BANKRUPTCY—THE INCOME TAX REFUND IS PROPERTY WITHIN SECTION 70a(5) OF THE BANKRUPTCY ACT; THE WAGE GARNISHMENT LIMITATIONS OF THE CONSUMER CREDIT PROTECTION ACT ARE NOT APPLICABLE—*Kokoszka v. Belford,* 417 U.S. 642 (1974).

Henry A. Kokoszka was temporarily employed in 1971, working the first three months of the year and the last week and a half of December.[1] During the interim period Kokoszka received unemployment compensation.[2] For federal income tax purposes he declared two withholding exemptions, the maximum number of deductions he was entitled to;[3] and his employer withheld the proper amount from his wages.[4] For the taxable year 1971 Kokoszka had a gross income of $2,322.00[5] from which $250.90 was withheld.[6]

Kokoszka filed a voluntary petition in bankruptcy on January 5, 1972.[7] The only asset the trustee in bankruptcy claimed was an income tax refund check for $250.90 to which Kokoszka was entitled.[8] The referee in bankruptcy issued an ex parte order[9] directing the bankrupt to file his 1971 income tax return[10] and turn over

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[1] Kokoszka v. Belford, 417 U.S. 642, 644 (1974).

[2] Order on Motion for Rehearing at 1, *In re* Kokoszka, No. 37,437 (D. Conn., March 24, 1972).

[3] Kokoszka v. Belford, 417 U.S. 642, 644 (1974). *See* INT. REV. CODE OF 1954, §§ 3402(f)(1)(A), (D).

[4] Kokoszka v. Belford, 417 U.S. 642, 644 (1974). The amount to be withheld is determined under INT. REV. CODE OF 1954, § 3402(a), Table 1(b). Claiming the maximum number of exemptions means that the minimum amount of withholding tax will be deducted by the employer.

[5] Kokoszka v. Belford, 417 U.S. 642, 644 (1974).

[6] Appendix to Brief for Petitioner at 19, Kokoszka v. Belford, 417 U.S. 642 (1974) (Kokoszka's federal income tax return for taxable year 1971).

[7] Kokoszka v. Belford, 417 U.S. 642, 644 (1974). Bankruptcy Act § 18(f), 11 U.S.C. § 41(f) (1970), provides in pertinent part:

> The filing of a voluntary petition under Chapters I to VII of this Act . . . shall operate as an adjudication with the same force and effect as a decree of adjudication.

[8] Kokoszka v. Belford, 417 U.S. 642, 644 (1974). The bankrupt also had a 1962 Corvair, which the trustee abandoned to the bankrupt for the sum of $25. *Id.*

[9] The order was issued pursuant to Bankruptcy Act § 2a(15), 11 U.S.C. § 11(a)(15) (1970).

[10] A married couple residing in the same household and filing a joint return need not file if their gross income for the taxable year is less than $2,800. INT. REV. CODE OF 1954, § 6012(a)(1)(A)(ii). But a husband and wife may file a joint return even if one spouse does not have gross income. *Id.* § 6013(a). This was Kokoszka's personal situation since his wife had not been employed. Certificate of Referee on Petition for Review at 2, *In re* Kokoszka, No. 37,437 (D. Conn., April 7, 1972).

to the trustee any tax refund he may receive,[11] and further making compliance with such order a condition for receiving an entry of discharge in bankruptcy.[12] The district court agreed with the referee,[13] and the United States Court of Appeals for the Second Circuit affirmed.[14]

In *Kokoszka v. Belford,*[15] the Supreme Court granted certiorari to resolve a conflict among the circuits on two questions:[16] first, whether the term "property" as used in section 70a(5) of the Bankruptcy Act[17] should be construed to include an income tax refund check, thereby vesting the title to said check in the trustee in bankruptcy; and second, if such refund is property, whether the Consumer Credit Protection Act (CCPA)[18] and its limitation on wage garnishment[19] applies to it. A unanimous Court held that the

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[11] Since Kokoszka had already filed his petition in bankruptcy, the trustee could have filed the claim for refund himself. *See* Rev. Rul. 72-387, 1972-2 CUM. BULL. 632.

[12] Order Re Income Tax Refund and Deferment of Bankrupt's Discharge, *In re* Kokoszka, No. 37,437 (D. Conn., Feb. 3, 1972).

[13] Memorandum of Decision at 3, *In re* Kokoszka, No. 37,437 (D. Conn., July 21, 1972).

[14] *In re* Kokoszka, 479 F.2d 990, 998 (2d Cir. 1973).

[15] 417 U.S. 642 (1974).

[16] *Id.* at 642-43. *Compare* Gehrig v. Shreves, 491 F.2d 668 (8th Cir. 1974) (amount due to minimum withholding is not property; the Consumer Credit Protection Act (CCPA) does not apply to amounts voluntarily withheld over the minimum amount) *and In re* Cedor, 470 F.2d 996 (9th Cir.), *aff'g* 337 F. Supp. 1103 (N.D. Cal. 1972), *cert. denied,* 411 U.S. 973 (1973) (excess of minimum withholding is not property; amount due to optional overwithholding is within the protection of the CCPA) *with In re* Kokoszka, 479 F.2d 990 (2d Cir. 1973) (total amount withheld is property; the CCPA is inapplicable).

[17] Bankruptcy Act § 70a(5), 11 U.S.C. § 110(a)(5) (1970), provides in pertinent part:

> a. The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . .

The Court's quotation of section 70a(5) deletes the phrase "except insofar as it is to property which is held to be exempt." 417 U.S. at 643 n.1.

[18] 15 U.S.C. § 1601 *et seq.* (1970). For the purposes of this Note, the pertinent provisions of the CCPA will be Subchapter II—Restrictions on Garnishment, 15 U.S.C. §§ 1671-77 (1970).

[19] 15 U.S.C. § 1673(a) (1970) provides in pertinent part:

> **Maximum allowable garnishment.**
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> Except as provided . . . the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
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> (1) 25 per centum of his disposable earnings for that week, or
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> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . at the time the earnings are payable,
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> whichever is less.

refund check is property,[20] but that the CCPA does not apply.[21]

Historically, the definition of property which is includable in the bankrupt's estate and which must be turned over to the trustee has been comprehensive. As a consequence, virtually all property which the bankrupt possesses or has an interest in as of the date of filing his petition in bankruptcy vests in the trustee, with certain limited exceptions. This was reflected in the earlier national bankruptcy acts.[22]

The Bankruptcy Act of 1898[23] for the first time made a system of bankruptcy "a permanent part of our jurisprudence."[24] That Act, in contrast to all previous bankruptcy laws, dealt with the property in the bankrupt's estate by enumerating the types of property within the estate and not specifying those outside of the bankrupt's estate.[25] However, the enumeration of property under

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[20] 417 U.S. at 648.

