Jill A Michaux, #11128
Neis & Michaux, P.A.
825 Bank of America Tower
534 S Kansas Ave Ste 825
Topeka KS 66603-3446
(785) 354-1471
(785) 354-1170 facsimile
jill.michaux@neismichaux.com
Attorney for *Amicus Curiae*
National Association of
Consumer Bankruptcy Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re: LAURIE LOUISE HUDSON Debtor.	No. 12-1297
LINDA S. PARKS, Trustee, Appellant, v. LAURIE LOUISE HUDSON, Debtor / Appellee, and DEREK SCHMIDT, Kansas Attorney General, Intervenor-Appellee.	Bankruptcy Case No. 11-12855 Chapter 7

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

COMES NOW the National Association of Consumer Bankruptcy Attorneys

(NACBA) by its attorney, Jill A. Michaux of Neis & Michaux, P.A., and moves the Court for

an order granting leave for the Amicus to file its brief in support of Debtor Laurie Louise Hudson and seeking affirmance of the Bankruptcy Court's decision.

In support thereof, NACBA states:

1. Advocating in support of Debtor Laurie Louise Hudson is particularly important in this case because the Debtor is not participating in this appeal and has not filed a brief, nor did Debtor file a brief in the Bankruptcy Court. Without the involvement of NACBA as Amicus, the voice of the Debtor would be silent in this proceeding.

2. NACBA is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide including attorneys in Kansas. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

3. The NACBA membership has a vital interest in the outcome of this case. The Bankruptcy Code permits individual debtors to exempt certain property from the bankruptcy estate pursuant to state law, thereby putting that property beyond the reach of the trustee and creditors. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start. The trustee has challenged the constitutionality of Kansas' exemption for earned income tax credit in bankruptcy cases. The trustee's argument strikes at the heart of debtor's fresh start by seeking to deny her the benefit of an exemption properly enacted by the State of Kansas and made applicable to debtors by Congress through section 522(b)(3)(A).

4. The proposed brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys with the unpublished decision cited therein on page 24, *In re Knapper*, No. 11-12942 (Bankr. W.D. Tex. June 13, 2012), is attached to this motion.

5. NACBA informs the Court that Trustee Linda Parks does not give her consent to the filing of the brief *amicus curiae*.

WHEREFORE, the National Association of Consumer Bankruptcy Attorneys (NACBA) prays for an order granting the association to file its brief *amicus curiae* in support of Debtor Laurie Louise Hudson and seeking affirmance of the Bankruptcy Court's decision.

Respectfully submitted,

s/Jill A Michaux

_____

Jill A Michaux, # 11128
Neis & Michaux, P.A.
825 Bank of America Tower
534 S Kansas Ave Ste 825
Topeka KS 66603-3446
(785) 354-1471
(785) 354-1170 facsimile
jill.michaux@neismichaux.com
Attorney for *Amicus Curiae*
National Association of
Consumer Bankruptcy Attorneys

Dated: December 12, 2012

CERTIFICATE OF MAILING

I hereby certify that on this December 12, 2012, a true and correct copy of the Motion for Leave to File Brief Amicus Curiae and Proposed Brief were electronically filed with the court using the CM/ECF system, which sent notification to all parties of interest and attorneys of record participating in the CM/ECF system.

s/Jill A Michaux

_____

Jill A Michaux
Attorney for *Amicus Curiae*

No. 12-1297

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re LAURIE LOUISE HUDSON
Debtor.

LINDA S. PARKS
Trustee-Appellant
— v. —
LAURIE LOUISE HUDSON
Debtor-Appellee
and
DEREK SCHMIDT,
Kansas Attorney General, Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS BY:
s/Jill A. Michaux

Jill A. Michaux #11128
Neis & Michaux, P.A.
825 Bank of America Tower
534 S. Kansas Ave., Ste. 825
Topeka, KS 66603-3446
785-354-1471
785-354-1170 facsimile
jill.michaux@neismichaux.com

December 12, 2012

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Linda S. Parks v. Laurie Louise Hudson – No. 12-1297

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

/s/ Jill A. Michaux
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE,* BY ITS ATTORNEY JILL A. MICHAUX, ESQ.
Neis & Michaux. P.A.
825 Bank of America Tower
534 S. Kansas Ave. Ste. 825
Topeka KS 66603-3446
(785)354-1471
Dated: December 12, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the outcome of this case. The Bankruptcy Code permits individual debtors to exempt certain property from the bankruptcy estate pursuant to state law, thereby putting that property beyond the reach of the trustee and creditors. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start. The trustee has challenged the constitutionality of Kansas' exemption for earned income tax credit in bankruptcy cases. The trustee's argument strikes at the heart of debtor's fresh start by seeking to deny her the benefit of an exemption properly enacted by the State of Kansas and made applicable to debtors by Congress through section 522(b)(3)(A).

ARGUMENT

The debtors in these consolidated appeals claimed exemptions under K.S.A. § 60-2315, a Kansas law that provides:

> An individual debtor under the federal bankruptcy reform act of 1978 (11 U.S.C. § 101 et seq.), may exempt the debtor's right to receive tax credits allowed pursuant to section 32 of the federal internal revenue code of 1986, as amended, and K.S.A. 2011 Supp. 79-32,205, and amendments thereto. An exemption pursuant to this section shall not exceed the maximum credit allowed to the debtor under section 32 of the federal internal revenue code of 1986, as amended, for one tax year. Nothing in this section shall be construed to limit the right of offset, attachment or other process with respect to the earned income tax credit for the payment of child support or spousal maintenance. K.S.A. § 60-2315.

The trustees objected to the exemption and the bankruptcy court denied the objection finding that the exemption statute is constitutional.

I. The Bankruptcy Court Properly Concluded that Kansas' Bankruptcy-Specific Exemption Functions Consistently with Congress's Power to Establish Uniform Bankruptcy Laws.

A. The Uniformity Requirement of the Bankruptcy Clause does not Apply to State Laws

The Bankruptcy Clause grants to Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4.[1] By its express language, the Bankruptcy Clause refers only to

[1] The Framers of the Constitution included the Bankruptcy Clause to create a "uniform federal response" to the problem raised by the states' conflicting treatment of debtors who had obtained discharge of their debts in one state only to be imprisoned on the basis of those same debts by another state. *Central Virginia*

Congress's authority to enact uniform bankruptcy laws. As the court below correctly found, the Bankruptcy Clause is inapplicable to state legislation. *In re McFarland*, 481 B.R. 242 (Bankr. S.D. Ga. 2012) (uniformity requirement "is an affirmative limitation or restriction upon Congress's power, not a limitation on the states' exercise of their own power."); *In re Jones*, 428 B.R. 720, 729 n.9 (Bankr. W.D. Mich. 2010). Nonetheless, the Trustee argues that Congress could not authorize enforcement of the Kansas EIC exemption, K.S.A. § 60-2315, under section 522(b)(3)(A) because to do so would give effect to a bankruptcy law that is not "uniform."

Federal bankruptcy laws are "uniform" when they operate the same way throughout the country even though application of state laws may cause variations in results from state to state. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, --- (1946) (Frankfurter, J, concurrence); *In re Urban*, 375 B.R. 882 (B.A.P. 9th Cir. 2007). The Bankruptcy Clause is not violated by Congress's adoption of state exemptions, whether specific to bankruptcy debtors or applicable to the general population of the state, so long as the federal bankruptcy law operates uniformly.

Nothing in the Clause prohibits the states from legislating in bankruptcy where Congress has left the field open, or where, as here, Congress has specifically deferred to state legislation. *Central Virginia Community College v. Katz*, 546 U.S. 356, 386 n.3 (2006)("the Bankruptcy Clause does not vest exclusive power in Congress, but instead

---

Community College v. Katz, 546 U.S. 356, 369 (2006)(discussing Bankruptcy Clause's effect on state sovereign immunity).

leaves an ample role for the States.") (Justice Thomas dissenting). *See also In re Schafer*, 689 F. 3d 601, 606 (6th Cir. 2012)("states [can], in the absence of federal legislation, pass laws on bankruptcy.")(quoting *Hood v. Tennessee Student Assistance Corp.,* 319 F.3d 755, 765 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004)).

