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By Dustin I. Nichols, Esq.

This article analyzes California retirement exemptions after Assembly Bill No. 2837 (2023-2024 Reg. Sess.) ("AB 2837"), highlighting the continued superiority of private retirement plans for retirement asset preservation over other traditional retirement vehicles. While the new law reduces protection for certain plans, a properly designed plan can exempt select retirement assets proven necessary to sustain a debtor's retirement.

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RETIREMENT EXEMPTION PLANNING IN CALIFORNIA AFTER AB 2837

Written by Dustin I. Nichols, Esq.*

I. SYNOPSIS

The practice and importance of incorporating Retirement Exemption Planning with estate planning for California resident business owners is underemphasized. California has maintained its reputation as a top-five “American Judicial Hellhole” for years according to the American Tort Reform Foundation, citing Assembly Bill No. 5 (2019-2020 Reg. Sess.) and the amount of Private Attorney General Act (“PAGA”) claims partly as the reason for receiving this less than prestigious label.⁰¹ While there are other vehicles available to California residents touting protection benefits, there is little to no argument that creditor exemptions play a large role in preserving retirement wealth.

We first must understand the evolution of the animal known as the “Creditor Exemption” before truly appreciating its value to preserving retirement assets in California. The development of creditor exemption statutes in the United States reflects a long and evolving struggle to balance two powerful yet competing interests: (1) the right of creditors to collect legitimate debts, and (2) the societal imperative to protect individuals and families from impoverishment.⁰² Although often viewed as technical provisions nestled within state civil procedure codes, exemption laws embody deep historical values concerning human dignity, economic opportunity, and the limits of private coercion. Their lineage traces back centuries, through English common-law traditions, early American statutory reforms, and the modern interplay between state and federal law. Understanding their chronology reveals not only the shifting attitudes toward debt, but also the legal theories that continue to influence contemporary policy debates.

In Colonial America, creditor-debtor relations were governed largely by English precedents, many of which

allowed harsh remedies, including imprisonment for unpaid civil debts and the near-total seizure of a debtor's property.⁰³ The brutality of these practices sparked widespread resistance, particularly as the new Republic began to articulate a political identity rooted in individual liberty and economic mobility. Early state legislatures started experimenting with limited exemptions, first through homestead protections and later through personal property carve-outs designed to preserve a debtor's ability to work and support a family. These foundational statutes marked a conceptual departure from punitive models of debt enforcement toward a more humanitarian approach. They also signaled the adoption of a broader legal philosophy: that the economic stability of households carried public significance, and that safeguarding minimal assets served both personal welfare and societal order.⁰⁴

Throughout the nineteenth century, exemption laws proliferated across states, but their scope and rationale varied widely. The westward expansion, combined with agrarian political movements, produced robust homestead protections intended to attract settlers and promote independence. In contrast, commercial states often adopted narrower exemptions reflecting the interests of mercantile creditors. This patchwork structure formed the basis of the decentralized system that remains today wherein each state maintains its own exemption scheme, defining what property, real or personal, a debtor may shield from judgment execution. These protections cover diverse assets, including wages, tools of trade, household goods, retirement accounts, and life insurance benefits.

The twentieth century introduced new legal underpinnings through the rise of federal bankruptcy law, which both incorporated and reshaped state exemption concepts. The Bankruptcy Act of 1898,⁰⁵ and later the Bankruptcy Reform Act of 1978,⁰⁶ cemented the principle that exemption laws

serve dual purposes. These dual purposes include providing debtors with a fresh start and preventing overreaching by creditors. Yet Congress preserved significant state autonomy by allowing states either to opt into federal exemptions or require debtors to rely on state-defined protections.⁰⁷ This federal-state dynamic has produced ongoing debates over uniformity, debtor fairness, creditor predictability, and the constitutional boundaries of economic regulation.

Today, exemption statutes remain central to consumer protection law and personal financial planning. Their evolution offers insight into shifting social values, economic pressures, and judicial interpretations concerning the limits of creditor power. By tracing their chronological development and legal foundations, we gain a deeper understanding of how American law seeks to balance economic accountability with the preservation of basic human security.