[21] *Id.* at 652.

[22] The first national bankruptcy law in the United States was enacted in the year 1800. Act of April 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). This Act applied only to merchants and provided for a national exemption, namely necessary wearing apparel and bedding. *Id.* §§ 1, 5. Except for this specific exemption, the commissioner had authority to take

> all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever.

Id. § 5.

The second national bankruptcy act was passed in 1841. Act of August 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843). This Act extended voluntary bankruptcy to "[a]ll persons whatsoever." *Id.* § 1. The assignee in bankruptcy was vested with the bankrupt's title to "all the property, and rights of property, of every name and nature, and whether real, personal, or mixed." *Id.* § 3. This Act also prescribed a national exemption, which included necessary household and kitchen furniture, and such other necessaries as the assignee in his discretion set aside, the value of such items not to exceed $300. Also exempted was "the wearing apparel of such bankrupt, and that of his wife and children." *Id.*

The next enactment, Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878), made bankruptcy available to any person, provided he owed provable debts in excess of $300. *Id.* § 11. Exemptions under this Act were broadened to include necessary household and kitchen furniture; wearing apparel of the bankrupt, his wife and children; and military uniform, arms, and equipment for any person who had been in the service of the United States. *Id.* § 14. This Act, for the first time in bankruptcy law, further excepted property which was exempted from execution by the laws of the state wherein the bankrupt was domiciled or by the laws of the United States. Property passing to the assignee in bankruptcy was defined as "all the estate, real and personal." *Id.* The term "property" under this Act was construed to be "broad and comprehensive enough to embrace the whole property of the bankrupt." Williams v. Heard, 140 U.S. 529, 540 (1891).

[23] Act of July 1, 1898, ch. 541, 30 Stat. 544, *as amended,* 11 U.S.C. § 1 *et seq.* (1970).

[24] 1 COLLIER ON BANKRUPTCY ¶ 0.01, at 2 (14th rev. ed. J. Moore & L. King 1974).

[25] Act of July 1, 1898, ch. 541, § 70a, 30 Stat. 565-66, *as amended,* 11 U.S.C. § 110(a) (1970). In addition to listing particular exemptions, the 1898 Act looked to state law, as did its predecessor, the Bankruptcy Act of 1867, which excepted such property

> as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of

section 70a did nothing to undermine the comprehensiveness of the definition of property, since one purpose of this section of the 1898 Act was "to bring within the control and administration of the court absolutely the *entire* available property of the bankrupt and distribute it among those entitled."[26]

While the 1898 Act was amended piecemeal many times,[27] it was not until the Bankruptcy Act of 1938,[28] known as the Chandler Act, that the bankruptcy law of 1898 was comprehensively amended and supplemented in an attempt to modernize the law of bankruptcy.[29] The Chandler Act and its amendments[30] effected many changes[31] in section 70 of the Bankruptcy Act of 1898, however these changes have not restricted the definition of property under section 70a. In fact, the property which must be turned over to the trustee in bankruptcy has been expanded in many areas.[32] One could thus contend that bankruptcy laws have histori-

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the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four . . . .

Act of March 2, 1867, ch. 176, § 14, 14 Stat. 523. For a discussion of this Act see note 22 *supra*.

The exemption section of the Bankruptcy Act of 1898 provided:

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Act of July 1, 1898, ch. 541, § 6, 30 Stat. 548.

The 1867 Act also exempted

such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States . . . .

Act of March 2, 1867, ch. 176, § 14, 14 Stat. 523. The Bankruptcy Act of 1898 did not contain a comparable provision.

[26] H. BLACK, A TREATISE ON THE LAW AND PRACTICE OF BANKRUPTCY UNDER THE ACT OF CONGRESS OF 1898 AND ITS AMENDMENTS 7 (3d ed. 1922) (emphasis added). *See also* Chandler v. Nathans, 6 F.2d 725, 727 (3d Cir. 1925).

[27] *See generally* 1 COLLIER ON BANKRUPTCY ¶ 0.06, at 12-16 (14th rev. ed. J. Moore & L. King 1974). For a list of the amendments see *id.* at 12 n.6.

[28] Act of June 22, 1938, ch. 575, 52 Stat. 840, *as amended,* 11 U.S.C. § 1 *et seq.* (1970).

[29] 1 COLLIER ON BANKRUPTCY ¶ 0.01, at 2 (14th rev. ed. J. Moore & L. King 1974).

[30] The Chandler Act was amended in 1950, 1952, and 1966. *See* 4A COLLIER ON BANKRUPTCY ¶ 70.03[1], at 31-33 (14th rev. ed. J. Moore & L. King 1971).

[31] For a summary of these changes see *id.* ¶ 70.03[1], at 33-34.

[32] The additions to section 70a include: specifically making the date of filing the petition in bankruptcy the date of cleavage; vesting the trustee with title to the bankrupt's property located both within and without the United States; expanding clause 2 to allow the trustee more time to prosecute an application for a patent, copyright, or trademark; in clause 3, specifically limiting which powers of the bankrupt would not be turned over to the trustee; clarifying existing law in clause 5 by including "rights of action" and listing the rights of action not included within the scope of this term; expanding the rights of action in clause 6 to include the debtor's right of action to recover usurious interest; enacting clause 7 to include within the bankrupt's estate various contingent and executory interests in real

cally been a device to serve the interests of creditors.[33] Virtually all the property the bankrupt possesses, has an interest in, or, for limited types of property, will have an interest in is subject to distribution to his creditors, except for property specifically exempted by the laws of the state wherein the bankrupt is domiciled or by the laws of the United States.[34]

This emphasis on the rights of creditors is tempered, however, by the discharge provision of the Bankruptcy Act,[35] and every bankruptcy law enacted in the United States has had one.[36] The purpose of the discharge is twofold. On the one hand, the possibility of a discharge encourages the debtor to cooperate with the trustee and the court in the collection and distribution of all the

property which became assignable by the bankrupt within 6 months after the date of filing; codification of existing law in clause 8 to include bequests, devises, or inheritances which vest in the bankrupt within 6 months after filing the petition in bankruptcy. *Id.* ¶ 70.03[2], at 35-37.

