

SIGNED.

Dated: February 6, 2012



*James M. Marlar*

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

<p>10 In re:</p> <p>11 DEAN A. RODY and SOROYA H.</p> <p>12 MOHAMMADPOUR,</p> <p>13 _____ Debtors.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 7</p> <p>No. 4:11-bk-17790-JMM</p> <p><b>MEMORANDUM DECISION</b></p>
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Dean Rody and Soroya Mohammadpour (“Debtors”) claimed various items of personal property exempt under 11 U.S.C. § 522(d). The chapter 7 Trustee objected that the Debtors were required to claim the Arizona exemptions, which, he asserted, applied beyond state borders (ECF No. 30). It was undisputed that Debtors, who had moved to Massachusetts prepetition, met the domiciliary requirements of the Bankruptcy Code for application of the Arizona exemptions. Debtors responded, however, that Arizona’s “opt-out” statute for use of the state exemptions was restricted to residents of Arizona. Thus, because they were not Arizona residents on the petition date, they maintained they were entitled to use the federal exemptions pursuant to the default rule of 11 U.S.C. § 522(b)(3). The contested matter was heard and taken under advisement. The Court now renders its decision overruling the Trustee’s objection.

**I. Jurisdiction**

The Court has jurisdiction over this core matter under 28 U.S.C. § 1334; see also 28 U.S.C. § 157(b)(2)(B) . Venue is proper in this district under 28 U.S.C. § 1408.

1 **I. Facts and Procedure**

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3 Debtors resided in Arizona from 2000 to May 16, 2011. On May 17, 2011, they  
4 moved permanently to Massachusetts and were residing there on the petition date. On June 21,  
5 2011, Debtors filed a joint chapter 7 petition in Arizona.

6 On Amended Schedule C, Debtors claimed various items of personal property exempt  
7 pursuant to 11 U.S.C. § 522(d). Debtors used the federal exemptions even though they met the  
8 domiciliary requirements for the Arizona exemptions in accordance § 522(b)(3), which provides:

9  
10 (3) Property listed in this paragraph is–

11 (A) subject to subsections (o) and (p), any property that is exempt under  
12 Federal law, other than subsection (d) of this section, or State or local  
13 law that is applicable on the date of the filing of the petition to the place  
14 in which the debtor's domicile has been located for the 730 days  
15 immediately preceding the date of the filing of the petition or if the  
debtor's domicile has not been located in a single State for such  
180-day period, the place in which the debtor's domicile was located for  
180 days immediately preceding the 730-day period or for a longer  
portion of such 180-day period than in any other place;

15 . . . .

16 If the effect of the domiciliary requirement under subparagraph (A) is  
17 to render the debtor ineligible for any exemption, the debtor may elect  
to exempt property that is specified under subsection (d).

18 Since Debtors had not been in Massachusetts for 730 days prior to filing bankruptcy,  
19 but had lived in Arizona for the 180 days immediately preceding the 730-day period (or a longer  
20 portion of such 180-day period than any other place), they met the domiciliary requirements for the  
21 Arizona exemption statutes.

22 As permitted by 11 U.S.C. § 522, Arizona has elected to “opt out” of the federal  
23 exemption scheme, such that Arizona debtors can only use the state exemptions. The opt-out  
24 statute, provides, in pertinent part:

25  
26 [I]n accordance with 11 U.S.C. § 522(b), **residents** of this state are not entitled  
27 to the federal exemptions provided in 11 U.S.C. 522(d). Nothing in this  
28 section affects the **exemptions provided to residents of this state** by the  
constitution or statutes of this state.

1 A.R.S. § 33-1133(B) (emphasis supplied.)

2 Debtors believed they were ineligible for the Arizona exemptions because they were  
3 residents of Massachusetts on the petition date. Given the “plain language” of A.R.S. § 33 1133(B),  
4 Debtors followed the default rule in the “hanging paragraph” of § 522(b)(3), cited above, which  
5 states: “[I]f the effect of the domiciliary requirement . . . is to render the debtor ineligible for any  
6 exemption, the debtor may elect to exempt property that is specified under subsection (d)” of § 522.  
7 11 U.S.C. § 522(b)(3).

