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OCT 31 2008  
CLERK U.S. BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
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**FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION**

In re:  
  
WILLIAM S. PATRICK,  
  
Debtor.

Case No. SV 07-10312-GM  
Chapter 7

**MEMORANDUM OF OPINION  
OVERRULING OBJECTION TO  
DEBTOR'S CLAIM OF EXEMPTION**

DATE: AUGUST 27, 2008  
TIME: 10:00 a.m.  
PLACE: COURTROOM 303  
21041 BURBANK BLVD.  
WOODLAND HILLS, CA 91367

This case presents an issue of first impression under the 2005 amendments to the Bankruptcy Code: under what conditions may a debtor exempt an individual retirement arrangement ("IRA") from the bankruptcy estate under the federal exemptions created by 11 U.S.C. §522(b)(3)(C) and (d)(12)?<sup>1</sup>

Specifically, the issue is whether distributions from an IRA rolled over more than once during a one-year interval are exempt from the bankruptcy estate under 11 U.S.C. §522(b)(4)(D). To resolve this issue, the court must determine whether the Bankruptcy Code's requirements for exempting distributions rolled over from an IRA incorporate the requirements for exemption from taxation found in 26 U.S.C. §408(d)(3).

<sup>1</sup> The language contained in both subsections is identical.

1 **I. STATEMENT OF RELEVANT FACTS**

2 On January 31, 2007, William S. Patrick (“Debtor”) filed a voluntary Chapter 7 petition. In  
3 his original Schedule C, Debtor claimed the “whole” IRA as exempt in the amount of \$175,000 under  
4 Cal. Civ. Proc. Code §703.140(b)(10)(E). In amended schedules filed on July 18, 2007 and then again  
5 on November 19, 2007, the Debtor claimed as exempt \$172,870.95 in his First Bank IRA under both  
6 Cal. Civ. Proc. Code §703.140(b)(10)(E) and 11 U.S.C. §522(b)(3)(C). On June 18, 2007, Walter  
7 Prince (“Prince”), a judgment creditor owed approximately \$2.4 million and the Debtor’s former  
8 business partner, filed an objection to the Debtor’s claim of exemptions.

9 Debtor opened the IRA in 1975 and claims to have contributed the maximum amount  
10 allowed every year since, except for 1995 when no contributions were made.<sup>2</sup>

11 On June 5, 2006, the IRA in question consisted of account number 001-805237 at First  
12 Private Bank & Trust in Granada Hills, CA (“First Bank IRA” or “IRA”) with a balance of  
13 \$172,685.05. Beginning on that date, three cashier’s check were drawn on the First Bank IRA and each  
14 was subsequently redeposited into that same account within a four-month period:

- 15 1. June 5, 2006 - the Debtor obtained a cashier’s check made payable to himself in the  
16 amount of \$172,000. The check was labeled as “distribution 1-805237.” On June 12,  
17 2006, the Debtor deposited the same check back into his First Bank IRA.
- 18 2. July 14, 2006 - after making an additional \$4,000 contribution to the First Bank IRA, the  
19 Debtor obtained another cashier’s check made payable to himself in the amount of  
20 \$176,000. The check was labeled “1805237.” On July 24, 2006, the Debtor deposited  
21 the same check back into his First Bank IRA.
- 22 3. August 30, 2006 - the Debtor obtained another cashier’s check made payable to himself  
23 in the amount of \$176,000. The check was labeled “2006 distribution.” On September  
24 27, 2006, the Debtor deposited the same check back into his First Bank IRA.

25 The principal issue raised at the time that this objection was filed and for months thereafter  
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27 <sup>2</sup> Debtor initially declared that he made no contributions in 1988, 1990, 1999, and 2002; however, the account  
28 statements later turned over by Debtor show that he actually did make contributions in all of these years and those contributions  
are reflected in the charts used for the purpose of calculating the eligible amount of his exemption. Further, Debtor concedes that  
he was not allowed to make contributions after he reached age 70½ and therefore no amount is reflected in 2006.

1 was whether the Debtor had made the correct contributions so that the full amount of the funds held in  
2 the First Bank IRA was tax deferred. Debtor asserted lack of records and the matter was continued  
3 several times to allow him to gather evidence so that accountants for both parties could review the  
4 records and ascertain whether all contributions qualified for tax deferred status. Eventually, the Debtor  
5 produced substantially complete records of contributions and then, for the first time, the three 2006  
6 transactions noted above came to light and Prince raised the issue of whether the IRA had lost its  
7 exempt status because there had been more than one rollover in a single twelve-month period.

