

In re Zaremba 685-08335

PSW 11/12/1986

Court overruled chapter 7 trustee's objection to claim of B-4 exemption under ORS 23.160(1)(k). Court distinguished the Eggers case where it held that a (k) exemption was not available to protect a portion of non-exempt garnished funds which were recoverable as a preference, as to allow its use would be to increase the amount available to debtors under ORS 23.185(1). Here, the use of (k) would not increase the amount of any other exemption. Only 1 debtor could claim exemption.

The court agreed with Judge Hess's opinion, In re Kao, 52 Bankr. 452 (Bankr. D.Or. 1985) that the funds paid to chapter 13 trustee constituted property of the chapter 7 estate after conversion.

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U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

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BY J. A. DEPUTY

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE )  
 )  
JOSEPH EDWARD ZAREMBA and ) Case No. 685-08335-W7  
RHONDA RAY STEELE, )  
 )  
 ) MEMORANDUM OPINION  
Debtors. )

The debtors, having filed a chapter 13 proceeding, later, prior to confirmation, moved the court to convert their case to a chapter 7 proceeding. The debtors had made some plan payments to the chapter 13 trustee. The trustee placed these funds in a bank account. The source of these payments was the debtors' wages. Upon conversion the chapter 13 trustee deducted an administrative fee from the funds he held and transferred the balance of \$541.50 to the chapter 7 trustee. The debtors filed new chapter 7 schedules. Each claimed a B-4 exemption of \$400 under ORS 23.160(1)(k) in "bank deposits, chapter 13 payments, tax and renter's refunds."

The trustee objected to the exemptions. The basis of his objection is two-fold. First, he argues that as ORS 23.166(1) and ORS 23.185(1) operating together provide an exemption for those funds, and the debtors cannot use the exemption of ORS 23.160(1)(k) to protect those funds due to the language in (k)

1 which states: "However, this exemption may not be used to  
2 increase the amount of any other exemption." I fail to see the  
3 logic in this reasoning. In Eggers v. Professional Credit  
4 Service (In re Eggers), Case No. 683-07444, Adversary No.  
5 683-6282, unpublished op. (Bankr. D.Or. Nov. 8, 1983), I held  
6 that the (k) exemption was not available to debtors who hoped to  
7 use it to protect the portion of non-exempt garnished funds which  
8 were recoverable as a preference, as to allow its use would be to  
9 increase the amount of the exemption available to the debtors  
10 under ORS 23.185(1). Here, however, no wage garnishment took  
11 place; ORS 23.185 was never used by the debtors to exempt the  
12 funds from garnishment; thus (k) could not be used in the manner  
13 prohibited by Eggers. The use of (k) by the debtors simply would  
14 not "increase the amount of any other exemption."

15 The second basis for the trustee's objection is that the  
16 funds paid to the chapter 13 trustee are the trustee's funds, in  
17 the trustee's bank account, are not the debtor's funds and thus  
18 the debtor can claim no exemption in them. The court finds this  
19 reasoning off target. Pursuant to § 522(b) the debtors may claim  
20 exemptions in property of the chapter 7 estate. The question,  
21 under these facts, is whether the funds are assets of the chapter  
22 7 estate. This question was answered in the affirmative by Judge  
23 Hess in In re Kao, 52 Bankr. 452 (Bankr. D.Or. 1985).

24 One remaining point needs to be addressed. This court notes  
25 the debtors are each claiming a (k) exemption of \$400.00 in the  
26 funds. ORS 23.160(3) limits the (k) exemption in this instance  
27 to one.

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1 An order shall be entered overruling the trustee's objection  
2 to the extent of \$400.00 and sustaining it to the extent of  
3 \$141.50.

4 This Memorandum Opinion contains the court's findings of  
5 fact and conclusions of law and pursuant to Bankruptcy Rule 9014,  
6 which incorporates Rule 7052, they will not be separately stated.

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9 POLLY S. WILHARDT  
10 Bankruptcy Judge  
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