Sec. 12-1001 Personal property exempt

(735 ILCS 5/12-1001)

(from Ch. 110, par. 12-1001)

Sec. 12-1001.

Personal property exempt.

The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:

(a) The necessary wearing apparel, bible, school books, and family pictures of the debtor and the debtor's dependents;

(b) The debtor's equity interest, not to exceed

$4,000 in value, in any other property;

(c) The debtor's interest, not to exceed $2,400 in value, in any one motor vehicle;

(d) The debtor's equity interest, not to exceed

$1,500 in value, in any implements, professional books, or tools of the trade of the debtor;

(e) Professionally prescribed health aids for the debtor or a dependent of the debtor;

(f) All proceeds payable because of the death of the insured and the aggregate net cash value of any or all life insurance and endowment policies and annuity contracts payable to a wife or husband of the insured, or to a child, parent, or other person dependent upon the insured, or to a revocable or irrevocable trust which names the wife or husband of the insured or which names a child, parent, or other person dependent upon the insured as the primary beneficiary of the trust, whether the power to change the beneficiary is reserved to the insured or not and whether the insured or the insured's estate is a contingent beneficiary or not;

(g) The debtor's right to receive:

(1) a social security benefit, unemployment compensation, or public assistance benefit;

(2) a veteran's benefit;

(3) a disability, illness, or unemployment benefit; and

(4) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(h) The debtor's right to receive, or property that is traceable to:

(1) an award under a crime victim's reparation law;

(2) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor;

(3) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor or a dependent of the debtor;

(4) a payment, not to exceed $15,000 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent; and

(5) any restitution payments made to persons pursuant to the federal Civil Liberties Act of 1988 and the Aleutian and Pribilof Island Restitution Act, P.L. 100-383.

For purposes of this subsection (h), a debtor's right to receive an award or payment shall be exempt for a maximum of 2 years after the debtor's right to receive the award or payment accrues; property traceable to an award or payment shall be exempt for a maximum of 5 years after the award or payment accrues; and an award or payment and property traceable to an award or payment shall be exempt only to the extent of the amount of the award or payment,

without interest or appreciation from the date of the award or payment.

(i) The debtor's right to receive an award under Part

20 of Article II of this Code relating to crime victims' awards.

(j) Moneys held in an account invested in the

Illinois College Savings Pool of which the debtor is a participant or donor, except the following non-exempt contributions:

(1) any contribution to such account by the debtor as participant or donor that is made with the actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) any contributions to such account by the debtor as participant during the 365 day period prior to the date of filing of the debtor's petition for bankruptcy that, in the aggregate during such period, exceed the amount of the annual gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended, in effect at the time of contribution; or

(3) any contributions to such account by the debtor as participant during the period commencing 730 days prior to and ending 366 days prior to the date of filing of the debtor's petition for bankruptcy that, in the aggregate during such period, exceed the amount of the annual gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended, in effect at the time of contribution.

For purposes of this subsection (j), "account" includes all accounts for a particular designated beneficiary, of which the debtor is a participant or donor.

Money due the debtor from the sale of any personal property that was exempt from judgment, attachment, or distress for rent at the time of the sale is exempt from attachment and garnishment to the same extent that the property would be exempt had the same not been sold by the debtor.

If a debtor owns property exempt under this Section and he or she purchased that property with the intent of converting nonexempt property into exempt property or in fraud of his or her creditors, that property shall not be exempt from judgment, attachment, or distress for rent. Property acquired within 6 months of the filing of the petition for bankruptcy shall be presumed to have been acquired in contemplation of bankruptcy.

The personal property exemptions set forth in this Section shall apply only to individuals and only to personal property that is used for personal rather than business purposes. The personal property exemptions set forth in this Section shall not apply to or be allowed against any money, salary, or wages due or to become due to the debtor that are required to be withheld in a wage deduction proceeding under Part 8 of this Article XII.

(Source: P.A. 97-1030, eff. 8-17-12.)

331 F.3d 575
In the matter of: Fred E. SCHOONOVER, Debtor-Appellant.
No. 02-3440.
United States Court of Appeals, Seventh Circuit.
Argued May 19, 2003.
Decided June 9, 2003.
Page 576
Donald R. Brandon (argued), Herrin, IL, for Appellee, Edward Karr.
Page 577
Edward C. Eytalis (argued), Carterville, IL, for Debtor-Appellant, Fred J. Schoonover.
Before EASTERBROOK, ROVNER, and EVANS, Circuit Judges.
EASTERBROOK, Circuit Judge.

Edward Karr obtained a $100,000 judgment in Illinois court against Fred Schoonover. When Schoonover did not pay, Karr invoked the judgment to garnish about $80,000 that Schoonover had in the Bank of Herrin. Schoonover then filed a bankruptcy petition and listed the $80,000 as exempt, on the ground that the money had come from Social Security, veterans, and disability payments. He relied on 735 ILCS 5/12-1001(g) and 12-1006, state exemption statutes that a debtor may elect to use. See 11 U.S.C. § 522(b)(2)(A). Karr ignored the proceeding until Schoonover filed a motion to avoid the judicial lien. See 11 U.S.C. § 522(f). Karr then objected to the claim of exemption. After an evidentiary hearing, at which Schoonover testified that most of the money had come from the sale of antiques and not from the deposit of benefit checks, Bankruptcy Judge Meyers concluded that the funds are not exempt under state law, even if some of the money had a source in governmental benefits (as Schoonover's wife testified). The district judge affirmed. 285 B.R. 695 (S.D.Ill.2002).

Schoonover's testimony that the money came from antiques raises the question whether his claim of exemption should be classified as bankruptcy fraud. Assuredly he is not entitled to shield these funds from creditors. Section 12-1001(g) exempts "[t]he debtor's right to receive" public benefits; it has nothing to do with funds on deposit long after their receipt and commingling with the debtor's other assets. Like the anti-alienation clauses in the federal benefits statutes themselves, this law ensures that recipients enjoy the minimum monthly income provided by the benefits laws; it does not entitle recipients to shield hoards of cash. See *Fayette County Hospital v. Reavis,* 169 Ill.App.3d 246, 250, 119 Ill.Dec. 937, 523 N.E.2d 693, 695 (1988) ("the Illinois legislature did not intend to exempt property which is traceable to social security benefits ..."). Section 12-1006 exempts an "interest in or right, whether vested or not, to the assets held in ... a retirement plan ... if the plan ... is intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code...." What is necessary is a trust or equivalent arrangement segregating the assets until retirement. That assets freely usable for current consumption may be traced to public benefits does not make them a tax-qualified "retirement plan" and thus does not support an exemption under § 12-1006. See *In re Weinhoeft,* 275 F.3d 604 (7th Cir.2001); *Auto Owners Insurance v. Berkshire,* 225 Ill.App.3d 695, 167 Ill.Dec. 1100, 588 N.E.2d 1230 (1992).

In this court, Schoonover disdains the language of the statutes and disregards the opinions interpreting them. He contends instead that the bankruptcy court erred in requiring him to shoulder the "burden of proof" — by which he means the burden of producing evidence about the funds' genesis. How this could affect the outcome is a mystery. If Schoonover had not presented his own testimony (and that of his spouse) about the provenance of the funds, Karr surely would have called them to the stand for that purpose. Nothing turns on the allocation between debtor and creditor of the risk of nonpersuasion: the dispute was resolved on

wholly legal grounds, so the burden of persuasion is irrelevant.

Along the way, however, Schoonover made a legal argument: that

Page 578

Karr waited too long before contesting the claim of exemption. The creditors' meeting occurred on April 12, 2001, and from then creditors had 30 days to object to any claim of exemption. That time may be extended only if a creditor asks for more before the 30 days have run. See Fed. R.Bankr.P. 4003(b). Once the period expires, creditors are out of luck even if the claim of exemption is specious. See *Taylor v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). Karr let the 30 days pass without action. On August 24, 2001, Schoonover filed a motion under § 522(f) asking the bankruptcy court to avoid Karr's lien. Karr filed a timely answer to this motion — but by then it was September, too late (Schoonover says) to deny that the accounts are exempt. And if they are exempt then the lien should be avoided. See *Owen v. Owen,* 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991).

After May 12, 2001, no unsecured creditor could have asserted any right to payment from the funds on deposit at the Bank of Herrin. But Karr had a judicial lien, and though this may not have given him a security interest in the accounts it did give him a valuable entitlement: to wait out the bankruptcy and enforce the lien at its conclusion, unless the debtor asked the bankruptcy court for relief. "[A] creditor's right to foreclose on [a lien] survives or passes through the bankruptcy." *Johnson v. Home State Bank,* 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). Although general unsecured creditors must take the initiative by objecting, lienholders may wait for notice under § 522(f). Once they receive notice, lienholders litigate on the schedule appropriate to a proceeding under § 522(f), not the schedule for general creditors.