8 Since then, several issues have been put before the court: (1) whether obtaining the three  
9 cashier's checks within the same twelve-month period removes \$176,000 (and its accrued interest from  
10 July 14, 2006) from tax deferred status as set forth in 28 U.S.C. §408; (2) if the First Bank IRA funds no  
11 longer have tax deferred status under 28 U.S.C. §408, does that prevent the Debtor from claiming an  
12 exemption under 11 U.S.C. §522(b)(3)(C); (3) whether some or all of the remaining First Bank IRA  
13 funds can be exempted under 11 U.S.C. §522(b)(3)(C) and, if so, how much is exempt; (4) whether  
14 some or all of the First Bank IRA funds can be exempted under Cal. Civ. Proc. Code  
15 §703.140(b)(10)(E); and (5) assuming that some portion of the funds in the First Bank IRA can be  
16 exempted, what is that amount.

## 17 18 **II. WHETHER DEBTOR CAN CLAIM THE FUNDS EXEMPT UNDER FEDERAL LAW**

### 19 **A. Eligible amount of exemption in the First Bank IRA**

20 The amounts and dates of the contributions are disputed, and the objection has been  
21 continued over a period of months to allow the Debtor to obtain sufficient evidence to finalize the  
22 calculation. On January 8, 2008, Prince filed a declaration by his expert Neil S. Harmon concluding  
23 that "the total deposits reveal a total balance of \$70,030.16 inclusive of accrued interest as of December  
24 31, 2006" and therefore anything above that amount should be disallowed. Then, in a pleading dated  
25 January 14, 2008, Prince argued that, based on a review of additional documents, the above amount  
26 should be decreased by \$4,000, which was deposited post-retirement, for a new total of \$66,030.16.

27 In a declaration dated June 4, 2008, Prince's expert Neil Harmon discussed the interest on  
28 \$42,887.62 in disputed contributions which constitute the "beginning balance" as of 1/1/87 and for

1 which the Debtor provided no supporting documents. Harmon calculated that this amount plus interest  
2 currently accounts for \$119,271.80 of the claimed exemption. In response, the Debtor provided  
3 evidence that he sought to obtain records from the financial institution but was unable to do so because  
4 the deposits were made too many years ago. Because the Debtor has met his burden and satisfied  
5 Federal Rule of Evidence 1004 by presenting adequate testimony to explain the lack of records, the  
6 disputed funds will not be subtracted from the eligible amount.

7 The parties also argued over a \$2,000 IRA contribution on 3/5/97, a \$4,000 contribution on  
8 7/17/06, and a \$15,000 contribution on 6/21/06. However, the Debtor eventually conceded that these  
9 contributions and interest thereon should be excluded from the exempt amount (see Debtor's Response  
10 to Evidentiary Objections, etc. dated 6/11/08).<sup>3</sup>

11 In sum, Prince argues that once the total disputed contributions of \$140,899.79 are taken into  
12 account, the Debtor's exemption should be denied in full because the disputed contributions exceed  
13 what the Debtor has already withdrawn from the IRA and the balance on hand.

14 Based on the evidence before the court at this time, I find that the contributions are as set  
15 forth in the charts entitled "Summary of Actual IRA Activity from 1987" (Exhibit 3) and "Projected  
16 IRA Analysis" (Exhibit 25) filed by Debtor on March 25, 2008 with the Declarations of Donald T. Fife,  
17 CPA and William S. Patrick.<sup>4</sup> In accordance with the figures reflected in those charts, the court  
18 concludes that the full \$172,870.95 constitutes an eligible amount which would qualify as exempt  
19 deposits and proceeds in the First Bank IRA account.

20 However, once monies are deposited in an IRA account, they can lose their exempt status  
21 through later acts of the Debtor.

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25 <sup>3</sup> As to the \$4,622.21 discrepancy relating to 1975-1986 deposits by debtor's deceased spouse (described on p.1 of the  
26 Debtor's Response to Evidentiary Objections, etc., dated 8/11/08), the court accepts Debtor's explanation as reasonable and will  
27 not subtract this amount from the eligible amount.

28 <sup>4</sup> I have accepted the projected deposit amounts for 1975-1986 made by both the Debtor and his deceased spouse as  
reflected in Exhibit 25 based on Debtor's uncontroverted evidence that (1) he commenced contributions when the retirement  
savings system first became available in 1975, (2) he sought to but was unable to obtain complete supporting documents for the  
years 1975-1986, (3) the figures are documented in part by past tax returns which comport with Debtor's testimony, and (4)  
Debtor's expert Mr. Fife used a reasonable method to calculate the contributions and interest thereon.