It is well established that Congress may defer to state property laws without compromising its obligation to enact uniform bankruptcy laws. *Comm'r of Internal Rev. v. Stern,* 357 U.S. 39, 45 (1958). In fact, state property laws are frequently incorporated into the federal bankruptcy scheme despite the fact that their inclusion may lead to disparate results from state to state and within states. Courts have routinely found that this disparity does not violate the uniformity requirement. *See e.g. In re Schafer,* 689 F.3d 601, 612 (6th Cir. 2012). *See also Jafari v. Wynn Las Vegas*, 569 F.3d 644, 648 (7th Cir. 2009) (property rights in bankruptcy determined by reference to state law despite resulting lack of uniformity); *Herrin v. GreenTree-AL, L.L.C.*, 376 B.R. 316, 321 (S.D. Ala. 2007) (applying state law to determine real property interests subject to modification under 11 U.S.C. § 1322(b)(2) does not violate the Bankruptcy Clause); *In re Simon*, 311 B.R. 641 (Bankr. S.D. Fla. 2004).

Reference to disparate state exemption laws, even those aimed only at bankruptcy debtors, does not violate the uniformity requirement because states have no obligation to create uniformity in their exemption laws under the Bankruptcy Clause.

B. A Bankruptcy Law Is Uniform When it Applies to Defined Classes of Debtors.

Even if state bankruptcy laws were subject to the uniformity requirement of the Bankruptcy Clause, K.S.A. § 60-2315 would pass constitutional muster. Addressing the application of state exemption laws in bankruptcy, the Supreme Court in *Hanover National Bank v. Moyses,* approved an existing practice under federal law in which bankruptcy debtors could claim the exemptions applicable under the law of the state where they had lived for the greater portion of the preceding six months. 186 U.S. 181, 189-90 (1902). The debtor claimed exemptions under Tennessee law where he was domiciled, rather than under Mississippi law where there was a judgment against him. In validating the reference to state exemptions in federal bankruptcy cases, the Court found that the differences between state exemption laws and the resulting differing outcomes under the federal laws between citizens of different states, did not result in violation of the uniformity requirement because that requirement was "geographical, not personal" and the federal bankruptcy law operated identically throughout the United States. *Id.*

Two later decisions reflect the post-*Hanover* evolution of the Supreme Court's standard for determining uniformity under the Bankruptcy Clause. *Railway Labor Executive Ass'n v. Gibbons*, 455 U.S. 457 (1982); *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974). In these cases, the Court established that if the bankruptcy law in question applies to debtors differently over a common geographic area, it can

nevertheless withstand constitutional challenge if it treats the debtors differently based upon a reasonable classification.

In *Blanchette*., the Court addressed a challenge to legislation creating a special insolvency reorganization system for regional railroads. Certain railroads challenged the statute as violating the Bankruptcy Clause's uniformity requirement because it treated debtors differently based on geographic location. The Supreme Court rejected this contention concluding that the bankruptcy laws may designate an "evil to be remedied" and adopt classifications for addressing the problem. 419 U.S. at 160-61 (*quoting The Head Money Cases*, 112 U.S. 580, 594-95 (1884)). Despite disparate geographical impact, legislation may be uniform if the classifications apply to defined parties as necessary to address a particular government objective.

The concept of class uniformity was reinforced in *Gibbons* which is the only case in which the Supreme Court has struck down a bankruptcy statute for failure to comply with the Bankruptcy Clause. In that case Congress enacted the statute in question to regulate labor relations of a single insolvent railroad. Because the statute applied to only one entity it was deemed "nothing more than a private bill," which could not possibly apply uniformly to a class of similarly situated entities. 455 U.S. at 471. In striking down the law, the Court summarized the limited situations in which it was appropriate to invalidate a statute under the Bankruptcy Clause:

> Prior to today, the Court has never invalidated a bankruptcy law for lack of uniformity. The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit

> Congress from recognizing that state laws do not treat commercial transactions in a uniform manner.

Id. at 469. Recognizing that lack of geographic uniformity is not fatal to a bankruptcy law the *Gibbons* Court said, "[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473.

The Sixth Circuit and the Bankruptcy Appellate Panel for the Ninth Circuit have both addressed a Uniformity Clause challenge to bankruptcy-specific exemptions and found the exemptions constitutional. *In re Schafer*, 689 F.3d 601 (6th Cir. 2012) *rev'g* 455 B.R. 590 (B.A.P. 6th Cir. 2011); *In re Applebaum*, 422 B.R. 684 (B.A.P. 9th Cir. 2009). The issue is currently pending before the Tenth Circuit BAP. *Williams v. Westby (In re Westby),* No. 12-27 (B.A.P. 10th Cir.).

In *Schafer,* the exemption scheme at issue permitted debtors to choose between the federal exemptions found in section 522(d), Michigan exemptions available to all state residents, or state exemptions available only to those debtors in bankruptcy. *Schafer*, 689 F.3d at 601. The debtor opted to take a homestead exemption under the state bankruptcy-specific scheme which yielded a significantly greater exemption amount than either of the other two options. Without deciding whether the uniformity requirement applies to state legislation, the court found that the disparity between the non-bankruptcy exemptions and the bankruptcy-specific exemptions did not offend the Uniformity Clause because that clause prohibits a *process* that is not uniform without regard to whether that process may lead to disparate *outcomes*. *Id.* at

611. *See also McFarland*, 481 B.R. 242, 254 ("The Georgia exemption statute applies uniformly to all debtors in bankruptcy, and therefore, I find it is sufficient to pass muster under the Uniformity Clause.").

The *Schafer* court also rejected the argument that, pursuant to dictum in *Hanover*, the Uniformity Clause requires that the trustee in bankruptcy be able to take whatever would have been available to creditors under non-bankruptcy laws. The court said simply, "In [Hanover] the Supreme Court did not hold that a bankruptcy exemption scheme is uniform in the constitutional sense only if the trustee takes in each state whatever would have been available if the bankruptcy law had not been passed." *Id.* at 610. Imposition of that requirement would "call into doubt the constitutionality of the federal exemptions set forth in section 522(d)." *Id.*

The constitutional provision applicable to laws establishing duties and excise taxes, which provides that Congress's power to lay and collect "all Duties and Excises shall be uniform throughout the United States," U.S. Const. Art. 1, sec. 8 cl. 1, generally sets a higher standard for uniformity than the Bankruptcy Clause. *Schultz v. U.S.*, 529 F.3d 343, 355 (6th Cir. 2008). Nonetheless, the Supreme Court has interpreted its uniformity requirement to permit distinctions based on class rather than location. In *United States v. Ptasynski,* the Supreme Court upheld a federal statute creating an oil production excise tax exemption that clearly preferred one geographic area over all others. The Court deferred to Congress's finding that there was a reasonable basis for the classification and that the uniformity clause "does not prevent

Congress from defining the subject of a tax by drawing distinctions between similar classes." 462 U.S. 74, 82 (1983).

