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

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

6	In re:)	BAP No. OR-09-1134-MkHPa
7	DAVID MICHAEL APPLEBAUM and)	Bk. No. 08-63391
8	LAURA MICHELLE FINLEY,)	
9	Debtors.)	
10	RONALD R. STICKA, Chapter 7)	
11	Trustee,)	
12	Appellant,)	
13	v.)	O P I N I O N
14	DAVID MICHAEL APPLEBAUM and)	
15	LAURA MICHELLE FINLEY,)	
16	Appellees,)	
17	STATE OF CALIFORNIA,)	
18	Intervenor.)	

Submitted Without Oral Argument on September 25, 2009

Filed - December 18, 2009

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Frank R. Alley III, Bankruptcy Judge, Presiding

Before: HOLLOWELL, PAPPAS and MARKELL, Bankruptcy Judges.

1 HOLLOWELL, Bankruptcy Judge:

2
3 Debtors David Applebaum and Laura Finley ("Debtors") filed a
4 petition under chapter 7 of the Bankruptcy Code¹ and claimed
5 exemptions under the California exemption statute, which is
6 applicable only to debtors in bankruptcy. See Cal. Civ. Proc.
7 Code ("C.C.P.") § 703.140. The trustee Ronald R. Sticka
8 ("Trustee") objected to the exemptions and argued that
9 California's bankruptcy-only exemption statute violates the
10 Supremacy Clause and the Uniformity Clause of the United States
11 Constitution. The bankruptcy court overruled the Trustee's
12 objections and concluded that California's exemption scheme is
13 constitutional. We agree that California's bankruptcy-only
14 exemption statute is not preempted by the Bankruptcy Code and
15 does not violate the Uniformity Clause, and AFFIRM the decision
16 of the bankruptcy court.

17 **FACTS**

18 Debtors resided in California between July 2004 and April
19 2007. In April 2007, Debtors moved to Oregon, where they
20 currently reside. When Debtors filed their chapter 7 petition on
21 September 5, 2008, they appropriately claimed exemptions under
22 California law, as provided by the domiciliary provisions in
23 § 522(b)(3)(A). Specifically, on their Schedule C, Debtors
24
25

26 _____
27 ¹ Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 claimed exemptions under C.C.P. § 703.140(b).²

2 The Trustee objected to Debtors' claimed exemptions. He
3 asserted that California's bankruptcy-only exemption statute is
4 unconstitutional, referencing In re Regevic, 389 B.R. 736 (Bankr.
5 D. Ariz. 2008) and In re Lennen, 71 B.R. 80 (Bankr. N.D. Cal.
6 1987). Debtors, for their part, contended that the bankruptcy
7 court should adopt the analysis set forth in In re Morrell, 394
8 B.R. 405 (Bankr. N.D. W. Va. 2008) aff'd sub nom. Sheehan v.
9 Peveich (In re Sheehan), 574 F.3d 248 (4th Cir. 2009), which
10 rejected these constitutional challenges to a similar bankruptcy-
11 only state exemption statute.

12 Under 28 U.S.C. § 2403(b), the bankruptcy court certified
13 the matter to the California Attorney General, but the California
14 Attorney General declined to intervene before the bankruptcy
15 court. The bankruptcy court thereafter issued a memorandum
16 decision overruling the Trustee's objections. Agreeing with
17 Morrell, the bankruptcy court concluded that § 522(b)'s opt-out
18 provision left ample room in the field of exemptions for a state
19 to enact bankruptcy-only exemptions and that California's
20 bankruptcy-only exemptions did not appear to conflict with the
21 overall scheme of the Bankruptcy Code. The bankruptcy court also
22 rejected the Uniformity Clause challenge.

23
24 ² We refer to the exemptions available under C.C.P.
25 § 703.140(b) as California's bankruptcy-only exemptions, because
26 they only are available to debtors "in a case under Title 11 of
27 the United States Code." C.C.P. § 703.140(a). California has
28 another set of exemptions, C.C.P. §§ 704.010, et seq., that is
not restricted to debtors in bankruptcy cases and may be
applicable in bankruptcy if the debtor does not make an election
contemplated by C.C.P. § 703.140(a).

1 The Trustee timely appealed. During the course of this
2 appeal, we issued our own Certification pursuant to 28 U.S.C.
3 § 2403(b) and the California Attorney General accepted the
4 invitation to intervene. Debtors neither filed a brief nor
5 otherwise actively participated in this appeal.

6 **JURISDICTION**

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 § 157(b)(1). We have jurisdiction under 28 U.S.C. § 158.

9 **ISSUE**

10 Is California's bankruptcy-only exemption statute, C.C.P.
11 § 703.140, unconstitutional because it violates either the
12 Supremacy Clause or the Uniformity Clause of the Constitution?

13 **STANDARD OF REVIEW**

14 We review the bankruptcy court's conclusions of law and
15 questions of statutory interpretation de novo. Drummond v. Urban
16 (In re Urban), 375 B.R. 882, 888 (9th Cir. BAP 2007).