1                   **B. Qualifying for exemption under §522(b)(3)(C) of the Bankruptcy Code**

2                   Under 11 U.S.C. §522, debtors may exempt certain property from the claims of creditors.

3                   Following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act  
4                   (“BAPCPA”), Pub. L. No. 109-8, § 224, 119 Stat. 23 (2005), exempt property now includes “retirement  
5                   funds to the extent that those funds are in a fund or account that is exempt from taxation under section  
6                   401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.”<sup>5</sup> Although the  
7                   language is identical, a debtor may elect to exempt property under either §522(b)(3)(C) or §522(d)(12);  
8                   in this case, the Debtor made the §522(b)(3)(C) election, which can be used in opt-out states such as  
9                   California.

10                   There are two ways for a retirement fund to be exempt: (1) a retirement fund is presumed to  
11                   be exempt under §522(b)(4)(A) if the fund has received a favorable determination under section 7805 of  
12                   the Internal Revenue Code of 1986 and that determination is in effect when the petition is filed or (2) if  
13                   the fund has not received a favorable determination, it may be exempt if the debtor demonstrates that (i)  
14                   no prior determination to the contrary has been made by a court or the IRS and (ii) the retirement fund  
15                   is in “substantial compliance” with the Internal Revenue Code (“IRC”) or the retirement fund fails to be  
16                   in “substantial compliance” with the IRC and the debtor is not materially responsible for that failure.<sup>6</sup>

17                   The first question requiring resolution by this Court is whether the Debtor’s IRA should be  
18                   presumed exempt from the bankruptcy estate under §522(b)(4). Neither party contends that the IRA  
19                   received any prior favorable or contrary determination by the IRS or a court of law. Therefore, pursuant  
20                   to §522(b)(4)(B), the Court must determine whether the IRA is in “substantial compliance” with the  
21                   applicable requirements of the IRC or, if not, whether the debtor is not materially responsible for the  
22                   non-compliance.

23                   To support his contention, the Debtor provided a declaration by Denise Wilson, Fiserv Trust  
24                   Company’s Compliance Officer, dated July 2007 and stating that the Debtor’s IRA “is in substantial  
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27                   <sup>5</sup> §522(b)(3)(C); §522(d)(12).

28                   <sup>6</sup> §522(b)(4)(B)(i)-(ii).

1 compliance with the applicable requirements of the Internal Revenue Code.”<sup>7</sup> Prince has not attempted  
2 to refute Ms. Wilson’s declaration with evidence to the contrary but instead argues that the Debtor’s  
3 multiple rollovers violate §408(d)(3)(B)<sup>8</sup> of the IRC, effectively disqualifying the IRA from exempt  
4 status. By so doing, Prince ignores the fact that a distribution can be taxed without having any effect on  
5 the tax exempt status of the account itself.<sup>9</sup> In other words, Prince fails to acknowledge the distinction  
6 made in the IRC and the Bankruptcy Code between a tax exempt account and a tax exempt  
7 distribution.<sup>10</sup>

8 While it is tempting to limit the inquiry to a determination of whether the Debtor’s IRA is in  
9 substantial compliance with the IRC, that would render the rest of §522(b)(4) superfluous. It is a  
10 fundamental rule of statutory construction that every word, clause, and provision in a statute must be  
11 given effect so that no part would be rendered inoperative or superfluous.<sup>11</sup> Therefore, paragraphs  
12 (b)(4)(C) and (D) must be given equal force in analyzing §522(b). Those subsections address direct  
13 transfers and rollover distributions (sometimes referred to as “indirect transfers”) from retirement  
14 accounts. Consistent with the tax treatment of direct transfers between trustees,<sup>12</sup> subsection (b)(4)(C)  
15 states that a direct transfer of retirement funds between tax exempt accounts does not affect the  
16 exemption under subsections (b)(3)(C) and (d)(12).<sup>13</sup> Similarly, a properly rolled-over distribution from  
17 a retirement account does not affect the exemption of the distribution under subsections (b)(3)(C) and  
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19 <sup>7</sup> Although Wilson’s declaration does not attest to whether the IRA was in substantial compliance on the date of the  
20 bankruptcy petition, which is the operative date for purposes of this analysis, the parties did not raise this as an issue.

21 <sup>8</sup> 26 U.S.C. §408(d) deals with the tax treatment of distributions and will be discussed in the next section.

22 <sup>9</sup> See Michel v. C.I.R., 58 T.C.M. (CCH) 1019 (T.C. 1989) (holding that the subsequent tax treatment of an IRA  
contribution does not affect the validity of the IRA).