As regards section 70a(5), *Collier* states that "[i]t is probably sufficiently broad to include all, or nearly all, the classes of property enumerated in the other clauses of the subdivision." *Id.* ¶ 70.15[1], at 136. By definition, section 70a(5) includes property which is transferable or leviable on the date of filing the petition in bankruptcy. However, this section may in fact be broad enough to include: property that is fraudulently transferred; rights of action belonging to the debtor; certain rights of action belonging to a creditor; real property interests such as a life estate, and equity of redemption, a lease, a contract for the sale of land, rights as lienor, rents on mortgaged property, public land rights, contingent interests, dower and curtesy, and joint estates in real property; interests in personal property and its proceeds; fixtures; pledged property; pensions; personal contracts; franchises and licenses; stock exchange seats; good will; insurance policies; property held by or for the bankrupt in trust; bequests, devises, or inheritances; certain rights of action such as for personal injury, damage to property, loss-carryback refunds; certain rights of action of a corporate bankrupt; bank deposits; wages, fees, or commissions; and certain rights in partnership property. *See generally id.* ¶¶ 70.15-.35, at 135-453.

[33] *See* 1A COLLIER ON BANKRUPTCY ¶ 14.01[6], at 1260.2 (14th rev. ed. J. MOORE & L. King 1974); *id.* ¶ 14.02[1], at 1261.

[34] Bankruptcy Act § 6, 11 U.S.C. § 24 (1970). That section provides:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State . . . .

Id.

The Chandler Act reintroduced the allowance of exemptions provided by the laws of the United States. Act of June 22, 1938, ch. 575, § 6, 52 Stat. 847. This allowance had been included in the 1867 Act; however, it was deleted from the Bankruptcy Act of 1898. *See* note 25 *supra.*

[35] *See generally* Bankruptcy Act §§ 14-17, 11 U.S.C. §§ 32-35 (1970). A "discharge" is defined as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act." *Id.* § 1(15), 11 U.S.C. § 1(15). Debts which may be proved are found in *id.* § 63, 11 U.S.C. § 103.

[36] 1A COLLIER ON BANKRUPTCY ¶ 14.01[1], at 1246.1 (14th rev. ed. J. Moore & L. King 1974). For a thorough discussion of the various discharge provisions throughout the American history of bankruptcy legislation see *id.* ¶ 14.01, at 1246.1-1260.3.

assets of his estate. On the other hand, it gives the honest debtor an incentive to accumulate new assets in the future.[37] This rehabilitative aspect of the discharge has come to be conceptualized as the "fresh start" doctrine.[38]

Wetmore v. Markoe[39] represents the Supreme Court's first acknowledgment of the fresh start doctrine. While expressly recognizing the existence of that doctrine, the Court held that arrears in alimony under a final decree of absolute divorce were not a provable debt barred by a discharge in bankruptcy.[40] The Court stipulated that the debt in question should not be discharged "[u]nless positively required by direct enactment."[41] This result was reinforced in *Burlingham v. Crouse*,[42] in which the Court construed a proviso of section 70a of the Bankruptcy Act of 1898 regarding life insurance. The Court considered the fresh start of the bankrupt to leave him with only "such exemptions and rights as the statute left untouched."[43] And in a companion case[44] dealing with the same life insurance proviso, the Court developed the "line of cleavage" concept, wherein the date of filing the petition in bankruptcy is taken as the cutoff date for the bankrupt's financial affairs.[45] Prior property vests in the trustee unless expressly exempted, and prior debts may be discharged if provable. But after-acquired property and after-acquired debts still remain with the bankrupt.[46] This line of cleavage interpretation of the fresh

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[37] *Id.* ¶ 14.01[6], at 1260.2.

[38] Wetmore v. Markoe, 196 U.S. 68 (1904), was the first Supreme Court case to give expression to the fresh start doctrine:

> Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes.

Id. at 77.

[39] 196 U.S. 68 (1904).

[40] *Id.* at 76.

[41] *Id.* at 77.

[42] 228 U.S. 459 (1913).

[43] *Id.* at 473.

[44] Everett v. Judson, 228 U.S. 474 (1913).

[45] *Id.* at 479. The Court stated:

> We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.

Id. This rationale was incorporated in the Chandler Act, wherein the trustee is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy." Act of June 22, 1938, ch. 575, § 70a, 52 Stat. 879.

[46] 4A COLLIER ON BANKRUPTCY ¶ 70.09, at 103, 105 (14th rev. ed. J. Moore & L. King 1971). This conceptualization of the date of cleavage doctrine is the general rule. Of course

start doctrine was reapplied just two years later in a case involving a contract to indemnify a surety.[47] There the Court reaffirmed the fact that while a creditor has the opportunity to share in a distribution of the bankrupt's assets, the discharge of a debt terminates the debtor-creditor relationship.[48] Similarly, in *Stellwagen v. Clum*,[49] upholding an Ohio fraudulent conveyance statute, the Court interpreted the bankrupt's fresh start to mean "free from debts, except of a certain character, after the property . . . owned at the time of bankruptcy has been administered for the benefit of creditors."[50]

The idea of giving the debtor a fresh start at the date of filing the petition in bankruptcy is further supported by *Local Loan Co. v. Hunt*.[51] There the Court considered the validity of a state rule that recognized as a non-dischargeable debt the assignment of future wages made prior to filing a petition in bankruptcy.[52] A unanimous Court held the assignment invalid, reasoning that under the purposes of the Bankruptcy Act, the discharge and release from debt could not logically be supposed to create

> an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, preëxisting property, but brought into being solely as the fruit of the subsequent labor of the bankrupt.[53]

As the respondent in *Kokoszka* aptly pointed out, the Court has treated the fresh start doctrine as

> simply a characterization of the benefits flowing to the debtor after bankruptcy-relief from the obligation of pre-bankruptcy

there are exceptions. These exceptions—that is, assets also held to be property within the bankrupt's estate as of the date of filing the petition in bankruptcy—include proceeds of property which was in the bankrupt's estate as of the date of filing, and interests which vest in the bankrupt or become assignable by him within 6 months after he files his petition, such as "future interests in realty, property passing by bequest, devise, or inheritance, and property held by the entirety at bankruptcy." *Id.* ¶ 70.07[1], at 90 (footnotes omitted).

[47] Williams v. United States Fidelity & Guar. Co., 236 U.S. 549 (1915).

[48] *Id.* at 556-57.

[49] 245 U.S. 605 (1918).

[50] *Id.* at 617.

[51] 292 U.S. 234 (1934).

[52] *Id.* at 242.

[53] *Id.* at 243.