Taylor did not get its 30-day limit from the Bankruptcy Code: all § 522(*l*) says is that creditors who want dibs on assets claimed as exempt must object, which Karr eventually did. The deadline came from Rule 4003(b), which deals with objections by general creditors. Motions under § 522(f) to avoid liens fall under Rule 4003(d), not Rule 4003(b) — and Rule 4003(d) does *not* set a 30-day schedule but instead provides that "[a] proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014." In turn, Rule 9014 leaves deadline-setting to the bankruptcy judge. The upshot is that lienholders have more time than general unsecured creditors, a dispensation essential if lienholders are to enjoy any chance to watch the proceedings from afar and enforce their liens later. Just as § 522(*l*) and Rule 4003(b) put the onus of timely objection on general unsecured creditors, so § 522(f) and Rules 4003(d) and 9014 put the onus of contesting a lien on debtors; the clock for lienholders runs from the motion under § 522(f) and not from the meeting of unsecured creditors. To the extent that *In re Chinosorn,* 248 B.R. 324, 327-28 (N.D.Ill. 2000), reaches a different conclusion, it is disapproved. (As far as we can tell, this is the first appellate consideration of the question whether Rule 4003(b) and *Taylor* affect the time available to lienholders.) Karr's objection was timely.

AFFIRMED.

600 F.3d 742
Carolyn LONDON, et al., individually and on behalf of all others similarly situated, Plaintiffs-Appellants,
v.
RBS CITIZENS, N.A., et al., Defendants-Appellees.
No. 09-1516.
United States Court of Appeals, Seventh Circuit.
Argued December 3, 2009.
Decided April 1, 2010.

[600 F.3d 743]

COPYRIGHT MATERIAL OMITTED

[600 F.3d 744]

Aron D. Robinson (argued), Chicago, IL, for Plaintiffs-Appellants.

Martin J. Bishop (argued), Foley & Lardner, LLP, Chicago, IL, for Defendants-Appellees.

Before EASTERBROOK, Chief Judge, and MANION and EVANS, Circuit Judges.

MANION, Circuit Judge.

Judgment creditor Chase Bank filed a citation under Illinois law seeking to discover any assets of judgment debtors Andrew and Carolyn London that Charter One Bank had in its possession. After being served with the citation, Charter One froze the funds in the Londons' checking account, some of which were Social Security benefits. When the Londons demanded that Charter One release their Social Security monies, which are exempt from attachment under federal and Illinois law, the bank refused. Although the citation was soon dismissed and their funds unfrozen, the Londons sued the Charter One defendants in federal court under 42 U.S.C. § 1983. The district court dismissed the complaint for failure to state a claim for which relief could be granted, and the Londons appeal. We affirm.

I.

Andrew and Carolyn London sued RBS Citizens, N.A., Citizens Bank of Pennsylvania, and Citizens Financial Group, Inc. d/b/a Charter One Bank, N.A. (collectively "Charter One") in the Northern District of Illinois, alleging the following facts in their complaint. In 2004, Chase Bank (which is not a party to this case) obtained a judgment against the Londons. On March 26, 2008, at Chase's request the Clerk of the Circuit Court of Cook County, Illinois, issued a Citation to Discover Assets that named the Londons as defendants and Charter One as third-party respondent. The citation stated that Chase was owed money on the 2004 judgment against the Londons and directed Charter One to appear at a hearing on April 28, 2008, so that Chase could discover any of the Londons' property in Charter One's possession. In addition, the citation prohibited Charter One "from making or allowing any transfer or other disposition of, or interfering with, any property not exempt from execution or garnishment" that belonged to the Londons until further order of the court or termination of the proceedings. Significantly, a notice included with the citation indicated that "Social Security and SSI benefits" were exempt funds. The citation also warned Charter One that failure to comply could result in a judgment against it for any unsatisfied amount of the judgment. Chase served the citation and the notice on Charter One.

The Londons maintained several accounts with Charter One, one of which was a checking account. Both Mr. and Mrs. London received monthly Social Security benefit deposits in the checking account via electronic funds transfer ("EFT"). Charter One's records designated these EFT deposits as Social Security payments from the United States Treasury. In February and March 2008, several deposits were posted to the Londons' checking account, some of which were

Social Security EFTs. On April 10, Charter One informed the Londons that it had been served with the citation and was freezing their accounts. Charter One also assessed a $50 processing fee for its trouble. Mrs. London visited the bank on April 14 and 15 and demanded that it unfreeze the Social Security funds in her checking account; Charter One refused. On April 16, a Social Security deposit for $1721.50 was added to the Londons' checking account. A few days later (April 21), Mrs. London returned to the bank and asked it to release the funds from that deposit. Charter One declined her request. Then, on April 23, a $687 Social Security deposit

[600 F.3d 745]

was made to the checking account. Mrs. London demanded the release of that deposit, too, but was again rebuffed by Charter One. As a result of Charter One's freezing of the checking account, several checks and bank drafts written by the Londons were refused and returned due to non-sufficient funds, for which the bank assessed various fees.

The Londons claim that the defendants were acting under color of state law when, without a hearing, they froze (and later refused to release) Social Security funds they knew were exempt from legal process under 42 U.S.C. § 407(a), actions they say violated § 407(a) and the Due Process Clause of the Fourteenth Amendment. They seek remedies for these violations under 42 U.S.C. § 1983 in the form of money damages, declaratory relief, and injunctive relief. They also request class certification on behalf of all persons who held accounts at Charter One and had exempt Social Security benefits restrained by Charter One in compliance with citations, garnishments, and similar legal processes.

Charter One moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), claiming the plaintiffs had failed to state a claim for which relief could be granted. The district court granted the motion. In so doing, the district court first took judicial notice of records from the Circuit Court of Cook County that indicated that the citation was dismissed and the freeze on the plaintiffs' checking account ended following a hearing on April 28—eighteen days after Charter One imposed the freeze. The district court then concluded that the plaintiffs were afforded adequate process by the April 28 hearing before the state court and held that their claim for a violation of § 407(a) failed because that statute permits temporary freezes of Social Security funds in advance of a prompt court hearing. The Londons appeal the dismissal of their complaint.

II.

We review de novo a district court's dismissal of a complaint for failure to state a claim, taking the factual allegations pleaded by the plaintiffs as true and drawing all reasonable inferences in their favor. *Chaudhry v. Nucor Steel-Indiana,* 546 F.3d 832, 836 (7th Cir.2008). We may affirm on any basis supported by the record. *Brooks v. Ross,* 578 F.3d 574, 578 (7th Cir.2009). A dismissal under Rule 12(b)(6) is required if the facts pleaded in the complaint fail to describe a claim that is plausible on its face. *Sharp Elecs. Corp. v. Metro. Life Ins. Co.,* 578 F.3d 505, 510 (7th Cir.2009) (citing *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)).

In their complaint, the Londons make two § 1983 claims against Charter One: one for violation of their Fourteenth Amendment right not to be deprived of property without due process of law, and one for violation of § 407(a), which shields Social Security benefits from "execution, levy, attachment, garnishment, or other legal process."[1] In order to state a claim under § 1983, a plaintiff must sufficiently allege that (1) a person acting under color

[600 F.3d 746]

of state law (2) deprived him of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Buchanan-Moore v. County of Milwaukee,* 570 F.3d 824, 827 (7th Cir.2009). We turn first to examine whether the plaintiffs' complaint

presents adequate averments on the color of state law element.

Because § 1983 actions may only be maintained against defendants who act under color of state law, the defendants in § 1983 cases are usually government officials. *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.,* 184 F.3d 623, 628 (7th Cir.1999). And although private persons may also be sued under § 1983 when they act under color of state law, *id.,* they may not be sued for "merely private conduct, no matter how discriminatory or wrongful," *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (internal quotation marks and citations omitted). Two conditions must be satisfied in order for a private party's actions to be deemed taken under color of state law. First, the alleged deprivation of federal rights must have been caused by the exercise of a right or privilege created by the state, a rule of conduct imposed by the state, or someone for whom the state is responsible. *Id.* Misuse of a state law by a private party, however, does not satisfy this requirement. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Second, the private party must be a person who may fairly be said to be a state actor. *Am. Mfrs.,* 526 U.S. at 50, 119 S.Ct. 977.

Turning to the first step, the Londons' complaint, even when read deferentially, does not allege that Charter One was following the directives of the citation (or any other state-imposed rule of conduct) when it froze Social Security funds it knew were exempt.[2] To the contrary: the citation—attached to the complaint and thus appropriate for consideration on a motion to dismiss, *Witzke v. Femal,* 376 F.3d 744, 749 (7th Cir.2004)—states that Charter One is

> prohibited from making or allowing any transfer or other disposition of, or interfering with, any property *not exempt* from execution or garnishment belonging to the judgment debtor or to which he/she may be entitled or which may be acquired by or income due to him/her, until further order of court or termination of the proceeding.

