

**“THE DIAMOND-STUDED
WHEELCHAIR”: THE HEALTH AID
EXEMPTION IN BANKRUPTCY AND ITS
APPLICATION TO THE ELDERLY DEBTOR¹**

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Nearly fifty percent of elderly debtors seeking bankruptcy protection attribute their financial difficulties to a medical reason, and an even larger percentage report being burdened by substantial medical expenses. For the elderly, a population that has witnessed more than a doubling in the rate of bankruptcy filings over the past decade, the application of the health aid exemption in bankruptcy proceedings is particularly important. In this note, Jennifer B. Herzog examines the health aid exemption as defined by federal and various state exemption schemes and their interpretive case law. In light of the special circumstances faced by elderly debtors, she explains that the health aid exemption, in its current state, is extremely vague and creates uncertainty as to what particular property may be legally claimed. Ms. Herzog makes

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1. “Money cannot buy health, but I’d settle for a diamond-studded wheelchair.” Dorothy Parker, American writer (1893–1967). World of Quotes, *Dorothy Parker Quotes*, available at <http://www.worldofquotes.com/author/Dorothy-Parker/1/index.html> (last visited Aug. 23, 2004).

recommendations for those advising elderly debtors as to how to most effectively ensure the applicability of the health aid exemption. Additionally, she proffers that specific statutory revisions are necessary to create a more equitable balance between protecting elderly debtors and the interests of legitimate creditors. She concludes that without an effort by legislatures to clarify the scope and application of the health aid exemption, vulnerable elderly debtors will remain without the flexibility necessary to protect the property they rely upon for their well-being.

I. Introduction

When Trustee Michael Batlan sees a piece of property claimed as a health aid, the property at issue is usually some kind of wheelchair or similar means of motorized assisted transportation.² Such property is not particularly problematic, as it is readily classifiable as a health aid.³ It was, therefore, an unusual case when Mr. Batlan came across a Lexus LS 400 being claimed as a health aid.⁴ At first glance, a Lexus might seem a world away from a wheelchair, but the debtor, Mr. Robert Driscoll, had a clear medical disability as well as a doctor's prescription for a vehicle suited to meet his medical needs.⁵ Consequently, litigation ensued.⁶

Mr. Driscoll's case, though not typical, illustrates some of the uncertainty intrinsic in the health aid exemption.⁷ For the approximately 6,310 new bankruptcy cases that will be filed today,⁸ such uncertainty can result in the loss of important property.⁹ A Chapter 7

2. Telephone Interview with Michael B. Batlan, Chapter 7 Trustee (Mar. 16, 2004) (on file with *The Elder Law Journal*). For a more detailed description of the duties of a trustee, see 11 U.S.C.A. § 704 (2004).

3. Wheelchairs are, in fact, specifically highlighted as property the exemption is intended to protect. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 117 (1997).

4. Telephone Interview with Michael B. Batlan, *supra* note 2. See generally *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995).

5. See *Driscoll*, 179 B.R. at 664; Telephone Interview with Michael B. Batlan, *supra* note 2.

6. *Driscoll*, 179 B.R. at 664.

7. For a full discussion of Mr. Driscoll's experience, see *id.*

8. Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers*, at http://www.usdoj.gov/ust/press/articles/abi_05_2003.htm (June 2003).

9. See, e.g., *In re Kirby*, 223 B.R. 825, 830 (Bankr. M.D. Fla. 1998), in which the Florida bankruptcy court found that though a motor home, which was specially equipped to accommodate the debtor's disability, did not qualify as a health aid under the applicable case law, it nonetheless suggested a "compelling" situational need which had perhaps never been considered by the legislature in its promulgation of the rules.

bankruptcy requires debtors to give up all nonexempt property for the benefit of their creditors.¹⁰ The remaining, exempted property is protected by various bankruptcy exemptions, which specify types of property that are essentially immune from liquidation.¹¹ One such protective exemption is the “health aid exemption.”¹² The health aid exemption plays a particularly important role for the elderly debtor.¹³ Understanding how the exemption applies and how to maximize its use is, therefore, fundamental when advising the elderly debtor. Simultaneously, protecting rightful creditors from abusive debtor practices (i.e., claiming the “diamond-studded wheelchair”) is necessary; therefore, a careful balance must be struck between concerns for the elderly debtor’s well-being and concerns for the legitimate creditor’s susceptibility to abuse.¹⁴

Despite the necessity for such clear statutory provisions in this regard, the health aid exemption, in its current state, is unnecessarily

10. TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 12 (2000) [hereinafter *THE FRAGILE MIDDLE CLASS*].

11. See 11 U.S.C. § 522 (2003).

12. 11 U.S.C. § 522(d)(9) (2002).

13. “Elderly,” for the purposes of this note, is defined as persons aged sixty-five and older. This classification was chosen in order to parallel those employed in the majority of cited studies. See, e.g., Melissa B. Jacoby, et al., *Medical Problems and Bankruptcy Filings*, NORTON BANKR. L. ADVISER, May 2000, at 1 [hereinafter *Medical Problems*]. See generally Teresa A. Sullivan et al., *Young, Old, and In Between: Who Files for Bankruptcy?*, NORTON BANKR. L. ADVISER, Sept. 2001, at 1 [hereinafter *Young, Old, and In Between*].

14. See DANIEL DEFOE, *AN ESSAY UPON PROJECTS “OF BANKRUPTS”* (1697), reprinted in CHARLES J. TABB & RALPH BRUBAKER, *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 56–57 (2003). Defoe writes:

There is the Honest Debtor, who fails by visible Necessity, Losses, Sickness, Decay of Trade, or the like. The Knavish, Designing, or Idle, Extravagant Debtor, who fails because either he has run out his Estate in Excesses, or on purpose to cheat and abuse his Creditors. There is the moderate Creditor, who seeks but his own, but will omit no lawful Means to gain it, and yet will hear reasonable and just Arguments and Proposals. There is the Rigorous Severe Creditor, that values not whether the Debtor be Honest Man or Knave, Able or Unable; but will have his Debt, *whether it be to be had or no*; without Mercy, without Compassion, full of Ill Language, Passion, and Revenge. How to make a Law to suit to all these, is the Case: *That a necessary favour might be shown to the first*, in Pity and Compassion to the Unfortunate, in Commiseration of Casualty and Poverty, which no man is exempt from the danger of. *That a due Rigor and Restraint be laid up on the second*, that Villany and Knavery might be encourag’d by a Law. *That a due Care be taken of the third*, that mens Estates may, as far as can be, secur’d to them. *And due limits set to the last*, that no man may have an unlimited Power over his Fellow-Subjects, to the Ruin of both Life and Estate.

vague and can create uncertainty as to what particular property may be legally exempted.¹⁵ Furthermore, many of the steps a debtor must take to ensure the exemption's protection must be taken prior to bankruptcy;¹⁶ if these steps are not taken early on in the process, the debtor will risk the loss of the property.¹⁷ This note will examine the deficiencies in the health aid exemption and discuss the considerations the elderly debtor must take into account given the current status of the exemption. This note will conclude with suggestions of future reforms for the exemption in order to make it more clear, equitable, and flexible.

II. Background

A. Bankruptcy Amongst the Elderly

Elderly debtors have a special interest in the health aid exemption. The rate at which the population aged sixty-five and older is filing for bankruptcy is increasing.¹⁸ This increase has been so great that the rate at which the elderly declare bankruptcy has more than doubled over the past decade.¹⁹ The extent of this increase is further evident in the fact that the number of elderly filings is now growing faster than the elderly population.²⁰ The rate will likely climb even higher as the baby boomer generation ages.²¹ Furthermore, the elderly population is more likely to be dealing with declining health than

15. See *In re Kirby*, 223 B.R. 825, 830 (Bankr. M.D. Fla. 1998), in which the Florida bankruptcy court found that though a specially equipped motor home did not qualify as a health aid under the controlling case law, it nonetheless suggested a "compelling" situational need which had perhaps never been considered by the legislature in its promulgation of the rules.

16. For example, if the property at issue is encumbered by a purchase-money security interest, it is not entitled to protection under the exemption. 11 U.S.C. § 522(c)(2)(A)(i), (f) (2003). Consequently, such security interests should be resolved prior to the bankruptcy filing.

17. See *THE FRAGILE MIDDLE CLASS*, *supra* note 10, at 12 ("A Chapter 7 case requires debtors to give up all their non-exempt property . . .").

18. *Young, Old, and In Between*, *supra* note 13; see also Flynn & Bermant, *supra* note 8.

19. *Young, Old, and In Between*, *supra* note 13, at 17 (stating that the rate of elderly filings jumped from .75 per 1000 older Americans in 1991, to 2.35 per 1000 older Americans in 2001).

20. *Id.*; see also Flynn & Bermant, *supra* note 8.

21. S. REP. NO. 107-158, at 142-44 (2002); see also *Young, Old, and In Between*, *supra* note 13. Baby boomers are defined as persons born between 1946 and 1964. S. REP. NO. 107-158, *supra*, at 155.

their younger counterparts;²² therefore, it is not surprising that almost half of elderly debtors identify a medical reason for filing bankruptcy.²³ Even more list medical bills as part of their significant debts.²⁴ Consequently, as a debtor ages, it becomes increasingly likely that he will declare bankruptcy for medical reasons.