In Legg v. St. John, 296 U.S. 489 (1936), the Court was faced with the difficult task of deciding that disability payments to a totally and permanently disabled person, payable under a matured supplementary contract to a life insurance policy, were property which had to be turned over to the trustee. *Id.* at 491-92. This asset was distinguished from that in *Local Loan* on the grounds that the disability benefits were not after-acquired property, not "in any sense future earnings," and "not the fruit of anything to be done by [the bankrupt] after the adjudication." *Id.* at 495-96. Since not exempt under state law, the disability payments passed to the trustee. *Id.* at 496.

debts, retention of exempt property provided in Section 6 of the Act, and freedom to accumulate future wealth.[54]

This balancing of the creditor-oriented purpose of the Bankruptcy Act against its debtor-oriented purpose has recently come into focus. While it was once considered firmly established that the bankrupt must turn over to the trustee any claim or right of action he may have against the Government for a refund of taxes paid,[55] some recent cases have called into question whether this same principle should apply to an excess of tax withheld by the employer from the wage earner's pay. In *Segal v. Rochelle*,[56] the Court, resolving a conflict among the circuits,[57] held that a business-generated

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[54] Brief for Belford as Amicus Curiae in Support of the Judgment Below at 23, Kokoszka v. Belford, 417 U.S. 642 (1974). The trustee in bankruptcy waived briefing the case and oral argument before the Court. This amicus brief was submitted pursuant to the Court's invitation to brief and argue the case in support of the judgment below. 415 U.S. 956 (1974).

[55] 4A COLLIER ON BANKRUPTCY ¶ 70.28[4], at 393 (14th rev. ed. J. Moore & L. King 1971). *See* Segal v. Rochelle, 336 F.2d 298, 303 (5th Cir. 1964), wherein the court cites this section of *Collier* and *In re* Goodson, 208 F. Supp. 837 (S.D. Cal. 1962), discussed below.

In Chandler v. Nathans, 6 F.2d 725 (3d Cir. 1925), after noting the expansive nature of section 70a of the Bankruptcy Act of 1898, the court held that an income tax refund check was properly includable as property within the bankrupt's estate based upon the broadness of the phrase " 'rights of action arising . . . from the unlawful taking or detention of . . . his property.' " *Id.* at 727-28 (quoting from Act of July 1, 1898, ch. 541, § 70a(6), 30 Stat. 566, *as amended*, 11 U.S.C. § 110(a)(6) (1970)). In Snyder v. Routzahn, 55 F.2d 396 (N.D. Ohio 1931), the court considered a compromise of taxes by a bankrupt corporation and found the income tax refund to be a "chose in action with a specific character" to be listed on the asset schedule under " 'unliquidated claims of every nature with their estimated value.' " *Id.* at 396. In *In re* Goodson, 208 F. Supp. 837 (S.D. Cal. 1962), the court held that the trustee was entitled to the income tax refund due from wages withheld prior to the filing of the petition in bankruptcy, while the wage earner would be entitled to the refund due to post-bankruptcy withholdings. *Id.* at 847. The court rejected the section 70a(6) argument that the property was unlawfully taken or detained. Instead, it applied section 70a(5), reasoning that the income tax refund could be assigned or transferred under federal and state law. *Id.*

In *In re* Wetteroff, 453 F.2d 544 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972), the court held the income tax refund from a joint return to be part of the bankrupt's property. 453 F.2d at 547-48. Under Missouri law, property held by the entirety is not includable in the bankrupt's estate unless both husband and wife are petitioning the bankruptcy court and the proceedings are consolidated. *Id.* at 546. Filing a joint tax return does not automatically create an estate by the entirety. Therefore, where there are no proper words of conveyance adequate to show the grantor's intent, the referee can require that a non-bankrupt wife who did not have gross income for that year endorse the refund check which was made payable to both the husband and wife to enable the proceeds to be administered as an asset of the bankrupt husband's estate. *Id.* at 547.

See also Rev. Rul. 72-387, 1972-2 CUM. BULL. 632, wherein the Commissioner of Internal Revenue took the position that the overpayment of income taxes by an individual taxpayer is an asset of the bankrupt's estate even though it is not yet reduced to possession, and further, that the trustee in bankruptcy himself is permitted to file the claim for refund.

[56] 382 U.S. 375 (1966).

[57] In Segal v. Rochelle, 336 F.2d 298, 303 (5th Cir. 1964), the court held the loss-

loss-carryback tax refund,[58] based on pre-bankruptcy losses but received after bankruptcy, passes to the trustee under section 70a(5).[59] The Court reasoned that "property" is defined in various ways in different legal contexts; therefore, in attempting to define property, the purposes of the Bankruptcy Act itself must control:

> The main thrust of § 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.[60]

This "main thrust" behind the definition of property is limited, however, by another "highly prominent" purpose of the Act—the fresh start, which allows the bankrupt to accumulate new wealth after the date of filing his petition in bankruptcy.[61] But the loss-carryback refund does not affect the bankrupt's ability to make a fresh start. That claim arises from taxes paid on net income within the past three years and a net operating loss in the year of bank-

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carryback tax refund to be property. The First and Third Circuits had held otherwise. In *In re* Sussman, 289 F.2d 76 (3d Cir. 1961), while recognizing that "accrued and immediately determinable and enforceable claims" for refunds undisputably passed to the trustee, the court reasoned that the loss-carryback refund could not pass to the trustee, since on the date Sussman filed his petition in bankruptcy there was no "right of action" in existence and such right would not arise until the end of the taxable year. *Id.* at 77-78. The court further noted that "this concept of 'title' to 'property' connotes an ownership interest in some res, whether that res shall be corporeal property or a chose in action." *Id.* at 78. At the time of filing his petition, Sussman had no legal or equitable interest in any existing cause of action within the meaning of section 70a(5). Further, the court reasoned that under the provisions of federal law, such a contingent claim could not be assigned or attached. Therefore, the claim was not transferable within the meaning of section 70a(5). *Id.* This "unfortunate" result was deemed " 'a windfall to the bankrupt at the expense of the creditors.' " *Id.* (quoting from the unreported opinion of the referee).

Fournier v. Rosenblum, 318 F.2d 525 (1st Cir. 1963), was a case "on all fours" with *Sussman,* the only difference being that Fournier filed his petition in bankruptcy closer to the end of the taxable year, thereby making the difference "merely one of degree." *Id.* at 526. The court in *Fournier* agreed with the reasoning of *Sussman,* declaring that since the net loss-carryback did not arise until the end of the taxable year, such a contingent claim could not come within section 70a(5) inasmuch as "the prospect, hope or expectation of a claim is not a right of action." *Id.* at 527. Similarly, the mere possibility of such a claim arising is not "property," since there is "no res or chose in action in existence on the date of the filing of the petition in bankruptcy." *Id. Fournier,* however, did not address the issue of transferability as did *Sussman,* since the court felt that holding the contingent claim not to be property was dispositive of the case. *Id.*

[58] The loss-carryback refund arises under INT. REV. CODE OF 1954, § 172.