(emphasis added). The citation's language is derived from 735 ILCS 5/2-1402(f)(1). The citation notice, consistent with 735 ILCS 5/2-1402(b), stated that a judgment debtor's Social Security benefits are exempt personal property. Elsewhere in the Illinois statutes, Social Security benefits are declared to be exempt from judgment and attachment. 735 ILCS 5/12-1001(g)(1). And as already mentioned, § 407(a) provides that Social Security monies are not subject to "execution, levy, attachment, garnishment, or other legal process." Because the citation required Charter One to restrain only the Londons' non-exempt funds and expressly listed Social Security benefits as exempt assets, any action taken by Charter One against funds it knew were exempt was not in accordance with the citation and Illinois law. And there is no traction to the argument that Charter One could use the citation as a basis for freezing the funds, because the misuse of state law by a private party is not action taken under color

[600 F.3d 747]

of state law.[3] *Lugar,* 457 U.S. at 940, 102 S.Ct. 2744; *Starnes v. Capital Cities Media, Inc.,* 39 F.3d 1394, 1397 (7th Cir.1994); *Winterland Concessions Co. v. Trela,* 735 F.2d 257, 262 (7th Cir.1984); *Loyd v. Loyd,* 731 F.2d 393, 398-99 (7th Cir.1984); *see also Greco,* 775 F.2d at 166 ("When a private party, in violation of a state statute, deprives another party of property, that deprivation obviously cannot constitute conduct fairly attributable to a state rule or decision.").

Our decision in *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC,* 480 F.3d 470 (7th Cir.2007), is not to the contrary. There, while attempting to collect on a judgment against Beler (the judgment debtor), a law firm sent a

Citation to Discover Assets (pursuant to 735 ILCS 5/2-1402) to a bank where Beler had a checking account. *Id.* at 472. The citation there, similar to the one here, informed the bank that assets that were exempt from execution should not be turned over. *Id.* In response, the bank froze the account. *Id.* The law firm eventually dismissed the citation after Beler asserted the entire balance in the account was exempt Social Security assets. *Id.* Beler sued the law firm under the Fair Debt Collection Practices Act, but lost on summary judgment in the district court. *Id.* In affirming the district court's judgment, we noted that the "citation had the practical effect of freezing the account until the Bank knew what was exempt." *Id.* at 474. Even if such a "practical effect" were sufficient to satisfy the first prong of the color of state law requirement—and we doubt it would be—the *Beler* language is inapplicable here because, at least as claimed by the Londons, Charter One *knew* that the April 16 and 23 Social Security EFT deposits were exempt from attachment. The freeze was thus not the practical effect of the citation.

In sum, the complaint makes clear that Charter One's freezing of the Social Security funds it knew were exempt was not the result of any state-created right, state-prescribed rule, or person for whom the state is responsible but was, in fact, private conduct that was not in keeping with state law.[4] Therefore, because the Londons did not allege any action by Charter One that was taken under color of state law, Charter One may not be held liable under § 1983. The district court's dismissal of the plaintiffs' complaint for failure to state a claim was thus appropriate.[5]

[600 F.3d 748]

III.

Based on the foregoing reasons, we hold that the plaintiffs' complaint does not describe a plausible § 1983 claim against Charter One because it does not contain sufficient factual allegations that Charter One was acting under color of state law. Accordingly, the judgment of the district court is AFFIRMED.

Notes:

1 The plaintiffs concede they are not suing under a private cause of action created by § 407. Rather, they contend that they may obtain a remedy under § 1983 for the defendants' alleged violation of § 407(a). In order to maintain a § 1983 cause of action for a violation of § 407(a), the plaintiffs "must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 120, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005). If shown, there is a rebuttable presumption that the right may be enforced under § 1983. *Id.* For the purposes of this opinion, we will assume, arguendo, that § 407(a) creates a private right that the Londons may enforce under § 1983.

2 In the briefs and at oral argument, counsel for the plaintiffs made clear that they are limiting their claims to Charter One's actions concerning the post-freeze (April 16 and 23) Social Security deposits it allegedly knew were exempt and are not challenging the bank's conduct regarding the commingled funds present in their account when the freeze was instituted.

3 Were there any doubt that the Londons contend that Charter One misapplied the directives from the citation rather than following them, the plaintiffs removed it with the following concessions in their briefs: "the citation itself informed the Defendants that it should not hold exempt property and the bank knew the deposits were exempt property when it received them"; "the citation itself does not command the freeze of exempt funds"; "the defendants hid within the citation and used it as a shield claiming they were compelled to freeze funds they knew were exempt until a judge told them otherwise"; and, "the issue here concerns property which the citation respondent knew was exempt and of which it was never advised to `freeze' in the first place."

Although we have recognized that private misuse of a statute can constitute state action where the private party acted jointly with a state official who abused his authority, *see Greco v. Guss,* 775 F.2d 161, 167-68 (7th Cir.1985), there are no allegations in the complaint that suggest any such involvement by a state official here.

4 Nothing in this opinion should be read to suggest that when a private party follows state law, it is automatically a state actor.

5 In their reply brief, the plaintiffs request that they be allowed to amend their complaint if their pleadings are found inadequate. Issues raised for the first time in a reply brief are ordinarily waived. *Gonzales v. Mize,* 565 F.3d 373, 382 (7th Cir.2009). Even if waiver were no obstacle, any proposed amendment would be futile because the amended complaint could not survive a motion to dismiss, *Vargas Harrison v. Racine Unified Sch. Dist.,* 272 F.3d 964, 974 (7th Cir.2002): to state a claim under § 1983, the plaintiffs would need to allege that Charter One was following the citation when it froze their exempt Social Security funds, which is flatly contrary to the terms of the citation they attached to their complaint. In the event of a conflict between a complaint proper and an attachment thereto that forms the basis of the plaintiffs' claims, the attachment prevails, and dismissal is warranted if, as here, the attachment negates the plaintiffs' claims. *Thompson v. Illinois Dep't of Prof'l Regulation,* 300 F.3d 750, 754 (7th Cir.2002).

Sec. 12-1201 Bankruptcy exemption

(735 ILCS 5/12-1201)

(from Ch. 110, par. 12-1201)

Sec. 12-1201.

Bankruptcy exemption.

In accordance with the provision of Section 522(b) of the Bankruptcy Code of 1978, (11 U.S.C. 522(b)), residents of this State shall be prohibited from using the federal exemptions provided in Section 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. 522(d)), except as may otherwise be permitted under the laws of Illinois.

(Source: P.A. 82-280.)

IN RE: BRIAN A.M. RUSSELL and STEPHANIE SUZANNE RUSSELL, Debtors.
Case No. 13-80468
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF ILLINOIS
SIGNED THIS: August 28, 2013

____

Thomas L. Perkins
United States Bankruptcy Judge

OPINION

An issue of statutory construction of an Illinois exemption statute is before the Court. Illinois has opted out of the federal bankruptcy exemption scheme so state law exemptions apply. The basic personal property exemptions available to Illinois debtors are found at 735 ILCS 5/12-1001. These include an unlimited exemption for the "debtor's right to receive a . . . public assistance benefit." 735 ILCS 5/12-1001(g)(1).

The Debtors filed this chapter 7 case on March 11, 2013. Their amended schedules indicate that before they filed, they received and deposited on March 1, 2013, federal and state tax refunds totaling $7,638, of which $4,140 is attributable to the Earned Income Credit (EIC) and the Additional Child Tax Credit (ACTC). They disclose that on the petition date, the sum of $6,685.15 remained on deposit in their bank account. They claim the entire

Page 2

petition date account balance exempt, relying upon section 12-1001(g)(1) to exempt the $4,140 attributable to the EIC and ACTC. The remaining $2,066 is claimed exempt under section 12-1001(b), the wild card provision.

The Trustee does not dispute that tax refund amounts attributable to EIC and ACTC are "public assistance benefits" as that term is used in the Illinois statute. He contends that section 12-1001(g)(1) protects only the "right to receive" a payment, so that funds already received, even if traceable to a public assistance benefit, are not covered by the exemption.

The Debtors favor a more expansive interpretation of the statute. They argue that the Trustee's interpretation would defeat the intent of the legislature to protect public assistance benefits from attachment by creditors. They argue that EIC and ACTC benefits should be treated the same as social security benefits, which remain fully exempt after receipt. They also argue that, similar to Indiana law, received funds should be protected.