Due to the susceptibility of the elderly population to insolvency, understanding the statutory exemptions that may apply in a bankruptcy proceeding is important.²⁵ Furthermore, because vulnerability to medical-related financial problems also increases with age,²⁶ the health aid exemption is likely to be invoked by the elderly debtor who, in addition to facing financial crises, is also likely facing various medical ailments which necessitate the use of health aids.²⁷

B. How the Exemption Functions

To analyze the exemption, it is necessary to first understand how bankruptcy works. Legally, “bankruptcy” refers to “a type of court proceeding designed to settle the financial affairs of a ‘bankrupt’ debtor.”²⁸ In modern-day America, the term “has come to encompass both notions of a remedy for creditors and of debtor relief.”²⁹ Bankruptcy is broadly governed by federal law and administered in federal courts,³⁰ but either federal or individual state law can determine exemptions.³¹ Exemptions determine which property in the debtor’s estate that, under most circumstances, the debtor will be able to keep—a determination that is especially important when a debtor files for Chapter 7 liquidation.³²

22. *Medical Problems*, *supra* note 13.

23. *Id.*

24. *Id.*

25. *See generally* *Young, Old, and In Between*, *supra* note 13.

26. *Medical Problems*, *supra* note 13, at 70.

27. *See* Daniel L. Skoler, *The Elderly and Bankruptcy Relief*, 6 BANKR. DEV. J. 121, 121 (1989) (“[O]lder Americans are, and will largely remain, especially vulnerable to the effects of increasing outlays for hospital care, physician services and medical supplies that can escalate debt enormously in short spans of time.”).

28. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.1 (1997).

29. *Id.*

30. *THE FRAGILE MIDDLE CLASS*, *supra* note 10, at 11.

31. *Id.* at 12.

32. *See id.* (stating that a Chapter 7 bankruptcy requires all of the debtor’s nonexempt property to be surrendered to the trustee for the benefit of the creditors).

A Chapter 7 case requires the debtor to give up all of his nonexempt property to a trustee for the benefit of his creditors, in exchange for which he will be discharged from most of his preexisting debt.³³ Nondischargeable debts such as child support obligations³⁴ will survive bankruptcy.³⁵ Also, any property subject to a lien may be repossessed unless the debtor makes special arrangements with the creditor who holds the lien.³⁶ But, if a particular piece of property is not subject to a lien (as will be discussed further below) and is covered by an exemption, it is not subject to liquidation and can be maintained by the debtor at his discretion.³⁷

The rationale of allowing such exemptions is to ensure that the debtor has the minimum property required for the “maintenance, health and welfare” of himself and his family³⁸ and thereby can ensure his physical survival.³⁹ It is therefore essential for debtors to ensure that their property complies with statutory exemptions to the greatest extent possible, while covering as much of that property as possible, so that maintenance of health is indeed ensured through protection of the maximum amount of property.

C. Statutory Definitions

Title 11 of the United States Code, also known as the “Bankruptcy Code,” broadly governs bankruptcy law in the United States.⁴⁰ The Bankruptcy Code contains a federal bankruptcy exemption scheme, but states may choose to opt out of the federal scheme and limit their residents to state exemptions.⁴¹ About three-fourths of the states have chosen to opt out.⁴² In those states that have not opted out, the Bankruptcy Code allows the Chapter 7 debtor to choose either a federal or state exemption scheme.⁴³ The health aid exemption is generally found in both bodies of law, and each statutory source provides

33. *Id.*

34. 11 U.S.C. § 523(a)(5) (2003).

35. THE FRAGILE MIDDLE CLASS, *supra* note 10, at 12.

36. *Id.* at 13.

37. *See* 11 U.S.C. § 522(c).

38. *In re Bruntz*, 10 B.R. 444, 447 (Bankr. N.D. Iowa 1981) (quoting *In re Curry*, 5 B.R. 282, 291 (Bankr. N.D. Ohio 1980)).

39. Michael G. Hillinger, *How Fresh a Start?: What Are “Household Goods” for Purposes of Section 522(f)(1)(B)(i) Lien Avoidance?*, 15 BANKR. DEV. J. 1, 7 (1998).

40. Bankruptcy Code, 11 U.S.C. §§ 101–1330.

41. 11 U.S.C. § 522.

42. TABB & BRUBAKER, *supra* note 14, at 552.

43. 11 U.S.C. § 522(b); Skoler, *supra* note 27, at 125.

approximately the same rule.⁴⁴ In some states, the pertinent provisions simply refer debtors to the federal exemption scheme.⁴⁵

The federal statutory exemption describes various exempt property, including, “professionally prescribed health aids for the debtor or a dependent of the debtor.”⁴⁶ Though many states define the exemption with similar language,⁴⁷ a few notable deviations exist. Ohio

44. Compare 11 U.S.C. § 522(d)(9) (2004), with CAL. CIV. PROC. CODE § 1801(i) (West 2004) (California health aid exemption), and COLO. REV. STAT. ANN. § 13-54-102 (West 2003) (Colorado health aid exemption), and D.C. CODE ANN. § 15-501(a)(6) (2004) (District of Columbia health aid exemption), and FLA. STAT. ANN. § 222.25(2) (West 2004) (Florida health aid exemption), and GA. CODE ANN. § 44-13-100(a)(10) (2003) (Georgia health aid exemption), and 735 ILL. COMP. STAT. 5/12-1001(e) (West 2003) (Illinois health aid exemption), and IND. CODE § 34-55-10-2(b)(4) (Michie 2004) (Indiana health aid exemption), and IOWA CODE § 627.6 (7) (2004) (Iowa health aid exemption), and KY. REV. STAT. ANN. § 427.010(1) (Michie 2003) (Kentucky health aid exemption), and ME. REV. STAT. ANN. tit. 44, § 22 (West 2003) (Maine health aid exemption), and MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(3) (2003) (Maryland health aid exemption), and MO. REV. STAT. § 513.430(1)(9) (2003) (Missouri health aid exemption), and MONT. CODE ANN. § 25-13-608(1)(a) (2003) (Montana health aid exemption), and NEB. REV. STAT. § 25-1556(5) (2003) (Nebraska health aid exemption), and N.C. GEN. STAT. § 1C-1601(a)(7) (2003) (North Carolina health aid exemption), and 2003 Okla. Sess. Law Serv. 152(9) (West) (Oklahoma health aid exemption), and OR. REV. STAT. § 23.160(1)(h) (2003) (Oregon health aid exemption), and S.C. CODE ANN. § 15-41-30(9) (1976) (South Carolina health aid exemption), and TENN. CODE ANN. § 26-2-111(5) (2003) (Tennessee health aid exemption), and TEX. PROP. CODE ANN. § 42.001(b)(2) (Vernon 2004) (Texas health aid exemption), and VT. STAT. ANN. tit. 12, § 2740(17) (2003) (Vermont health aid exemption), and WASH. REV. CODE ANN. § 6.15.010(3)(e) (West 2004) (Washington health aid exemption), and W. VA. CODE ANN. § 38-10-4(i) (Michie 2003) (West Virginia health aid exemption).

45. See, e.g., ALA. CODE § 6-10-11 (2003) (Alabama exemption scheme); ARK. CODE ANN. § 16-66-217 (Michie 2003) (Arkansas exemption scheme); MINN. STAT. § 550.371 (subdivision 1) (2004) (Minnesota exemption scheme).

46. 11 U.S.C. § 522(d)(9) (2004).

47. See, e.g., CAL. CIV. PROC. CODE § 1801(i) (California health aid exemption); COLO. REV. STAT. ANN. § 13-54-102 (Colorado health aid exemption); D.C. CODE ANN. § 15-501(a)(6) (District of Columbia health aid exemption); FLA. STAT. ANN. § 222.25(2) (Florida health aid exemption); GA. CODE ANN. § 44-13-100(a)(10) (Georgia health aid exemption); 735 ILL. COMP. STAT. 5/12-1001(e) (Illinois health aid exemption); IND. CODE § 34-55-10-2(b)(4) (Indiana health aid exemption); IOWA CODE § 627.6(7) (Iowa health aid exemption); KY. REV. STAT. ANN. § 427.010(1) (Kentucky health aid exemption); ME. REV. STAT. ANN. tit. 44, § 22 (Maine health aid exemption); MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(3) (Maryland health aid exemption); MO. REV. STAT. § 513.430(1)(9) (Missouri health aid exemption); MONT. CODE ANN. § 25-13-608(1)(a) (Montana health aid exemption); NEB. REV. STAT. § 25-1556(5) (Nebraska health aid exemption); N.C. GEN. STAT. § 1C-1601(a)(7) (North Carolina health aid exemption); 2003 Okla. Sess. Law Serv. 152(9) (Oklahoma health aid exemption); OR. REV. STAT. § 23.160(1)(h) (Oregon health aid exemption); S.C. CODE ANN. § 15-41-30(9) (South Carolina health aid exemption); TENN. CODE ANN. § 26-2-111(5) (Tennessee health aid exemption); TEX. PROP. CODE ANN. § 42.001(b)(2) (Texas health aid exemption); VT. STAT. ANN. tit. 12, § 2740(17) (Vermont health aid exemption); WASH. REV. CODE ANN.

allows for professionally prescribed or “medically necessary” health aids.⁴⁸ Alaska, Connecticut, and Utah allow for health aids that are “reasonably necessary” to enable the individual or a dependent to work or sustain health.⁴⁹ The Virginia health aid exemption allows “medically prescribed” health aids rather than “professionally prescribed” health aids.⁵⁰

Seemingly minor deviations in language, such as those employed in the aforementioned states, can have radical impacts on the outcome of a given case. For example, if a vehicle is specially outfitted to accommodate a debtor’s physical needs, and the vehicle is necessary for the debtor to work, it may be exempt as a health aid in Utah, where the health aid exemption covers property necessary to work.⁵¹ Conversely, such a vehicle would not be exempt as a health aid in Oregon, where no such allowance is made.⁵² Deviations in statutory language are also important in that such deviations may offer guidance as to how future reforms with regard to the health aid exemption should be executed.

