

MAR 08 2007

ORDERED PUBLISHED

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	EC-06-1198-DMoPa
)		
7	BRUCE EDWARD HOWARD SIMPSON,)	Bk. No.	05-31811
)		
8	Debtor.)		
)		
9	_____)		
)		
10	BRUCE EDWARD HOWARD SIMPSON,)		
)		
11	Appellant,)		
)		
12	v.)	O P I N I O N	
)		
13	MICHAEL F. BURKART, CHAPTER 7)		
	TRUSTEE,)		
)		
14	Appellee.)		
)		
15	_____)		

Argued and Submitted on February 21, 2007
at Sacramento, California

Filed - March 8, 2007

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Hon. Christopher M. Klein, Bankruptcy Judge, Presiding.

Before: DUNN, MONTALI and PAPPAS, Bankruptcy Judges.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 DUNN, Bankruptcy Judge:
2

3 The debtor, Bruce Edward Howard Simpson ("the debtor"),
4 appeals the bankruptcy court's order sustaining the trustee's
5 objection to the debtor's claimed exemptions in an annuity
6 contract under Cal. Code Civ. Proc. ("C.C.P.") §§ 704.100 and
7 704.115. For the reasons set forth below, we AFFIRM.
8

9 **I. FACTS**

10 A. The Keyport Annuity

11 The facts are undisputed. On or about July 4, 2005 (but
12 effective June 30, 2005), the debtor purchased a single-premium
13 annuity contract, known as the Keyport Index Multipoint Annuity
14 (the "Keyport Annuity" or "annuity contract"), from Sun Life
15 Financial ("Sun Life"), for \$10,000.¹ Exhibit A, Confirmation
16 Letter at 1-2; Exhibit A, Certificate at 3.² The debtor is both
17

18 ¹ The debtor purchased the Keyport Annuity through his
19 bankruptcy attorney, who was also his financial advisor.

20 ² At the March 15, 2006, hearing, counsel for the debtor
21 presented three exhibits marked Exhibit A, Exhibit B, and Exhibit
22 C, respectively. Counsel for the debtor characterized Exhibit A
23 as the annuity contract, Exhibit B as the "client guide," and
24 Exhibit C as a "pre-sale document" or brochure with respect to
25 the Keyport Annuity.

26 Exhibit A is comprised of two letters, both dated July 4,
27 2005, the annuity contract certificate, called the "Group
28 Deferred Equity Indexed Annuity Certificate/Single Premium
Payment/Nonparticipating - No Dividends" ("Certificate"), and a
document titled, "California Guaranty Association Notice"
("Notice"), which the bankruptcy court found did not constitute a
part of the annuity contract. The first letter is a confirmation
of the annuity contract and highlights certain provisions of the
annuity contract ("Confirmation Letter"). The second letter is a
letter of introduction, welcoming the debtor as the annuity
contract owner ("Welcome Letter").

Exhibit B, titled "Client Guide" ("Client Guide"), has
(continued...)

1 the annuitant and the annuity contract owner, and his two sons
2 are the designated beneficiaries under the annuity contract.
3 Exhibit A, Certificate at 3.

4 The Keyport Annuity is an equity-indexed annuity, which
5 earns interest on the principal based on the performance of a
6 certain index of stocks, specifically, the S&P 500. Exhibit B,
7 Client Guide at 2 ("Link to an Equity Index"). Simply put, when
8 the value of the stocks in the S&P 500 Index increases, the
9 interest earnings on the principal increase as well. If the S&P
10 500 Index drops, however, the annuity contract puts a floor on
11 potential losses so that the annuitant or his beneficiaries would
12 receive no less than ninety percent (90%) of the principal, plus
13 a return of "one-and-three-quarters percent on 90 percent of the
14 premium paid." Tr. of March 15, 2006 Hr'g at 30:25, 30:1-2.

15 The Keyport Annuity is a non-qualified plan for purposes of
16 the Internal Revenue Code of 1986, as amended ("IRC"). The
17 annuity payments are to commence on June 30, 2043 (the "Income
18 Date"), as long as the annuity contract is still in force. The
19 Income Date for the debtor is "the anniversary date of the
20 Annuitant's 95th birthday." Exhibit A, Certificate at 2-3, 10
21 (emphasis added). However, interest earnings on the annuity
22 contract principal are fully vested and accessible for withdrawal
23 by the annuity contract owner following the tenth anniversary of
24 the annuity contract's effective date. Exhibit C, Brochure at 2
25

26 ²(...continued)
27 various headings to which we will refer parenthetically as a
28 means of further specifying and clarifying citations. Exhibit C
is titled "Keyport Index Multipoint" ("Brochure"), which also has
various headings and subheadings to which we will refer
parenthetically.

