

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In Re:

Case No. 04-33535
Chapter 7 Case

Jean M.M. Owens and
John Gordon Owens,

Debtor(s).

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

TO: The United States Bankruptcy Court, the United States Trustee, the debtor, the debtor's attorney and all parties who requested notice under Bankruptcy Rule 2002:

1. Mary Jo A. Jensen-Carter, Trustee of the bankruptcy estate of the above named debtors, moves the court for the relief requested and gives notice of hearing.

2. The Court will hold a hearing on this motion on September 7, 2004 at 1:00 o'clock p.m. in Courtroom No. 228B at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this motion must be filed and delivered not later than 1:00 o'clock p.m. on September 1, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than August 26, 2004 which is seven business days before the hearing (excluding intermediate Saturdays, Sundays and legal holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Bankruptcy Rules 4003, 5005, 9013 and 9014, and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 7 cases was filed on June 15, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 522 and Bankruptcy Rule 4003 and Local Rule 702. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9001-1 to 9006-1 and 9013-1 to 9013-5. Movant requests relief with respect to the debtors' claim for exemption.

6. Debtors have claimed as exempt a TIAA-CREF-403b retirement plan, which debtors state has a fair market value of \$33,638.09, as exempt property pursuant to the provisions of 11 U.S.C. §522(d)(10)(E).

7. Based upon the documentation provided to trustee by the debtors, which trustee acknowledges does not consist of the entire retirement plan itself, it appears that the debtors' retirement plan consists of fixed and or variable annuity contracts. Based upon the rationale of *In re Linda D. Roesler, Bky 03-60504, decision of Dennis D. O'Brien (August 26, 2003)*, Trustee does not believe that the plan are eligible to be exempt under the cited provision of the bankruptcy code. Furthermore, based upon the court's rationale in *In re Adams, 535 B.R. 535 (6th Cir. 2003)*, it is the trustee's position that the annuity contracts are not excluded from the estate because they do not constitute a trust within the meaning of 11 U.S.C. § 541(c)(2).

WHEREFORE, trustee objects to the exemption of the retirement plan and moves the court for an order sustaining the trustee's objection to claimed exempt property and granting such other and further relief as the Court deems just and equitable.

Dated: August 12, 2004.

/e/ Mary Jo A. Jensen-Carter
Mary Jo A. Jensen-Carter
1339 East County Road D
Vadnais Heights, MN 55109
Phone: (651) 486-7475

VERIFICATION

I, Mary Jo A. Jensen-Carter, Chapter 7 Trustee of the captioned bankruptcy case, certify under penalty of perjury that I have read the foregoing Notice of Hearing and Motion Objecting to Claimed Exempt Property and the information contained therein is true and correct to the best of my knowledge, information and belief.

Dated: August 12, 2004

/e/ Mary Jo A. Jensen-Carter
Mary Jo A. Jensen-Carter

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In Re:

Chapter 7
Bankruptcy No. 04-33535

Jean M.M. Owens and
John Gordon Owens,

Debtor(s)

UNSWORN CERTIFICATE OF SERVICE

I, Ann M. Gagner, declare under penalty of perjury that on August 12, 2004, I served copies of the attached *Notice of Hearing and Motion Objecting to Claimed Exempt Property and a proposed Order* by first class U.S. Mail, to the following parties:

Jean M.M. Owens John Gordon Owens 23 S.W. Fifth Avenue Faribault, MN 55021	United States Trustee 1015 U.S. Courthouse 300 South Fourth Street Minneapolis, MN 55415
Stephen R. Ecker Ecker Law Office 301 1 st Avenue NW Faribault, MN 55021	eCAST Settlement Corporation, assignee of MBNA America Bank, N.A. c/o Becket and Lee, LLP P.O. Box 35480 Newark, NJ 07193-5480

Executed on: August 12, 2004.

Signed: /e/ Ann M. Gagner
Ann M. Gagner
Buckley & Jensen
1339 East County Road D
Vadnais Heights, MN 55109

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ORDER

A hearing on the trustee's objection to the debtor's exemption of a TIAA-CREF 403b retirement plan was held before the undersigned judge of Bankruptcy Court on September 7, 2004.

Based upon the trustee's objection and all the files and records of the proceeding herein,

IT IS HEREBY ORDERED:

The debtor's exemption of the TIAA-CREF 403b retirement plan is hereby denied.

Date: _____

Gregory F. Kishel
Chief United States Bankruptcy Judge