

1
2
3
4 POSTED ON WEBSITE

5
6 NOT FOR PUBLICATION

7
8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF CALIFORNIA
10 FRESNO DIVISION

11 In re) Case No. 08-17274-B-13
12)
13 Raylene Therese Altmiller-Rubio) DC No. DFE-2
and David Rubio,) DC No. MHM-2
14 Debtors.)
15 _____)

16 **MEMORANDUM DECISION REGARDING OBJECTIONS**
17 **TO AMENDED CLAIM OF EXEMPTION**

18 This disposition is not appropriate for publication. Although it may be cited for
19 whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no
20 precedential value. See 9th Cir. BAP Rule 8013-1.

21 D. Max Gardner, Esq., appeared on behalf of the debtors, Raylene Therese Altmiller-
22 Rubio and David Rubio.

23 Gregory Mann, Esq., appeared on behalf of the State of California, Department of Fair
24 Employment and Housing.

25 Kristen M. Gates, Esq., appeared on behalf of the chapter 13 trustee, Michael H.
26 Meyer, Esq.

27 Before the court is an objection filed by the chapter 13 trustee (the “Trustee”) to
28 an amended claim of exemption filed by Raylene Altmiller-Rubio and David Rubio
(the “Debtors”). The Trustee objects to the Debtors’ exemption of the proceeds from
Mr. Rubio’s pre-petition cause of action for personal injury (the “Objection”). The
Trustee is joined in the Objection by the State of California, Department of Fair

1 Employment and Housing (“DFEH”)¹ (the Trustee and DFEH are collectively referred
2 to herein as “Objectors”). The Objectors contend that the personal injury proceeds are
3 not necessary for the support of the Debtors. For the reasons set forth below, the
4 Objection will be overruled and the exemption will be allowed.

5 This memorandum decision contains the court’s findings of fact and
6 conclusions of law required by Federal Rule of Civil Procedure 52(a), made applicable
7 to this contested matter by Federal Rule of Bankruptcy Procedure 7052. The court has
8 jurisdiction over this matter under 28 U.S.C. § 1334, 11 U.S.C. § 522² and General
9 Orders 182 and 330 of the U.S. District Court for the Eastern District of California.
10 This is a core proceeding as defined in 28 U.S.C. §§ 157(b)(2)(A) & (B).

11 **Background and Findings of Fact.**

12 In December 2007, David Rubio was involved in an automobile accident with a
13 vehicle owned and operated by the Kern High School District (“KHS”). Mr. Rubio’s
14 vehicle, a pickup, was hit from behind by a school bus traveling at a substantial speed.
15 The pickup was demolished. Mr. Rubio sustained significant physical injuries to his
16 back, neck, and legs (the “P.I. Claim”).³ Mr. Rubio was treated at a local hospital and
17 has since undergone extensive treatment and rehabilitation for his injuries. Mr. Rubio
18 no longer runs the business he owned before the bankruptcy was filed. At the
19 commencement of this case, he was unemployed and unable to seek gainful
20

21 ¹DFEH represents the interest of creditor Christina McQuiston who has a claim for
22 \$160,000 based on the settlement, which this court approved earlier, of a dispute involving
23 alleged violations of the California Fair Employment and Housing Act.

24 ²Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy
25 Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-
26 9036, as enacted and promulgated *after* October 17, 2005, the effective date of The Bankruptcy
27 Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat.
28 23.

27 ³Mr. Rubio also sustained property damage on account of his vehicle. That damage was
28 substantially compensated through insurance. There is no evidence to suggest that any of the
money at issue here relates to compensation for property damages.

1 employment because of his injuries.

2 This bankruptcy was filed in November 2008. The Debtors listed Mr. Rubio's
3 P.I. Claim on schedule B with an estimated value of \$0. The Debtors did not initially
4 exempt the P.I. Claim on schedule C. In December 2008, Mr. Rubio filed a civil
5 action against the KHS to liquidate the P.I. Claim in the state court. Based on the
6 Debtors' schedules, at the commencement of the case, they owned two parcels of real
7 property, their residence and a rental property, valued collectively at \$394,500. Both
8 properties are heavily encumbered with mortgage debt and the rental property has since
9 been surrendered to the creditors. The Debtors reported personal property assets
10 worth \$97,590.70, including two life insurance policies valued at \$78,000.