1 ("How to Access Your Money: Vesting Schedule").

2 The annuity contract also contains a death benefit
3 provision. Upon the death of the debtor, if his beneficiaries
4 surrender the annuity contract within ninety days following his
5 death, the beneficiaries would receive the entire principal plus
6 all interest accrued, as fully vested, through the anniversary
7 date of the annuity contract immediately preceding the debtor's
8 death. If the annuity contract is not surrendered during the
9 ninety-day period, the designated beneficiaries could exercise
10 any and all ownership rights in the annuity contract, including
11 the right to make full or partial surrenders, for a five-year
12 period. Exhibit A, Certificate at 9. At the end of the five-
13 year period, the annuity contract would automatically terminate,
14 and the designated beneficiaries would receive the surrender
15 value of the annuity contract at that time. Id.

16 The debtor has the right to assign the annuity contract at
17 any time while it is in force. Exhibit A, Certificate at 15.
18 However, no beneficiary or payee under the annuity contract can
19 assign any payments thereunder before they become due. Exhibit
20 A, Certificate at 16. To the extent allowable by law, none of
21 the annuity payments would be subject to the debts of any
22 beneficiary or payee or to any judicial process for payment of
23 such debts. Id.

24
25 B. The Debtor's Claimed Exemptions in the Keyport Annuity

26 On September 16, 2005, the debtor filed for bankruptcy
27 relief under chapter 7.³ Among the assets identified on the

28 _____
³ Unless otherwise indicated, all chapter, section and rule
(continued...)

1 original Schedule B, the debtor listed the Keyport Annuity, with
2 a market value of \$10,000. On his original Schedule C, the
3 debtor claimed an exemption in the entire value of the Keyport
4 Annuity pursuant to C.C.P. § 704.115.⁴

5 The first § 341(a) meeting took place on October 25, 2005,
6 and, after several continuances, concluded on January 4, 2006.
7 On October 28, 2005, the debtor amended his Schedule C, claiming

8
9
10
11 ³(...continued)
12 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
13 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
14 enacted and promulgated prior to October 17, 2005, the effective
15 date of most of the provisions of the Bankruptcy Abuse Prevention
16 and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
17 ("BAPCPA"), as the debtor's chapter 7 case was filed in advance
18 of the BAPCPA effective date.

19 ⁴ C.C.P. § 704.115(a) defines the following as "private
20 retirement plans" qualifying for exemption:

- 21 (1) Private retirement plans, including, but not limited to,
22 union retirement plans.
- 23 (2) Profit-sharing plans designed and used for retirement
24 purposes.
- 25 (3) Self-employed retirement plans and individual retirement
26 annuities or accounts provided for in the Internal Revenue
27 Code of 1986, as amended, including individual retirement
28 accounts qualified under Section 408 or 408(A) of that code,
to the extent the amounts held in the plans, annuities, or
accounts do not exceed the maximum amounts exempt from
federal income taxation under that code.

29 C.C.P. § 704.115(b) provides that "[a]ll amounts held,
30 controlled, or in process of distribution by a private retirement
31 plan, for the payment of benefits as an annuity, pension,
32 retirement allowance, disability payment, or death benefit from a
33 private retirement plan are exempt." However, under C.C.P.
34 § 704.115(e), the amounts described in C.C.P. § 704.115(a) (3)
35 "are exempt only to the extent necessary to provide for the
36 support of the judgment debtor when the judgment debtor retires
37 and for the support of the spouse and dependents of the judgment
38 debtor. . . ."

1 an exemption in the Keyport Annuity under C.C.P. § 704.100.⁵ On
2 February 21, 2006, the debtor amended his Schedule C a final
3 time, claiming exemptions in the Keyport Annuity under both
4 C.C.P. §§ 704.100 and 704.115.

5
6 C. The Trustee's Objection to the Claimed Exemptions

7 On January 20, 2006, the trustee filed an objection to the
8 exemptions claimed by the debtor in the Keyport Annuity and a
9 motion for turnover thereof ("Objection"). On February 14, 2006,
10 the debtor filed an opposition to the Objection, arguing that the
11 Keyport Annuity had certain characteristics inherent in life
12 insurance policies, thereby qualifying it for exemption under
13 C.C.P. § 704.100. The debtor also contended that the Keyport
14 Annuity qualified as an exempt private retirement plan within the
15 meaning of C.C.P. § 704.115, because he intended to establish the
16 Keyport Annuity as such.

17 On March 15, 2006, the bankruptcy court held a hearing on
18 the Objection. At the hearing, the debtor testified that he
19 "entered into the [annuity contract] in order to supplement
20 retirement assistance down the road." He also testified that he

21
22 ⁵ C.C.P. § 704.100 provides, in relevant part:

23 (a) Unmatured life insurance policies (including endowment
24 and annuity policies), but not the loan value of such
policies, are exempt without making a claim.