It is also important to note the potential transformation which the Bankruptcy Code may soon undergo.⁵³ Under currently pending legislation, the U.S. bankruptcy system would be drastically altered,⁵⁴ but the federal exemption scheme, including the explicit provision for health aids, would be left unchanged.⁵⁵ The maintenance of the status quo in this regard is in defiance of the recommendations made by the National Bankruptcy Review Commission.⁵⁶

The Commission’s original report on this matter maintained the language allowing for professionally prescribed health aids, but advised that a uniform system of exemptions be adopted, hence elimi-

§ 6.15.010(3)(e) (Washington health aid exemption); W. VA. CODE ANN. § 38-10-4(i) (West Virginia health aid exemption).

48. 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin).

49. ALASKA STAT. § 09.38.015(a)(2) (Michie 2003); CONN. GEN. STAT. ANN. § 52-352b(f) (West 2003) (this statute leaves out the term “reasonably” and only refers to “necessary” health aids); UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

50. VA. CODE ANN. § 34-26(6) (Michie 2003).

51. UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

52. See *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995).

53. See TABB & BRUBAKER, *supra* note 14, at 60 (noting that Congress has passed several reform bills, but as of February 1, 2003, no new bill has been enacted into law).

54. See H.R. Res. 2120, 108th Cong. (2003).

55. See *id.*

56. See *What the Fuss Is All About: The Commission’s Consumer Bankruptcy Recommendations*, CONSUMER BANKR. NEWS, Nov. 20, 1997, at 6.

nating the ability of states to opt out of the federal exemption scheme.⁵⁷ The effect of such a change on states employing the more lenient “necessity” standard to health aids⁵⁸ would be practically to end this leniency and bring the state exemptions up to the higher “professionally prescribed” standard of the federal exemption.⁵⁹ Though this particular provision does not appear in the proposed legislation, it illustrates the importance of choice in statutory language; for if such an amendment is ever passed, it will be necessary to consider the impact the chosen language has on debtors throughout the nation.

D. Case Law Interpreting the Health Aid Exemption

The case law regarding health aids consists of judicial determinations of what does and does not qualify as a health aid in a particular case.⁶⁰ An early case on this matter was *In re Johnson*, in which the debtor claimed a water treatment system as a health aid under the exemption.⁶¹ The debtor suffered from health problems stemming from the hard drinking water in her home.⁶² As a result, her doctor prescribed that she not drink her home’s tap water until it was properly filtered.⁶³ To enable his patient to drink her home’s tap water, the doctor recommended the use of a water treatment system.⁶⁴ The Oklahoma bankruptcy court found that the water treatment system was a professionally prescribed health aid and fell under the statutory exemption.⁶⁵

In re Johnson offers a good example of the application of the exemption. The property at issue had been prescribed by a medical pro-

57. *Id.*

58. See, e.g., ALASKA STAT. § 09.38.015(a)(2) (Michie 2003); CONN. GEN. STAT. ANN. § 52-352b(f) (West 2003); 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin); UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

59. 11 U.S.C. § 522(d)(9) (2002).

60. See, e.g., *In re Moss*, 258 B.R. 427 (Bankr. W.D. Mo. 2001); *Murphy v. Murphy* (*In re Murphy*), No. 98-36084, 2000 Bankr. LEXIS 59 (Bankr. E.D. Pa. Jan 19, 2000); *In re Kirby*, 223 B.R. 825 (Bankr. M.D. Fla. 1998); *In re Liston*, 206 B.R. 235 (Bankr. W.D. Okla. 1997); *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997); *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995); *In re Johnson*, 101 B.R. 280 (Bankr. W.D. Okla. 1989).

61. *Johnson*, 101 B.R. at 282.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

fessional in order to help treat the debtor's health problems,⁶⁶ and, as such, the bankruptcy court found the water filtration system fell within the exemption.⁶⁷ Most litigated claims concerning the exemption, though, are much less clear.⁶⁸

The health aid exemption has also been invoked with regard to more questionable property. In the case of *In re Driscoll*, the debtor claimed his car qualified as a health aid under the exemption.⁶⁹ The debtor's right foot had been amputated, leaving him disabled. His occupational therapist advised him that if he were to continue to operate a vehicle, he would need to buy either a vehicle that was specially equipped for his needs or a vehicle that was structured to allow substantial space for pedal operation.⁷⁰ Consequently, the debtor experimented with his existing vehicle and determined that its structure was such that it would allow him to continue to operate it despite his disability.⁷¹ He subsequently declared it a health aid under the exemption.⁷²

The Oregon bankruptcy court found that the vehicle at issue in *Driscoll* did not qualify as a health aid because it did not aid in the "diagnosis, cure, mitigation, treatment or prevention of disease," was not "for the purpose of affecting . . . any structure or function of the body," and was not "essential to medical care."⁷³ It is worth noting that the vehicle the debtor sought to exempt was a Lexus LS 400, a vehicle he owned prior to the accident that left him disabled.⁷⁴ The fact that this was a luxury vehicle that the debtor owned prior to incurring his disability (rather than buying it afterward out of necessity) may have shaded the court's opinion in this case.

66. *Id.*

67. *Id.*

68. For example, in the case of *In re Liston*, 206 B.R. 235 (Bankr. W.D. Okla. 1997), in the same jurisdiction in which *Johnson* had been decided eight years earlier, the bankruptcy court ruled that a treadmill did not constitute a health aid under the exemption. In *In re Kirby*, 223 B.R. 825 (Bankr. M.D. Fla. 1998), the Florida bankruptcy court suggested that the debtor had presented a compelling situational need for use of his motor coach, one that had perhaps not been considered by the legislature in its promulgation of the rules, but nonetheless found that the motor coach did not properly qualify as a health aid. *Id.* at 830.

69. *In re Driscoll*, 179 B.R. 664, 665 (Bankr. D. Or. 1995).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 666.

74. *Id.* at 665.

Two other cases, *In re Lorson*⁷⁵ and *In re Kirby*,⁷⁶ dealt with the issue of vehicles as qualifying for the exemption. Following the precedent set by the *Driscoll* court, the Pennsylvania bankruptcy court in *Lorson* also reasoned that a vehicle does not qualify as a health aid under the exemption.⁷⁷ The *Lorson* court specifically relied on the fact that the vehicle under consideration was not professionally prescribed by any health care professional.⁷⁸

The *Kirby* court faced a more difficult issue with regard to vehicles. The debtor in this case suffered from a physical disability that required medical treatment at various hospitals throughout the country and severely restricted the debtor's mobility.⁷⁹ As a result of the debtor's situation, his doctor prescribed that the debtor purchase a "motor home, fully equipped with hoist, ceiling track, monitoring system, [and] wheelchair access."⁸⁰ The debtor purchased such a motor home and used the vehicle as his primary residence.⁸¹ He subsequently filed for bankruptcy and claimed the motor home as a health aid.⁸²

Following the law of *Driscoll*, the *Kirby* court found that the motor home was not appropriately classified as a health aid because it was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment or prevention of disease or for the purpose of affecting any structure or function of the body."⁸³ It is worth noting that the Florida bankruptcy court in this case suggested that the debtor had presented a "compelling" situational need for the use of the motor home, but that it was bound by existing case law (referring to *Driscoll*) to decide against him nonetheless.⁸⁴ The court further noted that situations such as these, in which a person's medical infirmity limits him to a particular lifestyle and residence, had perhaps never been considered by the legislature in its promulgation of the

75. *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997).

76. 223 B.R. 825 (Bankr. M.D. Fla. 1998).

77. *Lorson*, 1997 Bankr. LEXIS 1777, at *3.

78. *Id.*

79. *Kirby*, 223 B.R. at 827.

80. *Id.* at 829.

81. *Id.* at 827.

82. *Id.*

83. *Id.* at 830.

84. *Id.*

rules.⁸⁵ The court's conclusion suggests that the health aid exemption may be underinclusive in its current form.

