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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP Nos.	EC-05-1476-MoSB
	)		EC-05-1477-MoSB
HARVEY ZALL and SELMA JANET	)		(Consolidated)
ZALL,	)		
	)	Bk. No.	05-25124-D-13L
Debtors.	)		
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T & F CONSTRUCTION COMPANY,	)		
INC.,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
HARVEY ZALL; SELMA JANET ZALL,	)		
	)		
Appellees.	)		
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**MEMORANDUM<sup>1</sup>**

Argued and Submitted on July 21, 2006  
at Sacramento, California

Filed - September 5, 2006

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, SMITH and BRANDT, Bankruptcy Judges.

\_\_\_\_\_  
<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 Appellant T & F Construction Co., Inc., ("Creditor") objected  
2 to the claimed \$150,000 homestead exemption of appellees Harvey  
3 Zall and Selma Janet Zall ("Debtors"). Creditor asserted that the  
4 exemption amount is limited to the amount available (\$100,000)  
5 under California law when its judgment lien attached. The  
6 bankruptcy court overruled Creditor's objection. We hold that the  
7 date Debtors filed their bankruptcy petition was the relevant date  
8 for determination of the amount of the homestead exemption under  
9 California law. Accordingly, we AFFIRM.

10 **I. FACTS**

11 Debtors own and live in a home in Sacramento, California (the  
12 "Residence"). On September 27, 1993, Creditor obtained a judgment  
13 against Debtors for approximately \$100,000 and recorded an  
14 abstract of judgment against the Residence. On this date, the  
15 amount available under the homestead exemption provisions of the  
16 California Code of Civil Procedure ("CCP") § 740.730(a)(3) was  
17 \$100,000. On April 29, 2005, Debtors filed their joint chapter  
18 13<sup>2</sup> petition, valuing the Residence in the amount of \$300,000. By  
19 this time, Debtors owed approximately \$250,000 on Creditor's  
20 judgment. In Schedule C of their Schedules and Statement of  
21 Financial Affairs ("Schedules"), Debtors claimed a \$125,000  
22 homestead exemption in the Residence, pursuant to CCP

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26 <sup>2</sup> Unless otherwise indicated, all chapter, section and  
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
28 as enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 § 704.730(a)(3).<sup>3</sup> On August 23, 2005, Debtors amended their  
2 Schedule C, claiming a homestead exemption of \$150,000 and again  
3 relying on CCP § 704.740(a)(3).

4 On August 30, 2005, Creditor filed a timely objection to  
5 Debtors' amended homestead exemption claim. Creditor again  
6 contended that Debtors' homestead exemption is limited to the  
7 \$100,000 available in 1993 when Creditor fixed its lien against  
8 Debtors. The bankruptcy court overruled Creditor's objections to  
9 both the original and amended exemption claims and sustained the  
10 \$150,000 claimed homestead exemption.<sup>4</sup> Creditor's notice of  
11 appeal was timely.

## 12 **II. ISSUE**

13 Is the relevant date for the determination of the amount of  
14 the California Debtors' homestead exemption the date on which  
15 Creditor's judicial lien was fixed or the date on which Debtors  
16 filed for bankruptcy?

## 17 **III. STANDARD OF REVIEW**

18 Questions regarding a debtor's right to claim exemptions are  
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20 <sup>3</sup> CCP § 704.730(a)(3) requires that the residence at issue  
21 be a homestead and that at least one of the debtors be over the  
22 age of 65. Creditor concedes that the Residence is a homestead  
and that at least one of the Debtors is over the age of 65.

23 <sup>4</sup> Creditor's objection to the original exemption claim was  
24 overruled as moot. Creditor filed notices of appeal of both the  
25 order denying the objection to the original exemption as moot and  
26 the order denying the objection to the amended exemption on  
27 substantive grounds. Because both objections focused on the same  
28 argument (i.e., that the exemption amount should be the statutory  
amount available on the date Creditor recorded its abstract of  
judgment), the appeals have been consolidated. Because, as  
discussed below, we are affirming the order denying the objection  
to the amended exemption on substantive grounds, we are likewise  
affirming the denial of the original objection to the exemption as  
moot.

1 questions of law to be reviewed de novo. Arnold v. Gill (In re  
2 Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000). "The bankruptcy  
3 court's application of California exemption law is a question of  
4 statutory construction which is reviewed de novo." Cisneros v.  
5 Kim (In re Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000).

#### 6 IV. JURISDICTION

7 The bankruptcy court's order allowing Debtors' claimed  
8 homestead exemption is a final appealable order that we may  
9 review. Sticka v. Casserino (In re Casserino), 290 B.R. 735, 738  
10 (9th Cir. BAP 2003); 28 U.S.C. § 158(b).