25 (b) The aggregate loan value of unmaturred life insurance
26 policies (including endowment and annuity policies) is
subject to the enforcement of a money judgment but is exempt
27 in the amount of nine thousand seven hundred dollars
(\$9,700). . . .

28 (c) Benefits from matured life insurance policies (including
endowment and annuity policies) are exempt to the extent
reasonably necessary for the support of the judgment debtor
and the spouse and dependents of the judgment debtor.

1 viewed the annuity contract as an investment, with the amount of
2 gain subject to fluctuation, though he understood he would not
3 lose any principal as long as he did not surrender the annuity
4 contract during the first ten years following its effective date.

5 The debtor further testified that he was receiving Social
6 Security disability benefits and that he was a retired insurance
7 salesman, though he worked occasionally part-time. He stated
8 that he did not have a "structured retirement program of any
9 kind," although he did have an IRA. He also testified that he
10 understood that the Keyport Annuity was not a "qualified
11 contract."

12 After listening to the debtor's testimony, the bankruptcy
13 court allowed the parties to brief the issues further and
14 continued the hearing to May 9, 2006, to hear closing arguments
15 and to make its findings of fact and conclusions of law orally on
16 the record. The bankruptcy court also charged the debtor, as the
17 party asserting the claim of exemption, with the burden of proof
18 to establish his right to an exemption in the annuity contract.
19 Neither of the parties contested the bankruptcy court's
20 allocation of the burden of proof.

21 At the May 9, 2006, hearing, after highlighting the
22 pertinent provisions of the annuity contract orally on the
23 record, and applying the prevailing case law to the facts at
24 hand,⁶ the bankruptcy court found that the debtor could not claim
25 an exemption in the Keyport Annuity under either C.C.P. § 704.100
26

27 ⁶ Specifically, the bankruptcy court relied on three cases:
28 Kennedy v. Pikush (In re Pikush), 157 B.R. 155 (9th Cir. BAP
1993), aff'd 27 F.3d 386 (9th Cir. 1994); Bernard v. Coyne (In re
Bernard), 40 F.3d 1028 (9th Cir. 1994); and DeMassa v. MacIntyre
(In re MacIntyre), 74 F.3d 186 (9th Cir. 1996).

1 or § 704.115, and sustained the Objection. On May 16, 2006, the
2 bankruptcy court entered its order thereon.

3 The debtor timely appealed.
4

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 §§ 1334 and 157(b)(1) and (b)(2). We have jurisdiction under 28
8 U.S.C. § 158(b).
9

10 **III. ISSUES**

11 (1) Whether the bankruptcy court erred in sustaining the
12 trustee's objection to the debtor's claimed exemptions in the
13 Keyport Annuity by finding that it did not qualify as life
14 insurance or as a private retirement plan under C.C.P. §§ 704.100
15 and 704.115, respectively.

16 (2) Whether we may impose sanctions on the debtor and his
17 bankruptcy attorney for bringing a frivolous appeal.
18

19 **IV. STANDARDS OF REVIEW**

20 We review questions of statutory interpretation de novo.
21 DeMassa v. MacIntyre (In re MacIntyre), 74 F.3d 186, 187 (9th
22 Cir. 1996). Thus, we review the scope of an exemption under
23 California law de novo.⁷ Estate of Short v. Payne (In re Payne),
24

25 ⁷ The debtor earlier, before the motions panel, requested
26 certification of this appeal to the California Supreme Court.
27 The motions panel denied his request pursuant to California Rule
28 of Court 29.8, which does not include the Bankruptcy Appellate
Panel as one of the designated courts permitted to make such a
certification. The debtor brings this issue again before us in
the briefs, but merely to reserve his right to renew his motion
for certification before the Ninth Circuit, should this appeal be
(continued...)

1 323 B.R. 723, 727 (9th Cir. BAP 2005). We also review
2 interpretations of contract law de novo. Id.

3 Interpreting the scope of C.C.P. §§ 704.100 and 704.115 and
4 applying those statutory provisions with respect to the annuity
5 contract present mixed questions of law and fact. "Where the
6 facts are established and the rule of law is undisputed, whether
7 the facts satisfy the legal rule is a mixed question of law and
8 fact that we review de novo." Jacoway v. Wolfe (In re Jacoway),
9 255 B.R. 234, 237 (9th Cir. BAP 2000).

