No. 15-56814

In the United States Court of Appeals for the Ninth Circuit

IN RE: ROSALVA LUA,
Debtor.

ROSALVA LUA,
Appellant,

v.

ELISSA MILLER,
Appellee.

Appeal from the United States District Court, 2:15-cv-04026-CJC,
Hon. Cormac J. Carney, District Judge

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF APPELLANT ROSALVA LUA

Tara Twomey
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
1501 The Alameda
San Jose, CA 95126
Tel.: (831) 229-0256

M. Jonathan Hayes
Matthew D. Resnik
SIMON RESNIK HAYES LLP
15233 Ventura Blvd. Suite 250
Sherman Oaks, CA 91403
Tel.: (818) 783-6251
Fax: (818) 783-6253
jhayes@srhlawfirm.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for amicus curiae certifies that the National Association of Consumer Bankruptcy Attorneys is a nongovernmental corporate entity; it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization with a membership of approximately 3,000 consumer bankruptcy attorneys practicing throughout the country. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors. NACBA member attorneys and their law firms represent debtors in tens of thousands of cases each year.

As part of its mission, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on issues that cannot be adequately addressed by individual member attorneys. NACBA has filed amicus briefs in this Court in several cases involving the rights of consumer debtors. *See*, *e.g.*, *American Servicing Co. v. Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc); *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013).

The resolution of the question presented in this case is of substantial importance to NACBA. Many thousands of debtors represented by NACBA members depend on exempt property to achieve a "fresh start" after declaring bankruptcy. However, it is not always clear at the outset of a case whether the debtor has rights in certain property. The use of state law to limit the debtor's right to amend their exemptions after the nature of the property has been determined has potential

far-reaching consequences. Additionally, the relationship between the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure on one hand, and state law on the other hand is an issue that potentially affects every bankruptcy proceeding in which NACBA members participate.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

CONSENT

The parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

Under Federal Rule of Bankruptcy Procedure 1009, debtors have a right to amend their schedules, including claimed exemptions, as a matter of course, at any time before the case is closed. Notwithstanding this federal rule, the bankruptcy court concluded that the Debtor asserted her homestead exemption too late. This conclusion was based on California's state law doctrine of equitable estoppel. Because Bankruptcy Rule 1009 is both constitutional and within the scope of the Rule Enabling Act, the bankruptcy court erred in applying state law in contravention of the rule. For this reason alone, the bankruptcy court must be reversed.

Furthermore, equitable estoppel cannot be used to deny a "late" claim to a homestead exemption under California law. California's exemption law contains no explicit limitation with respect to when the debtor may make her homestead exemption claim. Indeed, California's homestead exemption is broadly construed in favor of the debtor, and is applied irrespective of delay or even debtor's intent to hinder creditors. According to California courts, creditors are on notice from the outset that the very nature of the homestead exemption is intended to impair their ability to collect debts. There can be no prejudice to creditors resulting from a late-filed claim of homestead exemption.

Finally, even if this Court concludes that the state law doctrine of equitable estoppel was available to prevent the Debtor from amending her exemptions (in

contravention of Bankrutpcy Rule 1009), the doctrine is inapplicable to the facts of this case. California law requires that one party make a representation or conceal a material fact, while the other party is ignorant of the truth and acts in reliance on the representation. Here, the debtor did not conceal the property in question. Instead, she was uncertain as to the nature and scope of her interest in the property as it was titled solely in her husband's name. The Trustee disagreed that the Debtor had only a nominal interest in the property, and she initiated an adversary proceeding to determine the extent of the Debtor's interest in the property. In June 2014, the bankruptcy court concluded that the scope of the Debtor's interest in the property was much more significant than she had previously thought. Here, Debtor did not have true knowledge of the facts until after the court made a final determination as to her interest in the property. In July 2014, Debtor amended her schedules to reflect both the significant interest in the property and to claim a homestead exemption. Debtor acted promptly after the determination was made. The doctrine of equitable estoppel is further inapplicable because the Trustee could not have reasonably believed that Debtor waived her right to amend her schedules as provided in Bankruptcy Rule 1009. Given the permissive nature of Bankruptcy Rule 1009 and California's homestead exemption, the Trustee's reliance was not justified.

STATUTORY FRAMEWORK

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974); *In re Sanchez*, 372 B.R. 289, 296-98 (Bankr. S.D. Tex. 2007). To achieve these twin objectives, the Bankruptcy Code employs a mechanism by which all the debtor's non-exempt assets in a chapter 7 case may be liquidated by a trustee. *See* 11 U.S.C. 704(a)(1). In turn, the trustee distributes the liquidation proceeds to creditors in accordance with an elaborate system that dictates the order in which claims are paid and in what amount. *See, e.g.,* 11 U.S.C. 506, 507.

