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## Avoiding Liens Under the New Bankruptcy Code: Construction and Application of Section 522(f)

Judy Toyer

*University of Michigan Law School*

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## AVOIDING LIENS UNDER THE NEW BANKRUPTCY CODE: CONSTRUCTION AND APPLICATION OF SECTION 522(f)<sup>6</sup>

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Until recently, federal bankruptcy law<sup>1</sup> permitted creditors to enforce “blanket” security interests<sup>2</sup> in household goods against consumer loans. Frequently these liens were secured not for the purpose of providing the creditor with redeemable collateral but simply to frighten the debtor into repayment by threatening him with the loss of his personal belongings.<sup>3</sup> In 1978 an attempt was made to remedy this problem.<sup>4</sup> Congress legislated special protection for household goods by providing debtors with a lien avoidance right<sup>5</sup> — applicable only to household goods and other

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1. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). The Bankruptcy Act of 1898 did not permit debtors to protect exempt property from seizure by secured creditors.

2. The term “blanket security” refers to the grant of a security interest in all of the household goods of a borrower. Creditors use blanket security clauses to encumber as much of the debtor’s property as possible, without considering the relationship between the value of the property and the amount of the loan. FEDERAL TRADE COMMISSION, REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULES: CREDIT PRACTICES 131, 133 (1973) [hereinafter cited as F.T.C. REPORT].

Blanket security interests are one of the most widely abused devices available to creditors. *Bankruptcy Reform Act of 1978: Hearings on H.R. 31 and H.R. 32, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Judiciary*, 94th Cong., 1st & 2d Sess. 758-63 (1975-76) (statement of David H. Williams, Federal Trade Commission staff), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6127 (app. 1). Mr. Williams commented:

A blanket lien on household goods is among the most effective levers available for securing an anticipatory reaffirmation of a debt which is otherwise dischargeable in bankruptcy . . . . [W]e believe that there is no justification whatsoever for the common practice of requiring debtors to pledge all of their household property to small lenders . . . .

*Id.* at 6133.

3. See F.T.C. REPORT, *supra* note 2, at 138. The Federal Trade Commission noted that nonpurchase-money security interests in household goods have been used to thwart the debtor’s discharge in bankruptcy. *Id.*

4. In an effort to provide consumer debtors adequate bankruptcy relief, Congress replaced the Bankruptcy Act of 1898 with the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)).

5. *Id.* § 522(f). The debtor may avoid any judicial lien on exempt property and any nonpurchase-money security interest in certain exempt property such as household

personal belongings<sup>6</sup> — in section 522(f)(2) of the Bankruptcy Reform Act of 1978 (“Reform Act”).<sup>7</sup>

Since the passage of the Reform Act, however, a new problem has arisen. Uncertain as to which household goods section 522(f)(2) applies, many courts have permitted debtors to exploit the lien avoidance right by using section 522(f)(2) to exempt valuable household luxuries from creditor attachment.<sup>8</sup> In *In re Beard*,<sup>9</sup> for example, a federal bankruptcy court held that the debtor was free to invoke section 522(f)(2) to exempt an expensive stereo system and television recording equipment from the creditor’s lien. Not all courts, however, have agreed with the *Beard* approach.<sup>10</sup> Some have applied section 522(f)(2) only to household goods that are clearly needed to support a minimum level of subsistence for the debtor following bankruptcy.<sup>11</sup>

A pressing question, therefore, concerns whether courts should give section 522(f)(2) an expansive or restrictive interpretation. This Note argues that strict construction of section 522(f)(2) is most consistent with congressional intent. Part I discusses the congressional rationale behind lien avoidance. Part II examines

goods. *Id.*

6. For a fuller discussion of the type of household goods to which the lien avoidance right has been applied see *infra* notes 37-70 and accompanying text.

7. 11 U.S.C. § 522(f) (Supp. IV 1980). All of the debtor’s interests in property — both legal and equitable — are brought into the estate of the debtor. *Id.* § 541(a)(1). After the property comes into the estate, the debtor is permitted to exempt certain items under section 522. Section 522(f) provides that “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” if such lien is a judicial lien, or a nonpossessory, nonpurchase-money security interest in such items as household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, jewelry, implements, professional books, tools of the trade, or professionally prescribed health aids of the debtor or a dependent of the debtor. *Id.* § 522(f).

8. See, e.g., *Household Fin. Co. v. Brahm (In re Brahm)*, 7 Bankr. 253 (Bankr. S.D. Ohio 1980); *Jones v. SunAmerica Fin. Corp. (In re Jones)*, 5 Bankr. 655 (Bankr. M.D.N.C. 1980); *Beard v. Plan (In re Beard)*, 5 Bankr. 429 (Bankr. S.D. Iowa 1980); *Coleman v. Lake Air Bank (In re Coleman)*, 5 Bankr. 76 (Bankr. M.D. Tenn. 1980); *In re Ford*, 3 Bankr. 559 (Bankr. D. Md. 1980), *aff’d sub nom. Greenblatt v. Ford*, 638 F.2d 14 (4th Cir. 1981).

9. *Beard v. Plan (In re Beard)*, 5 Bankr. 429 (Bankr. S.D. Iowa 1980).

10. See, e.g., *Sweeney v. Pacific Fin. Co. (In re Sweeney)*, 7 Bankr. 814 (Bankr. E.D. Wis. 1980) (adopting restrictive rather than broad interpretation of § 522(f)); *Credithrift of America v. Meyers (In re Meyers)*, 2 Bankr. 603 (Bankr. E.D. Mich. 1980) (holding that the pickup truck which the debtor used only to get to and from work, where he was employed to operate a forklift truck, was not a “tool of the trade” and was thus not exempt from the creditor’s security interest); *General Fin. Corp. v. Ruppe (In re Ruppe)*, 3 Bankr. 60 (Bankr. D. Colo. 1980) (holding that debtor could not avoid liens on camera, slide projector, and movie projector because they were not household goods); *Abt v. Household Fin. Co. (In re Abt)*, 2 Bankr. 323 (Bankr. E.D. Pa. 1980) (holding that a car is not a household good within the meaning of section 522(f)(2)(A)).

11. See *supra* note 10.

present efforts to apply section 522(f)(2), and concludes that judicial interpretation to date has proved largely inadequate. Finally, Part III proposes new judicial guidelines and statutory amendments designed to standardize application of the lien avoidance provision in a manner consistent with the congressional intent behind the Reform Act.