Other courts have likewise found that class-wide uniformity satisfies the Bankruptcy Clause. *See Matter of Reese*, 91 F.3d 37, 39 (7th Cir. 1996) ("[T]he [Bankruptcy] Clause forbids only two things: The first is arbitrary regional differences in the provisions of the Bankruptcy Code. The second is private bankruptcy bills – that is, bankruptcy laws limited to a single debtor – or the equivalent."); *Wood v. U.S.*, 866 F.2d 1367, 1372 (11th Cir. 1989) (the Uniformity Clause "requires that bankruptcy laws apply uniformly among classes of debtors.").; *In re Applebaum*, 422 B.R. 684, 692 (B.A.P. 9th Cir. 2009) ("The concept of uniformity requires that federal bankruptcy laws apply equally in form (but not necessarily in effect) to all creditors and debtors, or to 'defined classes' of debtors and creditors," (*quoting Gibbons*, 455 U.S. at 473)); *In re Urban*, 375 B.R. 882, 890 (B.A.P. 9th Cir. 2007); *In re Chandler,* 362 B.R. 723, 728-29 (Bankr. N.D. W.Va. 2007) ("Geographical uniformity and class uniformity are separate concepts, and when a law is applied to a specified class of debtors, the uniformity requirement is met, so long as the law applies uniformly to that defined class of debtors."). *See also* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs.* 74 Neb. L. Rev. 91, 105 (1995) ("[T]he Supreme Court has held that debtors may be classified and dealt with differently provided that the bankruptcy statute applies uniformly to a defined class, which class must have more than one

member."). *Compare St. Angelo v. Victoria Farms, Inc.,* 38 F.3d 1525 (9th Cir. 1994) (striking bankruptcy law as non-uniform based on fundamentally arbitrary regional classification).

The Tenth Circuit spoke on the issue over two decades ago. In *In re Kulp*, the court rejected the argument that bankruptcy-only exemptions violate the uniformity clause. In so holding, the court specifically rejected contrary cases stating, "[t]he *In re Mata*, [115 B.R. 288 (Bankr. D. Colo. 1990)] and *In re Lennen,* [71 B.R. 80 (Bankr. N.D. Cal. 1987)] cases confuse the geographical uniformity doctrine with the well-established principle that states may pass laws which do not conflict with the federal scheme. . . . In this case, we have no conflict because 11 U.S.C. § 522 expressly delegates to states the power to create bankruptcy exemptions." *In re Kulp*, 949 F.2d 1106, 1109 n.3. (10th Cir. 1991).

While Amicus does not concede that the Bankruptcy Clause applies to state legislation, even if it did, the Kansas statute at issue here, which applies uniformly to all Kansas debtors in bankruptcy, passes that test.

II. In Enacting K.S.A. § 60-2315 the State Legislature Did Not Exceed its Power Under Section 522(d).

The trustee argues that K.S.A. § 60-2315 exceeds the power Congress delegated to the states in section 522. Citing *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000) and *In re Pontius*, 421 B.R. 814 (Bankr. W.D. Mich. 2009), the trustee argues that the opt-out power given to the states in section 522(d) consists of the "power to forbid" use

of federal exemptions rather than the "power to create" bankruptcy-specific exemptions.

Article 1, section 1, of the U.S. Constitution which provides that "all legislative Powers herein granted shall be vested in a Congress of the United States," is not a prohibition against delegation. *Iske v. United States*, 396 F.2d 28, 31 (10th Cir. 1968). "This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving v. United States*, 517 U.S. 748 (1996) (*quoting Wayman* v. *Southard*, 10 Wheat. 1, 42 (1825)). There are many areas where, despite Congress' plenary power and a requirement of uniformity, broad freedom is accorded the states to affect federal law. *See, e.g., Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946)(Congress may permit states to apply tax on out-of-state insurance companies despite Congress' plenary power in the area of taxation and interstate commerce and its regulation of insurance); *Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589, 602 (1931) ("The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity.").

The *Hanover* Court specifically found that Congress' incorporation of state exemption schemes in bankruptcy was not an unconstitutional delegation of legislative power. *Hanover*, 186 U.S. at 190 ("Nor can we perceive in the recognition of

the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power.").

With section 522(b)(3)(A), Congress did not limit its grant of authority to the states to fashion the exemption laws to be recognized in bankruptcy cases and there is no textual or historical support for the insertion of qualifiers into this plain language. Rather, Congress expressly authorized states to create exemptions to be used in the context of federal bankruptcy law. "Congress has not seen fit to restrict the authority delegated to the states by requiring that state exemptions apply equally to bankruptcy and non-bankruptcy cases," such that "we are without authority to impose such a requirement." *Schafer*, 689 F.3d at 607 (quoting *Sheehan v. Peveich*, 574 F.3d 248, 252 (4th Cir. 2009)).

The court in *Schafer* rejected the strained reading of section 522(b), advanced by the trustees in this case that section 522(b)(3)(A) limits the states to the power to "forbid" rather than the power to "enact" exemptions, finding that this "interpretation misunderstands the concept of concurrent jurisdiction in the area of bankruptcy exemptions, and imputes, without a basis to do so, a limit onto a state's power to act." *Id.* at 608. *See also In re Shumaker*, 124 B.R. 820, 826 (Bankr. D. Mont. 1991)("Therefore, the underlying premise of Mata and Lennen that it is not permissible for states to seek to enact two different levels of exemptions, one applicable in bankruptcy and one without, simply misstates the applicable

constitutional power of a state to enact bankruptcy laws where Congress has not sought to act.").

The Tenth Circuit has also rejected this arbitrary distinction. In *In re Walker*, 959 F.2d 894 (10th Cir. 1992), the trustee challenged an Oklahoma exemption statute that permitted the exemption of certain retirement accounts on the basis that the statute exceeded the power Congress had bestowed upon the states in section 522. The Tenth Circuit stated:

> Pursuant to Congress' authority to establish uniform bankruptcy laws, it may delegate to the States the authority to legislate bankruptcy exemptions. Trustee argues that the Oklahoma exemption statute exceeds the scope of this authority, but he cites no persuasive authority from case law or from the structure of legislative history of the current Bankruptcy Act. . . . Congress certainly was aware of the "wide disparity in the type and amount of exemptions allowed by the various states," and by delegating to the states the option to legislate bankruptcy exemptions Congress implicitly acknowledged the disparity.

Id. at 900-01 (citations omitted).

Clearly, there is no limit in section 522(b)(3)(A) or in the Supreme Court's consistent interpretation of Congress' legislative power that limits states to the power to "forbid" and precludes the power to "enact" as the courts in *Pontius* and *Cross* found. Indeed, how could Congress "reference" a scheme of state exemptions unless a state has first decided what the scheme of state exemptions to be referenced will be? States have the power to enact and amend their own exemptions, and under section 522(b)(3)(A), Congress unquestionably authorized states to supply the exemption scheme that will be recognized in bankruptcy cases.

The trustees' reliance on the 1920 case of *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) is unavailing. In that case, the plaintiff sought compensation under New York's Worker's Compensation Law for the death of her husband while working as a bargeman on the Hudson River. In finding that a principle purpose behind the maritime laws was to create uniformity, the Court held that Congress could not allow states to apply their own worker's compensation laws in maritime cases, stating: "since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will." *Id.* at 160.

Knickerbocker has been limited in its scope by subsequent congressional enactments and Supreme Court decisions. *Askew v. American Waterways Operators*, 411 US. 325, 338 (1973) (referring to *Knickerbocker* as an example of "isolated instances where 'state law must yield to the needs of a uniform federal maritime law'" and acknowledging that there are many instances in which states may legislate in the area of maritime law); *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4th Cir. 1944) (Despite the apparently restrictive holding in *Knickerbocker*, Congress may make laws placing maritime injuries within jurisdiction of state worker's compensation commission).

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the Court drew a distinction between Congress delegating legislative power to the states and Congress merely incorporating evolving state laws. In that case, the Court upheld a state law that taxed out-of-state insurance companies at greater rates than in-state companies.

Prudential challenged the law, inter alia, as an unconstitutional delegation of legislative power.

The Court rejected this argument stating, "The . . . contention that Congress' 'adoption' of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner." *Prudential,* 328 U.S. at 438 n. 51. *See also In re Sullivan*, 680 F.2d 1131, 1137 (7th Cir. 1982) (applying reasoning in *Prudential* to uphold bankruptcy-specific exemptions against unconstitutional delegation challenge); *Waterfront Comm'n of New York Harbor v. Constr. & Marine Equip. Co.,* 928 F.Supp. 1388, 1404 (D. N.J. 1996) (citing *Prudential* for the proposition that "While Congress may not delegate to the states power to legislate in areas that are reserved to Congress, such as interstate Commerce Clause powers, it may by federal legislation, adopt and incorporate by reference, state laws which exist or which may exist in the future".).

