

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Howard and Sharon Hewitt

CHAPTER 7  
Bky. 97-33854

Debtors.

MEMORANDUM  
ORDER GRANTING  
SUMMARY JUDGMENT

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I. Introduction

This matter came before the court on cross-motions for summary judgment concerning the Trustee's objection to Debtor Howard Hewitt's claimed exemption under Minn. Stat. Section 550.37(22) of four remaining payments, totaling \$375,000, still outstanding from a June 20, 1985 settlement of a personal injury claim(1). Alternatively, the Debtor seeks to amend his Schedule C to claim the payments exempt under Minn. Stat. Section 550.37(24).

A hearing was held on November 4, 1998, Stephen J. Behm appeared for the Trustee and Christopher M. Kennedy appeared for the Debtors. At the conclusion of oral arguments the Debtors were granted ten days to reply to the Trustee's Resp. Mem., specifically whether the payments in dispute could be exempted under Minn. Stat. Section 550.37(24) if disallowed under Minn. Stat. Section 550.37(22). The Debtors response was filed on November 13, 1998.

The Court has jurisdiction pursuant to 28 U.S.C. Section 157 and 1334, Bankruptcy Rule 5005, and Local Rule 1070-1. This is a core proceeding and the case is now pending in this Court. The grant of summary judgment is made pursuant to Fed. R. Civ. Pro. 56 and under Bankruptcy Rule 9014 and 7056.

The Court must determine whether the Debtor can exempt the contested payments under either Minn. Stat. Section 550.37(22) or (24). The Court, having considered the briefs of the parties, oral arguments, and being fully advised in the matter, now makes this ORDER:

II. Facts

The Debtors filed their petition commencing this Chapter 7 case on June 5, 1997 and included on "Schedule B- Personal Property" a "Personal Injury Settlement Annuity with Executive Life" with a current market value of "approximately \$60,000."(2) The Hewitts chose Minnesota state law exemptions instead of those available under federal law. In the Debtors' "Amended Schedule C - Property Claimed As Exempt" Howard Hewitt claims

the entire stated value of the settlement annuity, \$60,000(3), as exempt property under Minn. Stat. Section 550.37(22) and pursuant to In re Dulas, 177 B.R. 897, (Bankr.D.Minn. 1995)(4).

In 1985 Mr. Hewitt settled a claim resulting from a 1982 automobile-motorcycle accident. On June 20, 1985 he signed a release and settlement agreement with the defendants (Mark Lindstrom and Northland Trailers, Inc.) insurance company, Northwestern National Insurance Company of Milwaukee, Wisconsin (Northwestern).

Northwestern agreed to pay Mr. Hewitt: \$41,990.63 for "medical, wage loss and other claims" and \$250,000 "on or about May 30, 1985." For future medical expenses (covering the next ten years) and a trust account of \$30,000 was created for Mr. Hewitt. The insurance company also agreed to pay Mr. Hewitt (or his estate) \$1000 per month from July 1985 to August 1991, for a total of \$74,000.

Finally, Northwestern agreed to pay Mr. Hewitt (or his estate) a series of cash payments in five year intervals: \$15,000 on September 1, 1991, \$20,000 on September 1, 1996, \$25,000 on September 1, 2001, \$30,000 on September 1, 2006, \$35,000 on September 1, 2011, and \$250,000 on September 1, 2016. The last four payments under the agreement are the subject of this dispute.

According to the language of the settlement, Mr. Hewitt agreed to "accept the payments to be made pursuant to this Agreement in full compromise and settlement of all his claims against Northland and Lindstrom for damages on account of personal injuries[.]" The consideration for Mr. Hewitt's release was the full payment of all of agreed funds. Northwestern was required to furnish evidence "of an annuity contract in an amount sufficient to satisfy and guarantee the payment obligations set forth[,]" and it was "recognized and agreed that the payments . . . are guaranteed payments[.]"