17 **DISCUSSION**

18 **I. Bankruptcy Exemptions**

19 Upon filing a bankruptcy petition, all property of the
20 debtor becomes property of the bankruptcy estate. 11 U.S.C.
21 § 541. The debtor may then exempt certain property from the
22 estate and remove that property from distribution to creditors.
23 11 U.S.C. § 522(d). Allowing debtors exemptions enables them to
24 emerge from bankruptcy with adequate property to achieve the
25 fundamental goal of the Bankruptcy Code, a financial "fresh
26 start." See In re Vasko, 6 B.R. 317, 321 (Bankr. N.D. Ohio 1980)
27 (citing legislative history).

28 A fundamental component of an individual debtor's fresh

1 start in bankruptcy is the debtor's ability to set
2 aside certain property as exempt from the claims of
3 creditors. Exemption of property, together with the
4 discharge of claims, lets the debtor maintain an
appropriate standard of living as he or she goes
forward after the bankruptcy case.

5 4 Collier on Bankruptcy, ¶ 522.01 (Alan N. Resnick & Henry J.
6 Sommer, eds., 15th ed. rev. 2009).

7 In exempting property from the estate, a debtor chooses
8 between exempting the property protected by state or local law,
9 or, exempting the property specified in § 522(d). 11 U.S.C.
10 § 522(b)(1). A debtor cannot pick or choose among these options:
11 he or she must elect the exemptions authorized by state law, or
12 elect those afforded in § 522(d). However, a state may "opt out"
13 of the federal exemption scheme and deny the debtor the option of
14 taking the exemptions under § 522(d). 11 U.S.C. § 522(b)(2).
15 Thirty-four states, including California, have opted out of the
16 bankruptcy exemptions provided under § 522(d). See C.C.P.
17 § 703.140; 4 Collier on Bankruptcy, ¶ 522.01[1]. Thus, a
18 California debtor may claim only those exemptions provided by
19 California law. Id.

20 Like several other states, California has two exemption
21 statutes: one provides exemptions that apply to judgment debtors
22 generally and the other applies only to debtors in bankruptcy
23 proceedings. California's bankruptcy-only exemptions are similar
24 but not identical to the federal bankruptcy exemptions. C.C.P.
25 § 703.140(b); 11 U.S.C. 522(d). Among other things, California's
26 bankruptcy-only exemptions include a "wildcard" exemption that is
27 nearly double the wildcard provided in the Bankruptcy Code's
28

1 exemptions. Compare C.C.P. § 703.140(b)(5) with 11 U.S.C.
2 § 522(d)(5).

3 The Trustee contends, and the dissent agrees, that a state
4 exemption statute that applies only in bankruptcy cases conflicts
5 with the Bankruptcy Code and is, therefore, rendered invalid by
6 the Supremacy Clause. Furthermore, the Trustee argues the
7 separate scheme of exemptions applicable only to debtors in
8 bankruptcy proceedings (and not generally available to all state
9 residents) violates the Uniformity Clause.

10 **II. The Supremacy Clause and Preemption Doctrine**

11 The Supremacy Clause provides that the "Constitution and the
12 Laws of the United States which shall be made in Pursuance
13 thereof . . . shall be the supreme Law of the Land . . . any
14 Thing in the Constitution or Laws of any State to the Contrary
15 notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy
16 Clause and the doctrine of preemption, which implements it,
17 operate to invalidate state statutes to the extent they are
18 inconsistent with, or contrary to, the purposes or objectives of
19 federal law. Perez v. Campbell, 402 U.S. 637, 652 (1971) ("[A]ny
20 state legislation which frustrates the full effectiveness of
21 federal law is rendered invalid by the Supremacy Clause."). A
22 state law may be preempted when federal legislation expressly
23 declares its intent to do so; when Congress has legislated
24 comprehensively so as to "occupy the field" of regulation leaving
25 no room for states to supplement federal law; or, when the state
26 law actually conflicts with federal law. La. Pub. Serv. Comm'n
27 v. F.C.C., 476 U.S. 355, 368-69 (1986).

1 Congress has expressly authorized states to create
2 bankruptcy exemptions when it empowered states to "opt out" of
3 the federal exemption scheme under § 522(b)(1). 11 U.S.C.
4 § 522(b)(1). Even so, "[a]bsent explicit preemptive language,
5 Congress' intent to supercede state law altogether may be found
6 from a 'scheme of federal regulation so pervasive as to make
7 reasonable the inference that Congress left no room to supplement
8 it.'" Pac. Gas & Elec. Co. v. State Energy Res. Conservation &
9 Dev. Comm'n, 461 U.S. 190, 204 (1983) (quoting Fid. Fed. Sav. &
10 Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

11 While federal bankruptcy law is pervasive and there is a
12 strong federal interest in bankruptcy, particularly in light of
13 its enumeration in the Constitution as an area where Congress has
14 been granted plenary power to legislate, federal bankruptcy law
15 is not so pervasive, nor is the federal interest so dominant, as
16 to wholly preclude state legislation in the area.