Likewise, the courts in *Cross* and *Pontius* have confused Congress' power to consent to state legislation in the area of bankruptcy exemptions and its power to legislate. Arguments such as those offered by the Trustees offer inconsistent and illogical views of the congressional power exercised in section 522(b)(3)(A). They essentially write new text into the Bankruptcy Code which allows reference to general state exemption laws while prohibiting reference to bankruptcy-specific exemption laws.

The reach of the federal exclusivity doctrine espoused by the Trustee and the bankruptcy courts in *Cross,* and *Pontius* is extraordinary. If followed consistently, it would disrupt the interplay between state and federal law that is a cornerstone of American bankruptcy practice. The attempt to interject this doctrine into the sphere of bankruptcy exemptions in which deference to state law has a deeply entrenched history is particularly inappropriate.

III. The Bankruptcy Court Properly Concluded That the K.S.A. § 60-2315 Is Not Preempted by Section 522(b)(3)(A) and Does Not Violate the Supremacy Clause.

A. Where Congress Has Explicitly Permitted Reference to State Exemption Laws those Laws Are not Preempted.

The bankruptcy court correctly rejected the trustees' argument that K.S.A. § 60-2315 is preempted.

A state law may violate the Supremacy Clause in one of three ways. "Express preemption" renders a state law unconstitutional when it encroaches on an area in which Congress has explicitly preempted state law. "Field preemption" preempts state laws that fall within a field Congress has evidenced an intent to occupy. "Conflict preemption" applies to state laws that actually conflict with federal law. *Schafer*, 689 F.3d at 614-15. *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190, 203-04 (1983); *Perez v. Campbell,* 402 U.S. 637, 652 (1971) (state law preempted if it "frustrates the full effectiveness of the federal law."); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963); *Hines v.*

Davidowitz, 312 U.S. 52, 67 (1941); *In re Vasko*, 6 B.R. 317, 323 (Bankr D. Ohio 1980) ("The state law must in its effect, obstruct the basic objectives of the federal law."). In keeping with these proscriptions, "[s]tates may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." *International Shoe, Inc. v. Pinkus,* 278 U.S. 261, 265 (1929).

Bankruptcy-specific state exemptions do not fall under any of these three categories of preempted state legislation. *Sheehan v. Peveich*, 574 F.3d 248 (4th Cir. 2009). Section 522(b)(3)(A) provides that a debtor may exempt from the bankruptcy estate "any property that is exempt under federal law . . . or State or local law that is applicable on the date of the filing of the petition." This provision "allows the States to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his creditors." *Owen v. Owen*, 500 U.S. 305, 306 (1991).

Although in section 522(b)(3)(B) Congress specified that property held as tenant in the entirety be exempt according to non-bankruptcy law, it did not place similar restriction on the broader opt-out provision of section 522(b)(3)(A). To the contrary, Congress placed no limits on the content of state law exemptions to be recognized in bankruptcy cases. *Applebaum*, 422 B.R. at 690. Where Congress includes particular language in one section of a statute but omits it from another, it is presumed that Congress acted intentionally. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Courts have consistently acknowledged that Congress chose not to preempt state law in the area of defining the exemptions to be allowed in bankruptcy cases. *Sheehan v. Peveich*, 574 F.3d 248 (4th Cir. 2009)("There can be no preemption, however, where Congress 'expressly and concurrently authorizes' state legislation on the subject.");*Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995); *In re Kulp*, 949 F.2d 1106, 1109 n.3 (10th Cir. 1991) (no conflict because Congress expressly delegated the power to create bankruptcy exemptions to states); *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983) (Congress "vested in the states the ultimate authority to determine their own bankruptcy exemptions")*; In re Sullivan*, 680 F.2d 1131, 1136 (7th Cir. 1982) ("To apply a preemption analysis in this context is to ignore totally the explicit language of the section 522(b)(1) opt-out provision."); *In re Stephens*, 402 B.R. 1 (B.A.P. 10th Cir. 2009) ("Rather than preempting the [exemption] area, Congress expressly authorizes the states to 'preempt' the *federal* legislation.") (internal quotation omitted); *McFarland*, 481 B.R. 242, 252("Georgia's creation of a bankruptcy exemption statute does not conflict with [section 522] as Congress expressly delegated that power to the States.").

The opt-out provision operates consistently with the Bankruptcy Code's general approach of allowing state law to determine property rights in bankruptcy cases. *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankruptcy estate to state law."). *See also In re Borgman,* No. 11-1369 (10th Cir. Oct. 23, 2012)(application of state

exemptions is determined by state law); *Rhodes*, 705 F.2d at 163 (states and the federal government have concurrent jurisdiction in the area of defining exemptions that are to be applied in bankruptcy cases). Since its genesis, the federal bankruptcy construct has incorporated varied state exemption laws. *See Smalley v. Laugenour,* 196 U.S. 93 (1904)(discussing state exemptions in the context of section 6 of the 1878 Bankruptcy Act); *Reese*, 91 F.3d at 39.

Given the range of exemptions that are routinely enforced in bankruptcy cases nationally, it cannot be seriously argued that K.S.A. § 60-2315 actually conflicts with or interferes with the operation of federal bankruptcy laws. *In re Applebaum*, 422 B.R. 684, 691(B.A.P. 9th Cir. 2009) ("There is no conflict between the purposes and goals of the Bankruptcy Code and the California bankruptcy-only exemption statute. Simply because the exemptions differ from the federal exemptions (or from its non-bankruptcy counterpart), does not mean that such differences create a conflict that impedes the accomplishment and execution of the Bankruptcy Code.").

In fact, bankruptcy-specific exemptions may further federal bankruptcy goals. As noted by the Sixth Circuit in *Schafer*, "[b]y permitting debtors in bankruptcy a higher homestead exemption than either the general state exemption statute or the federal exemption statute allow, bankruptcy debtors in Michigan are better able to achieve a fresh start and to obtain 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Schafer*, 689 F.3d at 616.

Where Congress has specifically authorized the states to act, the prohibition set forth in *International Shoe, Inc. v. Pinkus,* 278 U.S. 261, 265 (1929), and cited by the trustee in this case is inapplicable. In *Pinkus* the state statute in question purported to operate as a full-service bankruptcy law, setting out a scheme for liquidation of assets, distribution to creditors, and discharge of debts. The debtor in that case was barred from obtaining a discharge of debts under the federal Bankruptcy Act because he had obtained a federal bankruptcy discharge within the past six years. So the debtor sought relief through the state law. The complementary state law in that case, was not a law that functioned in accordance with federal bankruptcy law, but one that usurped it altogether. This is a far cry from the situation here where state legislators have acted in accordance with federal invitation.

B. There is No Actual Conflict Between K.S.A. § 60-2315 and Federal Law

The trustees also contend that K.S.A. § 60-2315 conflicts with federal law because it alters the balance between creditors and debtors by allowing debtors to withhold assets from creditors that were previously accessible to them. This argument fails for two reasons. First, it proves too much. To say that a state exemption is preempted when it shifts the balance between debtors and creditors would invalidate every state exemption, whether bankruptcy-specific or not, so long as it differed from the federal exemptions. Where Congress enacted legislation for the express purpose of permitting debtors to choose between federal and state exemptions, it would be

absurd to impose a restriction on the state exemptions that they not change the creditor's potential recovery.

Second, as the trustee acknowledges, the underlying principle of bankruptcy is two-fold, to afford debtors a fresh start and to optimize repayment to creditors. Clearly, these two goals often conflict. By allowing the use of state exemptions, Congress has left it to the states to determine how that balance should best be struck. *Schafer*, 689 F.3d at 616 (adopting state bankruptcy-only exemption furthers Congress's goal of providing debtors a fresh start). States that accept this invitation are not obstructing the basic objectives of the federal law; they are furthering those objectives.

In accordance with Congress's clear edict to the contrary, it cannot reasonably be concluded that Congress has preempted state bankruptcy-specific exemption laws.

