtor's employer to turn over the nonexempt portion of the judgment debtor's earned but unpaid compensation. Although this latter approach is more cumbersome than wage garnishment established under the rationale of *Lynn,* it would allow a judgment creditor to apply a debtor's future earnings toward satisfaction of a judgment. In short, voiding the South Carolina earnings exemption statutes is likely to have a significant impact in the enforcement of judgments.

---

124. Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924); Brown v. Liberty Loan Corp., 539 F.2d 1355, 1363 (5th Cir. 1976). *But see* Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution:* Sniadach *and its Progeny,* 65 GEO. L.J. 1 (1976).

125. 228 S.C. 357, 90 S.E.2d 204 (1955).

126. *Id.* at 363, 90 S.E.2d at 206-07 (obligation of local union to pay dues to parent union is chose in action and attachable property of the parent). *See* note 96 *supra.*

2. *Upon Federal Bankruptcy Proceedings.*—This section examines the relationship between subjecting earnings to judicial process and consumer bankruptcies. Empirical studies establish that the rate of consumer bankruptcies is higher in states where a debtor's earnings for personal services are subject to judicial process than in states where such earnings are exempt.[127] These studies strongly suggest a causal relationship between "wage garnishment" and consumer bankruptcy. Although the rate of consumer bankruptcies in South Carolina is currently among the lowest in the nation,[128] the empirical studies suggest that if the South Carolina statutory exemption of earnings for personal services is declared unconstitutional an increase in consumer bankruptcies would result.

The causal relationship between subjecting earnings for personal services to judicial process and consumer bankruptcies arises because a consumer can free his future earnings from the claims of his existing creditors by filing a petition in bankruptcy. The ability to free future earnings from the claims of his creditors may provide a substantial incentive to a consumer to file in bankruptcy. In essence, filing a petition in bankruptcy enables a consumer to exempt property, future earnings, that are not exempt under state law.

Section 70a is the provision of the current Bankruptcy Act that entitles the bankrupt to retain his future wages free from the claim of his prebankruptcy creditors.[129] Section 70a establishes

---

127. *See, e.g.*, D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 28-32, 236-41 (1971); Shuchman & Jantscher, *Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates*, 77 COM. L.J. 360 (1972).

Other factors play in the equation. For a study that considered the effects of the unemployment rate, consumer debt as a percentage of personal income, wage garnishment, and exemptions, see Apilado, Dauten & Smith, *Personal Bankruptcies*, 7 J. LEGAL STUD. 371 (1978). Of these four, wage garnishment was found to be the most significant. *Id.* at 380. The authors concluded, however, "that other explanatory variables have yet to be identified." *Id.* at 391.

128. *See* [1977] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 464-71. For a comparison with other states from 1962-74 which ranked South Carolina as having the lowest bankruptcy rate, see Apilado, Dauten & Smith, *supra* note 127, at 375-76 (1978). During that period South Carolina never ranked higher than forty-sixth, and was fiftieth for seven years. *Id.* at 392. That South Carolina's wage garnishment statute in effect from 1960 to 1974 did not generate a higher rate of consumer bankruptcies may result from the narrow class of obligations (judgments on food, fuel, and medical accounts) that could be enforced by garnishment, and the limited amount that could be garnished ($100 per judgment). *See* notes 97-100 and accompanying text *supra*.

129. 11 U.S.C. § 110(a) (1976).

the date of filing the petition as the date of "cleavage."[130] That provision vests the trustee with the bankrupt's title to all nonexempt property falling within the scope of one of the eight subsections of section 70a that the bankrupt owned "as of the date of filing the petition."[131] This property must be turned over to the trustee for liquidation and the proceeds are distributed to those creditors of the bankrupt who have established allowable claims.[132] Subject to the windfall clauses of section 70a,[133] however, the bankrupt may retain all property he acquires after filing the petition, free from the reach of his prior creditors holding dischargeable claims.[134] Thus, the bankrupt can retain the compensation for personal services that he earns after filing the petition free from the claims of his trustee and his prebankruptcy creditors holding dischargeable debts.[135] When such creditors have begun or threatened to begin subjecting the nonexempt portion of a debtor's earned but unpaid compensation to judicial process, filing a bankruptcy petition will prevent the creditors from reaching any portion of the debtor's postbankruptcy earnings.

The analysis is more complex when a creditor has obtained a garnishment that under state law has the effect of establishing a lien upon the debtor's future earnings. State law liens are normally enforceable in bankruptcy proceedings unless subject to one of the trustee's avoiding powers.[136] Nevertheless, when a garnishment lien is not voidable by the trustee, the doctrine of *Local Loan Company v. Hunt*[137] protects the bankrupt's postbankruptcy earnings from the valid state law lien of a garnishing credi-

130. *See* Bailey v. Baker Ice Machine Co., 239 U.S. 268, 276 (1915); Everett v. Judson, 228 U.S. 474, 479 (1913).

131. 11 U.S.C. § 110(a) (1976).

132. *See id.* § 105(a). *See also* Bankruptcy Act § 57, 11 U.S.C. § 93 (1976) (allowable claims).

133. The windfall clauses vest the trustee with the title the bankrupt acquires in contingent remainders, "like interests in real property," estates by the entirety that vest within the six month period after filing the petition, and property the bankrupt receives "by bequest, devise or inheritance" within the six month period. 11 U.S.C. § 110(a)(7) (1976) and the paragraph following *id.* § 110(a)(8) (1976).

134. *See* Segal v. Rochelle, 382 U.S. 375, 379-80 (1966). *See generally* 1A J. MOORE, J. MULDER & R. OGLEBAY, COLLIER ON BANKRUPTCY ¶ 17.30 (J. Moore & L. King ed. 1978) [hereinafter cited as COLLIER]. *See also* Bankruptcy Act §§ 14, 17, 11 U.S.C. §§ 32, 35 (1976) (dischargeability).

135. *See* 1A & 4A COLLIER, *supra* note 134, at ¶¶ 17.30, 70.34.

136. *See* Zartman v. First National Bank, 216 U.S. 134, 138 (1910); Carina Mercury, Inc. v. Igaravides, 344 F.2d 397, 399-400 (1st Cir. 1965).

137. 292 U.S. 234 (1934).

tor. In *Local Loan* the Supreme Court ruled that an assignment of wages to secure a dischargeable debt could not be enforced against wages earned after the filing of the petition.[138] The Court found that such a holding was necessary to preserve the benefit of the bankrupt's discharge and afford him a fresh start in life.[139] The doctrine announced in *Local Loan* for assignments of wages applies with equal force to wage garnishments.[140] Thus, a garnishment issued to enforce a dischargeable debt, which under state law imposes a lien upon a debtor's future earnings, does not bind the debtor's compensation earned after filing a petition in bankruptcy.

The analysis under the new Bankruptcy Code[141] is similar. Section 541 defines the property of the bankrupt estate that will be liquidated and distributed to creditors with allowable claims.[142] Section 541(a)(6) excludes from the estate, "earnings from services performed by an individual debtor after commencement of the case."[143] Furthermore, nothing in the Code purports to repudiate the doctrine of *Local Loan.* Therefore, a consumer can free his future earnings from the grip of a garnishment lien by filing in bankruptcy. The date of cleavage concept of bankruptcy law thus provides the debtor whose earnings have been subjected to judicial process with an incentive to file in straight bankruptcy.

Although the impact of this incentive is difficult to quantify, in many cases, it will be substantial. A consumer whose financial condition is such that his creditors have resorted to judicial process to reach his earnings will most likely need his entire earnings to retain and acquire necessities for the well-being of himself and his family. For example, the loss of even twenty-five percent of his earnings may prevent the consumer from meeting such current obligations as his rent. Default on this obligation will result in the consumer being evicted from his residence. If, by filing bankruptcy, the consumer can free his future earnings from the claim of his creditors and thereby retain his residence, the incentive to file in bankruptcy will be strong.

In order to determine whether this incentive will actually

138. *Id.* at 242-44.
139. *Id.* at 244-45.
140. *See* Hodgson v. Bicknell, 49 Wash. 2d 130, 298 P.2d 844 (1956).
141. Bankruptcy Code, *supra* note 11.
142. *Id.* § 541.
143. *Id.* § 541(a)(6).

induce consumer bankruptcies, one must assess the disincentives to filing in bankruptcy. The principal disincentive to filing in straight bankruptcy is that the debtor must surrender all his nonexempt property to the trustee.[144] In theory this disincentive should have no impact upon the decision to file in bankruptcy of a debtor whose earnings have been subjected to judicial process. Under South Carolina law, a judgment creditor would be able to reach a debtor's earnings only through supplementary proceedings.[145] One condition for instituting supplementary proceedings is that the judgment creditor must have issued an execution that was returned unsatisfied.[146] Thus, before a judgment creditor can obtain an order applying the debtor's earnings toward satisfaction of a judgment he must have exhausted all nonexempt property in the debtor's possession.[147] If the debtor owned assets not in his possession, such as a bank account, the judgment creditor would probably apply those assets toward satisfaction of the judgment before resorting to the judgment debtor's earnings. The debtor, therefore, will have lost all his nonexempt property before the judgment creditor subjects the debtor's earnings to judicial process. Furthermore, the exemptions that a debtor is entitled to claim in bankruptcy are at least as large as those he claimed under South Carolina law prior to the institution of supplementary proceedings.[148] Thus, in theory a consumer whose earnings have been subjected to judicial process will not own property which must be surrendered to the trustee upon filing in bankruptcy.