An Illinois appellate court issued an instructive opinion in *Fayette County Hosp. v. Reavis,* 169 Ill.App.3d 246, 523 N.E.2d 693 (Ill.App. 5 Dist. 1988), where a judgment debtor's certificate of deposit contained funds traceable to social security benefits. Construing section 12-1001(g), the court contrasted that provision with section 12-1001(h), which exempts not only a debtor's right to receive certain payments and awards, but also "property that is traceable to" such payments and awards. Reasoning that the omission in section 12-1001(g) of language exempting traceable property was purposeful, the court determined that the Illinois legislature did not intend to exempt property traceable to social security benefits, so that the certificate of deposit was not exempt. As section 12-1001(g)

Page 3

applies equally to public assistance benefits and social security benefits, the *Reavis* decision's reasoning is valid and compelling here, where the Debtors are seeking to exempt funds traceable to public assistance benefits received prepetition.

The court's reasoning in *Reavis* was followed and extended by another Illinois appellate court in *In re Marriage of Pope-Clifton,* 355 Ill.App.3d 478, 823 N.E.2d 607 (Ill.App. 4 Dist. 2005), where the court was faced with an exemption claim in a bank account

containing only funds received as Veterans Administration disability benefits. The funds were claimed exempt under section 12-1001(g)(2) exempting a debtor's right to receive a veteran's benefit and section 12-1001(g)(3) exempting a debtor's right to receive a disability benefit. Relying on the absence in section 12-1001(g) of language applying the exemptions to traceable property, the court, citing *Reavis,* held that traceable funds already received were not covered by section 12-1001(g).

Although neither *Reavis* nor *Pope-Clifton* dealt with public assistance benefits, the reasoning of those opinions is equally applicable to each of the categories of benefits described in section 12-1001(g). No Illinois court has issued a decision contrary to *Reavis* or *Pope-Clifton.* There is no reason to suspect that the Illinois Supreme Court would not apply the same reasoning to public assistance benefits.

An Illinois bankruptcy court recently followed *Reavis* and *Pope-Clifton* in *In re McQuaid,* 492 B.R. 514 (Bankr.N.D.Ill. 2013)(decided May 16, 2013), where the chapter 7 debtors claimed an exemption under section 12-1001(g)(3) in trust assets traceable to settlement proceeds from a disability insurance claim. Upholding the trustee's objection, the court held that section 12-1001(g), protecting only a debtor's right to receive certain

Page 4

benefits, does not protect funds in the debtor's possession. Only the debtor's entitlement to receive future payments is covered by the exemption. The court denied the exemption claim. *Cf. In re Leitch,* --- B.R. ----, 2013 WL 3722091 (8th Cir.BAP 2013) (federal exemption in debtor's "right to receive" certain benefits did not protect funds already received).

The *McQuaid* court also relied upon an earlier bankruptcy court opinion in *In re Bowen,* 458 B.R. 918 (Bankr.C.D.Ill. 2011) (Gorman, J.), where the court applied the reasoning of *Reavis* and *Pope-Clifton.* In that case, the debtors claimed an exemption under section 12-1001(g)(3) in two disability insurance policies. Relying upon *Reavis* and *Pope-Clifton,* the court determined that the disability policies evidenced a contingent right to receive disability benefits in the future that were exempt under section 12-1001(g)(3).

This Court agrees with *McQuaid* and *Bowen* that the Illinois appellate court decisions in *Reavis* and *Pope-Clifton* correctly interpret the "right to receive" language in section 12-1001(g) as limiting the exemption to future benefits only. Funds already received may not be exempted under that provision. This Court predicts that the Illinois Supreme Court will adopt that reasoning when faced with the issue.

The Debtors argue that public assistance benefits should be treated the same as social security benefits, which they contend are fully exempt by federal law even once received so long as traceable, citing 42 U.S.C. § 407(a). That provision, however, expressly exempts social security benefits "paid or payable." The Illinois statute at issue is clear and unambiguous that only the debtor's right to receive certain benefits is exempt. That federal law provides a broader exemption for social security benefits has no effect on the interpretation of the Illinois statute.

Page 5

The Debtors also argue that denial of the exemption would be bad policy and would defeat the legislative intent of section 12-1001(g) to protect public assistance benefits from a recipient's creditors. It is not for the Court to second guess the legislature's policy choice reflected in the language of the statute. The statute is clear that received funds are not exempt. Unambiguous statutes are interpreted literally unless the result would be absurd. This extraordinarily narrow exception does not apply here. Finally, the Debtors' argument that the Illinois exemption statute should be interpreted so as to provide the same exemption rights as those provided in neighboring states is a nonstarter.

The Trustee's objection to the Debtors' amended claim of exemptions (Doc. 28) will be granted. The Debtors' amended claim of exemption under section 12-1001(g)(1) in $4,140 on deposit in their bank account on the petition date, traceable to EIC and ACTC credits, will be denied. The pending Trustee's motion for turnover (Doc. 11) will be set for hearing.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

###

Page 693
523 N.E.2d 693
169 Ill.App.3d 246, 119 Ill.Dec. 937,
21 Soc.Sec.Rep.Ser. 661

FAYETTE COUNTY HOSPITAL, A Municipal Corporation, Plaintiff-Appellant,
v.
Ira REAVIS and Bernice Reavis, Defendants-Appellees (First National Bank of Mulberry Grove, Illinois, Garnishee-Appellee).

No. 5-86-0433.
Appellate Court of Illinois,
Fifth District.
May 12, 1988.

Page 694

[119 Ill.Dec. 938] [169 Ill.App.3d 247] LeFevre, Zeman, Oldfield & Schwarm, Law Group, Ltd., Larry L. LeFevre (S. Gene Schwarm, of counsel), Vandalia, for plaintiff-appellant.

George H. Huber and Richard O. Habermann, Vandalia, for Ira Reavis and Bernice Reavis.

Justice LEWIS delivered the opinion of the court:

Plaintiff, Fayette County Hospital (Hospital), appeals from an order entered by the circuit court of Fayette County in a proceeding to enforce a judgment against defendants, Ira and Bernice Reavis, finding that a certain certificate of deposit was exempt from garnishment. The Hospital maintains on appeal that the trial court erred in [169 Ill.App.3d 248] determining that a certificate of deposit, purchased with social security benefits, payable upon death of the owner to a funeral home, is exempt under section 12-1001 of the Code of Civil Procedure (Code) (Ill.Rev.Stat.1985, ch. 110, par. 12-1001).

On December 18, 1985, the Hospital filed an amended complaint in the circuit court of Fayette County requesting that the court enter an order directing defendants, Ira and Bernice Reavis, to pay the Hospital for the medical services rendered to Mr. Reavis. On February 11, 1986, the parties agreed to the entry of a judgment in which the trial court directed defendants to pay the Hospital the sum of $18,632.93 for the medical services rendered to Mr. Reavis by the Hospital. In an effort to enforce the February 11, 1986, judgment, the Hospital filed an affidavit for nonwage garnishment, alleging that garnishee, First National Bank of Mulberry Grove (Bank), was indebted to the defendants. In an affidavit filed on March 27, 1986, the Bank's cashier averred that the defendants had a checking account with a balance of $4,955.65 and a certificate of deposit owned by Mr. Reavis payable on his death to a funeral home.

On May 6, 1986, the Hospital filed a motion for turnover of monies held requesting that the court enter an order directing the Bank to issue a check to the Hospital in an amount equal to the sum of the balance of the checking account and the certificate of deposit. Mr. Reavis died on May 14, 1986. On May 19, 1986, Mrs. Reavis filed an affidavit of exemptions, alleging in part that the checking account and the certificate of deposit were exempt property because those funds were traceable to, and derived from, social security benefits.

During a May 20, 1986, hearing, the parties agreed that, despite Mr. Reavis' death, Mrs. Reavis could exempt $4,000 of personal property which represented both Mr. and Mrs. Reavis' exemptions under section 12-1001(b) of the Code (Ill.Rev.Stat.1985, ch. 110, par. 12-1001(b)). The only contested issue at the hearing concerned whether the checking account and certificate of deposit funds, which were traceable to social security benefits, were exempt. In a May 29, 1986, docket entry, the trial court found that the certificate of deposit, which was payable on Mr. Reavis' death to a funeral home, and the checking account were exempt under sections 12-1001(f) and 12-1001(g) (Ill.Rev.Stat.1985, ch. 110, pars. 12-1001(f), (g)). After applying certain exemptions, the trial court ordered that the sum of $1,255.65 be turned over to the Hospital.

On June 2, 1986, the Hospital filed a motion to reconsider or, in the alternative, for clarification of judgment. In an order entered on June 24, 1986, the trial court denied the motion to reconsider and [169 Ill.App.3d 249] stayed the May 29, 1986, order "as it relates to [the certificate of deposit] pending appeal." On June 27, 1986, the Hospital filed a timely notice of appeal.