II. CALIFORNIA'S EXEMPTION PLANNING LEGAL LANDSCAPE

In California, exemption planning has long been considered a resident's first line of defense against creditor attacks. California residents, including non-U.S. citizens,⁰⁸ may avail themselves of a number of potential state and federal exemption laws to help safeguard assets from exposure to money judgments.⁰⁹ A debtor may assert any available creditor exemptions in either state or federal court (bankruptcy and non-bankruptcy settings), as California "opted-out" of the federal exemption scheme and created its own set of creditor exemptions for its residents.¹⁰ Notwithstanding this opt-out, California residents may still avail themselves of applicable federal exemptions, as these possess strong retirement exemption benefits. In California, an "ERISA compliant" retirement plan (meaning a plan compliant with the Employee Retirement Income Security Act¹¹ ("ERISA")) is not subject to creditor attachment, even outside of a bankruptcy, which makes it an incredibly attractive tool to be used as part of a comprehensive retirement exemption planning solution.¹²

California residents residing in the state for two years may avail themselves of these potent state law-created exemption protection carve-outs.¹³ Exemptions are also unique animals in the law as their use is to be construed in a light most favorable to the debtor. The leading articulation of this principle in modern jurisprudence comes from the Ninth Circuit's decision in *In re Dudley*.¹⁴ In *Dudley*, the court reaffirmed a deeply rooted canon of California law, that exemption statutes must be interpreted liberally in favor of the debtor, and ambiguities should be resolved to maximize the protection intended by the legislature. This approach is not merely a convenient presumption; it is an

interpretive doctrine embedded in California's statutory and case law history. The *Dudley* court explained that exemptions, by design, are meant to ensure that debtors retain "the necessary property to maintain a basic standard of living" and to prevent financial ruin from cascading into homelessness, unemployment, and dependency.¹⁵

III. DIMINISHED EXEMPTION PROTECTION POST-AB 2837

For decades, California Code of Civil Procedure section 704.115, subdivision (b), has served as the state's first line of defense for retirement assets, shielding bona fide retirement assets such as Non-ERISA qualified plans (i.e., single employee 401(k) plans, or "Solo 401(k)s"), private retirement plans (like the Private Retirement Trust), defined benefit plans, profit sharing plans, public retirement, and non-profit plan benefits from the reach of creditors. Yet the passage of Assembly Bill 2837 (2023-2024 Reg. Sess.) ("AB 2837"), effective January 1, 2025,¹⁶ marks a significant recalibration of that protection as we knew it. While the statute's modernization improves clarity and procedural uniformity, it also narrows and reduces the scope of protection for certain retirement vehicles. Retirement vehicles established under Internal Revenue Code sections 403, 414, and 457, which cover most tax-sheltered annuities, government plans, non-profit and church plans, certain deferred compensation arrangements, and "top-hat" or nonqualified employer plans, are directly impacted by the new legislation.

The legal effect of the new legislation is that retirement plans created pursuant to Internal Revenue Code sections 403, 414, and 457 are now protected by the "necessity for support test" or "means test" found in California Code of Civil Procedure section 704.115, subdivision (e). This essentially means that distributions from these plans are subject to a means test (the "Means Test") to determine whether or to what extent they receive exemption protection. The Means Test requires the court to look at all assets of the debtor, including, but not limited to, any excess equity in the debtor's principal residence over the homestead exemption, other retirement funds, and whether the debtor is still working. Depending on these variables, some or all of a debtor's retirement funds in these plans may be exposed to creditors enforcing money judgments when mandatory distributions commence.

In effect, AB 2837 redefines the California retirement exemption terrain. The good news is that the new legislation preserves robust protection for traditional private retirement plans (i.e., the Private Retirement Trust ("PRT")) and ERISA-qualified pensions, but the bad news is that it diminishes or conditions the protection historically available to nonqualified or quasi-retirement arrangements

that fall outside of strict ERISA or California Code of Civil Procedure section 704.115, subdivision (b), exemption protection coverage.

