

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Todd D. Wendt
Debtor

Case No: 04-33329 GFK
Chapter 7

**MEMORANDUM IN OPPOSITION TO OBJECTION
TO EXEMPT PROPERTY**

The debtor, through his attorney undersigned submits this Memorandum in Opposition to the Trustee's Objection to Exemption. The property in question is the debtor's interest in a 403(b) retirement plan provided to him by his employer. This plan is not property of the estate pursuant to 11 USC § 541 (c) and if it is property of the estate it is exempt under 11 USC § 522 (d)(10)(e).

This plan is a church plan as defined by ERISA (See Exhibit A). The Supreme Court in Patterson vs. Shumate 504 US 753 (1992) definitively ruled that if a plan is qualified for treatment under ERISA, it is excluded from the bankruptcy estate under 11 USC § 541 (c). In the recent case In Re Roesler (03-60504 DDO) the Trustee asserted that the 403(b) church plan was not covered by ERISA pursuant to 29 USC § 1003(b). This section states that "the provisions of this subchapter shall not apply to any employee benefit plan if ... (2) such plan is a church plan (as defined in § 1002(33) of this title with respect to which no election has been made under § 410(d) of title 26." The way ERISA is structured, it is clear that the term "provisions of this subchapter" refers to the numerous requirements regarding summary plan descriptions, annual reports and the like required by ERISA. It does not mean a 403(b) church plan is not qualified for treatment under ERISA and excluded from the bankruptcy estate. 29 USC § 1056 (d)(1) is the key provision of ERISA that excludes ERISA qualified plans from bankruptcy estates. Nothing in this section denies 403(b) church plans from this protection. The Court should follow the clear ruling of the Supreme Court in Patterson v Shumate and find that all ERISA qualified plans are excluded from the bankruptcy estate. The Sixth Circuit

Bankruptcy Appellate Panel was mistaken in not following this ruling by adding additional requirements to exclude ERISA plans in In Re Adams 302 BR 535 (BAP 6th Cir 2003).

In the event this 403(b) plan is not excluded from the bankruptcy estate it is exempt under 11 USC § 522 (d)(10)(e), the provisions of 26 USC 403(b). Because this plan qualifies for the special tax treatment under 403(b), it is exempt specifically under 11 USC § 522 (d)(10)(e) (ii) and (iii).

In conclusion, the Trustee objection to the debtor's exemption should be denied.

Dated: September 16, 2004

/e/Robert J. Everhart
Robert J. Everhart #180671
Everhart Law Office, Ltd.
Attorney for Debtors
PO Box 120534
New Brighton, MN 55112
651-636-9212

In RE:
Todd D. Wendt

U.S. Bankruptcy Court
District of Minnesota

Debtor(s)

Unsworn Declaration
Proof of Service

Mari M. Scotch, employed by Robert J. Everhart attorney(s) licensed to practice law in this court, with office address of P. O. Box 120534, New Brighton, Minnesota 55112, declares that on September 17 , 2004, I served the annexed:

Memorandum in Opposition to Objection to Exempt Property

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 New Brighton, Minnesota addressed to each of them as follows:

U.S. Bankruptcy Court
(Electronic Filed Service)

Patti J. Sullivan
Chapter 7 Trustee
PO Box 16406
St. Paul, MN 55116

Office of the U. S. Trustee
1015 US Courthouse
300 South 4th Street
Minneapolis, MN 55415

Todd D. Wendt
907 SW 8th Street Apt 206
Forest Lake, MN 55025

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

Executed: 09/17/2004

Signed:

