

DEC 19 2012

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OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

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

5	In re:	)	BAP No.	NC-11-1506-JuKiJo
		)		
6	HERBERT M. ZUKERKORN; JENNIFER)	)	Bk. No.	10-13626
	ZUKERKORN,	)		
7		)		
	Debtors.	)		
8		)		
		)		
9	LINDA S. GREEN, Chapter 7	)		
	Trustee,	)		
10		)		
	Appellant,	)		
11	v.	)	O P I N I O N	
		)		
12	HERBERT M. ZUKERKORN; JENNIFER)	)		
	ZUKERKORN,	)		
13		)		
	Appellees.	)		
14		)		

Argued and Submitted on May 17, 2012  
at San Francisco, California

Filed - December 19, 2012

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

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Appearances: John H. MacConaghy, Esq., MacConaghy & Barnier,  
PLC, argued for appellant Linda S. Green, Chapter  
7 Trustee; Daniel Sturm, Esq. argued for  
appellees Herbert M. Zukerkorn and Jennifer K.  
Zukerkorn.

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Before: JURY, KIRSCHER, and JOHNSON\*, Bankruptcy Judges.

Opinion by Judge Jury  
Dissent by Judge Johnson

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\* Hon. Wayne E. Johnson, Bankruptcy Judge for the Central  
District of California, sitting by designation.

1 JURY, Bankruptcy Judge:  
2

3 Chapter 7<sup>1</sup> trustee, Linda S. Green (the "Trustee"), moved  
4 to compel turnover of all or some of the income distributed to  
5 debtor, Herbert M. Zukerkorn ("Herbert"), under a spendthrift  
6 trust. The Trustee's motion and amended motion raised issues  
7 regarding (1) the enforceability of the trust's choice of law  
8 clause which designated Hawaii as the governing law; (2) the  
9 validity of the trust's spendthrift clause; and (3) whether the  
10 postpetition income distributions to Herbert became property of  
11 the estate under § 541(a)(5)(A). The bankruptcy court denied  
12 the Trustee's motion in its entirety, the Trustee appealed, and  
13 we AFFIRM.

#### 14 I. FACTS

15 The facts established by the record in this case are  
16 undisputed. In 1978, Herbert's mother, Sally Zukerkorn  
17 ("Sally"), established the Revocable Trust of Sally Zukerkorn  
18 (hereinafter, the "Sally Zukerkorn Trust") after Herbert's  
19 father passed away. Sally was the settlor ("grantor"),  
20 individual trustee, and beneficiary of this trust during her  
21 lifetime. American Trust Co. of Hawaii, Inc. was named as the  
22 corporate trustee. The trust was fully revocable and provided  
23 that Sally could use all income and whatever portion of the  
24 principal she deemed fit for whatever purposes she believed  
25 ". . . to be for Grantor's best interest."

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26  
27 <sup>1</sup> Unless otherwise indicated, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
"Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 The trust contained the following spendthrift clause:

2 No interest under this instrument shall be  
3 transferable or assignable by any beneficiary, or be  
4 subject during said beneficiary's life to the claims  
of said beneficiary's creditors. This paragraph shall  
not restrict the exercise of any power of appointment.

5 The trust also contained a choice of law clause:

6 This instrument and the dispositions under it shall be  
7 construed and regulated and their validity and effect  
shall be determined by the law of Hawaii.

8 On October 15, 1982, Sally amended the trust. The amended  
9 trust provided that on her death the corpus was split into two  
10 separate trusts for her sons Herbert and Jack. Herbert was  
11 named as the successor trustee and lifetime beneficiary for his  
12 trust. Herbert's children, Jon and Sara, were granted a  
13 contingent remainder interest in Herbert's trust. Herbert's  
14 brother Jack was named as the successor trustee and lifetime  
15 beneficiary of the second trust. Herbert was named as the  
16 successor trustee of this trust upon Jack's death. Herbert's  
17 children, Jon and Sara, were likewise named the contingent  
18 beneficiaries of Jack's trust.

19 Sally died in 1984. Jack died in 1986. Herbert became the  
20 trustee of both trusts. In 2003, Herbert, acting as trustee,  
21 sold Sally's real property for \$5.8 million. He netted \$4  
22 million and placed half into Jack's trust and half into his own  
23 trust. Jack's trust terminated when Herbert's children reached  
24 the age of 45. Herbert remains the trustee and the life  
25 beneficiary of the Sally Zukerkorn Trust up through the present  
26 time.

### 27 **The Bankruptcy**

28 On September 20, 2010, Herbert and Jennifer Zukerkorn

1 (collectively, "Debtors") filed their chapter 7 petition. Green  
2 was appointed the Trustee.

3 Debtors' Schedule B identified Herbert's life income  
4 interest only in the trust and noted that the trust had a  
5 spendthrift provision valid under Hawaii law, which governed the  
6 instrument. Debtors valued Herbert's interest at "0.00" and did  
7 not claim this interest as exempt. Debtors' Schedule I showed  
8 income of \$12,224 per month, \$7,160 of which was from the trust  
9 and related income.<sup>2</sup> Debtors' Schedule F showed that they owed  
10 \$162,062 in unsecured debt, consisting mostly of credit card  
11 debt.

12 On December 3, 2010, the Trustee filed a motion to compel  
13 turnover of twenty-five percent of the distributions paid to  
14 Herbert pursuant to the trust, contending that portion was  
15 property of the estate under Cal. Prob. Code § 15306.5.<sup>3</sup> The

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16  
17 <sup>2</sup> Herbert paid himself a \$986 monthly fee for his duties as  
18 spendthrift trustee for himself. Herbert also received \$4,841  
19 per month in beneficiary income distributions.

20 <sup>3</sup> Cal. Prob. Code § 15306.5 provides in relevant part:

21 (a) Notwithstanding a restraint on transfer of the  
22 beneficiary's interest in the trust under Section 15300  
23 or 15301, and subject to the limitations of this  
24 section, upon a judgment creditor's petition under  
25 Section 709.010 of the Code of Civil Procedure, the  
26 court may make an order directing the trustee to  
27 satisfy all or part of the judgment out of the payments  
28 to which the beneficiary is entitled under the trust  
instrument or that the trustee, in the exercise of the  
trustee's discretion, has determined or determines in  
the future to pay to the beneficiary.

(b) An order under this section may not require that  
the trustee pay in satisfaction of the judgment an

(continued...)

1 Trustee argued that California law, rather than Hawaii law,  
2 should apply to the Sally Zukerkorn Trust because (1) California  
3 had the more substantial relation to the dispute and (2)  
4 enforcing the spendthrift provision under Hawaii law would  
5 violate the fundamental policies of California.

6 On April 29, 2011, the Trustee filed an amended motion,  
7 seeking turnover of the entire principal and all income from the  
8 trust, arguing that the spendthrift clause was unenforceable  
9 because Herbert was both the trustee and beneficiary of the  
10 trust. Alternatively, the Trustee sought Herbert's postpetition  
11 income distributions from the trust, contending they were  
12 property of the estate under § 541(a)(5)(A).<sup>4</sup>

13 The bankruptcy court considered the Trustee's motion and  
14 amended motion in two phases. First, it concluded on cross  
15 motions for summary judgment that the trust was governed by  
16 Sally's choice of Hawaii law. Second, after an evidentiary  
17 hearing held on August 11, 2011, the bankruptcy court concluded  
18 that none of the principal or interest paid or payable to  
19 Herbert under the trust was property of the estate since the

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21 <sup>3</sup>(...continued)  
22 amount exceeding 25 percent of the payment that  
23 otherwise would be made to, or for the benefit of, the  
beneficiary. . . .

24 <sup>4</sup> Section 541(a)(5)(A) provides that the estate includes:

25 Any interest in property that would have been property  
26 of the estate if such interest had been an interest of  
27 the debtor on the date of the filing of the petition,  
and that the debtor acquires or becomes entitled to  
acquire within 180 days after such date -

28 (A) by bequest, devise, or inheritance; . . . .

1 spendthrift provisions were fully enforceable under Hawaii law.<sup>5</sup>  
2 The court further found that § 541(a)(5)(A) was inapplicable to  
3 the Sally Zukerkorn Trust because it was an inter vivos trust as  
4 opposed to a testamentary trust. Thus, Herbert's postpetition  
5 income distributions were not property of the estate. On  
6 September 2, 2011, the bankruptcy court entered its order  
7 denying the Trustee's motion to compel turnover of property of  
8 the estate. The Trustee timely appealed.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction over this proceeding  
11 under 28 U.S.C. §§ 1334 and 157(b)(2)(E). We have jurisdiction  
12 under 28 U.S.C. § 158.

## 13 **III. ISSUES**

14 A. Did the bankruptcy court err by deciding that Hawaii  
15 law rather than California law should govern the Sally Zukerkorn  
16 Trust?

17 B. Did the bankruptcy court err in concluding that the  
18 postpetition income distributions from the Sally Zukerkorn Trust  
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20  
21 <sup>5</sup> At issue in the evidentiary hearing was whether the  
22 spendthrift trust was enforceable under Hawaii law when Herbert  
23 was both the beneficiary and dominant spendthrift trustee. The  
24 issue which generated the evidentiary hearing has not been  
25 briefed by the Trustee in this appeal and therefore has been  
26 waived. Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). In  
27 the Memorandum on Motion for Turnover, the bankruptcy court  
28 upheld the spendthrift provision finding that Herbert did not  
have full control over the trust assets and that the whole  
purpose of the trust was to keep Herbert from exercising  
unfettered control equivalent to ownership. The court further  
found that under Hawaii law, Herbert's interest was protected  
from the claims of creditors incurred for the necessities of life  
and taxes.