C. K.S.A. § 60-2315 does not conflict with other provision of the Bankruptcy Code.

The trustee argues that K.S.A. § 60-2315 conflicts with section 544 of the Bankruptcy Code. That section provides in part:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by – (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists.

These "strong arm" powers come into existence upon commencement of the bankruptcy case and extend only to those causes of action possessed by the estate. 5 COLLIER ON BANKRUPTCY ¶ 544.01 (A. Resnick and H. Sommer, eds., 16th ed). "What property belonged to the bankrupt as of the date of bankruptcy, what liens, if any, existed thereon, validity of such liens, order or priority among creditors having liens and other cognate questions are governed by the law of the state and not by any provision of the Bankruptcy Act." *In re Dean and Jean Fashions, Inc.*, 329 F. Supp. 663, 666 (W.D. Okla. 1971) (citing *Seymour v. Wildgen*, 137 F.2d 160, 161 (10th Cir. 1943)(interpreting the strong arm clause in section 70(c) of the Bankruptcy Act of 1878)); *PM Denver, Inc. v. Porter (in re Porter McLeod, Inc.)*, 231 B.R. 786, 792 (D. Colo. 1999).

As the lower court correctly pointed out, the trustee's right to step into the shoes of the creditor extends only with respect to property of the estate and K.S.A § 60-2315 removes the EIC from the estate corpus. The same is true of all exemptions which by their very nature remove property from the reach of creditors and, therefore, from the reach of trustees standing in the shoes of the creditor.

Contrary to the trustees' argument section 544 does not authorize her to reach the debtors' exempt assets. *Rupp v. Duffin (In re Duffin)*, 457 B.R. 820 (B.A.P. 10th Cir. 2011), is inapposite because it addresses the trustee's ability to gain access to non-exempt funds. In her opinion in *Westby*, Judge Karlin, who was member of the

unanimous panel in *Duffin*, dispensed with a preemption argument based on that case, explaining:

> For this reason, among many others, the Tenth Circuit BAP opinion in *Rupp v. Duffin (In re Duffin),* 457 B.R. 820 (10th Cir. BAP 2011), upon which the Trustee relies, is inapplicable. In *Duffin*, the BAP considered whether a trustee could object to an exemption under 11 U.S.C. §544(a), utilizing his "rights and powers" under that statute as a hypothetical creditor. *Id* at 827-29. The BAP analyzed a Utah exemption that excluded from its reach prepetition payments on life insurance policies. *Id* at 829. The BAP concluded that, "[t]hrough the use of a trustee's hypothetical powers" under §544, the trustee could stand as a creditor would, and gain access to the *non-exempt* funds. As should be abundantly clear from the discussion herein, [K.S.A. § 60-2315] makes a debtor's EIC exempt, and no creditor of a debtor in bankruptcy could reach that exempt asset, just as the Trustee may not.

In re Westby, No. 11-40986, 473 B.R. 392 (Bankr. D. Kan. 2012).

Further, the trustee ignores section 522(g), under which the Debtors may exempt property that the trustee recovers under section 550 if it was not voluntarily transferred. In this case, the debtors' EIC refund is exempt under Kansas law; the trustee simply may not administer that asset.

The trustee also appears to argue that bankruptcy-specific exemptions somehow deprive the trustee of the power to "object to an exemption" in conflict with section 544(a). That is not the case. The trustee, under section 544 has the identical right to object that the hypothetical creditor would have with respect to any claimed exemption. And, like any other claimed exemption, the court will determine the applicability of the exemption under state law.

The trustees' other assertion of conflict suffers from the same infirmity.

The trustees argue that K.S.A. § 60-2315, which provides in part, "Nothing in this section shall be construed to limit the right of offset, attachment or other process with respect to the earned income tax credit for the payment of child support or spousal maintenance," conflicts with section 507(a) because it elevates child support payment over that of the trustee's administrative costs by permitting use of the refund for the payment of child support debts.

However, as noted by the court below, the exemption does not alter the priority of the administration of the estate because the funds at issue are removed from estate property and are not subject to administration. *In re Earned Income Tax Credit Cases (In re Hudson),* 477 B.R. 791 (Bankr. D. Kans. 2012). The Bankruptcy Court found that there is no conflict between the Kansas EIC exemption law and section 507, which spells out the duties of the trustee. As the Bankruptcy Court correctly held under the Kansas statute, refunds attributable to the EIC are exempt, removed from the estate, and not subject to administration by the trustee. *See* 11 U.S.C. § 704(a)(1) (precluding the trustee from selling exempt property). Section 507 contains no grant of authority for a trustee to liquidate exempt assets to pay domestic support obligations when section 507 itself simply provides the priorities for distribution of property of the estate. *See In re Quezeda*, 368 B.R. 44 (Bankr. S.D. Fla. 2007).

Simply stated, the trustee has no authority under section 507 or otherwise, to administer exempt assets. *In re Knapper*, No. 11-12942, *10 (Bankr. W.D. Tex. June 13,

2012) ("Here, the IRA is properly exempted and effectively removed from the estate. Therefore, the Trustee has no authority to administer the IRA for the benefit of creditors in general or Anderson, a [domestic support obligation] creditor, in particular."); *In re Westby,* 473 B.R. 392, 2012 WL 1144412 (Bankr. D. Kan. Apr. 4, 2012)("There is no conflict with § 507, because that section only applies to the distribution of estate property, not exempted property."). Congress resolved the conflict between exemptions and creditor's rights by deferring to the states to establish exemption parameters, including the effect of exemptions on non-dischargeable debts. *In re Davis*, 170 F.3d 475 (5th Cir. 1999).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to find that Kansas's bankruptcy specific exemption is constitutional and affirm the decision of the lower court.

Respectfully submitted,

_/s/Jill A. Michaux_____
Jill a. Michaux, Esq.
attorney for *Amicus Curiae*
National assoc. of Consumer
Bankruptcy Attorneys
Neis & Michaux, P.A.
825 Bank of America Tower
534 S. Kansas Ave. Ste. 825
Topeka KS 66603-3446
(785) 354-1471

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 6329 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

_/s/Jill A. Michaux_____
JILL A. MICHAUX, ESQ.
ATTORNEY FOR *AMICUS CURIAE*
NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS
Neis & Michaux, P.A.
825 Bank of America Tower
534 S. Kansas Ave. Ste. 825
Topeka KS 66603-3446
(785) 354-1471
(785) 354-1170 facsimile

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Kansas by using the CM/ECF system on December 12, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
BY
s/Jill A. Michaux

Jill A. Michaux #11128
Neis & Michaux, P.A.
825 Bank of America Tower
534 S. Kansas Ave., Ste. 825
Topeka, KS 66603-3446
785-354-1471
785-354-1170 facsimile
jill.michaux@neismichaux.com

IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: June 13, 2012

Craig A. Gargotta

CRAIG A. GARGOTTA
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	CASE NO. 11-12942-CAG
	§	
KELLY L. KNAPPER,	§	CHAPTER 7
	§	
Debtor.	§	

MEMORANDUM OPINION AND ORDER DENYING LORI ANDERSON'S MOTION FOR TURNOVER OF NON-EXEMPT ASSETS AND REQUEST FOR ADMINISTRATION BY THE CHAPTER 7 TRUSTEE

Came on to be considered the above-styled and numbered case and, in particular, the Motion of Lori Anderson for Turnover of Non-Exempt Assets and Request for Administration by the Chapter 7 Trustee (the "Motion") filed March 2, 2012 (docket no. 30), on behalf of Creditor and party-in-interest Lori Anderson ("Anderson"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the matter is deemed a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (E), and (O). This matter is referred to this Court under the District's Standing Order of Reference. Venue is proper under 28 U.S.C. §§ 1408 and 1409. A hearing on the Motion was held on March 26, 2012. Having considered the arguments presented

and the applicable law, for the reasons stated below, the Court finds that Anderson's Motion should be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Lori Anderson, the Movant, and Kelly L. Knapper, the Debtor, were divorced in Texas in September, 2010 (docket no. 30, at 1). Pursuant to the terms of the divorce decree, the Debtor was to pay alimony in the amount of $1,950 per month and child support in the amount of $3,000 per month to Anderson beginning on October 1, 2010 (*id.*). The Debtor had been making the payments to Anderson until June 2011 after he became unemployed (docket no. 53, at 3). Thereafter, the Debtor was in arrears on his payments of both alimony and child support (docket no. 30, at 1).