Mr. Hewitt entered into a contract with the defendants' insurance company settling and releasing all of his claims from the 1982 crash for \$291,990.63 in cash, \$30,000 in trust for future medical expenses, and \$449,000 in future payments guaranteed by Northwestern. It was agreed that Northwestern would purchase and retain ownership of the annuity, Mr. Hewitt's only rights were "to the payments set forth therein as and when they are accrued."

### III. Procedural Posture

Both parties seek summary judgment under Fed. R. Civ. P. 56 and Fed. R. Bankr. P. 7056. Rule 56(c) provides summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits . . . show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Trustee and the Debtor agree that there are no questions of material fact in this dispute, the Debtor is entitled to a series of future payments and the court must determine whether a legal basis exists for exempting these payments under the Minnesota law cited. Bankruptcy Rule 4003(c) provides: "In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed" Fed. R. Bankr. P. 4003(c). In this matter, the facts as related above are undisputed.

#### IV. Discussion

- A. Are the future payments promised to the Debtor in the June 20, 1995 Settlement agreement "rights of action for injury to the person" under Minn. Stat. Section 550.37(22)(5)?

If Mr. Hewitt had insisted on a cash payment in complete settlement of his personal injury claim, he would not be entitled to an exemption for any remaining funds under Section 550.37(22). See, *In re Procter*, 186 B.R. 466 (Bankr.D.Minn. 1995). "This court has consistently construed 'rights of action' as referring only to pending or future claims." *Id.*, at 468.

Here, the legislature has not chosen to exempt settlement proceeds arising from a personal injury claim. The legislature has the ability and knows how to effectively provide exemption protection for proceeds of exempt property if it so chooses. Clearly then, the fact that the legislature omitted any inclusion of proceeds from personal injury claims indicates a deliberate choice not to do so. *Procter*, 186 B.R. at 469, quoted in *Dulas*, 95 F.3d at 705.

The Eighth Circuit Court of Appeals recently held that annuity payments represent rights of payment and not rights of action under Minn. Stat. Section 550.37(22). *Christians v. Dulas*, 95 F.3d 703 (8th Cir. 1996). The Debtors seek to distinguish this case, arguing that unlike the debtor in *Dulas*, Mr. Hewitt has no ownership interest in the annuity which guarantees the future payments under the settlement agreement.

In a more recent exemption case involving an annuity, the Eighth Circuit Court of Appeals agreed that an "annuity" is a purely generic term which refers to the method of payment and not to the underlying nature of the asset." *In re: Eilbert, Eilbert v. Pelican*, 1998 WL 839598, \*3

(8th Cir. 1998). As in this case, whether an annuity is guaranteed by a third party annuitant, or a structured settlement is guaranteed by the insurance company of a personal injury defendant, the Dulas analysis applies.

The statute exempts rights of action, not rights of payment. Although the debtors had a right of action when Connie was injured, they no longer have such a right. Instead, they have proceeds from the settlement of their personal injury action-no part of which was still pending at the time of the bankruptcy filing. By settling their claim, the debtors reduced their right of action to a right of payment. Dulas, 95 F.3d at 704-705.

Mr. Hewitt has no right of action until such time, if ever, that Northwestern fails to make a payment under the 1985 settlement agreement. "At best, the debtors may in the future have a breach of contract action against the third-party annuity guarantor. Such an action would clearly not be an action 'for injuries to the person' under Minnesota law." Id. at 705. The settlement executed by Mr. Hewitt refers to "full compromise and settlement of all his claims against Northland and Lidstrom[.]" Neither Northland nor Lidstrom signed the settlement agreement, although they are included by reference. The next payment owed Mr. Hewitt is due in 2001, sixteen years after the settlement, and nineteen years after the crash. If Northwestern fails to make the scheduled payment, the remedy will be found in contract law, not in reopening or filing a personal injury lawsuit on a 1982 injury. That eventuality, remote or not, does not create a "right of action for injuries to the person" under Minn. Stat. 550.37(22).