The theoretical result outlined above, however, rests upon the assumption that state law collection remedies against a judgment debtor's property are as efficient as the trustee's remedies in bankruptcy. If this assumption is false, then loss of property may be a disincentive to filing in bankruptcy. If state collection

144. Bankruptcy Act § 70a, 11 U.S.C. § 110(a) (1976); Bankruptcy Code, *supra* note 11, § 542.

145. A debtor's earned but unpaid compensation is a debt owing to the debtor. A judgment creditor cannot reach an indebtedness owing to the judgment debtor through execution; he must invoke supplementary proceedings. McManus v. Bank of Greenwood, 171 S.C. 84, 88-89, 171 S.E. 473, 474 (1933) (code of procedure does not provide for levy on choses in action such as bank accounts). *See generally* John Deere Co. v. Cone, 239 S.C. 597, 603-04, 124 S.E.2d 50, 53 (1962).

146. S.C. CODE ANN. § 15-39-310 (1976).

147. *See id.* § 15-39-80 (contents of executions).

148. Bankruptcy Act § 6, 11 U.S.C. § 24 (1976); Bankruptcy Code, *supra* note 11, § 522(b).

remedies are inefficient a judgment debtor may be able to retain free from the claims of his judgment creditors nonexempt property which upon filing a petition in bankruptcy the debtor would be forced to turn over to the trustee. If a judgment debtor can retain nonexempt property under state law collection actions, a disincentive to file in bankruptcy will arise.[149] Therefore, one cannot determine the impact upon voluntary consumer bankruptcies of subjecting judgment debtors' earnings for personal services to judicial process without first determining whether other state law collection remedies enable a judgment creditor to reach all a judgment debtor's nonexempt property. The impact of subjecting judgment debtors' earnings for personal services to judicial process upon the rate of voluntary consumer bankruptcies should vary directly with the efficiency of other state law collection remedies. The greater the efficiency of these other remedies, the higher the probability that a subjection of earnings for personal services to judicial process will force a debtor to file in bankruptcy.

Furthermore, there are disincentives to filing in bankruptcy in addition to the loss of nonexempt property. Many consumer debtors may refrain from filing because of the stigma of bankruptcy.[150] Although in recent years the courts[151] and Congress[152] have attempted to limit the collateral injuries a debtor suffers as a result of filing in bankruptcy, bankruptcy may still have a profound negative impact upon a debtor's future employment and social standing.[153] The stigma of bankruptcy may cause a debtor to endure, if possible, the economic pressure imposed upon

149. This situation, however, will create an incentive for creditors of a debtor to file an involuntary petition against him. For the view that limiting a debtor to smaller exemptions in a bankruptcy proceeding than available under state law would create an incentive for creditors to file involuntary petitions, see Donnelly, *The New (Proposed?) Bankruptcy Act: The Development of Its Structural Provisions and Their Impact on the Interests of Consumer-Debtors*, 18 SANTA CLARA L. REV. 291, 304-08 (1978).

150. *See* 1 D. COWANS, BANKRUPTCY LAW AND PRACTICE § 48 (2d ed. 1978).

151. *See* Perez v. Campbell, 402 U.S. 637 (1971) (state cannot suspend driver's license for failure to satisfy debt discharged in bankruptcy); Handsome v. Rutgers Univ., 445 F. Supp. 1362 (D.N.J. 1978) (violates fresh start policy for a public university to deny transcripts for nonpayment of discharged student loan); Bankruptcy Code, *supra* note 11, § 523(a)(8), (b). *But see* Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977) (private college can refuse transcripts to those not paying student loans discharged in bankruptcy). *See generally* Comment, *Post Discharge Coercion of Bankrupts by Private Creditors: Girardier v. Webster College*, 91 HARV. L. REV. 1336 (1978).

152. Bankruptcy Code, *supra* note 11, § 525 (protection against discriminatory treatment).

153. *See generally* 1 D. COWANS, *supra* note 150 at § 52.

him by subjecting his earnings to judicial process, and to refrain from filing in bankruptcy.

Thus, allowing judgment creditors to subject a debtor's earnings to judicial process will create an incentive to file consumer bankruptcies. The strength of this incentive may be substantial. Furthermore, it is probable that this incentive will be sufficiently strong to induce a higher rate of consumer bankruptcies in South Carolina.

IV. Exemptions Under the Bankruptcy Reform Act of 1978

A. *Impediments to the Fresh Start*

On November 6, 1978 the President signed the Bankruptcy Reform Act of 1978.[154] This Act represents the culmination of nearly a decade of congressional activity in the area of bankruptcy reform.[155] Title I of the Reform Act consists of the Bankruptcy Code.[156] The Bankruptcy Code represents a significant reformation and a complete restructuring of the substantive law of bankruptcy now contained in the Bankruptcy Act.[157] The Bankruptcy Code will apply to all cases commenced after September 30, 1979.[158] Among the most significant reforms effected by the Bankruptcy Code are those in the area of consumer bankruptcies. With respect to liquidation proceedings the Bankruptcy Code was drafted to insure that debtors would realize the principle benefit of straight bankruptcy—the opportunity to obtain a fresh start in life. The constitutional limitations imposed upon the power of the General Assembly to enact exemption statutes may impede the effectiveness of the Code in accomplishing this purpose.

Congress concluded that the provisions of the Bankruptcy Act were not operating to allow debtors to obtain a "fresh start in life."[159] Two prerequisites must be met to provide a debtor with a fresh start in life. First, the debtor must be granted an effective release from personal liability for the debts he incurred prior to filing his petition.[160] Second, the debtor must be entitled to retain sufficient property for a return to normal life.[161] Although the

154. Pub. L. No. 95-598, 92 Stat. 2549 (1978).
155. See H.R. Rep. No. 95-595, *supra* note 3, at 2-3.
156. Bankruptcy Code, *supra* note 11.
157. Pub. L. No. 95-598, § 402, 92 Stat. 2549, 2682.
158. *See* H.R. Rep. No. 95-595, *supra* note 3, at 125.
159. *Id.*
160. *Id.*
161. *Id.*

current Bankruptcy Act contains provisions entitling a bankrupt individual to a discharge of personal liability for his prebankruptcy debts[162] and reserving to him property exempt under state law,[163] the drafters of the new Code found the Act deficient in meeting both of the prerequisites to a fresh start.[164] One reason for this finding is that the Bankruptcy Act incorporates state exemption statutes, and that these 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."[165] The principal reason, however, is that the Bankruptcy Act does not make adequate provision for consumer credit secured by security interests in essential consumer goods.[166] A discharge releases the bankrupt from personal liability for his secured debts, but it does not affect the validity of a security interest the creditor may hold upon the bankrupt's property.[167] Under the law of most states including South Carolina, a debtor can waive an exemption in the security agreement.[168] Consumer credit is frequently extended pursuant to a security agreement under which the consumer grants the creditor a security interest in essential consumer goods and waives his exemption rights.[169] Upon the consumer's subsequent bankruptcy neither his discharge nor the exemption of the goods under state law will prevent the secured creditor from enforcing its security interest by repossessing the goods. Thus, despite the exemption and discharge, secured consumer credit can operate to deprive a bankrupt of goods that are essential to his fresh start in life.

The problems posed by secured consumer credit are more complex, however, than the description above would indicate. Furthermore, a secured creditor confronted with the default and bankruptcy of his debtor may invoke less direct and more invidi-

162. Bankruptcy Act § 14, 11 U.S.C. § 32 (1976).

163. *Id.* § 6, 11 U.S.C. § 24 (1976).

164. H.R. REP. NO. 95-595, *supra* note 3, at 125.

165. *Id.* at 126.

166. *Id.* at 125, 127.

167. *See generally* 1A COLLIER, *supra* note 134, at ¶ 17.29.

168. *Cf.* S.C. CODE ANN. § 15-41-120 (1976) (waiver of homestead exemption). *See generally* Vukowich, *supra* note 1, at 848-52 (1974); FTC, REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE: CREDIT PRACTICES, *16 CFR 444* 98-114 (1978) [hereinafter FTC REPORT]; Student Symposium, *Prohibiting Advance Contractual Waivers of the Benefits of State Property Exemptions Laws: § 444.2(a)(2) of the Proposed FTC Rule on Credit Practices,* 8 CONN. L. REV. 503 (1976).

169. *See* FTC REPORT, *supra* note 168, at 110-12; H.R. REP. No. 95-595, *supra* note 3, at 127, 172.

ous methods to defeat the bankrupt's ability to obtain a fresh start than by merely repossessing the bankrupt's exempt consumer goods.[170]

A creditor with a security interest in consumer goods may not be fully secured within the traditional definition of the term.[171] A creditor is fully secured when he has a contractual right upon the debtor's default to seize and sell specified property of the debtor sufficient to generate a fund that will satisfy the underlying obligation.[172] When a creditor's collateral is consumer goods it is likely that the resale value of the goods will be less than the amount of the underlying debt.[173] Leaving aside the not atypical situation in which the consumer purchases goods at a grossly inflated price under a secured credit arrangement,[174] two factors contribute to the lack of security. First, most consumer goods tend to depreciate more rapidly than the debtor reduces the amount of the secured debt.[175] Second, there may be no viable market in which to sell used and repossessed consumer goods.[176] That the creditor with a security interest in consumer goods may be at least partially unsecured does not mean that the creditor lacks the ability upon the consumer's default to enforce the obligation.[177] Although the collateral may have a minimal resale value, the cost to the consumer of replacing the goods may be substantial. In addition, if the goods are essential to the consumer's well-being the consumer may be willing to enter into repeated refinancing agreements to avert repossession.[178] A secured creditor, therefore, may effectively use threats of repossession to extract from the debtor payments that far exceed the resale value of the collateral.[179] The value to the secured creditor of his security interest in consumer goods may be found primarily in the leverage it gives him to extract payments from the debtor.[180]

