

26 USC § 415
29 USC § 1002(2)(A)
29 USC § 1003(b)(5)
29 USC § 1056(d)
ORS 23.170(d)
pension

In re Kane, No. 392-32133-S11A

3/2/92 & 11/2/92 DDS unpublished

The court sustained objections to the debtor's claim of exemption in a stream of payments he received from his former employer. The debtor claimed that the fund was exempt as a pension under ORS 23.170(d).

The court determined that the fund was a pension plan subject to ERISA. The fund was also property of the estate because it was unfunded and maintained primarily for the purpose of providing deferred compensation to a highly compensated employee, so it was not entitled to the protection of ERISA's mandatory anti-alienation clause. Mr. Kane was not able to rely on Oregon's exemption because ERISA preempts state law and the plan was not entirely excluded from ERISA as an excess benefit plan.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 392-32133-S11
HARRY JOSEPH KANE,)
) SUPPLEMENTAL MEMORANDUM
Debtor.) SUSTAINING OBJECTIONS OF
) CREDITORS' COMMITTEE AND
) HARPER TO CLAIM OF EXEMPTION

Mr. Kane claimed in his schedules that an annuity he is receiving from his former employer should be exempt as a pension under O.R.S. 23.170(1)(d). In an opinion entered on November 2, 1992, I found that the annuity is a pension plan under 29 U.S.C. § 1002(2)(A), and therefore subject to the terms of the Employee Retirement Income Security Act ("ERISA"). I also determined that the plan was property of the estate because it is unfunded and maintained primarily for the purpose of providing deferred compensation to a highly compensated employee, so that it does not include the mandatory anti-alienation provision found in 29 U.S.C. § 1056(d). Since ERISA preempts state law, Mr. Kane may not rely on the Oregon exemptions unless the plan is entirely

excluded from ERISA under 29 U.S.C. § 1003(b)(5) as an excess benefit plan.

After considering the supplemental briefs filed by the parties, I have determined that the Georgia Pacific annuity is not an excess benefit plan, that it is deferred compensation, and that the committee's objection to the claimed exemption should be sustained. My reasons follow.

A pension plan is excluded from ERISA if it is unfunded and is an excess benefit plan. 29 U.S.C. § 1003(b)(5). The term excess benefit plan is defined as:

a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

The plan at issue in this case was not maintained by Georgia Pacific solely for the purpose of exceeding the contribution and benefit limit imposed by the tax code. There is no indication in any of the depositions or documents presented that 26 U.S.C. § 415 played any role whatsoever in creating the plan. There is no evidence that the plan was maintained to exceed the limitation imposed by the tax code or was calculated based on any reference to another plan.

The plan at issue was calculated by continuing to accrue the salary Mr. Kane would have earned for the two year period from the date he left Georgia Pacific's employ until the date he turned 62. The principal of the fund would stop growing if Mr. Kane died before he reached the age of 62. Mr. Kane was not accruing benefits under a qualified plan that was subject to Section 415 during that time period, so there was no limitation under another plan to exceed, if that period were the relevant time frame. The debtor's attempt to separate the fund at issue into two separate plans is not logical nor consistent with the structure of the plan. The pension at issue is not an excess benefit plan as that term is defined in 29 U.S.C. § 1003(b)(5) or as interpreted by the courts in cases such as Catacosinos v. Applied Digital Data Systems, Inc., 592 F. Supp. 49 (E.D. NY 1984), Petkus v. Chicago Rawhide Manufacturing Co., 763 F.Supp. 357 (N.D.Ill. E.D. 1991) or Farr v. U.S.West, Inc., 15 E.B.C. 2322, 1992 U.S. Dist. LEXIS 16900, (D. Or. 1992).

Although the amount of the fund was calculated during the two year period after Mr. Kane stopped working at Georgia Pacific, it was earned during his 28 year tenure with the company. The fund was in recognition of his prior services, and as such was deferred compensation. The debtor has not established that Mr. Kane received benefits under a plan that

exceeded the limits imposed by 26 U.S.C. § 415, or that the fund at issue falls within any other exclusion under 29 U.S.C § 1003(b). As a result, the fund is a pension subject to ERISA, is not protected from creditors by 29 U.S.C. § 1056, and the state exemptions are preempted. Since Section 415 was not a consideration in creating the fund, it is not necessary to determine whether the plan is a defined benefit plan or a defined contribution plan. The objections filed by the creditors' committee and Gloria Harper to the claimed exemption are sustained. A separate final order will be entered.

DATED this _____ day of March, 1993.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Daniel F. Vidas
Bruce H. Orr
Peter C. McKittrick
U. S. Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
HARRY JOSEPH KANE,) 392-32133-S11
Debtor.)
ORDER SUSTAINING OBJECTIONS
TO EXEMPTION CLAIMED IN
GEORGIA PACIFIC SEVERANCE
AGREEMENT

Based on memoranda entered on March 2, 1993 and
November 2, 1992,

IT IS ORDERED that the objections filed by the
unsecured creditors' committee and Gloria Harper to the
debtor's claimed exemption in the Severance Agreement with
Georgia Pacific are sustained. The payments under the
Severance Agreement are property of the estate and are not
exempt.

DATED this _____ day of March, 1993.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Daniel F. Vidas
Bruce H. Orr
Peter C. McKittrick
U. S. Trustee