## I. THE RATIONALE BEHIND LIEN AVOIDANCE

Modern bankruptcy law rests on two fundamental principles. First, the debtor should not emerge from bankruptcy proceedings so destitute that he has no choice but to become a public charge.<sup>12</sup> Rather, the debtor should have an opportunity to make a "fresh start."<sup>13</sup> Second, all creditors should receive equitable treatment.<sup>14</sup> Rehabilitation of the debtor must not interfere with the goal of treating all creditors "substantially alike."<sup>15</sup>

Beginning with the Bankruptcy Act of 1898,<sup>16</sup> Congress repeatedly has struggled to strike a balance between these two goals.<sup>17</sup> Yet, prior to 1978, Congress had largely failed to find an acceptable middle ground between the conflicting interests of creditors and consumer debtors. Despite frequent amendment, the Bankruptcy Act of 1898 provided relief primarily to business debtors; little protection was offered to consumer debtors.<sup>18</sup> More specifically, creditors were permitted to enforce "blanket" nonpurchase-money security interests in household goods against consumer debtors.<sup>19</sup> Frequently creditors secured these

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12. See 123 CONG. REC. 35,452 (daily ed. October 27, 1977) (statement of Rep. Drinan).

13. *Id.* The United States Supreme Court expressed the "fresh start" policy of the Bankruptcy Act of 1898 as "[o]ne of the primary purposes of the bankruptcy act," designed "to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), quoting *Williams v. U.S. Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915).

14. See 123 CONG. REC., *supra* note 12, at 35,452.

15. *Id.*

16. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

17. The Bankruptcy Act of 1898 was amended frequently over the course of the century. See generally, 123 CONG. REC., *supra* note 12, at 35,444.

18. See *id.*

19. The securing of nonpurchase-money liens in household goods is a creditor practice which is criticized frequently. As a secured party, the creditor can force seizure and sale of the property. The creditor has considerable leverage; by promising not to seize the goods, the creditor can persuade the debtor to reaffirm the debt. Consequently, the debtor is left in much the same position as he was before the bankruptcy proceeding. See F.T.C. REPORT, *supra* note 2, at 138.

household goods not because of their inherent market value — which was minimal — but because the threat of repossessing the debtor's personal possessions proved to be an effective means of forcing repayment.<sup>20</sup> As a result, many consumer debtors found themselves forced to reaffirm their debts and emerged from the bankruptcy process without enough property for a "fresh start."<sup>21</sup>

By 1970 the need for reform had grown acute. Business bankruptcies had declined as a proportion of total bankruptcy cases during the post World War II period, while the proportion of consumer bankruptcies had increased. Indeed, as of 1970 consumer bankruptcies accounted for nearly ninety per cent of the bankruptcy cases filed each year.<sup>22</sup> Consequently, in 1970 the Commission on the Bankruptcy Laws of the United States was established to propose changes in federal bankruptcy law which would strike a new, fairer balance between creditor and debtor interests.<sup>23</sup> Among its many recommendations, the Commission suggested that federal law should establish minimum exemption levels for "necessary" personal belongings.<sup>24</sup> The Commission further concluded that nonpossessory, nonpurchase-money security interests in household goods, wearing apparel, and health aids be made unenforceable against exempt property to protect

20. The testimony of consumer finance analysts before both the Bankruptcy Commission and congressional committees suggests that finance companies generally did not regard nonpurchase-money security interests as a source of funds in the event of default; rather, they viewed these interests only as a means to coerce reaffirmation. See *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary*, 95th Cong., 1st Sess. 651, 655-56 (1977) (statement of Alvin O. Wiese, Jr., Chairman, National Consumer Financial Association Subcommittee on Bankruptcy. Mr. Wiese commented that section 522(f) is apparently designed to help debtors retain possession of items that have greater personal value than market value. *Id.* Household goods may not have a great deal of resale value, but they have significant psychological value to both the debtor and the creditor). *Id.*

21. The Bankruptcy Reform Act of 1978 recognizes that "there is a Federal interest in seeing that a debtor that [sic] goes through bankruptcy comes out with adequate possessions to begin his fresh start." H.R. REP. No. 595, 95th Cong., 1st Sess. 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087 [hereinafter cited as HOUSE REPORT]. See also Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C.L. REV. 723 (1980).

22. See 123 CONG. REC., *supra* note 12, at 35,444.

23. Act of July 24, 1970, Pub. L. No. 91-354, 1970 U.S. CODE CONG. & AD. NEWS (84 Stat.) 468. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess. Part I (1973), *reprinted in* Appendix 2 COLLIER ON BANKRUPTCY 169 (15th ed. 1979) [hereinafter cited as COMMISSION REPORT]. The Commission filed a two-part report with Congress. The first part of the report contained recommendations concerning bankruptcy reforms, and the second part was a proposed statute designed to carry out the proposed reforms.

24. See COMMISSION REPORT, *supra* note 23, at 173.

the debtor's discharge and fresh start.<sup>25</sup> The Commission noted, however, that "household" collateral should be free from encumbrance only when worth less than the amount of the debtor's exemption; if the collateral is worth more than the exemption, the debtor should be allowed to redeem the collateral upon payment of the excess value, rather than lose the item automatically at judicial sale.<sup>26</sup>

Congress seized upon the Commission's proposals as a means of restoring balance to the bankruptcy process by passing the Bankruptcy Reform Act of 1978.<sup>27</sup> One of the most important substantive protections for consumer debtors was incorporated into section 522(f) of the Reform Act. This provision reflects a bankruptcy policy favoring a "fresh start" for consumer debtors.<sup>28</sup> The section empowers consumer debtors to void any judicial lien or nonpossessory, nonpurchase-money security interest in exempt household goods, appliances, wearing apparel and jewelry.<sup>29</sup> It also exempts both health aids and items that are tools of the trade.<sup>30</sup>

Sponsors of the Reform Act agreed with the Commission's conclusion that without a specific statutory provision for lien avoidance, creditors would continue to exploit contracts of adhesion by threatening repossession of consumer debtors' personal goods.<sup>31</sup> Aware of the high replacement cost of household goods, shrewd creditors would threaten foreclosure in order to coerce

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25. *Id.*

26. *Id.* The Commission's recommendation is embodied in section 722 of the Bankruptcy Reform Act of 1978. In order to exercise the redemption right the property must either be exempted under section 522 or abandoned by the trustee as burdensome to the estate under section 554.

27. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)).

28. See HOUSE REPORT, *supra* note 21, at 126-27.

29. Section 522(f) provides in part:

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 — a judicial lien, or a nonpossessory, nonpurchase-money security interest in any — (A) 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 . . .

11 U.S.C. §§ 522(f) (Supp. IV 1980).

30. Section 522(f) provides further that debtors may avoid nonpossessory, nonpurchase-money security interests in "(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or (C) professionally prescribed health aids for the debtor or a dependent of the debtor." *Id.* § 522(f)(2)(B), (C) (Supp. IV 180).

31. See HOUSE REPORT, *supra* note 21, at 127.

repayment, knowing full well that actual foreclosure would produce little, insofar as household goods have negligible resale value.<sup>32</sup> Drafters of section 522 also agreed with the Commission's recommendation that the debtor be permitted to protect his "necessary property" from a nonpurchase-money security interest or judicial lien only to the extent that the item is exempt.<sup>33</sup> Thus, for example, a cooking stove would be exempt from a lien only up to the statutorily authorized \$200 limit. The creditor would be entitled to that part of the stove's value which exceeded \$200.<sup>34</sup>

Nevertheless, in redressing the imbalance plaguing the old legislation, sponsors of the Reform Act stated that their intentions were not to create "pro-debtor" legislation.<sup>35</sup> The lien avoidance and exemption provisions were tailored to provide individual debtors with the bare minimum needed for a fresh start while simultaneously providing all creditors equitable treatment.<sup>36</sup> Implicit in the philosophy behind this establishment of a lien avoidance right is the belief that lien avoidance cannot be used to give debtors more property than is essential to a fresh start without depriving the creditor of a legal interest in property of substantial value. Thus, it is clear that Congress intended the bankruptcy courts to adhere closely to the boundaries established by the Reform Act for lien avoidance; an unduly expansive approach will undermine the purpose of the legislation by creating a new kind of imbalance, one which unjustifiably favors debtors by encroaching on legitimate and valuable creditor interests.

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32. *Id.*

33. Section 522(f) follows closely the Commission's recommended § 4-503:

(f) Waiver; Liens . . . . A lien obtainable by legal or equitable proceedings and, with respect to wearing apparel, household goods, and health aids, any lien created by agreement to give security other than for a purchase money obligation, is unenforceable against the property allowed to the debtor pursuant to this section as exempt, except that such lien may be preserved for the benefit of the debtor.

See COMMISSION REPORT, *supra* note 23, Part 2, at 126.

34. 11 U.S.C. § 522(d)(3) (Supp. IV 1980). For a fuller discussion of how the household goods exemption operates, see *infra* notes 58-70 and accompanying text.

35. See 123 CONG. REC., *supra* note 12, at 35,444 (statement of Rep. Rodino) (the bill is "neither pro-debtor nor pro-creditor").

36. See *id.* at 35,452 (statement of Rep. Drinan).

## II. PRESENT EFFORTS TO APPLY FEDERAL PROTECTIONS FOR CONSUMER DEBTORS

### A. *Judicial Interpretation of Section 522(f)(2)*

Despite Congress's efforts to legislate a uniform federal exemption policy, bankruptcy courts have proved unable to interpret section 522(f)(2) consistently.<sup>37</sup> The controversy has turned primarily upon two distinct problems: first, it is not clear from the wording of the statute precisely which household goods are "necessary" and thus exempt from lien; second, courts have differed in their use of the "spillover exemption"<sup>38</sup> to construe section 522(f)(2).

1. *Defining "necessary" household goods*— The bankruptcy courts have adopted vastly different interpretations of the phrase "household goods." Although section 522(f)(2) makes no reference to the term "necessary,"<sup>39</sup> most bankruptcy courts have followed state court precedent<sup>40</sup> and limited lien avoidance

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37. See *infra* notes 41-70 and accompanying text.

38. See 11 U.S.C. § 522(d) (Supp. IV 1980); *infra* notes 101-06 and accompanying text.

39. Because the Reform Act contains no language defining "household goods" or "household furnishings," bankruptcy courts have looked to decisions construing similar phrases in state exemption statutes. Most of the state statutes limit the scope of "household goods" by the adjective "necessary." See, e.g., *Independence Bank v. Heller*, 275 Cal. App. 2d 84, 79 Cal. Rptr. 868 (1969); *Conklin v. McCauley*, 41 A.D. 452, 58 N.Y.S. 879 (1899); *Montague v. Richardson*, 24 Conn. 337 (1856).

40. State court interpretations of "necessary household goods" vary considerably, ranging from "indispensable" to merely "convenient" or "useful." Some older cases have defined "necessary" as including beds and bedding, cooking stoves, carpets, bureaus, chairs and sofas, and clocks. See, e.g., *Haswell v. Parsons*, 15 Cal. 266 (1860) (debtor entitled to exempt all beds in residence as necessary household furniture, regardless of whether all beds are required for immediate and constant use by the family); *Weed v. Dayton*, 40 Conn. 293 (1873) (holding that in determining whether a boarding house mattress, bureau, and table were "necessary" household furniture, the debtor's occupation could be taken into consideration); *Sims v. Reed*, 51 Ky. 51 (1851) (carpeting is a necessary household item within the meaning of the exemption statute); *Dunlap v. Edgerton*, 30 Vt. 224 (1858) (holding that a piano does not come within the class of articles "necessary" for maintaining a family in reasonable comfort and convenience); *Hart v. Hyde*, 5 Vt. 328 (1833) (a cooking stove is protected from attachment as a necessary article of household furniture).

Several federal courts have held that entertainment items — such as television sets — are not "necessary" household goods or furnishings. See *In re DeMartini*, 414 F. Supp. 69 (S.D.N.Y. 1976) (concluding that to exempt a \$600 color television set as "necessary" household furniture would require an unduly expansive construction of the New York exemption statute); *In re Michealson*, 113 F. Supp. 929 (D. Minn. 1953) (meaning of "household furniture" limited to items required to provide necessities of household life; a television set was not "necessary" as furniture or as a musical instrument), *aff'd sub nom. Michealson v. Elliott*, 209 F.2d 625 (8th Cir. 1954). But see *Independence Bank v.*



to those items which are "necessary" for the debtor's fresh start. Yet the courts have been unable to agree on the type of household goods that should fall into the category of "necessary."<sup>41</sup> Because judicial construction of the term involves subjective judgment, it has proved relatively easy for different courts to reach widely varying conclusions.