The Debtor filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code on December 3, 2011 (docket no. 1). In the Debtor's "Schedule C—Property Claimed as Exempt," he checked the box that referred to 11 U.S.C. § 522(b)(3), which was his formal election of the exemptions under the state law (docket no. 7, at 7). In particular, the Debtor claimed a Roth IRA held at T.D. Ameritrade in the amount of $50,000 as exempt property pursuant to Texas Property Code § 42.0021 (*id.*). The § 341 meeting of Creditors was held on January 5, 2012, and no objection to the claimed exemption was ever filed.

On March 2, 2012, Anderson filed this Motion requesting that the Court (1) order T.D. Ameritrade[1] to turn over the Roth IRA to the Chapter 7 Trustee, and (2) instruct the Trustee to administer this asset for the benefit of Anderson. Anderson requests the funds to go toward the Debtor's alimony and child support arrearages as well as Anderson's attorney's fees for filing this Motion (docket no. 30, at 2).

[1] In the Motion, Anderson used "T.D. Ameriprise" and "T.D. Ameritrade" interchangeably (docket no. 30, at 1–2). The entity at issue is T.D. Ameritrade.

On March 26, 2012, the Court held a hearing to consider the Motion. Subsequently, upon the Court's request, Anderson submitted a Letter to the Court on April 3, 2012 to provide relevant case law supporting her position (docket no. 51). The Debtor submitted a Response Letter to the Court on April 12, 2012 (docket no. 53).

PARTIES' CONTENTIONS

In the Motion, Anderson asserts that, because the Debtor is in arrears on his payments of both alimony and child support pursuant to their divorce decree, she is the holder of a domestic support obligation ("DSO") claim as defined by 11 U.S.C. § 101(14A) (docket no. 30, at 1). She contends that, in the face of a DSO claim, no asset owned by the Debtor is allowed to be claimed as exempt under 11 U.S.C. § 522(c)(1) (*id.* at 2). Further, Anderson contends that Congress appears to provide for the Chapter 7 Trustee's administration of this "non-exempt" asset for the benefit of the DSO claimant because 11 U.S.C. § 507(a)(1) authorizes the administrative expense of the trustee to be paid before the payment of a DSO claim (*id.*). Accordingly, Anderson requests that the Court order the Roth IRA to be turned over to the Trustee, and instruct the Trustee to administer this asset for the benefit of Anderson (*id.*). At the hearing on the Motion on March 26, 2012, Anderson presented similar contentions.

The Debtor listed the DSO claim as undisputed on his amended Schedule E (docket no. 14, at 1).[2] At the hearing, the Debtor argued that 11 U.S.C. § 522(c)(1) does not disallow the claimed exemptions, and that the Trustee does not have authority to administer the IRA as an exempt asset. Further, according to the Debtor, the proper venue for determining how the DSO claim will be resolved in this case is the state family court, in which the Debtor's motion to modify arrearages of alimony and child support is currently pending.

[2] In the amended Schedule E, filed on January 12, 2012, the Debtor listed a DSO in the amount of $4,950 per month payable to the Office of the Attorney General of Texas, Child Support Division (docket no. 14, at 1–2).

In her Letter submitted to the Court on April 3, 2012, Anderson provides four reported opinions specifically addressing 11 U.S.C. § 522(c)(1) in connection with DSO claims: ***In re Vandeventer***, 368 B.R. 50 (Bankr. C.D. Ill. 2007); ***In re Quezada***, 368 B.R. 44 (Bankr. S.D. Fla. 2007); ***In re Ruppel***, 368 B.R. 42 (Bankr. D. Or. 2007); ***In re Covington***, 368 B.R. 38 (Bankr. E.D. Cal. 2006) (docket no. 51, at 1). Anderson acknowledges that the four opinions unanimously hold that a Chapter 7 trustee does not have authority to object to or administer exempt assets for DSO claimants, but argues that the four cases are distinguishable from the instant case in that the moving party in those cases is the trustee, whereas the moving party here is the DSO claimant (*id.*). Anderson contends that the *Quezada* court noted that DSO claimants, not the trustee, may enforce the federal right provided by § 522(c)(1) against exempt property (*id.* at 2) (citing ***In re Quezada***, 368 B.R. at 48). Moreover, Anderson argues that the courts in the four cases erred in characterizing the property at issue as exempt property, rather than non-exempt property, when a DSO claim is present (*id.* at 3). Furthermore, Anderson argues that the changes with the Bankruptcy Code, § 507(a)(1)(C) in particular, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), indicate "Congress's intent to permit a trustee's administration of otherwise exempt assets for the benefit of [a] DSO claimant among the various holders." (*Id.* at 2–3). The trustee, according to Anderson, is usually best positioned to evaluate competing DSO claims (*id.* at 3–4). Finally, Anderson urges the Court to rule in her favor because Congress, in amending the Bankruptcy Code, did not intend to "allow deadbeat parents to hide their wealth in IRAs and 401(k)s while not paying child support, alimony and/or spousal maintenance." (*Id.* at 4).

In his Response Letter on April 12, 2012, the Debtor rejects all of Anderson's arguments (docket no. 53). First, the Debtor points out that Anderson admittedly can find no case law

supporting her request for relief (*id.* at 1). In particular, the Debtor rejects Anderson's citation to *Quezada* for the proposition that § 522(c)(1) authorizes the bankruptcy court to turn exempt asset over to the DSO claimant and argues that *Quezada* simply holds that the bankruptcy court has jurisdiction to hear the claim (*id.* at 1–2). Moreover, the Debtor contends that whether it is the Chapter 7 trustee or the DSO claimant who brings the motion for turnover is of no legal difference, and that it does not change the characterization of the asset at issue as exempt (*id.* at 2). Furthermore, the Debtor argues that the state court, rather than the bankruptcy court, is the appropriate venue for any efforts by a DSO claimant to seek turnover relief (*id.* at 2–3). Finally, according to the Debtor, Anderson's contention that he is a deadbeat parent who is hiding his wealth in IRAs is without merit because "he has made payments on that arrearage to the best of his ability" and "is doing everything in his power to get back on his feet again, exactly what Chapter 7 provides." (*Id.* at 3).

ANALYSIS

A debtor is required to turn over all property of the estate to the trustee. 11 U.S.C. § 542(a). Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). After establishing property of the estate, the debtor may exempt certain property from the estate either under the federal exemptions or under state or other applicable exemption laws. 11 U.S.C. § 522(b). Objections to exemptions must be filed within thirty days of the creditors' meeting. Fed. R. Bankr. P. 4003(b). If no objections are filed, the claimed exemptions are deemed allowed. ***Taylor v. Freeland & Kronz***, 503 U.S. 638, 643–44 (1992); ***Coie v. Sadkin (In re Sadkin)***, 36 F.3d 473, 477–78 (5th Cir. 1994).

In this case, the property at issue is the Debtor's Roth IRA. The IRA is property of the estate as it was part of the Debtor's "legal or equitable interests" as of the petition date. Also, the IRA is properly exempt under 11 U.S.C. § 522(b) and the Texas Property Code § 42.0021. Moreover, the IRA is deemed exempt because no objection thereto was ever filed.

The dispute centers on whether, because of Anderson's DSO claim, BAPCPA grants Anderson the relief requested. In particular, there are two issues before the Court. First, may a DSO claimant, by filing a motion for turnover, request the claimed exemptions to be turned over to the DSO claimant or the trustee under § 522(c)(1)? Second, does § 507(a)(1) authorize the trustee to administer exempt property for the benefit of a DSO claimant? For the reasons that follow, this Court answers no to both questions.