I. The Bankruptcy Estate

To achieve the dual goals of bankruptcy, the Code creates the bankruptcy estate upon commencement of a case. 11 U.S.C. 541. Section 541(a) defines the bankruptcy estate and contains an expansive definition of property that includes all legal or equitable interests in property whether tangible or intangible, real or personal. 5-541 COLLIER ON BANKRUPTCY ¶ 541.01 (A. Resnick and H. Sommer, eds. 16th ed.). Some property, such as that described in section 541(b), is specifically excluded from becoming property of the estate. *See, e.g.*, 11 U.S.C. 541(b)(5) (excluding certain funds placed in an education savings accounts). Other property ini-

tially considered part of the bankruptcy estate may be removed from the estate through the exemption process. 11 U.S.C. 522(b)(l); *see* Part II, *infra*. Certain property may also be added to the bankruptcy estate after the commencement of the case. For example, property acquired by inheritance by the debtor within 180 days of the filing of the petition may become property of the estate. *See* 11 U.S.C. 541(a)(5).

Section 541 defines what interests of the debtor must be transferred to the bankruptcy estate, however it does not address "the threshold question of the existence and scope of the debtor's interest in a given asset…[r]ather, bankruptcy courts are required to look to state property law…to determine the property which is to be included in the bankruptcy estate." *Dumas v. Mantle*, 153 F.3d 1082, 1084 (9th Cir. 1998) *citing State of California v. Farmers Markets, Inc.* (*In re Farmers Markets, Inc.*), 792 F.2d 1400, 1402 (9th Cir. 1986) *and Butner v. United States*, 440 U.S. 48, 55 (1979). At the outset of the case, the scope of the debtor's interest in property is not always clear, and sometimes the bankruptcy court is called upon to determine the nature and extent of the debtor's, and the estate's interest, if any, in a certain asset. *See Mantle*, 153 F.3d at 1083 (whether under California law, proceeds from sale of marital home, which had been purchased using down payment from wife's separate property, were property of the estate); *MacKenzie v. Neidorf,*

534 B.R. 369, 371-72 (B.A.P. 9th Cir. 2015) (post-petition payment on account of national mortgage settlement was not property of the estate).

Once the nature and extent of the estate's property is determined, the Bankruptcy Code authorizes the trustee to collect and reduce to cash any non-exempt property of the estate for distribution to creditors. *See* 11 U.S.C. 704(a)(1); *In re Vandeventer*, 368 B.R. 50, 53 (Bankr. C.D. Ill. 2007)("a trustee is limited to collecting and reducing to money 'property of the estate'").

II. Exempt Property

Historically, the purpose of exemption law has always been to allow debtors to keep those items of property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start by maintaining essential property necessary to build a new life. *See* H.R. Rep. No. 95-595, at 117 (1977) (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."); *Rousey v. Jacoway*, 544 U.S. 320, 322, 325 (2005).

Accordingly, section 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions,

listed in 11 U.S.C. 522(d), or the applicable state exemptions.[1] Subsections 522(b) and 522(l) of the Code and Federal Rule of Bankruptcy Procedure 4003 set forth the method by which exempt property is withdrawn from the bankruptcy estate and revested in the debtor.

> Section 522(b) states, in part, as follows:
>
> Notwithstanding section 541 of this Title…*an individual may exempt from property of the estate* the property listed in paragraph (2) [federal exemptions] or, in the alternative paragraph (3) of this subsection [state exemptions].

Section 522(l), in turn, requires the debtor to file a list of property that the debtor claims as exempt under subsection (b). *See also* FED. R. BANKR. P. 4003(a). Prior to April 1, 2016,[2] debtors most commonly satisfied this requirement by completing and filing Official Form 6C, "Schedule C – Property Claimed as Exempt." This form directs the debtor to provide a description of the property being claimed as exempt, the law providing each exemption, the value of the claimed exemption and the current value of the property. The information provided by the debtor must be

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[1] The Bankruptcy Code allows states to "opt out" of the federal exemption scheme. 11 U.S.C. 522(b)(1), 522(b)(3). The State of California has "opted out," and therefore the Debtor was limited to state law exemptions and any applicable federal non-bankruptcy exemptions.

[2] Schedule C was amended as of April 1, 2016, and is now referred to as Official Form 106C.

sufficient to put interested parties, including the trustee, on notice as to what property the debtor is claiming as exempt. *Preblich v. Battley*, 181 F.3d 1048, 1053 (9th Cir. 1999). If no timely objection is made to the debtor's claimed exemptions, or if a timely objection is overruled, the exempt assets are withdrawn from the property of the estate by operation of law. 11 U.S.C. 522(l); *In re Cunningham*, 513 F.3d 318, 323 (1st Cir. 2008), *citing Owen v. Owen*, 500 U.S. 305, 308 (1991).