17 Indeed, there are many instances in the Bankruptcy Code
18 where Congress either has deferred to state law or has expressly
19 and affirmatively incorporated state law into the bankruptcy
20 scheme. See Sherwood Partners Inc. v. Lycos, Inc., 394 F.3d
21 1198, 1201 (9th Cir. 2005) (listing examples). Notably, states
22 had their own insolvency and bankruptcy laws in the 19th Century,
23 when Congress elected not to enact a federal bankruptcy statute.
24 See generally Sturges v. Crowninshield, 17 U.S. 122, 195-97
25 (1819) (holding that states were not precluded by the
26 Constitution from passing bankruptcy and insolvency laws so long
27 as Congress had not exercised its power to enact uniform
28 bankruptcy laws). States, therefore, have retained the power to

1 enact bankruptcy laws so long as they do not conflict with
2 federal bankruptcy legislation. Rhodes v. Stewart, 705 F.2d 159,
3 163 (6th Cir. 1983); Matter of Sullivan, 680 F.2d 1131, 1137
4 (7th Cir. 1982). As a result, Congress has not occupied the
5 field of bankruptcy regulation to the point of preempting state
6 exemption statutes.

7 Therefore, the California bankruptcy-only exemption statute
8 must actually conflict with the Bankruptcy Code in order to
9 violate the Supremacy Clause. In order for a state law to be in
10 actual conflict with federal law, it must frustrate the purpose
11 of Congress: "The state law must in its effect, obstruct the
12 basic objectives of the federal law." In re Vasko, 6 B.R. at
13 323. "Deciding whether a state statute is in conflict with a
14 federal statute and hence invalid under the Supremacy Clause is
15 essentially a two-step process of first ascertaining the
16 construction of the two statutes and then determining the
17 constitutional question whether they are in conflict." Perez,
18 402 U.S. at 644.

19 Because § 522 specifically permits states to opt out of the
20 federal exemption scheme and implement their own exemptions,
21 several courts have concluded that no conflict exists when state
22 exemption statutes differ from § 522(d) or other provisions of
23 the federal bankruptcy laws. See, e.g., Storer v. French (In re
24 Storer), 58 F.3d 1125, 1128-29 (6th Cir. 1995) (states are
25 empowered to create whatever exemptions they elect even if they
26 are less inclusive or more restrictive than those in § 522(d));
27 Sheehan v. Peveich, 574 F.3d at 252 (§ 522(b)(1) is an express
28 delegation to give the states the unrestricted authority to

1 create exemptions); In re Brown, 2007 WL 2120380 *11 (Bankr.
2 N.D.N.Y. July 23, 2007) (states that have opted out are not
3 required to provide exemptions comparable, concomitant, or
4 corresponding to the federal exemptions); see also Granger v.
5 Watson (In re Granger), 754 F.2d 1490, 1492 (9th Cir. 1985)
6 (state that has opted out has considerable freedom in creating
7 exemptions); Talmadge v. Duck (In re Talmadge), 832 F.2d 1120,
8 1126 (9th Cir. 1987) (“[S]tates are free to both create and limit
9 exemptions for their residents without violating the Supremacy
10 Clause.”); McManus v. Avco Fin. Serv. of La. (Matter of
11 McManus), 681 F.2d 353, 355 (5th Cir. 1982) (§ 522(b) expressly
12 grants the states broad discretion and open-ended opportunity to
13 determine what property may be exempt.) Thus:

14 to say that state exemption provisions providing
15 [different exemptions] to debtors than the federal
16 exemptions of section 522(d) are in “conflict” with
17 either the language of the Code or expressions of
18 Congressional intent underlying it is simply
19 inaccurate. If Congress has the power to permit states
20 to set their own exemption levels, the [state
21 exemptions] are constitutional.

22 Matter of Sullivan, 680 F.2d at 1137.

23 The Trustee, in this case, does not challenge the state’s
24 authority to adopt its own exemptions, but challenges the
25 separate bankruptcy-only exemption statute. The constitutional
26 analysis, however, is the same. Section 522(b) “allows the
27 States to define what property a debtor may exempt from the
28 bankruptcy estate that will be distributed among his creditors.”
Owen v. Owen, 500 U.S. 305, 306 (1991). This delegation to the
states is broad:

1 If a state opts out [of the § 522(d) federal
2 exemptions], then its debtors are limited to the
3 exemptions provided by state law. Nothing in
4 subsection [522](b) (or elsewhere in the Code) limits a
State's power to restrict the scope of its exemptions;
indeed, it could theoretically accord no exemption at
all.