8 The Trustee filed a timely objection to the claimed exemptions (ECF No. 30) solely  
9 on the grounds that Debtors were required to claim the Arizona exemptions. Debtors filed a  
10 response in opposition (ECF No. 32), maintaining that, as nonresidents, they were not eligible to  
11 use the Arizona exemptions.

12 The Trustee replied that Debtors’ “strained reading” of A.R.S. § 33-1133(B) “would  
13 defeat the federal bankruptcy exemption scheme that preserves to individual states the right to opt  
14 out of the federal exemptions and require the use of the state’s exemption laws.” Trustee’s Reply at  
15 1:20-23 (ECF No. 33). The Trustee contended that the Arizona exemptions were available to the  
16 nonresident Debtors because (1) A.R.S. § 33-1133(B) did not explicitly prohibit their use by  
17 nonresidents, and (2) opt-out state statutes have extraterritorial application, citing In re Arrol, 170  
18 F.3d 934 (9th Cir. 1999) (interpreting California law).

19 Debtors’ sur-reply (ECF No. 34) was also filed. A hearing took place at which the  
20 Court considered the arguments and pleadings, and took the matter under advisement.

21  
22 **II. Issues**  
23

- 24 1. Whether Arizona’s exemption scheme is only applicable to resident  
25 debtors.  
26 2. Whether a determination as to the extraterritorial effect of Arizona’s  
27 personal property exemptions is necessary to decide this matter.  
28

- 1           3.     Whether the Debtors correctly concluded that they could use the federal  
2                         exemptions because there were no state exemptions available to them.

3  
4   **III. Discussion**

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6           The commencement of a bankruptcy case creates an estate comprised of all legal and  
7 equitable interests in property (including potentially exempt property) of the debtor. 11 U.S.C.  
8 § 541. A debtor is entitled to exempt certain assets from the bankruptcy estate. 11 U.S.C. § 522.  
9 In general, exemption laws are to be construed liberally in favor of debtors. See Arrol, 170 F.3d  
10 at 937.

11           Because we are a mobile society, Congress enacted a statute which would determine  
12 which exemption law would apply to debtors whose domicile has changed near the time of the filing  
13 of the petition. The main purpose of this legislation was to prevent opportunistic bankruptcy filings  
14 by debtors simply to take advantage of lenient state exemption laws. W.H. Brown, L. Ahern & N.  
15 Frass MacLean, Bankr. Exempt. Manual §4.6 (2011 Thomas Reuters/Westlaw).

16           This case, however, does not involve forum shopping by Debtors or the so-called  
17 “mansion loophole,” “by which wealthy individuals could shield millions of dollars from creditors  
18 by filing bankruptcy after converting nonexempt assets into expensive and exempt homesteads in  
19 one of the handful of states that have unlimited homestead exemptions . . . .” In re Greene, 583 F.3d  
20 614, 619 (9th Cir. 2009) (citation omitted). Debtors are simply among the growing number of  
21 peripatetic debtors who moved to another state and then found themselves subject to the expanded  
22 domiciliary rules. See generally, L. Bartell, “The Peripatetic Debtor: Choice of Law and Choice of  
23 Exemptions,” 22 Emory Bankr. Dev. J. 401 (Spring 2006).