I. Section 522(c)(1) Does Not Provide for Turnover of Exempt Property.

Section 522(c)(1), as amended by BAPCPA, provides:

> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt has arisen, before the commencement of the case, except—
>
> > (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable non-bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5)).

11 U.S.C. § 522(c)(1). Section 523(a)(5), also amended by BAPCPA, excepts from discharge any debt for a DSO, which is defined by 11 U.S.C. § 101(14A). Thus, § 522(c)(1) provides that property deemed exempt in the bankruptcy case will remain liable for DSO debts even if the exempt property would not be reachable to satisfy these claims under applicable state law. *See, e.g.*, ***In re Quezada***, 368 B.R. at 47.

Anderson argues that, according to § 522(c)(1), no asset owned by the Debtor is allowed to be claimed as exempt in the face of a DSO claim. The Court finds Anderson's interpretation

of § 522(c)(1) unpersuasive. In fact, other courts that considered this argument have unanimously rejected it. *See, e.g.*, ***In re Bozeman***, 376 B.R. 813, 814 (Bankr. W.D. Ky. 2007); ***In re Vandeventer***, 368 B.R. at 52–53; ***In re Quezada***, 368 B.R. at 47; ***In re Ruppel***, 368 B.R. at 44; ***In re Covington***, 368 B.R. at 40. Section 522(c)(1) does not provide that property exempted under § 522 loses its exempt status with respect to the DSO debts; rather, it provides that notwithstanding its exempt status, exempt property remains liable for the DSO debts. ***In re Vandeventer***, 368 B.R. at 52–53; ***In re Quezada***, 368 B.R. at 47; ***In re Ruppel***, 368 B.R. at 44; ***In re Covington***, 368 B.R. at 40. Thus, § 522(c)(1) does not create a valid basis for disallowing the Debtor's exempt property. ***In re Vandeventer***, 368 B.R. at 52–53; ***In re Quezada***, 368 B.R. at 47; ***In re Ruppel***, 368 B.R. at 44; ***In re Covington***, 368 B.R. at 40. Anderson's characterization of the IRA—an exempt asset—as a non-exempt asset pursuant to § 522(c)(1) is, therefore, misplaced.

Anderson also argues that *Vandeventer*, *Quezada*, *Ruppel*, and *Covington* are nevertheless distinguishable from the instant case in that it is the Chapter 7 trustee who moves for the objection in those cases, whereas it is the DSO claimant who moves for the turnover in this case. The Court finds that Anderson's argument lacks force in supporting her position. First, whether it is a trustee or a DSO claimant that objects to the exemptions pursuant to § 522(c)(1) is of no difference under this circumstance because, as stated above, § 522(c)(1) simply does not provide that property exempted under § 522 loses its exempt status with respect to the DSO debts. Indeed, the *Quezada* court expressly held that § 522(c)(1) does not create a valid basis for an objection to exemptions by *the trustee or a DSO creditor*. ***In re Quezada***, 368 B.R. at 46 (emphasis added). Second, even if Anderson, as a DSO claimant, may object to the exemption of the IRA pursuant to § 522(c)(1), she lacks standing to bring the turnover action. A

section 542 turnover involves an action to recover money or property to the bankruptcy estate. *See* 11 U.S.C. § 542. The trustee is the representative of the bankruptcy estate. 11 U.S.C. § 323(a). In a Chapter 7 case, "there is no textual basis in the Bankruptcy Code to support the notion that a non-trustee, such as a creditor . . . has independent standing to pursue . . . other estate causes of action [such as a turnover action] . . . ." ***Reed v. Cooper (In re Cooper)***, 405 B.R. 801, 804 (Bankr. N.D. Tex. 2009).[3]

Anderson further argues that the *Quezada* court expressly recognized a DSO claimant' right to enforce the DSO claim against exempt property pursuant to § 522(c)(1):

> Section 522(c)(1) grants DSO creditors a federal right of action against exempt property. This federal right trumps state law which may otherwise shield the asset from execution. Since this federal right is provided in the Bankruptcy Code, a proceeding to enforce that right would be a proceeding arising under title 11, thus creating jurisdiction under § 1334(b). *See In re Toledo*, 170 F.3d 1340, 1345 ("Arising under" proceedings are matters invoking a substantive right created by the Bankruptcy Code).

In re Quezada, 368 B.R. at 49. The Court finds Anderson's interpretation of the *Quezada* court's language unconvincing. The above-cited language illustrates that the bankruptcy court has jurisdiction if a DSO creditor seeks to enforce the DSO claim against exempt property in the bankruptcy court because § 522(c)(1) creates a federal right. *Id.* The statutory language of § 522(c)(1) does not suggest that § 522(c)(1) itself affirmatively authorizes the bankruptcy court to enforce a DSO creditor's federal right against exempt property. *See* ***In re Wolf***, No. 11-51327, 2012 WL 32480, at *2 (Bankr. E.D. Ky. Jan. 6, 2012) (rejecting that section 522(c)(1) creates an enforcing mechanism against exempt property (citing ***Davis v. Davis (In re Davis)***, 170 F.3d 475, 481 (5th Cir. 1999))).[4]

[3] In *Reed v. Cooper (In re Cooper)*, 405 B.R. at 803, the estate causes of action at issue are a section 542 turnover action and certain state law fraud causes of action.

[4] The Court of Appeals for the Fifth Circuit in the pre-BAPCPA case, *Davis v. Davis (In re Davis)*, on hearing en banc, was called upon to interpret then § 522(c) and to determine whether the debtor's ex-spouse could utilize the

Finally, Anderson's Motion for Turnover should be denied because the Motion fails on procedural grounds. A motion for turnover can only be used by the trustee if seeking turnover from the debtor. *See* Fed. R. Bankr. P. 7001(1). All other turnovers must be filed as adversary proceedings. *Id.* "A turnover proceeding commenced by motion rather than by [adversary] complaint will be dismissed . . . ." ***In re Perkins***, 902 F.2d 1254, 1258 (7th Cir. 1990) (internal citations omitted). In this case, Anderson is a creditor, not the Trustee, and accordingly, she should have commenced the turnover action in an adversary proceeding, rather than resorting to a motion.

In sum, § 522(c)(1) does not provide a valid basis for disallowance of exemptions, and a DSO claimant may not, by filing a motion for turnover, request the claimed exemptions to be turned over to the DSO claimant or the trustee under § 522(c)(1). Accordingly, the Court finds that Anderson's request for turnover of the IRA should be DENIED.

II. Sections 507(a)(1) Does Not Authorize the Trustee to Administer Exempt Property.

Anderson further argues that Congress, in amending the Bankruptcy Code through BAPCPA, intended to permit a trustee's administration of otherwise exempt assets for the benefit

---

Texas turnover statute to force seizure and sale of the debtor's Texas homestead in order to pay a § 523(a)(5) nondischargeable debt. 170 F.3d 475, 478–79 (5th Cir. 1999). The court held that (1) § 522(c)(1) did not preempt Texas law, which prohibited the seizure and sale of a homestead for payment of alimony or child support; and (2) § 522(c)(1) was not self-executing and did not provide any method for execution based on the support creditor's rights. *Id.* at 483. BAPCPA amended § 522(c)(1) to expressly add the language: "notwithstanding any provision of applicable non-bankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5)." 11. U.S.C. § 522(c)(1) (2005). Therefore, the first holding of *Davis* was effectively overruled by BAPCPA. *See, e.g.*, Michaela M. White & James P. Caher, *The Dog That Didn't Bark: Domestic Support Obligations and Exempt Property After BAPCPA*, 41 Fam. L.Q. 299, 312 (2007). It is less clear whether the second holding of *Davis* remains valid after BAPCPA, in other words, whether BAPCPA makes § 522(c) self-executing and provides the DSO claimant with a method of enforcing the claim against exempt property. *Id.* at 320 n.66. The *Davis* court cited the following language as creating an affirmative mechanism for the collection of spousal support: "Notwithstanding this or any other federal or state injunction of liability for exempt property, exempt property shall be liable for debts of a kind specified in section 523(a)(5)." *Davis*, 170 F.3d at 481 n.5. This proposed language in *Davis* is similar but not identical to the language of BAPCPA's amendment to § 522(c)(1). The Fifth Circuit has not spoken to the effect of BAPCPA on the second holding of *Davis* yet.

of a DSO claimant. In particular, Anderson finds support from § 507(a)(1)(C),[5] which provides in relevant part: "If a trustee is appointed . . . the administrative expenses of the trustee . . . shall be paid before payment of [DSO claims], to the extent that the trustee administers assets that are otherwise available for the payment of [DSO claims]." 11 U.S.C. § 507(a)(1)(C).