Section 12-1001 sets forth the personal property owned by a debtor which is exempt from judgment, attachment or distress for rent. The Hospital maintains on appeal that the trial court erred in determining

Page 695

[119 Ill.Dec. 939] that Mr. Reavis' certificate of deposit, purchased solely with social security benefits and payable upon his death to a funeral home, was exempt under sections 12-1001(f) and 12-1001(g) of the Code. We agree.

We initially note that the cases relied upon by the trial court to support its decision may be distinguished from the case at bar. In In re Marriage of Logston (1984), 103 Ill.2d 266, 285, 82 Ill.Dec. 633, 641, 469 N.E.2d 167, 175, the supreme court determined that section 12-1001 was not a defense to a contempt order for nonpayment of maintenance, even though all of the husband's income was from a source which section 12-1001 listed as exempt from judgment. In Cochennour v. Lofton (4th Dist.1978), 62 Ill.App.3d 955, 957, 20 Ill.Dec. 89, 90, 379 N.E.2d 922, 923, the court determined that a debtor's right to receive monthly public aid benefits was exempt from garnishment under section 11-3 of the Illinois Public Aid Code (Ill.Rev.Stat.1975, ch. 23, par. 11-3). Neither the Logston nor Cochennour court addressed the issue of whether a judgment can be satisfied by garnishing property which is derived from an exempt source of funds such as social security benefits.

We further note that section 12-1001(f) exempts from judgment:

"All proceeds payable because of the death of the insured and the aggregate net cash value of any or all life insurance and endowment policies and annuity contracts payable to a wife or husband of the insured, or to a child, parent or other person dependent upon the insured." (Emphasis added.) (Ill.Rev.Stat.1985, ch. 110, par. 12-1001(f).)

The certificate of deposit in this case obviously is not a form of life insurance or annuity contract. Accordingly, the certificate of deposit does not qualify for the exemption set forth in section 12-1001(f).

Section 12-1001(g) provides that a debtor's right to receive various benefits, including social security benefits, is exempt from judgment (Ill.Rev.Stat.1985, ch. 110, par. 12-1001(g)). However, the Hospital is not attempting to attach social security benefits as they are received. The Hospital is attempting to satisfy its judgment from the funds of a certificate of deposit which are traceable exclusively to the social security benefits the Reavises previously had received.

Although the language of section 12-1001(g) which exempts [169 Ill.App.3d 250] a debtor's "right to receive" social security benefits does not clearly indicate whether the legislature intended to exempt a debtor's funds which are traceable solely to social security benefits, section 12-1001(h) expressly exempts a "debtor's right to receive, or property that is traceable to" certain awards and payments (Ill.Rev.Stat.1985, ch. 110, par. 12-1001(h)). However, section 12-1001(h) does not exempt a debtor's property that is traceable to social security benefits. It is well established that an expression of certain exceptions in a statute is construed as an exclusion of all others. (People ex rel. Difanis v. Barr (1980), 83 Ill.2d 191, 199, 46 Ill.Dec. 678, 681, 414 N.E.2d 731, 734.) As a result, we conclude that the Illinois legislature did not intend to exempt property which is traceable to social security benefits and the certificate of deposit in this case is not exempt under section 12-1001.

However, Congress has provided such an exemption. Section 407(a) of the Social Security Act provides:

"The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." (Emphasis added.) (42 U.S.C.A. § 407(a) (West 1983).)

In Philpott v. Essex County Welfare Board (1973), 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608, the Supreme Court determined that section 407(a) barred the State of New Jersey from garnishing federal social security disability insurance paid to the plaintiff and deposited in his bank account. In barring the garnishment action, the Philpott court noted that section 407(a)

Page 696

[119 Ill.Dec. 940] applies to "monies paid" and determined that the funds on deposit in plaintiff's bank account were exempt because they were readily withdrawable, retained "the quality of money" and had not become a permanent investment. 409 U.S. 415, 416, 93 S.Ct. 590, 592, 34 L.Ed.2d 608, 611.

In Shrader v. Maultz (1st Dist.1978), 58 Ill.App.3d 484, 16 Ill.Dec. 44, 374 N.E.2d 819, the court expressly applied the Philpott analysis to an Illinois case involving an attempt by a judgment creditor to garnish a defendant's bank account which consisted solely of funds derived from defendant's pension under the Railroad Retirement Act of 1937 (45 U.S.C.A. § 228a et seq.). The Shrader court, noting that the protection afforded recipients under an exemption provision of the Railroad Retirement Act must be analyzed in terms of the protection afforded recipients under section 407(a) of the Social Security Act, determined [169 Ill.App.3d 251] that the exemption is not limited to the funds before they reach the pensioner, but also includes monies derived from the pension payments in the hands of the pensioner. (58 Ill.App.3d at 485, 487, 16 Ill.Dec. at 46-47, 374 N.E.2d at 821-22.) Accordingly, the court concluded that the defendant's bank deposits should be exempt because they were readily withdrawable and were not in any way converted into permanent investments. 58 Ill.App.3d at 486, 16 Ill.Dec. at 46, 374 N.E.2d at 821.

The affidavit of the Bank's cashier, the Hospital's motion for turnover of monies, and the Reavises' affidavit of exemptions filed in this case indicate that the Reavises owned a checking account with a balance $4,955.65 and Mr. Reavis owned a certificate of deposit with a balance of $3,860.20 which was payable on his death to a funeral home. The uncontroverted affidavit of exemptions indicates that the funds contained in both the checking account and the certificate of deposit were derived solely from the Reavises' social security benefits.

Under section 407(a) and the Philpott rationale, the funds in the checking account are

exempt from garnishment as they obviously retained the "quality of money". With respect to the certificate of deposit, there is no evidence in the record to indicate that Mr. Reavis could not change the beneficiary of the certificate or that Mr. Reavis had a contract with the funeral home which required the proceeds of the certificate of deposit to be payable on his death to the funeral home. Accordingly, we conclude that the funds in the certificate of deposit were readily withdrawable, retained the "quality of money", had not become a permanent investment, and were exempt under section 407(a).

As the affidavit of exemptions properly indicates, all of the remaining property owned by the Reavises was exempt under the provisions of sections 12-901 and 12-1001(a), (b) of the Code of Civil Procedure. (Ill.Rev.Stat.1985, ch. 110, pars. 12-901 and 12-1001(a), (b).) The Hospital asserted no objection at trial concerning the application of the sections 12-901 and 12-1001(a), (b) exemptions. Supreme Court Rule 366(a)(5) provides that a court of review may "enter any judgment and make any order that ought to have been given or made." (107 Ill.2d R. 366(a)(5).) Accordingly, we conclude that all of the Reavises' property was exempt from garnishment and we reverse the trial court's judgment ordering that the sum of $1,255.65 be turned over to the Hospital.

One further point should be noted. Mr. Reavis died after the filing of the motion for turnover of monies, but prior to the trial court's judgment in this case. However, the parties stipulated at trial that Mrs. Reavis would be entitled to benefit from Mr. Reavis's exemptions, [169 Ill.App.3d 252] despite Mr. Reavis's death. Stated differently, the parties treated this case as though Mr. Reavis were still alive for the purpose of calculating the exemptions to which the Reavises were entitled. We recognize that statements and stipulations made by a party's counsel may be binding on that party. (See Bishop v. Crowther (1st Dist.1980), 92 Ill.App.3d 1, 12, 47 Ill.Dec. 594, 603, 415 N.E.2d 599, 608; Candalaus Chicago, Inc. v. Evans Mill Supply Company (1st Dist.1977), 51 Ill.App.3d 38, 46-47, 9 Ill.Dec. 62, 68-69, 366 N.E.2d 319, 325-26.) Accordingly, this court has considered the issues

Page 697

[119 Ill.Dec. 941] presented on appeal based upon the foregoing stipulation of the parties.

For the reasons stated herein, we reverse the judgment entered by the circuit court of Fayette County.

REVERSED.

CALVO and KARNS, JJ., concur.

823 N.E.2d 607
355 Ill. App.3d 478
291 Ill.Dec. 315

In re the MARRIAGE OF Dora A. POPE-CLIFTON, n/k/a Dora A. Pope-Grubb, Petitioner-Appellee, and
Decatur Earthmover Credit Union, an Illinois Credit Union, Respondent (Walter S. Clifton, Respondent-Appellant).

No. 4-04-0307.
Appellate Court of Illinois, Fourth District.
February 7, 2005.

Ruth A. Warden Waller, Johnson, Waller & Chiligiris, Decatur, for Walter S. Clifton.

Andrew W.B. Bequette, Beckett & Webber, P.C., Urbana, for Dora A. Pope-Clifton.

James E. Peckert, Kehart, Robinson & Booth, Decatur, for Decatur Earthmover Credit Union.