11 According to schedule I, Mrs. Rubio was employed as a licensed pharmacist at
12 the commencement of the case with a gross income of \$11,000 per month. Mr. Rubio
13 was unemployed with no reported income. After the payroll deductions, Mrs. Rubio's
14 net monthly income was \$7,803 per month. On schedule J, the Debtors reported
15 monthly expenses, including the mortgage payment on their residence, in the amount
16 of \$6,848.35. Their monthly net income was stated to be \$954.86. According to
17 schedule J, the Debtors were not then paying for their medical insurance, it was
18 provided by Mrs. Rubio's employer.

19 The Debtors' chapter 13 plan was confirmed on March 30, 2009 (the "Plan").
20 The Plan requires monthly payments to the Trustee in the amount of \$954 for a period
21 of five years. The Plan provides for surrender of the rental property, maintenance of
22 two automobile leases, and payment of priority tax claims. The Plan provides for a 1%
23 distribution to unsecured creditors with claims estimated at \$72,251 (exclusive of the
24 McQuiston claim, *see* n.1, *supra*). Because the P.I. Claim had not yet been
25 adjudicated, the Plan included a provision, negotiated with the Trustee, which
26 contemplated, *inter alia*, that the Debtors would continue to prosecute the P.I. Claim in
27 the state court until it was settled or reduced to a judgment, that they could thereafter
28 amend their exemption to include any proceeds of the P.I. Claim, and that the Trustee

1 could then object to the amended exemption.

2 In January 2010, this court granted the Debtors' motion to approve a settlement
3 of the P.I. Claim in the amount of \$80,000. The settlement contemplated that litigation
4 fees and costs would be paid from the proceeds. The balance, in the amount of
5 \$41,696.44 (the "P.I. Proceeds") was supposed to be turned over to Debtors' counsel to
6 hold pending resolution of the exemption issue as provided in the Plan.⁴ In July 2010,
7 the Debtors amended their exemption schedule C to exempt the P.I. Proceeds (the "P.I.
8 Exemption"). In support of the P.I. Exemption, the Debtors filed a declaration of
9 David Rubio which summarized the background of the P.I. Claim and Mr. Rubio's
10 medical treatment. The Objectors timely filed their Objections to the P.I. Exemption.

11 At trial, the Debtors offered testimony regarding Mr. Rubio's various medical
12 issues. Since commencement of the bankruptcy case, Mrs. Rubio, a licensed
13 pharmacist, lost her job. She has taken a new job with a substantially lower salary, but
14 she no longer has employer-funded health insurance coverage for Mr. Rubio. The
15 collective financial impact of Mrs. Rubio's job change alone was about \$800 per
16 month in lost revenue and increased health insurance costs.

17 When the Debtors finish their Plan, they will be about 60 years old. They have
18 two IRA accounts worth approximately \$80,000. Mr. Rubio is unemployed and unable
19 to perform meaningful work due to his physical condition. He has difficulty walking,
20 has consistent pain in his back, and takes a long list of medications. To help manage
21 the pain, Mr. Rubio sees a chiropractor two or three times per week at a cost of \$77 per
22 visit. Mr. Rubio also sees an orthopedic specialist. Mr. Rubio suffers from
23 deterioration of the spine which causes substantial pain. He also suffers from an injury
24 to the knee which he attributes to the accident. Mr. Rubio's treating physician had
25 recommended steroid injections to help alleviate the pain condition. Those treatments

26
27 ⁴ The ruling approving the settlement is reflected in the court's minutes. However, the
28 Debtors never submitted an order. The settlement was implemented without an order formally
approving it.

1 were likely to cost tens of thousands of dollars. There was no evidence to show what,
2 if any, of those treatments would be covered by health insurance. The Debtors contend
3 that they require the P.I. Proceeds to help fund, *inter alia*, the ongoing medical
4 treatments for Mr. Rubio.