Some courts have concluded that an expensive item used for the comfort of a wealthy individual's family falls within the definition of "necessary."<sup>42</sup> In *In re Coleman*,<sup>43</sup> for example, the debtor sought to avoid a nonpossessory, nonpurchase-money security interest in an elaborate component stereo system. The creditor argued that the property subject to the lien avoidance provision should be restricted to items essential to the debtor's fresh start and should not include entertainment and recreational items. Rejecting the creditor's argument, the court employed a liberal construction of the phrases "household goods" and "household furnishings" as used in subsections (d) and (f) of section 522, concluding that "necessary" meant more than "indispensable to the bare existence of the debtor and his family." Thus the court exempted items — like a stereo system<sup>44</sup> — that enabled the debtor and his family to live "in a comfortable and convenient manner."<sup>45</sup>

Similarly, in *In re Beard*<sup>46</sup> the debtor filed a complaint to avoid the creditor's security interest in stereo equipment, a television recorder, camera equipment, and cross-country skis. The court held that the creditor's security interest in the camera equipment and skis was enforceable under the Reform Act's lien avoidance provision. The stereo equipment and television recording system, however, presented a more difficult issue. Failing to find "any sound reason" why stereo and television recording systems should not be considered "household goods," the court held that the debtor could invoke a lien avoidance right against the creditor's nonpossessory, nonpurchase-money secur-

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Heller, 275 Cal. App. 2d 84, 79 Cal. Rptr. 868 (1969) (exempting over 400 various and sundry luxury and ornamental items on the ground they were necessary to maintain the debtor's accustomed lifestyle).

41. See *infra* notes 43-57 and accompanying text.

42. See, e.g., *Independence Bank v. Heller*, 275 Cal. App. 2d 84, 79 Cal. Rptr. 868 (1969) (the court concluded that all of the items were necessary to maintain the high station in life and comfortable manner of living to which the debtor had been accustomed).

43. *Coleman v. Lake Air Bank (In re Coleman)*, 5 Bankr. 76 (Bankr. M.D. Tenn. 1980).

44. *Id.* at 79.

45. *Id.* at 78.

46. *Beard v. Plan (In re Beard)*, 5 Bankr. 429 (Bankr. S.D. Iowa 1980).

ity interest in these items.<sup>47</sup>

Conversely, several courts have adopted a restrictive construction of section 522(f)(2).<sup>48</sup> In *In re Sweeney*,<sup>49</sup> for example, the court held that section 522(f)(2) was not designed to grant exemptions to debtors, but rather was aimed at avoiding enforceable liens which worked to the detriment of creditors.<sup>50</sup> The *Sweeney* court rejected an expansive interpretation even for those items clearly within the subparagraphs covered by section 522(f)(2).<sup>51</sup> In *In re Meyers*<sup>52</sup> a debtor sought to avoid a creditor's security interest in his truck, alleging that the truck was a tool of his trade. Concluding that Congress could not have intended to place all nonpurchase-money security interests in jeopardy at bankruptcy, the court applied a restrictive definition of the terms included in the lien avoidance provision.<sup>53</sup> Because the truck was used merely for transportation to and from work, the court ruled that the truck was not a tool of the debtor's trade within the meaning of section 522(f)(2); the security interest was thus not avoidable.<sup>54</sup> Similarly, the court in *In re Ruppe*<sup>55</sup> held that a slide projector, movie projector, and movie camera were not "household goods."<sup>56</sup> The court limited the lien avoidance right to "those items necessary to the functioning of the household consistent with providing the debtor the fresh start contemplated by the overall bankruptcy philosophy."<sup>57</sup>

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47. *Id.* at 432.

48. *See supra* note 10.

49. *Sweeney v. Pacific Fin. Co. (In re Sweeney)*, 7 Bankr. 814, 818 (Bankr. E.D. Wis. 1980). The court noted that "Congress specified that section 522(f) should apply to certain limited categories of personal property which are necessities of family life and have little if any resale value from the creditor's standpoint." *Id.*

50. *Id.* at 819.

51. *Id.*

52. *Credithrift of America v. Meyers (In re Meyers)*, 2 Bankr. 603 (Bankr. E.D. Mich. 180).

53. *Id.* at 605-06. The court noted that:

Lending institutions which make loans to consumer-debtors serve a legitimate purpose in our credit-oriented society. Congress did not intend to place all non-purchase-money secured loans in jeopardy when the debtor filed a bankruptcy petition. A motor vehicle is a legitimate source of security. It is not the kind of collateral that gave rise to the problems with which section 522(f) was concerned.

*Id.*

54. *Id.*

55. *General Fin. Corp. v. Ruppe (In re Ruppe)*, 3 Bankr. 60 (Bankr. D. Colo. 1980).

56. *Id.* at 61. The court reasoned that the Congress intended the term "appliance," as used in section 522(f)(2)(A), to refer to household goods or furnishings. In the court's view, a relatively specific term like appliance would not have been set forth in the statute unless Congress intended "household goods" to be construed narrowly. *Id.*

57. *Id.*

2. *Use of the spillover exemption*— When a debtor avoids the fixing of a lien pursuant to section 522(f), the lien is avoided only “to the extent that such lien impairs an exemption to which the debtor would have been entitled under section 522(b).”<sup>58</sup> Consequently, creditors are deprived entirely of their security interest only when the value of the secured property is less than or equal to the amount exempted by section 522(b);<sup>59</sup> the value exceeding the amount exempted may still be enforced by the creditor.<sup>60</sup>

Some debtors have attempted to avoid liens entirely by claiming that the “spillover” provision of section 522(d)(5) protects expensive household goods.<sup>61</sup> Many courts have agreed with this construction and have denied creditors their security interests.<sup>62</sup> For example, in *In re Dubrock*<sup>63</sup> a debtor was allowed to avoid a \$4,760 lien on the automobile he used for his trade, even though the section 522(d)(6) tool-of-the-trade exemption allowed an

58. 11 U.S.C. § 522(f) (Supp. IV 1980).

59. *Id.* § 522(b). Section 522(b) states in part:

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

- (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
- (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place . . .