23 <sup>10</sup> The distinction can be found in the IRC in that the tax-exempt status of distributions and the tax-exempt status of an  
24 IRA are discussed separately. Section 408(d)(3) deals specifically with the taxability of distributions, while §408(e) governs  
the disqualification and taxability of the fund itself.

25 <sup>11</sup> In re Catapult Entm’t, Inc., 165 F.3d 747, 751 (9th Cir. 1999); see also 2A Singer, SUTHERLAND STATUTORY  
26 CONSTRUCTION § 46.6 (7th Ed. 2007).

27 <sup>12</sup> IRS Publication 590 (2007) states in part: “[a] transfer of funds in your traditional IRA from one trustee directly to  
another, either at your request or at the trustee’s request, is not a rollover. Because there is no distribution to you, the transfer  
is tax free.”

28 <sup>13</sup> §522(b)(4)(C).

1 (d)(12).<sup>14</sup> Therefore, retirement funds that are properly transferred via direct transfer or a tax-free  
2 rollover distribution do not cease to qualify for exemption by reason of such transfer or distribution.  
3 Conversely, this implies that if a direct transfer or rollover distribution does not comply with the  
4 applicable IRC provisions “to the extent allowed by law,”<sup>15</sup> the funds may cease to qualify for  
5 exemption from the bankruptcy estate. Thus, the court must determine whether the funds that Debtor  
6 distributed in the multiple rollovers ceased to qualify for exemption from the bankruptcy estate under  
7 subsection (b)(4)(D) by reason of such distribution.

### 8 **C. How can IRA funds qualify for exemption?**

#### 9 1. Rollover distributions exempt from taxation under the IRC

10 Section 402(c) of the IRC contains the rules applicable to rollovers from exempt trusts,<sup>16</sup>  
11 and provides that distributions from such trusts that are transferred to “eligible retirement plans”<sup>17</sup> are  
12 exempt from taxation as long as such transfers are made within 60 days of the distribution.<sup>18</sup> If the  
13 transfer is not “rolled over” within 60 days, the distribution is taxable.<sup>19</sup> An individual will be treated as  
14 receiving a distribution if a check is made payable and received by the individual, as opposed to the  
15 funds being transferred directly from trustee of one IRA to trustee of another IRA.<sup>20</sup> This is because the  
16 “receipt of a check is tantamount to the receipt of cash, even if the check is not deposited or otherwise  
17 negotiated, provided that its receipt is not subject to ‘substantial limitations’ and there is no reason to  
18 suppose that it will be dishonored.”<sup>21</sup>

19 Rollover distributions from an IRA are described in §408(d) of the IRC. Such distributions  
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21 <sup>14</sup> §522(b)(4)(D).

22 <sup>15</sup> §522(b)(4)(D)(ii)(II).

23 <sup>16</sup> Pursuant to §402(c)(8)(A), “exempt trust” means an employees’ trust described in §401(a) that is tax-exempt under  
24 §501(a) of the IRC.

25 <sup>17</sup> An IRA, described in §408(a) of the IRC, is an example of an “eligible retirement plan.”

26 <sup>18</sup> 26 U.S.C. §402(c)(3).

27 <sup>19</sup> §402(c)(3)(A).

28 <sup>20</sup> Martin v. C.I.R., 63 T.C.M. (CCH) 3122 (T.C. 1992), aff’d, 987 F.2d 770 (5th Cir. 1993).

<sup>21</sup> Id. n.5, citing Lavery v. Commissioner, 158 F.2d 859, 860 (7<sup>th</sup> Cir. 1946), affg. 5 T.C. 1283 (1945).

1 are exempt from taxation as long as they are “rolled over” into an IRA within 60 days.<sup>22</sup> However, such  
2 tax exempt rollovers may only occur once per year from the time of receipt of the distribution and any  
3 additional rollovers made during that year are taxable.<sup>23</sup> For purposes of §408(d)(3)(B), the fact that  
4 funds distributed from an IRA are withdrawn and redeposited on the same day is irrelevant, and such  
5 act constitutes a rollover.<sup>24</sup>

6 **2. Rollover distributions exempt from the bankruptcy estate under §522(b)(4)(D)**

7 In addition to the retirement accounts described above, §522(b)(4)(D) exempts from the  
8 bankruptcy estate two types of distributions:

9 (i) [A]ny distribution that qualifies as an eligible rollover distribution within the meaning of  
10 section 402(c) of the Internal Revenue Code of 1986 or . . . (ii) . . . an amount that . . . has been  
11 distributed from a fund or account that is exempt from taxation under section . . . 408 of the  
Internal Revenue Code . . . and . . . to the extent allowed by law, is deposited in such a fund or  
account not later than 60 days after the distribution of such amount.<sup>25</sup>