5 There was testimony from Mr. Rubio which suggests that some of his pain and
6 discomfort may be the result of a pre-accident degenerative condition in his back.
7 There is no evidence to directly connect any of Mr. Rubio's residual physical problems
8 with the automobile accident, but he was seriously injured in the accident and the P.I.
9 Proceeds represent compensation for that injury. The court accepts the inference that
10 the automobile accident aggravated or advanced in some way any pre-existing
11 conditions Mr. Rubio may have had. The fact that he cannot work and will need
12 ongoing expensive treatments remains unchanged.

13 **Issues Presented.**

14 The Debtors have claimed an exemption of the P.I. Proceeds pursuant to CCP
15 § 704.140 which reads, in pertinent part:

16 (a) [A] cause of action for personal injury is exempt without making a
17 claim.

18 (b) [A]n award of damages or a settlement arising out of personal injury
19 is exempt *to the extent necessary for the support of the judgment debtor*
and the spouse and dependents of the judgment debtor. (Emphasis
added.)

20 The Objection raises only one issue, whether the P.I. Proceeds are “necessary for the
21 support” of the Debtors within the meaning of CCP § 704.140.

22 **Analysis and Conclusions of Law.**

23 **Burden of Proof.** There is substantial disagreement between the parties over
24 the burden of proof, production, and persuasion. The Debtors' P.I. Exemption is
25 supported solely by the Debtor's testimony and the documents in the record. They
26 testified that some medical records had been offered or provided to the Trustee for
27 review, but at trial they did not submit evidence of any outside medical records or
28 expert testimony regarding Mr. Rubio's health and their future financial condition.

1 The Trustee contends that the Debtors have not come forward with enough evidence to
2 support the P.I. Exemption. He argues that the Debtors have the burden of establishing
3 their complete financial picture. DFEH contends that the Debtors' own schedules
4 show that the P.I. Exemption is not appropriate based on their financial circumstances
5 at the commencement of the case. However, neither of the Objectors offered any
6 rebuttal witnesses nor evidence. The outcome of this dispute essentially turns on the
7 question of who was able to sustain their burden of proof.

8 It is well accepted in the Ninth Circuit that an exemption claim is presumptively
9 valid. *Carter v. Anderson (In re Carter)*, 182 F.3d 1027, 1029-30, n.3 (9th Cir. 1999).
10 Once the exemption has been claimed, "the objecting party has the burden of proving
11 that the exemptions are not properly claimed." Rule 4003(c); *Gonzalez v. Davis (In re*
12 *Davis)*, 323 B.R. 732, 736 (9th Cir. BAP 2005) (Klein, J., concurring). Even if the
13 presumption is rebutted with evidence from the objecting party, forcing the debtor to
14 come forward with unequivocal evidence to support the exemption, "[t]he burden of
15 persuasion, however, always remains with the objecting party." *Carter*, 182 F.3d at
16 1029 n.3.

17 The Objectors urge the court to shift the burden of proof to the Debtors on the
18 theory advanced by J. Klein in the concurring opinion to *Davis*, 323 B.R. at 740-45
19 (the burden of proof applicable to a state law exemption is a substantive issue that,
20 under state law, must be carried by the judgment debtor, citing *Raleigh v. Ill. Dep't of*
21 *Rev.*, 530 U.S. 15 (2000)). The court declines the Objectors' invitation to disregard
22 Rule 4003(c) and make new law for two reasons. First, J. Klein's concurring opinion,
23 which thoughtfully questions the application of Rule 4003(c), has been in the record
24 for more than six years, yet it has never been adopted by the Circuit as a shift away
25 from the fundamental rule stated in *Carter*. Second, based on the evidence presented
26 by the Debtors, and the lack of any rebuttal evidence by the Objectors, the court is
27 satisfied that the Debtors have carried the burden of proof, even if it was appropriate
28 that they be required to do so.