Presiding Justice COOK delivered the opinion of the court:

Respondent, Walter S. Clifton, appeals from the trial court's judgment that a bank account containing only funds received as Veterans' Administration disability benefits was not exempt from collection to pay

[823 N.E.2d 608]

a judgment for child support, maintenance, and attorney fees and court costs arising from a domestic relations cause of action. We affirm.

Respondent and petitioner, Dora A. Pope-Clifton, now known as Dora A. Pope-Grubb, were divorced in Champaign County in 1989. Respondent was ordered to pay child support, which was modified in 1991, requiring respondent to pay $935 per month in child support. On February 26, 1992, respondent was found to be in indirect civil contempt for failure to comply with the support order, and all other previous orders were reaffirmed.

In August 2000, after eight years of inactivity in the case, petitioner filed petitions for review of child support and for rule to show cause. At the hearing on August 16, 2000, respondent appeared by counsel, who stated respondent was unable to attend because he was undergoing treatment at the Veterans' Administration Hospital in Danville. On November 2, 2000, the trial court found respondent's failure to pay child support was willful and without any legal justification and held respondent in indirect civil contempt. The court entered judgment in the amount of $31,665.50 representing unpaid child support and maintenance owed by respondent to petitioner and additionally awarded $2,955.51 in attorney fees and court costs to be paid by respondent.

On August 16, 2002, petitioner filed in the circuit court of Macon County a certified copy of the docket sheet of the Champaign County proceedings and a citation to discover assets against Earthmover Credit Union (Earthmover), which is located in Decatur. Earthmover subsequently notified petitioner that it was holding $26,711.01 for respondent in an account at its bank. The Macon County court froze the assets held at Earthmover. On March 17, 2004, the court found the citation was a supplemental proceeding to collect a judgment for child support, maintenance, and attorney fees and court costs arising from a domestic relations cause of action. The court further found that the funds in the Earthmover account were not exempt under section 12-1001(g) of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/12-1001(g) (West 2002)) and ordered Earthmover to turn over the account to petitioner. This appeal followed.

On appeal, respondent argues that (1) the Macon County court did not have subject-matter jurisdiction, (2) the Earthm-over account was exempt under the Civil Procedure Code, and (3) the Earthmover account was exempt under federal law. We affirm.

We first examine respondent's argument that the circuit court of Macon County did not have subject-matter jurisdiction in the present case. Respondent argues that the procedures of Supreme Court Rule 277 (134 Ill.2d R. 277) were not followed in bringing supplemental proceedings against Earthmover in Macon County. Specifically, respondent alleges that petitioner did not have leave of the court to bring multiple citations in this matter, no transcript of the original judgment was filed, and the citation ignored amounts already paid by respondent in satisfaction of the judgment. We find no merit in respondent's arguments.

Nothing in the record suggests that petitioner had filed a previous supplementary proceeding against Earthmover. Rule 277(a) only requires leave of the court if there have been prior supplementary proceedings filed against a party. 134 Ill.2d R. 277(a). Although petitioner only filed the docket sheet in Macon County, it is apparently because there was no written transcript of the judgment to file. The docket sheet clearly shows the entry of judgment against respondent and is adequate to meet the requirements of Rule

[823 N.E.2d 609]

277. See *Bentley v. Glenn Shipley Enterprises, Inc.,* 248 Ill.App.3d 647, 651, 189 Ill.Dec. 115, 619 N.E.2d 816, 819 (1993) (provisions of Rule 277 are to be liberally construed). Finally, even with the money from the Earthmover account and all amounts previously recovered by petitioner, the judgment against respondent has not been satisfied, so it is moot that petitioner sought to recover the entire amount of the judgment in her proceedings against Earthmover. The circuit court of Macon County had jurisdiction to enter a judgment on the supplementary proceedings.

Respondent next argues that because the funds in the Earthmover account were directly traceable to Veterans' Administration disability benefits, they are exempt from garnishment under Illinois law. Section 12-1001 of the Civil Procedure Code provides in relevant part as follows:

> "The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:
>
> * * *
>
> (g) The debtor's right to receive:
>
> (1) a social security benefit, unemployment compensation, or public assistance benefit;
>
> (2) a veteran's benefit;
>
> (3) a disability, illness, or unemployment benefit; and
>
> (4) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
>
> (h) The debtor's right to receive, or property that is traceable to:
>
> (1)* * *[.]" 735 ILCS 5/12-1001 (West 2002).

Respondent relies upon the court's reasoning in *Internal Medicine Associates of Decatur, S.C. v. Patterson,* 244 Ill.App.3d 704, 184 Ill.Dec. 231, 613 N.E.2d 1 (1993), where the court held that funds traceable to reimbursement for foster-parenting services were exempt from garnishment. The reimbursement for foster-parenting services was not included as an exemption in section 12-1001, but after comparing the language in the Children and Family Services Act (Ill.Rev.Stat.1989, ch. 23, par. 5005) exempting the reimbursement to the exemptions found in

the Social Security Act (42 U.S.C. § 407 (Supp. I 1983)), we found them to be similar and granted the reimbursement for foster-parenting services the same exemption that social security receives under federal law. *Patterson,* 244 Ill.App.3d at 707-08, 184 Ill.Dec. 231, 613 N.E.2d at 3. However, because veterans' benefits are explicitly included in section 12-1001(g), the reasoning respondent relies upon in *Patterson* is inapposite.

In *Fayette County Hospital v. Reavis,* 169 Ill.App.3d 246, 250, 119 Ill.Dec. 937, 523 N.E.2d 693, 695 (1988), which we discussed in *Patterson,* the court held that because 12-1001(g) exempted only a debtor's "right to receive" while 12-1001(h) exempted a debtor's "`right to receive, or property that is traceable to' certain awards and payments (Ill.Rev.Stat.1985, ch. 110, par. 12-1001(h))," the legislature clearly did not intend to exempt property that is traceable to funds listed in section 12-1001(g). "It is well established that an expression of certain exceptions in a statute is construed as an exclusion of all others." *Fayette County Hospital,* 169 Ill.App.3d at 250, 119 Ill.Dec. 937, 523 N.E.2d at 695, citing *People ex rel. Difanis v. Barr,* 83 Ill.2d 191, 199, 46 Ill.Dec. 678, 414 N.E.2d 731, 734 (1980). Therefore, funds traceable to either social security benefits or veterans' benefits are not exempt under section 12-1001. *Fayette County Hospital,* 169 Ill.App.3d at 250, 119 Ill.Dec. 937, 523 N.E.2d at 695.

Respondent next argues that even if the funds are not exempt under state law, funds traceable to veterans' benefits are

[823 N.E.2d 610]

exempt under federal law. Section 5301(a)(1) of Title 38 of the United States Code (38 U.S.C. § 5301(a)(1) (2000)) provides in relevant part as follows:

> "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1) (2000).

Respondent notes that courts have recognized two purposes for the general exemption of veterans' benefits: (1) to " `avoid the possibility of the Veterans' Administration... being placed in the position of a collection agency'" and (2) to "`prevent the deprivation and depletion of the means of subsistence of veterans dependant upon these benefits as the main source of their income.'" *Rose v. Rose,* 481 U.S. 619, 630, 107 S.Ct. 2029, 2036, 95 L.Ed.2d 599, 610 (1987), quoting S.Rep. No. 94-1243, at 147-48 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5241, 5369-70.

Respondent argues that by allowing the court to seize his bank account, he can be deprived of his means of subsistence. However, as the Supreme Court stated in *Rose,* veterans' benefits are not for the sole benefit of disabled veterans, but are intended to "`provide reasonable and adequate compensation for disabled veterans *and their families.*'" (Emphasis in original.) *Rose,* 481 U.S. at 630, 107 S.Ct. at 2036, 95 L.Ed.2d at 610, quoting S.Rep. No. 98-604, at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4479, 4488. Because the benefits were intended to benefit both veterans and their families, the *Rose* Court explicitly held that section 5301 (formerly 38 U.S.C. § 3101 (1988)) "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Rose,* 481 U.S. at 634, 107 S.Ct. at 2038, 95 L.Ed.2d at 613. Respondent's funds are clearly not exempt from seizure under federal law.

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.

STEIGMANN and MYERSCOUGH, JJ., concur.

United States Bankruptcy Appellate Panel
For the Eighth Circuit

____

No. 13-6009

____

In re: Kirk Patrick Leitch

Debtor

Kirk Patrick Leitch

Debtor - Appellant

v.

Julia A. Christians

Trustee - Appellee

____

Appeal from United States Bankruptcy Court
for the District of Minnesota - Minneapolis

____

Submitted: June 26, 2013
Filed: July 16, 2013

____

Before FEDERMAN, Chief Judge, SALADINO and NAIL, Bankruptcy Judges.