According to Anderson, § 507(a)(1)(C), in providing for compensation for a Chapter 7 trustee who undertakes to assist the holder of a DSO to collect that claim, also provides specific authority for the trustee to administer those assets that are available for the payment of the DSO. Other courts that previously considered this argument have rejected it. *See, e.g.*, ***In re Vandeventer***, 368 B.R. at 53–54; ***In re Quezada***, 368 B.R. at 47–48. A chapter 7 trustee has the duty to collect and reduce to money the property of the estate. 11 U.S.C. § 704(a)(1). "When a debtor exempts property, it is effectively removed from the estate." ***In re Covington***, 368 B.R. at 40–41 (internal citation and footnote omitted). Therefore, "[e]xempt property is property of the estate which a chapter 7 trustee cannot liquidate or distribute to creditors holding allowed claims." ***S & C Home Loans, Inc. v. Farr (In re Farr)***, 278 B.R. 171, 177 (B.A.P. 9th Cir. 2002) (citing ***Owen v. Owen***, 500 U.S. 305, 308 (1991)); ***In re Ruppel***, 368 B.R. at 43–44. Here, the IRA is properly exempted and effectively removed from the estate. Therefore, the Trustee has no authority to administer the IRA for the benefit of creditors in general or Anderson, a DSO creditor, in particular.

---

[5] In addition to § 507(a)(1)(C), Anderson lists other provisions in BAPCPA providing enhanced rights for DSO claimants:

> 1) § 362(b)(2)(B) provides that the holder of a DSO claim may levy on non-estate assets without violating the automatic stay;
> 2) § 101(14A) provides an expanded definition for domestic support obligation;
> 3) §§ 523(a)(5) and 1328(a)(2) provide that a discharge in chapter 7, 11, 12, or 13 does not discharge a debt for a DSO;
> 4) § 507(a)(1)(A) creates a first priority for a DSO for distribution of estate assets by the trustee;
> 5) § 547(c)(7) excludes payment of a DSO from a trustee's preference action; and
> 6) § 704(a)(10) requires the trustee to provide notice to a DSO claimant of the claimant's rights to payment in the bankruptcy, information regarding assistance by government agencies in collecting child support during and after the bankruptcy case, and to provide other specified information.

(Docket no. 51, at 3) (citing ***In re Ruppel***, 368 B.R. at 44 n.4).

Congress, by enacting BAPCPA, amended § 507(a)(1) to provide DSO claimants first priority for distribution of estate by the trustee. *See* 11 U.S.C. § 507(a)(1). Congress, however, did not amend the Bankruptcy Code to allow a trustee to liquidate exempt assets for distribution to a DSO claimant. Congress left intact § 704(a)(1), which specifically prescribes the duties of a trustee. In fact, in amending § 704, Congress only amended § 704(a)(10) and (c) to require a trustee to provide written notice to DSO claimants and state child support enforcement agencies of their rights in collecting child support during and after the case. ***In re Vandeventer***, 368 B.R. at 54. Moreover, § 507, setting forth the priority of distributions, has to be read in conjunction with the distribution provisions in § 726. Section 726 explicitly provides that in payment of claims of the kind specified in § 507, wherein DSO claims have first priority, only *property of the estate* shall be distributed. ***In re Quezada***, 368 B.R. at 48 (citing 11 U.S.C. § 507) (emphasis in original). Therefore, "[s]ection 507 simply provides the priorities for distribution of property of the estate; it does not grant authority to a trustee to liquidate exempt property." ***In re Vandeventer***, 368 B.R. at 54.

Anderson does not cite, and the Court has not found, any case law to support Anderson's argument for administration of exempt property by the trustee to pay DSO claims.[6] Anderson, however, offers two additional policy arguments. First, Anderson argues, in amending § 507, Congress did not intend for the bankruptcy courts to be a refuge for deadbeat parents trying to escape their obligations to their children and former spouses. It is true that Congress never intended § 507, or the entire Bankruptcy Code, to provide debtors a refuge to escape DSO

[6] Anderson finds support in one published article: Dennis G. Bezanson & Gary B. Rudolph, *The "Super-Priority" of a "Domestic Support Obligation" ("DSO"): The Trustee as Liquidator of Exempt Property for the Benefit of DSO Claimants; and Other DSO Issues*, 22 J. Nat'l Ass'n Bankr. Trustees 24 (2006) ("NABTalk"). The *Quezada* court carefully considered NABTalk and found that the authors' arguments "do not penetrate the statutory roadblock of § 704(a)(1) which precludes a trustee from selling exempt property." ***In re Quezada***, 368 B.R. at 48. This Court agrees with the *Quezada* court's analysis and finds the arguments in NABTalk unpersuasive.

liabilities. This, however, does not mean that Congress intended § 507 to provide the trustee authority to administer exempt property for DSO claimants.[7] As the foregoing analysis shows, if Congress had intended the trustee to administer exempt assets for DSO claimants, it could have amended the Bankruptcy Code to expressly impose such an obligation.

Second, Anderson argues that there may be competing DSO claims, and the trustee is usually best positioned to evaluate those claims and distribute the funds to the various holders according to the proper priorities or *pro rata* in a clear and transparent way that allows all parties to participate and protect their interests. The Court disagrees with this argument. A chapter 7 trustee "has a unique role as an independent fiduciary, with a completely different perspective and interest in a bankruptcy estate than an individual creditor." ***Reed***, 405 B.R. at 804. The trustee generally will not administer an asset unless it will produce a net return for the estate—for the benefit of creditors generally. *See, e.g.*, ***In re Covington***, 368 B.R. at 41. Administering the exempt property for the benefit of DSO claimants is not for the benefit of the creditors generally. Especially, as the *Covington* court noted, when a government unit—in this case, the Attorney General's Office—is collecting the claim for the benefit of the DSO claimant, it is unnecessary to involve the assistance of the trustee, which would come at a price—the trustee's administrative expenses. *Id.*

[7] There are other remedies that DSO claimants may have against debtors who fraudulently claim exemptions of retirement accounts. For instance, DSO claimants may object to such fraudulent retirement accounts, and if the objection is upheld, the retirement accounts lose their exempt status and are subject to the trustee's administration. *See, e.g.*, ***In re Jarboe***, 365 B.R. 717, 722 (Bankr. S.D. Tex. 2007) (holding that an IRA that has been established fraudulently would not be exempt). In this case, however, there is no objection or allegation that the Debtor set up the IRA fraudulently before filing bankruptcy to escape DSO liabilities. The Debtor continued making child support payments until after he became unemployed, and subsequently filed a motion to modify the amount of child support arrearages, which is currently still pending in the state court.

In sum, § 507(a)(1)(C) does not authorize a trustee to administer exempt property for DSO claimants. Accordingly, the Court finds that Anderson's request for the Trustee's administration of the Debtor's IRA should be DENIED.

CONCLUSION

For the foregoing reasons, the Court finds that Anderson's Motion for Turnover of Non-Exempt Assets and Request for Administration by the Chapter 7 Trustee filed March 2, 2012 (docket no. 30) should be DENIED.

IT IS SO ORDERED.

# # #