In the context of bankruptcy, the leverage available to the

170. *See* H.R. REP. No. 95-595, *supra* note 3, at 127.
171. *Id.* at 162-64, 166-73.
172. *See id.* at 180-81.
173. *Id.* at 166, 171-73.
174. *See* D. CAPLOVITZ, THE POOR PAY MORE 16-20, 81-93 (2d ed. 1967).
175. H.R. REP. No. 95-595, *supra* note 3, at 171.
176. *Id.*
177. *Id.* at 172.
178. *Id.*
179. *See id.* at 127.
180. *Id.* at 172.

secured creditor with a security interest in consumer goods appears in the form of reaffirmation agreements.[181] A reaffirmation agreement is a promise by the debtor to pay a debt that is subject to the debtor's discharge.[182] Reaffirmation agreements can arise whenever the bankrupt estate does not have an interest in the goods. Two such situations typically arise in consumer bankruptcies. First, if the value of the goods subject to a valid security interest is less than the amount of the secured debt, the debtor and hence the estate has no interest in the goods. In this situation the trustee abandons the goods and allows the secured creditor to enforce his security interest outside the bankruptcy proceedings.[183] The second situation arises when the goods subject to the security interest are exempt under state law.[184] The debtor may have an equity in the goods, but that equity is reserved to the debtor and cannot be applied toward satisfaction of the claims of the unsecured creditors. Under existing law exempt property is not part of the bankrupt estate.[185] Therefore, the trustee will allow the debtor to retain exempt consumer goods. The secured creditor can then enforce its security interest outside the bankruptcy proceeding. In either situation, the debtor invariably will be in default under the terms of the agreement,[186] and the secured creditor will have the right to take possession of the collateral, sell it, and apply the proceeds toward satisfaction of the security interest.[187] When the amount of the debt exceeds the market value of the collateral or when the replacement cost to the consumer exceeds the amount of the unpaid debt, the secured creditor may eschew the direct enforcement of its security interest and propose a reaffirmation agreement. In a typical reaffirmation agreement, the secured party agrees to refrain from exercising his right to take

181. *Id. See generally* 2 D. COWANS, *supra* note 150, at § 654.

182. *See* 2 D. COWANS, *supra* note 150, at § 654.

183. BANKRUPTCY R. 608; Bankruptcy Code, *supra* note 11, § 554. *See generally* 1 D. COWANS, *supra* note 150, at § 377.

184. COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON BANKRUPTCY LAW OF THE UNITED STATES, *H.R. Doc. No.* 137, 93d Cong., 1st Sess. Pt. I 174 (1973) [hereinafter cited as BANKRUPTCY COMMISSION REPORT].

185. Bankruptcy Act § 70a, 11 U.S.C. § 110(a) (1976) (exempt property does not vest in trustee). *See generally* 2 D. COWANS, *supra* note 150, at §§ 694-95.

186. Even if the debtor has not missed an installment payment, the security agreement will provide that the filing of a petition in bankruptcy by or against him will constitute a default. Presumably such a term would be enforceable under S.C. CODE ANN. § 37-5-109(2) (Cum. Supp. 1978) because bankruptcy will significantly impair the secured party's prospect for payment.

187. S.C. CODE ANN. §§ 36-9-501, -503 to -505, 37-5-103 (1976 & Cum. Supp. 1978).

possession of the collateral in exchange for the bankrupt's promise to pay the original debt.[188] The proposed reaffirmation agreement may be attractive to the bankrupt because the goods are essential to his and his dependents' well-being and the replacement cost of the goods may exceed the amounts called for under the reaffirmation agreement. The reaffirmation agreement, however, subverts the fresh start policy of the Bankruptcy Act, because the bankrupt remains personally liable for a prebankruptcy debt.[189] The bankrupt, thus, loses the benefit of his discharge of the underlying debt.

In summary, two aspects of practice under the current Bankruptcy Act impede a consumer bankrupt from obtaining the fresh start in life contemplated by the Act. First, in many instances the state law exemptions applicable in a bankruptcy proceeding under section 6 of the Act are inadequate to protect property essential to the well-being of the debtor. Second, the Act affords minimal relief to the consumer bankrupt whose essential property is encumbered by valid security interests. More specifically, the Act does not control the creation of reaffirmation agreements that a partially secured creditor can impose upon a bankrupt through threats of repossession.

B. The Bankruptcy Code—Attempts at Reform and Incentives to Liquidate

The Bankruptcy Code includes provisions designed to correct these perceived deficiencies under the current Act. First, the Code includes a provision that may operate to allow a consumer debtor to claim exemptions enumerated in the Code that are more generous and more in conformity with the needs of consumer debtors than exemptions available under South Carolina law.[190] By providing for federal exemptions Congress sought to allow a debtor to retain sufficient property to enable the debtor to return to normal life.[191] Second, the Code includes provisions designed to preclude the secured credit problems that under the current Act may prevent a consumer bankrupt from realizing the benefit of his discharge.[192]

188. *See* H.R. REP. No. 95-595, *supra* note 3, at 163, 170.
189. *Id.* at 162-64.
190. Bankruptcy Code, *supra* note 11, §§ 522(b)(1), 522(d).
191. *See* H.R. REP. No. 95-595, *supra* note 3, at 126-27.
192. Bankruptcy Code, *supra* note 11, §§ 522(f), 524, 525, 722.

The Bankruptcy Reform Act is substantially the enactment of H.R. 8200 as it was passed by the House of Representatives.[193] H.R. 8200 set forth a comprehensive and integrated statutory scheme designed to assure that straight bankruptcy would operate to grant a consumer a fresh start in life.[194] Although the Bankruptcy Code includes most of the statutory scheme set forth in H.R. 8200, the House was forced to compromise one crucial provision to gain Senate approval.[195] Under H.R. 8200 an individual debtor was given an absolute right to elect to claim liberal "federal exemptions" in a bankruptcy proceeding in lieu of the exemptions available under state law.[196] Under the Bankruptcy Code as enacted each state has the right to enact specific legislation to deprive debtors of the right to claim the federal exemptions.[197] The effect of enacting such legislation will be to limit bankrupt debtors to the exemptions available under state law and nonbankruptcy federal law.[198]

The issue now raised is whether the General Assembly should enact legislation to deprive South Carolina debtors of the right to claim federal exemptions in bankruptcy proceedings. In order to assess the advisability of enacting such legislation several factors must be considered. First, one must determine the probable impact upon the rate of consumer bankruptcies in South Carolina of allowing debtors to claim the federal exemptions. Second, one must determine whether depriving debtors of their right to claim the federal exemptions will frustrate the fundamental objective of the Reform Act as it applies to consumer liquidations—assuring the debtor of the opportunity to obtain a fresh start in life. Specifically, one must determine whether depriving debtors of the right to claim the federal exemptions will undercut the effectiveness of the provisions of the Code designed to cure the secured credit problem. Finally, one must consider the advisability and availability of alternative courses of action.

1. *Impact on the Rate of Bankruptcies.*—A strong argument supports the General Assembly's enacting legislation to deprive debtors of the right to claim the federal exemptions enu-

193. H.R. 8200, 95th Cong., 2d Sess. (1978).

194. *See* H.R. REP. No. 95-595, *supra* note 3, at 125.

195. See 124 CONG. REC. H11,089 (Sept. 28, 1978) (remarks of Rep. Edwards); 124 CONG. REC. S17,406 (Oct. 6, 1978) (remarks of Sen. Deconcini).

196. H.R. 8200, 95th Cong., 2d Sess., Title I, § 522(b).

197. Bankruptcy Code, *supra* note 11, § 522(b)(1).

198. *Id.* at § 522(b)(2).

merated in section 522(d) of the Bankruptcy Code. Should the General Assembly fail to enact such legislation a great disparity would arise between the amount of property a debtor could exempt from the claims of his creditors under state law and the amount he could exempt from claims of the trustee as a representative of the creditors in bankruptcy. This disparity would create an incentive to file in bankruptcy. To illustrate the size of the disparity consider the following comparison. Under South Carolina law the head of a family can exempt a real estate interest worth $1,000.[199] Under section 522(d) any debtor can exempt his equity in real or personal property that he uses as a residence in an amount up to $7,500.[200] If a husband and wife are joint debtors, the maximum exemption in real estate available to them under South Carolina law is $1,000.[201] If the husband and wife file a joint petition in bankruptcy, section 522(m) entitles them to exempt their equity in their residence in an amount up to $15,000.[202] With respect to personal property, the maximum exemption available to a debtor under South Carolina law is property with a value of $500.[203] In a bankruptcy proceeding, under section 522(d) a debtor is entitled to exempt his equity in an automobile up to $1,200,[204] in any item of household furnishings, household goods, wearing apparel, or appliances up to an amount of $200 per item with no aggregate limitation,[205] his equity in the tools for his trade up to $750,[206] and much much more.[207] Under state law consumer debtors are entitled to exempt a maximum of $1,500 from the claims of their unsecured creditors. In bankruptcy proceedings, however, section 522(d) will enable most consumers to exempt all or virtually all of their property from the claims of the trustee as the representative of their unsecured creditors.

