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(Revised 10/90)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Chapter 7
Bky Case No. 03-47216-NCD

Daniel L. Rea and
Diane L. Rea,

**VERIFIED NOTICE OF HEARING AND MOTION
OBJECTING TO CLAIMED EXEMPT
PROPERTY**

Debtor(s).

TO: The United States Bankruptcy Court, the United States Trustee, the debtor, the debtors' attorney,
and all parties who requested notice under Bankruptcy Rule 2002 (none):

1. John R. Stoebner, Trustee herein, moves the Court for the relief requested below, and
gives notice of hearing herewith.

2. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334,
Bankruptcy Rule 5005, and Local Rule 1070-1. This motion is filed pursuant to Bankruptcy Rule 9014
and Local Rules 9013-1 through 9013-5. This proceeding arises under 11 U.S.C. § 522 and Local Rule
4003-1(a).

3. The Court will hold a hearing on this objection on February 18, 2004, at 11:30 a.m. in
Courtroom No. 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, or as soon
thereafter as counsel can be heard.

4. Any entity opposing the motion under Local Rule 9013-2 is required to file and serve a
response, including a memorandum of facts and law and any opposing affidavit, not later than February
12, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and
holidays), or filed and served by mail not later than February 6, 2004, which is seven days before the time
set for the hearing (excluding Saturdays, Sundays and holidays). **If no response is timely served and
filed, the Court may grant the relief requested without a hearing.**

5. The undersigned trustee hereby objects to the debtors' claim that the following property

is exempt under the applicable exemption statute:

IRA (rollover from 401k)at New England Financial listed at a value of \$63,130.00 and claimed exempt to the extent of \$63,130.00 under Minn. Stat. §550.37, subd. 24.

6. The objection is made for the following reasons:

Debtor claimed the Individual Retirement Account (“IRA”) exempt under Minn. Stat. §550.37, subd. 24. Upon information and belief, the IRA is held by New England Financial in the form of mutual funds and money market funds/cash. The IRA is not exempt under §550.37, subd. 24 because it is not payable on account of illness, disability, death, age or length of service.

This court has held that to qualify for exemption under subdivision 24, a plan must meet three criteria: (1) Debtor must have the right to receive payments under a stock bonus, pension, profit sharing, annuity, individual retirement, individual retirement annuity, simplified employee pension, or similar plan; (2) Debtor’s right to payment must be on account of illness, disability, death, age or length of service; and, (3) Debtor’s aggregate interest under all such plans and contracts must have a present value of no more than [\$54,000.00]. In Re Gagne, 166 B.R.362, 363 (Bankr. D. Minn. 1993), Aff’d in relevant part, Gagne v. Bergquist, 179 B.R. 884 (D. Minn. 1994)(emphasis added). Gagne dealt with an earlier version of the statute, but the relevant language still applies. Debtor’s IRA meets the first and third requirement, but does not meet the second requirement. Debtor is free to withdraw the balance in her account at any time. Also see, In re Clark, BKY No. 03-40923-RJK (unreported decision – copy of Order entered July 2, 2003 attached, and In re Smith BKY No.03-45266-NCD (unreported decision – copy of Order entered October 9, 2003 attached).

In addressing the exemption of an IRA under 11 U.S.C. §522(d)(10)(E), the Eighth Circuit Bankruptcy Appellate Panel held that payments “are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the Debtor’s support or the support of a dependent of the Debtor”, and, that the plan must meet all three requirements. In Re Rousey, 283 B.R. 265, 269 (8th Cir. BAP, 2002). In Rousey, Debtors argued that the fact there would be tax penalties for early withdrawal of

the IRA funds amounted to a restriction on access, but the BAP found that the Debtor still had unfettered discretion to withdraw the funds. Rousey, 283 B.R. at 272.

In applying the same language under the Iowa exemption statute, Iowa Code §627.6(8)(e), the 8th Circuit Court of Appeals likewise held that the unfettered ability to withdraw money from an annuity or plan means that the rights to payment are not “on account of illness, disability, death, age, or length of service,” disqualifying the IRA from exemption. See, In Re Eilbert, 162 F.3d. 523, 527-528 (8th Cir. 1998), In Re Huebner, 986 F.2d. 1222, 1224-1225 (8th Cir. 1993), cert. denied, 510 U.S. 900, 114 S.Ct. 272 (1993).

Accordingly, where, as here, the manner in which funds are held in an IRA allows the Debtor to withdraw the funds without restriction, other than early withdrawal tax penalties or brokerage fees, the Debtor’s right to payment under the IRA is not on account of illness, disability, death, age or length of service and the IRA does not qualify for exemption under Minn. Stat. §550.37, subd. 24.

In addition, as an alternative and wholly independent basis for objecting to this claimed exemption, the Trustee objects to the debtors’ claim of exemption in the IRA based on the debtors’ failure to disclose the IRA in their original schedules.

Finally, the Trustee objects to the debtors’ claim of exemption in the IRA on the alternate ground that even if the IRA is determined to be exempt; the amount exceeds the statutory “safe harbor” of \$54,000. Upon information and belief, debtor, Diane Rea, is only 45 years old and in good health. Accordingly, even if it were determined that the IRA account qualifies for exemption under Minn Stat. §550.37, subd. 24, to the extent that the account balance exceeds \$54,0000.00, the exemption should be disallowed.

Dated: January 9, 2004

/e/ John R. Stoebner
John R. Stoebner, Trustee
One Financial Plaza, Suite 2500
120 South Sixth Street
Minneapolis, MN 55402
(612) 338-5815

VERIFICATION

John R. Stoebner, being duly sworn, says that he is the Chapter 7 Trustee in this action, that he has read this Verified Notice and Objection To Claimed Exempt Property and that it is true of his own knowledge, to the best of his information.