5 Id. at 308.

6 Section 522(b)(3)(A) defines exempt property as "any
7 property that is exempt under federal law, . . . or State or
8 local law that is applicable" at the petition date in the place
9 the debtor is domiciled. 11 U.S.C. § 522(b)(3)(A) (emphasis
10 added). Congress did not limit the exempt property to a state's
11 "applicable non-bankruptcy law" (as it did in § 522(b)(3)(B)
12 regarding property held in tenancy by the entirety.) See
13 Russello v. United States, 464 U.S. 16, 23 (1983) (where Congress
14 includes particular language in one section of a statute but
15 omits it from another, it is presumed that Congress acted
16 intentionally and purposely). Therefore, there is simply no
17 requirement that the state or local law referenced in
18 § 522(b)(3)(A) be the same as the law that applies to non-
19 bankruptcy debtors. See Sheehan v. Peveich, 574 F.3d at 252
20 (Congress did not restrict the states' authority to adopt
21 exemptions with a requirement that exemptions apply equally to
22 bankruptcy and non-bankruptcy cases). As a result, a separate
23 bankruptcy-only exemption scheme is not in and of itself
24 preempted by the Supremacy Clause.³

26 ³ The dissent argues that because, in this case, the
27 application of the California bankruptcy-only exemption statute
28 results in creditors receiving less than under the federal
exemptions, that California's bankruptcy-only statute conflicts
with federal bankruptcy policy. But, arguably any separate state
(continued...)

1 The Fifth Circuit has held that the language of § 522(b)
2 "implicitly indicates a state may exempt the same property in
3 522(d), more property than that included in 522(d) or less
4 property than that. In fact states may also prescribe their own
5 requirements for exemptions which may either circumscribe or
6 enlarge the list of exempt property." Matter of McManus, 681
7 F.2d at 355-56.

8 We note that Congress knows how to remedy what it perceives
9 to be problems with state exemption laws that differ from the
10 Bankruptcy Code. In 2005, Congress changed the domiciliary
11 requirements for exemption purposes in order to curb the so-
12 called "mansion loophole," in which a debtor would move to a
13 state with a more generous homestead exemption statute prior to
14 filing bankruptcy. See, e.g., 11 U.S.C. § 522(b)(3)(A); In re
15 Urban, 375 B.R. 882, 889 (9th Cir. BAP 2007). Thus, if Congress
16 perceives problems with a bankruptcy-only exemption statute that
17 provides different exemptions than the federal exemptions, it can
18 act to curtail the use of such exemptions.

19 One of the primary purposes of bankruptcy is to "relieve the
20 honest debtor from the weight of oppressive indebtedness and
21 permit him to start afresh free from the obligations and
22 responsibilities consequent upon business misfortunes." Local
23 Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Marrama v. Citizens
24 Bank of Mass., 549 U.S. 365, 367 (2007) (principal purpose of
25

26
27 ³(...continued)
28 exemption statute whether "general" or "bankruptcy-only" may
conflict with either the bankruptcy policy of a fresh start, or
of a ratable distribution to creditors. That is the inevitable
result of the "opt out" provision of § 522(b).

1 bankruptcy is to grant a fresh start to the "honest but
2 unfortunate" debtor). The fresh start policy is implemented by
3 allowing the individual debtor to exercise exemptions, which are
4 intended to provide the debtor with an appropriate standard of
5 living post-bankruptcy. See In re Brown, 2007 WL 2120380 at *4-6
6 (discussing the evolution of the concept of the fresh start
7 through legislative history). In providing for a fresh start,
8 the Bankruptcy Code provisions convert the debtor's estate into
9 cash for distribution to creditors. Stellwagen v. Clum, 245 U.S.
10 605, 617 (1918) (main purpose of bankruptcy is to give a fresh
11 start free from certain debts after property is administered and
12 distributed to creditors).

13 Similarly, the purpose of the California exemption statutes
14 is to "save debtors and their families from want by reason of
15 misfortune or improvidence." Little v. Reaves (In re Reaves),
16 285 F.3d 1152, 1156 (9th Cir. 2002) citing Turner v. Marshack (In
17 re Turner), 186 B.R. 108, 113 (9th Cir. BAP 1995). The
18 California bankruptcy-only exemption statute allows a bankrupt
19 debtor the opportunity to claim exemptions in order to preserve
20 his or her fresh start. Id. at 1157.

21 Several courts have examined the legislative history and
22 historical context of C.C.P. § 703.140 and its companion statute,
23 C.C.P. § 703.130, and have concluded that it was intended to
24 prevent joint debtors from "stacking" exemptions, by having one
25 debtor choose the federal bankruptcy exemptions under § 522(d)
26 and having the other choose generally-applicable state
27 exemptions. Baldwin v. Marshack (In re Baldwin), 70 B.R. 612,
28

1 615 (9th Cir. BAP 1987); In re Regevic, 389 B.R. at 738-39; In
2 re Lennen, 71 B.R. at 81-82.

3 Thus, the California exemption statutes reflect the state's
4 desire to allow a debtor to retain only certain property deemed
5 necessary for a fresh start, while leaving the remaining property
6 in the estate for distribution to creditors. California's
7 bankruptcy-only exemptions are very similar to the federal
8 bankruptcy exemptions, providing California bankruptcy debtors
9 the option of selecting those exemptions without allowing a
10 stacking of federal and state exemptions. Congress effectively
11 eliminated the practice of stacking in its 1984 amendments to the
12 Bankruptcy Code. See In re Regevic, 389 B.R. at 739.

13 Nevertheless, even if one of the original legislative purposes
14 (anti-stacking) for the California bankruptcy-only exemptions has
15 been otherwise accommodated by a change in the Bankruptcy Code,
16 the underlying purpose of the exemption statute to provide a
17 bankruptcy debtor a fresh start remains.