1 to Herbert were excluded from property of the estate?<sup>6</sup>

2 **IV. STANDARD OF REVIEW**

3 We review de novo the bankruptcy court's decisions on  
4 summary judgment, choice of law questions, statutory  
5 interpretation and whether property is property of the estate.  
6 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1221-22 (9th  
7 Cir. 2010) (summary judgment); Mazza v. Am. Honda Mtr. Co., 666  
8 F.3d 581, 589 (9th Cir. 2012) (choice of law); Simpson v.  
9 Burkart (In re Simpson), 557 F.3d 1010, 1014 (9th Cir. 2009)  
10 (statutory interpretation); White v. Brown (In re White), 389  
11 B.R. 693, 698 (9th Cir. BAP 2008) (property of the estate).

12 **V. DISCUSSION**

13 The trustee is charged with the duty of collecting and  
14 reducing to money the property of the estate. § 704(a).  
15 Property of the bankruptcy estate is property in which the  
16 debtor has a "legal or equitable interest as of the commencement  
17 of the case." § 541(a)(1). Section 541(c)(2) excludes from the  
18 property of the estate any property that is held in trust and  
19 subject to a restriction on transfer under applicable  
20 nonbankruptcy law. An anti-alienation provision in a valid

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21  
22 <sup>6</sup> The Trustee listed two additional issues on appeal in her  
23 Designation of Record and Statement of Issues on Appeal: (1) Did  
24 the Bankruptcy Court err in concluding that the Debtor's entire  
25 interest in the principal and income of a spendthrift trust was  
26 not property of the estate where the Debtor exercised  
27 discretionary control over the Trust as both trustee and  
28 beneficiary? and (2) Did the Bankruptcy Court err in concluding  
that the Debtor's entire interest in the principal and income of  
a spendthrift trust was not property of the estate where the  
Debtor owed substantial claims to creditors for the necessities  
of life? These issues were not discussed on appeal and therefore  
have been waived. Smith, 194 F.3d at 1052.

1 spendthrift trust created under state law is an enforceable  
2 restriction on the transfer of a beneficial interest of the  
3 debtor. Patterson v. Shumate, 504 U.S. 753, 758 (1992).

4 The bankruptcy court found that the Sally Zukerkorn Trust  
5 was a valid spendthrift trust and that ruling has not been  
6 appealed. The Trustee's main complaint on appeal is that the  
7 bankruptcy court erred in upholding Sally's choice of Hawaii law  
8 when Herbert was domiciled in California and filed bankruptcy  
9 there. Based on these facts, the trustee argues that California  
10 law should apply.

11 Hawaii recognizes spendthrift trusts, see Welsh v.  
12 Campbell, 41 Haw. 106 (Haw. 1955) and Haw. Rev. Stat. § 554G-  
13 5(d),<sup>7</sup> as does California, see Canfield v. Sec. First Nat. Bank,  
14 87 P.2d 830 (Cal. 1939) and Cal. Prob. Code, §§ 15300, 15301.  
15 However, California limits the scope of the spendthrift  
16 protection under Cal. Prob. Code § 15306.5. That statute  
17 provides that a judgment creditor may obtain an "order directing  
18 the trustee to satisfy all or part of the judgment out of the  
19 payment to which the beneficiary is entitled under the  
20 [spendthrift] trust instrument, . . ." as long as the payment  
21 does not exceed twenty-five percent of the funds otherwise  
22 available to the beneficiary.<sup>8</sup> Because a bankruptcy trustee

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24 <sup>7</sup> In addition, Hawaii law provides that a restriction on  
25 transfers in a Hawaii trust instrument is a restriction "that is  
26 enforceable under applicable nonbankruptcy law within the meaning  
of § 541(c)(2) of the Bankruptcy Code." Haw. Rev. Stat. § 554G-  
5(d).

27 <sup>8</sup> Even then, this rule is subject to further qualification.  
28 California law imposes a significant limitation on a creditor's  
(continued...)

1 enjoys the powers of a hypothetical judgment creditor under  
2 § 544(a)(1), the Ninth Circuit has held that the trustee can  
3 seek an order under Cal. Prob. Code § 15306.5 to obtain twenty-  
4 five percent of a valid spendthrift trust. Neuton v. Danning  
5 (In re Neuton), 922 F.2d 1379 (9th Cir. 1990). Due to the  
6 differences in Hawaii and California law, the parties do not  
7 dispute that there is a genuine conflict in the laws of the two  
8 states. We thus look to choice of law rules for guidance.

9 Federal courts in the Ninth Circuit and California state  
10 courts both look to the Restatement (Second) of Conflicts of Law  
11 (1971) (the "Restatement") for the choice of law rules. See  
12 Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex  
13 Fishing Sys., Inc.), 277 F.3d 1057, 1069 (9th Cir. 2002);  
14 Mandalay Resort Grp. v. Miller (In re Miller), 292 B.R. 409, 413  
15 (9th Cir. BAP 2003); see also Nedlloyd Lines B.V. v. Super. Ct.,  
16 834 P.2d 1148, 1151 (Cal. 1992) (California courts apply the  
17 principles set forth in the Restatement Second of Conflict of  
18 Laws). Although § 6 of the Restatement sets forth general  
19 factors for consideration in a choice of law analysis,<sup>9</sup> the

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21 <sup>8</sup>(...continued)  
22 right to reach payments made to a beneficiary of a spendthrift  
23 trust. Cal. Prob. Code § 15306.5(c) exempts from payments to  
24 which a creditor would be entitled under Cal. Prob. Code  
25 § 15306.5 "any amount that the court determines is necessary for  
the support of the beneficiary and all the persons the  
beneficiary is required to support."

26 <sup>9</sup> The general factors relevant to a choice of law analysis  
27 are: (a) the needs of the interstate and international systems;  
28 (b) the relevant policies of the forum; (c) the relevant policies  
of other interested states and the relative interests of those  
states in the determination of the particular issue; (d) the  
(continued...)

1 Restatement also points to specific factors related to the issue  
2 at hand. Here, the validity and enforceability of the choice of  
3 law clause in Sally's trust implicates both contract choice of  
4 law rules and those applicable to trusts.<sup>10</sup>

5 Section 187 of the Restatement relates to contracts and  
6 provides:

7 (1) The law of the state chosen by the parties to  
8 govern their contractual rights and duties will be  
9 applied if the particular issue is one which the  
parties could have resolved by an explicit provision  
in their agreement directed to that issue.

10 (2) The law of the state chosen by the parties to  
11 govern their contractual rights and duties will be  
12 applied, even if the particular issue is one which the  
13 parties could not have resolved by an explicit  
provision in their agreement directed to that issue,  
unless either

14 (a) the chosen state has no substantial relationship  
15 to the parties or the transaction and there is no  
16 other reasonable basis for the parties' choice, or

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17 <sup>9</sup>(...continued)

18 protection of justified expectations; (e) the basic policies  
19 underlying the particular field of law; (f) certainty,  
20 predictability and uniformity of result; and (g) ease in the  
21 determination and application of the law to be applied. These  
factors are not exclusive and "[v]arying weight will be given to  
a particular factor, or to a group of factors, in different areas  
of choice of law." Restatement § 6 cmt. c.

22 <sup>10</sup> It has been said that trust law lies between, but also  
23 overlaps, with contract law and property law. See Thomas P.  
24 Gallanis, The New Direction of Am. Trust Law, 97 Iowa L.Rev. 215,  
25 234 (2011). Those who view trust law as closer to contract law  
26 see a trust as a contract between the settlor and the trustee,  
27 with the trust's beneficiaries being "akin to contractual  
28 third-party beneficiaries." Id. at 235. Those who view trust  
law as closer to property law, view a trust as "a property  
arrangement arising from a conveyance or devise, not a contract."  
Id. Under either view, the choice of law rules for contracts and  
trusts set forth in the Restatement contain factors that are  
substantially similar for purposes of our analysis.

1 (b) application of the law of the chosen state would  
2 be contrary to a fundamental policy of a state which  
3 has a materially greater interest than the chosen  
4 state in the determination of the particular issue and  
5 which, under the rule of § 188, would be the state of  
6 the applicable law in the absence of an effective  
7 choice of law by the parties.

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Comment g of §6 states:

Protection of justified expectations. This is an  
important value in all fields of the law, including  
choice of law. Generally speaking, it would be unfair  
and improper to hold a person liable under the local  
law of one state when he had justifiably molded his  
conduct to conform to the requirements of another  
state. Also, it is in part because of this factor  
that the parties are free within broad limits to  
choose the law to govern the validity of their  
contract (see § 187) and that the courts seek to apply  
a law that will sustain the validity of a trust of  
movables (see §§ 269-270).

In applying § 187 of the Restatement, the California  
Supreme Court in Nedlloyd Lines, 834 P.2d at 1158, explained:

[T]he proper approach under Restatement section 187,  
subdivision (2) is for the court first to determine  
either: (1) whether the chosen state has a  
substantial relationship to the parties or their  
transaction, or (2) whether there is any other  
reasonable basis for the parties' choice of law. If  
neither of these tests is met, that is the end of the  
inquiry, and the court need not enforce the parties'  
choice of law. If, however, either test is met, the  
court must next determine whether the chosen state's  
law is contrary to a fundamental policy of California.  
If there is no such conflict, the court shall enforce  
the parties' choice of law. If, however, there is a  
fundamental conflict with California law, the court  
must then determine whether California has a  
'materially greater interest than the chosen state in  
the determination of the particular issue. . . .' If  
California has a materially greater interest than the  
chosen state, the choice of law shall not be enforced,  
for the obvious reason that in such circumstance we  
will decline to enforce a law contrary to this state's  
fundamental policy.