*Id.*

60. See 3 COLLIER ON BANKRUPTCY, *supra* note 23, ¶ 522.29, at 522-68.

61. Section 522(d)(5) provides an exemption for “[t]he debtor's aggregate interest, not to exceed in value \$400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.” Section 522(d)(1) exempts “[t]he debtor's aggregate interest, not to exceed \$7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor of a dependent uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.” The federal exemptions include a spillover provision to prevent discrimination against non-homeowners. See HOUSE REPORT, *supra* note 21, at 361. The spillover provision allows debtors to exempt \$400, regardless of other exemptions taken, as well as the unused portion of the 522(d)(1) homestead exemption. The total homestead exemption potentially can reach \$7,500.

62. See, e.g., *Associates Commercial Corp. v. Dillon (In re Dillon)*, 18 Bankr. 252 (Bankr. E.D. Cal. 1982) (finding debtor entitled to avoid creditor's lien on a cab tractor for the amount of the tool of the trade and spillover exemptions); *Eagan v. Household Fin. Corp. (In re Eagan)*, 16 Bankr. 439 (Bankr. N.D.N.Y. 1982) (debtor entitled to avoid creditor's interest in debtor's pickup truck by employing the spillover provision and the lien avoidance provision).

63. *Credithrift of America v. Dubrock (In re Dubrock)*, 5 Bankr. 353 (Bankr. W.D. Ky. 1980).

avoidance of only \$750. The court thus used the spillover provision to permit the debtor to exempt up to \$7,900 worth of property over and above the exemptions specifically enumerated in section 522(d).<sup>64</sup> As a result, the debtor managed effectively to escape the remainder of the lien.

In *In re Sweeney*,<sup>65</sup> on the other hand, section 522(f) was limited to the exempted property values specified in sections 522(d)(3), (4), (6) and (9).<sup>66</sup> The *Sweeney* court addressed the issue of whether nonpossessory, nonpurchase-money security interests in items such as color television sets, washers, dryers, air conditioners, and tape recorders were avoidable. After reviewing the legislative history of Section 522(f), the court concluded that the spillover exemptions of sections 522(d)(1) and (5) were not applicable to the lien avoidance provisions of section 522(f).<sup>67</sup> Thus, while the debtor's expensive stereo was held to be a household good, the court permitted him to avoid only \$200 of the security interest.<sup>68</sup> Similarly, in *In re Hobson*<sup>69</sup> the creditor

64. *Id.* at 356. The *Dubrock* rationale has been adopted by many courts. *See, e.g., Associates Commercial Corp. v. Dillon (In re Dillon)*, 18 Bankr. 252 (Bankr. E.D. Cal. 1982); *Eagan v. Household Fin. Corp. (In re Eagan)*, 16 Bankr. 439 (Bankr. N.D.N.Y. 1982); *In re Upright*, 1 Bankr. 694 (Bankr. N.D.N.Y. 1979); *Bagley v. Robert Scott Gordon, Inc. (In re Bagley)*, 1 Bankr. 116 (Bankr. E.D. Pa. 1979).

65. *Sweeney v. Pacific Fin. Co. (In re Sweeney)*, 7 Bankr. 814 (Bankr. E.D. Wis. 1980).

66. *Id.* at 818. Subsections 522(f)(2)(A), (B), and (C), set out in full *supra* notes 29-30, are identical to sections 522(d)(3), (4), (6) and (9). Section 522(d) exempts the following property under subsection (b)(1):

(3) The 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.

(4) The 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.

... (6) The 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.

... (9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

67. *Sweeney v. Pacific Fin. Co. (In re Sweeney)*, 7 Bankr. 814, 819 (Bankr. E.D. Wis. 1980).

68. *Id.* 11 U.S.C. § 522(d)(3) provides a \$200 per item exemption for household goods. *Sweeney* has been followed by several courts: *Falck v. Household Fin. Corp. (In re Falck)*, 12 Bankr. 835 (Bankr. C.D. Cal. 1981) (permitting finance company to retain a nonpossessory, nonpurchase-money security interest in particular items of property to the extent the value of those items exceeded the statutory exemption of \$200 provided under section 522(d)(3)); *Avco Fin. Serv. v. Tevis (In re Tevis)*, 12 Bankr. 219 (Bankr. S.D. Ohio 1981) (nonpurchase-money security interest in debtor's \$2,000 stereo avoidable under the tool of the trade exemption, subject to a \$750 limit as provided under section 522(d)(6)); *Hobson v. Rich's Employees Credit Union (In re Hobson)*, 11 Bankr. 220

loaned the debtor more than \$2,600, and secured the loan with a \$2,000 piano as collateral. Although the debtor wanted to avoid the creditor's lien entirely by use of the spillover exemption, the court disagreed; Congress had specifically limited the available exemption to \$200, and consequently the creditor's lien was valid for the amount by which the piano's value exceeded the \$200 exemption.<sup>70</sup>

### *B. Consequences of Liberal Court Interpretation of the Lien Avoidance Provision*

The courts' failure to hew closely to the guidelines for lien avoidance established by the drafters of section 522(f) has adversely affected the bankruptcy process in several important ways.

1. *Disparate treatment of debtors*— Liberal construction of section 522(f)(2) has resulted in disparate treatment of debtors in those cases where a state has chosen to opt out of the federal exemptions and require debtors to use state and non-Code federal exemptions.<sup>71</sup> Although states may opt out of the section 522(d) exemptions, lien avoidance cannot be nullified.<sup>72</sup> Section 522(f) thus protects debtors to the extent debtor exemptions are allowed by state law.<sup>73</sup> If the state does not provide a spillover exemption, however, the debtor is deprived of the extensive lien

(Bankr. N.D. Ga. 1981) (holding a creditor's nonpossessory, nonpurchase-money security interest in piano valid to the extent the value of the collateral exceeded the \$200 exemption provided by section 522(d)(3)).

69. *Hobson v. Rich's Employees Credit Union (In re Hobson)*, 11 Bankr. 220 (Bankr. N.D. Ga. 1981).

70. *Id.* at 223.

71. Exemption provisions available to debtors vary among the states. Section 522 of the Reform Act attempts to provide a more uniform application of exemptions by eliminating antiquated state statutes. Congress provided debtors with a choice between the new federal exemptions and state exemptions, but also gave the states power to veto the debtor's choice. To exercise its veto power a state must enact legislation that specifically declares its desire to opt out of section 522(d). 11 U.S.C. § 522(b) provides:

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate . . . (1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize.