1 **The P.I. Proceeds Are Necessary to the Support of the Debtors.**

2 To begin the analysis, it is established that a debtor's exemption rights under
3 state law are determined as of the date of the petition. *Moffat v. Habberbush (In re*
4 *Moffat)*, 119 B.R. 201, 204, n.3 (9th Cir. BAP 1990). Here, there is no dispute that the
5 Debtors had a right to exempt the initial P.I. Claim. The P.I. Claim arose pre-petition.
6 It was disclosed on the Debtors' schedules even though it was then unliquidated. Prior
7 to its settlement, the P.I. Claim was exempt even without a formal exemption claim
8 being made on the bankruptcy schedules. CCP § 704.140(a).

9 However, CCP § 704.140(a) & (b) are not mutually exclusive. CCP 704.140(a)
10 does not allow for the exception of an unliquidated personal injury claim in its entirety.
11 Once the P.I. Claim was settled and reduced to cash proceeds, the nature of the
12 "exempt" property shifted from the unliquidated claim to the cash proceeds
13 themselves. The exemption right remains unchanged, but the analysis shifted from
14 CCP § 704.140(a) to the "necessary for support" inquiry under § 704.140(b). *Gose v.*
15 *McGranahan (In re Gose)*, 308 B.R. 41, 48 (9th Cir. BAP 2004). The Debtors had a
16 right to amend their exemption schedule to add the P.I. Proceeds, so long as the
17 amendment was made in good faith and without prejudice to third parties. *Arnold v.*
18 *Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir. BAP 2000). Bad faith is not an issue
19 here; neither the Trustee, nor DFEH, contends that the Debtors amended their
20 exemption in bad faith. Likewise, there is no prejudice here because the P.I. Claim
21 was disclosed in the Debtors' original schedules and the Plan provides for amendment
22 of the exemption after the P.I. Claim was liquidated.

23 When the debtor is claiming an exemption under state law, then the bankruptcy
24 court must look to applicable state law to determine the scope of the exemption.
25 *Sylvester v. Hafif (In re Sylvester)*, 220 B.R. 89, 91 (9th Cir. BAP 1998), citing *In re*
26 *Golden*, 789 F.2d 698, 700 (9th Cir. 1986). Under the Bankruptcy Code and applicable
27 California law, exemptions are to be broadly and liberally construed in favor of the
28 debtor. *In re Gardiner*, 332 B.R. 891, 894 (Bankr. S.D. Cal. 2005).

1 When, as here, an exemption of personal injury proceeds is claimed under CCP
2 § 704.140, two criteria must be satisfied. First, the money which is subject to the
3 exemption must arise as a result of a “personal injury” to the claimant. Second, the
4 exemption may only be allowed to the extent that the money is “necessary for the
5 support” of the claimant. CCP § 704.140(b). *Sylvester*, 220 B.R. at 91.

6 The term “necessary for the support of the debtor” is not well defined in
7 California law. However, that language does appear in other exemption statutes and
8 has been considered by the courts in similar contexts. In *In re Moffat*, the BAP
9 considered the “necessary for the support” term found in CCP § 704.100, which allows
10 for exemption of an unmatured life insurance policy (CCP § 704.100(a)) and the
11 proceeds from a matured life insurance policy. CCP § 704.100(b). The court in *Moffat*
12 affirmed the bankruptcy court’s decision disallowing the exemption of life insurance
13 proceeds in whole on the grounds that the money was not necessary to the debtor’s
14 support.

15 On the eve of bankruptcy the debtor in *Moffat* had encumbered the family
16 residence, thus increasing the payment due on that claim, in order to purchase the life
17 insurance annuity. The annuity was then transferred to a living trust in an effort to
18 increase the debtor’s exempt property and to protect it from creditors. Noting that the
19 debtor’s exemption rights under state law are determined as of the date of the petition,
20 the court identified factors which are relevant in determining the extent of the debtor’s
21 exemption under the “necessary for support” standard. *In re Moffat*, 119 B.R. at 204,
22 n.3. Those factors included “anticipated living expenses and income; the age and
23 health of the debtor and his or her dependents; the debtor’s ability to work and earn a
24 living; the debtor’s training, job skills and education; the debtor’s other assets and their
25 liquidity; the debtor’s ability to save for retirement; and any special needs of the debtor
26 and his or her dependents.” *Id.* at 206 (citation omitted).