Choice of law rules pertaining to trusts also inform our  
analysis. Similar to the contractual area, choice of law

1 principles generally respect a designation in a trust which  
2 provides that certain law be applied to interpret it. In its  
3 introductory note, Chapter 10 of the Restatement pertaining to  
4 trusts states:

5 The creation of a trust is a method by which the owner  
6 of property makes a disposition of it. The chief  
7 purpose in making decisions as to the applicable law  
8 is to carry out the intention of the creator of the  
9 trust in the disposal of the trust property. It is  
10 important that his intention, to the extent to which  
11 it can be ascertained, should not be defeated, unless  
12 this is required by the policy of a state which has  
13 such an interest in defeating his intention, as to the  
14 particular issue involved, that its local law should  
15 be applied. . .

16 Section 268(1) of the Restatement provides: "A will or  
17 other instrument creating a trust of interests in movables is  
18 construed in accordance with the rules of construction of the  
19 state designated for this purpose in the instrument." Comment  
20 (b) of this section states:

21 When law designated by the settlor or testator to  
22 govern construction[,] [t]he courts will give effect  
23 to a provision in a trust instrument . . . that it  
24 should be construed in accordance with the rules of  
25 construction of a particular state. It is not  
26 necessary that this state have any connection with the  
27 trust. This is because construction is a process for  
28 giving meaning to an instrument in areas where the  
intentions of the party, or parties, would have been  
followed if they had been made clear. (emphasis added)

Finally, as to the trust's validity, § 270(a) of the  
Restatement states that an inter vivos trust is valid if valid

[U]nder the local law of the state designated by the  
settlor to govern the validity of the trust, provided  
that this state has a substantial relation to the  
trust and that the application of its law does not  
violate a strong public policy of the state with  
which, as to the matter at issue, the trust has its  
most significant relationship . . . .

Comment (b) to § 270 of the Restatement states:

1 Law designated by the settlor to govern validity of  
2 the trust. Effect will be given to a provision in the  
3 trust instrument that the validity of the trust shall  
4 be governed by the local law of a particular state,  
5 provided that this state has a substantial relation to  
6 the trust and that the application of its local law  
7 does not violate a strong public policy of the state  
8 with which as to the matter at issue the trust has its  
9 most significant relationship.

6 A state has a substantial relation to a trust when it  
7 is the state, if any, which the settlor designated as  
8 that in which the trust is to be administered, or that  
9 of the place of business or domicile of the trustee at  
10 the time of the creation of the trust, or that of the  
11 location of the trust assets at that time, or that of  
12 the domicile of the settlor, at that time, or that of  
13 the domicile of the beneficiaries. There may be other  
14 contacts or groupings of contacts which will likewise  
15 suffice.

### 12 **Analysis**

13 On appeal, the Trustee does not contend there was a genuine  
14 issue of material fact that prevented entry of summary judgment  
15 for Herbert on the choice of law question. Instead, the Trustee  
16 argues that on the undisputed facts before us, the bankruptcy  
17 court erred as a matter of law in concluding that Hawaii law  
18 applied.

19 First, the Trustee maintains that the strong public policy  
20 of California embodied in Cal. Prob. Code § 15306.5 demonstrates  
21 that California had a materially greater interest in the  
22 spendthrift trust than Hawaii. According to the Trustee, Cal.  
23 Prob. Code § 15306.5 reflects the California legislature's  
24 intent that "trust-fund babies" should get no better treatment  
25 than wage earners when it comes to judgment creditors.<sup>11</sup> Thus,  
26 the Trustee argues, the legislature enacted Cal. Prob. Code

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27  
28 <sup>11</sup> We could locate no reference to trust-fund babies in  
connection with the statute.

1 § 15306.5 to correspond to the wage garnishment statute which  
2 subjects wage earners to a levy on twenty-five percent of their  
3 monthly income.

4 Second, the Trustee contends that the court erred by giving  
5 some factors under the Restatement little weight. In this  
6 regard, the Trustee contends that California is not only the  
7 forum of the dispute, but also the forum that Debtors themselves  
8 chose. The Trustee further asserts that California has the most  
9 substantial relation to the trust, because Herbert - both as  
10 trustee and as one of the trust's primary beneficiaries - is and  
11 has been a California resident and seeks to retain his exempt  
12 assets pursuant to California's exemption scheme. We address  
13 each of the Trustee's arguments in turn.

14 As can be seen by the rules stated above, choice of law  
15 questions involve a multi-step analysis in which a variety of  
16 factors are considered. We start from the premise that the  
17 Restatement reflects a strong policy favoring enforcement of  
18 choice of law provisions. In the contract area this policy  
19 protects the justified expectations of the parties and in the  
20 trust area this policy carries out the intention of the creator  
21 of the trust which is given great import. In addition, choice  
22 of law provisions are usually respected by California courts in  
23 the area of both contracts and trusts. See Nedlloyd Lines, 834  
24 P.2d at 1151; Cal. Prob. Code § 21103.<sup>12</sup> We thus examine whether

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25  
26 <sup>12</sup> Cal. Prob. Code § 21103 provides:

27 The meaning and legal effect of a disposition in an  
28 instrument is determined by the local law of a

(continued...)

1 any exception to the general rule of upholding a party's choice  
2 of law is warranted under these circumstances.<sup>13</sup>

3 Under the Restatement, Sally's choice of Hawaii law should  
4 be upheld if Hawaii has a substantial relation to her trust.  
5 Restatement § 187(2)(a); § 270(a). Comment b of § 270 of the  
6 Restatement provides that a state has a substantial relation to  
7 a trust if at the time the trust is created: (1) the trustee or  
8 settlor is domiciled in the state; (2) the assets are located in  
9 the state; and (3) the beneficiaries are domiciled in the state.  
10 These contacts with the state are not exclusive.

11 Applying these contacts, there is little question that the  
12 State of Hawaii has a substantial relation to the Sally  
13 Zukerkorn Trust. At the time Sally created the trust in 1978,  
14 approximately 34 years ago, the trustee and settlor (Sally) was  
15 domiciled in Hawaii, her assets were located in Hawaii, and  
16 Herbert, one of the beneficiaries, was domiciled in Hawaii and  
17 remained a citizen of Hawaii for over 70 years. Furthermore,  
18 the trust is administered by a Hawaii corporate trustee. These

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19  
20 <sup>12</sup>(...continued)  
21 particular state selected by the transferor in the  
22 instrument unless the application of that law is  
23 contrary to the rights of the surviving spouse to  
24 community and quasi-community property, to any other  
25 public policy of this state applicable to the  
26 disposition . . . .

27 <sup>13</sup> The dissent departs from our analysis in one sharp  
28 respect which leads to its different conclusion: rather than  
give weight to the expectations of Sally as creator of the trust  
when she chose Hawaiian law to govern the execution of her  
wishes, the dissent ignores Sally altogether and focuses instead  
on Herbert and his creditors as the only relevant parties. We  
believe this vision ignores the principles of the Restatement and  
leads to the incorrect result.

1 same contacts – and there is nothing in the record to the  
2 contrary – demonstrate that Sally had a reasonable basis for her  
3 choice of Hawaii law to govern her trust. Because Hawaii has a  
4 substantial relationship to the parties and a reasonable basis  
5 otherwise exists for the choice of law, Sally’s choice will be  
6 enforced unless the Trustee can establish (1) that the chosen  
7 law is contrary to a fundamental policy of California and (2)  
8 that California has a materially greater interest in the  
9 determination of the particular issue. Wash. Mut. Bank FA v.  
10 Sup. Ct., 15 P.3d 1071, 1079 (Cal. 2001).

11 There is no bright-line definition of a “fundamental  
12 policy.” Restatement § 187 comment g. A fundamental policy  
13 must be “substantial,” and “may be embodied in a statute which  
14 makes one or more kinds of contracts illegal or which is  
15 designed to protect a person against the oppressive use of  
16 superior bargaining power.” Id. “California’s narrow, public  
17 policy exception to the resolution of conflicts through a  
18 neutral comparison of government interests . . . applies only  
19 when foreign law is so offensive to [California] public policy  
20 as to be ‘prejudicial to . . . recognized standards of morality  
21 and to the general interest of the citizens. . . .’” McGhee v.  
22 Arabian Am. Oil Co., 871 F.2d 1412, 1423 n. 8 (9th Cir. 1989)  
23 (quoting Wong v. Tenneco, Inc., 702 P.2d 570, 576 (1985)).  
24 Under these standards, we understand the public policy exception  
25 in choice of law analysis to require something more than the law  
26 of the other state be different from the law of California.

27 Here, the Trustee simply points to Cal. Prob. Code  
28 § 15306.5 as if it were a statutory declaration that California

1 public policy would be offended by enforcing the choice of law  
2 clause in Sally's trust. The Trustee has not identified any  
3 recognized standard of morality in California that is impacted  
4 by the application of Hawaii law in this case nor does she  
5 explain how upholding a Hawaii choice of law clause in an  
6 otherwise valid spendthrift trust adversely affects the "general  
7 interests of Californians." Although self-settled trusts are  
8 void and against public policy in California, as found by the  
9 bankruptcy court here and not challenged on appeal, the Sally  
10 Zukerkorn Trust is not a self-settled trust.<sup>14</sup> Without more,  
11 there is inadequate authority for us to find that Cal. Prob.  
12 Code § 15306.5, standing alone, is a fundamental policy of  
13 California.