The ability to obtain increased exemptions would provide

199. S.C. CODE ANN. § 15-41-10 (1976).
200. Bankruptcy Code, *supra* note 11, § 522(d)(1).
201. S.C. CODE ANN. § 15-41-410 (1976).
202. Bankruptcy Code, *supra* note 11, §§ 522(d)(1), 522(m).
203. S.C. CODE ANN. § 15-41-310 (1976).
204. Bankruptcy Code, *supra* note 11, § 522(d)(2).
205. *Id.* § 522(d)(3).
206. *Id.* § 522(d)(6).
207. *See, e.g., id.* § 522(d)(4) (jewelry, $500); *id.* § 522(d)(8) (loan value of certain life insurance policies, $4,000); *id.* § 522(d)(10)(D) (the right to receive alimony, support, or separate maintenance, to the extent "necessary for the support of the debtor and any dependent of the debtor").

consumers a significant incentive to file for liquidation.[208] Furthermore, since bankruptcy entitles a debtor to a discharge releasing him from personal liability for his prebankruptcy debts,[209] and enables him to acquire property after filing free from the claims of his prior creditors,[210] granting the exemptions enumerated in section 522(d) may render the inducement to file in bankruptcy irresistible to any consumer residing in this state who is pressed by his creditors. Thus, one result of enacting legislation to deprive debtors of the right to claim the federal exemptions would be to eliminate a significant incentive to file consumer bankruptcies.[211] By eliminating this incentive, the General Assembly may forestall a marked increase in the number of consumer liquidation proceedings filed under the new Code.

2. *State Exemptions v. Federal Objectives.*—Before endorsing such legislation, one must examine the impact that the legislation would have upon the provisions of the Bankruptcy Code designed to cure the secured credit problem. The secured credit problem in consumer bankruptcies under the current Act, as identified above, is that a creditor with a security interest in consumer goods can use that security interest as a leverage device to force a bankrupt consumer to reaffirm a debt discharged in the bankruptcy proceeding.[212] The reaffirmation agreement has the effect of depriving the bankrupt of the benefit of his discharge, and thus of his fresh start in life.[213] The Bankruptcy Code attacks the secured credit problem on two levels. First, the Code contains provisions that limit the enforceability in bankruptcy proceedings of security interests in consumer goods.[214] Second, the Code imposes rigorous procedural and substantive conditions upon a creditor's right to bind a debtor to an enforceable agreement to

208. Commentators have recognized that the ability to obtain increased exemptions may provide an incentive to file in bankruptcy. *See* UNIFORM EXEMPTIONS ACT, Prefatory Note at 1, *reprinted in* 13 U.L.A. 1 (Supp. 1979).

209. Bankruptcy Act § 14c, 11 U.S.C. § 32 (1976); Bankruptcy Code, *supra* note 11, § 727.

210. Bankruptcy Act § 70a, 11 U.S.C. § 110(a) (1976); Bankruptcy Code, *supra* note 11, § 541.

211. For the view that state exemptions should be *larger* than those under bankruptcy, see Comment, *Personal Property Exemptions and the Uniform Exemptions Act*, 1978 B.Y.U.L. REV. 462, 464.

212. *See* text at notes 168-89 *supra*.

213. *See* H.R. REP. No. 95-595, *supra* note 3, at 162-64.

214. Bankruptcy Code, *supra* note 11, § 522(f)(2) (avoidance of nonpossessory, nonpurchase-money security interests), § 722 (redemption).

reaffirm a discharged debt.[215] Since the exemption provisions directly affect only the first level of attack, the discussion herein will focus upon those provisions limiting the enforceability of security interests in consumer goods.

Two provisions of the Code limit the enforceability of security interests in consumer goods. These limitations are, however, connected with and in large part dependent upon the exemption of the consumer goods under section 522. Section 522(f)(2) provides that the debtor may avoid nonpossessory nonpurchase-money security interests in specified types of personal property.[216] The types of personal property specified are all included in the enumeration of exemptions set forth in section 522(d).[217] Included among the types of property to which the avoiding power of section 522(f)(2) applies are items that are essential to the debtor's well-being, including: household furnishings, wearing apparel, appliances, implements of the debtor's trade, and professionally

---

215. *Id.* § 524(c)-(d). For a discussion of reaffirmations covering the FTC's role, the Bankruptcy Code revisions, and statistics on reaffirmations, see Student Symposium, *Reaffirmation of Debts Discharged in Bankruptcy: An Empirical Study of an Area of Potential FTC Regulation,* 8 CONN. L. REV. 519 (1976).

216. Bankruptcy Code § 522(f)(2) provides:

> 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—
>
> . . . .
>
> (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.

217. Bankruptcy Code, *supra* note 11, § 522(d)(3) provides that a debtor may exempt "[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." Bankruptcy Code § 522(d)(4) provides that a debtor may exempt "[t]he debtor's aggregate interest, not to exceed $500 in value in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor." Bankruptcy Code § 522(d)(6) provides that a debtor may exempt "[t]he debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor." Bankruptcy Code § 522(d)(9) provides that a debtor may exempt "[p]rofessionally prescribed health aids for the debtor or a dependent of the debtor."

prescribed health aids. The policy of section 522(f)(2) is one advocated by the Federal Trade Commission.[218] The FTC maintains that a creditor who takes a nonpurchase-money security interest in all the consumer's household goods does so not to obtain security, but rather to obtain leverage over the consumer.[219] The consumer's household goods will typically have little resale value. These goods are, however, essential to the consumer, and they may have a high replacement cost.[220] Thus, by using threats of repossession the creditor can extract from the consumer payments which far exceed the value of the collateral. Because of the potential for creditor abuse inherent in nonpurchase-money security interests in consumer goods, the FTC has proposed a trade regulation rule under which taking a nonpurchase-money security interest in household necessities would be an unfair trade practice.[221] The inclusion of section 522(f)(2) in the Code is designed to accomplish at least two goals. First, the provision was intended to implement the above stated FTC policy of deterring the practice of claiming nonpurchase-money security interests in consumer necessities.[222] Second, by allowing the debtor to avoid such security interests the provision was intended to preclude the possibility that the debtor might be compelled to reaffirm a dis-

---

218. *See Hearings on H.R. 31 and H.R. 32 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st & 2d Sess., ser. 27, pt. 2 at 758-63 (statement of David H. Williams, Federal Trade Commission), *reprinted in* H.R. REP. No. 95-595, *supra* note 3, at 166-73. *See also* Proposed Trade Regulation Rule Involving Credit Practices, 40 Fed. Reg. 16,347 (1975) (to be codified at 16 C.F.R. §§ 444.1-.2), *reprinted in* [1975] 4 TRADE REG. REP. (CCH) ¶ 38,034. *See* note 226 *infra*. For a collection of articles on the FTC's activities in this area, see *Student Symposium on the Proposed FTC Rule on Credit Practices*, 8 CONN. L. REV. 450 (1976).

219. *See* H.R. REP. No. 95-595, *supra* note 3, at 171-72.

220. *Id.*

221. The Proposed Trade Regulation Rule on Credit Practices, *supra* note 218, provides:

> In connection with the extension of credit to consumers . . . it is an unfair act or practice within the meaning of Section 5 of [the Federal Trade Commission] Act for a lender or retail installment seller directly or indirectly:
>
> (a) To take or receive from a consumer an obligation which . . .
>
> . . . .
>
> (4) Constitutes or contains a security interest other than a Purchase Money security interest, except, where the proceeds of a personal loan are not to be primarily applied to the purchase of consumer goods, the lender may take a security interest in other than household goods.

Id. (to be codified at 16 C.F.R. § 444.2(a)(4)). *See* Student Symposium, *Security—In Whose Interest? The FTC's Proposed Restrictions on Blanket Security and Cross-Collateral Clauses: § 444.2(a)(4), (5), (6) of the Rule on Credit Practices*, 8 CONN. L. REV. 511 (1976).

222. *See* H.R. REP. No. 95-595, *supra* note 3, at 179.

charged debt in order to retain his essential goods.[223]

The debtor's right to avoid a nonpurchase-money security interest under section 522(f)(2), however, is dependent upon the security interest impairing an exemption to which the debtor would have been entitled under section 522(b).[224] Assuming that the General Assembly enacts legislation depriving the debtor of the right to claim the federal exemptions, the avoiding power of section 522(f)(2) would be virtually eliminated. Depriving debtors of the avoiding power under section 522(f)(2) will not, however, grant secured creditors uncontrolled power to force debtors into unfair reaffirmation agreements in order to retain possession of their consumer goods because the Code now controls these agreements.[225] Nevertheless, denying debtors the power to avoid nonpurchase-money security interests in the essential consumer goods enumerated in section 522(f)(2)(A)-(C) will result in a greater number of enforceable reaffirmation agreements. To this extent depriving debtors of the right to claim the federal exemptions may frustrate the fresh start policy of the Bankruptcy Reform Act.

The second provision in the Bankruptcy Code that limits the enforceability in bankruptcy of security interests in consumer goods is section 722.[226] Section 722 grants an individual debtor a

---

223. *See id.* at 126-27.

224. Bankruptcy Code, *supra* note 11, § 522(f)(2). For the text of this section, see note 216 *supra.*

225. Section 524(d) of the Bankruptcy Code requires the bankruptcy court to approve an individual debtor's agreement to reaffirm a discharged debt in order for the reaffirmation agreement to be enforceable. Under § 524(c)(4) the court will approve a reaffirmation of a consumer debt secured by an interest in personal property only if one of two sets of conditions is satisfied. First, under § 524(c)(4)(A) the court can approve the reaffirmation only if the agreement does not impose an undue hardship on the debtor or his dependents, and the reaffirmation is in the best interests of the debtor. Presumably, a court would not find a reaffirmation to be in the best interests of the debtor if the amount of the reaffirmed debt exceeds the fair market value of the collateral or at least its replacement cost. Second, under § 524(c)(4)(B) the court can approve a reaffirmation agreement if it finds that the agreement was entered into in good faith and in settlement of litigation over the dischargeability of the debt or to finance a redemption under § 722. Significantly, the debt financed in a redemption cannot exceed the amount of the creditor's allowed secured claim. The amount of the allowed secured claim is determined under § 506(a) and equals the value of the collateral. *See* text at notes 226-242 *infra.*

226. Bankruptcy Code, *supra* note 11, § 722, provides:

> 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 544 of this title, by paying the holder of

limited right to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt.[227] The debtor may redeem the property and retain it free of the lien by paying the lienholder the amount allowed as a secured claim.[228] The amount allowed as a secured claim is determined under section 506(a) and equals the fair market value of the collateral securing the debt.[229] For example, assume that a consumer borrows $1,500 to pay household expenses from a finance company pursuant to a security agreement that grants the finance company a security interest in his automobile. Assume further, that the consumer subsequently files a voluntary petition in bankruptcy for liquidation. On the date of filing the petition the amount of the debt that the consumer owes the finance company remains at $1,500 and the value of his automobile is $1,000. Under section 722, the consumer may be entitled to redeem the automobile from the finance company's security interest by paying the finance company $1,000, the amount of its secured claim.