On the other end of the health aid litigation spectrum is property that does not operate to directly affect the debtor's health but rather is used in order to buy and maintain health aids. One such case was *In re Murphy*, in which the debtor claimed an annuity as a health aid.⁸⁶ The annuity at issue in this case provided for a "lifetime payment" to the debtor in the form of \$1,310.33 per month for 240 months, to be paid on account of the debtor's total physical disability.⁸⁷ The Pennsylvania bankruptcy court rejected this claim, reasoning first that an annuity is not professionally prescribed because a prescription requires one to "direct, designate, or order use of a particular remedy, therapy, medicine, or drug."⁸⁸ The court also reasoned that the annuity was not properly classified as a health aid because it was not a "prescribed medical item."⁸⁹ In the case of *In re Moss*, a Missouri bankruptcy court elaborated on this notion when the court refused to recognize cash as a health aid.⁹⁰ The Missouri bankruptcy court suggested that, "while cash may cure many ills, it is not [a health aid] recognized by the medical profession."⁹¹

Overall, these cases give some guidance as to what items the health aid exemption may and may not pertain to and offer broad standards that can be applied in any given situation. Nonetheless, neither the statutes nor the combined case law offer a conclusive test as to what property may be properly exempted as a health aid, thus the bankruptcy debtor may be left uncertain as to the potential vulnerability of his claimed health aids in bankruptcy.

III. Analysis

A. Elderly Bankruptcy Needs

In evaluating the best means of applying the health care exemption to the elderly debtor, the attorney must first consider the special

85. *Id.*

86. *Murphy v. Murphy (In re Murphy)*, No. 98-36084, 2000 Bankr. LEXIS 59 (Bankr. E.D. Pa. Jan 19, 2000).

87. *Id.* at *3.

88. *Id.* at *7.

89. *Id.*

90. *In re Moss*, 258 B.R. 427, 432 (Bankr. W.D. Mo. 2001).

91. *Id.* at 431.

needs the elderly debtor presents. It must be made clear to the elderly debtor that he, like his younger counterparts, is entitled to a fresh start, even late in life, when his debts have become unbearable.⁹² The elderly debtor may initially be hesitant to accept such relief, as he may feel societal pressure to be well established at this later point in life, and may fear being labeled as irresponsible in his planning to have arrived in such a situation.⁹³

Contributing to the stigma against elderly bankruptcy filings are the societal views that the elderly “should be the most financially secure demographic group in their population,” based on their “years of experience in handling personal finances;” that they should possess “tempered” perspectives based on their life experiences; that their expenses are lessened by the fact that their child rearing debts are completely behind them; and that a rising stock market has enhanced the value of their investments.⁹⁴ These stereotypes of the elderly hardly tell the entire story and contribute to the stigma against elderly filings.

The ignominies associated with elderly bankruptcy become evident when the average gross monthly income of elderly debtors and their younger counterparts are compared: the average gross monthly income of elderly debtors is more than one-third below the average for Chapter 7 debtors, and Social Security is the main source of their income.⁹⁵ These numbers suggest a hesitance on the part of elderly debtors to go into bankruptcy, a hesitance which must be considered when counseling the elderly debtor and which suggests not only that such advice be given carefully and empathetically, but also that the attorney offer such advice early on in the process, as the elderly are seemingly more willing than their younger counterparts to fall further into debt before asking for help.⁹⁶

The relatively high likelihood of the elderly debtor having a medical reason for his insolvency suggests that the affects of a bank-

92. Skoler, *supra* note 27, at 144–45.

93. The irony of which is that elderly debtors are more likely than any other age group to cite a health reason as the cause of their bankruptcy (see *Medical Problems*, *supra* note 13, at 17; *THE FRAGILE MIDDLE CLASS*, *supra* note 10, at 165), as a result of declining health and the final medical expenses of a failing or deceased spouse (*Medical Problems*, *supra* note 13).

94. Theresa A. Sullivan et al., *From Golden Years to Bankrupt Years*, NORTON BANKR. L. ADVISER, July 1998, at 7.

95. Flynn & Bermant, *supra* note 8.

96. *Id.*

ruptcy on future medical needs must also be considered.⁹⁷ Medical costs are increasing and will continue to rise.⁹⁸ In addition to this base increase in medical costs, an individual with a bankruptcy on his record may also face additional medical expenses based on his status as a recent bankruptcy debtor; these expenses include: higher insurance premiums (if he can obtain insurance at all) and higher medical bills (if he can find a doctor willing to work with him).⁹⁹

An uncertain future with regard to medical care means that an elderly debtor must be careful to protect and maintain the health aids he already has as future medical care, and, consequently, accessibility to prescription health aids may be more difficult to obtain.¹⁰⁰ Furthermore, given these considerations, the elderly debtor must be careful not to enter into bankruptcy until he has a clear strategy for protecting his health interests; otherwise, these interests may be vulnerable in bankruptcy, and the debtor may ultimately be left without the necessary medical support.¹⁰¹

A fresh perspective may also be necessary from the legislative standpoint. As the Bankruptcy Code evolves, the legislature must go beyond considerations of the “typical” debtor alone to also consider

97. See THE FRAGILE MIDDLE CLASS, *supra* note 10, at 165; *Medical Problems*, *supra* note 13, at 7.

98. THE FRAGILE MIDDLE CLASS, *supra* note 10, at 25–26. In 1988, the United States was spending \$600 billion on health care; this number rose to \$1.5 trillion in 2002 and is expected to double to \$3 trillion in 2012. *Time for Change: The Hidden Cost of a Fragmented Health Insurance System: Hearing on In Critical Condition: America's Ailing Health Care System Before the Senate Special Comm. on Aging*, 108th Cong. 41 (2003) (testimony of Karen Davis, Ph.D., President, The Commonwealth Fund) (citing Heffler et al., *Health Spending Projections for 2002–2012*, HEALTH AFFAIRS (Feb. 7, 2003)).

99. See THE FRAGILE MIDDLE CLASS, *supra* note 10, at 168–70 (suggesting that “doctors who have suffered serious losses by way of unpaid bills may not be eager to continue rendering medical services after a patient’s bankruptcy”).

100. See Skoler, *supra* note 27, at 121 (“[O]lder Americans are, and will largely remain, especially vulnerable to the effects of increasing outlays for hospital care, physician services and medical supplies that can escalate debt enormously in short spans of time.”).

101. For example, if the debtor resides in a state that employs the federal exemption language and requires a prescription by a medical professional to protect property claimed as a health aid (see 11 U.S.C. § 522(d)(9) (2002)), such a prescription should be obtained *prior* to the bankruptcy filing; otherwise it may be ruled nonexempt during the course of the bankruptcy proceedings and consequently be subject to liquidation. See, e.g., *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997), in which the court concluded that a vehicle was not a health aid because it was not prescribed by a health care professional.

the needs of nontypical debtors, including the elderly.¹⁰² Considering elderly bankruptcy needs may mean rethinking policies that make protection too tenuous and exemptions too unruly.¹⁰³ As the Florida bankruptcy court in *Kirby* indicated, the legislature has not adequately planned beyond the typical debtor and must further consider the special needs of individuals that may arise in bankruptcy,¹⁰⁴ especially health needs, which may arise suddenly and without warning. Suddenly arising needs cannot be planned for and are significantly more difficult to address after the fact.¹⁰⁵ Therefore, accommodating debtors presenting medical needs must be done as early in the stages of bankruptcy planning as possible, while simultaneously considering any future medical needs which may arise.

B. Purpose of Exemption

The general purpose of exemptions in bankruptcy is to provide the debtor with a “fresh start.”¹⁰⁶ The rationale of the Bankruptcy Code’s “fresh start policy” is to provide the debtor with “a new opportunity in life and a clear field for future effort” by allowing him to be “unhampered by the pressure and discouragement of preexisting debt.”¹⁰⁷ Within this broader purpose are specific rationales with regard to the individual exemptions.¹⁰⁸ In its discussion of the health aid exemption, the National Bankruptcy Review Commission has specifically described its reasoning as follows:

It would be antithetical to the rehabilitative goals of bankruptcy, and generally contrary to public policy, to require a debtor to choose between retaining household goods, tools of the trade, and a wheelchair for a disabled child. Similarly, a prescribed health

102. This is especially warranted as elderly bankruptcy rates rise in the coming years. See *Young, Old, and In Between*, *supra* note 13; see also Flynn & Bermant, *supra* note 8.

103. Skoler, *supra* note 27, at 145.

104. See *In re Kirby*, 223 B.R. 825 (Bankr. M.D. Fla. 1998).

105. See *Medical Problems*, *supra* note 13, at 9 (“unanticipated medical expenses play a major role in the family finances of more than half the personal bankrupts” (quoting from Philip Schuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288, 295 (1983))).

106. See, e.g., *United States v. Sec. Indus. Bank*, 459 U.S. 70, 72 (1982) (“The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a ‘fresh start’ after bankruptcy.”).

107. *Lightowler v. Continental Ins. Co.*, 769 A.2d 49, 51 (Conn. 2001).

108. See, e.g., NAT’L BANKR. REVIEW COMM’N, *supra* note 3.

aid should not become an object of leverage for general creditors.¹⁰⁹

The Commission's enunciated rationale demonstrates the notion that a "fresh start" requires an allowance for physical, as well as economical healing.¹¹⁰ Furthermore, such a justification demonstrates the public policy encouragement of health aids and the desire that such property not become a bargaining chip in the insolvency game.

The courts have also provided insight into the rationale of the health aid exemption. In *Butcher*, the Maryland bankruptcy court suggested that the uncapped health aid exemption represents "the conscious recognition by the legislature that the value of things required to preserve or restore life and health is inherently reasonable,"¹¹¹ thereby further emphasizing the importance of the health aid in the life of the debtor and the inherent reasonableness in maintaining such equipment.

