

In re Hoffman Case #384-00084
Ridgway (Trustee) v. Credits, Inc. Adv. Pro. #84-0151
11-8-84 HLH

11 U.S.C. §522(h)
ORS 23.160(1)(k)

Credits, Inc. garnished one of the debtors' wages within 90 days of the filing of the petition. Shortly thereafter, the debtors' asserted a wage exemption in the funds at a hearing before the state district court. The state court denied the exemption. Credits, Inc. voluntarily gave $\frac{1}{2}$ of the garnished wages back to the debtors. In bankruptcy court, the debtors filed a complaint seeking to void the garnishment under 11 USC §522(h) by claiming an exemption in the funds under ORS 23.160(1)(k).

ORS 23.160(1)(k) cannot be used to increase any other exemption. Since the alleged preference came from wages, and since the debtors claimed a wage exemption, they cannot now use ORS 23.160(1)(k) to increase the wage exemption. Accordingly, the motion for reconsideration of the court's order dismissing the complaint was denied.

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1064 (5)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re)	
)	
JAMES DEAN HOFFMAN)	Case No. <u>384-0084</u>
SHARIECE EULA HOFFMAN,)	
)	
Debtors.)	Adversary No. 384-00151
)	
ROBERT RIDGWAY, on the relation)	
of JAMES DEAN HOFFMAN)	
SHARIECE EULA HOFFMAN,)	MEMORANDUM OPINION
)	
Plaintiffs,)	
)	
v.)	
)	
CREDITS, INCORPORATED,)	
)	
Defendant.)	

Prior to, but within 90 days of the filing of the petition for relief in this case, the defendant, Credits, Incorporated (hereinafter referred to as the creditor), caused a garnishment to be served upon the employer of the plaintiff, James Dean Hoffman (hereinafter referred to as the debtor). The debtor claimed a portion of the wages which had been paid to the clerk of the District Court of Oregon for Umatilla County as exempt.

1 At a hearing before the District Court, the court announced
2 that it would deny the claim of exemption. The creditor
3 thereupon stated, through its representative, that it would be
4 willing that half of the sum under garnishment be delivered to
5 the debtor. The debtor when asked by the court whether this
6 would be satisfactory, responded that it was. The court then
7 endorsed a memo instructing the clerk to divide the funds
8 equally. Accordingly, the clerk delivered to the debtor the
9 sum of \$277.76 and to the creditor a like sum.

10 In the schedules filed in this bankruptcy case by the
11 debtors they listed, among other things, the following unencum-
12 bered assets:

13	1. First American Banking - savings acct.	\$ 2.00
14	2. Landlord (rent deposit)	150.00
15	3. Household goods	770.00
16	4. Books, pictures, etc	25.00
17	5. Wearing apparel	100.00
18	6. Rifle and pistol	500.00
19	7. Home made boat	50.00
20	8. Calculator	5.00
21	9. Carpet cleaners	25.00
22	10. Credits, Inc., garnishment	277.76
23	11. State tax refund	440.00

24 In the schedule of property claimed as exempt, the debtors
25 claim as exempt item 3 under subsection (1)(f) of ORS 23.160,
26 item 4 under subsection (1)(a), item 5 under subsection (b),
items 8 and 9 under subsection (1)(c), and item 6 under ORS
23.200. Items 1, 2, 7, 10 and 11 are claimed exempt under ORS
23.160 (1)(k). This latter statute permits an exemption of up
to \$400 for each debtor. The value of items 1, 2, 7 and 11
total \$642. The difference between this figure and the maxi-

1 mum exemption for both debtors of \$800 is \$158. Therefore, if
2 the debtors can utilize 11 U.S.C. §522(h) to void a preference
3 received by Credits, Inc., they may do so only to the extent of
4 \$158.

5 Following an earlier hearing in this matter, the court, on
6 June 8, 1984, entered an order denying relief to the debtors
7 under the complaint filed in this adversary proceeding. The
8 basis for the order was a ruling by the court that the matter
9 of whether or not the debtor was entitled to a wage exemption
10 in the funds which had been garnished having been determined by
11 the state court prior to the filing of this bankruptcy case,
12 the question of a wage exemption was res judicata. Following
13 that order the debtors filed a motion for reconsideration. The
14 debtors stated that they are not claiming that the funds
15 received by Credits, Inc., was exempt as wages but rather are
16 claiming that this sum, if set aside by the trustee as a pre-
17 ference received within 90 days of the petition in bankruptcy,
18 could be claimed exempt under ORS 23.160(1)(k).

19 Under 11 U.S.C. §522(h) the debtor may avoid a transfer of
20 property of the debtor to the extent that the debtor could have
21 exempted the property under §522(g)(i) if the trustee had
22 avoided such transfer if -- (1) such transfer was avoidable as
23 a preference and (2) the trustee does not avoid such transfer.

24 ORS 23.160(1)(k) provides an exemption for "the debtor's
25 interest, not to exceed \$400 in value, in any personal
26 property. However, this exemption may not be used to increase

1 the amount of any other exemption."

2 It appears to the court that §522(h) can be utilized by a
3 debtor when the specific property transferred to the creditor
4 was property in which the debtor could claim an exemption.
5 Thus, if the preferential transfer was of an automobile, then
6 upon avoidance of the transfer and recovery by the trustee of
7 the automobile or its proceeds, the debtor could claim his
8 exemption for an automobile in that automobile or its proceeds.
9 Subsection (d) of ORS 23.160(1) provides an exemption of \$1,200
10 for an automobile. If through a preferential transfer a credi-
11 tor received a vehicle of the value of \$2,000, upon recovery of
12 the \$2,000 the debtor would be able to claim an exemption of
13 \$1,200. He would not also be able to claim an additional \$400
14 of the proceeds under subsection (k) since it provides that the
15 latter exemption cannot be used to increase the amount of any
16 other exemption.

17 In the present case the preference came from wages.
18 Subsection (k) cannot be utilized to claim an exemption in
19 wages. The wage exemption is controlled by ORS 23.175 and
20 23.185. The schedule of property claimed exempt which was
21 filed by the debtors in this bankruptcy case bases the claim of
22 exemption in the \$277.76 received by Credits, Inc., not upon
23 ORS 23.175 and 23.185 but upon ORS 23.160 (1)(k). Since the
24 property received by the creditor was wages which are not
25 exempt under subsection (k) the requirements of 11 U.S.C.
26 §522(h) are not fulfilled.

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Should the debtors be inclined to amend their schedule of exemptions to claim the funds exempt under OR 23.175 and 23.185, it would be appropriate for the creditor to assert the defense of res judicata.

An order will be entered denying the motion for reconsideration.

DATED this 8th day of November, 1984.


Henry L. Hess, Jr.
Bankruptcy Judge

cc: Robert Ehmann
Donald D. Yokom