72. *See generally, Beneficial Fin. Co. v. Rodgers (In re Rodgers)*, 5 Bankr. 761 (Bankr. W.D. Va. 1980); *In re Hill*, 4 Bankr. 310, 316 (Bankr. N.D. Ohio 1980); *Cox v. Blazer Fin. Serv., Inc. (In re Cox)*, 4 Bankr. 240, 242 (Bankr. S.D. Ohio 1980). *But see In re Babcock*, 9 Bankr. 475, 478 (Bankr. W.D. La. 1981) (where state "law prohibits avoiding a lien on exempt property where there is a valid chattel mortgage," section 522(f) is inapplicable).

73. 3 COLLIER ON BANKRUPTCY, *supra* note 23, at 522-68 to 69.

avoidance available under *Dubrock*.<sup>74</sup> The result in this type of situation is disparate treatment between those states where debtors may claim the federal exemptions and those states where debtors have no spillover exemption.

Disparate treatment among debtors is undesirable for two reasons. First, congressional sponsors of the Reform Act sought to create a uniform federal exemption policy.<sup>75</sup> Thus, when judicial interpretation of 522(f) results in uneven treatment for individual debtors, congressional intent is undermined. Second, inconsistent treatment makes it impossible for the debtor to assess what the consequences of declaring bankruptcy will be prior to actually entering the bankruptcy process. To deny the debtor the opportunity to make an important decision without a means of predicting the likely outcome violates basic notions of fundamental fairness.

2. *Unavailability of credit*— A second problem with an expansive interpretation of section 522(f)(2) is its effect on the availability of credit.<sup>76</sup> If courts insist on denying a nonpurchase-money security interest in valuable luxury household items, creditors will be forced to turn to other sources of collateral to secure loans. In many instances, this will mean that creditors will begin to require security interests in real property, or alternatively that debtors will no longer be able to secure loans without producing a co-signer capable of posting additional collateral.<sup>77</sup> The end result will be to make credit more difficult to obtain. Moreover, eliminating nonpurchase-money security interests in valuable household items will create serious financial losses for creditors by reducing the lender to an unsecured sta-

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74. *Credithrift of America v. Dubrock (In re Dubrock)*, 5 Bankr. 353 (Bankr. W.D. Ky. 1980); see also 3 COLLIER ON BANKRUPTCY, *supra* note 23, at 522-68 to 69. For example, a debtor domiciled in Ohio may exempt only property that is specified under Ohio Revised Code § 2329.66; the Ohio Code does not provide a spillover exemption comparable to the federal provision. OHIO REV. CODE ANN. § 2329.66(A)(17) (Page 1981). Ohio debtors are permitted only a \$400 spillover exemption. The Ohio exemption provision for household goods, however, includes a \$200 per item limit. *Id.* § 2329.66(A)(4)(b). Consequently, an Ohio debtor is not protected from a lien of more than \$600 in any household good or furnishing. Yet under the *Dubrock* rationale, a debtor using the federal exemptions can avoid an additional \$7,900 above the \$200 limit specified in section 522(d)(3) by using the spillover exemption.

75. 123 CONG. REC., *supra* note 12, at 35,444. One commentator has suggested that "[o]ver-generous federal exemptions encourage states to opt out of the federal set of exemptions. This not only destroys uniformity, but tends to harm consumers by reducing exemptions substantially below the federal level." Proposed Consumer Bankruptcy Improvements Act of 1981, at 8 (April 1, 1981) (anonymous, unpublished report) (on file with the *Journal of Law Reform*).

76. *Id.* at 79.

77. *Id.* at 82.

tus. This loss will inevitably be passed on to future debtors, ultimately making credit more expensive and thus more difficult to obtain.<sup>78</sup>

3. *Imbalance between debtors and creditors rights*— With the passage of the Reform Act, Congress intended to provide greater protection for consumer debtors. Congress did not intend, however, to shift the balance so heavily in favor of debtors that creditors were no longer treated equitably.<sup>79</sup> The liberal construction of section 522(f)(2) that is employed by numerous courts threatens to shift the balance in precisely this manner. It has permitted debtors to emerge from bankruptcy with substantial property of significant value,<sup>80</sup> and has made it possible for employed individuals to file for bankruptcy and still retain all of their possessions, including luxury items.<sup>81</sup> In short, liberal construction has provided consumer debtors with more than a fresh start — it has provided them with a head start, one that is unfair to both less fortunate debtors and deserving creditors.

The extent to which the balance has been undermined is exemplified by *In re Coleman*. In *Coleman*, “household goods” was so broadly defined that effectively it included any property used by the debtor, regardless of how elaborate or valuable. While

78. In some instances valuable household goods are the only collateral available to the borrower. To deny nonpurchase-money security interests in these items may preclude the borrower from obtaining much needed credit.

79. See 123 CONG. REC., *supra* note 12, at 35,452.

80. In the calendar year 1980 an unprecedented 286,424 nonbusiness bankruptcies were recorded. See Brimmer, *Economic Implications of Personal Bankruptcies*, 35 PERS. FIN. L.Q. REP. 187, 188 (1981). Undoubtedly part of this increase resulted from the cumulative effects of inflation and recession. Some commentators believe, however, that general economic conditions do not offer a complete explanation. *Id.* See also *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Courts of the Senate Comm. on Judiciary, 97th Cong., 1st Sess. 39-105 (1981)* (statement of Claude Rice, Alvin O. Wiese, Jr., and Professor Jonathan M. Landers, representing Bankruptcy Discussion Group), reprinted in *Record Statement of Claude Rice, Esq., Alvin O. Wiese, Jr., Esq., and Professor Jonathan M. Landers, On Problems of Consumer Creditors Under the Bankruptcy Reform Act*, 35 PERS. FIN. L.Q. REP. 158, 162 (1981) [hereinafter cited as *Record Statement of Claude Rice*]. These commentators indicate that many debtors are reaping personal gain from the bankruptcy laws. *Id.*

81. See Tobin, *Banks Claim Bankruptcy Increases Hurt Borrowers*, 107 N.J.L.J. 194 (1981). Some members of Congress are aware of these abuses. See *Address of Senator Strom Thurmond at the Conference of Commercial Law League of America*, 86 COM. L.J. 322 (1981). Senator Thurmond informed the group that a bill was being prepared to amend the new Bankruptcy Code to prevent abuses:

It is absolutely necessary that the 1978 Act be closely scrutinized to insure that abuses are not tolerated, while insuring that legitimate debtors are not penalized . . . . There have been some real problems with the increase in the number of insolvencies . . . . While the ability to declare bankruptcy should remain available to those who need to do so, there must be a fair balancing of all interests . . . .