The aforementioned legislative rationales suggest that the underlying goal of the health aid exemption is to preserve the debtor's physical health.¹¹² Therefore, when considering the proper role and application of the exemption, one should bear the preservation of health rationale in mind and continually question whether a particular policy is furthering this restorative goal.

C. Determining What the Exemption Covers

In determining what property is properly covered by the health aid exemption, one can look to the test provided by the Oregon bankruptcy court in *Driscoll*.¹¹³ The first source the court looked to was *Black's Legal Dictionary*, from which it determined the meaning of "prescribe" to be "to direct, designate, or order use of a particular remedy, therapy, medicine, or drug."¹¹⁴

The court then looked to the statutory definition of a "tool of the trade" for further guidance, finding that qualifying tools were re-

109. *Id.* at 138.

110. See *In re Larson*, 143 B.R. 543, 546 (Bankr. D. N.D. 1992) (suggesting that policies implicit in legitimate exemptions include providing the debtor with the property necessary for his physical survival and allowing the debtor to rehabilitate himself financially and earn income in the future) (citing *Norwest Bank, N.A. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)).

111. *In re Butcher*, 189 B.R. 357, 367 (Bankr. D. Md. 1995).

112. See *id.*

113. *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995).

114. *Id.* at 665 (quoting BLACK'S LAW DICTIONARY 1064 (5th Ed. 1981)).

quired to be “uniquely suited for and principally used in connection with a principal business activity.”¹¹⁵ From this definition, the court inferred that a health aid must similarly be uniquely suited and principally used as a health aid.¹¹⁶

Driscoll next considered the meaning of “medical care” under the Internal Revenue Code and suggested that:

In allowing deductions for expenses of medical care, the Internal Revenue Code defines medical care to mean, in relevant part, amounts paid . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, or for transportation primarily for and essential to [the aforementioned] medical care¹¹⁷

The *Driscoll* court found this definition persuasive and useful in determining whether an asset in bankruptcy could qualify as a health aid.¹¹⁸

Future debtors are therefore advised to consider the aforementioned interpretive tools when planning application of the health care exemption. The debtor should first look to the plain meaning and dictionary definition of any applicable provision.¹¹⁹ Thus, the meaning of “professionally prescribed” should be determined in jurisdictions utilizing the federal exemption scheme,¹²⁰ and the meaning of “medi-

115. *Id.* at 666 (quoting *In re Lindsay*, 29 B.R. 25, 26 (Bankr. D. Or. 1983)).

116. *Id.*

117. *Id.* (quoting 26 U.S.C. § 213(d)(1)).

118. *Id.*

119. *See id.* at 665.

120. 11 U.S.C. § 522(d)(9) (2002); *see, e.g.*, ALA. CODE § 6-10-11 (2003) (Alabama exemption scheme); ARK. CODE ANN. § 16-66-217 (Michie 2003) (Arkansas exemption scheme); CAL. CIV. PROC. CODE § 1801(i) (West 2003) (California health aid exemption); COLO. REV. STAT. ANN. § 13-54-102 (West 2003) (Colorado health aid exemption); D.C. CODE ANN. § 15-501(a)(6) (2003) (District of Columbia health aid exemption); FLA. STAT. ANN. § 222.25(2) (West 2003) (Florida health aid exemption); GA. CODE ANN. § 44-13-100(a)(10) (2003) (Georgia health aid exemption); 735 ILL. COMP. STAT. 5/12-1001(e) (2003) (Illinois health aid exemption); IND. CODE § 34-55-10-2(b)(4) (Michie 2003) (Indiana health aid exemption); IOWA CODE § 627.6(7) (2002) (Iowa health aid exemption); KY. REV. STAT. ANN. § 427.010(1) (Banks-Baldwin 2003) (Kentucky health aid exemption); ME. REV. STAT. ANN. tit. 44, § 22 (West 2003) (Maine health aid exemption); MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(3) (2003) (Maryland health aid exemption); MINN. STAT. § 550.371 (subdivision 1) (2003) (Minnesota exemption scheme); MO. REV. STAT. § 513.430(1)(9) (2003) (Missouri health aid exemption); MONT. CODE ANN. § 25-13-608(1)(a) (2003) (Montana health aid exemption); NEB. REV. STAT. § 25-1556(5) (2003) (Nebraska health aid exemption); N.C. GEN. STAT. § 1C-1601(a)(7) (2003) (North Carolina health aid exemption); 2003 Okla. Sess. Law Serv. 152(9) (West) (Oklahoma health aid exemption); OR. REV. STAT. § 23.160(1)(h) (2003) (Oregon health aid exemption); S.C. CODE ANN. § 15-41-30(9) (1976) (South Carolina health aid exemption); TENN. CODE ANN. § 26-2-111(5) (Tennessee health aid exemption); TEX. PROP. CODE ANN. § 42.001(b)(2) (Vernon 2003) (Texas health aid exemption);

cally” or “reasonably” necessary should be determined in the minority jurisdictions that employ such language.¹²¹ The debtor should also consider other definitions within the statutory exemption section that may be relevant to the interpretation.¹²² The debtor might also look to definitions utilized by other statutory sources.¹²³ Finally, the debtor should consider any applicable case law on this issue.¹²⁴ When these various sources are considered as a whole, determining what may or may not qualify as a health aid under the current law becomes a simpler task.

Even with these general guidelines, many of the issues surrounding the health aid exemption remain ambiguous. One such issue is who may properly qualify as a “professional” under the exemption.¹²⁵ For example, whereas a medical doctor may provide a clear example of a “professional” for these purposes, the rise in use of alternative medicine may present more challenging classifications, such as determining the status of the acupuncturist, homeopath, and touch healer.¹²⁶

In deciding whether such nontraditional parties can properly qualify as “professionals” under the health aid exemption, the debtor can look to the law of his state for guidance as to how the “practice of medicine” is defined.¹²⁷ Elements of most statutory definitions in this regard include the following:

- 1) diagnosing, preventing, treating, and curing disease; 2) holding oneself out to the public as able to perform the above; 3) intending to receive a gift, fee, or compensation for the above; 4) attaching such titles as “M.D.” to one’s name; 5) maintaining an office for reception, examination, and treatment; 6) performing surgery;

VT. STAT. ANN. tit. 12, § 2740(17) (2002) (Vermont health aid exemption); WASH. REV. CODE ANN. § 6.15.010(3)(e) (West 2003) (Washington health aid exemption); W. VA. CODE ANN. § 38-10-4(i) (2003) (West Virginia health aid exemption).

121. See, e.g., ALASKA STAT. § 09.38.015(a)(2) (Michie 2003); 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin); UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

122. *In re Driscoll*, 179 B.R. 664, 666 (Bankr. D. Or. 1995).

123. See *id.*

124. See, e.g., *In re Moss*, 258 B.R. 427, 432 (Bankr. W.D. Mo. 2001); *Murphy v. Murphy* (*In re Murphy*), No. 98-36084, 2000 Bankr. LEXIS 59 (Bankr. E.D. Pa. Jan. 19, 2000); *In re Kirby*, 223 B.R. 825 (Bankr. M.D. Fla. 1998); *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997); *In re Liston*, 206 B.R. 235 (Bankr. W.D. Okla. 1997); *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995); *In re Johnson*, 101 B.R. 280 (Bankr. W.D. Okla. 1989).

125. See 11 U.S.C. § 522(d)(9) (2002) (allowing “professionally prescribed” health aids).

126. See Michael H. Cohen, *A Fixed Star in Healthcare Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79, 88 (1995).

127. See *id.* at 98.

7) using, administering, or prescribing drugs or medicinal preparations.¹²⁸

Hence, a prescribing party is more likely to be considered a valid professional for the purposes of the health aid exemption if he can demonstrate these various factors for establishing the practice of medicine.¹²⁹ If these factors are not readily applicable, it remains in the debtor's best interests to acquire the health aid prescription from a person who clearly qualifies as a medical professional rather than risking the loss of equipment that might otherwise be exempt due to the uncertain qualifications of the prescribing party.¹³⁰

Ultimately, under the federal and majority of state exemption schemes, the claimed property must be professionally prescribed.¹³¹ Even if not expressly required by a particular statute,¹³² a professional prescription for an item designated as treatment for a medical condition is still advisable, as it lends more weight to the argument that a particular item is indeed a health aid.¹³³ It may also be valuable to state the rationale of the prescription.¹³⁴ A prescription alone may be insufficient if it fails to describe the medical need warranting the health aid.¹³⁵ Describing the underlying basis for the prescription helps to support the health aid exemption's "preservation of life" ra-

128. *See id.*

129. *Id.*

130. *See* *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997) (concluding that a vehicle was not a health aid because it was not prescribed by a health care professional).

131. *See* 11 U.S.C. § 522(d)(9) (2002) (federal health aid exemption); *See* sources cited *supra* note 120.

132. *See, e.g.*, ALASKA STAT. § 09.38.015(a)(2) (Michie 2003); CONN. GEN. STAT. ANN. § 52-352b(f) (West 2003); 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin); UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

133. *See* Telephone Interview with Michael B. Batlan, *supra* note 2 (suggesting that a professional prescription is helpful in determining what may qualify as a health aid because it offers a medical professional's opinion, which is more objective than that of a debtor or creditor).