14 Even if we were to find that California has such a  
15 fundamental policy, pursuant to the Restatement (Second) of  
16 Conflict of Laws § 187(2)(b), the Trustee still has to show that  
17 California has a materially greater interest than Hawaii in the  
18 determination of the particular issue. The relative weight of  
19 material interest in the determination of an issue requires the  
20

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21 <sup>14</sup> California law voids self-settled trusts to prevent  
22 individuals from placing their property beyond the reach of their  
23 creditors. Nelson v. Cal. Trust Co., 202 P.2d 1021 (Cal.1949).  
The Nelson court explained the rationale for the rule:

24 It is against public policy to permit a man to tie up  
25 his property in such a way that he can enjoy it but  
26 prevent his creditors from reaching it, and where the  
27 settlor makes himself a beneficiary of a trust any  
restraints in the instrument on the involuntary  
28 alienation of his interest are invalid and ineffective.

Id. at 1021.

1 court to weigh a number of factors, including where the contract  
2 was made, the state where a party to the contract is domiciled,  
3 where the events that are the subject of the case transpired,  
4 the origin of the laws that plaintiffs seek to invoke, the  
5 public policy expressed by those laws, the number of contacts a  
6 state has with the subject matter of a case, and the nature of  
7 the state's interest in the case. Klussman v. Cross Country  
8 Bank, 134 Cal.App.4th 1283, 1299 (Cal. Ct. App. 2005).

9 The Trustee argues that California has a materially greater  
10 interest than Hawaii because (1) Herbert is now domiciled in  
11 California;<sup>15</sup> (2) the chapter 7 petition was filed in California;  
12 and (3) some of Debtors' scheduled unsecured creditors are  
13 located in California.

14 At first blush, the Trustee's argument has appeal. Upon  
15 the filing of their bankruptcy, debtors obtained the benefit of  
16 California exemption laws based on the fact that California was  
17 their domicile. These laws allow Debtors to shield certain  
18 assets from execution by their creditors. Therefore, it could  
19 be said that California has some interest in the choice of law  
20 determination at issue in this case because Debtors have taken  
21 advantage of its laws that regulate debtor-creditor  
22 relationships. However, as noted above, a number of essential  
23 elements demonstrate that Hawaii had the more substantial  
24 relation to the trust and that the State of California had no  
25 relationship with the Sally Zukerkorn Trust other than the fact

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26  
27 <sup>15</sup> Herbert Zukerkorn's children who are the remainder  
28 beneficiaries of the Zukerkorn Trust are not residents of  
California. The Trustee has not pointed to any authority that  
eliminates from consideration secondary beneficiaries.

1 that Herbert, one of the beneficiaries, lived in California.  
2 Therefore, on balance, we cannot say that under these  
3 circumstances California has a "materially greater" interest  
4 than Hawaii in the determination of the choice of law issue.

5 Finally, we are not persuaded by case law the Trustee cites  
6 in support of her position. In Marine Midland Bank v. Portnoy  
7 (In re Portnoy), 201 B.R. 685 (Bankr. S.D.N.Y. 1996), Larry  
8 Portnoy transferred all of his personal property to an offshore  
9 trust at a time he knew that his guarantee to a New York bank of  
10 the debts of his New York company would soon be called. Portnoy  
11 was both the settlor and beneficiary of the offshore trust.  
12 After he filed his chapter 7 petition, the creditor that held  
13 his guaranty sought to deny his discharge alleging, among other  
14 things, that Portnoy had transferred his assets to an offshore  
15 trust in Jersey, but remained de facto owner by continuing to  
16 maintain unlimited control over the assets and conceal the  
17 trust.

18 In deciding whether debtor had control over the assets of  
19 the trust, the court first had to decide whether the law of New  
20 York or Jersey law, which was the trust's choice of law,  
21 supplied the substantive rules. The court found:

22 That Portnoy settled the trust in Jersey, designated  
23 the trust to be administered in Jersey, and appointed  
24 a Jersey resident as trustee, gives Jersey an  
25 undeniable relationship to the trust. On the other  
26 hand, Portnoy, who is both the settlor and primary  
27 beneficiary, Portnoy's creditors, and the other  
28 beneficiaries are all United States domiciliaries.  
Portnoy's creditors have no contacts with Jersey, and  
Portnoy had the greatest contact with the United  
States at the time he settled the trust and reasonably  
could have believed that United States law would be  
applicable . . . . On balance, I conclude that New  
York has the weightier concern in determining whether

1 or not whatever rights Portnoy retained after he  
2 formed the trust could be considered to constitute a  
3 property interest such that that interest should have  
4 been disclosed in his bankruptcy schedules. The  
5 trust, the beneficiaries, and the ramifications of  
6 Portnoy's assets being transferred into trust have  
7 their most significant impact in the United States. In  
8 addition, I believe that application of Jersey's  
9 substantive law would offend strong New York and  
10 federal bankruptcy policies if it were applied . . . .

11 Id. at 698.

12 In discussing New York's policies, the court observed that  
13 under New York law, "when a person creates for his own benefit  
14 a discretionary trust, his creditors can reach the maximum  
15 amount which the trustee under the terms of the trust could pay  
16 to him or apply for his benefit, even though the trustee in the  
17 exercise of his discretion wished to pay nothing to the  
18 beneficiary or to his creditors, and even though the beneficiary  
19 could not compel the trustee to pay him anything . . . ." Id.  
20 In contrast to New York's policies, the bankruptcy court found  
21 that Jersey's interest in the trust was perhaps to only "augment  
22 business." Id. at 700. In the end, the court stated: "I  
23 think it probably goes without saying that it would offend our  
24 policies to permit a debtor to shield from creditors all of his  
25 assets because ownership is technically held in a self-settled  
26 trust, where the settlor/beneficiary nonetheless retains control  
27 over the assets and may effectively direct disposition of those  
28 assets." Id. Based on New York's "deeply rooted" policies, the  
court found that New York law applied.

The court also found a second basis for applying New York  
law. According to the court, a choice of law "will not be  
regarded where it would operate to the detriment of strangers to

1 the agreement, such as creditors or lienholders.” Id. at 701  
2 (quoting Hong Kong and Shanghai Banking Corp., Ltd. v. HFH USA  
3 Corp., 805 F.Supp. 133, 140 (W.D.N.Y.1992) ) and citing Carlson  
4 v. Tandy Computer Leasing, 803 F.2d 391 (8th Cir.1986); Ferrari  
5 v. Barclays Bus. Credit (In re Morse Tool, Inc.), 108 B.R. 384,  
6 386 (Bankr. D. Mass. 1989). In that regard, the court found  
7 that the only person that was a party to this choice of law  
8 provision was Portnoy himself. “Portnoy may not unilaterally  
9 remove the characterization of property as his simply by  
10 incorporating a favorable choice of law provision into a  
11 self-settled trust of which he is the primary beneficiary.” Id.

12 Portnoy is distinguishable from the facts here. First,  
13 unlike Portnoy, we concluded, as did the bankruptcy court, that  
14 Sally and her trust had a substantial relation to Hawaii at the  
15 time it was created. Moreover, once the Portnoy court found  
16 insufficient contacts, its rationale for finding a “deeply  
17 rooted” New York policy was based on New York law applicable to  
18 self-settled trusts. The policy that a debtor should not be  
19 able to escape claims of his creditors by himself setting up a  
20 spendthrift trust and naming himself as beneficiary is not  
21 unique to New York, but also relevant in California. See  
22 Nelson, 202 P.2d 1021. However, because Herbert did not  
23 establish a self-settled trust to escape the claims of his  
24 creditors, the public policy behind self-settled trusts in  
25 California is not applicable here. As stated above, we found no  
26 California public policy on spendthrift trusts that warranted  
27 application of the public policy exception under the facts of  
28 this case.

1           The Portnoy court's second reason for applying New York law  
2 is also not relevant to this case. The Eighth Circuit's  
3 decision in Carlson v. Tandy Computer Leasing, 803 F.2d 391,  
4 393-94 (8th Cir. 1986) discussed choice of law rules with  
5 respect to the Missouri Uniform Commercial Code ("U.C.C.").  
6 There, the parties to a contract involving computer equipment  
7 were Brock, the lessee, and Tandy, the lessor. Following the  
8 execution of the contract, Brock filed a petition in bankruptcy.  
9 The bankruptcy trustee attempted to claim the computer equipment  
10 for the bankruptcy estate on the basis that Tandy's interest in  
11 the property was an unperfected security interest. Whether the  
12 contract was deemed a lease or an installment sales contract  
13 would determine whether Tandy could repossess the equipment or  
14 whether the trustee had priority over Tandy with respect to the  
15 equipment. Id. at 393.

16           Brock and Tandy had agreed in the lease agreement that  
17 Texas law would apply, even though the equipment was located in  
18 Missouri. Citing § 1-105 of the Missouri UCC, the court noted  
19 that parties were generally free to choose which state's law  
20 shall govern, unless the dispute fell within an exception.  
21 Under § 1-105 of the Missouri UCC, there are five exceptions,  
22 all involving third party rights, where a choice of law clause  
23 in the contract would not prevail. One such limitation was  
24 found in § 9-102 of the Missouri U.C.C., which provided that  
25 Article 9 of the Missouri U.C.C. shall apply to any transaction  
26 intended to create a security interest in personal property  
27 located in Missouri. A "lease intended as security" is one type  
28 of security interest included in section 9-102.