[59] 382 U.S. at 378-79.

[60] *Id.* at 379.

[61] *Id.*

ruptcy.[62] Though the calculation of such amount at the end of the taxable year makes the claim contingent,[63] the refund claim

> is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as "property" under § 70a(5).[64]

Once it has been determined that the loss-carryback is property at the time of filing the petition in bankruptcy, it still remains to be considered whether such property is transferable.[65] Since the Court found transferability proper under the applicable state law, section 70a(5) was operative inasmuch as the loss-carryback refund was an existent asset at the time of filing the petition in bankruptcy and was transferable.[66]

Four years later the Court had occasion to consider the applicability of section 70a(5) to a different type of asset. In *Lines v. Frederick*,[67] the Court held that vacation pay, accrued prior to the date of filing the petition in bankruptcy, but not collectible until either the plant's annual shutdown for vacation, or under a conventional voluntary vacation plan, or upon final termination of employment, does not pass to the trustee as section 70a(5) property.[68] The Court in *Lines* applied basically the same considerations to vacation pay as it had in *Segal* to the loss-carryback refund, noting the impossibility of defining property without looking to the purposes of the Bankruptcy Act, the "main thrust" of the Act—

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[62] *Id.* at 380.

[63] *See* note 57 *supra*. The claim is contingent unless the petition in bankruptcy is filed after the end of the taxable year, in which case it would be a determinable amount.

[64] 382 U.S. at 380. The Court looked to the fact that

> any administrative inconvenience to the bankrupt will not be prolonged . . . and the bankrupt without a refund claim to preserve has more reason to earn income rather than less.

Id. (citation omitted).

[65] *Id.* at 381. What constitutes a "transfer" is a federal question; however, the transferability of a certain res is usually determined by state law, unless a federal statute is controlling. *Id.* n.6. *See also* 4A COLLIER ON BANKRUPTCY ¶ 70.15[2], at 144-47 & nn.22, 25 (14th rev. ed. J. Moore & L. King 1971).

[66] 382 U.S. at 385. Although a federal assignment statute was involved, the Court reasoned that while the bankrupt's assignment would not be enforceable against the Government, a Texas court of equity would enforce such an assignment by the bankrupt to another individual. *Id.* at 384-85.

[67] 400 U.S. 18 (1970) (per curiam).

[68] *Id.* at 18, 20. Upon a petition for certiorari, the Court rendered a per curiam opinion granting certiorari and at the same time affirming the court below. Chief Justice Burger would have denied certiorari, and Justice Harlan dissented. *Id.* at 21. Justice Harlan's dissent argued that due to the close question and the split of opinion in the courts of appeals, the Court should have allowed oral argument on the issue. *Id.* at 22.

" 'to secure for creditors everything of value' " in the bankrupt's estate—and the generous recognition of contingent interests.[69] However, here *Lines* and *Segal* parted ways, the *Lines* Court further reasoning that the most important limitation in defining section 70a(5) property was the "basic purpose" of the Act—to give the bankrupt a fresh start after the date of filing the petition in bankruptcy.[70] The Court felt that applying these considerations to vacation pay would "compel a decision for the bankrupt."[71] Important to the Court's decision was the fact that the bankrupt was a wage earner whose vacation pay represented

> "a specialized type of property presenting distinct problems in our economic system." . . . Where the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that protection that might be unnecessary or unwise for other kinds of property may be required.[72]

It should be noted that the Court was not unanimous in this decision. Dissenting, Justice Harlan objected that the order exempting vacation pay afforded the bankrupt something more than the required fresh start—it amounted to a "*head* start."[73]

Not until after the *Lines* decision, with its emphasis on the importance of wages to the fresh start of the debtor, did the question of an income tax refund check based on the overwithholding of tax from an employee's wages become a viable issue.[74] In *In*

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[69] *Id.* at 19 (quoting from Segal v. Rochelle, 382 U.S. 375, 379 (1966)).

[70] 400 U.S. at 19.

[71] *Id.* at 20.

[72] *Id.* (quoting from Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969)) (citation omitted).

While the Court here noted that legislatures will often give special protection to wages, it should be pointed out that the California state legislature had provided some protection for vacation pay. The Court acknowledged this, stating that one-half of the vacation pay accrued during the 30 days prior to the filing of the petition in bankruptcy was exempted by the referee pursuant to California law. 400 U.S. at 18.

[73] 400 U.S. at 21 (Harlan, J., dissenting) (emphasis in original). Under California law, the bankrupt did receive a certain amount of his accrued vacation pay. *See* note 72 *supra.* The crux of Justice Harlan's dissent was that if a person started work on the date the debtor filed his petition in bankruptcy, which Justice Harlan termed "the paradigm of 'an unencumbered fresh start,' " that person would not have any vacation pay. 400 U.S. at 21. A debtor with accrued vacation pay who declared bankruptcy would still be entitled under California law to half a day's pay. The bankrupt therefore is getting something more than a fresh start. *Id.* at 21-22 (Harlan, J., dissenting).

Justice Harlan wrote the opinion of the Court in Segal v. Rochelle, 382 U.S. 375 (1966).

[74] The *Lines* Court's emphasis on the importance of wages raised questions about other wage-related assets accruing to the bankrupt. *See, e.g., In re* Aveni, 458 F.2d 972 (6th Cir.) (per curiam), *cert. denied*, 409 U.S. 877 (1972), holding that the non-exempt portion of a bankrupt's wages, accrued but unpaid as of the date of filing the petition in bankruptcy,

re Cedor,[75] the district court held that to the extent "the tax refund to a bankrupt is attributable to an excess of the *minimum* amount" withheld from wages, the refund is not property within section 70a(5) and therefore need not be turned over to the trustee.[76] The *Cedor* court noted that in considering the income tax refund check it was "confronted with elements of both *Segal* and *Lines,*" but in light of the reasoning of *Lines,* concluded that "the balance on this question tips in favor of the bankrupt."[77]

Recognizing that the decision in *Lines* was grounded on the character of the asset which the trustee claimed, the court asserted that "[i]f *Lines* stands for anything, it is that the practical realities are controlling in this determination."[78] Viewing the practicalities, the *Cedor* court reasoned that the refund was not related to any losses which had precipitated the bankruptcy as did the loss-carryback refund in *Segal,* but rather that the income tax refund resulted from "a *forced* overpayment of tax *on wages.*"[79] Further, although the amount of the refund was not as easy to calculate as vacation pay, the income tax refund is a "planned-on annually recurring payment," equally as important as two weeks paid vacation.[80] The refund from minimum withholding is not property because of these realities; however, any amount which is the result of voluntary overwithholding does pass to the trustee since such amount is not a forced payment. Instead, it may be the result of a conscious choice by "an astute candidate for bankruptcy" who knew that the income tax refund would not be turned over to the trustee.[81] The amount withheld over the minimum, therefore, is property. Since it is transferable, it passes to the trustee.[82]

As a result of the conflict among the circuits on the applicability of section 70a(5) to the income tax refund, and possibly due to a fear that the *Lines* rationale would be extended to many other assets related to wages, the Supreme Court reached the issue in

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passes to the trustee and does not interfere with the bankrupt's ability to make a fresh start. Under Ohio law the non-exempt portion of wages was $71.50 out of $925.90 unpaid wages. 458 F.2d at 973.