IV. CALIFORNIA RETIREMENT EXEMPTION RECAP

California recognizes two general categories of retirement plans for purposes of retirement exemption application. First, there are the *fully exempt* retirement plans pursuant to California Code of Civil Procedure section 704.115, subdivision (b). Post-AB 2837, these plans now include Non-ERISA qualified plans (i.e., Solo 401(k)s), private retirement plans ("PRPs"), defined benefit plans and profit-sharing plans. Plans under this code section enjoy a "trifecta" of exemption protection. Specifically, in these plans, the money contributed, distributions to the plan participant, and the death benefit are fully protected from money judgments. Further, distributions from these plans *are not* subject to the Means Test.

Second, there are the less protected or diminished protection plans. These plans are known as *partially exempt* plans and dwell under California Code of Civil Procedure section 704.115, subdivision (e). Retirement plans that fall under this code section include Individual Retirement Accounts ("IRAs"), SEP IRAs, *and now* retirement vehicles established under Internal Revenue Code sections 403, 414, and 457, which cover tax-sheltered annuities, government and church plans, certain deferred compensation arrangements, and "top-hat" or nonqualified employer plans. Unlike fully exempt plans, distributions of plan benefits from these plans are subject to the Means Test if attacked by a judgment creditor.¹⁷ That means that if a judgment debtor is still earning income, there is a good chance that those plan benefit distributions can be seized by a judgment creditor.

It is important to also note that plans with prior employers that were previously fully exempt ERISA-qualified plans retain their full exemption protection under ERISA for the existing funds in said plan when they are "rolled-over" to a new plan.¹⁸ However, any future contributions to these Roll-Over IRAs will not be exempt under ERISA and will present a potential tracing nightmare to a plan participant who is trying to differentiate and prove what portion is exempt to a collecting judgment creditor.

V. THE PRIVATE RETIREMENT PLAN EXEMPTION

With PRPs surviving AB 2837 as a superior retirement vehicle, the question arises: what is the private retirement plan exemption and how can one use it? California Code of Civil Procedure section 704.115, subdivision (b),

provides that "[a]ll amounts held, controlled, or in the process of distribution by a Private Retirement Plan, for the payment of benefits, as an annuity, pension, retirement allowance, disability payment, or death benefit from a Private Retirement Plan are exempt." While not an officially defined term, a common name for this creditor exemption often used by the courts is "The Private Retirement Plan Exemption."¹⁹ In addressing what constitutes a Private Retirement Plan, the court in *In re Philips*²⁰ stated that "[t]he critical question for the court to decide is whether the Retirement Plan constitutes a 'private retirement plan' as provided in [Code of Civil Procedure section 704.115, subdivision (a)(1)], which section curiously and unhelpfully defines 'private retirement plan' as a 'Private retirement plan.'" Properly identified retirement assets that are funded into a PRT are considered exempt private retirement plan assets under this code section. The assets funded into the trust must be administered in accordance with the PRP.²¹ While the statute does not specifically provide the recipe (including necessary ingredients) to properly create, implement, and administer a PRT, over 50 years of case law provides some guidance as to its recommended legal architecture.

VI. PRP INGREDIENTS

To create a valid and effective PRP, its corresponding PRT should possess certain attributes and ingredients. Assets held in a PRT and administered pursuant to a PRP are exempt from creditors under California Code of Civil Procedure section 704.115, subdivision (b), only if it can be demonstrated that said PRP is principally designed and used for retirement purposes. Further, key ingredients that a PRP should possess to ensure it will survive this test and hold up to court scrutiny include (at a minimum) the following: (1) a PRP must be sponsored by an employer company; (2) a PRT must be created to hold and administer certain appropriate retirement assets; (3) a PRP must be supported by proper retirement analytics telling the retirement story ("Retirement Appraisal"); (4) a PRT must be administered by an independent trustee or custodian; and (5) a PRT must be annually administered and maintained. It is important to note that a PRT can be created and covered under federal exemption laws pursuant to ERISA or not. It is the author's opinion that a non-qualified PRT treated as a grantor trust pursuant to IRC section 677, not subject to ERISA compliance, provides the same exemption protection with greater flexibility and less restrictions than ERISA-designed PRTs.