B. Can the Debtor claim the future payments under the June 20, 1995 Settlement agreement as exempt under Minn. Stat. 550.37(24)?

In the alternative to the claimed exemption under Minn. Stat. Section 550.37(22), the Debtor Howard Hewitt seeks leave to amend his Schedule C to claim an exemption for the disputed payments under Minn. Stat. Section 550.37(24). Bankruptcy Rule 1009 allows "A voluntary petition, list, schedule . . . may be amended by the debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009. The motion to amend should be granted here.

The Debtors argue correctly that courts have allowed exemptions under Section 550.37(24) which go beyond the specific rights enumerated in the statute.(6) Mr. Hewitt cites In re Sederstrom, 52 BR

448 (Bankr.D.Minn. 1985), where exempted payments were from a tax sheltered annuity, and In re Schlee, 60 BR 524 (Bankr.D.Minn. 1986), concerning the exemption of assets held in a Keogh plan. Courts have not, however, allowed the use of this exemption for rights or assets which do not arise in an employment context.(7)

The Debtors argue that a broad reading of the statute should allow exemption because the right to receive future payments, or payments under an annuity, are payments of the type anticipated by the statute. Judge Kressel disallowed an exemption under the same statute in In re Gagne, noting:

the lesson of all these cases is that while the word annuity appears in subd. 24, it is there to cover those instances where an annuity is created by an employer to provide for retirement or income protection for an employee or a similar annuity is created on an ongoing basis by a self employed person to similarly provide such retirement benefit or income protection. In re Gagne, 166 B.R. 362, 365 (Bankr.D.Minn. 1993). See also, In re Lunde, Ch. 7 Case No. 6-90-268 (Bankr.D.Minn. Dec. 13, 1986) <<http://www.mnb.uscourts.gov>>.

"Subdivision 24 bears the title of employee benefits and clearly evidences an intent by the Minnesota Legislature to protect benefits that result from employment." Gagne, 166 B.R. at 363, 364 n.1. In this case the payments are part of a structured settlement of a personal injury lawsuit which had nothing to do with Mr. Hewitts' employment. The Debtor's exemption under Minn. Stat. 550.37(24) is disallowed.

#### V. Disposition

Based on the foregoing, it is hereby ORDERED: Debtor Howard Hewitt's motion for summary judgment is denied; the Trustee's motion for summary judgment is granted; the Trustee's objection to the Debtor's claimed exemption for future payments under a settlement of a personal injury lawsuit is sustained; all proceeds of the Northwestern settlement, including future payments, are property of the bankruptcy estate.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 18, 1998.

By the Court:

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Dennis D. O'Brien  
Chief Bankruptcy Judge

(1) Debtors' Mem. In Support of Cross-Motion for Sum. Judg. refers to Mr. Hewitt's "pending legal action" although neither Mr. Hewitt's affidavit nor the settlement agreement itself reference a specific case filing in a Minnesota court.

(2) There is no discussion about how this value was determined. The "agreement and Release" signed by the Debtor Howard E. Hewitt, and the annuity documentation submitted as part of the Debtors' pleadings in this case, show four remaining payments: \$25,000 on September 1, 2001; \$30,000 on September 1, 2006; \$35,000 on September 1, 2011; and \$250,000 on September 1, 2016.

(3)

(4) This decision was reversed by *Christians v. Dulas*, 95 F.3d 703 (8th Cir. 1996).

(5) Minn. Stat. Section 550.37 allows: "Subdivision 1. The property mentioned in this section is not liable to attachment, garnishment, or sale on any final process, issued from any court. . . . Subd. 22. Rights of action for injuries to the person of the debtor or of a relative whether or not resulting in death." Minn. Stat. Section 550.37.

(6) "Subd. 24. 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, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service:" Minn. Stat. Section 550.37

(7) Although not raised in this proceeding, if these payments were allowable under Section 550.37(24) there would still be a four part test to determine what, if any, part of the payments would be exempt. See, *In re Gagne*, 166 B.R. 362, 363.