24           Since 2005, § 522(b)(3)(A), as amended, has provided a look-back period of 730 days  
25 for use of a state’s exemptions --a debtor must have been domiciled for that period of time in the  
26 state immediately preceding the bankruptcy filing, or else the exemptions of the state where the  
27 debtor was domiciled for 180 days or the greater part of 180 days prior to the 730 days would apply.  
28 The amendment was a departure from the bankruptcy venue requirements, and courts now must

1 construe exemption laws of other states. See In re Jevne, 387 B.R. 301, 303 (Bankr. S.D. Fla. 2008).  
2 Congress presumably contemplated the effect of state laws which might restrict their applicability  
3 to residents or to in-state property, potentially leaving debtors without any exemptions. That is why  
4 it included the default language or hanging paragraph in § 522(b)(3) as a fail-safe mechanism. As  
5 cited above, this provision states in relevant part: “[I]f the effect of the domiciliary requirement . .  
6 . is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that  
7 is specified under subsection (d)” of § 522. 11 U.S.C. § 522(b)(3) .<sup>1</sup>

8 Arizona has opted out of the federal bankruptcy exemption scheme only with respect  
9 to Arizona residents. The opt-out statute, provides, in pertinent part:

10 [I]n accordance with 11 U.S.C. § 522(b), *residents* of this state are not entitled  
11 to the federal exemptions provided in 11 U.S.C. 522(d). Nothing in this  
12 section affects the *exemptions provided to residents* of this state by the  
constitution or statutes of this state.

13 A.R.S. § 33-1133(B) (emphasis supplied.)

14 “A.R.S. § 33–1133(B) clearly states that Arizona debtors are only entitled to the  
15 exemptions set forth in the Constitution or Statutes of Arizona.” In re Hoffpauir, 125 B.R. 269, 271  
16 (Bankr. D. Ariz. 1990). Thus, Arizona residents may not use the federal bankruptcy exemptions.  
17 In addition, the statute states that the exemptions are “provided to residents.” Courts must apply the  
18 plain meaning of the statute and may not read into a statute an exemption that is not there. Id. The  
19 Trustee’s suggestion that this statute does not expressly prohibit a nonresident from utilizing the  
20 Arizona exemptions is contrary to the plain meaning of the opt-out for residents.

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23 <sup>1</sup> There is little legislative history regarding this paragraph except that it was carried  
24 forward from an earlier House bill whose Conference Report explained that “if the effect of [the  
25 new 730 day domiciliary rule] is to render the debtor ineligible for any exemption, the debtor  
26 may elect to exempt property of the kind described in the federal exemption notwithstanding  
27 state opt out.” H. Rep. No. 107-617, Conference Report to Accompany H.R. 333, Bankruptcy  
28 Abuse Prevention and Consumer Protection Act of 2002, at 58-59 (July 25, 2002). The  
language was apparently included after a legislative affairs liaison at the Department of Justice  
sent a letter to a House member pointing out that the proposed domiciliary requirement might  
not be effective depending on how state exemption laws are applied. See In re Fernandez, 445  
B.R. 790, 816 & n.42 (Bankr. W.D. Tex. 2011), rev'd on other grounds, In re Fernandez, 2011  
WL 3423373 (W.D. Tex. Aug. 5, 2011).

1 According to a leading treatise, Debtors’ approach was the correct one. A debtor’s  
2 election to exempt property under § 522(d)

3  
4 may arise if the exemption law of the debtor’s domicile *requires that the*  
5 *debtor reside within the state* to claim exemption rights *or* if the state law does  
6 not permit an exemption to be taken on property located outside the state.

7 4 Collier on Bankruptcy ¶522.06, p. 522-39 (16th ed. 2011) (emphasis added).

8 Confusingly, the courts have focused on one or the other--either residency restrictions  
9 or extraterritorial effect (particularly for homesteads)--and have reached divergent results.  
10 Nevertheless, Debtors’ case law presents a majority view which this Court finds compelling.