Creating and implementing a PRT begins with an employer company, including corporations wholly owned by the plan participant, sponsoring and adopting a PRP. The PRP should be structured to set forth the policies and procedures regarding eligibility and participation in the

plan, how and what contributions can be made to the plan, recharacterization of assets contributed to the plan, how and when distributions can be made to the participant, and protocol and procedures concerning plan loans and administrative matters. Plan loan policies and procedures are especially important. In *In re Bloom*, the court first considered whether or not loans taken by the plan participant destroyed the “retirement purpose” of the plan.²² The principal query was whether or not the plan participant “followed the procedures set out in the Trust Agreement for obtaining loans,” which emphasizes the importance of properly structuring the PRP and PRT.²³

Appropriate funding of a PRT is also important to its future success when asserting the PRP exemption over select retirement assets. To properly fund a PRT, the plan should be customized for each plan participant and be primarily purposed, designed, and used exclusively for retirement purposes. The plan and respective PRT funding should be based on the participant’s Retirement Appraisal, which involves an extensive study and analysis of the participant’s net worth, life expectancy, the types of assets held, adjustments for inflation, the participant’s current and future earnings capacity, as well as lifestyle expenses and projected retirement age.

The PRT should be administered by an independent trustee or custodian. Technically, the PRT participant can serve as a trustee of the PRT. However, using an independent trustee is safer and preferable since courts can invalidate plans for lacking retirement purpose if the PRT participant exercises substantially all control “over contributions, management, administration, and use of funds.”²⁴ Creditors often use a plan participant acting as trustee to attack the plan’s legal integrity, dilute the efficacy of the exemption, and potentially implode the plan. Another important reason PRT participants should not serve as trustees is that it will most likely destroy the ability for the PRT to be considered an “excluded asset” from bankruptcy (i.e., not part of a debtor’s bankruptcy estate). A plan participant exercising control over a PRT can destroy a PRT’s anti-alienation provisions that make it a spendthrift trust under 11 USC section 541(c)(2).²⁵ With an independent trustee, a properly designed, created, used, and maintained PRT can assert itself as both exempt and excluded from bankruptcy.

Finally, a PRT should receive annual maintenance to ensure the plan is being followed and nothing slips through the proverbial cracks. Maintenance should involve a revisit of a PRT participant’s Retirement Appraisal to ensure maximization of his or her retirement benefit, especially considering any change in PRT asset values, net worth, and income circumstances. Any of these important PRT variables can change over time. A dip in asset values could result in overfunding the PRT, or the PRT participant losing

out on an increased exemption protection potential. While the incredibly potent exemption protection is certainly attractive to many California business owners, the PRT’s proper and primary objective is to produce an exempt retirement benefit that will sustain future lifestyle needs throughout the retirement years.

VII. FACTORS NEEDED TO SUPPORT PRP EXEMPTION VALIDITY

When evaluating whether or not a PRP is exempt, it is critical to inquire as to whether or not the plan is principally or primarily designed and used for retirement purposes. While the statute does not provide what factors the court will consider when making a determination of the applicability of the private retirement plan exemption, recent case law helps clarify and provide guidance in answering this question. In *O’Brien v. AMBS Diagnostics, LLC* (2019) 38 Cal.App.5th 553, 561, the court provided that “[i]n assessing whether a plan or account was principally or primarily designed and used for retirement purposes, courts are to look at the totality of the circumstances.” The *O’Brien* case set forth a non-exclusive list of five factors a court may consider to determine if a plan qualifies for the exemption when evaluating the totality of the circumstances. These factors are discussed below.