#### 11 V. DISCUSSION

12 In this case, Debtors claimed an "automatic" homestead  
13 exemption pursuant to CCP § 704.720. To be eligible for the  
14 "automatic" homestead exemption, at least one of the Debtors must  
15 have resided continuously in the dwelling from the time Creditor's  
16 lien attached until the forced judicial sale. CCP § 704.710(c);  
17 Hastings v. Holmes (In re Hastings), 185 B.R. 811 (9th Cir. BAP  
18 1995). Creditor does not dispute Debtors' entitlement to claim  
19 that exemption; instead, it disputes the amount of the exemption  
20 claimed by Debtors under the statute.

21 A. The Law and Practicality Dictate that the Measuring Date for  
22 a Homestead Exemption is the Petition Date.

23 In California, "if a homestead is sold . . . the proceeds . .  
24 . are exempt in the amount of the homestead exemption provided in  
25 Section 704.730." CCP § 704.720. Debtors contend in their  
26 amended Schedule C that they are eligible for an exemption of  
27 \$150,000 exemption, the amount available under CCP  
28 § 704.730(a) (3) at the time of the commencement of their Chapter

1 13 petition in April of 2005. Creditor asserts that Debtors are  
2 only entitled to the \$100,000 exemption amount allowed under CCP  
3 § 704.730(a)(3) at the time its judicial lien was fixed in 1993.  
4 Because we are bound by prior BAP decisions on point (Ball v.  
5 Payco-General Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597  
6 (9th Cir. BAP 1995)), resolution of this issue on appeal is  
7 straight-forward. The decision in Nadel v. Mayer (In re Mayer),  
8 167 B.R. 186 (9th Cir. BAP 1994) is on point and mandates that we  
9 affirm the bankruptcy court's decision to use Debtors' petition  
10 date to determine the amount of their exemption.

11 In In re Mayer, the debtor claimed a homestead exemption  
12 under CCP § 704.730(a)(3) in the amount available for the year he  
13 filed for bankruptcy. Id. at 187. The creditors objected,  
14 asserting that the debtor was limited to the lesser exemption  
15 amount that was applicable the year their judgment lien was fixed.  
16 Id. The bankruptcy court so held, but this panel held that  
17 "exemptions are determined as of the date the bankruptcy petition  
18 was filed." Id. at 188. Further, the panel specifically held  
19 that the creditor's judgment lien is irrelevant in determining the  
20 debtor's exemption, because the debtor's bankruptcy petition  
21 constituted a hypothetical levy by the trustee on the property,  
22 id. at 189, and "it is this hypothetical levy that the court must  
23 focus on." Id. The debtor was entitled to the homestead  
24 exemption amount available under California law when he filed his  
25 bankruptcy petition. Id.

26 The holding in In re Mayer is not only controlling, but also  
27 sound. When a debtor files a bankruptcy petition, all legal and  
28 equitable property interests become property owned by the

1 bankruptcy estate. 11 U.S.C. § 541. A debtor is entitled,  
2 however, to exempt certain assets from the estate. 11 U.S.C.  
3 § 522. In general, "exemption rights are determined as of the  
4 petition date." Gaughan v. Smith (In re Smith), 324 B.R. 801, 806  
5 (9th Cir. BAP 2006). See also Chiu v. Chiu (In re Chiu), 266 B.R.  
6 743, 751 (9th Cir. BAP 2001); In re Kim, 257 B.R. at 685; In re  
7 Mayer, 167 B.R. at 188; Owen v. Owen, 500 U.S. 305, 314 (1991).  
8 Indeed, without support of legal authority, an "attempt to carve  
9 out an exception to the well-established law that exemption rights  
10 are determined on the petition date must be rejected." In re Kim,  
11 257 at 685 (quoting Wolf v. Salven (In re Wolf), 248 B.R. 365, 368  
12 (9th Cir. BAP 2000)).

13       Creditor contends that California exemption law in effect on  
14 the petition date provides that parties should refer to prior  
15 versions of the statutes to determine whether the exemption amount  
16 of a judgment lien predates the current enactment. This procedure  
17 is not only unworkable in the bankruptcy context, but it is also  
18 inconsistent with the Bankruptcy Code. In re Kim, 257 B.R. at  
19 687.

20       First, as a practical matter, if the exemption amount is  
21 fixed as of the dates of multiple judgment liens, a debtor may  
22 have varying amounts of exemptions in the same property. How  
23 would a bankruptcy trustee, who is generally the party who objects  
24 to a debtor's exemptions, be able to determine the appropriate  
25 amount of the exemption if there are multiple judgment liens  
26 against the property?

27       Secondly, and more importantly, limiting the exemption to the  
28 amounts available on the dates that judgment liens attach is

1 inconsistent with section 522(f). Under section 522(f), Debtor  
2 could simply avoid Creditor's lien as impairing his exemption and  
3 the exemption amount would be that amount available on the  
4 petition date.