11 Debtors cite numerous cases from states in other circuits with similar facts and statutes  
12 containing a residency restriction. This line of cases holds that debtors may claim the federal  
13 exemptions because they are not residents of the opt-out states whose opt-out statutes prohibit only  
14 their residents from using the federal exemptions. See In re Camp, 631 F.3d 757, 760 (5th Cir.  
15 2011) (listing cases).<sup>2</sup>

16 In Camp, the Fifth Circuit Court of Appeals held that the Florida opt-out statute, by  
17 its own terms, neither applied to nonresident debtors nor barred nonresident debtors from claiming  
18 the federal exemptions if they remained eligible to use them. Id. The court therefore avoided a  
19 discussion of thornier, “corollary” questions dealing with the effect of the savings clause of §  
20 522(b)(3) when a state restricts the extraterritorial application of its exemption scheme, and  
21 preemption. Id. at 761 n.3.

22 This line of cases was adopted as the “state-specific” view by the court in In re  
23 Fernandez, \_\_\_ B.R. \_\_\_, 2011 WL 3423373 (W.D. Tex. Aug. 5, 2011), which is “that a state’s  
24 exemption laws may be used by out-of-state debtors for out-of-state property to the extent that each

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25  
26 <sup>2</sup> These and other cases include: In re Cole, 2011 WL 3207369 at \*2 (Bankr. S.D.  
27 Ind. July 26, 2011); In re Beckwith, 448 B.R. 757 (Bankr. S.D. Ohio 2011); In re Chandler,  
28 362 B.R. 723 (Bankr. N.D. W. Va. 2007); In re Battle, 366 B.R. 635 (Bankr. W.D. Tex. 2006);  
In re Underwood, 342 B.R. 358 (Bankr. N.D. Fla. 2006); In re Jewell, 347 B.R. 120 (Bankr.  
W.D. N.Y. 2006); In re Volk, 26 B.R. 457 (Bankr. D. S.D. 1983); In re Walley, 9 B.R. 55  
(Bankr. S.D. Ala. 1981); cf. In re Nickerson, 375 B.R. 869 (Bankr. W.D. Mo. 2007) (Kansas  
personal property exemption statute restricted to residents).

1 state's exemption law permits." Id. at \*11. The District Court examined the applicable Nevada  
2 homestead statute and held that it would reach property in Texas. Id. at \*27.

3 The Trustee relies on Fernandez and has framed his objection in terms of the  
4 extraterritorial effect of Arizona's personal property exemptions upon those assets in Massachusetts.  
5 Fernandez's facts are distinguishable from ours, however. There, the debtor was seeking to use the  
6 *Nevada homestead exemption* for his current residence in Texas. Thus, the District Court expressly  
7 did not address the effect of Nevada's opt-out statute and any residency requirement. Id. at \*22 n.5.  
8 Instead, the *corollary* question addressed by the District Court was whether Nevada's homestead  
9 exemption law, consisting of its Constitution, its homestead exemption statute and relevant case law,  
10 would permit a nonresident debtor to claim an exemption in a home that was located in a state other  
11 than Nevada. The District Court concluded it would. Id. at \*28.

12 Also, central to the Trustee's argument is the seminal Ninth Circuit case of In re Arrol,  
13 170 F.3d 934, 937 (9th Cir. 1999). In Arrol, the Ninth Circuit held that California law, although  
14 silent on the subject, would allow the extraterritorial application of its homestead exemption so that  
15 a debtor, who was currently residing in Michigan but who met the § 522(b)(3)(A) domiciliary  
16 requirements for applying California's exemptions, could protect his Michigan residence.

17 Arrol was decided pre-BAPCPA, when there was no default provision allowing use  
18 of the federal exemptions if a debtor did not qualify for the applicable state's exemptions. The  
19 Ninth Circuit Court of Appeals was concerned that the debtor would be left with no way to preserve  
20 his need for basic housing. Id. at 936. Nor did Arrol's state-specific interpretation address the issue  
21 of any residency requirement in the California opt-out statute.