Further, Federal Rule of Bankruptcy Procedure 1009 permits the debtor to amend a voluntary petition, list, schedule or statement, as a matter of course, at any time before the case is closed. The time for objection is automatically extended if the debtor files amended or supplemental schedules. FED. R. BANKR. P. 4003(b)(1). The objecting party has the burden of proving that exemptions are not properly claimed. FED. R. BANKR. P. 4003(c).

RELEVANT FACTS

1. Rosalva Lua (the "Debtor") filed her chapter 7 case on July 21, 2011. *In re Lua*, 529 B.R. 766, 768 (Bankr. C.D. Cal. 2015).

2. Twenty two years earlier, in 1989, Rigoberto Lua ("Husband"), Debtor's husband at the time she filed her chapter 7 case, acquired real property located at 2044 Pennywood Place, Pomona, CA (the "Property) with two other people. *Id*. at 769. Twelve years before the Debtor's bankruptcy, in 1999, she executed a deed

transferring any interest she had in the property to her husband as his sole and separate property. *Id.*

3. In her initial schedules, the Debtor indicated that she had "a 30% interest in the Property, describing the Property as the Husband's property prior to marriage." *Id*. at 768. She claimed a homestead exemption of $75,000 based on her 30% interest in the Property. *Id.*

4. On October 13, 2011, the Debtor filed amended schedules indicating that she had no interest in the Property aside from "such community interest as may exist for the purposes of a divorce action." *Id.* at 769. Debtor also removed the homestead exemption she had previously claimed. *Id.*

5. The Trustee believed that the Debtor had an interest in the property that could be monetized, by sale or agreement, for the benefit of unsecured creditors. *Id*. Those unsecured creditors held claims against the estate, which totaled approximately $10,000. *Id.*

6. On June 6, 2012, the Trustee filed an adversary proceeding against only Husband to establish the Debtor's pre-petition interest in the Property, and therefore the estate's interest, in the Property. *Id*. The Debtor was not a party to this adversary proceeding. *Id*. On July 24, 2012, a default judgment was entered against the Husband, and on September 25, 2012, the bankruptcy court entered a judgment finding that the Debtor had a community property interest in the Property of an un-

determined amount. *Id*. at 770. Specifically, the order states that "[t]he size or value of Plaintiff's community property interest in the Property relative to the Defendant's separate property interest in the Property cannot be determined until such time as Defendant provides the accounting required under 11 U.S.C. 542(a)." Adv Pro. 2:12-ap-01769, Docket No. 16 (Addendum A). Further, the judgment required the Husband to provide an accounting though no deadline was specified in the order. *Id.*

7. Sixteen months later, on December 18, 2013, with no accounting from the Husband, the Trustee filed a motion to modify the judgment and to declare the entire Property community property. *Id*. at 770. Husband did not oppose the motion. *Id*.

8. On June 2, 2014, almost six months after the Trustee filed her uncontested motion, the bankruptcy court entered an order amending the judgment in the adversary proceeding against the Husband, finding that the Property was 100% community property, and ordering turnover of the Property to the Trustee. *Id.* While not a party to the adversary proceeding, the Debtor's property interests were significantly affected by the amended judgment. The amended judgment meant that the Debtor's belief that she had no interest in the property beyond what she would get in a divorce was wrong. As with hundred percent community property, the entire Property became property of the estate. *See* 11 U.S.C. 541(a)(2).

9. Seven weeks after the bankruptcy court issued its amended order finding that the Debtor, and consequently the estate, had a significant interest in the Property, the Debtor amended her schedules to include the property interest as determined by the court and to claim a homestead exemption. *Lua*, 529 B.R. at 771.

10. On August 10, 2014, The Trustee objected to the amended homestead exemption, and on May 1, 2015, the bankruptcy court disallowed the Debtor's exemption based on state law equitable estoppel grounds. *Id.* at 771, 779.

ARGUMENT

I. DENYING DEBTOR'S HOMESTEAD EXEMPTION BASED ON THE TIMING OF DEBTOR'S AMENDED CLAIM OF EXEMPTION IMPERMISSIBLY CONTRAVENES THE EXPRESS LANGUAGE OF FEDERAL RULE OF BANKRUPTCY PROCEDURE 1009.

Federal Rule of Bankruptcy Procedure 1009 states:

> (a) GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor *as a matter of course at any time before the case is closed*. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. (emphasis added)

Although not a statute, the Rule was promulgated by the Supreme Court pursuant to authority granted by Congress under 28 U.S.C. 2075, and it has the force of law. *American Universal Ins. Co., v. Pugh*, 821 F.2d 1352, 1354 (9th Cir. 1987); *see also In re Dorner*, 343 F.3d 910, 913 (7th Cir. 2003). Rule 1009 is valid and controls over state law so long as (i) the rule is within the scope of the Rules Enabling Act; and (ii) the rule under the Rules Enabling Act is constitutional, that is, within

Congress's Article I power. *Hanna v. Plumer,* 380 U.S. 460, 464 (1965). A federal rule is within the scope of the Rules Enabling Act if the rule:

> "really regulate[s] procedure,--the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which [the] court will adjudicate[those] rights, it is not."

Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (internal citations and quotations omitted). The test for Article I constitutionality is whether the rule is "rationally capable" of being characterized as procedural. *Hanna*, 380 U.S. at 464. Bankruptcy Rule 1009 clearly satisfies the *Hanna* test.

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure set forth a general process for scheduling, asserting, amending, and objecting to exemptions claimed in bankruptcy proceedings. *See, e.g.,* 11 U.S.C. 522; FED. R. BANKR. P. 1007, 1009, 4003(c). For example, Bankruptcy Rule 1007(b) specifies the schedules, statements and other documents that debtors are required to file, and Bankruptcy Rule 1007(c) sets forth the time limits for filing those documents. Bankruptcy Rule 4003 more specifically describes the process of claiming exemptions, including who may file the list of exemptions, how to object to exemptions and when, and the burden of proof in determining exemptions. Similar to these other rules, Bankruptcy Rule 1009 describes the procedure for amending the documents

identified in Bankruptcy Rule 1007. It sets forth when the debtor may amend his schedules, including his claim of exemptions, and to whom notice must be provided. While these rules may have some practical effect on the parties' rights, at core they are procedural. *See Shady Grove,* 559 U.S. at 407. They foster uniformity in the administration and adjudication of exemptions in federal bankruptcy cases.

There was no dispute that the Debtor was qualified under California law to claim a homestead exemption of $100,000. That is, if the Debtor had "timely" asserted her claim to the homestead exemption, nothing in the bankruptcy court's decision suggests that the exemption would have been denied on substantive grounds. Here, however, the bankruptcy court concluded that state law—the state law doctrine of equitable estoppel—precluded the Debtor from amending her exemptions. According to the bankruptcy court the Debtor "slept on her rights" to claim the exemption, and that such delay necessitated disallowance of the exemption. *Lua*, 529 B.R. at 778. Because Federal Bankruptcy Rule 1009 permits the Debtor, "as a matter of course," to amend her schedules, including her schedule of exemptions, "at any time before the case is closed," a bankruptcy court may not use state law to deny the exemption based on the timing of the amended claim. On the question of when debtors may amend claims of exemption, Bankruptcy Rule 1009 is controlling. On this basis alone, the bankruptcy court should be reversed.

II. CALIFORNIA'S STATE LAW DOCTRINE OF EQUITABLE ESTOPPEL IS INAPPLICABLE IN THIS CASE.

In *Law v. Siegel*, the Supreme Court held that a debtor's exempt assets could not be used to pay administrative expenses incurred as a result of the debtor's misconduct. 134 S.Ct. 1188, 1192 (2014). The Court further noted that the Bankruptcy Code does not permit courts to use their equitable power under section 105(a) to disallow an exemption based on debtor's misconduct. Thus, under *Law*, equitable considerations cannot be used to disallow exemptions that otherwise would be allowable under section 522. However, the Court noted that when debtors claim a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of misconduct warrant denial of the exemption. The Court acknowledged such limitations with reference to *In re Sholdan*, 217 F.3d 1006 (8th Cir. 2000).

In *Sholdan*, prior to filing for bankruptcy, the debtor liquidated non-exempt assets and purchased an exempt homestead with the proceeds. *Id*. at 1008. Minnesota statutes provide for an individual homestead exemption, but also prohibit such exemption if the debtor transfers the property with actual intent to hinder delay, or defraud creditors. *Id., citing* Minn. Stat. Ann. §§ 510.01-.02, 513.44(a)(1). In affirming the bankruptcy court, the court of appeals concluded that there was ample evidence to show fraudulent intent on the part of the debtor. *Id*. at 1010-11.

Unlike Minnesota law, California courts have long held that the mere fact that a debtor filed a declaration of homestead with the purpose of hindering or delaying his or her creditors does not affect the validity of the declaration.[3] *Putnam Sand & Gravel Co. v. Albers*, 14 Cal. App. 3d 722, 725 (1971). This is true even if the declaration is made during the pendency of an action in which the creditor obtains a judgment, since according to the courts, that result is to be expected from the very existence of the homestead statutes. *Id*. Indeed, California exemption law does not limit the validity of the exemption based on when the exemption is claimed. Instead, California courts have consistently held that strong public policy requires courts to adopt a liberal construction of the law and facts to promote the beneficial purposes of the homestead legislation to benefit the debtor. *Ingebretsen v. McNamer*, 137 Cal. App. 3d 957, 960-61(1982) (holding increase in homestead amount applied retrospectively). Additionally, the exemption continues in the proceeds after sale. Cal. Civ. Proc. Code §§ 704.710, 704.960.