A. Subjective Intent

First, the court is to consider the “debtor’s subjective intent” concerning the design and use of the plan. Should a PRT participant acknowledge upon examination that the primary purpose of the plan was “asset protection” (which is an acceptable secondary purpose), the chance of the plan obtaining the exemption is probably close to zero. This factor was considered by the court in *In re Simpson*, wherein the court stated that “while the debtor’s subjective intent cannot create an exemption, it may take one away.”²⁶

B. Chronology of Events

The second factor for the court to consider is the “chronology” or timing of the creation of the plan in relation to other events in existence at the time of its creation. The court in *Yaesu Electronics Corp. v. Tamura* took on this issue and found that the chronology suggested the debtor intended to conceal money from a creditor and did not consider the plan assets a source of retirement income.²⁷

C. Debtor’s Control

The third factor the court is to consider is the degree of control the debtor maintains “over contributions, management, administration and use of funds” in the plan or account. In evaluating this factor, the court in *Schwartzman*

v. *Wilshinsky* stated that “[t]he kind of control which would show a nonretirement purpose would be substantially all control over contributions, management, administration, and use of funds”²⁸ The court in this case found that a high degree of control was not exercised because the debtor had no part in administering the plan, did not take loans or disbursements, and did not contribute more than he was entitled to contribute.

D. Compliance with Plan Rules

The fourth factor the court is to consider is whether the debtor violated or complied with IRS rules or the plan rules in contributing to the plan. The court in *In re Rucker* also addressed this factor and held that the debtor’s unlawful and deceptive behavior in funding his plans indicates, considering all the circumstances, that his plans were not designed and used primarily for retirement.²⁹

E. Purpose of Plan Withdrawals

The final factor the court is to consider is the debtor’s purpose for withdrawing money from the plan or account and whether those funds were used for a retirement or nonretirement purpose. In addressing this issue, the court in the case of *In re Jacoway* noted that factors to be considered include:

whether the withdrawals or loans ‘benefited the plan’s retirement purpose’ by ‘[preserving and enhancing] the capital of the plan,’ and whether any withdrawals diminished or will diminish the assets in the plan to such an extent that they are inconsistent with the majority of the assets being used for long-term retirement purposes.³⁰

In *Jacoway*, the court also made it clear that a debtor does not have to stop working to receive retirement benefits from a plan and retain the exemption protection.

VIII. IMPORTANCE OF CONDUCTING CLIENT DUE DILIGENCE TO PRESERVE RETIREMENT PURPOSE

California’s PRP exemption is one of the most powerful retirement exemption tools available under state law. Properly structured, a PRP can protect unlimited assets contributed for the purpose of providing retirement benefits to the plan’s participants (provided that need can be proved). However, the statute’s protective power is only triggered when the plan has a *bona fide* “retirement purpose.” This requirement is both substantive and temporal, and courts enforce it with rigor. As numerous cases demonstrate, the PRP exemption cannot be used as a vehicle to shelter assets after debts have ripened,

catastrophic lawsuits have been filed, or creditors have begun moving toward collection. Thus, careful *client due diligence* is not simply good practice, it is essential to ensuring that the plan will withstand judicial scrutiny.

The “retirement purpose” requirement is the linchpin of PRP validity. Courts have held that in determining whether a plan qualifies for exemption, they will look beyond the formalities of plan documents and examine the real-world context in which the plan was created and funded. If the plan was adopted or materially amended when the debtor already faced substantial legal exposure, such as pending litigation, looming judgments, or known claims, courts may infer that the contributions were made not for retirement but for mere creditor avoidance, rendering the exemption invalid.

