

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bky. Case No. 04-41614-RJK
Chapter 7

Richard J. Karl and Bonnie A. Karl,

Debtors.

VERIFIED NOTICE OF HEARING AND MOTION ON TRUSTEE'S SECOND AMENDED
OBJECTION TO CLAIMED EXEMPT PROPERTY

TO: Debtor; Debtor's attorney; the United States Trustee and other parties in interest.

1. Timothy D. Moratzka, 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, Fed.R.Bankr.P. 5005 and Local Rule 1071-1. 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 40031 (a). This is a core proceeding. The petition commencing this Chapter 7 case was filed on March 26, 2004, and the case is now pending in this Court.

3. The Court will hold a hearing on this objection on October 20, 2004 at 9:30 a.m. in Courtroom No. 8 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, or as soon thereafter as counsel can be heard.

4. Any objection to the relief requested herein must be filed and delivered not later than October 15, 2004, which is three (3) days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than October 13, 2004, which is seven (7) days before the time set for the hearing, (excluding Saturdays, Sundays and holidays). UNLESS A WRITTEN RESPONSE IS TIMELY FILED,

THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

5. This renewed motion is filed pursuant to Bankruptcy Rule 4003(b) and Local Rule 4003-1 and 9013 *et seq.* In response to Trustee's initial objection, Debtors amended their schedules to change their exemptions from Federal to Minnesota exemptions. Debtors have subsequently filed Second Amended Schedules B & C. Trustee objects to the Debtors' claim that the following property is exempt under the applicable exemption statute:

A) SEP claimed exempt under Minn. Stat. Sec. 550.37(24). Debtors claim the value is the surrender value calculated by Debtor to be \$39,811. Value was originally scheduled as \$68,504.

B) IRA claimed exempt under Minn. Stat. Sec. 550.37(24). Debtors claim the value is the surrender value calculated by Debtor to be \$10,283. Value was originally scheduled as \$18,470.

C) PERA claimed exempt under Minn. Stat. Sec. 550.37(24). Value is scheduled as \$841.00 .

6. The value of the SEP IRA exceeds the \$54,000 limit under Minn. Stat. Sec. 550.37(24). Debtors have not demonstrated that the excess funds are "reasonably necessary for the support of the debtor and any spouse or dependent of the debtor". The statute states that a Debtor may exempt certain specified retirement accounts "to the extent of the debtor's aggregate interest under all plans and contracts up to a present value of \$30,000". Minn. Stat. Sec. 550.37(24). Debtors argue that the 'indexed present value' equals their calculation as to the surrender value of the accounts. The term "indexed" as used in *Clark v. Lindquist*, 683 N.W.2d 784 (Minn. 2004) references the fact that the exempt amount is adjusted every two years, per statute. The present value of the SEP IRA should be the value of the SEP IRA as determined on the face of the plan. Debtors should not be able to utilize a claimed surrender value to reduce the value of the plan to make it fit under the \$54,000 exemption cap.

7. The value of the PERA, even if found not to be part of the bankruptcy estate, should be included when calculating the limit under Minn.Stat. Sec. 550.37(24). *See In re Nielsen*, 1998 WL 3379 (Bky. D. Minn. 1998)(J. Dreher). This Court is urged to follow *Nielsen*, and not the position taken in *In re Hawkinson*, 222 B.R. 334 (Bky. D. Minn. 1998)(J. O'Brien).

8. Debtors are both employed or receive regular monthly income such that the SEP IRA is not need for the support of Debtors. Debtors schedule no dependents.

9. In addition, the SEP appears to have been established by an insider that employed Debtor. Trustee requires additional information on the number of participants or others involved in the SEP.

WHEREFORE, Trustee respectfully moves the Court for an order sustaining the Trustee's motion to Debtor's claimed exemption listed herein and for such other relief as may be just and equitable.

Dated: October 12, 2004

MACKALL, CROUNSE & MOORE
By /e/Patrick C. Summers
Timothy D. Moratzka (Atty No. 75036)
Patrick C. Summers (Atty. No. 028841X)
Attorneys for Trustee
1400 AT&T Tower
Minneapolis, Minnesota 55402
(612) 305-1400

VERIFICATION

Timothy D. Moratzka, 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.

DATED: October 12, 2004

/e/Timothy D. Moratzka

U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bky. No. 04-41615-RJK

Richard and Bonnie Karl,
Debtor(s)

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Amy J. Ditty, employed by Mackall, Crouse & Moore, attorney(s) licensed to practice law in this court, with office address of 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, MN 55402-2859, declares that on the date set forth below, I served the annexed **Verified Notice of Hearing and Motion on Trustee's Second Amended Objection to Claimed Exempt Property and Proposed Order** upon each of the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota addressed to each of them as follows:

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

William P. Kain
13 South 7th Avenue
St. Cloud, MN 56301

Richard J. Karl
Bonnie A. Karl
20016 Major Avenue
Hutchinson, MN 55350

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: October 12, 2004

Signed: /e/ Amy J. Ditty

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bky. Case No. 04-41614-RJK
Chapter 7

Richard J. Karl and Bonnie A. Karl,

Debtors.

The above-entitled matter came before the Court for hearing on October 20, 2004, on the motion of Timothy D. Moratzka, Trustee for the above-referenced Debtor, objecting to the exemption claim of the Debtor of the SEP, IRA and PERA under Minn.Stat. Sec. 550.37(24). Appearances were noted in the Court's record. Based upon the proceedings had on said date, the statements of counsel, and all of the files and records herein, the Court now finds grounds for sustaining the Trustee's objection.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the debtor's claim of exemption in the SEP, PERA and IRA accounts is not exempt and shall be administered as property of the estate.

Dated: _____

Honorable Robert J. Kressel
United States Bankruptcy Judge