The right to redeem, however, is limited to property that is either exempt under section 522 or abandoned under section 554.[230] Both the language of section 722 and the legislative history behind its enactment indicate that the drafters of section 722 contemplated that the debtor seeking to redeem property would be entitled to claim the federal exemptions.[231] The property to which section 722 applies, "tangible personal property intended primarily for personal, family, or household use" is exempt under section 522(d).[232] Thus, if South Carolina enacts legislation that deprives a debtor of the right to claim the federal exemptions, the General Assembly will limit the availability of the remedy of redemption to those situations in which the consumer goods have

---

such lien the amount of the allowed secured claim of such holder that is secured by such lien.

227. *Id.*

228. *Id.* § 506(a).

229. *See* H.R. REP. No. 95-595, *supra* note 3, at 356-57.

230. Bankruptcy Code, *supra* note 11, § 722. *See* note 226 *supra.*

231. *See* H.R. REP. No. 95-595, *supra* note 3, at 127-28.

232. "Tangible personal property intended primarily for personal, family, or household use" includes the following types of property exempt under § 522(d): a mobile home the debtor uses as a residence, § 522(d)(1); an automobile, § 522(d)(2); household furnishings, household goods, wearing apparel, and appliances, § 522(d)(3); jewelry, § 522(d)(4); and professionally prescribed health aids, § 522(d)(9). Furthermore, the right to redeem extends to the whole of the property, not just the debtor's exempt interest in it. *See* H.R. REP. No. 95-595, *supra* note 3, at 381.

been abandoned.

Despite the observations set forth above, the enactment of legislation depriving debtors of the right to claim the federal exemptions will not frustrate the basic policy that sections 522(f)(2) and 722 seek to implement. The principal purpose of these provisions is to limit the enforceability of security interests in consumer goods in order to prevent a creditor from using such a security interest as a leverage device to force the debtor into an unfair reaffirmation agreement. A reaffirmation agreement is unfair to a debtor only when the amount of the debt reaffirmed exceeds the value of the collateral. In other words, the potential for abuse exists when the creditor is only partially secured.[233] In the consumer context a creditor holding a nonpurchase-money security interest in household goods, the situation envisioned in section 522(f)(2), is typically partially secured. Furthermore, partial security is not atypical when the creditor holds either a purchase-money or nonpurchase-money security interest in consumer goods, the situation envisioned in section 722. When a creditor holds a security interest in consumer goods that have a value of less than the amount of the secured debt, the debtor can avert the possibility of an unfair reaffirmation agreement even if the consumer goods subject to the security interest are not exempt.

Under section 722 an individual debtor is entitled to redeem not only exempt consumer goods from a security interest securing a consumer debt, but also goods that have been abandoned by the trustee under section 554.[234] As the definition of consumer goods in section 722 is broad enough to cover all items of personal property described in section 522(f)(2) except for the implements of a debtor's trade,[235] clearly a debtor may have the right to redeem those goods from the nonpurchase-money security interests envisioned in section 522(f)(2). The crucial issue for the application of section 722 to nonexempt consumer goods is whether they are abandoned. Section 554(b) provides that "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate . . . that

233. *See* text at notes 171-80 *supra.*

234. Bankruptcy Code, *supra* note 11, § 554(a). "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." *Id.*

235. *See* notes 216 and 217 *supra.*

is of inconsequential value to the estate."[236] If consumer goods of the debtor are fully encumbered by a security interest, the goods are of no value to the estate. The debtor, as a party in interest, can thus request and obtain from the court an order to the trustee to abandon the goods.[237] Having compelled the trustee to abandon the consumer goods, the debtor may redeem them under section 722.[238] The first step in effecting the redemption is for the debtor to file the creditor's claim under section 501(c) in the event the creditor has refrained from filing.[239] Once the creditor's claim is filed, the debtor can obtain a determination of the secured status of the claim under section 506(a).[240] The court will deem the creditor's claim a secured claim to the extent of the value of the creditor's interest in the property. In other words the amount of the secured claim is equal to the current value of the collateral. In the instances envisioned as having the potential for secured creditor abuse under sections 522(f)(2) and 722, the amount of the secured claim will be significantly less than the debt. The debtor is then entitled to redeem the property by paying the creditor the amount of the secured claim.[241] Furthermore, although one may question the debtor's ability to generate the cash needed to redeem the property, the Code clearly contemplates that the debtor can finance the redemption by entering a reaffirmation agreement under which the debtor can pay the creditor the value of its secured claim over time at a reasonable rate of interest.[242] A proposal to reaffirm the amount of the secured claim should be more attractive to the creditor than repossession because the creditor is saved the expenses of repossession and resale. Thus, the General Assembly can enact legislation depriving debtors of the right to claim the federal exemptions enumerated in section

236. Bankruptcy Code, *supra* note 11, § 554(b).

237. The debtor should be viewed as a party in interest for the purpose of effecting an abandonment of the property, when the abandonment is essential to effecting a redemption. The Code does not define "party in interest." Presumably this point will be clarified when new Bankruptcy Rules are promulgated under 28 U.S.C. § 2075 as amended by Pub. L. No. 95-598, § 247, 92 Stat. 2672.

238. Bankruptcy Code, *supra* note 11, § 722. For the text of this section see note 226 *supra*.

239. Bankruptcy Code, *supra* note 11, § 501(c) provides, "If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim."

240. *Id.* § 506(a). *See* text at notes 228 and 229 *supra*.

241. Bankruptcy Code, *supra* note 11, § 506(a).

242. *See* BANKRUPTCY COMMISSION REPORT, *supra* note 184 at 174. *See generally* note 225 *supra*.

522(d) of the Code without frustrating the operation of the Code provisions by which Congress intended to preclude secured credit abuse.

3. *The Availability of Alternatives: Costs and Benefits.*—Two points have been established. First, unless the General Assembly enacts a specific statute depriving debtors of the right to claim the federal exemptions enumerated in section 522(d), a substantial and perhaps irresistible incentive to file consumer bankruptcies will arise with the probable result of a significant increase in the rate of consumer bankruptcies in South Carolina. Second, the General Assembly can enact legislation depriving debtors of the federal exemptions without frustrating the operation of those provisions of the Code designed to curb secured credit abuse in consumer bankruptcies. Given this framework, one must assess the costs and benefits of depriving the debtors of the right to claim the federal exemptions, and consider the availability of alternate measures before endorsing such legislation.

The principal cost of enacting legislation depriving debtors of the right to claim the federal exemptions in a bankruptcy proceeding is that such legislation may preclude the discharged debtor from retaining property sufficient to obtain a fresh start in life. If such legislation is enacted, a South Carolinian would be effectively limited to asserting the State's statutory exemptions in bankruptcy proceedings.[243] It is apparent that the exemptions

243. Bankruptcy Code § 522(b)(2) would limit the debtor's exemption in bankruptcy to that property exempt under federal law other than § 522(d) and under the state law of the debtor's domicile. A debtor claiming exemptions under § 522(b)(2) is also entitled to retain his interest as a tenant by the entirety or joint tenant, provided that the interest is exempt from judicial process under state law. South Carolina does not recognize the estate of tenancy by the entirety. *See* Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). South Carolina does recognize joint tenancy with a right of survivorship. *See* Note, *Cotenancies, Estates of, in South Carolina,* 11 S.C.L.Q. 520 (1959). Presumably, however, South Carolina would follow the majority rule and subject the interest of such a cotenant to judicial process. *See* 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 618, at 672 (rev. ed. 1979). Furthermore, the debtor's property that will constitute the bankruptcy estate under § 541 of the Bankruptcy Code is more extensive than the property the title to which vests in the trustee under § 70a of the Bankruptcy Act. In applying § 70a(5) of the Act the Supreme Court has held that the definition of "property" under § 70a(5) is a matter of federal law to be determined by the policies of the Bankruptcy Act. *See* Segal v. Rochelle, 382 U.S. 375 (1966); Kokoszka v. Belford, 417 U.S. 642 (1974). The Court has held that a bankrupt's right to accrued vacation pay does not constitute property under section 70a(5). Lines v. Frederick, 400 U.S. 18 (1970). *See also* In re Schmelzer, 480 F.2d 1074 (6th Cir. 1973) (cause of action for personal injury does not constitute property). Under § 541 of the Bankruptcy Code debtors will not be entitled to retain property under the theory

available to a debtor under South Carolina law are antiquated and inadequate to provide even minimal protection to a modern consumer. Many consumers own no interest in real estate and thus the $1,000 homestead exemption is useless to them. Even if the debtor does own real estate, the $1,000 exemption may be inadequate to enable the debtor to retain either his residence or land sufficient to generate an income. The maximum personal property exemption of $500 may be inadequate to allow a debtor to retain even the basic household goods essential to the well-being of the debtor and his dependents. Thus, incorporating these exemptions into a bankruptcy proceeding may leave the discharged debtor with insufficient property to realize his opportunity for a fresh start in life. The debtor will then be immediately forced back into the consumer credit market to obtain necessities for himself and his dependents. The discharged debtor will thus be in the same financial circumstances that caused or contributed to his original bankruptcy.