18 There is no conflict between the purpose and goals of the
19 Bankruptcy Code and the California bankruptcy-only exemption
20 statute. Simply because the exemptions differ from the federal
21 exemptions (or from its non-bankruptcy counterpart), does not
22 mean that such differences create a conflict that impedes the
23 accomplishment and execution of the Bankruptcy Code. Therefore,
24 for the reasons stated above, the California bankruptcy-only
25 exemption statute does not violate the Supremacy Clause.

1 of the differences in law between the states. Ry. Executives'
2 Ass'n v. Gibbons, 455 U.S. at 473. As the Supreme Court
3 explained:

4 Notwithstanding this requirement as to uniformity the
5 Bankruptcy acts of Congress may recognize the laws of
6 the state in certain particulars, although such
7 recognition may lead to different results in different
8 states. For example, the Bankruptcy Act recognizes and
9 enforces the laws of the states affecting dower,
10 exemptions, the validity of mortgages, priorities of
11 payment and the like.

12 Stellwagen v. Clum, 245 U.S. at 613.

13 The concept of uniformity requires that federal bankruptcy
14 laws apply equally in form (but not necessarily in effect) to all
15 creditors and debtors, or to "defined classes" of debtors and
16 creditors. See Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S.
17 at 473; Blanchette v. Conn. Gen. Ins. Corps. (Reg'l Rail
18 Reorganization Act Cases), 419 U.S. 102, 159 (1974). For
19 example, in In re Urban, this Panel concluded that the
20 domiciliary requirements of § 522 do not violate the Uniformity
21 Clause, even though they can lead to disparate effects among
22 debtors residing in the same state, can lead to disparate effects
23 between states, and can lead to disparate effects between the
24 exempt property a debtor can keep inside bankruptcy versus what
25 that debtor can keep outside of bankruptcy. 375 B.R. at 891.

26 The California bankruptcy-only exemption statute applies
27 equally to all similarly situated debtors. Even though
28 California residents in bankruptcy proceedings are allowed
29 different exemptions from those not in bankruptcy, the
30 bankruptcy-only statute is a permissible grant of the state's
31 power to enact bankruptcy laws. In re Shumaker 124 B.R. at 826;

1 In re Vasko, 6 B.R. at 320. Accordingly, the opt-out provision
2 and corresponding California bankruptcy-only exemption statute
3 apply uniformly to all debtors and all creditors in bankruptcy,
4 and therefore, are sufficient to pass muster under the Uniformity
5 Clause.

6 The Trustee argues that under California's bankruptcy-only
7 exemption scheme, creditors might not receive the same assets
8 that otherwise might be available to them under California's
9 generally applicable exemption statute, or, than those allowed by
10 federal law. However, that is exactly the result in a non-opt-
11 out state when a debtor chooses the federal exemption scheme. In
12 such instances, it may be that the bankruptcy trustee will not
13 recover the same assets of a debtor for distribution that he or
14 she would under state law.⁵

15 That the California bankruptcy-only exemption statute
16 differs from the California general exemption statute does not
17 create a sufficient conflict with federal law to violate the
18 Uniformity Clause.⁶ As discussed above, Congress, by adopting
19

20 ⁵ See In re Granger, 754 F.2d 1490 (9th Cir. 1985) and In
21 re Talmadge, 832 F.2d 1120 (9th Cir. 1987) which held that a
22 state that opts out of the federal exemptions of § 522(d) is not
23 required to provide separate exemptions for married debtors.
24 Thus, this is an instance where a bankruptcy trustee and
25 creditors benefit from state exemption law because the federal
26 exemptions apply separately with respect to each debtor in a
27 joint case. 11 U.S.C. § 522(m).

26 ⁶ To the extent these facts may support an equal protection
27 argument, we decline to consider it, as it was not raised by the
28 parties in the bankruptcy court nor in this appeal. We note,
however, that other courts have addressed the issue with respect
to bankruptcy-only exemptions and have found there to be an

(continued...)

1 the opt-out provision in § 522(b)(1), expressly gave states the
2 authority to exercise their bankruptcy powers to enact exemption
3 schemes that differed from federal law.⁷ As a result, the
4 California bankruptcy-only exemption statute does not violate the
5 Supremacy Clause.

6 **CONCLUSION**

7 C.C.P. § 703.140 does not interfere with the purposes and
8 objectives of the Bankruptcy Code and, therefore, it is not
9 preempted. Furthermore, C.C.P. § 703.140 applies equally to all
10 similarly situated debtors and creditors in bankruptcy and does
11 not run afoul of the Uniformity Clause. Accordingly, the
12 bankruptcy court's order overruling the Trustee's objections to
13 the Debtor's claim of exemptions is AFFIRMED.

14
15 MARKELL, Bankruptcy Judge, dissenting:

16
17 I respectfully dissent. Section 703.140 of California's
18 Code of Civil Procedure is an example of a state-enacted
19 bankruptcy-only exemption statute that is fundamentally
20 inconsistent with the Bankruptcy Code's distribution scheme.
21 Contrary to the majority's holding, this actual conflict should

22
23 ⁶(...continued)
24 adequate rational basis for the discrimination. See, e.g., In re
Shumaker, 124 B.R. 820 (Bankr. D. Mont. 1991).