Congress found a legitimate need for lien avoidance where the goods involved had little or no economic value,<sup>82</sup> there was no intention to deny creditors a nonpurchase-money security interest in property with a high resale value. Indeed, valuable security interests such as those sought by the creditor in *Coleman* merit the same protection given purchase-money security interests, which are not avoidable under the congressional scheme.<sup>83</sup> The facts of *Coleman* make clear that an expansive interpretation of section 522 encroaches on legitimate creditor interests. Allowing this imbalance to continue unabated ill serves "fresh start" and "fairness" policies, for it provides improvident debtors with an opportunity and an incentive to misuse the bankruptcy laws.<sup>84</sup>

### III. PROPOSALS FOR JUDICIAL AND STATUTORY REFORM

#### A. Defining "Necessary" Household Goods

*In re Coleman*<sup>85</sup> and *In re Beard*<sup>86</sup> make clear that section 522(f)(2), as presently constructed, does not provide adequate guidance for courts in interpreting what constitutes a "household good."<sup>87</sup> While the bankruptcy courts have read into the lien avoidance provision the requirement that household goods must be "necessary" to the debtor's comfort and convenience, the case law reflects confusion over how to define the term "necessary."<sup>88</sup> Thus it is essential that new, workable guidelines be established to enforce the intent behind section 522(f).

1. *A proposed test*— This Note proposes a two-part test for defining items that are reasonably necessary for a fresh start. In

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82. See HOUSE REPORT, *supra* note 21, at 127. Congress expressed concern that creditors were depriving debtors of household items with little, if any, realizable market value. *Id.*

83. See F.T.C. REPORT, *supra* note 2, at 173. The Commission did not recommend impairing purchase-money security interests. The Commission argued against further restriction of security interests because such action would "impair the ability of a debtor to obtain financing without a substantial corresponding benefit to the debtor." *Id.*

84. See Record Statement of Claude Rice, *supra* note 80, at 166-67: "Cumulatively the exemptions, lien avoidance, and redemption provisions have an important impact in encouraging bankruptcies and in reducing the assets available for distribution."

85. *Coleman v. Lake Air Bank (In re Coleman)*, 5 Bankr. 76 (Bankr. M.D. Tenn. 1980).

86. *Beard v. Plan (In re Beard)*, 5 Bankr. 429 (Bankr. D. Iowa).

87. See *supra* notes 43-57 and accompanying text.

88. *Id.*



determining whether certain items are "necessary," the courts must examine the nature of the collateral and its value to the creditor. If, after applying the test, the court concludes that the item was not truly "necessary" for the debtor's fresh start after bankruptcy, then the Reform Act's provision for lien avoidance should not be enforced. If, on the other hand, the item is found to be "necessary," then lien avoidance should be invoked and the item should be declared exempt from encumbrance.<sup>89</sup> The following criteria establish guidelines to standardize interpretation of the term "necessity."

*a. Items directly related to the provision of food, shelter, and clothing*— Certain items are so essential to the maintenance of a minimal subsistence level that a fresh start would be virtually impossible unless these items were protected from nonpurchase-money security interests. While it remains for the courts to determine precisely which items meet this standard, the category may be broadly defined as those items which are directly related to the provision of food, shelter, and clothing for the debtor. An inexhaustive list might include: cooking stoves, refrigerators, cooking and dining utensils, beds, bureaus, sofas, chairs, tables, lamps, mirrors, clocks, rugs, and functional clothing. All of these goods should have little or no resale value.<sup>90</sup>

*b. Household goods with substantial value*— Some types of household goods — antiques, multiple color television sets, pianos, hobby and recreation equipment, video recording systems, and elaborate stereo systems — as well as other personal property, have significant monetary value to creditors at bankruptcy and thus are appropriate as collateral for loans. These items go well beyond reasonable comfort and convenience for the debtor and are not the "household goods" Congress intended to protect from creditors' liens. The relationship between the value of the item as security and the amount of the loan may prove to be a useful indicator of whether the good has such substantial value that it should not be exempt from a nonpurchase-money security interest. It may also prove helpful to examine if this relationship between the value of the item and the amount of the loan

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89. The debtor, however, may not be able to avoid the security interest entirely. The amount of the collateral that is unencumbered depends upon the value of the item and the extent of the exemption allowed under section 522(d). See *supra* notes 58-70 and accompanying text.

90. Congress enacted the lien avoidance provision in large part to protect against creditor exploitation of liens on inexpensive household goods. It is important, therefore, that bankruptcy courts permit section 522 to be invoked only where household goods with little resale value are involved. See HOUSE REPORT, *supra* note 21, at 127.

resembles that found in purchase-money security interests;<sup>91</sup> if there is a resemblance, clearly the lien avoidance right should not be enforced.<sup>92</sup>

2. *Applying the test*— If the court determines initially that an item is directly related to the provision of food, clothing, or shelter, the debtor should be held to have established a “rebuttable presumption of fact”<sup>93</sup> that the item is a “necessary” household good. This presumption is “sensible and time saving”<sup>94</sup> for the simple reason that household goods used for basic subsistence purposes have little or no market value.<sup>95</sup> In general, creditors who take security interests in this type of item have no intention of foreclosing; rather the lien is maintained for purposes of harassment.<sup>96</sup>

The rebuttable presumption, however, does not shift the ultimate burden of persuasion to the creditor; if the creditor comes forward with probative evidence indicating that the item is not directly related to the provision of food, clothing, or shelter, the presumption disappears and has no further effect on the outcome.<sup>97</sup> On the other hand, if the creditor fails to meet his bur-

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91. Where purchase-money security interests are involved, “[a] creditor lends the money on the strength of the property and the amount he is willing to lend is determined by his estimate of what the property is worth to him; the valuation at which, in case the debt is not paid, he would be willing to take the property.” *In re Carter*, 56 F. Supp. 385, 393 (W.D. Va. 1944).