The principal benefit to be derived from enacting legislation that deprives debtors of the right to claim the federal exemptions is avoiding the increased costs and reduced availability of consumer credit that would result in the absence of such legislation. As discussed above if debtors are entitled to claim the federal exemptions a significant increase in the number of consumer bankruptcies filed in South Carolina would ensue under the new Code.[244] Furthermore, in these bankruptcies there would rarely be any nonexempt property available to apply toward satisfaction of the unsecured claims. Thus, large losses would result. These losses would be borne in the first instance by the consumer credit community. The supply of consumer credit appears to be moderately elastic.[245] Therefore, as the financial market adjusts, these costs will be passed on to consumers in the form of increased interest rates and decreased availability of consumer credit.[246] Consumers who pay their debts and consumers who will be unable to obtain credit will ultimately bear most of the costs generated by the increased rate of consumer bankruptcies.[247] The im-

---

that a given property interest does not fall within the federal definition of property. *See* H. R. REP. No. 95-595, *supra* note 3, at 368.

244. *See* text at notes 199-211 *supra*.

245. *See* Weston, *Some Economic Fundamentals for an Analysis of Bankruptcy*, 41 L. CONTEMP. PROB., Autumn 1977, at 47.

246. *See* Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, 41 L. CONTEMP. PROB., Autumn 1977, at 13.

247. *Id.* at 27.

pact of an increase in cost and a decrease in the availability of consumer credit would tend to work a hardship upon all consumers and upon the economy of South Carolina. Thus, substantial benefits to consumers as a whole and to the economy of the State would flow from depriving debtors of the right to claim the federal exemptions in bankruptcy proceedings.

Weighing the costs against the benefits to be derived from enacting legislation depriving debtors of the right to claim the federal exemptions is, perhaps necessarily, a matter of some speculation. Nevertheless, it appears to the author that such legislation is on balance advisable. Such legislation is not, however, the optimal solution to the problems presented. As will be discussed below, the best resolution would be to enact narrow but adequate state law exemptions that would apply both under state law and in bankruptcy proceedings. The General Assembly, however, cannot pursue such a course of action. Article III, section 28 of the constitution of South Carolina and the doctrine of *Duncan v. Barnett* preclude the General Assembly from enacting exemptions more liberal than those set forth in the constitution. Thus, given the alternatives available, the General Assembly should promptly enact a statute specifically depriving debtors of the right to claim the federal exemptions in cases filed under the Bankruptcy Code.[248]

V. Proposed Constitutional Amendment and Legislation

The General Assembly should promptly enact legislation authorized under section 522(b)(1) of the Bankruptcy Code specifically depriving debtors of the right to claim the exemptions enumerated in section 522(d). Unless such legislation is in effect prior to October 1, 1979,[249] there could be a sharp increase in the number of consumer bankruptcies. Furthermore, because of the size of the federal exemptions individual liquidation cases commenced under the Code will rarely provide a distribution to the unsecured creditors.

248. Such legislation was introduced and referred to committee on May 29, 1979. S. 563, A Bill to amend the Code of Laws of South Carolina, 1976, By adding Section 15-41-425, so as to provide that No Individual May Exempt From the Property of the Estate in Any Bankruptcy Proceeding the Property Specified in Subsection (d) of Section 522 of the Bankruptcy Reform Act (Public Law 95-598) Except as May Otherwise Be Expressly Permitted By The Laws of This State. *See* S.J.S.C. No. 82 at 6 (May 29, 1979).

249. This is the effective date of the Bankruptcy Code. Bankruptcy Reform Act of 1978, § 402, Pub. L. No. 95-598, 92 Stat. 2549, 2682.

This legislation, however, should be viewed as a stop-gap measure. South Carolina's existing statutory exemptions are either unconstitutional or outmoded. This condition exists because under the constitution the General Assembly lacks the power to enact statutes that vary from the terms of article III, section 28 of the constitution.[250] The first step in modernizing South Carolina's statutory exemptions is to amend the constitution to repeal the existing article III, section 28 and to substitute in its place a broad grant of power to the General Assembly to enact reasonable exemption statutes.[251] The General Assembly should commence the process of constitutional amendment.[252]

Assuming that the constitutional amendment suggested above is approved by the voters and ratified, the General Assembly will be presented with the task of enacting "reasonable" exemptions.[253] In approaching this problem the General Asembly should be mindful of the interrelationship between state law exemptions and federal bankruptcy. Specifically, the General Assembly should be guided by several basic policies. First, the General Assembly must recognize that an incentive to file in bankruptcy will arise if a debtor can retain more of his property in bankruptcy than he can under state law.[254] As the cost of consumer bankruptcies will ultimately be borne by consumers, the General Assembly should avoid creating any significant disparities between the exemptions available under state law and in bankruptcy. Second, a debtor should be entitled to retain free from the claims of his judgment creditors sufficient property to enable him to provide the essentials for the well-being of himself and his dependents.[255] In the context of bankruptcy this policy translates to allowing the debtor to retain sufficient property free from the claim of the trustee to enable the debtor to obtain an

250. *See* text at notes 39-47 *supra.*

251. Such an amendment was proposed in *The Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 47 (1969). For discussions of the changes in the exemptions under the constitutions of other states, see Adams, *Homestead Legislation in California,* 9 PAC. L.J. 723 (1978); Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption,* 30 U. FLA. L. REV. 297 (1978); Wall, *supra* note 1, at 895-925.

252. For the procedure for amending the constitution, see S.C. CONST. art. XVI, § 1 (1895).

253. For a discussion and critique of the Uniform Exemptions Act proposed by the National Conference of Commissioners on Uniform State Laws, see Comment, *supra* note 1, at 473-83.

254. *See* text at notes 199-211 *supra.*

255. *See* H.R. REP. No. 95-595, *supra* note 3, at 126.

opportunity for a fresh start in life. Third, the exemptions granted should be narrowly drawn so that a debtor cannot avoid paying his just debts while retaining more property than is necessary to provide for his essential well-being.

A. Exemptions of Property Other Than Earnings

Turning initially to the exemption of property other than earnings for personal services, the first policy outlined above dictates that the exemptions available under South Carolina law be the same as those available in bankruptcy. One method of achieving this policy would be simply to enact legislation depriving debtors of the right to claim the federal exemptions in bankruptcy, and leaving the current South Carolina statutory exemptions unamended. As stated above, such a course of action is undesirable because the current statutory exemptions are antiquated and inadequate to protect a debtor's essential possessions. Furthermore, the application of these exemptions in bankruptcy would tend to frustrate a debtor's ability to obtain a fresh start in life. In short, such a course of action would violate the second policy consideration set forth above.

A second method by which the General Assembly might achieve parity between state and federal exemptions would be to refrain from enacting legislation depriving debtors of the federal exemptions in bankruptcy proceedings and to amend the State's statutory exemptions to conform to section 522(d) of the Bankruptcy Code. This course of action appears undesirable for two principal reasons. First, granting exemptions enumerated in section 522(d) would render almost all consumers judgment proof. Such an action would tend to increase the cost and to reduce the availability of consumer credit. Such a trend would be detrimental to both consumers and the economy of the State. Second, allowing debtors to claim the federal exemptions in bankruptcy proceedings would create a strong, if short term, incentive to file in bankruptcy even if the legislature enacted state exemptions identical to the federal exemptions. The Supreme Court has consistently held that the contract clause of the United States Constitution prohibits the retrospective application of state exemption statutes.[256] Although commentators have questioned the cur-

256. W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); Bank of Minden v. Clement, 256 U.S. 126 (1921); Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872).

rent validity of this interpretation of the contract clause,[257] South Carolina's power to enforce retrospectively increased state exemptions is subject to serious doubt. In contrast, the constitutional grant of power to enact bankruptcy laws enables Congress to impair the obligation of contract.[258] Therefore, Congress has the power to enact retrospective exemption provisions applicable in bankruptcy proceedings. Thus, debtors could claim the federal exemptions in bankruptcy proceedings against all creditors, but could claim the increased state exemptions against only those creditors whose claims arose out of transactions occurring after the effective date of the new exemption law.

A third alternative would be for the General Assembly to increase the state law exemptions to an amount that is reasonable in light of current economic conditions, and to preclude debtors from claiming the federal exemptions in bankruptcy proceedings. The exemptions should be adequate but limited to an amount actually necessary to enable a debtor to maintain a decent standard of living. Moreover, the legislation should not specify the types of property which can be claimed as exempt. The legislation should set a dollar figure limitation upon the exemptions and allow the debtor to choose the property upon which he claims the exemption.[259] In 1868 when the original homestead exemption was adopted, land was the primary source of income.[260] The drafters of the 1868 exemption allowed a debtor to retain a significant interest in land because they believed that an interest in land was essential to enable a debtor to generate sufficient income to provide for his family and satisfy his creditors.[261] In a nonagrarian society, the homestead exemption can be defended only on the

257. *See* Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 727 (1960); Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 PAC. L.J. 889 (1978). In 1976 the National Conference of Commissioners on Uniform State Laws approved the Uniform Exemptions Act. The Commissioners determined that the contract clause argument against retrospective application of state exemption statutes had lost its validity. UNIFORM EXEMPTIONS ACT § 23, Comment (2). Therefore, in section 23(b) of the Act the Commissioners provided, "All provisions of this Act apply to the collection of claims arising before and after the effective date and to the enforcement of judgments rendered or entered before and after that date, but do not govern a levy made before that date." 13 U.L.A. 45 (Supp. 1978).