____

SALADINO, Bankruptcy Judge

Debtor, Kirk Patrick Leitch, appeals an order of the bankruptcy court[1] dated March 6, 2013, holding that the funds in his health savings account ("HSA") are not excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(b)(7)(A)(ii) and are not exempt. For the reasons that follow, we affirm.

BACKGROUND

This appeal concerns $3,310.01[2] held in an HSA owned by Mr. Leitch at the time he filed his voluntary Chapter 7 petition on November 24, 2012. Mr. Leitch is employed as a police officer with the City of Mounds View, Minnesota. He and his family are insured through a high-deductible health insurance policy offered through his employer. Mr. Leitch also has an HSA, which he uses to pay his family's medical expenses up to the amount of the deductible under his health insurance policy. Mr. Leitch listed the funds in his HSA on the date of bankruptcy filing as an asset on Schedule B of his bankruptcy petition and asserted that the funds were excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). He subsequently amended Schedule C, which amendment continued to assert that the funds were excluded from the estate, but also provided the alternative assertion that the funds were exempt pursuant to 11 U.S.C. § 522(d)(10)(C) and (11)(E).

The Chapter 7 trustee objected to Mr. Leitch's exclusion arguments and exemption claims. For the first time, in Mr. Leitch's response he argued his primary position on appeal – that the HSA was excluded from the estate pursuant to 11 U.S.C.

---

[1]The Honorable Kathleen Hvass Sanberg, United States Bankruptcy Court for the District of Minnesota.

[2]The HSA actually contained $8,686.13. Mr. Leitch also asserted his maximum available wildcard exemption in the amount of $5,376.12, which was allowed by the bankruptcy court and was not appealed by the trustee. Therefore, at issue in this appeal are the remaining funds in the account, after application of the allowed wildcard exemption.

§ 541(b)(7)(A)(ii). The bankruptcy court held a hearing on March 6, 2013, and issued an oral ruling rejecting Mr. Leitch's arguments. This appeal followed.

STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *First Nat'l Bank of Olathe v. Pontow*, 111 F.3d 604, 609 (8th Cir. 1997). The bankruptcy court's construction of a statute is a question of law, subject to de novo review. *In re Graven*, 936 F.2d 378, 384-85 (8th Cir. 1991).

DISCUSSION

Health savings accounts were created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Pursuant to that Act, an HSA is "a trust created or organized in the United States as a health savings account exclusively for the purpose of paying the qualified medical expenses of the account beneficiary . . . [.]" 26 U.S.C. § 223(d)(1). An individual can make contributions to an HSA only if that individual is separately covered by a "high deductible health plan." 26 U.S.C. § 223(c)(1)(A). A "high deductible health plan" is a health plan that requires beneficiaries to pay a certain amount of out-of-pocket expenses before the insurance plan begins picking up the tab. *See* 26 U.S.C. § 223(c)(2)(A).

The beneficiary of an HSA has liberal access to the funds – indeed, the beneficiary is entitled to distributions from the account for any purpose. *See* Treasury Notice 2004-50, 2004 WL 1636921 at Q-79. However, the beneficiary will incur tax penalties unless the funds are used for "qualified medical expenses," which are essentially costs of health care "not compensated for by insurance or otherwise." 26 U.S.C. § 223(d)(2)(A).

In this appeal, Mr. Leitch first asserts that his "clearest and most concise argument" is that the funds in his HSA are excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(b)(7)(A)(ii), which provides in pertinent part as follows:

> (b) Property of the estate does not include –
> . . .
> (7) any amount –
> (A) withheld by an employer from the wages of employees for payment as contributions –
> . . .
> (ii) to a health insurance plan regulated by State law whether or not subject to such title[.]

Mr. Leitch asserts that the HSA is excluded from the estate by 11 U.S.C. § 541(b)(7)(A)(ii) because the HSA is "a health insurance plan regulated by State law." He points to Minnesota statute 47.75 for state regulation, which statute provides in pertinent part:

> (a) A commercial bank, savings bank, savings association, credit union, or industrial loan and thrift company may act as trustee or custodian:
> . . .
> (3) of a health savings account under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, as amended;
> . . .
> (b) The trustee or custodian may accept the trust funds if the funds are invested only in savings accounts or time deposits . . ., except that health savings accounts may also be invested in transaction accounts. . . .

That statute is found in the Financial Corporations portion of the Minnesota statutes under a section entitled "Limited trusteeship." The bankruptcy court held

that Mr. Leitch failed to show that the HSA constitutes a health insurance plan regulated by state law in accordance with the exclusion statute. In particular, the bankruptcy court held that the state statute cited by Mr. Leitch, Minn. Stat. § 47.75, simply identified which institutions can act as a trustee of certain types of accounts, including health savings accounts, and identified how the funds could be invested. We agree.

An HSA is simply a trust account. The account beneficiary has unrestricted access to the funds. The account beneficiary may receive certain tax benefits if the beneficiary uses the funds for medical expenses, but that beneficial taxation does not make the account a health insurance plan regulated by state law. An HSA is not insurance. As the trustee aptly pointed out, an HSA is just a tax-preferred place to park money for use in paying health care expenses that are not covered by insurance.

Further, Congress added § 541(b)(7) (which specified certain exclusions from property of the bankruptcy estate) to the Bankruptcy Code as part of the 2005 BAPCPA amendments. Health savings accounts were created in 2003, two years before the BAPCPA amendments became law. Accordingly, we agree with the bankruptcy court's conclusion that had Congress intended for HSAs to be excluded it would have said so. Since Congress did not specifically mention HSAs in its amendments, and since the funds in the HSA can be used by the beneficiary for any purpose,[3] we hold that an HSA is not a health insurance plan regulated by state law and, therefore, the HSA is not excluded from the bankruptcy estate by 11 U.S.C. § 541(b)(7)(A)(ii).

Mr. Leitch further argues that even if the HSA is not excluded from the bankruptcy estate, he should be able to exempt the funds in the account pursuant to 11 U.S.C. § 522(d)(10)(C) or (11)(D). In the bankruptcy case, Mr. Leitch elected to

[3]Subject to tax if not used for health care expenses.

use the federal exemptions, rather than the state exemptions, as permitted by 11 U.S.C. § 522(b)(1) and (2). Subsection (d) of 11 U.S.C. § 522 lists the property that may be exempted, including subsection (d)(10)(C), which allows a debtor to exempt "[t]he debtor's right to receive – . . . a disability, illness, or unemployment benefit[,]" and (d)(11)(D), which allows a debtor to exempt "a payment . . . on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent . . . [.]"

The bankruptcy court denied the exemptions because the funds in the HSA could be used for purposes other than "disability, illness, or unemployment" (and in fact, could be used for anything) and also could be used for purposes other than "personal bodily injury." We agree. In addition, the exemptions under 11 U.S.C. § 522(d)(10)(C) and (11)(D) apply only to a debtor's "right to receive" the stated benefits. Here, Mr. Leitch has *already* received the money from his employer. The employer has paid the money to the HSA, and Mr. Leitch is the account owner/beneficiary with unrestricted access to the funds. Thus, there is no longer a "right to receive" the funds that are already in the account.

CONCLUSION

For the foregoing reasons, we affirm the bankruptcy court.

____

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Publishing and Posting on Website

Will This Opinion be Published: Yes

Bankruptcy Caption: Daniel J. McQuaid and Alice M. Wood

Bankruptcy No. 12 B 34265

Adversary Caption:

Adversary No.

Date of Issuance: May 16, 2013

Judge: Donald R. Cassling

Appearance of Counsel:

Attorneys for movant:

David E. Grochocinski
InnovaLaw, P.C.
1900 Ravinia Place
Orland Park, IL 60462

Kathleen M. McGuire
InnovaLaw, P.C.
1900 Ravinia Place
Orland Park, IL 60462

Attorney for respondent:

John J. Lynch
Law Offices of John J. Lynch, P.C.
801 Warrenville Road, Suite 152
Lisle, IL 60532

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Bankruptcy No. 12 B 34265
	)	Chapter 7
DANIEL J. MCQUAID and	)	Judge Donald R. Cassling
ALICE M. WOOD,	)	
	)	
Debtors.	)	

MEMORANDUM OPINION

David E. Grochocinski, the Chapter 7 trustee (the "Trustee"), has objected to the Debtors' claim of exemption in a Special Needs Trust funded by insurance proceeds arising from a disability claim. Because the Court agrees with the Trustee that the trust does not fall within one of the Illinois statutory exemptions, the Court sustains the Trustee's objection.

I. JURSIDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II. BACKGROUND

The Debtors, husband and wife Daniel J. McQuaid and Alice M. Wood, filed a joint Chapter 7 petition on August 29, 2012. They listed an interest in the Alice M. Wood Special Needs Trust (the "Trust") as jointly owned property on Schedule B of their bankruptcy petition. The Debtors claim an exemption in the Trust under 735 Ill. Rev. Stat. 5/12-1001(g)(3) on Schedule C of their petition.