12 Congress inserted subsection (b)(4) as a way of qualifying or limiting the types of actions a debtor may  
13 take with respect to his or her IRA. This is also evident by use of the phrase “[f]or purposes of  
14 paragraph (3)(C) and subsection (d)(12), the following shall apply,”<sup>26</sup> which resembles qualifying  
15 language. As long as a distribution complies with §402(c) (and qualifies for exemption from taxation  
16 under that subsection) or is “rolled over” into another retirement account within 60 days, it is exempt  
17 from the bankruptcy estate. In other words, to qualify for exemption from the bankruptcy estate, a  
18 rollover distribution must be exempt from taxation.

19 **D. Applicability of IRC §408(d)(3)(B) to Bankruptcy Code §522(b)(4)(D)**

20 The issue in contention here is whether the totality of the requirements and limitations for  
21 rolling over distributions from an IRA are listed in §522(b)(4)(D) or whether the IRC rules governing  
22 the taxability of such distributions must also be applied in the bankruptcy context. The Debtor contends  
23 that the requirements for rolling over distributions from an IRA are conclusively laid out in

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24 <sup>22</sup> §408(d)(3)(A)(i). Failure to comply with the rollover requirements may result in an excess contribution and the  
25 imposition of a 6% excise tax. 26 U.S.C. §4973(a).

26 <sup>23</sup> §408(d)(3)(B).

27 <sup>24</sup> Martin, *supra* note 15.

28 <sup>25</sup> 11 U.S.C. §522(b)(4)(D).

<sup>26</sup> 11 U.S.C. §522(b)(4).

1 §522(b)(4)(D), and that if Congress wanted to incorporate the IRC’s requirements, it would have  
2 expressly done so. Prince argues that there are multiple instances where §522(b) refers to IRC sections  
3 generally as a way of incorporating their respective requirements. The court agrees with Prince.

4 Each part or section of a statute should be construed in connection with other parts or  
5 sections of the statute in order to produce a uniform and harmonious result.<sup>27</sup> The general purpose and  
6 intent of the whole act controls, and all parts of the statute must be interpreted consistently with that  
7 purpose.<sup>28</sup> With this in mind, it is clear from the language of §522(b) that funds from an IRA are  
8 exempt from the bankruptcy estate under federal law to the extent that they are exempt from taxation  
9 under the applicable sections of the IRC. For example, paragraph (4)(C) states that a direct transfer of  
10 retirement funds from one tax exempt retirement account to another does not disqualify the funds from  
11 exemption from the bankruptcy estate. This is consistent with the fact that such direct transfers are tax  
12 free. A close reading of subsection (b)(4)(D) renders a similar conclusion regarding the exemption of  
13 distributions out of a retirement account: a distribution out of a tax exempt retirement account does “not  
14 cease to qualify for exemption” from the bankruptcy estate if (1) it is rolled over in accordance with  
15 §402(c) of the IRC or (2) to the extent allowed by law, is rolled over into a tax exempt retirement  
16 account within 60 days. In other words, if the distribution is exempt from taxation, it is exempt from  
17 the bankruptcy estate.

18 The IRC’s rule that only one tax free rollover can be made in a one-year period applies in  
19 determining whether a rolled-over distribution is exempt from the bankruptcy estate under  
20 §522(b)(4)(D)(ii). This rule is incorporated by the phrase “to the extent allowed by law,”<sup>29</sup> which  
21 indicates intent to include any other requirements and limitations that may exist in the IRC. Because  
22 the IRC often contains long and complex provisions, Congress’ use of the phrase “to the extent allowed  
23 by law” indicates an intent to incorporate these requirements for bankruptcy purposes without the hassle  
24 of reiterating them in the Bankruptcy Code. In fact, the language of §522(b)(4)(B) contains an

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25 <sup>27</sup> Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).

26 <sup>28</sup> BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

27 <sup>29</sup> It should be noted that this phrase does not exist anywhere else in the Bankruptcy Code. The court disagrees with the  
28 Debtor’s interpretation that this means “[t]ransactions which are legal but taxable are ‘allowed by law’” because such  
interpretation omits the qualifying language “**to the extent** allowed by law” (emphasis added). And for purposes of tax exempt  
rollovers, the law does not allow distributions to take place more often than once a year.