258. Kuehner v. Irving Trust Co., 299 U.S. 445, 452 (1937); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902).

259. *See* Comment, *supra* note 1, at 471-73.

260. See D. WALLACE, SOUTH CAROLINA: A SHORT HISTORY 687-90 (1961).

261. *See* 1868 PROCEEDINGS, *supra* note 4, at 473, 496.

ground that a dwelling is a necessity.[262] In view of the limited amount of the homestead exemption, however, it rarely allows a debtor to retain his dwelling.[263] In practice, the homestead exemption operates to grant land-owning debtors an indirect cash exemption of $1,000 drawn from the proceeds of the sale of the homestead. By allowing a debtor free choice this anachronism can be eliminated.

This third approach is also consistent with the other policies outlined above. The increased state exemptions would apply equally in state law collection proceedings and in bankruptcy proceedings. Furthermore, the exemptions would apply prospectively in both state law collection actions and bankruptcy proceedings.[264] Therefore, the ability to obtain increased exemptions would not provide an incentive to file in bankruptcy. Finally, the enactment of adequate but narrow exemptions would further sound bankruptcy policy. The exemptions should be sufficient to enable a debtor forced to file a petition for liquidation under Chapter 7 of the Bankruptcy Code to retain enough property to obtain a fresh start in life.[265] The exemptions should not, however, encourage the financially embarrassed consumer to resort to a liquidation proceeding. The exemption statutes should be narrowly drawn in order to encourage these debtors to seek relief under Chapter 13.[266] Under Chapter 13 a debtor is entitled to retain all his property free from the claims of his unsecured creditors.[267] The creditors' claims are satisfied out of the debtor's future income rather than from the liquidation of the nonexempt property he owned on filing.[268] Under the current Bankruptcy Act, creditors recover a much larger portion of their claims when a debtor elects to file a Chapter XIII wage-earner plan rather than

262. See Vukowich, *Debtors' Exemption Rights* 62 GEO. L.J. 779, 797-98 (1974).

263. *Id.* at 801-02.

264. *See* Kener v. La Grange Mills, 231 U.S. 215 (1913); England v. Sanderson, 236 F.2d 641 (9th Cir. 1956). *But see* Countryman, *For a New Exemption Policy in Bankruptcy,* 14 RUTGERS L. REV. 678, 727-32 (1960).

265. *See* H.R. REP. No. 95-595, *supra* note 3, at 126.

266. Bankruptcy Code, *supra* note 11, §§ 1301-1330.

267. *See* H.R. REP. No. 95-595, *supra* note 3, at 118.

268. Bankruptcy Code, *supra* note 11, § 1322(a)(1).

Although the Bankruptcy Code makes significant changes in the area, the following articles can be consulted for general background on the use of Chapter XIII Wage Earner Plans: Bare, *The New Rules in Straight and Chapter XIII Bankruptcies,* 41 TENN. L. REV. 567 (1974); Wickham, *Bankruptcy or Not? Advice for Attorneys Who Counsel Consumer Debtors,* 41 TENN. L. REV. 667 (1974); Note, *The Chapter XIII Wage Earner Petition Under the New Federal Rules of Bankruptcy,* 4 MEM. ST. L. REV. 554 (1974).

in straight bankruptcy.[269] There is no reason that different results should be expected under the Bankruptcy Code. Encouraging debtors to file for relief under Chapter 13 rather than under Chapter 7 should have a positive effect on cost and availability of consumer credit, and thereby benefit the economy. An effective way to encourage debtors to file under Chapter 13 rather than Chapter 7 is to insure that the debtor will be able to retain substantially more of his property if he files under Chapter 13. Enacting adequate but narrow state exemption statutes and making them applicable in Chapter 7 liquidation cases would achieve this result.

B. Exemption of Earnings for Personal Services

The exemption of earnings for personal services presents somewhat more difficult problems of policy resolution. Initially the General Assembly can act only within the limitations imposed by the Federal Consumer Credit Protection Act of 1968.[270] In most actions the Act limits "garnishment"[271] to an amount not in excess of twenty-five percent of a debtor's disposable earnings.[272] In resolving this issue the General Assembly should be mindful of the three policies outlined above. Specifically, the General Assembly should recognize that allowing a creditor holding a claim that is dischargeable in a bankruptcy proceeding to subject a debtor's earnings to judicial process will create an incentive for the debtor to file in bankruptcy. Second, the General Assembly should consider that subjecting a debtor's earnings to judicial process can be a harsh remedy that may operate to deprive a debtor of the ability to retain and acquire the necessities of life. Third, despite these shortcomings, the General Assembly should recognize that subjecting a debtor's earnings to judicial process is an efficient collection device and will facilitate the enforcement of judgments.

1. *Prejudgment.*—Once the constitution is amended, the General Assembly should adhere to the position set forth in section 37-5-104 and prohibit attachment or prejudgment garnishment of earnings for personal services.[273] The due process require-

269. *See* Girth, *The Bankruptcy Reform Process: Maximizing Judicial Control in Wage Earners' Plans*, 11 J.L. REF. 51, 54 (1977).

270. 15 U.S.C.A. §§ 1601-1693r (1974 & Cum. Supp. 1979).

271. *See* note 111 *supra* (definition of garnishment).

272. 15 U.S.C. § 1673 (1976).

273. S.C. CODE ANN. § 37-5-104 (1976).

ments imposed upon a prejudgment wage garnishment by *Sniadach* would require the adoption of a cumbersome statutory procedure similar to the preseizure hearing provisions of the claim and delivery statute.[274] Furthermore, *Sniadach* has been interpreted to allow a creditor to garnish a debtor's earnings upon a mere showing of the probable validity of the creditor's claim.[275] This standard is too lax to be applied to earnings for personal services. Although the creditor has established the probable validity of his claim, the debtor may have a valid defense that would enable him to prevail at a final hearing on the merits. The creditor, having garnished the debtor's earnings may, however, be able to force the debtor to abandon his defenses and to agree to refinance the disputed claim in exchange for a release of the garnished earnings.[276] Thus, the debtor may be deprived of an opportunity to present his defense. Prejudgment collection remedies should not be invoked to give a creditor leverage to force the settlement of a disputed claim. The proper sphere of prejudgment collection remedies is limited to providing a creditor with necessary security for the collection of a debt.[277] Since earnings for personal services are perhaps a consumer's most essential asset, prejudgment garnishment may give a creditor unconscionable leverage to force a debtor to settle a claim. The General Assembly should preclude this abuse by prohibiting prejudgment garnishment or attachment of earnings for personal services in all actions.

2. *Postjudgment.*—Postjudgment process against earnings for personal services should be evaluated primarily through a societal perspective. An order in supplementary proceedings directing the application of earnings for personal services towards satisfaction of a judgment is an efficient collection procedure. The remedy may enable creditors to satisfy debts that are uncollectable under South Carolina's current creditors' remedies. In many cases the only unencumbered asset that a debtor can apply toward satisfaction of a jugment is his earnings for personal services. Allowing a debtor to retain these earnings free from the

274. S.C. CODE ANN. §§ 15-69-40, 15-69-50, 15-69-70 (1976).

275. Sniadach v. Family Finance Corp., 395 U.S. 337, 342-43 (Harlan, J., concurring) (1969); Rogoski v. Hammond, 9 Wash. App. 500, 513 P.2d 285 (1973).

276. *See* Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 753 (1968), *quoted in* Sniadach v. Family Finance Corp., 395 U.S. 337, 341 (1969).

277. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (Powell, J., concurring) (1974).

claims of his creditors imposes unnecessary losses upon the creditors. The bulk of these losses are passed on to consumers through increased interest rates and decreased availability of credit. If postjudgment wage garnishment would allow creditors to satisfy currently uncollectable obligations, the savings to the credit community should be passed on to consumers in the form of lower interest rates and greater availability of credit. Thus, there is a societal benefit to be derived from subjecting earnings for personal services to postjudment judicial process.

Subjecting earnings for personal services to judicial process, however, also imposes societal costs. Such process would tend to increase the rate of consumer bankruptcies in South Carolina. A significant increase in the number of consumer bankruptcies will adversely affect the economy. In consumer straight bankruptcies the holders of unsecured claims typically receive no distribution from the estate.[278] Although these losses will be borne in the first instance by the consumer credit community, they will be passed on to consumers through increased interest rates and decreased availability of credit. This economic analysis, however, must be applied carefully. Not every consumer bankruptcy triggered by wage garnishment imposes additional losses upon the consumer's creditors. The bankruptcy may serve to formalize rather than create the loss. In many cases an order to apply earnings toward satisfaction of a judgment will merely expose a hopeless financial situation. The consumer's debts may be no more uncollectable after bankruptcy than before bankruptcy. Thus, in these cases, filing a bankruptcy petition will not increase costs of providing consumer credit that will be passed on to consumers.

In terms of societal costs and benefits the General Assembly's task is to determine a level of postjudgment judicial process against earnings that will minimize the costs of extending consumer credit. The amount fixed by the General Assembly should be large enough to provide creditors with an effective collection device, but not so large that it will force debtors with the ability to pay their debts to file in bankruptcy. In 1973 the Bankruptcy

278. *See* D. Stanley & M. Girth, *supra* note 127, at 87-93 (1971). The authors found that "[u]nsecured creditors who proved claims were paid in one out of four cases and received only 7 percent of the amounts proved and allowed . . . . [I]n more than half of the cases distributions amounted to less than $100." *Id.* at 92-93. Many times creditors do not bother to file proof of their claims. *Id.* at 89-90. Of the claims scheduled at the start of the bankruptcy case, only ten percent of the unsecured creditors filed proof of their claims in nonbusiness bankruptcies. *Id.* at 90.