134. *Id.* (suggesting that a professional prescription is fairly convincing, providing that the basis on which the prescription was given is apparent).

135. *See In re Driscoll*, 179 B.R. 664, 665-66 (Bankr. D. Or. 1995) (therapist advised that use of certain vehicles would accommodate the debtor's disability and enable him to drive, but the court failed to find the vehicle a health aid, in part because it was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body").

tionale, while reinforcing the legitimacy and rationality of the claimed exemption.¹³⁶

The determination of what specific instruments constitute health aids is more difficult to make. A debtor seeking to exempt a particular piece of property as a health aid should be advised to find a connection between the property and the preservation of his health.¹³⁷ Again, the prescription for the instrument should specifically refer to this connection.¹³⁸ It should also be noted that mere assistance in living may not provide a sufficient purpose to qualify for the exemption; rather, a clear connection to the preservation of one's health should be made.¹³⁹

Making this connection to preservation of health in states that require some degree of necessity in lieu of a professional prescription is especially important.¹⁴⁰ In such states, in order to determine what necessity entails, one can look to workers' compensation cases, in which awards are partially based on the medical needs of the claimant resulting from his injury.¹⁴¹ Under such cases, one test that emerges as

136. See Telephone Interview with Michael B. Batlan, *supra* note 2 (suggesting that a professional prescription is more convincing if the basis on which the prescription was given is apparent).

137. See *Driscoll*, 179 B.R. at 665-66 (finding that, despite the fact that the therapist advised that use of certain vehicles would accommodate the debtor's disability and enable him to drive, the vehicle was not a health aid, in part because it was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body").

138. See *id.*

139. For example, many instruments which might arguably improve the quality of one's life are not exempted under the statutes; one such case being that of vehicles, even though exemptions give some allowance for vehicles. See, e.g., 11 U.S.C. § 522(d)(2) (2002) (federal statutory exemption for vehicles); CAL. CIV. PROC. CODE § 1801(b) (West 2004) (California vehicle exemption); GA. CODE ANN. § 44-13-100(a)(3) (2003) (Georgia vehicle exemption); 735 ILL. COMP. STAT. 5/12-1001(c) (West 2003) (Illinois vehicle exemption); MO. REV. STAT. § 513.430(1)(5) (2003) (Missouri vehicle exemption); N.C. GEN. STAT. § 1C-1601(a)(3) (2003) (North Carolina vehicle exemption); 2003 Okla. Sess. Law Serv. 152(13) (West) (Oklahoma vehicle exemption); S.C. CODE ANN. § 15-41-30(2) (1976) (South Carolina vehicle exemption); WASH. REV. CODE ANN. § 6.15.010(3)(c) (West 2004) (Washington vehicle exemption). The general rationale of these exemptions is that some amount of value in the vehicle can be exempted, with the particular amount varying depending on the vehicle exemption. Such exemptions are not unlimited, as a vehicle is more a luxury than a necessity for living.

140. See, e.g., ALASKA STAT. § 09.38.015(a)(2) (Michie 2003); CONN. GEN. STAT. ANN. § 52-352b(f) (West 2004); 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin); UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

141. See, e.g., *Clements v. Morrow's Nut House*, 598 So. 2d 279 (Fla. Dist. Ct. App. 1992); *Temps & Co. Servs. v. Cremeens*, 597 So. 2d 394 (Fla. Dist. Ct. App.

a means of establishing necessity is whether the claimed health aid mitigates the effects of injury.¹⁴²

Even when the seemingly objective workers' compensation test is employed, the results may still be inconsistent. For example, in the case of *Temps & Co. Services v. Cremeens*,¹⁴³ under facts which were substantially similar to those in the case of *In re Driscoll*,¹⁴⁴ the Florida District Court of Appeals found that the claimant's car was medically necessary because its structure was such that it allowed the claimant to drive despite his disability and hence mitigated the effects of that disability.¹⁴⁵ In contradistinction, the Oregon bankruptcy court in *Driscoll* found that the use of a similarly situated vehicle was not medically necessary because it was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment or prevention of disease," but rather, that it was used for transportation and that such transportation was not primarily for and essential to medical care.¹⁴⁶ Thus, though mitigation of disability is seemingly a valid means of proving medical necessity, the scope of such mitigation remains ill-defined.

With regard to specificity, one should advise a debtor seeking to invoke the health aid exemption that he should ensure that the instrument in question has been prescribed for a specific, readily ascertainable medical condition.¹⁴⁷ General well-being and welfare may be insufficient to assure application of the exemption.¹⁴⁸ Conversely, a

1992); *Stasack v. Capital Dist. Physicians' Health Plan Inc.*, 736 N.Y.S.2d 764 (N.Y. App. Div. 2002).

142. See *Clements*, 598 So. 2d at 280; *Temps & Co. Servs.*, 597 So. 2d at 396.

143. *Temps & Co. Servs.*, 597 So. 2d at 394.

144. *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995) (stating that the debtor's right foot had been amputated, leaving him disabled. The debtor's occupational therapist consequently advised him that if he were to continue to operate a vehicle, he would need to either buy a vehicle that was specially equipped for his needs or a vehicle that was structured to allow substantial space for pedal operation. The debtor consequently experimented with his existing vehicle and determined that its structure was such that it would allow him to continue to operate it despite his disability; he subsequently declared it a health aid under the exemption).

145. *Temps & Co. Servs.*, 597 So. 2d at 396.

146. *Driscoll*, 179 B.R. at 666.

147. See, e.g., *In re Johnson*, 101 B.R. 280 (Bankr. W.D. Okla. 1989) (water treatment system at issue had been prescribed to treat a specific health issue of the debtor and was consequently readily accepted as a health aid).

148. For example, a treadmill, which is used to promote general well-being, may not be covered by the health aid exemption. See Telephone Interview with Michael B. Batlan, *supra* note 2 (describing a case in which Mr. Batlan objected to the debtor's claim of a treadmill as a health aid); see also *In re Liston*, 206 B.R. 235,

specific health condition may provide an unambiguous connection to the need for a remedial health aid, thus improving the likelihood of the health aid being accepted under the exemption.¹⁴⁹

IV. Recommendation

A. Recommendations for Advising the Elderly Debtor

The elderly debtor has a unique interest in the health aid exemption that must be carefully addressed.¹⁵⁰ The first steps the elderly debtor should take in order to protect his health aids should occur prior to bankruptcy. The health aid should be prescribed by a person who clearly qualifies as a medical professional for the purpose of addressing a specific medical condition.¹⁵¹ The health aid should be necessary for the preservation of the debtor's health and have utility beyond mere convenience.¹⁵² The greater the extent to which these requirements are met, both in quality and quantity, the greater the likelihood that the instrument will be accepted as a bona fide health aid falling within the exemption.¹⁵³ Conversely, failure to meet even one of these requirements can be fatal to any given claim;¹⁵⁴ therefore,

239 (Bankr. W.D. Okla. 1997) (finding that a treadmill did not constitute a health aid under the exemption).

149. For example, it is difficult to connect the car in the case of *Driscoll*, 179 B.R. 664, to a clear medical need; whereas the water treatment system in the case of *Johnson*, 101 B.R. at 282, had a clear connection to the health issues the debtor suffered from as a result of the hard water in her home. The latter is therefore much more easily classified as a health aid than the former. Even under the proposed legislative allowance for vehicles under the health aid (discussed in the recommendation section below), this case would still be unlikely to qualify.

150. See *supra* Part III.1, 3. Essentially, the elderly debtor is more likely to be filing for a medical reason and therefore more likely to need the protection of the health aid exemption.

151. See, e.g., *Johnson*, 101 B.R. at 282 (deciding that ailments suffered as a result of hard water constituted a valid medical need for the purposes of applying the health aid exemption).

152. See, e.g., *Driscoll*, 179 B.R. at 665–66 (finding that, despite the fact that the therapist advised that use of certain vehicles would accommodate the debtor's disability and enable him to drive, the vehicle was not a health aid, in part because it was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body").

153. See *id.*

154. See *In re Moss*, 258 B.R. 427, 431–32 (Bankr. W.D. Mo. 2001) (money did not qualify as a health aid because it was not recognized as such by the medical profession); *Murphy v. Murphy* (*In re Murphy*), No. 98-36084, 2000 Bankr. LEXIS 59, at *7 (Bankr. E.D. Pa. Jan. 19, 2000) (annuity did not qualify for exemption because it was not professionally prescribed, as it did not involve a particular remedy, therapy, medicine, or drug); *In re Kirby*, 223 B.R. 825, 830 (Bankr. M.D. Fla.

it is best for the debtor and his attorney to consider and account for all of these factors *prior* to bankruptcy.