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[3] A California homestead exemption may be asserted in two ways. First a declaration of homestead may be recorded. Cal. Civ Pro. Code 704.920. Because many California debtors failed to file homestead exemptions, in 1974, the legislature created an "automatic" homestead exemption. Cal. Civ. Pro. Code 704.720. This later exemption need not be written and recorded in order to be effective. While there are differences in a creditors' remedies under these two different types of homestead, they are not relevant here.

The bankruptcy court's reliance on *Jefferson v. Tom*, 52 Cal. App. 2d 432 (1942), is misplaced. That case did not involve the relationship between debtors and creditors, for as indicated above neither delay nor even an intent to hinder creditors will preclude application of California's homestead exemption. Further, *Jefferson* alone does not outweigh the numerous subsequent cases that apply California's homestead exemption expansively. Under California law, delay in claiming the homestead exemption is not a bar to the claim. See *Putnam,* 14 Cal. App. at 725.

Even if the state law doctrine of equitable estoppel were applicable to state law claims in state law courts, the doctrine is inapplicable in federal court. The Supreme Court in *Law* made clear that exemptions exist based on specific statutes and may not be disregarded on federal equitable principles. "A debtor need not invoke an exemption to which the statute entitles him; but if he does, the court may not refuse to honor the exemption absent a valid *statutory* basis for doing so" (emphasis added). California exemption law provides no direct limitation on the Debtor's amended claim of exemption. The bankruptcy court attempted to cir

cumvent *Law*[4] and California's policy in favor of homestead exemptions by using the state law doctrine of equitable estoppel. This was error. Just as federal law governs the application of judicial estoppel in diversity cases pending in federal courts, so too should federal law govern the application of equitable estoppel in federal courts. *See Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996); *see also Johnson v. State, Oregon Dept. of Human Resources, Rehabilitation Div.*, 141 F.3d 1361, 1364 (9th Cir. 1998); *Ergo Science, Inc. v. Martin,* 73 F.3d 595, 600 (5th Cir. 1996) (judicial estoppel is a matter of federal procedural law). Under federal law equitable estoppel will not prevent an amended claim of exemption, see generally Law v. Seigel, the bankruptcy court erred in disallowing debtor's homestead exemption on this basis.

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[4] The effect is the same as in *Law*: the Debtor's otherwise valid exemption will be surcharged to pay creditors and the Trustee's administrative expenses. There is no doubt that the Trustee will seek not only to pay unsecured creditors from the proceeds of the sale of the property, but also her administrative expenses. If the trustee administers assets of the estate, the chapter 7 trustee is entitled to receive a commission as an administrative expense equal to a certain percentage of the assets distributed to the unsecured creditors. However, when the trustee employs counsel, as is the case here, that counsel is paid his "reasonable fees" before any distributions to the unsecured creditors. *See* 11 U.S.C. 726. Often the chapter trustee fee or trustee's counsel's fee far exceeds the benefits to unsecured creditors. *See, e.g., In re Scoggins*, 517 B.R. 206 (Bankr. E.D. Cal. 2014) (disallowing chapter 7 trustee fees in excess of amount made available to unsecured creditors as unreasonably disproportionate, and therefore not reasonable). Here, the unsecured claims against the estate totaled approximately $10,000. *In re Lua*, 529 B.R. 766, 769 (Bankr. C.D. Cal. 2015).

III. ASSUMING *ARGUENDO* THAT CALIFORNIA'S DOCTRINE OF EQUITABLE ESTOPPEL WAS AVAILABLE IN THIS CASE, THE FACTS DO NOT SUPPORT ITS APPLICATION.

If despite the foregoing points, this Court were to conclude that California's doctrine of equitable estoppel could be invoked to disallow an "untimely" claim of exemption, the facts in this case do not justify its application. "A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it…There can be no estoppel if one of these elements is missing." *Simmons v. Ghaderi*, 44 Cal.4th 570, 584, 187 P.3d 934 (2008). Here, at the time the Debtor filed her original schedules and First Amended Schedules, she did not know the full nature of her interest in the property. It makes a difference in debtor's choice of exemptions whether an interest in property is *de minimus* or, as the bankruptcy court ultimately concluded here, the property is entirely within the reach of the estate. Second, the Debtor promptly amended her claim of exemptions after the bankruptcy court made a final determination of the existence and scope of her pre-petition interest, and therefore the estate's interest, in the Property. Third, the filing of an amended schedule, which is subject to further amendment at any time before the case is filed, cannot serve as the basis for the Trustee's reliance. Fourth, the bankruptcy

court consistently ascribes three years of delay to the Debtor's delay, but fails to take into account twenty-two months between the bankruptcy court's finding that the Debtor had "some" interest in the Property and the bankruptcy court's ultimate conclusion that the Property was 100% community property.