[75] 337 F. Supp. 1103 (N.D. Cal.), *aff'd,* 470 F.2d 996 (9th Cir. 1972), *cert. denied,* 411 U.S. 973 (1973). For other circuit cases dealing with the income tax refund check and the Wage Garnishment Act see note 16 *supra.*

[76] 337 F. Supp. at 1105 (emphasis by court).

[77] *Id.*

[78] *Id.*

[79] *Id.* (emphasis by court).

[80] *Id.*

[81] *Id.* at 1106.

[82] *Id.*

Kokoszka v. Belford.[83] The Court in *Kokoszka,* like its predecessors in *Segal* and *Lines,* approached section 70a(5) by noting the impossibility of defining property categorically, so that its meaning must be determined by reference to the purpose of the Bankruptcy Act. The Court further recognized that "*Segal* and *Lines,* while construing § 70a(5) in almost identical language, reached contrary results."[84] Rather than resolving this inconsistency, the Court implied that the inconsistency was the result of the test applied to section 70a(5) property:

> [T]he crucial analytical key [is] not in an abstract articulation of the statute's purpose but in an analysis of the nature of the asset involved in light of those principles.[85]

The Court then applied this "nature of the asset" test to distinguish the vacation pay in *Lines* from the income tax refund, stating that the income tax refund "does not relate conceptually to future wages and it is not the equivalent of future wages for the purpose of giving the bankrupt a 'fresh start.' "[86] The crucial distinction is that the vacation pay

> was designed to function as a wage substitute at some *future* period and, during that *future* period, to "support the basic requirements of life for [the debtors] and their families . . . ."[87]

The Court therefore included the income tax refund as property within section 70a(5), reasoning that it is not " 'weekly or other periodic income' " necessary for the wage earner's basic support, and that merely having a " 'source in wages' " does not give a property interest any special protection since many assets of the bankrupt's estate have their " 'origin in wages.' "[88]

The Court in *Kokoszka* purported to employ what may be termed a "functional approach." A court utilizing such an approach examines the nature of the asset in terms of its operation or function within the structure of the Act. This functional approach to property is a fairly recent conceptualization of the definition of property under section 70a(5). That section is "the most com-

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[83] 417 U.S. 642 (1974). For another discussion of the judicial treatment afforded income tax returns under the Bankruptcy Act as well as the Second Circuit's decision in *Kokoszka* see Note, *Treatment of Income Tax Refunds in Bankruptcy After Lines v. Frederick,* 72 MICH. L. REV. 331 (1973).

[84] 417 U.S. at 646.

[85] *Id.*

[86] *Id.* at 647.

[87] *Id.* at 648 (quoting from Lines v. Frederick, 400 U.S. 18, 20 (1970)) (emphasis by Court) (brackets added by the *Kokoszka* Court).

[88] 417 U.S. at 648 (quoting from *In re* Kokoszka, 479 F.2d 990, 995 (2d Cir. 1973)).

prehensive of all the clauses" of section 70a, and it would appear to be comprehensive enough to include all the other types of property under section 70a.[89] Under the present section 70a, the trustee is vested with the title to all the bankrupt's property except insofar as such property is exempted under section 6,[90] with certain limited exceptions.[91]

The traditional test applied to property to determine whether it would come within section 70a(5) is whether, at the date of filing the petition in bankruptcy, the property could have been either "transferred by the bankrupt, or . . . levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered."[92] The functional test represents a departure from this traditional test. Whereas the Court formerly looked at whether the asset was transferable or leviable as of the date of filing, it did not concern itself with how the asset operated, that is, what possible value the asset might have to the debtor's estate. This is not to say that the traditional test for defining section 70a(5) property ignores the fresh start of the bankrupt. Rather, it applies the fresh start doctrine in an objective manner, by insuring that the bankrupt's future opportunities, or post-filing opportunities, are not invaded, instead of weighing the amount of benefit a particular asset might have for the bankrupt.

While the Court in *Kokoszka* seems to indicate that both *Segal* and *Lines* applied the same functional test to section 70a(5) property,[93] it can be argued that *Segal* in fact applied the traditional test to the loss-carryback refund. *Segal* applied a two-part test to the asset, considering first whether it was property, then whether it was transferable.[94] At first glance it would appear that when the Court

[89] 4A COLLIER ON BANKRUPTCY ¶ 70.15[1], at 136 (14th rev. ed. J. Moore & L. King 1971).

[90] Bankruptcy Act § 6, 11 U.S.C. § 24 (1970) provides:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.

[91] *See* note 46 *supra.*

[92] 4A COLLIER ON BANKRUPTCY ¶ 70.15[2], at 137 (14th rev. ed. J. Moore & L. King 1971) (footnote omitted). Note that the transferability of the income tax refund was not in dispute in this case. 417 U.S. at 643 n.1.

[93] 417 U.S. at 646.

[94] 382 U.S. at 381.

considered whether the loss-carryback refund was property, it applied the functional test to the asset. However, *Segal* did not consider how the asset operated within the debtor's estate, but rather addressed the question of whether the loss-carryback was even an existent asset on the date of filing the petition in bankruptcy, or whether such an asset did not come into existence until the end of the taxable year. *Segal's* main emphasis was on deciding whether a refund of such a contingent nature was an asset of the bankrupt's estate on the date of filing. Once it had held that such was the case, the Court then applied the traditional test of transferability.