Given the important role a health aid can play in an individual's life, the attorney should advise the elderly debtor to keep the aid free of liens.¹⁵⁵ Despite any valid exemptions the debtor may have claimed on a piece of property, that property is still not protected if a creditor has a qualifying security interest in it.¹⁵⁶ If such a lien exists in the property, that property may still be subject to liquidation.¹⁵⁷ To ensure that his health aid will not be subject to such a lien, the debtor should not tender to any creditor such property as collateral and secondly, should ensure that there is no purchase-money security interest in the property.¹⁵⁸

A purchase-money security interest in goods is an interest that is created when a creditor extends money or credit to the debtor in order to acquire rights in or the use of the collateral.¹⁵⁹ As a result of the rules on purchase-money security interests, a creditor who has ex-

1998) (property did not qualify for exemption because it was not uniquely and principally designed to be used for maintenance of health); *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777, at *3 (Bankr. M.D. Pa. Oct. 20, 1997) (property did not qualify for exemption because it was not professionally prescribed by any health care professional); *Driscoll*, 179 B.R. at 665-66 (property did not qualify for exemption because it was not essential to medical care).

155. Property subject to a lien may be not be protected by the exemptions and is therefore subject to repossession by creditors holding the lien. 11 U.S.C. § 522(c)(2) (2002).

156. 11 U.S.C. § 522(c) (“Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except . . . a debt secured by a lien . . .”).

157. *Id.*

158. 11 U.S.C. § 522(f)(1) (“Notwithstanding any waiver of exemptions but subject to paragraph (3), 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 nonpossessory, nonpurchase-money security interest in any . . . professionally prescribed health aids for the debtor or a dependent of the debtor.”).

159. U.C.C. § 9-103(a)-(b) (2000) (“‘[p]urchase-money collateral’ means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and . . . ‘purchase-money obligation’ means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used A security interest in goods is a purchase-money security interest . . . to the extent that the goods are purchase-money collateral with respect to that security interest . . . if the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest.”).

tended money or credit to the debtor in order to allow the debtor to purchase the specific health aid at issue can hold a lien on the property that may not be overcome by the statutory exemption.¹⁶⁰ Consequently, the attorney should advise the elderly debtor to avoid the fixing of such a lien on the property, lest it be ineligible for the exemption and hence subject to liquidation.¹⁶¹

To avoid the fixing of a lien on a health aid, the debtor should make the best attempt possible to buy the health aid outright, and avoid relying on credit and payment plans for the purchase.¹⁶² Such systems are likely to create a valid lien on the property and hamper the protection of the exemption.¹⁶³ Therefore, the elderly debtor should be advised to avoid these liens at all costs. Though such an objective may be difficult during a period in which the debtor is already facing financial insolvency, it is critical to prioritize one's existing needs and ensure that property, which is medically necessary, remains unencumbered.

B. Recommendations for Future Legislation

Given the important role the health aid may play in the elderly debtor's life, the debtor should have a greater degree of clarity regarding what property qualifies under the exemption, yet sufficient leniency should still exist in this area to ensure that any necessary equipment will continue to be protected. It is therefore necessary to create a statutory definition with sufficient specificity for a debtor to be on reasonable notice of what will qualify as a health aid, but with adequate flexibility so that all reasonable health aids can be properly exempted.¹⁶⁴ To attain this goal, lawmakers should revise the exact wording of the exemption and then add provisions governing various

160. 11 U.S.C. § 522(c) ("Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except . . . a debt secured by a lien . . .").

161. *Id.*

162. Thereby preventing the property from becoming purchase-money collateral under U.C.C. § 9-103(a)-(b) (2000).

163. *See id.*

164. *See In re Butcher*, 189 B.R. 357, 367 (Bankr. D. Md. 1995) (highlighting the importance of the exemption as recognized by its uncapped limit, thereby implicating the tendency toward flexibility already offered by the legislature in this regard).

applications of the exemption into areas beyond those readily covered by the statutory definition.

1. DESCRIPTION OF EXEMPTION

In revising the exemption description, federal and state legislatures should consider the language employed by the states that currently utilize a unique statute in this area.¹⁶⁵ For example, addition of the Ohio statutory language, which includes health aids that are “medically necessary,” though not necessarily professionally prescribed,¹⁶⁶ ensures that debtors who cannot afford a professional prescription due to rising health care costs¹⁶⁷ can still exempt health aids that are medically necessary. Though such cases may invoke stricter scrutiny, the allowance still needs to be made, as those debtors who are already on the brink of financial insolvency may not be willing or able to incur further debt for the sake of a professional prescription of a device that they already know that they need.¹⁶⁸ Furthermore, use of this statutory language would help resolve any conflicts over who qualifies as a medical professional, as the focus shifts more to the role of the health aid and its impact on the debtor’s well-being.¹⁶⁹ The addition of this language would, therefore, improve the coverage and flexibility of the health aid exemption and better ensure its protection for those in need.

In order to define what is “medically necessary,” a statutory revision could look to the existing Utah health aid exemption, which includes health aids that are “reasonably necessary to enable the individual or a dependent to work or sustain health.”¹⁷⁰ Adopting this definition as the standard for determining which health aids qualify as “medically necessary” would provide a more objective basis for making this determination. An objective definition makes the exemp-

165. See 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin); UTAH CODE ANN. § 78-23-5(1)(ii) (2004); VA. CODE ANN. § 34-26(6) (Michie 2003).

166. 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin).

167. See THE FRAGILE MIDDLE CLASS, *supra* note 10, at 146.

168. For example, an elderly debtor who purchases a wheelchair due to a decreasing ability to walk should not be required to have a professional prescription to justify owning this property. It may clearly be medically necessary for him to have the wheelchair without a medical professional having prescribed it as such.

169. For example, looking again to the above wheelchair example; whether the wheelchair was prescribed by a medical doctor or a chiropractor would no longer matter, for as long as the wheelchair is medically necessary to the debtor, it would be exempted.

170. UTAH CODE ANN. § 78-23-5(1)(a)(ii).

tion less susceptible to abuse and better informs the debtor as to what property will properly qualify as a health aid.

Overall, incorporation of the aforementioned language into the statute will help provide more objective notice to the debtor of what property is properly exemptible. Furthermore, this language offers greater flexibility with regard to medically necessary health aids. Such language offers the advantages of sufficient objectivity to prevent abuse, while not impairing any bona fide money-purchase security interests a creditor may have in a given piece of property. To enable more specific applications of the exemption, though, lawmakers should create additional provisions.

2. APPLICATION OF THE EXEMPTION TO VEHICLES

Vehicles have provided the impetus for multiple health aid litigations; therefore, further elaboration as to the interaction between health aids and vehicles may be necessary.¹⁷¹ Mobility may certainly be characterized in some cases as a medical need,¹⁷² but, at a certain point, mobility crosses the line into a luxury, separately covered in the code by vehicular exemptions.¹⁷³ It is, therefore, paramount to distinguish what is necessary from what is a luxury.

Looking to the prescribed statutory definition above, a health aid is suggested to encompass instruments that are “reasonably necessary to enable the individual or a dependent to work or sustain health.”¹⁷⁴ By this standard, a vehicle may qualify as a health aid if it plays a reasonably sufficient role in enabling the debtor to work or sustain his health.¹⁷⁵ Therefore, to qualify as reasonably necessary, the vehicle would most likely have to be the only reasonable means of transporta-

171. See *In re Kirby*, 223 B.R. 825 (Bankr. M.D. Fla. 1998) (examining motor home); *Lorson v. AVCO Fin. Servs.*, No. 5-96-02269, 1997 Bankr. LEXIS 1777 (Bankr. M.D. Pa. Oct. 20, 1997) (examining automobile); *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995) (examining luxury automobile).

172. The wheelchair, again, provides a clear example. *Kirby* provides a more challenging question. See *Kirby*, 223 B.R. at 830 (finding that the debtor presented a compelling situational need for use of his motor home but that it nonetheless did not qualify as a health aid, and suggesting that situations such as these, in which a person's medical infirmity limits him to a particular lifestyle and residence, had perhaps never been considered by the legislature in its promulgation of the rules).

173. See, e.g., 11 U.S.C. § 522(d)(2) (2002).

174. See, e.g., 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin).

175. See UTAH CODE ANN. § 78-23-5(1)(ii) (2004).

tion available to the debtor for accessing work or health care.¹⁷⁶ If a vehicle can meet this high standard, it may qualify as a health aid.¹⁷⁷

The suggested language revision is, concededly, more problematic in this area, as one could foresee a slippery slope emerge concerning what is “necessary” for working.¹⁷⁸ Therefore, though the rest of the exemption is to be liberally construed in favor of providing the debtor with a fresh start,¹⁷⁹ this particular section should perhaps be approached with greater caution. Even if a vehicle cannot meet this standard, it may still fall under the purview of the health aid exemption.

A vehicle may be specially outfitted to accommodate the physical disability of its driver.¹⁸⁰ If such accommodations are made, the debtor should not be penalized for these improvements. A penalty will be incurred if the value of the accommodations is added to the overall value of the car, resulting in a lessened impact of the vehicle exemption.¹⁸¹ For example, a car valued at \$2,400 would be fully exempted under the federal statutory exemption scheme,¹⁸² but any improvements made to that vehicle which subsequently elevate the vehicle’s worth beyond the \$2,400 limit are afforded no protection by the exemption.¹⁸³ The result, therefore, would be to punish the debtor for the improvements he has made to accommodate for his disability. Hence, a vehicle exemption that only exempts a limited amount of value in a vehicle¹⁸⁴ should also take into account any special accom-

176. *See id.*

177. *Id.*

178. For example, in *In re Driscoll*, 179 B.R. 664 (Bankr. D. Or. 1995), the Oregon bankruptcy court rejected the debtor’s contention that his Lexus was a health aid based, in part, on the fact that the vehicle was used for transportation, rather than “affecting the structure or function of the body” and that the transportation was not primarily for and essential to medical care. *Id.* at 666. It can be inferred that if the debtor had claimed the vehicle as essential to accessing medical care (or essential for allowing him to work, under the suggested statutory revision), this may have been a more difficult case.

179. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 72 n.1 (1982) (“The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a ‘fresh start’ after bankruptcy.”).

180. *Driscoll*, 179 B.R. at 665.

181. *See, e.g.*, 11 U.S.C. § 522(d)(2) (2002) (limiting the debtor’s vehicle exemption to \$2,400 in value, in one motor vehicle).

182. *Id.* (stating that the debtor’s interest, not to exceed \$2,400 in value, in one motor vehicle may be exempted).

183. *Id.*

184. *See, e.g.*, 11 U.S.C. § 522(d)(2) (2002) (federal vehicle exemption); CAL. CIV. PROC. CODE § 1801(b) (West 2003) (California vehicle exemption); GA. CODE ANN. § 44-13-100(a)(3) (2003) (Georgia vehicle exemption); 735 ILL. COMP. STAT. 5/12-

modations made for the debtor's disability. The value of such accommodations should be allowed to be subtracted from the total value of the vehicle and separately exempted as health aids.

Furthermore, a vehicle that is not protected by the exemption should be considered separately from any improvements made in order to accommodate a disability. Any improvements that have been made on a vehicle to accommodate the debtor's disability should either be removed and returned to the debtor or, if not removable, should count toward the debtor's equity in the vehicle so that such improvements can at least contribute toward offsetting the debt.

Note that even with both of the recommended provisions for vehicles in place, the vehicle in the case of *In re Driscoll*,¹⁸⁵ would likely still not be exempted as a health aid because it was neither specially outfitted,¹⁸⁶ nor medically necessary;¹⁸⁷ therefore, the outcome of this influential case would likely remain unchanged.

3. APPLICATION OF THE EXEMPTION TO HOMES

A similar approach to that recommended for vehicles may be applied to homes. Homesteads, like vehicles, are evaluated under their own exemption provisions, and, similarly, homesteads can still be subject to a variety of liens and may only be covered by limited exemption protection.¹⁸⁸ Therefore, when assessing the value of a home for purposes of calculating the amount covered by the exemption, improvements made to accommodate the debtor's medical necessities should be considered separately and fully exempted in their own right. If the home is subject to a lien, medical accommodations in the home should not be considered as fixtures in the home. Rather, these

1001(c) (West 2003) (Illinois vehicle exemption); MO. REV. STAT. § 513.430(1)(5) (2003) (Missouri vehicle exemption); N.C. GEN. STAT. § 1C-1601(a)(3) (2003) (North Carolina vehicle exemption); 2003 Okla. Sess. Laws 152(13) (West) (Oklahoma vehicle exemption); S.C. CODE ANN. § 15-41-30(2) (1976) (South Carolina vehicle exemption); WASH. REV. CODE ANN. § 6.15.010(3)(e) (West 2004) (Washington vehicle exemption). The general rationale of these exemptions is that some amount of value in the vehicle can be exempted, with the particular amount varying depending on the statute.

185. *Driscoll*, 179 B.R. 664.

186. *Id.* at 665-66.

187. *Id.* at 666 (stating that the vehicle at issue was not "uniquely suited and principally used for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body").

188. *Cf.* sources cited *supra* note 184. Similar to the vehicle exemption, the general rationale of these exemptions is that some amount of value in real estate can be exempted, with the particular amount varying depending on the statute.

accommodations should be returned to the debtor when possible or accounted for when return is not possible. The underlying rationale remains the same: the debtor is entitled to those health aids that are medically necessary, and the creditor should therefore not acquire this property by a windfall.¹⁸⁹

4. APPLICATION OF THE EXEMPTION IN QUESTIONABLE INSTANCES

With regard to other questionable property,¹⁹⁰ the overarching consideration should be to allow for what is reasonable, as health plays a tremendously important role in a debtor's life and should be preserved at all costs.¹⁹¹ The intent of these exemptions is to provide the debtor with a fresh start,¹⁹² but that fresh start will be deeply impaired if the debtor lacks the ability to sustain basic health. Therefore, courts must construe the health aid exemption in favor of the debtor when questionable situations arise. Consequently, providing a more objective and easily discernable standard as suggested above should reduce the instances of such questionable situations. The end result should be more flexibility and coherence in the health aid exemption.

V. Conclusion

Given the increasing tendency toward declining health as one ages, it is vital that the elderly debtor has the protection of the health

189. Again though, a slippery slope problem may arise. One could argue that a home, in itself, is necessary to one's health (which is certainly the case if the homelessness is the only alternative). The exemption must therefore be carefully applied in this regard to ensure against abuse and to prevent too much overlap with the function of the homestead exemptions already in place. 11 U.S.C. § 522(d)(1) (2002); CAL. CIV. PROC. CODE § 1801(a) (West 2003); GA. CODE ANN. § 44-13-100(a)(1) (2003); 735 ILL. COMP. STAT. 5/12-901 (West 2003); MO. REV. STAT. § 513.475 (2003); N.C. GEN. STAT. § 1C-1601(a)(1) (2003); 2003 Okla. Sess. Law Serv. 152(1)-(2) (West); S.C. CODE ANN. § 15-41-30(1) (1976); WASH. REV. CODE ANN. § 6.13.010 (West 2004).

190. Effectively, any other property that is not readily classifiable as a health aid. See, e.g., *In re Moss*, 258 B.R. 427, 432 (Bankr. W.D. Mo. 2001) (questioning whether cash could be considered a health aid); *Murphy v. Murphy* (*In re Murphy*), No. 98-36084, 2000 Bankr. LEXIS 59 (Bankr. E.D. Pa. Jan. 19, 2000) (questioning whether an annuity could be considered a health aid); *In re Liston*, 206 B.R. 235, 238 (Bankr. W.D. Okla. 1997) (questioning whether a treadmill properly constituted a health aid under the exemption).

191. See Hillinger, *supra* note 39, at 7 (stating that one goal of the exemption statutes is to achieve the debtor's physical survival).

192. See *United States v. Sec. Indus. Bank*, 459 U.S. 70, 72 n.1 (1982) ("The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a 'fresh start' after bankruptcy.").

aid exemption in bankruptcy.¹⁹³ Common sense and general public policy concerns suggest the importance of protecting and preserving health aids, but the scope of such protection is not readily apparent. Certainly property that aids in the preservation and maintenance of health or mitigates the effects of disease or disability is of sufficient importance to merit protection, but the question remains of how limited the scope of such aid should be and what restrictions on this allowance are necessary to prevent abuse. Although the important role of the health aid advocates the existence of statutory protection for such property, the proper form and range of that protection is less clear.

A professional prescription helps to assure a certain degree of reasonableness but may be difficult to attain and complicated to determine.¹⁹⁴ Certainly, in determining what property properly qualifies as medically necessary, having a professional prescription attesting to the debtor's necessity is helpful,¹⁹⁵ but such a prescription should not be required when the necessity is readily ascertainable and objectively reasonable.¹⁹⁶ The dominant focus must always be on assisting the debtor in making as fresh a start as possible, and good health is essential to such a start.¹⁹⁷ Simultaneously, reasonable limitations must always exist to safeguard against abuse.¹⁹⁸

Until such statutory regulations are in place, the elderly debtor must carefully guard what health aids he has. He should err on the side of caution in abiding by those standards already in place and

193. See generally *Medical Problems*, *supra* note 13 (suggesting that older Americans in bankruptcy are likely trying to cope with declining health); *Young, Old, and In Between*, *supra* note 13 (discussing the increasing rate at which elderly debtors are filing for bankruptcy and their problematic economic security).

194. See Telephone Interview with Michael B. Batlan, *supra* note 2 (suggesting that a professional prescription is helpful in determining what may qualify as a health aid because it offers a medical professional's opinion, which is more objective than that of a debtor or creditor).

195. See *id.*

196. Such an allowance suggests employing the language of the Ohio health aid exemption, 2003 Ohio Legis. Serv. 2329.66(A)(7) (Banks-Baldwin) (referring to "medically necessary" health aids), as opposed to the language of the federal exemption, 11 U.S.C. § 522(d)(9) (2002) (referring to "professionally prescribed" health aids).

197. See *In re Larson*, 143 B.R. 543, 546 (Bankr. D. N.D. 1992) (suggesting that policies implicit in legitimate exemptions include providing the debtor with the property necessary for his physical survival and allowing the debtor to rehabilitate himself financially and earn income in the future) (quoting from *Norwest Bank, N.A. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)).

198. See *DEFOE*, *supra* note 14.

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should ensure that he has taken the proper steps to protect himself before he files for bankruptcy. The problem is that taking these steps may mean incurring more expenses and, consequently, more debt. For the elderly individual who is already on the brink of insolvency, such costs are hardly desirable. For this reason, and for the sake of improving the clarity and flexibility of the health aid exemption, federal and state legislatures should amend the exemption as suggested and allow for more flexible language in this regard, thereby protecting the vulnerable debtor and the property he relies on for his very well-being.