A. Representation or Concealment of Material Fact

According to the bankruptcy court the "fact" represented by the Debtor was that she was not claiming a homestead exemption in the Property based on her First Amended Schedules.[5] While it is true that the Debtor did not claim a homestead exemption in her First Amended Schedules, it is also true, though not mentioned by the bankruptcy court in its equitable estoppel analysis, that she also amended her schedule of real property to indicate that she had no interest in the Property other than "such community interest that may exist for purposes of divorce." The amended schedule of real property further stated that the Property was

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[5] It is unclear from the bankruptcy court's decision what the "fact" is. In one section of the equitable estoppel analysis the bankruptcy court states the "fact" is the Debtor "was not claiming a homestead exemption in the Property when she filed her First Amended Schedules," which is true and of which the Trustee had knowledge. In another portion of the analysis, the bankruptcy court identifies the "fact" as Debtor's intent to file her Second Amended Schedules. *Lua*, 529 B.R. at 777 ("The Trustee had no knowledge or indication that the Debtor was going to file her Second Amended Schedules."). However, this later fact, whether the Debtor was going to amend, is not represented or concealed. These facts are also both distinguishable from the underlying fact of what the Debtor's interest in the Property was, which was not determined until June 2, 2014.

owned by the Husband along with two of his family members. It should not be surprising that the Debtor did not claim a homestead exemption for property in which she believed she had little or no interest. By contrast, the Trustee believed that the Debtor's interest was more than nominal, and therefore she sought an accounting from the Husband (but not the Debtor) to determine the community's interest in the Property.

It is evident from the Debtor's initial schedules, her amended schedules and the Trustee's conduct, that the nature and scope of the Debtor's interest in the Property was uncertain when she filed both her initial schedules and her First Amended Schedules. *See, e.g., Hanf v. Summers*, 278 B.R. 808 (B.A.P. 9th Cir. 2002) (reviewing the complex question of transmutation of community property under California law); *Estate of Bibb*, 87 Cal. App. 4th 461 (2001) (holding a grant can satisfy express declaration requirement for transmutation under California law). Indeed, even the bankruptcy court was unable to determine the scope of the Debtor's interest in the Property when it issued its first judgment against the Husband in September 2012, finding that the Debtor had some, as yet undetermined amount, of interest in the Property.

At the time of her First Amended Schedules, the Debtor represented that she was not claiming a homestead exemption in the Property in which she believed that she had little or no interest. Bankruptcy Rule 1009 gave the Debtor the right to

amend her schedules further at any time before the case was closed. The Debtor may amend the exemption schedule to include property previously omitted or improperly scheduled. 9-1009 COLLIER ON BANKRUPTCY ¶ 1009.02. There is no suggestion that the Debtor represented that she would not claim a homestead exemption if her interest in the property turned out to be greater than she believed. There is no suggestion that the Debtor, in any other way, waived her right to amend her schedules. It was clear error for the bankruptcy court to conclude that the filing of the First Amended Schedules constituted the prerequisite representation upon which to base equitable estoppel.

B. Made with Knowledge of the Facts

As stated above, the Debtor did not know of the extent of her interest in the property until June 2, 2014, when the bankruptcy court entered an order determining that the Property was 100% community property. Prior to that time, it was known that the Debtor had "some" interest in the property, but to an undetermined extent. There was no evidence to suggest that at the time the Debtor filed her First Amended Schedules she knew she was going to later amend those schedules. Had the bankruptcy court ultimately determined that the community's share of the property was inconsequential, the Debtor may not have sought to further amend her schedules. Instead, the bankruptcy court erroneously concludes that because the Debtor was aware that she had "some" interest in the Property, she was pre-

cluded from amending her schedules once the full nature of her interest had been determined by the court. The Debtor's non-participation in a lawsuit brought by the Trustee only against the Husband or her decision not to object to the sale of the Property does prove that she knew she would later amend her schedules to claim a homestead exemption and does not constitute a waiver of her right to amend her schedules provided by Bankruptcy Rule 1009.