10 Whether an annuity qualifies as exempt life insurance under
11 California law is a factual determination that we review under
12 the clearly erroneous standard. Id. Whether an annuity contract
13 is designed and used for retirement purposes, qualifying it for
14 exemption under California law, is a factual determination that
15 we review under the clearly erroneous standard. See Jacoway, 255
16 B.R. at 237 (stating that determining whether a private
17 retirement plan is designed and used for retirement purposes is a
18 question of fact reviewed for clear error). "A factual
19 determination is clearly erroneous if the appellate court, after
20 reviewing the record, has a firm and definite conviction that a
21 mistake has been committed." Wall St. Plaza, LLC v. JSJF Corp.
22 (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006) (citing
23 Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)).

24
25
26
27 ⁷(...continued)
28 brought before it.

1 **V. DISCUSSION**

2 A. The Bankruptcy Court Did Not Err in Sustaining the
3 Objection

4 1. The Keyport Annuity is not exempt as life insurance.

5 The debtor maintains that the Keyport Annuity qualifies as
6 life insurance and is thus exempt under C.C.P. § 704.100 because
7 it contains certain features of a life insurance policy. The
8 debtor primarily relies on two aspects of the Keyport Annuity in
9 asserting that it qualifies for exemption as life insurance: 1)
10 the guaranteed return of the principal, and 2) the death benefit
11 provision.

12 It is well-established within the Ninth Circuit that C.C.P.
13 § 704.100 applies only to life insurance policies and not to
14 annuities. Kennedy v. Pikush (In re Pikush), 157 B.R. 155, 159
15 (9th Cir. BAP 1993) (determining that "the exemption provided by
16 [§] 704.100(c) is limited to life insurance policies"), aff'd 27
17 F.3d 386 (9th Cir. 1994); Bernard v. Coyne (In re Bernard), 40
18 F.3d 1028, 1032 (9th Cir. 1994) (stating that C.C.P. § 704.100
19 only applies to life insurance policies) (quoting Pikush, 157 B.R.
20 at 159); Estate of Short v. Payne (In re Payne), 323 B.R. 723,
21 727 (9th Cir. BAP 2005) (stating that "[t]he Ninth Circuit has
22 held that [C.C.P.] § 704.100(c)'s parenthetical reference to
23 'endowment and annuity policies' does not create an independent
24 exemption for endowments and annuities in general."); Turner v.
25 Marshack (In re Turner), 186 B.R. 108, 117 (9th Cir. BAP
26 1995) (stating that under Pikush, in order "to qualify for an
27 exemption under [C.C.P.] § 704.100, the policy must be life
28 insurance.").

1 Generally, life insurance policies are contracts whereby the
2 insurer "undertakes to indemnify the insured against loss, damage
3 or liability arising from a contingent or unknown event" (i.e.,
4 the death of the insured). Pikush, 157 B.R. at 156 (quoting Cal.
5 Ins. Code § 22 (West 1972)). Annuity contracts, in contrast,
6 provide the annuitant with the right to receive fixed, periodic
7 payments, either in perpetuity, for life or over a stated period
8 of time. Id. (citing California Insurance Law & Practice
9 § 20.20[2][a] (Matthew Bender 1993)).

10 It has been acknowledged that similarities exist between
11 life insurance policies and annuity contracts. Payne, 323 B.R.
12 at 729 (noting that authorities agree that annuity contracts and
13 life insurance policies have much in common); Turner, 186 B.R. at
14 117 (acknowledging that, as there are annuities that appertain to
15 human life and those that do not, certain annuities contingent
16 upon human life may be exempt under § 704.100).

17 Both life insurance policies and annuity contracts may be
18 used for investment purposes. Payne, 323 B.R. at 729 (citing
19 Turner, 186 B.R. at 115). Annuity contracts also may involve
20 risks, contingencies, or unknown events, making them the
21 functional equivalents of life insurance policies. Payne, 323
22 B.R. at 729 (citations omitted). In addition, "[a]s with life
23 insurance, the uncertainty facing the annuitant [under an annuity
24 contract] is the length of his or her life," though the risks
25 involved in an annuity contract versus a life insurance policy
26 are usually different. Id. "'With an annuity, the risk insured
27 is that death will be postponed; with life insurance, the risk
28 insured is that death will be premature.'" Id. (quoting

1 California Insurance Law & Practice § 20.20[2][b] (Matthew Bender
2 2004)).

3 Given these similarities, a court must, on a case-by-case
4 basis, make a factual determination as to whether an annuity
5 contract constitutes an investment or life insurance when
6 deciding whether the exemption of C.C.P. § 704.100 applies.
7 Payne, 323 B.R. at 729 (citing Turner, 186 B.R. at 117). In
8 making its determination, the court should consider a number of
9 factors, including: 1) whether the annuity is truly contingent;
10 2) whether the debtor can accelerate the maturity date; 3)
11 whether the debtor can borrow against the policy; 4) who owns the
12 policy; 5) whether the payment of the premium was consistent with
13 an investment or a payment for insurance coverage; 6) whether the
14 issuer of the annuity was licensed to sell life insurance in
15 California; 7) what are the opinions of experts; 8) what
16 provisions of the application are also part of the policy; and 9)
17 whether life insurance in California must contain a death
18 benefit.⁸ Payne, 323 B.R. at 729-30 (quoting Turner, 186 B.R. at
19 117). These factors are not exclusive. See Turner, 186 B.R. at
20 117.