Commission concluded that the limitations imposed by the Federal Consumer Credit Protection Act of 1968 were adequate to prevent garnishment from triggering unnecessary consumer bankruptcies.[279] Although the Consumer Credit Protection Act adequately protects debtors whose earnings do not markedly exceed thirty times the federal minimum wage, the maximum exposure of twenty-five percent of a debtor's disposable earnings may be too harsh and trigger unnecessary bankruptcies.[280] The General Assembly should certainly consider providing a larger exemption than that provided by the Consumer Protection Act. Another method the General Assembly could adopt that would protect consumers and avoid triggering consumer bankruptcies would be to grant the judge in supplementary proceedings discretion to reduce the amount of earnings to be applied toward satisfaction of a judgment in hardship cases. Prior to the statutory abolition of the application of earnings toward satisfaction of a judgment, the court was granted such discretion.[281]

3. *Enforcement of Nondischargeable Debts.*—The General Assembly could take limited advantage of the efficiency of allowing a judgment creditor to enforce his judgment against earnings and minimize the risk that such process would trigger bankruptcies if such process were limited to enforcing judgments upon the type of debts that can be excepted from a debtor's discharge in bankruptcy. Both the Bankruptcy Act[282] and the Bankruptcy Code[283] provide that certain obligations can be excepted from a debtor's discharge. If a creditor can establish that the debt owed to him is subject to an exception, the discharge in bankruptcy will not release the debtor from personal liability upon the debt.[284] Therefore, filing a petition in bankruptcy would afford a debtor at best only temporary relief from judicial process against his earnings brought to enforce a nondischargeable debt.[285] As a result, if process against earnings were limited to enforcing judg-

279. BANKRUPTCY COMMISSION REPORT, *supra* note 184 at 9.

280. *See generally* sources cited in note 127 *supra.*

281. *See* 1961 S.C. Acts 450, No. 265 (repealed 1974).

282. Bankruptcy Act § 17a, 11 U.S.C. § 35(a) (1976).

283. Bankruptcy Code, *supra* note 1, § 523(a).

284. Bankruptcy Act § 17a, 11 U.S.C. § 35(a) (1976); Bankruptcy Code, *supra* note 11, § 524(a). *See generally* Countryman, *The New Dischargeability Law,* 45 AM. BANKR. L.J. 1 (1971).

285. *See* BANKRUPTCY R. 401; Bankruptcy Code, *supra* note 11, § 362(a)(2). *But see* Bankruptcy Code, supra note 11, § 362(b)(2). *See generally* Kennedy *The Automatic Stay in Bankruptcy,* 11 U. MICH. J.L. REF. 175, 195-202 (1978).

ments upon debts of the type that would be nondischargeable in bankruptcy, no significant incentive for the judgment debtor to file in bankruptcy would arise. Thus, the General Assembly should consider legislation allowing postjudgment process against earnings to enforce only those classes of debts excepted from discharge under section 523(a) of the Bankruptcy Code.

Section 523(a) of the Bankruptcy Code sets forth nine classes of debts that constitute exceptions to discharge.[286] Although certain debts are excepted from discharge in order to facilitate bankruptcy administration, most of the exceptions rest upon two basic policies. First, the debtor should not be relieved of obligations to those persons who have a high moral or legal claim upon him.[287] Second, the debtor should not be relieved of debts that result from his illegal or fraudulent conduct.[288] There are two exceptions based upon administrative considerations. These include debts the debtor failed to schedule in the bankruptcy proceeding in which the discharge is granted,[289] and debts that were or could have been scheduled in a prior bankruptcy proceeding in which the debtor was denied a discharge.[290] Clearly, these exceptions cannot form a class of debts upon which to base state legislation allowing judicial process against earnings. Four exceptions are supported by the first basic policy outlined above. These include:

---

286. Bankruptcy Code, *supra* note 11, § 523(a)(1)-(9).

287. *See* 1 D. COWANS, *supra* note 150, at § 242.

288. *Id.*

289. Bankruptcy Code, *supra* note 11, § 523(a)(3) provides:

A discharge . . . does not discharge an individual debtor from any debt . . .

. . . .

(3) neither listed nor scheduled under section 521(*l*) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request . . . .

290. Bankruptcy Code, *supra* note 11, § 523(a)(9) provides:

A discharge . . . does not discharge an individual debtor from any debt . . .

. . . .

(9) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

certain taxes owing to a governmental unit,[291] certain fines owing to a governmental unit,[292] certain educational loans,[293] and debts for alimony, maintenance, or child support.[294] Three exceptions are supported by the second basic policy. These include debts for money, property, or services obtained through actual fraud[295] or

---

291. Bankruptcy Code, *supra* note 11, § 523(a)(1) provides:
A discharge . . . does not discharge an individual debtor from any debt . . . for a tax or a customs duty—
(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;
(B) with respect to which a return, if required—
(i) was not filed; or
(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . .

292. Bankruptcy Code, *supra* note 11, § 523(a)(7) provides:
A discharge . . . does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—
(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition . . . .

293. Bankruptcy Code, *supra* note 11, § 523(a)(8) provides:
A discharge . . . does not discharge an individual debtor from any debt . . . to a governmental unit, or a nonprofit institution of higher education, for an education loan, unless—
(A) such loan first became due before five years before the date of the filing of the petition; or
(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .

294. Bankruptcy Code, *supra* note 11, § 523(a)(5) provides:
A discharge . . . does not discharge an individual debtor from any debt . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—
(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or
(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support. . . .

For discussion of the marital exception, see Swann, *Dischargeability of Domestic Obligations in Bankruptcy,* 43 TENN. L. REV. 231 (1976); Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten,* 52 IND. L.J. 469 (1977).

295. Bankruptcy Code, *supra* note 11, § 523(a)(2)(A) provides:
A discharge . . . does not discharge an individual debtor from any debt . . . for obtaining money, property, services, or an extension, renewal, or refinance of credit, by . . .

in certain instances through use of a false financial statement,[296] debts for fraud or defalcation while acting in a fiduciary capacity,[297] and debts for a debtor's willful and malicious injury to another's person or property.[298] The General Assembly should consider allowing judicial process against a debtor's earnings to enforce judgments based upon these seven principled exceptions to discharge. The claims excepted from discharge are not only highly meritorious, but also allowing process against earnings to enforce judgments based upon those claims should not create an incentive for the judgment debtor to file in bankruptcy.

One class of debts excepted from discharge merits special consideration—debts for alimony, support, and maintenance. It has been suggested that South Carolina enact legislation permitting wage garnishment to enforce alimony and support decrees.[299] This proposal was motivated by a desire to take advantage of a 1975 federal statute waiving sovereign immunity and allowing garnishment of the earnings of federal employees for alimony and support if a state court had issued a garnishment order.[300] In

---

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

296. Bankruptcy Code, *supra* note 11, § 523(a)(2)(B) provides:

A discharge . . . does not discharge an individual debtor from any debt . . . for obtaining money, property, services, or an extension, renewal, or refinancing of credit, by . . .

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive . . . .

297. Bankruptcy Code, *supra* note 11, § 523(a)(4) provides:

A discharge . . . does not discharge an individual debtor from any debt . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . . .

298. Bankruptcy Code, *supra* note 11, § 523(a)(6) provides:

A discharge . . . does not discharge an individual debtor from any debt . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .

299. Perrin, *South Carolina Hobbled in Enforcing Alimony/Child Support Obligations*, THE BULLETIN, S.C. TRIAL LAW. A. 2, 3 (July 1975). *See also* H. 2719 H.J.S.C. 1013 (March 22, 1979) (bill would grant the family court jurisdiction to order garnishment of personal earnings to enforce delinquent alimony or child support payments).

300. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357 (1975) (codified as amended at 42 U.S.C.A. § 659 (Cum. Supp. 1979)). Section 659 of Title 42 merely waives the government's sovereign immunity to garnishment in the specified actions. The actual order for garnishment must be grounded upon state statutory author-

addition to this particular benefit, such legislation would make the process of enforcing all alimony and support decrees more efficient.[301] Thus, even if the General Assembly concludes that subjecting earnings for personal services to judicial process is ill advised, and enacts a general exemption for earnings, the General Assembly could make an exception to the general exemption and allow wage garnishment to enforce alimony and support decrees.

VI. CONCLUSION

The General Assembly should immediately enact legislation authorized under section 522(b)(1) of the Bankruptcy Code that specifically precludes debtors in bankruptcy proceedings from claiming the exemptions enumerated under section 522(d) of the Bankruptcy Code. At the same time the General Assembly should enact a resolution to amend the constitution by repealing article III, section 28, and adopting a constitutional provision authorizing the General Assembly to enact reasonable exemption statutes. When the amendment is adopted, the General Assembly should enact adequate but narrow exemption statutes that will entitle a debtor to retain free from the claims of his creditors property sufficient to provide the essentials for his well-being. The General Assembly should also carefully consider the problem of subjecting earnings for personal services to judicial process. On consideration, the legislature may deem it advisable to allow limited postjudgment wage garnishment.

---

ity. Overman v. United States, 563 F.2d 1287 (8th Cir. 1977); Popple v. United States, 416 F. Supp. 1227, 1228 (W.D.N.Y. 1976).

301. *See* Perrin, *supra* note 299, at 4. For a discussion of North Carolina's statute allowing garnishment for child support, *see* Note, *Remedies—Domestic Relations: Garnishment for Child Support*, 56 N.C.L. Rev. 169 (1978).