1 The court further explained:

2 The policy behind section 1-105(2), especially as it  
3 relates to the scope of Article 9 of the Missouri  
4 U.C.C., is to prohibit choice of law agreements when  
5 the rights of third parties are at stake. . . . If we  
6 applied Texas law to determine whether a security  
7 interest existed here, this would violate a  
8 fundamental purpose of Article 9: to create commercial  
9 certainty and predictability by allowing third party  
10 creditors to rely on the specific perfection and  
11 priority rules that govern collateral within the scope  
12 of Article 9. In order to prevent the constant  
13 unilateral expansion and contraction of the scope of  
14 Missouri's Article 9, a Missouri court would apply  
15 Missouri law to determine the scope of Article 9 of  
16 the Missouri U.C.C.

17 Id. at 394. Ultimately, the Eighth Circuit found that the  
18 Missouri U.C.C. did not apply, but nonetheless upheld the  
19 district's court application of Missouri law and holding that  
20 the agreement between the parties was a lease.

21 The Portnoy court adopted the reasoning behind the U.C.C.  
22 choice of law rules for purposes of the self-settled trust  
23 involved. However, that reasoning does not apply under the  
24 facts of this case. We decline to import the rule in Portnoy  
25 simply because the Trustee enjoys the rights of a judgment  
26 creditor under § 544(a)(1). Further, importing such a rule  
27 under these circumstances would completely ignore Sally's intent  
28 when she created her trust. The choice of law rules in the  
29 Restatement state that only in the absence of a substantial  
30 relationship, or if public policy dictates, should courts deny a  
31 party's choice of law.

32 Last, in In re Morse Tool, Inc., 108 B.R. 384 (Bankr. D.  
33 Mass. 1989), the bankruptcy court disregarded a choice of law  
34 provision when ruling in an adversary action that was a  
35 fraudulent conveyance matter. The court found that the parties

1 to a contractual conveyance cannot in their contract make a  
2 choice of law that binds creditors who allege that they were  
3 defrauded by the conveyance. Id. at 386. The rule in this case  
4 has no bearing on the outcome of this appeal.

5 For all these reasons, we agree with the bankruptcy court  
6 that Sally's choice of Hawaii law should be applied to her  
7 trust. Accordingly, the bankruptcy court properly granted  
8 summary judgment in favor of Herbert on the choice of law issue.

9 Although § 541(c) (2) excludes the corpus of the trust from  
10 property of the estate, the postpetition distributions of income  
11 from a spendthrift trust may become property of the estate under  
12 § 541(a) (5) (A) if the trust is testamentary in nature. Relying  
13 on § 541(a) (5) (A), the Trustee maintained that she was entitled  
14 to \$42,000 in income distributions that Herbert received for the  
15 180 days after the filing of his bankruptcy.

16 The bankruptcy court rejected this position because  
17 § 541(a) (5) (A) does not apply to inter vivos trusts. In re  
18 Neuton, 922 F.2d at 1384 n.6. The Trustee concedes in her  
19 appeal brief that § 541(a) (5) (A) was inapplicable because the  
20 Sally Zukerkorn Trust was an inter vivos trust. Nonetheless,  
21 relying on In re Neuton, the Trustee asserts for the first time  
22 on appeal that the 180-day limitation under § 541(a) (5) (A) was  
23 immaterial and that once Herbert was actually paid distributions  
24 from the trust, the distributions became property of the estate  
25 under §§ 541(a) (6) and (7). These arguments do not appear in  
26 the record and the bankruptcy court's decision following the  
27 evidentiary hearing does not address either of these statutes.  
28 We decline to consider these issues which are raised for the

1 first time on appeal. Cold Mountain v. Garber, 375 F.3d 884,  
2 891 (9th Cir. 2004).

3 **VI. CONCLUSION**

4 For the reasons stated, we AFFIRM.

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10 Dissent begins on next page.  
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1 JOHNSON, Bankruptcy Judge, dissenting:  
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3       The issue on appeal is whether a bankruptcy court should  
4 apply the trust laws of the forum state where the bankruptcy  
5 court sits and where the debtor elected to file his bankruptcy  
6 case (California) or, instead, the laws of another state  
7 (Hawaii) selected in a trust document by the benefactor of the  
8 debtor. In one sense, this issue is novel. Neither the  
9 appellant nor the appellee has cited any case directly on point  
10 and we could not find one either. No known case (federal, state  
11 or otherwise) addresses whether a court sitting in California  
12 should enforce Probate Code section 15306.5 against assets in a  
13 trust created by an instrument that invokes the trust law of  
14 another state or jurisdiction.

15       However, published cases throughout the country have  
16 considered the broader question of whether a court should apply  
17 the trust law of a forum state or the trust law of another state  
18 designated in a trust instrument. A review of those cases  
19 reveals a pattern in which the courts have generally declined to  
20 apply the trust law of a foreign jurisdiction selected by the  
21 settlor of a trust if doing so would harm creditors or other  
22 third parties. In other words, while some courts have applied  
23 the trust law of a foreign jurisdiction, they usually do not do  
24 so to the detriment of creditors or other third parties. When  
25 enforcing a judgment against assets of a trust, courts typically  
26 apply the judgment remedies of the forum state when those laws  
27 protect creditors more than the law of the other jurisdiction.

28       To avoid this result, the Debtor urges us to adopt a view

1 of the Restatement (Second) of Conflict of Laws ("Restatement")  
2 which applies to parties who consent to bilateral agreements.  
3 But that reasoning does not apply here. This is not a situation  
4 in which one party to a contract seeks to hold another party to  
5 the contract to a choice of law provision to which both parties  
6 agreed in the contract. To the contrary, the Debtor (who is not  
7 a party to the Zukerkorn trust agreement) seeks to enforce its  
8 terms against other parties (the trustee and creditors) who are  
9 also not parties to the agreement. Because the Restatement does  
10 not provide for this result, and should not be so interpreted, I  
11 respectfully dissent.

12 **I. Cases When Courts Disregard Choice of**  
13 **Law Provisions in Trust Instruments**

14 In general, courts typically refrain from applying the  
15 trust law of a foreign jurisdiction selected by the settlor of a  
16 trust if doing so would harm creditors or other third parties.  
17 In most instances, the judgment remedies of the forum state  
18 apply. For example, in Marine Midland Bank v. Portnoy (In re  
19 Portnoy), 201 B.R. 685 (Bankr. S.D.N.Y. 1996), the debtor  
20 created a self-settled trust in the Jersey Channel Islands and  
21 transferred his assets into that trust. The debtor included in  
22 the trust instrument a provision that stated his creditors could  
23 not reach his assets. When the debtor filed a personal  
24 bankruptcy case in New York, one of his creditors asserted that  
25 the assets of the trust constituted assets of the bankruptcy  
26 estate. The debtor argued that (1) the trust instrument  
27 provided for the application of the law of Jersey Channel  
28 Islands (not New York) and (2) under the law of Jersey Channel

1 Islands, creditors could not reach the trust assets. The  
2 bankruptcy court disagreed for two reasons.

3 First, the bankruptcy court (like many other courts)  
4 declined to allow a debtor to shield assets from creditors by  
5 creating a self-settled trust. Second, the bankruptcy court  
6 applied New York law for an additional reason: "In addition  
7 there is a second basis upon which to apply New York law--a  
8 choice of law provision 'will not be regarded where it would  
9 operate to the detriment of strangers to the agreement, such as  
10 creditors or lienholders.'" Id. at 701 (citing cases). The  
11 court declined to enforce the choice of law provision in the  
12 trust agreement because doing so would harm "strangers to the  
13 agreement, such as creditors or lienholders." Id.

14 Other courts have followed the reasoning in Portnoy and not  
15 allowed a debtor to shield assets from a creditor by relying  
16 upon a trust instrument that invokes a foreign jurisdiction.  
17 Instead, when application of local law would protect creditors  
18 more than a foreign jurisdiction, the courts have applied the  
19 local law of the forum state when interpreting a trust agreement  
20 and not the foreign law selected in the trust instrument.  
21 Goldberg v. Lawrence (In re Lawrence), 227 B.R. 907 (Bankr.  
22 S.D.Fla. 1998) (Florida bankruptcy court followed Portnoy by  
23 applying Florida trust law and not the laws of a foreign  
24 jurisdiction selected in the trust instrument); Sattin v. Brooks  
25 (In re Brooks), 217 B.R. 98, 103 (Bankr.D.Conn. 1998)  
26 (Connecticut bankruptcy court applied Connecticut trust law, not  
27 the law of a foreign jurisdiction designated in a trust  
28 agreement, because application of the foreign laws would harm

1 creditors).