C. Party Ignorant of the Truth and Induced to Act on Representation

According to the bankruptcy court, the Trustee did not know that the Debtor was going to file her Second Amended Schedules, and relied on that fact to pursue settlement with the Husband and sale of the Property. Putting aside the fact that there is no evidence that the Debtor knew she would file her Second Amended Schedules at the time she filed her First Amended Schedules, the bankruptcy court erred in holding that the Trustee could reasonably assume that the Debtor was not going to further amend her schedules or rely on that assumption. Further, the bankruptcy court erred in concluding the Trustee proved that she exercised reasonable diligence in determining the facts. *See Berson v. Browning Ferris Indus*., 7 Cal. 4th 926, 936 (1994). Lack of knowledge alone is not sufficient. *See id.*

The Trustee claimed that she had "no knowledge or indication that the Debtor was going to file her Second Amended Schedules." *Lua*, 529 B.R. at 777. First, as discussed above, Bankruptcy Rule 1009 permits the Debtor to amend her sched-

ules at any time. Second, California's strong policy in favor of homestead exemptions is not curtailed by either delay or even an intent to hinder creditors. The Trustee is presumed to know the law. Given the permissive nature of the Bankruptcy Rule 1009 and of California's homestead law, it was not reasonable for the Trustee to assume the Debtor would not amend her schedules. Further, the evidence in the case does not demonstrate that the Trustee made any specific effort to determine whether the Debtor would amend her schedules after the extent of her Property interest was determined.

The bankruptcy court stated that the Trustee acted diligently throughout the case, and repeatedly ascribes to the Debtor fault for the nearly three years of delay between the filing of the First Amended Schedules and Second Amended Schedules. However, in its equitable estoppel analysis the bankruptcy court does not explain why the Debtor is responsible for the twenty-two month delay in the Trustee's adversary proceeding against the Husband (the Debtor was not a party to this proceeding) between the entry of judgment finding that the Debtor had a community property interest of undetermined amount in the Property (September 25, 2012), and a final determination that the Property was 100% community property (June 2, 2014). Given the bankruptcy court's discretion to apply equitable estoppel, it was error to consider the Debtor responsible for thirty-three months of delay, when in

fact two-thirds of that time—twenty-two months—was beyond the Debtor's control.

IV. DEBTOR'S AMENDMENT TO HER EXEMPTIONS DID NOT PREJUDICE CREDITORS AND WAS NOT FILED IN BAD FAITH.

The bankruptcy court repeatedly takes issue with what it perceived to be prejudice to creditors as a result of the amended homestead exemption claim. While prejudice to creditors is not an element of equitable estoppel under California law, prior to *Law*, courts routinely held that bankruptcy courts had no discretion to deny amendments of exemption unless the amendment was proposed in bad faith or would prejudice creditors. *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000); *see Magallanes v. Williams (In re Magallanes)*, 96 B.R. 253, 256 (B.A.P. 9th Cir. 1988). The bankruptcy court correctly concluded that *Law* prevents the court from disallowing the Debtor's claimed homestead exemption based on its equitable powers in section 105(a). However, even if such standard still applied it would not be applicable in this case. Here the Debtor did not act in bad faith by concealing the existence of the Property, nor does a later claim of a homestead exemption prejudice creditors where exemption rights are fixed on the date of the petition.

"The usual ground for a finding of 'bad faith' is the debtor's attempt to hide assets." *In re Arnold*, 252 B.R. 778, 785 (B.A.P. 9th Cir. 2000), *abrogated by Law v. Siegel*, 134 S.Ct. 1188 (2014). The rationale for this previous exception to

Bankruptcy Rule 1009's liberal policy of amendment was based on the need for honest reporting. Omission of known property from the debtor's initial schedules suggested (though did not conclusively determine) that the debtor meant to hide assets. *Id.* Here, the Debtor did not conceal the existence of the Property. In fact her initial schedules indicated a 30% interest in the Property, and her First Amended Schedules indicated no interest beyond community property available in the divorce. *Lua*, 529 B.R. at 768-769. The Trustee was put on notice of the Property from the outset of the case. And while the Trustee believed the Debtor's interest was more significant than the Debtor indicated, such a difference of opinion as to the scope of the Debtor's community property interest is not bad faith. Contrary to the district court's opinion, the debtor's uncertainty as to the nature and extent of her interest in the Property does not constitute concealment or rise to the level of bad faith. *In re Lua*, 2015 WL 7176005, *3 (November 10, 2015); *see also In re Hildalgo*, 2007 WL 7540950, *3-4 (B.A.P. 9th Cir. 2007) (amended exemptions not claimed in bad faith even where property not initially disclosed); *In re Hoffpauir*, 258 B.R. 447, 452 (Bankr. D. Idaho 2001) (observing that '[b]ad faith must be evaluated on the entirety of the evidence, and generally involves consideration of whether debtors have attempted to conceal assets').

"Exemption rights are fixed on the date of the petition." *Harris v. Herman (In re Herman)*, 120 B.R. 127, 130 (B.A.P. 9th Cir. 1990). If the Debtor

could have validly claimed the homestead exemption as of the date of the petition, then her creditors could not have forced the sale of the Property unless the proceeds were sufficient to pay the homestead exemption. *Id*. at 131. That is, the proceeds that the Trustee now seeks to distribute to unsecured creditors would not have been available to them. Neither the bankruptcy court nor the Trustee suggest that the Debtor would not have been entitled to the exemption based on California exemption law. If the Debtor had properly guessed her property interest under state community property law and listed her interest in the Property on her initial schedules as 100% community property, she would be entitled to the full homestead exemption.