It appears, then, that *Lines* was actually the first case to apply the functional test to property under section 70a(5). This was the result of a subtle change in emphasis on the dual purposes of the Bankruptcy Act. *Segal* stated that the "main thrust" of bankruptcy was to accumulate the debtor's assets for the benefit of creditors, limited by the "highly prominent" purpose of providing the debtor with a fresh start.[95] *Lines,* however, elevated the debtor's fresh start to a "basic purpose" of bankruptcy, supporting this result by citing *Local Loan Co. v. Hunt.*[96] But *Local Loan* was concerned with whether a debtor's unaccrued but future assets could be applied to debts supposedly discharged in bankruptcy and thus did not represent the same factual situation as in *Lines.* Where *Lines* was concerned with an amount already accrued to the bankrupt, *Local Loan* dealt with assets to be obtained by the debtor after his discharge. While the subtle change in the Court's attitude toward the debtor's fresh start may appear to be unworthy of note, it gave the Court the springboard it needed to deal with the functions of the already accrued vacation pay as it related to the post-filing financial situation of the bankrupt. Relying on the importance conferred upon wages in *Sniadach v. Family Finance Corp.*,[97] the *Lines* Court reasoned that vacation pay was just as important to the bankrupt as other types of wages in that vacation pay could support the basic requirements of life for the wage earner and his family as did other wages. Therefore, the bankrupt needed his vacation pay to achieve a " 'new opportunity in life.' "[98]

While there can be no doubt about the importance of wages to

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[95] *Id.* at 379.

[96] 292 U.S. 234 (1934). *See* 400 U.S. at 19. For a discussion of *Local Loan* see notes 51-53 *supra* and accompanying text.

[97] 395 U.S. 337 (1969).

[98] 400 U.S. at 20 (quoting from Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

the wage earner, whether bankrupt or not, it seems anomalous to apply the reasoning of *Sniadach* to the bankruptcy situation in *Lines*. The significance of *Sniadach* is that some forms of property, there the use of wages,[99] could not be taken from a person without such prior notice and hearing as would satisfy the requirements of procedural due process of law.[100] Bankruptcy, however, is a total legal process in itself. Thus, it is questionable whether these same considerations should be applied to a wage-based asset earned or accrued prior to the filing of the petition as the Court in *Lines* did. This was the import of Justice Harlan's dissent in *Lines*.[101] So while the holding of *Lines* may be emotionally satisfying to people other than creditors, it appears that the purposes of the Bankruptcy Act were slightly contorted in reaching this result.

While it is arguable that the functional approach to property was applied in *Lines* but not in *Segal*, a question arises as to whether that test was in fact applied in *Kokoszka*, as the Court felt it was. One way of determining this is to compare the functions of vacation pay with the functions of the income tax refund check to ascertain whether there is enough of a functional difference between the two assets to justify their different treatment by the Court.[102] Both the income tax refund and the vacation pay are related to the wage earner's employment, and both assets have their source in wages.[103] Both amounts of money were accrued but unpaid at the date of filing the petition in bankruptcy.[104] Finally, both sums are unreachable until a specified date.[105]

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[99] While the majority opinion spoke of property in general terms, Justice Harlan specified that what the petitioner was actually being deprived of was "the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." 395 U.S. at 342 (Harlan, J., concurring) (emphasis in original).

[100] 395 U.S. at 342.

[101] 400 U.S. at 21-22. *See* note 73 *supra* and accompanying text.

[102] The petitioner argued that there was no difference and therefore the income tax refund should be treated as the *Lines* Court treated vacation pay. Brief for Petitioner at 9-11, Kokoszka v. Belford, 417 U.S. 642 (1974).

It is interesting to note that the commission report on proposed changes in the bankruptcy laws affords the income tax refund and accrued vacation pay the exact same treatment. Both are included within cash, securities, and receivables which would be exempt up to an aggregate amount of not more than $500. EXECUTIVE DIRECTOR, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93-137, 93d Cong., 1st Sess., pt. II, § 4-503(c)(3), at 125 (1973) [hereinafter cited as REPORT OF THE COMMISSION ON BANKRUPTCY LAWS]. *See* note 122 *infra*.

[103] *Compare* 417 U.S. at 648 *with* 400 U.S. at 20.

[104] Kokoszka filed his petition in bankruptcy on January 5, 1972. In mid-February, he filed his income tax return for the taxable year 1971 and did not receive the refund check until several weeks later. 417 U.S. at 644. *See also* 400 U.S. at 18.

[105] INT. REV. CODE OF 1954, § 3402(a) requires the employer to withhold certain

The *Kokoszka* Court reasoned that the crucial distinction between the two assets was that the vacation pay was periodic and functioned as a wage-substitute for a future period. During such future period, the vacation pay would provide the wage earner and his family with " 'the basic requirements of life.' "[106] This distinction pales, however, when one considers that the income tax refund check is also received at a future time,[107] that its receipt may be an anticipated event, and that due to the financial state of affairs of a bankrupt, this refund may in fact be used to support the basic requirements of life for the wage earner and his family.[108] Further, the Court's analogizing the income tax refund to a savings account or an investment in an automobile, which may also have their " 'source in wages,' "[109] loses much of its force when one considers that the minimum amount of withholding is involuntary, whereas maintaining a savings account or investing in an automobile are voluntary choices. Also, both the income tax refund and the vacation pay would aid the debtor in reestablishing a positive financial position.[110] And significantly, if either asset were taken from the bankrupt, it would provide little financial benefit to any of his creditors.[111]

Since the functions of the two assets are so closely related and the value of each asset to the debtor is basically the same, it appears that the *Kokoszka* Court did not in fact apply a functional definition

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amounts from wages. *See also* 400 U.S. at 18. The wage earner could not reach the vacation pay until the plant was closed for vacation, until he was laid off, or, in the case of respondent Harris, until he voluntarily chose to take his vacation. *Id.*

[106] 417 U.S. at 648 (quoting from Lines v. Frederick, 400 U.S. at 20 (1970)).

[107] *See* note 104 *supra.*

[108] *See* Note, *The Income Tax Refund as a Possible Asset of a Wage Earner's Bankruptcy Estate,* 87 HARV. L. REV. 395, 405 (1973). Kokoszka could have used the income tax refund to help pay for a hernia operation, dental work, and eyeglasses. Order on Motion for Rehearing at 2, *In re* Kokoszka, No. 37,437 (D. Conn., March 24, 1972).

[109] 417 U.S. at 648 (quoting from *In re* Kokoszka, 479 F.2d 990, 995 (2d Cir. 1973)).

[110] The income tax refund due Kokoszka was $250.90. 417 U.S. at 644. However, the vacation pay due to the bankrupts in *Lines* amounted to $137.28 and $144.14. 400 U.S. at 18. While the amount due Kokoszka was not payable as weekly compensation, it is contended that the income tax refund is just as important to the bankrupt. *See* note 108 *supra.*

[111] One study found that administrative expenses consume 41% of the assets in personal bankruptcy cases. D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 91 (1971) [hereinafter cited as STANLEY & GIRTH]. Based upon this fact, the amount of money available to Kokoszka's creditors would be $148.03, or 59% of the refund check. Kokoszka had $6,105.22 in unsecured debts. Brief for Belford as Amicus Curiae in Support of the Judgment Below at 37, Kokoszka v. Belford, 417 U.S. 642 (1974). Thus, the creditors would only be getting a return from his estate of $0.024 on the dollar.