92. In this situation it is unlikely that the creditor obtained a security interest to coerce the debtor into making repayments. Rather, the creditor expected that he would receive the amount of the loan from repossession and sale of the collateral without interfering with the debtor’s discharge and fresh start. This is not the type of creditor harassment Congress sought to eliminate. Given the rationale for protecting purchase-money security interests and the deleterious effects which lien avoidance has on the availability of credit, Congress clearly intended to protect legitimate creditor expectations in some nonpurchase-money security interests. The redemption provision of the Reform Act, Section 722, offers further support for this conclusion. Section 722 allows the debtor to “redeem tangible personal property from a creditor’s nonpurchase-money security interest by paying the creditor the fair market value of the property . . . .” Thus, Congress contemplated that some nonpurchase-money security interests would escape lien avoidance. See S. REP. NO. 989, 95th Cong., 2d Sess. 7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5793.

93. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.9 (2d ed. 1977).

94. See McCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 343, at 807 (E. Cleary 2d ed. 1972) (“Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.”).

95. See *supra* note 90.

96. See HOUSE REPORT, *supra* note 21, at 127; see also text accompanying note 21; Ulrich, *Comments on the Consumer Finance Industry’s Proposal to Improve the Position of Secured Creditors in Consumer Bankruptcy Cases*, 39 WASH. & LEE L. REV. 381 (1982).

97. F. JAMES & G. HAZARD, *supra* note 93, § 7.9, at 258. The orthodox view holds that

den and the items are held to have little value, the court should find conclusively that the goods are protected under section 522(f)(2).<sup>98</sup> In this instance the debtor should be permitted to avoid the creditor's security interest entirely.

Conversely, if the household good has substantial value and does not fall into the "directly related" category, a rebuttable presumption on behalf of the debtor should not be established. To the contrary, the burden should rest with the debtor to show that the item in question is reasonably necessary for the debtor's comfort, and that the household good has negligible resale value. For example, the debtor may persuasively argue that a basic radio and television set are communications as well as entertainment devices which enable the debtor and his family to live in reasonable comfort. Evidence of this kind would vitiate the presumption against the debtor and permit enforcement of the lien avoidance provision.<sup>99</sup> Shifting the presumption from creditor to debtor ensures that creditors will in no sense be punished for extending credit, and that debtors will not abuse their lien avoidance right where valuable collateral is involved.

In the event an item both meets the "direct relationship" test and has substantial value, the good should be considered a necessity. The debtor, however, should not be allowed to avoid the amount of the security interest above the \$200 limit set forth in section 522(d)(3).

### B. *Eliminating the Spillover Exemption*

Application of the proposed test will significantly improve enforcement of section 522(f). Yet if debtor abuse of the lien avoidance provision is to be entirely curtailed, action must be taken to prohibit use of the spillover exemption. As presently construed, the spillover provision increases the exemption that is impaired by a lien, and thus the amount of the lien which debtors may avoid. With these increased exemptions, debtors have been able to retain luxury items which are clearly not "necessary" for a fresh start.<sup>100</sup>

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once rebutting evidence has been submitted "the presumption is utterly destroyed and disappears . . ." *Id.* This burden is likely to be met only in cases where the creditor produces evidence that the debtor has retained more than reasonably can be used. For example, evidence that the debtor possesses multiple television sets would be sufficient to vitiate the presumption.

98. *Id.*

99. See *supra* note 97.

100. See *supra* notes 80-81 and accompanying text.

Eliminating application of the spillover exemption to section 522(f) can be achieved by incorporating the language of the exemption provision, section 522(d), into section 522(f)(2) by enacting the following amendments.

1. *Household goods, and jewelry*— Section 522(f)(2)(A) presently states that a debtor may avoid a lien in “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 . . . .”<sup>101</sup> This section should be amended to parallel section 522(d)(3) and (4). Specifically, the provision should state that:

*The debtor’s interest, not to exceed \$200 in value in any particular item, in household furnishings, household goods, wearing apparel . . . ; and the debtor’s aggregate interest must not exceed \$500 in value in jewelry primarily held for the personal, family, or household use of the debtor . . . .*

This change would limit the avoidable amount of a security interest to the specific exemption value enumerated in section 522(d). This type of limitation is consistent with congressional intent insofar as it enables debtors to avoid liens on personal property with little monetary value.<sup>102</sup>

2. *Tools of the trade*— Similarly, section 522(f)(2)(B) presently states that a debtor may avoid a nonpossessory, nonpurchase-money security interest in “implements, professional books, or tools of the trade . . . .”<sup>103</sup> This provision should be amended to parallel section 522(d)(6) as follows:

*The debtor’s aggregate interest, not to exceed \$750 in value, in any implements, professional books, or tools of the trade of the debtor . . . .*

Like the amendment proposed for section 522(f)(2)(A), this amendment would limit the avoidable amount of a security interest to a specific exemption level.

3. *Clarifying the use of the term “exemption”*— Finally, section 522(f) states that the debtor may avoid security interests which impair an “exemption to which the debtor would have

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101. 11 U.S.C. § 522(f)(2)(A) (Supp. IV 1980).

102. See *supra* notes 12-36 and accompanying text.

103. 11 U.S.C. § 522(f)(2)(B) (Supp. IV 1980).

been entitled under subsection (b) of this section . . . ."<sup>104</sup> Subsection (b) provides the debtor with the choice of federal exemptions listed in section 522(d) or exemptions provided elsewhere under state or federal law.<sup>105</sup> The vagueness of subsection (f)'s language opens the door for misapplication of section 522(d)(5) — the spillover exemption — for it allows debtors to avoid certain liens. To insure that bankruptcy courts do not continue to misconstrue the avoidance provision, section 522(f) should be amended to include the following subparagraph:

(3) The debtor is not entitled to the exemption under section 522(d)(5) in using this subsection.<sup>106</sup>

### CONCLUSION

The present controversy surrounding the bankruptcy courts' application and interpretation of section 522(f)(2) threatens to undermine congressional efforts to achieve the twin goals of debtor rehabilitation and equitable treatment for all creditors. Without new judicial guidelines to prevent exploitation and abuse of the lien avoidance right, the balance between creditor and debtor interests which Congress so carefully constructed in the Bankruptcy Reform Act of 1978 will be destroyed. To be consistent with congressional intent, section 522(f)(2) must be construed narrowly. An expansive interpretation of the lien avoidance provision offers the debtor unnecessary assistance at the expense of the creditor.

—*Judy Toyer*

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104. *Id.* § 522(f).

105. *See supra* note 59.

106. This single amendment by itself, would eliminate use of the spillover exemption; in that sense it is an alternative to proposed amendments 1 and 2. *See supra* notes 101-03 and accompanying text. Enacting all three proposed amendments, however, will remove unequivocally any uncertainty surrounding the use of the spillover exemption.