21 Applying the relevant Turner factors to the facts at hand,
22 we agree with the bankruptcy court that the Keyport Annuity is
23 not a life insurance policy.

24 Unlike a life insurance policy, the payments under the
25 Keyport Annuity are not contingent upon the debtor's life. The
26 annuity contract specifically states that "[i]f this certificate

27
28 ⁸ The Payne court noted that the last factor was intended
to look at the risks involved in the transaction, given the
inherent differences between annuity contracts and life insurance
policies. Id. at 730 n. 7.

1 is in force [on the Income Date], [Sun Life] will begin making
2 income payments to the Annuitant [and] will make such payments
3 according to the terms of the [annuity contract]." Exhibit A,
4 Certificate at 1. The only condition for payment is that the
5 annuity contract remain in force at the time the payments are due
6 to begin. As long as this condition is met, Sun Life will pay
7 the annuity, even if the annuitant dies prior to the payment
8 start date. In such circumstance, the payments go to the
9 designated beneficiaries listed in the annuity contract - in this
10 case, the debtor's sons. There is nothing in this language or
11 anywhere else in the annuity contract indicating that Sun Life's
12 obligation to pay the annuity is contingent upon the debtor's
13 life; once the annuity contract becomes effective, Sun Life's
14 obligation to pay is absolute.

15 In addition, the Keyport Annuity does not allow for the
16 debtor to accelerate the maturity date. The debtor may take
17 distributions of accrued interest, as fully vested, following the
18 tenth anniversary of the effective date of the annuity contract
19 and may fully or partially surrender the annuity contract prior
20 to the Income Date, but the debtor cannot necessarily retrieve
21 the entire principal and interest accrued thereon. Should the
22 debtor decide to surrender the annuity contract while it is in
23 force and before the Income Date, depending on the time frame in
24 which he makes his decision, the debtor should receive the
25 invested principal, plus a variable return. However, the payment
26 start date, June 30, 2043, remains the same, and the debtor will
27 not receive any annuity payments until that date.

28 The Keyport Annuity also does not allow the debtor to borrow

1 against it. It allows the debtor, who owns it, to assign the
2 annuity contract at any time while it is in force, but the debtor
3 cannot take out a loan against any future annuity payments. In
4 fact, the annuity contract specifically provides that, to the
5 extent allowable by law, none of the payments will be subject to
6 the debts of any beneficiary or payee.

7 The debtor argues that because return of the principal is
8 guaranteed, the annuity contract is not an investment. He
9 asserts that, unlike a variable annuity for which the annuitant
10 assumes "all market risk of possible loss of principal," under
11 the Keyport Annuity, Sun Life assumes all the investment risk and
12 promises to pay at least ninety percent (90%) of the initial
13 investment amount, as well as a minimum small percentage return,
14 if the value of the stocks in the S&P 500 falls.

15 Contrary to the debtor's assertion, the Keyport Annuity is
16 in the nature of an investment. An annuity contract qualifies as
17 an investment if, "[i]nstead of creating an immediate estate for
18 the benefit of others, the annuitant [reduces] the annuitant's
19 immediate estate in favor of future contingent income.'" Payne,
20 323 B.R. at 728 (quoting California Insurance Law & Practice
21 § 20.20[2][a] (Matthew Bender 2004)). Here, the Keyport Annuity
22 provides a future contingent income stream based on an initial
23 investment of \$10,000, with a return tied to the performance of
24 S&P 500 stocks.

25 If the primary purpose of an annuity is investment, then the
26 annuity does not qualify as exempt life insurance under C.C.P.
27 § 704.100. Payne, 323 B.R. at 731. The debtor testified that he
28 viewed the annuity as an investment, with the amount of gain

1 subject to fluctuation. Sun Life even describes the Keyport
2 Annuity as an "investment." Exhibit A, Welcome Letter at 1.
3 Thus, it is clear, from the nature of the annuity contract, as
4 well as the debtor's own testimony, that the primary purpose of
5 the Keyport Annuity is investment.

6 Further, as the Payne court points out, though an annuity
7 may exhibit some of the same features as a life insurance policy,
8 such common features are not conclusive. See id. at 729 (stating
9 that "where the annuity contains some attributes of insurance and
10 some of investment, consideration of [whether the payment of the
11 premium was consistent with an investment or a payment for
12 insurance] must include a determination of the primary purpose of
13 the annuity.").