2       On appeal, the Debtor attempts to distinguish Portnoy and  
3 similar cases on the basis that these cases often involve fraud  
4 by the settlors in establishing the trusts. But the cases do  
5 not turn on this factual premise. To the contrary, the courts  
6 have been careful to state that the choice of law decision does  
7 not depend on whether or not fraud by the settlor exists.  
8 Indeed, they often declare that it is "irrelevant" whether the  
9 settlor of the trust intended to defraud creditors or whether  
10 the settlor was solvent at the time. Portnoy, 201 B.R. at 685,  
11 698 (Bankr. S.D.N.Y. 1996) (stating that it is "irrelevant"  
12 whether or not the settlor of the trust intended to defraud  
13 anyone); Goldberg v. Lawrence (In re Lawrence), 227 B.R. 907,  
14 917 (Bankr. S.D.Fla. 1998) (noting that it is "irrelevant"  
15 whether or not the settlor of a trust intended to defraud  
16 anyone); In re Brooks, 217 B.R. 98, 103 (quoting the Restatement  
17 (Second of Trusts) and stating that it is "not relevant" whether or  
18 not the settlor has any intention to defraud his creditors).  
19 Likewise, the Restatement states that the intent of the settlor  
20 of a trust is not relevant when evaluating whether a self-  
21 settled trust can defeat the claims of creditors. See  
22 1 Restatement (Second) of Trusts § 156, Comment a. ("It is  
23 immaterial that the settlor-beneficiary had no intention to  
24 defraud his creditors.").

25       Regardless of the intent of the settlor, choice of law  
26 provisions in trust agreements are not enforced if the law of  
27 the forum state prohibits self-settled trusts. If a trust  
28 instrument states that the trust is governed by the law of a

1 foreign jurisdiction, that choice of law is not honored if the  
2 beneficiary files a bankruptcy case in a different jurisdiction  
3 that prohibits self-settled trusts. As a matter of public  
4 policy, the laws of the forum state override the choice of law  
5 decision by the settlor. It is against public policy to enforce  
6 a trust provision from a foreign jurisdiction that would impose  
7 this kind of harm upon creditors.

8 **II. Cases When Courts Disregard Choice of Law**  
9 **Provisions in Other Contracts**

10 On appeal, Herbert contends that his mother's trust is not  
11 a self-settled trust and, of course, he is correct. But  
12 Portnoy, Lawrence, Brooks, Cameron and similar cases establish  
13 precedent against enforcing a choice of law provision in a trust  
14 instrument if doing so would harm creditors. A settlor of a  
15 trust cannot invoke the laws of a foreign jurisdiction to the  
16 detriment of creditors or other third parties who are not  
17 parties to the trust instrument.

18 The idea that a choice of law provision in an agreement is  
19 not enforced to the detriment of third parties appears in other  
20 areas of the law. For example, in Carlson v. Tandy Computer  
21 Leasing, 803 F.2d 391, 393-94 (8th Cir. 1986), the debtor  
22 entered into a "lease" of certain computer equipment from Tandy  
23 pre-petition. After the debtor filed a bankruptcy case, the  
24 bankruptcy trustee sued Tandy arguing that the "lease" was  
25 actually a disguised installment sales contract and that Tandy  
26 should be treated as a seller of goods that retained an  
27 unperfected and avoidable security interest. Whether the  
28 contract was deemed a lease or an installment sales contract

1 would determine whether Tandy could repossess the equipment or  
2 whether the bankruptcy trustee had priority over Tandy with  
3 respect to the equipment.

4 Tandy and the debtor agreed in the "lease" agreement that  
5 Texas law would apply but the debtor filed the bankruptcy case  
6 in Missouri. Acting pursuant to his strong-arm powers as a  
7 hypothetical lienholder under section 544, the trustee contended  
8 that neither the trustee nor the creditors whose interests the  
9 trustee protected were bound by the choice of law provision in  
10 the "lease" agreement. The trustee argued for the application  
11 of Missouri law.

12 The bankruptcy court ruled in favor of the trustee. The  
13 Missouri bankruptcy court held that Missouri law applied and  
14 that under Missouri law, the "lease" should be treated as an  
15 installment sales contract. The district court reversed and  
16 held that the trustee was bound by the law selected by Tandy and  
17 the debtor in the "lease" agreement (Texas law) and that under  
18 Texas law, the agreement must be construed as a true lease. The  
19 Court of Appeals affirmed the decision of the district court but  
20 not its reasoning.

21 Instead, the Court of Appeals held that Missouri law  
22 applied. The Court of Appeals stated "[w]e conclude that  
23 because the dispute in question implicates the rights of third  
24 party creditors, Missouri law should be applied." Tandy, 803  
25 F.2d at 393. The Court of Appeals was not willing to enforce  
26 the choice of law provision in the agreement against a trustee  
27 or other parties who were not parties to the agreement. The  
28 Court stated that the "present case is unlike those situations

1 where only the rights of parties privy to the initial choice of  
2 law agreement are implicated . . . . In those situations, no  
3 policy is furthered by refusing to allow the parties to select  
4 the law governing their rights alone." Id. at 394. When the  
5 rights of third parties are implicated, however, the Court did  
6 not enforce the choice of law provision in an agreement against  
7 non-parties.

8 Likewise, a similar result occurred in In re Eagle  
9 Enterprises Inc., 223 B.R. 290 (E.D. Pa. 1998), affirmed, 237  
10 B.R. 269 (E.D. Pa. 1999). In Eagle, a German "lessor" purported  
11 to "lease" certain equipment to an American debtor. When the  
12 debtor filed a bankruptcy case in Pennsylvania, the chapter 7  
13 trustee asserted that the "lease" was really a disguised security  
14 interest under the UCC and not a true lease and, because the German  
15 company had not perfected its security interest, it had no interest  
16 of any kind in the equipment. The German company responded by  
17 arguing that the debtor agreed in the lease agreement that German  
18 law would govern and, under German law, the agreement was a true  
19 lease.

20 The trustee prevailed. The Court declined to follow German  
21 law and, instead, applied the Uniform Commercial Code and held the  
22 agreement was not a true lease. In declining to enforce the choice  
23 of law provision selected by the parties, the Court noted that many  
24 courts have held that a choice of law provision in a contract is  
25 not valid if it negatively affects the rights of third parties. It  
26 may govern the rights between the parties but if the rights of a  
27 third party are also affected, the choice of law provision is not  
28 binding.

1 Under normal circumstances, contracting parties are free  
2 to stipulate what state's or nation's law will govern  
3 their contractual rights and duties, provided that the  
4 state or nation has a reasonable relationship with the  
5 transaction, and the law chosen does not violate a  
6 fundamental public policy of the forum state....  
7 Nonetheless, the parties' stipulation will not be  
8 regarded where it would operate to the detriment of  
9 strangers to the agreement, such as creditors or  
10 lienholders . . . .

11 See In re Eagle Enterprises, 223 B.R. at 295 (emphasis added)

12 (quoting Hong Kong and Shanghai Banking Corp. v. HFH USA Corp., 805

13 F.Supp. 133, 139-40 (W.D.N.Y. 1992)). A similar holding occurred

14 in Ferrari v. Barclay's Bus. Credit, Inc. (In re Morse Tool, Inc.),

15 108 B.R. 384 (Bankr. D. Mass. 1989). In Ferrari, a bankruptcy

16 trustee filed an action to avoid a security agreement as a

17 fraudulent transfer. The parties to the agreement included a

18 provision stating that Connecticut law would govern the agreement.

19 The trustee attacked the agreement as a fraudulent transfer and the

20 Massachusetts bankruptcy court decided whether it would apply

21 Massachusetts law or Connecticut law. Following section 6 of the

22 Restatement, the Court applied the law of the forum state

23 (Massachusetts).

24 The Court refused to apply the choice of law provision in the

25 agreement because the trustee (and the creditors of the debtor) was

26 not a party to the agreement and the law selected would be

27 disadvantageous to them. The Court stated as follows:

28 And one of the parties to this suit -- the Trustee, who stands  
in the shoes of the creditors -- was not a party to the  
contract. The parties to a contractual conveyance cannot in  
their contract make a choice-of-law that binds creditors who  
allege that they were defrauded by the conveyance. The  
choice-of-law binds only parties to the contract, not the  
Trustee or the creditors.

1        Ferrari, 108 B.R. at 386.

2        The Court rejected the argument that, pursuant to section 187 of  
3        the Restatement, the choice of law provision selected by the  
4        parties to the agreement should control.

5  
6        Section 187 of the Restatement states that, under  
7        certain circumstances, 'the law of the state chosen by  
8        the parties to govern their contractual rights and  
9        duties will be applied.' Restatement (Second), § 187(1)  
10       and (2) (emphasis added). This section, on which  
11       Barclays relies, plainly applies only to suits between  
12       parties to a contract regarding their rights and duties  
13       under the contract. And it applies only where the  
14       parties to the suit have chosen which state's law will  
15       govern. Neither of these circumstances applies here.

16       Id. Because the parties to the lawsuit were not parties to the  
17       contract, it would be inappropriate to enforce the choice of law  
18       provision.

19       . . . . the contract is not between the parties to the  
20       suit, but between two parties whom the plaintiff (a  
21       creditor or a bankruptcy trustee) alleges executed the  
22       contract for the very purpose of defrauding creditors.  
23       In view of this, it makes no sense to follow the choice-  
24       of-law clause in the agreement between Barclays and the  
25       Debtor. That would be tantamount to giving the  
26       defendant unilateral control over the choice-of-law,  
27       which clearly would violate the requirements of due  
28       process.

29       Id. at 387. Thus, cases such as Tandy, Eagle and Ferrari, decline  
30       to enforce a choice of law provision against individuals who are  
31       not parties to the agreement. That is true in this case. Herbert  
32       is not a party to the trust. Neither are his creditors nor the  
33       trustee. And Sally's creditors are not parties to the trust  
34       instrument either.