25
26 ⁷ There is little legislative history on the opt-out
27 provision of § 522(b)(1). See Matter of Sullivan, 680 F.2d at
28 1135-36; In re Brown, 2007 WL 2120380 at *5. But Congress did
not define the scope of the state power or add limiting language
to the statute to restrict the power of the state to develop and
adopt its own exemption statutes that differed from the federal
scheme. See Owen v. Owen, 500 U.S. at 308.

1 lead to preemption of C.C.P. § 703.140, and reversal of the
2 bankruptcy court's opinion.

3 One of the traditional goals of federal bankruptcy law is
4 ratable distribution to creditors. Howard Delivery Serv., Inc.
5 v. Zurich Am. Ins. Co., 547 U.S. 651, 667 (2006); Young v.
6 Higbee Co., 324 U.S. 204, 210 (1945). To achieve this goal, the
7 Bankruptcy Code creates a comprehensive and intricate scheme
8 designed to equitably distribute the debtor's non-exempt assets.
9 Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1203-04
10 (9th Cir. 2005). When Congress acts in this area, pursuant to
11 its delegated power under Clause 4 of Section 8 of Article I of
12 the federal Constitution, it is well-settled that federal law has
13 primacy over contrary state law, especially in the area of
14 bankruptcy distribution. See Am. Sur. Co. Of N.Y. v. Sampsell,
15 327 U.S. 269, 272 (1946) ("federal bankruptcy law, not state law,
16 governs the distribution of a bankrupt's assets to his
17 creditors"); Elliot v. Bumb, 356 F.2d 749, 755 (9th Cir. 1966)
18 ("state creation of priorities in various classes of creditors
19 . . . would tend to thwart or obstruct the scheme of federal
20 bankruptcy").

21 An essential component of the federal bankruptcy
22 distribution scheme is the bankruptcy trustee's authority to
23 collect the debtor's nonexempt assets for distribution to
24 creditors holding allowed unsecured claims. See Kanter v.
25 Moneymaker (In re Kanter), 505 F.2d 228, 231 (9th Cir. 1974).
26 State laws that attempt to withhold or shield assets that
27 otherwise might be available to the trustee for distribution
28 often interfere with the federal bankruptcy distribution scheme

1 and, therefore, violate the Supremacy Clause. See e.g. Sherwood
2 Partners, 394 F.3d at 1204-06 (holding state statute preempted
3 when the statute authorized the assignee under a general
4 assignment for the benefit of creditors to bring an action to
5 recover a preference, because the assignee's preference recovery
6 potentially could diminish the assets available for collection by
7 the bankruptcy trustee); In re Kanter, 505 F.2d at 230-31
8 (holding state statute preempted where the statute selectively
9 "exempted" from bankruptcy estates, and only bankruptcy estates,
10 personal injury recoveries); Bumb, 356 F.2d 754-55 (holding
11 state statute preempted where the statute recognized a "trust" in
12 commingled funds held by debtors, because the trust effectively
13 would create an impermissible preference in favor of the
14 "beneficiary" creditor over the other creditors of the bankruptcy
15 estate).

16 To be sure, Congress has left room in the federal bankruptcy
17 distribution scheme for states to frame their own exemptions,
18 applicable to all their citizens, and has explicitly made them
19 applicable in bankruptcy. See 11 U.S.C. § 522(b)(3). These
20 state-enacted general exemption statutes are a long-standing part
21 of our federal bankruptcy system. See Smalley v. Laugenour, 196
22 U.S. 93, 97 (1905). However, the issue presented in this case is
23 whether Congress extended this accepted authority to include the
24 additional authority to frame bankruptcy-only exemptions; that
25 is, state exemptions that apply if, and only if, the debtor is a
26 debtor under the protection of the federal bankruptcy laws.

27 As a preliminary matter, the function and effect of
28 generally-applicable exemptions is markedly different than that

1 of bankruptcy-specific exemptions. Whereas general exemptions
2 protect assets from levy and sale by all judgment creditors,
3 bankruptcy-specific exemptions such as C.C.P. § 703.140(b) only
4 protect assets from collection by the bankruptcy trustee.¹

5 The majority decision holds there is no "conflict between
6 the purpose and goals of the Code" and the distribution-altering
7 bankruptcy-only exemptions at issue here. I disagree. Enactment
8 of a statute that affects only debtors in bankruptcy, and which
9 results in a distribution to that debtor's creditors unknown
10 under either the Bankruptcy Code or the law applicable to other
11 Californians, cannot help but create an actual conflict of the
12 type Ninth Circuit precedent condemns.