14 The debtor further contends that the death benefit provision
15 in the Keyport Annuity qualifies it as a life insurance policy.
16 However, simply because the Keyport Annuity contains a death
17 benefit does not make it the equivalent of a life insurance
18 policy. In fact, compared to life insurance death benefits that
19 typically are payable in full to the beneficiary on the death of
20 the insured, the death benefit under the annuity contract is
21 limited: the beneficiaries can surrender the annuity contract
22 within ninety days following the debtor's death and receive the
23 entire principal (\$10,000) plus all accrued interest as fully
24 vested. If the ninety-day surrender option is not exercised, the
25 annuity contract "can continue for up to five years from the date
26 of death," at which point, the Surrender Value under the annuity
27 contract is paid to the designated beneficiaries. Exhibit A,
28 Certificate at 9. These limited death benefits do not change the

1 fundamental purpose of the Keyport Annuity - to provide the
2 debtor with fixed, periodic payments for life or a stated period
3 of time, without requiring his death to trigger Sun Life's
4 obligation to pay.

5 In asserting that the Keyport Annuity qualifies as life
6 insurance, the debtor also relies on the facts that Sun Life,
7 which sold and issued the annuity contract, is an entity licensed
8 to sell and issue life insurance and thus regulated by the
9 California insurance commissioner, and that the California Life
10 and Health Insurance Guaranty Association guarantees the annuity
11 contract as an insurance contract. Even though Sun Life is
12 authorized to sell life insurance and is protected by a guaranty
13 from an insurance guaranty association, these facts are not
14 dispositive as to whether the annuity contract qualifies as life
15 insurance exempt under California law. They are only factors to
16 consider in our determination. See Turner, 186 B.R. at 117
17 (listing one of nine nonexclusive factors to take into
18 consideration as whether the issuer is licensed to sell life
19 insurance in California).

20 Considering all relevant factors present in this case, we
21 agree with the bankruptcy court that the Keyport Annuity does not
22 qualify as a life insurance policy, and accordingly, it is not
23 exempt under C.C.P. § 704.100.

24
25 2. The Keyport Annuity Is Not Exempt as a Private
26 Retirement Plan.

27 The debtor argues, alternatively, that the Keyport Annuity
28 qualifies as a private retirement plan exempt under C.C.P.

1 § 704.115. The debtor asserts that he purchased the Keyport
2 Annuity with the intent to use it as a "private retirement
3 vehicle." The debtor further contends that the Keyport Annuity
4 even presents itself as a private retirement plan, as exhibited
5 in the Client Guide and in the Brochure.

6 Though the debtor does not specify under which subsection of
7 C.C.P. § 704.115 he claims an exemption, the Keyport Annuity does
8 not constitute a private retirement plan pursuant to C.C.P.
9 § 704.115(a) (1). Just because the debtor or his bankruptcy
10 attorney characterizes the Keyport Annuity as, or intends it to
11 be a private retirement plan, does not make it so. See, e.g., In
12 re Barnes, 275 B.R. 889, 897 (Bankr. E.D. Cal. 2002) ("Subjective
13 intent alone is not sufficient for the creation of an exemptible
14 private retirement plan."); In re Phillips, 206 B.R. 196, 201
15 (Bankr. N.D. Cal. 1997) ("[T]he statement that Debtors intended to
16 retain their assets for their retirement is tantamount to saying
17 they intend to keep those assets from their creditors."), aff'd
18 218 B.R. 520 (N.D. Cal. 1998); Yaesu Elec. Corp. v. Tamura, 33
19 Cal. Rptr. 2d 283, 286 (1994) ("[N]either the debtor's mere
20 compliance with the pertinent IRS rules in creating the private
21 retirement plan nor the debtor's designation of the asset as a
22 private retirement plan translates to an automatic exemption from
23 execution.").

24 C.C.P. § 704.115(a) (1) applies only to private retirement
25 plans set up by private employers or employee groups, not by
26 individuals acting on their own, outside of the employment
27 sphere. See Lieberman v. Hawkins (In re Lieberman), 245 F.3d
28 1090, 1093 (9th Cir. 2001) (finding that C.C.P. § 704.115(a) (1)

1 was "intended to exempt retirement plans established or
2 maintained by private employers or employee organizations, not
3 arrangements by individuals to use specified assets for
4 retirement purposes."); In re Rogers, 222 B.R. 348, 351 (Bankr.
5 S.D. Cal. 1998) (stating that, under C.C.P. § 704.115(a)(1),
6 exclusively self-funded plans are only exempt if they qualify
7 through a professional corporate entity); In re Phillips, 206
8 B.R. at 202 ("[F]rom the context of the statute, it is evident
9 that the Legislature had in mind plans involving third parties
10 since the statute refers, by way of example, to 'union retirement
11 plans.'").