22 On our facts, however, the *first hurdle* for the Court is to determine whether Arizona's  
23 opt-out statute applies to nonresident debtors. It plainly does not. Nor are Debtors attempting to  
24 use Arizona's personal property exemptions; in contrast, the debtors in Fernandez and Arrol claimed  
25 exemptions under state law. There is no controversy before the Court with regards to the  
26 extraterritoriality of Arizona's personal property exemptions, as if Debtors had claimed exemptions  
27 under state law. Thus, this Court shall not reach the corollary issue of whether the Arizona personal  
28 property exemptions have extraterritorial effect.

1           That being said, the Court must discuss certain case law which holds that, even if the  
2 domiciliary state’s opt-out statute is limited to residents, before the debtor can utilize the federal  
3 exemptions, which are only available in case the debtor is ineligible for “any exemption,” the state  
4 exemption statute must not be extraterritorial. 11 U.S.C. § 522(b)(3)(A); see In re Beckwith, 448  
5 B.R. 757 (Bankr. S.D. Ohio 2011); In re Cole, 2011 WL 3207369 (Bankr. S.D. Ind. July 26, 2011).

6           Beckwith applied Florida opt-out law, which mirrors the Arizona opt-out statute.  
7 Florida Statutes § 222.20 provided:

8                           In accordance with the provision of s. 522(b) of the Bankruptcy Code  
9 of 1978 (11 U.S.C. 522(b)), residents of this state shall not be entitled  
10 to the federal exemptions provided in s. 522(d) of the Bankruptcy Code  
11 of 1978 (11 U.S.C. s. 522(d)). Nothing herein shall affect the  
exemptions given to residents of this state by the State Constitution and  
the Florida Statutes.

12 Fla. Stat. § 222.20 (2010). The court did not stop there, however. “The question then becomes, the  
13 Beckwith court stated, “are Florida's exemptions available only to its residents or are the exemptions  
14 given extraterritorial application?” 448 B.R. at 762. After looking at the exemption statutes and  
15 finding that they did not contain any language limiting them to residents of Florida, the court  
16 nonetheless determined that the majority of prior case law, including courts construing Florida law,  
17 had “upheld state residency requirements as a condition to invoking the state’s exemptions.” Id. at  
18 762.

19           In Cole, the bankruptcy court cited Beckwith, but merely examined the Georgia opt-  
20 out statute to determine that it was limited to those persons who are domiciled in Georgia on the  
21 petition date. It held that an opt-out statute limiting use of the exemption to individuals domiciled  
22 in Georgia effectively limits the use of the exemption to property within that state and has no  
23 extraterritorial effect. 2011 WL 3207369 at \*2. Therefore, both Beckwith and Cole allowed the  
24 debtors to claim the federal exemptions under the default provision.

25           As in Cole, Arizona’s opt-out statute is also an “exemption” statute that limits the  
26 availability of the state’s exemption scheme to its residents. See also Camp, 631 F.3d at 761; Battle,  
27 366 B.R. at 636-37. Moreover, neither party to this dispute has presented any Arizona authority for  
28



1 the extraterritorial effect of its personal property exemptions. Even assuming that A.R.S. § 33-1125  
2 has extraterritorial effect, the exemption is limited to Arizona residents.

3 As an illustration, in In re Jarski, 301 B.R. 342 (Bankr. D. Ariz. 2003), a debtor  
4 resided in a home in Arizona, filed bankruptcy in Arizona, and also owned a residence in California.  
5 This being a lien avoidance case, the court did not adjudicate which state’s exemption laws actually  
6 applied, but it nonetheless opined that Arizona’s homestead exemption statute “expressly  
7 contemplates that a debtor might have more than one residence that could qualify for the exemption  
8 because it creates a procedure for the debtor to choose which to claim as exempt.” Id. at 346; A.R.S.  
9 § 33-1102(A). The Jarski court also stated that § 522(b)(3)(A) (formerly § 522(b)(2)(A))  
10 “determines whose law governs the exemptions, *but not whether the property claimed exempt must*  
11 *exist in that same state.*” Id. (emphasis added).