1 additional provision to support this, namely that “the retirement fund is in substantial compliance with  
2 **the applicable requirements** of the Internal Revenue Code....”<sup>30</sup>

3 In addition, the conclusion that Congress intended to incorporate the IRC requirements for  
4 rolling over distributions into the Bankruptcy Code is supported by the “fundamental canon of statutory  
5 construction that the words of a statute must be read in their context and with a view to their place in the  
6 overall statutory scheme.”<sup>31</sup> Viewing §522(b)(4)(D)(ii) in context and in its place in the overall  
7 statutory scheme, it is apparent that under federal law, Congress intended to exempt retirement accounts  
8 and/or distributions from the bankruptcy estate only to the extent that the accounts and/or distributions  
9 are exempt from taxation under the applicable sections of the IRC.

10 In sum, this Court concludes that the language of §522(b) indicates that the IRC’s  
11 requirements and procedures for rolling over distributions from an IRA apply in determining whether  
12 any improperly rolled over distributions cease to qualify for exemption from the bankruptcy estate.

13 **E. The Debtor’s multiple rollovers are not exempt from the bankruptcy estate because**  
14 **they would not qualify for exemption from taxation under IRC §408(d)(3)(B)**

15 It is undisputed that the Debtor’s withdrawals and subsequent deposits of the money from his  
16 IRA in 2006 constitute rollovers. As required by law, all three rollovers were reported as distributions  
17 by First Private Bank & Trust on a 2006 Form 1099-R in the total sum of \$362,019.72. Although the  
18 Debtor’s first rollover on June 12, 2006 was proper, the second and third rollovers occurred within one  
19 year of the first, in violation of the limitation set out in §408(d)(3)(B). Consequently, the \$176,000  
20 distributions involved in the second and third rollovers within the same year cannot be exempt from the  
21 bankruptcy estate under §522(b)(4)(D) because they did not occur “to the extent allowed by law.”

22 Without providing any case law in support, the Debtor argues that the §408(d)(3)(B)  
23 limitation does not apply because the language of the section refers to receipt by the taxpayer of “any  
24 other amount” within the same year, and here the Debtor withdrew and redeposited exactly the same  
25 funds three times. Whether “amount” means an identical sum or a prior distribution is irrelevant  
26 because in this case there was a prior distribution and it was for a lesser sum (\$172,000 was first

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27 <sup>30</sup> 11 U.S.C. §522(b)(4)(B)(ii)(I) (emphasis added).

28 <sup>31</sup> FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Davis v. Mich. Dept. of Treasury,  
489 U.S. 803, 809 (1989)).

1 received and the second distribution was for \$176,000). For all the above reasons, Prince’s objection to  
2 the Debtor’s exemption under federal law must be sustained.<sup>32</sup>

### 3 4 **III. WHETHER DEBTOR CAN CLAIM THE FUNDS EXEMPT UNDER CALIFORNIA LAW**

5           However, the Debtor may still pursue the exemption as claimed under state law pursuant to  
6 Cal. Civ. Proc. Code §703.140(b)(10)(E). For purposes of meeting the exemption under California law,  
7 the issue is to what extent the funds in Debtor’s IRA are “reasonably necessary” for his support (debtor  
8 claims no dependants), given that he is a widower, 73 years old, and has no future employment  
9 prospects. In the Ninth Circuit, the “reasonably necessary” standard of §704.115(b) has been applied to  
10 cases in which a §703.140(b)(10)(E) exemption has been claimed.<sup>33</sup> Although the court has wide  
11 discretion in determining the amount necessary to support the debtor,<sup>34</sup> it is instructed to consider the  
12 Moffat factors when making findings on support: (1) the debtor’s present and anticipated living  
13 expenses and income; (2) the age and health of the debtor; (3) the debtor’s ability to work and make a  
14 living, including his/her training, skills and education; (4) the debtor’s other assets and their liquidity;  
15 (5) the debtor’s ability to save for retirement; and (6) any special needs of the debtor and his/her  
16 dependants.<sup>35</sup> Under Fed. R. Bankr. P. 4003(c), the objecting party has the burden of proving that the  
17 exemptions are not properly claimed, but there is no requirement that evidence must be provided on  
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19           <sup>32</sup> In their supplemental briefs filed after this matter was submitted, the parties did an excellent job briefing the legislative  
20 history which has confirmed the court’s result in this case, with the following additional noteworthy comments not contained in  
21 the discussion above: (1) although waivers of the 60-day rule can be granted by the IRS under specific conditions including  
22 natural disasters and other unusual situations (which do not exist in this case), no such waivers appear to be allowed for the one-  
23 year rule; (2) any such waiver authority would have to be exercised by the IRS, not the courts; (3) both the 2006 Form 1099-R  
24 and 2006 tax return Form 1040 show distributions of \$362,000; (4) Private Letter Ruling 9010007 cited by Prince confirms that  
25 temporarily withdrawn funds which are redeposited into same account within 60 days can qualify for tax-free treatment, but the  
26 taxpayer is limited to only one such tax-free event per year; (5) it appears that Debtor was aware of the one-year rule because  
27 he checked the box reflecting this limitation each time he took out the funds; and (6) the public policy reason clearly implicated  
28 in this case is the legislature’s intent to prevent shifting of investments more than once a year (previously more than once every  
three years). As to Prince’s evidentiary objection to Debtor’s declaration dated 10/6/08 (filed in support of the Debtor’s Brief Re  
Legislative History), that objection is sustained. In the brief dated 10/10/08, debtor blames First Private for not providing him  
with correct information regarding the effect of his withdrawals. However, assuming this is true, it would not absolve the Debtor  
from being materially responsible for compliance and would not change the court’s analysis.