12 In addition, if individuals could create and exempt "private
13 retirement plans" outside of an employment or associational
14 context under C.C.P. § 704.115(a)(1), the provisions of C.C.P.
15 §§ 704.115(a)(3) and 704.115(e), as discussed below, effectively
16 would be meaningless. Lieberman, 245 F.3d at 1095 ("[I]f a
17 debtor were permitted to exempt a fund created by himself under
18 § 704.115(a)(1), . . . the 'necessary for support' limitation for
19 plans created by the debtor under [§ 704.115(a)(3)] would be
20 eviscerated."), quoting Rogers, 222 B.R. at 351. Regardless of
21 the debtor's intent and the description provided by Sun Life in
22 the Brochure and Client Guide, the Keyport Annuity does not
23 qualify as a private retirement plan for the purposes of C.C.P.
24 § 704.115(a)(1).

25 The Keyport Annuity also is not a profit sharing plan
26 designed and used for retirement purposes pursuant to C.C.P.
27 § 704.115(a)(2). See In re Barnes, 275 B.R. at 897 (stating that
28 a profit sharing plan is an annuity purchased with the profits of

1 a business or some other enterprise); see also In re Bloom, 839
2 F.2d 1376, 1377 (9th Cir. 1988) (where the debtor, a partner in a
3 medical corporation, was a trustee of a private retirement and
4 profit sharing plan created by the corporation).

5 The debtor's claimed exemption further is inconsistent with
6 the remaining subsection of the exemption statute. C.C.P.
7 § 704.115(a)(3) exempts all amounts held in private retirement
8 plans, including individual retirement annuities or accounts
9 qualified under Section 408 or 408(A) of the IRC, to the extent
10 that such amounts do not exceed the maximum amounts exempt from
11 federal income taxation. C.C.P. § 704.115(a)(3) only exempts
12 individual retirement annuities or accounts that are tax-
13 qualified plans as provided for in the IRC. Barnes, 275 B.R. at
14 897 (stating that C.C.P. § 704.115(a)(3) provides an exemption
15 for individual retirement annuities or accounts only if they are
16 tax-qualified plans, which satisfy "specific requirements of the
17 Internal Revenue Code . . . entitling it to receive favorable tax
18 advantages."); In re Rogers, 222 B.R. at 350 (setting out the
19 qualifying attributes of individual retirement accounts and
20 annuities under 26 U.S.C. § 408 of the IRC).

21 With respect to individual retirement annuities, 26 U.S.C.
22 § 408(b) provides:

23
24 (b) For the purposes of this section, the term "individual
25 retirement annuity" means an annuity contract . . . issued
26 by an insurance company which meets the following
27 requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract -

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will
28 not exceed the dollar amount in effect under section
219(b)(1)(A) [\$4,500], and

1 (C) any refund of premiums will be applied before the
2 close of the calendar year following the year of the
3 refund toward the payment of future premiums or the
4 purchase of additional benefits.

5 26 U.S.C. § 408(b).⁹

6 Here, the Keyport Annuity specifically states that it is a
7 non-qualified plan for IRC purposes. Exhibit A, Certificate at
8 3. The debtor even admits in his brief that the annuity is not
9 an IRS-qualified annuity. Appellant's Opening Brief at 6.

10 Applying the elements of an individual annuity contract as
11 outlined in § 408(b) of the IRC, the Keyport Annuity clearly does
12 not qualify as a private retirement plan within the meaning of
13 C.C.P. § 704.115(a)(3), because the annuity contract is
14 assignable by the debtor owner, the single premium is fixed, and
15 the debtor's lump sum premium payment of \$10,000 exceeds the
16 maximum annual premium payment amount allowed by the IRC as of
17 the date of the filing of the petition.

18 The debtor contends that a private retirement plan need not
19 be IRC qualified to be exempt in California and cites to
20 MacIntyre in support.¹⁰ However, even if the Keyport Annuity

21 ⁹ 26 U.S.C. § 219(b) provides (subject to exceptions not
22 applicable here) that the maximum amount allowable as a deduction
23 for qualified retirement contributions of any individual for any
24 taxable year shall not exceed the lesser of the deductible amount
25 or an amount equal to the compensation that can be included in
26 the individual's gross income for such taxable year. 26 U.S.C.
§ 219(b)(1). Under § 219(b)(5)(A) and (B), the maximum
deductible amount for the debtor for the purposes of
§ 219(b)(1)(a) and based on his age is \$4,500 for the taxable
year of 2005. 26 U.S.C.A. § 219(b).