35       Indeed, no one agreed to anything with Sally. She simply  
36       selected a choice of law that she preferred and now Herbert wants

1 to use Sally's choice as a sword (or shield) against Herbert's  
2 creditors and the trustee. The California legislature will let  
3 her do so but only up to 75%. In that sense, this case presents a  
4 conflict between Sally and the California legislature. The latter  
5 should prevail.

### 6 **III. Similar New York Statutes**

7 As discussed above, courts have declined to enforce choice of  
8 law provisions in trust instruments or other agreements if doing  
9 so would harm creditors or other individuals who are not parties  
10 to the agreement. Instead, they apply the law of the forum state  
11 in order to protect creditors. Therefore, in California,  
12 bankruptcy courts should enforce section 15306.5 of the California  
13 Probate Code which permits creditors to reach up to 25% of the  
14 assets of a spendthrift trust even if the trust instrument asserts  
15 California law should not govern. Although there is no specific  
16 case directly on point reaching this conclusion, other courts have  
17 done so under similar facts.

18 For example, the laws of the state of New York governing  
19 spendthrift trusts are similar to California law. In New York,  
20 spendthrift trusts are not fully protected. Section 5205 of the  
21 New York Civil Practice Code governs enforcement of judgments  
22 against assets held in a trust in New York and the provisions of  
23 Section 5205 are similar to California law. Section 5205(c)  
24 provides a general exemption for assets held in a trust (like  
25 section 15301(a) of the California Probate Code) and section  
26 5205(d) creates an exception to this protection (like section  
27 15306.5 of the California Probate Code) that permits a creditor to  
28 attach between 10% to 100% of the income from a spendthrift trust.

1 So, as in California, creditors may reach a portion of the income  
2 of a spendthrift trust (between 10% to 100%). Although the  
3 percentages are different,<sup>1</sup> both states allow creditors to invade  
4 spendthrift trusts to some extent.

5 Given this statutory regime, New York courts have  
6 occasionally been called upon to address the issue that has arisen  
7 in the Zukerkorn case. Specifically, if a creditor in New York  
8 seeks to enforce a judgment against a New York debtor who is the  
9 beneficiary of a trust agreement, can the creditor seek to be paid  
10 from trust assets under section 5205 even if the trust agreement  
11 states it is governed by Connecticut law or any law other than New  
12 York. At least two New York cases have held that New York law  
13 applies.

14 For example, this issue was directly addressed in In the  
15 Matter of Wheat, 246 N.Y.S.2d 536 (1963). In that case, John  
16 Wheat failed to pay spousal support to his former wife. Mr. Wheat  
17 was the beneficiary of two trusts established by his deceased  
18 parents. His ex-wife sought to attach the income from the trusts  
19 in New York. The New York bank that acted as the trustee for the  
20 trusts opposed the enforcement of the judgment against the trust  
21 assets. The New York court overruled that opposition and allowed  
22 the creditor to attach 10% of the income of the trust.

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23 <sup>1</sup> California Probate Code section 15306.5 permits creditors  
24 to reach up to 25% of the assets of a trust. The statute  
25 establishes a range of between 0% to 25%. There is no minimum  
amount that creditors receive and a maximum of 25% exists.

26 In New York, creditors are entitled to a minimum of 10% of  
27 the income of a spendthrift trust and the court has the power to  
increase this 10% amount (theoretically) up to 100% to the extent  
28 (if any) that the trust assets are not necessary for the  
"reasonable requirements of the judgment debtor and his  
dependents . . . ." See NY CPLR § 5205(d).

1 The New York court noted it was "undisputed" that Mr. Wheat's  
2 mother "was at the time of her death domiciled in Connecticut and  
3 that her will was admitted to probate in that State." Id. at 538.  
4 The Court also noted that the trust instrument was "executed and  
5 delivered in the State of Connecticut" and specifically stated  
6 that "it shall be governed and construed in all respects according  
7 to the laws of the State of Connecticut". Id. Although the New  
8 York court stated that generally "the laws of the State where the  
9 trust is established is ruled to be applicable", the New York  
10 court declined to follow Connecticut law for attachment purposes.  
11 The Court cited section 5205 which would allow the creditor to  
12 recover 10% and stated as follows:

13 "The narrow question to be decided is whether the income  
14 from these two trusts is subject to attachment and, if  
15 so, to what extent. **Though the trusts may in many  
16 respects be controlled by the law of Connecticut, so far  
17 as the right to attachment is concerned we are required  
18 to apply the law of New York.** Attachment is a matter of  
19 remedy, and questions affecting it must therefore be  
20 ruled by the law of the forum . . . ."

21 Wheat, 246 N.Y.S.2d at 539 (emphasis added). So while the Court  
22 indicated that Connecticut law would apply when construing the  
23 trust generally, it would not supplant New York law for attachment  
24 purposes. In other words, the choice of law provision by the  
25 settlor would not defeat the rights of creditors under section  
26 5205 against a New York debtor in a New York court.

27 The United States District Court for the Southern District of  
28 New York reached a similar conclusion in a tax case entitled  
United States v. Pearson, 67-1 U.S. Tax Cas. (CCH) P9460; 1967  
U.S. Dist. LEXIS 10762 (S.D.N.Y. 1967). The Pearson case involved  
a complicated inter-creditor dispute in a case in which a debtor

1 was a beneficiary of a spendthrift trust established in  
2 Connecticut. The debtor had voluntarily assigned his interest in  
3 the trust to a creditor to secure a \$50,000 loan and the New York  
4 District Court enforced that assignment based on Connecticut law.

5 Specifically, the District Court held that Connecticut law  
6 should apply when considering the voluntary transfer of the  
7 interest in the trust because the settlor and his wife resided in  
8 Connecticut at the time of their death. Since Connecticut law (at  
9 the time) allowed the beneficiary of a spendthrift trust to  
10 anticipate and assign an interest in a trust (which is typically  
11 not permitted in modern times) the creditor was able to enforce  
12 the assignment under Connecticut law even though New York law did  
13 not permit such assignments. In effect, the Court enforced the  
14 terms of the contract between the lender and ruled that, under  
15 Connecticut law, the assignment of an interest in a trust to  
16 secure a loan is enforceable.

17 However, another creditor (Annabelle Pearson) sought to levy  
18 on the assets of the trust in order to satisfy an unpaid debt.  
19 Ms. Pearson did not have a voluntary assignment from the debtor of  
20 any interest in the trust. Therefore, Ms. Pearson needed to rely  
21 upon New York attachment law. The New York District Court applied  
22 New York attachment law as to Ms. Pearson.

23 The Court held that under New York law, a provision in a  
24 spendthrift trust that prohibits creditors from reaching such  
25 assets is enforceable against the levying creditor.<sup>2</sup> However,

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26 <sup>2</sup> Pearson, 1967 U.S. Dist. LEXIS 10762 at \*13 ("When New  
27 York law is applicable, by reason of Section 15 of the Personal  
28 Property Law as it existed during the prior proceedings herein  
and as it now exists, the right of Pearson to receive income

(continued...)

1 pursuant to section 5205, the levying creditor could reach 10% of  
2 the income of the trust. The Court cited section 5205 as the  
3 available remedy and then quoted extensively from the decision in  
4 Wheat.<sup>3</sup> As to the levying creditor (Ms. Pearson), the Court fully  
5 applied New York law against a testamentary trust which the Court  
6 considered otherwise governable by Connecticut law. The Court  
7 held that the rights of the nonconsensual levying creditors should  
8 be governed by the attachment law of the forum state (New York).

9 The Court stated:

10 "Although, as heretofore determined, the validity of the  
11 voluntary assignment by Pearson must be controlled by  
12 the law of Connecticut as a substantive matter, the  
13 attempt of Rathkopf and Annabelle Webb Pearson to reach  
14 Pearson's income by judgment, attachment or suit, unlike  
15 that of Penn, must be determined as a procedural matter  
16 by the law of the State of New York."

17 Pearson, 1967 U.S. Dist. LEXIS 10762 at \*14. So, in both Wheat  
18 and Pearson, judgment creditors were able to invoke New York  
19 attachment law (section 5205) to invade spendthrift trusts  
20 otherwise governed by Connecticut law.<sup>4</sup>

#### 21 **IV. The Restatement**

22 On appeal, Herbert wants the Court to apply section 187 of  
23 the Restatement to resolve this dispute. Section 187 provides

24 \_\_\_\_\_  
25 (...continued)

26 under the testamentary trust cannot be transferred by assignment  
27 or otherwise.").

28 <sup>3</sup> Pearson, 1967 U.S. Dist. LEXIS 10762 at \*14-\*17.

<sup>4</sup> The Pearson decision was clearly not what Annabelle  
Pearson hoped for. She apparently wanted the trust interpreted  
according to Connecticut law because New York law enforces anti-  
alienation clauses in trust agreements. In that regard, applying  
New York law harmed Ms. Pearson, the levying creditor, because  
her claim was not paid in full. But the Court still permitted  
her to invoke section 5205 and reach the assets of the trust  
"subject to whatever statutory limitations may be imposed under  
the laws of the State of New York." Pearson, 1967 U.S. Dist.  
LEXIS 10762 at \*23.

1 that a forum state should apply the law chosen by the parties  
2 unless a "fundamental policy" of the forum state provides  
3 otherwise. The "fundamental policy" test is a high standard and  
4 it makes sense for the Restatement to impose this high standard  
5 when the parties before a court have voluntarily selected a  
6 particular choice of law in their agreement. Parties to contacts  
7 should be held to their agreements.