33 See In re Davis, 323 B.R. 732, 736 (9<sup>th</sup> Cir. BAP 2005).

34 See In re Spenser, M.D., 212 B.R. 625, 631 (9<sup>th</sup> Cir. BAP 1997).

35 Davis, 323 B.R. at 736, quoting In re Moffat, 119 B.R. 201, 206 (9<sup>th</sup> Cir. BAP 1990), aff’d, 959 F.2d 740 (9<sup>th</sup> Cir. 1992).

1 each element “if there is other evidence from which it can be determined that the retirement funds at  
2 issue are not necessary for debtor’s support upon retirement.”<sup>36</sup>

3 The factors most relevant in this case are the Debtor’s age, lack of future employment  
4 prospects and limited income potential. Debtor is 73 years old and there is no dispute that he will not be  
5 meaningfully employed and able to add to his savings for retirement. In addition, due to his age, he’s  
6 not allowed to make any more IRA contributions. In a declaration filed on July 19, 2008 as part of his  
7 opposition to the motion objecting to his claim of exemption, the Debtor disclosed his only sources of  
8 income as social security (\$928 per month) and a U.S. Army pension (\$1,392.83 per month), totaling  
9 \$2,320.83 in monthly income. This amount is also reflected on Debtor’s most current amended  
10 schedules filed on November 19, 2007, which also show that Debtor requires \$3,256.69 in monthly  
11 living expenses. Since Debtor’s expenses are not met with his regular monthly income from social  
12 security and pension (the difference being \$935.86), he has been supplementing his income with  
13 distributions from his IRA. To wit, in 2005 Debtor received \$21,000 in net IRA distributions and in  
14 2006, Debtor received \$14,020. Based on his most recently filed schedules, Debtor has been  
15 withdrawing \$1,000/month from his IRA, for a 2007 estimated total of \$12,000.

16 As discussed above, the court finds that on the date of bankruptcy the account contained  
17 \$172,870.95, which would be subject to Cal. Civ. Proc. §703.140(b)(10)(E). Debtor’s expenses do not  
18 appear extravagant and Prince does not question their validity. Aside from increasing living expenses  
19 (due to inflation) which are discussed in Donald T. Fife’s declaration dated June 11, 2008, the Debtor  
20 estimates an additional \$18,450 in attorney’s fees if this case goes to trial, and perhaps \$25,000-30,000  
21 if additional discovery and appeals are taken into account. As a starting point, Debtor’s current  
22 expenses amount to \$39,080.28 a year.

23 It is difficult to ascertain what standard should be used to determine reasonable expenses.  
24 Although Prince alludes to the poverty level, that is not a proper guide. But neither is it appropriate to  
25 merely rubberstamp the lifestyle that the Debtor has been used to. The IRS Standards have become the  
26 darlings of Congress in recent years, so that might be a good place to start, keeping in mind that the  
27 Debtor is on a fixed income, but can expect an increase in health-related costs as he ages such as the

28 <sup>36</sup> Davis, 323 B.R. at 736, 739. Interestingly, in Davis, the trustee/objecting party presented the declaration and testimony  
of Donald Fife, the Debtor’s expert in this case.