27 ¹⁰ The debtor does not include this argument in his opening
28 brief, but included it in his opposition to the Objection before
the bankruptcy court. Generally, an appellate court will not
consider matters not specifically and distinctly argued in an
appellant's opening brief. United States v. Ullah, 976 F.2d 509,
(continued...)

1 does not need to be qualified under the IRC as a private
2 retirement plan for purposes of C.C.P. § 704.115(a)(3), which
3 would be contrary to the language of the statute, under C.C.P.
4 § 704.115(e), such annuities are exempt only to the extent
5 necessary to provide for the support of the debtor or the
6 debtor's dependents upon retirement.¹¹ Lieberman v. Hawkins (In
7 re Lieberman), 245 F.3d at 1095; DeMassa v. MacIntyre (In re
8 MacIntyre), 74 F.3d at 188; In re Barnes, 275 B.R. at 897; In re
9 Rogers, 222 B.R. at 350.

10 The bankruptcy court specifically charged the debtor with
11 the burden of proof to establish his exemption claim, but the
12 debtor did not offer any testimony or any other evidence
13 demonstrating that the Keyport Annuity was necessary for his
14 support or for the support of his dependents. In fact, the
15 debtor, who already is retired on Social Security disability,
16 will not be entitled to receive any annuity payments under the
17 annuity contract until the anniversary date of his 95th birthday,
18 June 30, 2043, although he could receive distributions of accrued
19 interest and surrender the annuity contract earlier. He did not
20 demonstrate that the Social Security disability benefits he
21 currently receives and his IRA are insufficient to support him in

22
23 ¹⁰ (...continued)
24 514 (9th Cir. 1992). For the sake of thoroughness, however, we
25 will address the debtor's argument here.

26 ¹¹ C.C.P. § 704.115(e) provides, in relevant part:

27 [T]he amounts described in paragraph (3) of subdivision (a)
28 are exempt only to the extent necessary to provide for the
support of the judgment debtor when the judgment debtor
retires and for the support of the spouse and dependents of
the judgment debtor, taking into account all resources that
are likely to be available for the support of the judgment
debtor when the judgment debtor retires.

1 his retirement or that the Keyport Annuity is necessary for his
2 support. Thus, the Keyport Annuity is not exempt under C.C.P.
3 § 704.115(a)(3).

4 We agree with the bankruptcy court and hold that it did not
5 err in deciding that the Keyport Annuity is not exempt as a
6 private retirement plan under any of the provisions of C.C.P.
7 § 704.115.

8
9 B. Sanctions for Frivolous Appeal

10 The trustee asks that we impose sanctions against the debtor
11 and his bankruptcy attorney for bringing a frivolous appeal. The
12 trustee contends that the debtor and his bankruptcy attorney are
13 abusing the appellate system; specifically, the trustee charges
14 that the bankruptcy attorney, who sold the annuity to the debtor,
15 is attempting to modify well-established law to provide a
16 business opportunity for himself to sell more annuities and
17 promise other debtors that they will be able to exempt otherwise
18 nonexempt assets in pre-bankruptcy planning. Due to this "ill-
19 advised purchase," the estate will forfeit approximately \$1,500
20 upon liquidation of the annuity contract. The trustee thus
21 requests that the debtor and his bankruptcy attorney reimburse
22 the estate this amount.

23 Further, the trustee asserts that this appeal forced him to
24 respond without the aid of an attorney, due to the small size of
25 the bankruptcy estate. Thus, the trustee also requests that the
26 debtor and his bankruptcy attorney pay for the time, on an hourly
27 basis, that the trustee has spent in responding to this appeal.

28 Rule 8020 allows the bankruptcy appellate panel to award

1 sanctions for a frivolous appeal only after a separately filed
2 motion or notice from the bankruptcy appellate panel and
3 reasonable opportunity to respond. Tanzi v. Comerica Bank-
4 California (In re Tanzi), 297 B.R. 607, 613 (9th Cir. BAP 2003).
5 This Rule is strictly enforced. Id. A request for sanctions in
6 a party's appellate brief is insufficient to allow for the
7 imposition of sanctions. Nghiem v. Ghazvini (In re Nghiem), 264
8 B.R. 557, 560 n.4 (9th Cir. BAP 2001) (citing In re Del Mission
9 Ltd., 98 F.3d 1147, 1154 (9th Cir. 1996)). We thus deny the
10 trustee's request for sanctions.

11

12 **VI. CONCLUSION**

13 The debtor's annuity contract is not exempt under either
14 C.C.P. § 704.100 or § 704.115 because it does not qualify as a
15 life insurance policy or as a private retirement plan within the
16 meaning of those statutes. The bankruptcy court did not err in
17 making such findings and sustaining the trustee's objection to
18 the debtor's exemption claims. We AFFIRM.

19
20
21
22
23
24
25
26
27
28