13 The California statute at issue here not only conflicts with
14 the present scheme in § 522(b), and thus is preempted, but it
15 would have conflicted with the relevant provisions of the 1898
16 Act. Under the Bankruptcy Act of 1898, there were no federal
17 exemptions whatsoever; rather, Congress entirely deferred to the
18 states to frame exemptions for their residents. See Smalley, 196
19

20 ¹ In fact, one could argue that state-enacted bankruptcy-
21 specific exemptions are not even covered in the definition of
22 exemption that Congress has made applicable in bankruptcy. The
23 term "exemption" is not defined in the Bankruptcy Code, but the
24 courts traditionally have defined the term in a manner that would
25 not cover state bankruptcy-specific exemptions. See Smalley, 196
26 U.S. at 97 ("The rights of a bankrupt to property as exempt are
27 those given him by the state statutes, and if such exempt
28 property is not subject to levy and sale under those statutes,
then it cannot be made to respond under the act of
Congress.") (emphasis added); In re Kanter, 505 F.2d at 230
(holding that a state exemption statute that restricts the
trustee in bankruptcy, and only the trustee in bankruptcy, from
recovering certain assets is not the type of exemption that
Congress recognizes in bankruptcy).

1 U.S. at 97. As a result, the exemptions available to bankrupts
2 under the Bankruptcy Act were only those that other similar
3 debtors had under applicable nonbankruptcy law.

4 But even under the Bankruptcy Act, there were limits to the
5 states' exemption-framing powers. This was recognized in In re
6 Kanter, in which the Ninth Circuit held that federal bankruptcy
7 law preempted another California exemption statute effective only
8 against a trustee in bankruptcy. In re Kanter, 505 F.2d at
9 230-31. In re Kanter concluded that the California exemption
10 statute violated the Supremacy Clause because: "it would operate
11 to deny to the trustee assets which could ordinarily be reached
12 in satisfying the claims of general creditors. [It] revives the
13 race to the courthouse by creditors seeking to avoid the threat
14 of having both their claims discharged and the assets necessary
15 to satisfy them denied to the trustee."² Id. at 231. In re
16 Kanter further noted that the state statute interfered with the
17 trustee's federal statutory authority to exercise the same rights
18 and powers as a judgment creditor would have under state law.³

19 In re Kanter should be binding precedent on this panel, yet
20 the majority does not even mention it. Instead, the majority
21 asserts that in 1978, after In re Kanter was decided, Congress
22 intended to empower the states to enact bankruptcy-specific
23

24 ² Similarly, California's current bankruptcy-specific
25 exemptions operate to deny to the trustee Sticka over \$3,400 in
26 assets that can be reached by creditors outside of bankruptcy.

27 ³ These powers are commonly referred to as the trustee's
28 "strong-arm powers," and they facilitate the trustee's collection
of estate assets for eventual distribution to creditors. The
current version of the trustee's strong-arm powers is codified in
§ 544 of the Bankruptcy Code.

1 exemptions such as the one at issue here by its use of the phrase
2 "State or local law" in § 522(b)(3)(A). According to the
3 majority, Congress would have used instead the phrase "applicable
4 non-bankruptcy law" in § 522(b)(3)(A) if it did not want states
5 to frame bankruptcy-specific exemptions. The majority supports
6 this assertion by pointing out that Congress used the phrase
7 "applicable non-bankruptcy law" in § 522(b)(3)(B), and thus we
8 should give different locutions different interpretations. The
9 argument then states that the only way to give these distinctive
10 phrases distinctive meanings is if Congress meant to give the
11 states the power to frame bankruptcy-only exemptions.

12 There is, however, a simpler, less-strained explanation for
13 the use of the two different phrases. The term "applicable non-
14 bankruptcy law" is a generic term Congress used in several places
15 in the Bankruptcy Code to refer collectively to both federal non-
16 bankruptcy law and state law. See Patterson v. Shumate, 504 U.S.
17 753, 758 & n.2 (1992). In describing property that may be
18 claimed as exempt in § 522(b)(3)(A), the statute starts by
19 referencing "property that is exempt under Federal law, [which
20 includes both federal bankruptcy and federal non-bankruptcy law]
21 other than subsection (d) of this section." (emphasis added.)
22 Having already included federal non-bankruptcy law, it would have
23 been redundant drafting to use the generic term "applicable non-
24 bankruptcy law."

25 This interpretation is supported by Congress' general intent
26 with respect to the addition of federal exemptions in 1978.
27 Section 522's legislative history leaves no room for doubt that
28 Congress intended to retain states' existing exemption-framing

1 rights, rather than expand them. Like many parts of the
2 Bankruptcy Code, Congress extensively debated the proper
3 treatment of exemptions.