1 need for a companion, a driver, and/or nursing care. And as far as income goes, it might be worthwhile  
2 to look at median income for this geographic area.<sup>37</sup>

3 The January 31, 2007 median family income for California for a single earner was \$3,592.25  
4 per month, which is well in excess of that received by Patrick exclusive of his IRA. To meet the  
5 median, he would have to draw about \$1,200 per month from the IRA. The IRS standards for a single  
6 person living in Los Angeles County for 2008 allow \$3,149 per month in expenses.<sup>38</sup> The expenses set  
7 forth by Debtor on Schedule J are very close to these totals. Assuming that he is allowed \$3,149 per  
8 month to live on, he would be required to draw \$828 per month from his IRA. Next, the court should  
9 look at how much must be in that IRA account to assure that it will last for Patrick's life expectancy.<sup>39</sup>

10 The experts disagree over which life expectancy table to use: Debtor's expert Mr. Fife is  
11 using a 2003 expectancy table, while Prince's expert Mr. Ahuja is relying on 1983 Group Annuity  
12 Mortality Tables. Since it is almost the end of 2008, the court believes that the 2003 table reflects a  
13 more accurate picture of today's mortality rates and thus adopts Mr. Fife's analysis as more convincing.  
14 Under Mr. Fife's analysis, the Debtor requires a minimum of \$197,199 of current funds to pay his  
15 expenses over the next **12 years**. Under Mr. Ahuja's analysis which uses the 2008 HHS Poverty  
16 Guidelines, the Debtor would require the maximum sum of \$120,158 to survive over the next **14 years**.  
17 As noted above, the HHS poverty guidelines are not the correct standard to use.

18 Assuming that income and expenses both rise at the inflation rate, the court can easily  
19 calculate the drawdown of the IRA account. If the debtor were to withdraw \$828 per month from the  
20 IRA account for the 14 years of Patrick's life expectancy, this would require \$139,104 in the account as  
21 of this time. However, it is very likely that, given the current technological advances in the health

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23 <sup>37</sup> All figures come from the websites of the U.S. Census Bureau and Internal Revenue Standards for 2008. Because  
24 the national IRS standards for food and clothing in effect when debtor filed were based on income, I am using the current  
25 standards, which no longer include this variable. In ascertaining the debtor's "income," the court notes that at the time of filing  
26 it included an IRA withdrawal of \$1,000 per month. This is deducted for purposes of these calculations. Therefore the gross  
27 income as of the date of filing (January 31, 2007) would be \$2,320.83 per month (Social Security of \$928 and pension of  
28 \$1,392.83). Because of the short time frame from filing to the present, "mixing apples and oranges" by using income in 2007  
and charts from 2008 should not have a meaningful impact on the outcome of this analysis.

<sup>38</sup> Food, clothing, etc. = \$507; transportation of one car = \$750; housing = \$1,748; and health care for age 65+ = \$144.

<sup>39</sup> Given the fluctuations of the stock market, it is extremely difficult to know how much will be in the account at any  
given time unless it is in cash. For this analysis, it is assumed that the money is in cash and will remain that way, drawing interest  
at about the inflation rate.

1 industry, Debtor may outlive his life expectancy, but not without having to meet an unknown higher  
2 cost of health care. In addition, Debtor presented uncontroverted evidence that he will likely incur a  
3 total of \$18,450 of legal expenses in the next two years and will be liable for a total of \$18,000 in taxes  
4 in the next two years and \$2,500 per year thereafter (or \$30,000 over the remaining years),<sup>40</sup> amounting  
5 to an additional \$66,450 needed in the next 14 years. This would require over \$200,000 in the account  
6 as of this time, which exceeds the \$172,870.95 exemption.

7 Thus, the court concludes that the whole amount of the exemption is reasonably necessary  
8 for Debtor's support and should be allowed as claimed under California law.

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11 DATED: 10/31/08

/s/ Geraldine Mund  
GERALDINE MUND, BANKRUPTCY JUDGE

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<sup>40</sup> See p.3 of Mr. Fife's declaration dated June 11, 2008 filed in support of Debtor's reply re the June 18, 2008 hearing. The court is not taking into account the \$100,000 projected cushion referred to in Mr. Fife's declaration in case Debtor exceeds the 12 year life expectancy used by Mr. Fife.

CERTIFICATE OF MAILING

I, CECILIA ESPINO, a regularly appointed and qualified clerk of the United States Bankruptcy Court for the Central District of California, do hereby certify that in the performance of my duties as such clerk, I personally mailed to each of the parties listed below, at the addresses set opposite their respective names, a copy of the MEMORANDUM OF OPINION OVERRULING OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION in the within matter. That said envelope containing said copy was deposited by me in a regular United States mailbox in the City of Los Angeles, in said District, on NOV - 3 2008.

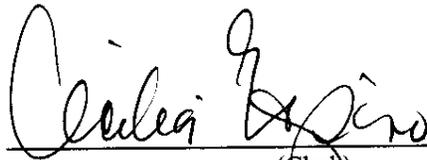
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(Clerk)