The bankruptcy court concluded that the Debtor's homestead exemption claim improperly deprived the estate of funds to pay administrative expenses and creditors of the estate. *Lua*, 529 B.R. at 776 (debtor's claim prevented distribution to creditors); *id*. at 778 ("creditors are clearly prejudiced because there will now be no funds available for distribution to unsecured creditors"). This conclusion, however, is based on the false premise that unsecured creditors were otherwise entitled to sale proceeds from the Property as of the date of the petition. They were not. As the *Harris* court noted, creditors could not have forced the sale of the property unless the proceeds were sufficient to pay the homestead exemption. 120 B.R. at 130. If creditors were not entitled to

the proceeds, they were not prejudiced when the Debtor later amended her schedules to claim the homestead exemption.

V. THE BANKRUPTCY COURT'S APPLICATION OF EQUITABLE ESTOPPEL PUNISHES DEBTORS WHO HONESTLY DISCLOSE ASSETS, BUT MAY NOT KNOW THE SCOPE OF THEIR INTEREST IN THOSE ASSETS.

Upon the filing of a case, the scope of the debtor's interest in property is not always clear. Nevertheless, debtors are encouraged to disclose any property in which they may have any interest. If the trustee believes that the interest is valuable or greater than indicated by the debtor, the bankruptcy court is called upon to determine the nature and extent of the debtor's pre-petition interest, and the estate's interest, if any, in a certain asset.

For example, in the recent case of *Neidorf*, years after the debtor's home was foreclosed, but while the her chapter 7 case was still open, the debtor received a post-petition payment as a result of the national mortgage settlement between banking regulators and certain financial institutions. 534 B.R. at 370. The chapter 7 trustee filed a motion to compel the debtor to turnover the payment asserting that it was property of the estate. *Id*. at 371. The debtor disagreed asserting that her legal right to payment did not accrue until after she filed her petition for relief, and therefore the property was not property of the estate. *Id.* at 372. The bankruptcy appellate panel affirmed the bankruptcy court in holding the payment was not property of the estate. However, under

the principles of equitable estoppel pronounced by the bankruptcy court in this case, if the *Neidorf* court had concluded otherwise, then debtor would have no ability to amend her exemptions with respect to the payment because she had previously asserted an exemption in the payment which she believed was not property of the estate. Such a result is untenable in light of policies favoring debtors' claims of exemption and the liberal policy of amendments to schedules. *See Arnold*, 252 B.R. at 784. The Debtor's exemptions should not be set in stone, and certainly not when the extent of the Debtor's interest in disclosed property in still under consideration by the bankruptcy court.

Here, the Husband had purchased the Property prior to his marriage to the Debtor. The Debtor executed a deed conveying to the Husband her interest in the property long before she filed for bankruptcy. Under these circumstances, it is plain that the nature and extent of her interest in the Property was uncertain. A final determination as to the scope of the Debtor's interest in the property was not made until June 4, 2014. *Lua*, 529 B.R. at 770. The Debtor filed her Second Amended Schedules, seven weeks after that determination on July 21, 2014. *Id*. at 771.

CONCLUSION

For the reasons stated above, the decision of the bankruptcy court disallowing the Debtor's amended homestead exemption should be reversed.

Respectfully submitted.

/s/ M. Jonathan Hayes
M. Jonathan Hayes
Matthew D. Resnik
SIMON RESNIK HAYES LLP
15233 Ventura Blvd. Suite 250
Sherman Oaks, CA 91403
Tel.: (818) 783-6251
Fax: (818) 783-6253
jhayes@srhlawfirm.com

Counsel for Amicus Curiae the National Association of Consumer Bankruptcy Attorneys

Tara Twomey
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
1501 The Alameda
San Jose, CA 95126
Tel.: (831) 229-0256

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/s/ M. Jonathan Hayes

M. Jonathan Hayes
Matthew D. Resnik
SIMON RESNIK HAYES LLP
15233 Ventura Blvd. Suite 250
Sherman Oaks, CA 91403
Tel.: (818) 783-6251
Fax: (818) 783-6253
jhayes@srhlawfirm.com

Counsel for Amicus Curiae

July 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 19 , 2016, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ M. Jonathan Hayes
M. Jonathan Hayes
Matthew D. Resnik
SIMON RESNIK HAYES LLP
15233 Ventura Blvd. Suite 250
Sherman Oaks, CA 91403
Tel.: (818) 783-6251
Fax: (818) 783-6253
jhayes@srhlawfirm.com

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