4 In this debate, there were four major players, each with its
5 own exemption scheme proposal.⁴ The Commission on Bankruptcy
6 Laws of the United States, which was created by act of Congress
7 in 1970, advanced the first proposal in 1973. Based on its
8 assessment of existing exemption law, the Commission recommended
9 that Congress enact exclusive federal exemptions. H.R. 31, 94th
10 Cong. § 4-503 (1975), reprinted in, 7 A. Resnick & E. Wypyski,
11 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY (1979) (hereinafter
12 "REFORM ACT HISTORY"), at pp. 146-51. The second participant was
13 the National Conference of Bankruptcy Judges ("NCBJ"). The
14 NCBJ's exemption proposal would have enabled debtors to choose
15 between uniform federal exemptions or, in the alternative, their
16 state's exemptions. H.R. 32, 94th Cong. § 4-503 (1975),
17 reprinted in, 7 REFORM ACT HISTORY, at pp. 146-51. The third body
18 to address the treatment of exemptions was the House of
19 Representatives. Several versions of exemption treatment were
20 introduced, but each version adopted an exemption approach
21 similar to that proposed by the NCBJ; like the NCBJ bill, the
22 House bills proposed to permit debtors to choose between a set of
23 federal, bankruptcy-specific exemptions and their state's

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26 ⁴ For excellent legislative histories of the events leading
27 up to the passage of § 522, see In re Neiheisel, 32 B.R. 146,
28 148-55 (Bankr. D. Utah 1983); Note, The Preemption of
Bankruptcy-Only Exemptions, 6 Cardozo L.Rev. 583, 594-597 (Spring
1985).

1 exemptions. See H.R. Rep. No. 95-595, at 126 (1977), reprinted
2 in, 13 REFORM ACT HISTORY, at p. 126.

3 Finally, in 1977, the final player, the Senate, drafted its
4 alternative to the House bill. This bill dismissed entirely the
5 idea of a slate of federal exemptions. S. 2266, 95th Cong.
6 § 522(b)(1)(A) (1977), reprinted in, 14 REFORM ACT HISTORY, at
7 p. 97. Under the Senate alternative, "[c]urrent law is retained
8 in the area of exempt property, which is property that the debtor
9 may retain after bankruptcy for a fresh start. For this purpose,
10 current law adopts the exemption law of the State in which the
11 debtor is resident." S.Rep. No. 95-989, at 6 (1978) (emphasis
12 added).

13 The House and Senate reconciled their differences by way of
14 the opt-out clause when they enacted § 522: "Section 522 of the
15 House amendment represents a compromise on the issue of
16 exemptions between the position taken in the House bill, and that
17 taken in the Senate amendment. . . . The States may, by passing a
18 law, determine whether the Federal exemptions will apply as an
19 alternative to State exemptions in bankruptcy cases." 124 Cong.
20 Rec. 32,398 (1978) (remarks of Rep. Edwards). Three other
21 legislative comments were made regarding the compromise at the
22 time of enactment: (1) "The code provides uniform Federal
23 exemptions which may be selected by the debtor as an alternative
24 to exemptions under State law unless State law forbids that
25 choice." 124 Cong. Rec. 32,418 (1978) (remarks of Rep. Butler);
26 (2) "In the area of exemptions, it was agreed that a Federal
27 exemption standard will be codified but that the States could at
28 any time reject them in which case the State exemption laws would

1 continue to prevail." 124 Cong. Rec. 33,990 (1978) (remarks of
2 Sen. DeConcini); and (3) "In the area of exemptions, we have won
3 an important victory for the rights of States to determine
4 exemptions for the debtors of their States, [sic] Reduced Federal
5 exemptions will be provided by the law but States by legislation
6 may elect not to have them apply [sic] their debtors." 124 Cong.
7 Rec. 33,992 (1978) (remarks of Sen. Wallop).

8 These comments reveal that Congress viewed the opt-out
9 clause merely as a means to allow the states to choose whether
10 their residents would have access to the federal slate of
11 bankruptcy exemptions enumerated in § 522(d). Further, the
12 notion that any player harbored an undisclosed intent to expand
13 state's exemption powers, and somehow succeeded in having it
14 included in the legislation as enacted, is wholly inconsistent
15 with the notion that § 522 constitutes a compromise of the
16 respective positions originally taken by the House and Senate.
17 Most importantly, the legislative history shows that none of the
18 key players proposed or even considered expanding states'
19 exemption-making powers to include an additional power to
20 legislate exemptions only applicable in bankruptcy, other than to
21 allow states to adopt (or not) the bankruptcy-only exemptions
22 offered by Congress in § 522(d).

23 The only conclusion that one can draw from this examination
24 is that Congress never intended § 522(b) to authorize states to
25 enact bankruptcy-only exemptions.

26 In closing, even if the majority were correct in its
27 interpretation, I question the wisdom of relegating the validity
28 of state-enacted bankruptcy-only exemptions to a case-by-case

1 analysis, without enunciating any test or guiding principles.
2 Bankruptcy is a complex area and such an approach likely will
3 leave states (and debtors and creditors in those states) with
4 little concrete guidance in framing permissible exemption
5 statutes. Further, that approach encourages a patchwork-quilt
6 methodology to framing bankruptcy-specific exemptions; it is not
7 difficult to imagine that the bankruptcy bench and bar, and the
8 public we serve, ultimately will have to contend with hundreds of
9 different exemption schemes, one slate from each state of
10 generally-applicable exemptions, another slate from each state of
11 bankruptcy-specific exemptions, and so on.

12 For the reasons set forth above, I dissent. I would reverse
13 the bankruptcy court and strike down C.C.P. § 703.140 as
14 preempted under the Supremacy Clause.⁵

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⁵ I have no problem with Part III of the majority's opinion dealing with the trustee's Uniformity Clause challenge.