Ms. Wood is the beneficiary of the Trust and Mr. McQuaid is the trustee. The Debtors testified at their 11 U.S.C. § 341(a) meeting of creditors that the Trust was funded by settlement

proceeds from a lawsuit that Ms. Wood filed against a disability insurer (the "Insurer").[1] Ms. Wood stated that the lawsuit arose from the Insurer's discontinuance of payments to her for a claim for a brain injury she suffered in 2002.

The Trustee objects to the Debtors' claim of exemption in the Trust on the basis that the Illinois statute does not exempt an actual benefit but rather a debtor's right to receive the benefit. According to the parties, Ms. Wood received the settlement payment from the Insurer in 2009, but the Debtors did not create the Trust until 2012, less than two months before the petition date.

III. APPLICABLE STANDARDS

Upon the filing of a bankruptcy petition, all of a debtor's pre-petition assets become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). Out of that property, a debtor is allowed to claim certain property exempt. 11 U.S.C. § 522(b). Statutory lists of permissible exemptions are found both in the Bankruptcy Code and under many states' laws, including those of Illinois. States may opt out of the federal exemption list and apply the state exemption list to their residents. Illinois has done just that and limits Illinois debtors to those exemptions listed in the Illinois exemption statute. 735 Ill. Rev. Stat. 5/12-1201. However, the Illinois exemptions generally resemble those that would otherwise be available under § 522(d) of the Code.

Any party in interest has standing to object to a debtor's exemptions. Fed. R. Bankr. P. 4003(b)(1). Bankruptcy Rule 4003(c) states that "[i]n any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." Fed. R. Bankr. P. 4003(c). An objecting party's burden of proving that a debtor's exemptions are not properly

[1] The initial amount of $190,000 was deposited into the Trust on July 2, 2012. (Trustee Objection, Ex. No. 1.) Two months later, on August 29, 2012, the Debtors reported the value of the Trust at $160,000 on their Schedules.

claimed must be established by a preponderance of the evidence. *In re Doyle*, 209 B.R. 897, 900 (Bankr. N.D. Ill. 1997).

The purpose of the exemption provision is to protect a debtor's fresh start in bankruptcy. *In re Wright*, 156 B.R. 549, 554 (Bankr. N.D. Ill. 1992). Therefore, exemption statutes are to be interpreted liberally in favor of a debtor. *In re Barker*, 768 F.2d 191, 196 (7th Cir. 1985). If an exemption statute can properly be construed in ways that are both favorable and unfavorable to a debtor, the favorable interpretation should be applied. *Id.*

The Debtors have claimed the Trust exempt under 735 Ill. Rev. Stat. 5/12-1001(g)(3) which provides:

> Personal property exempt. The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:
>
> (g) the debtor's right to receive:
>
> (3) a disability, illness or unemployment benefit[.]

735 Ill. Rev. Stat. 5/12-1001(g)(3).

IV. DISCUSSION

The Debtors argue that, because the funds in the Trust originated as proceeds from a disability insurance claim, their ultimate purpose was to pay for "a disability" or "illness" within the meaning of the Illinois statute. According to the Debtors, the fact that those insurance proceeds funded a trust which gave the trustee the discretion to provide for the "health, support and welfare" of the beneficiary[2] should not matter in determining whether the Illinois exemption has been satisfied.

The Court rejects this argument as contrary to the plain language of the Illinois statute, Illinois case-law applying that statute, and the language of the Trust the Debtors created.

---

[2] The Trust states that the trustee shall distribute to Ms. Wood "as much of the net income and principal of the trust, even to the extent of exhausting the principal, as the Trustee determines from time to time to be necessary for [Ms. Wood's] health, support, and welfare." (Trustee Objection, Ex. No. 1.)

By its plain terms, § 12-1001(g)(3) exempts only the "*right to receive* . . . a disability, illness or unemployment benefit." *Id.* (emphasis added). Illinois courts interpreting this statute have focused on the language that exempts the "right to receive" the benefit rather than the benefit itself.[3] *See In re Marriage of Pope-Clifton*, 823 N.E.2d 607, 609 (Ill. App. Ct. 2005) (holding that funds in an account that were traceable to disability benefits paid by the Veterans' Administration were not exempt under § 12-1001(g)(3) because that statute protects only the "right to receive" such benefits); *Fayette County Hosp. v. Reavis*, 523 N.E.2d 693, 695 (Ill. App. Ct. 1988) (stating that funds traceable to social security benefits are not exempt under § 12-1001(g) because the statute refers to the "right to receive" but excludes language referencing property traceable to social security benefits).

Moreover, a comparison of § 12-1001(g) to other Illinois exemptions demonstrates that the Illinois legislature explicitly draws a statutory distinction between benefits yet to be received and funds traceable to benefits already received. For example, § 12-1001(h), which deals with wrongful death and personal injury awards, crime-victims' reparation payments, and certain life-insurance payments, explicitly divides benefits yet to be received into a separate category of exempt property from funds traceable to benefits already received and treats those benefits differently from each other:

> (h) The debtor's *right to receive*, ***or*** property that is *traceable to*:
> (1) an award under a crime victim's reparation law;

[3]Although not controlling here, § 522(d) of the Bankruptcy Code, the statute that governs federal exemptions, contains provisions similar to those found in the Illinois statute. The legislative history of § 522(d)(10)(C), which contains language identical to § 12-1001(g)(3), states in pertinent part that the federal provision was intended to exempt "certain benefits that are *akin to future earnings of the debtor*." H.R. Rep. No. 95-595, at 362 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5787, 6318 (emphasis added). Because Ms. Wood has already received the disability benefits from the insurance company and deposited them in the Trust, there is nothing "akin to future earnings of the debtor" in this case. Thus, were the federal exemptions controlling here instead of the Illinois exemptions, the analysis would be the same.

> (2) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor;
> (3) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor or a dependent of the debtor;
> (4) a payment, not to exceed $15,000 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent; and
> (5) any restitution payments made to persons pursuant to the federal Civil Liberties Act of 1988 and the Aleutian and Pribilof Island Restitution Act, P.L. 100-383.
>
> For purposes of this subsection (h), *a debtor's right to receive an award or payment shall be exempt for a maximum of 2 years* after the debtor's right to receive the award or payment accrues; *property traceable to an award or payment shall be exempt for a maximum of 5 years* after the award or payment accrues; and an award or payment and property traceable to an award or payment shall be exempt only to the extent of the amount of the award or payment, without interest or appreciation from the date of the award or payment.

735 Ill. Rev. Stat. 5/12-1001(h) (footnotes omitted) (emphasis supplied).

Notably, § 12-1001(g)(3) lacks the "traceable to" language of § 12-1001(h) and, by implication, therefore, does not include within its reach funds traceable to disability benefits already received: "Because the Illinois legislature crafted different exemption language for different types of benefit[s] and payments, it is presumed that the legislature meant what it said and meant to exempt the right to receive disability benefits rather than the actual receipt or traceable proceeds of such benefits." *In re Bowen*, 458 B.R. 918, 923 (Bankr. C.D. Ill. 2011).

Finally, the language of the Trust itself removes it from the scope of § 12-1001(g)(3). As discussed above, Ms. Wood had already received one-hundred percent of her disability benefit pre-petition when her lawsuit against the insurance company was settled in 2009, three years before the Debtors filed their bankruptcy petition. In 2012, two months before filing their

petition, the Debtors elected to deposit those funds into the Trust that granted the trustee unfettered discretion to make any distributions he determined to be necessary for Ms. Wood's "health, support, and welfare," not just expenses related to her brain injury. Consequently, the funds that the Debtors now seek to exempt ceased to be even arguably a simple "disability" or "illness" benefit. This places the Trust funds outside the parameters of § 12-1001(g)(3).

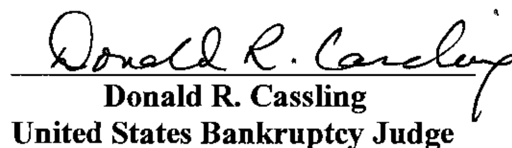
In short, while it is undisputed that the funds in the Trust are traceable to a disability payment that the Insurer paid to Ms. Wood prior to the petition date, the Illinois statute applicable to this transaction does not permit the Debtors to trace those funds and thereby exempt them. Instead, the statute protects only the Debtors' "right to receive" a disability benefit. The Debtors are therefore not able to claim the proceeds of the Trust as exempt assets under § 12-1001(g)(3). The Trustee's objection to the Debtors' exemption claim is sustained.

V. CONCLUSION

For the reasons stated above, the Court sustains the Trustee's objection to the Debtors' claim of exemption in the Trust.

ENTERED:

DATE: 5/16/13



Donald R. Cassling
United States Bankruptcy Judge