/e/ John R. Stoebner
John R. Stoebner

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Thomas Paul Clark,

Debtor.

ORDER SUSTAINING OBJECTIONS
TO EXEMPTIONS

BKY 03-40923

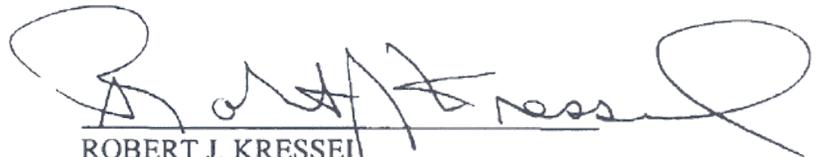
At Minneapolis, Minnesota, July 2, 2003.

This case came on for hearing on the objection of the trustee to three different exemptions. Patrick B. Hennessy appeared for the trustee and George W. Roberts appeared for the debtor. Prior to the hearing, the trustee withdrew his objection to the debtor's homestead exemption claim. Also prior to the hearing, the debtor agreed that his exemption in the Principal Life Insurance policy could be denied.

The debtor's IRA is not payable on account of illness, disability, death, age, or length of service and, therefore, is not exempt under Minnesota law.

THEREFORE, IT IS ORDERED:

- 1 The debtor's Principal Qualified Annuity is not exempt.
- 2 The debtor's Principle Life Insurance policy is not exempt.



ROBERT J. KRESSEL
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 03-45266

JEFFREY HOWARD SMITH,

MEMORANDUM ORDER
SUSTAINING OBJECTION

Debtor.

At Minneapolis, Minnesota, October 9, 2003.

The above-entitled matter came on for hearing on the Trustee's objection to Debtor's claim to exempt an individual retirement account ("IRA") that Debtor has with Charles Schwab & Co., Inc., identified by Debtor on his Schedule C - Property Claim as Exempt, as an IRA with Maico Hearing Instrument. Appearances were noted on the record.

The parties agree that no material facts are in dispute and that the Debtor may withdraw funds from the IRA in whole or in part at any time, subject only to transaction charges and tax penalties. The sole issue before me is whether the IRA is exempt under Minnesota Statute Section 550.37 subd. 24 that states:

Employee Benefits. (a) the Debtor's right to receive present or future payments, or payments received by the Debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, Roth IRA, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent of the Debtor's aggregate interest under all plans and contracts up to a present value of \$30,000.00 [\$54,000.00 currently per indexing] and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the Debtor and any spouse or dependent of the Debtor.

MINN. STAT. § 550.37 subd.24 (2002).

The question argued is whether the language “on account of illness, disability, death, age, or length of service” modifies the phrase “or similar plan or contract” or the phrase “Debtor’s right to receive present or future payments.” While I recognize that a dispute on this issue exists among the Circuits, I am compelled to follow the Eighth Circuit’s opinion in Eilbert v. Pelican (In re Eilbert), 162 F.3d 523, 527 (8th Cir. 1998) and the Eight Circuit Bankruptcy Appellate Panel’s decision in Rousey v. Jacoway, 283 B.R. 265, 272-73 (B.A.P. 8th Cir. 2002). Although Eilbert interpreted an Iowa exemption statute and Rousey interpreted section 522(d)(10)(E) of the Bankruptcy Code, I find no material differences between the issues. The plain fact is that Debtor may access the funds in this account at any time and therefore, the account is not restricted by the reasons delineated in the Minnesota statute and is not exempt.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Trustee’s Objection to the Debtor’s claim to exempt his individual retirement account with Charles Schwab & Co., Inc., identified by Debtor as the IRA with Maico Hearing Instrument, is SUSTAINED.
2. The Trustee shall pay any transaction fees involved in effecting a distribution of the non-exempt funds to the estate.

/e/ Nancy C. Dreher

Nancy C. Dreher
United States Bankruptcy Judge

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 10/09/03
Patrick G. De Wane, Clerk, By KK

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Chapter 7
Bky Case No. **03-47216-NCD**

Daniel J. and Diane L. Rea,

Debtor(s).

UNSWORN CERTIFICATE OF SERVICE

I, Lori A. Frey, declare under penalty of perjury that on January 9, 2004, I mailed copies of the attached **Trustee's Verified Notice of Hearing and Motion Objecting to Claimed Exempt Property and proposed Order** by first class mail postage prepaid to each entity named below at the address stated below for each entity:

Daniel J. and Diane L. Rea
6256 Rhode Island Avenue North
Brooklyn Park, MN 55428

Richard J. Pearson, Esq.
P O Box 120088
New Brighton, MN 55112

U.S. Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Executed on: January 9, 2004

/e/ Lori A. Frey
Lori A. Frey, Paralegal
Lapp, Libra, Thomson, Stoebner &
Pusch, Chartered
120 South Sixth Street, Suite 2500
Minneapolis, MN 55402
612/338-5815

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Chapter 7
Bky Case No. 03-47216-NCD

Daniel L. Rea and Diane L. Rea,

Debtor(s).

ORDER SUSTAINING OBJECTION TO CLAIM OF EXEMPTION

At Minneapolis, Minnesota, February 18, 2004.

The objection of the trustee to the debtors' claim that the following property is exempt under Minn. Stat. §550.37, subd 24: IRA (rollover from 401k)at New England Financial listed at a value of \$63,130.00 and claimed exempt to the extent of \$63,130.00, came duly on for hearing on February 18, 2004. Appearances, if any, were as noted in the record.

Upon said objection and for cause shown, and upon all the files, records, and proceedings herein,

IT IS ORDERED,

That the debtors' claim of exemption for the IRA (rollover from 401k) at New England Financial is disallowed.

Dated: _____, 2004

Nancy C. Dreher
United States Bankruptcy Judge