8 But those facts do not apply to this case. Section 187(1)  
9 states that the "law of the state **chosen by the parties** to govern  
10 their contractual rights and duties will be applied . . ." and  
11 section 187(2) states that the "law of the state **chosen by the**  
12 **parties** to govern their contractual rights and duties will be  
13 applied . . ." (emphasis added). None of the parties to the  
14 present appeal (not even Herbert) selected the law of Hawaii.  
15 That was the choice of Sally, not Herbert, the trustee or  
16 Herbert's creditors. Therefore, section 187 simply does not apply  
17 on its face and, likewise, the "fundamental policy" test does not  
18 apply either.

19 Instead, the introductory note to chapter 10 of the  
20 Restatement pertains to trusts and it states:

21 The creation of a trust is a method by which the owner  
22 of property makes a disposition of it. The chief  
23 purpose in making decisions as to the applicable law is  
24 to carry out the intention of the creator of the trust  
25 in the disposal of the trust property. It is important  
26 that his intention, to the extent to which it can be  
27 ascertained, should not be defeated, unless this is  
28 required by the policy of a state which has such an  
interest in defeating his intention, as to the  
particular issue involved, that its local law should be  
applied. . . .

27 Section 270(a) of the Restatement states that a trust is valid if  
28 valid

1 . . . under the local law of the state designated by the  
2 settlor to govern the validity of the trust, provided  
3 that this state has a substantial relation to the trust  
4 and that the application of its law does not violate a  
strong public policy of the state with which, as to the  
matter at issue, the trust has its most significant  
relationship . . . .

5 Comment (b) to § 270 of the Restatement states:

6 Law designated by the settlor to govern validity of the  
7 trust. Effect will be given to a provision in the trust  
8 instrument that the validity of the trust shall be  
9 governed by the local law of a particular state,  
10 provided that this state has a substantial relation to  
the trust and that the application of its local law does  
not violate a strong public policy of the state with  
which as to the matter at issue the trust has its most  
significant relationship.

11 Section 270(a) of the Restatement has two prongs: "the  
12 substantial relation" prong and the "strong public policy" prong.  
13 Therefore, under section 270(a), Hawaii law would apply if Hawaii  
14 "has a substantial relation to the trust and that the application  
15 of its law does not violate a strong public policy of  
16 [California]."

17 **A. The Trust Does Not Currently Have A Substantial**  
18 **Relationship To The State of Hawaii.**

19 With respect to the former, Herbert argues that Hawaii has a  
20 "substantial relation to the trust". This was certainly true when  
21 Sally, Herbert and Jack were all alive and lived in Hawaii.  
22 However, as with many things in life, events changed.

23 Herbert has outlived Sally and Jack. Both died nearly three  
24 decades ago. The record indicates that Herbert is the only  
25 remaining primary beneficiary as Jack has died and Herbert's  
26 children have received his portion of the inheritance from Sally.  
27 Real property assets in Hawaii were sold and converted to cash a  
28 decade ago. Herbert controls millions of dollars in trust assets

1 as trustee and is the beneficiary of the assets of the trust. The  
2 interests of the trust and Herbert are closely aligned. This is  
3 Herbert's trust (at least in practical terms).

4 Therefore, when Herbert elected to move to California, the  
5 relationship between the trust and the state of Hawaii diminished.  
6 It no longer makes sense to state that Hawaii currently has a  
7 "substantial" relationship with the trust. A relationship may  
8 still exist between the trust and Hawaii but it is no longer  
9 substantial.

10 **B. California Probate Code Section 15306.5 Reflects**

11 **A Strong Public Policy Under California Law.**

12 But even if the Court accepted Herbert's argument that the  
13 trust he now controls in California still has a "substantial"  
14 relationship with Hawaii, the second prong of section 270(a)  
15 provides the most significant problem for Herbert. Applying  
16 Hawaii law would run afoul of a strong public policy embodied in  
17 California Probate Code section 15306.5.

18 As discussed above, choice of law provisions in trust  
19 instruments are not enforced in certain circumstances (i.e. with  
20 respect to self-settled trusts). The Courts agree that a "strong  
21 public policy" exists against self-settled trusts. On appeal, the  
22 Trustee argues that California has other important policies that  
23 support the application of California law instead of Hawaii law.

24 Specifically, the Trustee argues on appeal that  
25 section 15306.5 promotes equality between debtors in California.  
26 Under California law, individuals who work for a living and  
27 generate wages are subject to wage garnishment. Creditors may  
28 attach up to 25% of earned wages.

1 But the system of wage garnishment does not affect  
2 individuals who enjoy so much wealth that they need not work  
3 because they are the beneficiaries of spendthrift trusts  
4 established by wealthy parents or other benefactors. The  
5 garnishment procedure does not apply to income from trusts.  
6 Instead, the California legislature enacted Section 15306.5 to  
7 promote equality. Section 15306.5 (in concert with the wage  
8 garnishment laws) insures that debtors who receive income from a  
9 wealthy trust do not receive more protection from their creditors  
10 than people who must work and rely upon wages for income. This  
11 equal treatment seems reasonable and rational and reflects a  
12 sensible strong policy judgment by the California legislature.

13 Applying section 15306.5 is also consistent with those cases  
14 that do not enforce self-settled trusts. For example, Herbert  
15 does not dispute that Sally could not have shielded any of her  
16 assets from her own creditors. Neither Hawaii nor California law  
17 allowed her to do that. Instead, Sally wanted to provide a multi-  
18 million dollar gift to her sons (and grandchildren) and prevent  
19 their creditors from reaching those assets. The California  
20 legislature allows this type of transfer but not 100%. Creditors  
21 can reach up to 25% of those funds just like they can reach 25% of  
22 earned wages. There does not appear to be any reason to treat the  
23 multi-million dollar gift from Sally to Herbert any differently  
24 than the wages earned from an employer.

25 This issue is magnified when thinking about ordinary  
26 Californians who live from paycheck to paycheck. Most of those  
27 paychecks are subject to wage garnishment of up to 25%.  
28 Therefore, section 15306.5 promotes equality among debtors whether

1 they are rich or poor debtors. Treating similarly situated  
2 individuals equally constitutes a "strong" public policy which  
3 satisfies the requirements of section 270(a) of the Restatement.

4 The attachment laws in New York also support this view. As  
5 in California, New York treats wage garnishment and trusts the  
6 same. Under section 5205 of the New York Civil Practice Code, a  
7 creditor can reach wages and trust income to the same extent.  
8 Section 5205 treats these sources of income in the same manner and  
9 section 5205 is enforced even if a trust instrument seeks  
10 application of the laws of another jurisdiction. Section 15306.5  
11 of the California Probate Code should be applied in the same  
12 manner. Section 15306.5 is entitled to the same respect as  
13 section 5205.

14 Also, a failure to apply Section 15306.5 would result in the  
15 inconsistent application of the law. Indeed, it would give  
16 Herbert the protection of the laws of two states in a manner that  
17 neither state contemplated. In effect, Herbert would enjoy the  
18 benefits of a new enhanced hybrid legal system.

19 Hawaii law protects assets in trusts more extensively than  
20 California law. On the other hand, California law contains very  
21 generous exemptions that are considerably better than Hawaiian  
22 exemptions.<sup>5</sup> Each state has created a combination of laws that  
23 protects the assets of debtors according to different criteria.

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24 <sup>5</sup> For example, the maximum homestead exemption in Hawaii is  
25 only \$30,000 but the maximum in California is \$175,000. Compare  
26 Hawaii Revised Statutes section 651-92(a)(1) and California Code  
27 of Civil Procedure section 704.730(a)(3). Likewise, the personal  
28 property exemptions in California appear to be considerably more  
generous than in Hawaii. Compare Hawaii Revised Statutes section  
651-121 with California Code of Civil Procedure sections 704.010-  
704.210.

1 The legislatures of each state have reached different conclusions  
2 regarding which kind of assets should be protected and to what  
3 degree.

4 Herbert wants the best of both worlds. Herbert wants the  
5 benefit of Hawaii's more generous trust laws and California's more  
6 generous exemption laws. But doing so would not be consistent  
7 with the system of laws enacted in either state.

8 California allows more generous exemptions but is more  
9 restrictive in its trust laws. Hawaii has less generous  
10 exemptions but has more protective trust laws. Each legislature  
11 is best suited to look at the larger picture (in each state) and  
12 make appropriate adjustments unique to the needs of both states.  
13 A decision in favor of Herbert would give him the best of both  
14 worlds simply because he moved from Hawaii to California. Herbert  
15 would not have this advantage had he remained in Hawaii.

16 In that sense, Herbert seeks the benefits of his decision to  
17 move to California but not its burdens. Herbert wants the  
18 benefits of moving to California (enhanced exemption law) but not  
19 its burdens (reduced protection for trusts). But that would  
20 elevate Herbert to a status above most citizens of California (who  
21 do not benefit from Hawaii trust law) and most citizens of Hawaii  
22 (who cannot invoke California exemption laws). When contemplating  
23 a choice of law question, the better decision is to apply the law  
24 in such a manner that treats people equally to the greatest extent  
25 possible. This result not only promotes equality but also  
26 personal responsibility.

## 27 **V. CONCLUSION**

28 Accordingly, for the reasons stated, I respectfully dissent.

1 Pursuant to section 270(a) of the Restatement, California law  
2 should apply, not Hawaii law.

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