27 The *Moffat* court considered the debtor’s assets, income, and expenses in
28 affirming the bankruptcy court’s decision. It found that there was no evidence that the

1 debtor's income, of more than \$5,000 per month from his orthodontist practice, was
2 insufficient to meet his expenses. Considering the age and medical condition of the
3 debtor, it found no indication that the debtor's income would decrease. The court also
4 noted the debtor had a significant exempt asset in the home. *Id.*

5 The Ninth Circuit Bankruptcy Appellate Panel in *Davis* considered the
6 "necessary for support" issue in the context of the debtor's exemption of retirement
7 accounts. The court applied the *Moffat* factors to reverse as clearly erroneous the
8 bankruptcy court's decision to allow the exemption. The objecting trustee introduced
9 at trial expert testimony of an accountant who carefully analyzed the ophthalmologist-
10 debtor's income and expenses during the debtor's projected work life and retirement.
11 Based thereon, the trustee established that the substantial retirement fund was not
12 "necessary" to the debtor's support.

13 Here, the facts as offered by the Debtors are significantly different from those
14 found in both *Moffat* and *Davis*. The Debtors do not have an unusually large estate,
15 there is no non-exempt equity in their home, and their retirement assets are modest in
16 light in their age and the likelihood that Mr. Rubio may never again be able to generate
17 a substantial salary. The facts do not suggest that the Debtors have the ability to fund a
18 substantial retirement plan or significantly increase their available assets after the
19 bankruptcy is finished. The amount at issue here, approximately \$42,000, is not overly
20 generous in light of the cost of medical treatments and rehabilitation which Mr. Rubio
21 is facing. It is true that Mrs. Rubio is a licensed pharmacist with the ability to earn a
22 comfortable salary until retirement, but that salary has been reduced substantially since
23 the bankruptcy was filed and she now must pay for Mr. Rubio's medical insurance.
24 The evidence does not suggest that Mrs. Rubio alone can pay for Mr. Rubio's ongoing
25 treatment costs. The Objectors offered nothing by way of a financial analysis, as did
26 the trustee in *Davis*, to show that the Debtors could support themselves, and pay for
27 Mr. Rubio's medical care, without the P.I. Proceeds.

28 Considering all of the *Moffat* factors, the court adopts the Rubios' discussion as

1 set forth in their post-trial brief. Construing the P.I. Exemption broadly and liberally in
2 favor of the Debtors, the court is satisfied, from the evidence presented, that the P.I.
3 Proceeds are necessary for the support of the Debtors within the meaning of CCP
4 § 704.140(b).

5 The Objectors contend that the court must make the “necessary for support”
6 determination based solely on the information in the Debtors’ schedules. At the time
7 the Debtors filed their petition, based on schedules I and J, Mrs. Rubio’s income was
8 apparently sufficient to support the Debtors, and pay for Mr. Rubio’s medical care,
9 even with Mr. Rubio’s unemployment. The Objectors suggest that schedules I and J
10 should be the end of the inquiry. Nothing in the applicable law suggests that the
11 “snapshot” approach is appropriate here. Indeed, the *Moffat* factors discussed above
12 compel a “forward looking” analysis. Relevant factors such as “anticipated living
13 expenses,” “ability to earn a living,” “ability to save for retirement,” and “special needs
14 and the debtors and/or their dependents” simply do not fit into a “snapshot”
15 framework. The right to claim the P.I. Exemption is determined as of commencement
16 of the bankruptcy, but the court may look to changes in the Debtors’ circumstances in
17 determining the amount of exemption to allow.

18 **Conclusion.**

19 Based on the foregoing, the court is persuaded that the P.I. Proceeds are
20 “necessary for the support” of the Debtors in their entirety. The Objection filed by the
21 Trustee and joined by DFEH will be overruled.

22 Dated: September 13, 2011

23
24
25 /s/ W. Richard Lee
26 W. Richard Lee
27 United States Bankruptcy Judge
28