While the amount of return per dollar varies among the different classes of creditors, the average return to creditors of all classes would be no more than $0.55 cents on the dollar. STANLEY & GIRTH, *supra* at 22 (based on 1964 statistics).

to determine whether an asset was section 70a(5) property. *Kokoszka* then might well be interpreted as a signal to bankrupts that the functional approach to property will no longer be applied and the Court will no longer define property by looking at how beneficial the asset would be to the bankrupt, but instead will look to whether the asset in fact exists at the date of filing the petition in bankruptcy, and if it does, whether such asset may be transferred or levied upon. Such an attitude conforms to the traditional definition of property within the Bankruptcy Act, and it would seem to provide a more stable position for even unsecured creditors, since *Lines* has been interpreted as "a very narrow exception to the general proposition that everything of value passes to the trustee."[112]

Once the Court had decided that the income tax refund check was an asset of the bankrupt's estate to be considered section 70a(5) property, it had little difficulty in disposing of the issue of whether the refund came within the protection of the CCPA which exempts 75 percent of an individual's disposable earnings from garnishment.[113] The Court held the CCPA inapplicable by employing the same reasoning used in distinguishing the income tax refund check from vacation pay—namely, that the CCPA protections do not apply to an asset which does not represent "periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis."[114]

Since the CCPA protects the individual's disposable earnings,[115] the Court looked to the legislative history of the CCPA to determine what purpose the legislature had in mind when it enacted the CCPA, and what Congress sought to include within the

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[112] *In re* Kokoszka, 479 F.2d 990, 994 (2d Cir. 1973). In its discussion of the CCPA, the Supreme Court emphasized the traditional interpretation of the purpose of the Bankruptcy Act, that is, "to assemble, once a bankruptcy petition is filed, all of the debtor's assets for the benefit of his creditors." 417 U.S. at 650.

[113] *See* note 19 *supra.*

[114] 417 U.S. at 651.

[115] *See* note 19 *supra.* 15 U.S.C. § 1672 (1970) provides:

> For the purposes of this subchapter:
>
> (a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.
>
> (b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.
>
> (c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

definition of the term "disposable earnings."[116] Congress recognized that in recent years it has been noted that there is a high correlation between the harshness of a state's garnishment laws and the number of consumers declaring bankruptcy in that state.[117] Consequently, the purposes of subchapter II of the CCPA were to reduce the overextension of credit to the debtor, preserve the debtor's employment, and allow the wage earner enough money to support himself and his family, thereby protecting many consumer debtors from " 'plunging into bankruptcy,' " while at the same time permitting a limited amount of the debtor's earnings to be used to pay off his debts.[118] As the Court noted, "Congress' concern was not the *administration* of a bankrupt's estate but the *prevention* of bankruptcy in the first place."[119] Congress sought to protect the amount of wages over which the debtor gained personal control on a regular basis. Thus, the debtor could use his wages to gradually pay off his debts in an orderly fashion without being deprived of his necessary support, but "if, despite [the CCPA's] protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act."[120]

Kokoszka v. Belford, then, is undoubtedly a landmark in bankruptcy law. Its importance extends beyond the dual holding of the case itself, and it is significant for its reflection of the Court's attitude toward what will be considered property within section 70a as well as its attitude toward the purpose of the Bankruptcy Act itself.

Kokoszka, while reiterating the functional or nature of the asset test, considered an asset virtually indistinguishable from the vacation pay in *Lines* and held it to be section 70a(5) property. Since the vacation pay is functionally so similar to the income tax refund, it leads to the inescapable conclusion that the Court has sounded the death knell for the short-lived functional approach to property. It appears that the Court in *Kokoszka* is returning not only to the traditional view of the purpose of the Bankruptcy Act—"to assemble, once a bankruptcy petition is filed, all of the debtor's assets for

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[116] 417 U.S. at 650-51.

[117] H.R. REP. No. 1040, 90th Cong., 1st Sess. 7, 21 (1967). *See also* STANLEY & GIRTH, *supra* note 113, at 30-31; Brunn, *Wage Garnishment in California: A Study and Recommendations,* 53 CALIF. L. REV. 1214, 1236 (1965); Snedecor, *Consumer Credit and Bankruptcy,* 35 REF. J. 37, 38 (1961). The Bankruptcy Commission also took cognizance of this fact. REPORT OF THE COMMISSION ON BANKRUPTCY LAWS, *supra* note 102, pt. I, at 49-50.

[118] 417 U.S. at 651 (quoting from H.R. REP. No. 1040, 90th Cong., 1st Sess. 21 (1967)).

[119] 417 U.S. at 650 (emphasis by Court).

[120] *Id.* at 651.

the benefit of his creditors"[121]—but also to the traditional test of section 70a(5) property—if the asset is in existence on the date of filing the petition in bankruptcy, whether that asset is transferable or leviable.[122] *Kokoszka,* then, stands for the premise that *Lines* and its reasoning is limited to "a very narrow exception to the general proposition that everything of value passes to the trustee."[123] With this reaffirmation that the Bankruptcy Act exists for the benefit of creditors, the Court is indicating that it will no longer be swayed by what are in effect policy arguments that favor the exclusion of various assets. Therefore, the holding of *Kokoszka* can serve to better "secure" unsecured creditors.

Ronald L. Bennardo

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[121] *Id.* at 650.

[122] 4A COLLIER ON BANKRUPTCY ¶ 70.15[2], at 137 (14th rev. ed. J. Moore & L. King 1971).

The Court perhaps wanted to keep clear of possible conflicts with Congress over the interpretation of the definition of property due to the fact that recent Congresses have been concerned with the possibility of reorganizing the bankruptcy laws. For while the term "property" is subject to judicial construction, there is no doubt that the primary responsibility for the definition of property is on the legislature. A commission study published in 1973 suggested a comprehensive scheme of reform. *See* REPORT OF THE COMMISSION ON BANKRUPTCY LAWS, *supra* note 102.

Specifically, cash, securities, and receivables to the aggregate value of not more than $500 would be exempt under the proposed laws. Included in this aggregate is the income tax refund check. *Id.,* pt. II, § 4-503(c)(3), at 125. Also included in that amount is accrued vacation pay. *Id.*

[123] *In re* Kokoszka, 479 F.2d 990, 994 (2d Cir. 1973).