This is why rigorous due diligence is indispensable. Attorneys and planners must make meaningful inquiries into the client’s existing and potential liabilities before drafting or implementing a PRP. At its core, due diligence should include, but not be limited to, identifying any (1) pending lawsuits (regardless of stage); (2) judgments or liens already entered; (3) threatened litigation, including demand letters, disputes with partners, creditors, or employees; (4) expected claims, whether contractual, tort-based, statutory, or regulatory; (5) debts in default, even if no suit has yet been filed; (6) personal guarantees that may be triggered; (7) tax liabilities under audit or dispute; and (8) family law risks, including pending divorce or support arrears. A PRP created in the shadow of such risks may fail because the court could determine that the debtor lacked the requisite prospective retirement intent. Instead, the timing will signal an impermissible attempt to shield assets from anticipated adverse outcomes.

Due diligence also matters because the PRP analysis is fact-intensive. Courts consider the debtor’s age, financial circumstances, work history, retirement horizon, contribution pattern, liquidity needs, and past retirement practices. If the client is older, underfunded for retirement, or has historically contributed to legitimate retirement plans, the PRP is more likely to be upheld. But if the client is younger, financially distressed, or makes sudden large contributions into a newly formed plan, courts may view the arrangement with skepticism.

Another layer of due diligence concerns the source of the assets intended for contribution. Courts scrutinize whether the contributions represent genuine retirement savings or whether they are last-minute transfers designed to remove assets from creditor reach. Evaluating the liquidity and origin of funds, assessing historical savings patterns, and ensuring that contributions are consistent with what a

reasonable business owner might contribute for retirement helps reinforce the legitimacy of the plan.

Failure to conduct adequate due diligence exposes both the client and the advisor to risk. The client risks having the PRP disallowed, resulting in the seizure of assets that were wrongly believed to be exempt and protected. Advisors may face professional liability for failing to identify red flags or for recommending a PRP when it was foreseeable that the exemption would be challenged.

The credibility of a PRP rests on the authenticity of its retirement purpose. Proper due diligence ensures that the plan is not merely a paper structure, but a legitimate retirement mechanism aligned with the client's financial trajectory and long-term planning goals. By thoroughly analyzing the client's exposure to current, threatened, or expected claims, practitioners can ensure the PRP is both legally sound and ethically grounded. In an area where courts carefully distinguish between genuine retirement planning and disguised asset-protection maneuvers, due diligence is not optional, it is foundational.

IX. CONCLUSION

In the wake of the recent enactment of AB 2837 in California, retirement exemption planning using a properly designed and used PRP and PRT may be a superior option for the protection of “can’t lose” retirement assets for California residents. Select assets funded into a PRP are intended to sustain and maintain a debtor’s lifestyle through a debtor’s retirement years. There is a barrier to entry to use the PRP exemption in that it must be primarily designed and used for retirement purposes. Conducting thorough due diligence prior to and surrounding the creation of any retirement plan is a must to ensure that the plan receives the requisite level of credibility and respect by the courts if challenged by a creditor. In other words, PRPs should be used as shields not swords. One could say that a PRP is the best “non-asset protection retirement protection” for California residents. The exemption protection afforded by a PRP may be utilized by both U.S. and non-U.S. citizens residing in California. However, it is important to understand that retirement assets in a PRT will only benefit from the exemption protection provided by California Code of Civil Procedure section 704.115, subdivision (b), if the PRP and PRT are properly designed, funded, used, and annually administered to maintain compliance with applicable laws and the rules provided for in the plan.

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- 18 *McMullen v. Haycock* (2007) 147 Cal.App.4th 753.
- 19 *Bagby v. Davis* (2026) 118 Cal.App.5th 652, 664.
- 20 *In re Phillips* (Bankr. N.D. Cal. 1996) 206 B.R. 196, 200.
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- 25 *In re Moses* (9th Cir. 1999) 167 F.3d 470, 473.
- 26 *In re Simpson* (9th Cir. 2009) 557 F.3d 1010, 1018.
- 27 *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 15.
- 28 *Schwartzman v. Wilshinsky, supra*, 50 Cal.App.4th at p. 629.
- 29 *In re Rucker* (9th Cir. 2009) 570 F.3d 1155, 1160.
- 30 *In re Jacoway* (9th Cir. BAP 2000) 255 B.R. 234, 239-240.