5 The 1994 amendments to section 522 clarified the limitations  
6 on state law exemption statutes. Congress amended section 522(f)  
7 by developing a mathematical formula from which courts determine  
8 whether or not a judicial lien impairs a debtor's exemption  
9 rights. Even though this appeal did not arise from a section  
10 522(f) motion to avoid the judgment lien, the bankruptcy court  
11 analyzed subsection (f) to support its decision to sustain the  
12 objection. We need not adopt this analysis, given the binding  
13 nature of In re Mayer. Nonetheless, the bankruptcy court's  
14 analysis is persuasive.

15 According to the statute, a "debtor may avoid the fixing of a  
16 lien on an interest of the debtor in property to the extent that  
17 such lien impairs an exemption to which the debtor would have been  
18 entitled." 11 U.S.C. § 522(f)(3). Congress instructs courts to  
19 consider "the amount of the exemption that the debtor could claim  
20 if there were no liens on the property" when calculating the  
21 impairment. 11 U.S.C. § 522(2)(A)(iii). Consequently, to  
22 calculate the extent to which a lien impairs an exemption, the  
23 court must add the lien, all other liens on the property, and the  
24 exemption amount if there were no liens; then the court must  
25 subtract from that sum the value of the debtor's interest in the  
26 property absent any liens. Katz v. Pike (In re Pike), 243 B.R.  
27 66, 71 (9th Cir. BAP 1999); 11 U.S.C. § 522(f)(2)(A). Although  
28 this formula clearly conflicts with the provisions of CCP

1 § 703.050 and state law definitions of property rights, "those  
2 rights are subject to federal bankruptcy law concerning conflicts  
3 between exemptions and other interests in property." Moldo v.  
4 Charnock (In re Charnock), 318 B.R. 720, 727 (9th Cir. BAP 2004).

5 In order to determine the amount of an exemption that Debtors  
6 could claim if there were no liens on the property, the court must  
7 look not to the time the lien was fixed but rather to the time the  
8 trustee's hypothetical levy became effective, which is the date  
9 Debtors filed their bankruptcy petition. "It is this hypothetical  
10 levy the court must focus on in analyzing [Debtors'] entitlement  
11 to a homestead exemption." In re Mayer, 167 B.R. at 189. The  
12 focus on the hypothetical levy forces the court to "disregard some  
13 element of reality" to ascertain whether the fixed lien is  
14 depriving the Debtors of property rights that would be available  
15 had the lien not existed. In re Hastings, 185 B.R. 811, 814 (9th  
16 Cir. BAP 1995) (quoting Owen, 500 U.S. at 314). See also In re  
17 Pike, 243 B.R. at 70 (the homestead exemption trumps the judgment  
18 lien, and Creditor's lien status is irrelevant to the lien  
19 avoidance proceeding).

20 B. The Cases Cited by Creditor are Inapplicable.

21 Creditor relies primarily on two cases to make its argument.  
22 In In re Morgan, 157 B.R. 467 (Bankr. C.D. Cal. 1993), the  
23 bankruptcy court relied on state court decisions and language in  
24 CCP § 704.965 to hold that the debtor was only eligible for the  
25 lesser, earlier declared homestead exemption amount. Id. at 469,  
26 470. The second case, Bernhanu v. Metzger, 12 Cal. App. 4th 445  
27 (Cal. Ct. App. 1992), does not address the application of the  
28 section 522 exemption laws. In Bernhanu, the court limited the



1 debtor to the lower exemption amount that was in effect at the  
2 date the judgment lien was fixed, relying also on CCP § 704.965.  
3 Id. at 448.

4 Unlike the present case, neither In re Morgan nor Bernhanu  
5 pertained to the automatic homestead exemption statute. Further,  
6 both cases were decided prior to the 1994 revisions of the  
7 Bankruptcy Code that altered section 522. Most importantly, since  
8 these cases were decided, this panel has issued In re Mayer and  
9 held that the date for the determination of the homestead  
10 exemption amount is the date on which debtors file a bankruptcy  
11 petition.

12 Creditor asserts that because California opted out of the  
13 federal bankruptcy scheme as permitted under section 522(b)(2)(A),  
14 California exemption rules alone should apply. Indeed, CCP  
15 § 703.050 states that the exemption amount is determined "by  
16 application of the exemption statutes in effect (1) at the time  
17 the judgment creditor's lien on the property was created." The  
18 policy, however, of allowing states to opt out of the federal  
19 exemption scheme is not absolute. Rather, courts must apply state  
20 exemption statutes "along with whatever other competing or  
21 limiting policies the statute contains." Owen, 500 U.S. at 315.  
22 Essentially, the state law exemption statutes must not conflict  
23 with the general policies underlying the Bankruptcy Code, or  
24 section 522 specifically. In re Charnock, 318 B.R. at 727. "To  
25 the extent that the California exemption law attempts to establish  
26 a procedure that overrides the well-settled bankruptcy law  
27 regarding the date for determining an exemption, it is preempted."  
28 In re Kim, 257 at 687.

**VI. CONCLUSION**

Because In re Mayer controls us and is correct, we AFFIRM.

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