12 While the logic of Jarski and Arrol could require the Court to review the  
13 extraterritorial effect of Arizona’s personal property exemption in the event that Arizona law was  
14 “applicable,” 11 U.S.C. § 522(b)(3)(A), here, Arizona law is not applicable. Arizona’s opt-out  
15 statute limits the state exemptions to residents of Arizona.

16 Therefore, Debtors were free to utilize the § 522(d) exemptions pursuant to the default  
17 clause. In addition, the Court concludes that an examination of the extraterritorial effect of the  
18 specific personal property exemption statutes is unnecessary for resolving this matter.

19 Finally, the Trustee’s objection also raises aspects of a minority view in the case law,  
20 which holds that federal law preempts any state limitations that would conflict with the federal  
21 choice of law in § 522(b)(3)(A). See In re Garrett, 435 B.R. 434 (Bankr. S.D. Tex. 2010) (holding  
22 that Bankruptcy Code provision that required debtors to look to North Carolina exemption law  
23 preempted provision of North Carolina law providing that its exemption laws would not have  
24 extraterritorial effect). Furthermore, the Ninth Circuit, in Arrol, asserted the supremacy of the  
25 federal choice of law statute, but ultimately ruled according to its interpretation of California law.  
26 170 F.3d at 936.

1 This Court is persuaded by the many legal analyses and opinions which have  
2 concluded that the preemption doctrine does not neatly fit this area where Congress has explicitly  
3 allowed the states to opt out of the federal exemptions—the opposite of preemption.<sup>3</sup>

4 In addition, it is well established law in the Ninth Circuit that where state exemption  
5 laws condition or limit the exempt status of property in ways that are more or less generous than the  
6 federal exemptions, such conditions or limitations must be respected. In re Konnoff, 356 B.R. 201,  
7 205-06 (9th Cir. BAP 2006) (citing In re Golden, 789 F.2d 698, 700 (9th Cir. 1986) and Owen, 500  
8 U.S. at 308). Ultimately, attempting to prevent potentially unfair or absurd results in the application  
9 of § 522(b)(3)(A) by ignoring unambiguous state law is not the role of the bankruptcy courts.

#### 10 11 **IV. Conclusion**

12  
13 Arizona’s opt-out exemption statute renders the nonresident Debtors ineligible for  
14 the state exemptions but does not prohibit them from utilizing the federal exemptions pursuant to  
15 § 522(b)(3) and (d). Therefore, Debtors’ federal exemption claims are valid and the Trustee’s  
16 objection is overruled. A separate order will be entered.

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18 DATED AND SIGNED ABOVE.  
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24 <sup>3</sup> As Judge Leif Clark points out in Fernandez, 445 B.R. at 807-15, if Congress had  
25 intended to preempt state restrictions, then § 522(b)(3)(A) would have stated that it applies to  
26 any property that “would be exempt”—i.e., an artificial application-- instead of any property that  
27 “is exempt.” There is precedent for disregarding an “element of reality” in order to avoid a  
28 judicial lien pursuant to § 522(f). See Owen v. Owen, 500 U.S. 305, 312-13, 111 S.C. 1833, 114  
L.Ed.2d 350 (1991) . See also T. Tarvin, “Bankruptcy, Relocation, and the Debtor’s Dilemma:  
Preserving Your Homestead Exemption Versus Accepting the New Job Out of State,” 43 Loy.  
U. Chi. L. J. 141, 203 (Fall 2011) (calling for a “statutory change” to correct for the “arbitrary  
imposition of a look-back period” while accomplishing the goal of preventing “relocation  
gaming”).

1 To be NOTICED by the BNC ("Bankruptcy Noticing Center") to:

2 Attorney for Debtors  
3 Chapter 7 Trustee  
4 Office of the U.S. Trustee

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