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3/2/92 & 11/2/92 DDS unpublished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-S11A
HARRY JOSEPH KANE,	)	
	)	OPINION AND FINDINGS
Debtor.	)	REGARDING EXEMPTION
	)	

The debtor was the chief financial officer for the Georgia-Pacific Corporation ("G.P.") until he retired in 1983. He was 59 years old then, and retired earlier than the customary age at his employer's insistence. At the time he left, he negotiated an agreement with G.P. to pay him $6,822.60 per month for 15 years. The payments started the month after Mr. Kane reached 62 years of age, the normal retirement age. These benefits were in addition to the company's usual retirement package which he received as a lump sum. In his schedules he claimed the annuity as an exempt pension. The creditors' committee and a creditor objected to the allowance of the exemption. The parties submitted depositions, memoranda, affidavits, and documents in support of their opposing positions. Unless Mr. Kane submits material to establish that his G.P. annuity falls within 29 U.S.C. § 1003(b), the objections of the creditors' committee and creditor to his claimed exemption in the annuity should be sustained.

The annuity is a pension plan under 29 U.S.C. § 1002(2)(A) which is subject to the provisions of the Employee Retirement Income Security Act ("ERISA"). However, the plan is unfunded and maintained primarily for the purpose of providing deferred compensation to a highly-compensated employee, so it is not subject to the mandatory anti-alienation provision found in 29 U.S.C. § 1056(d). Since ERISA preempts state law, Mr. Kane may not claim the fund as exempt under the Oregon exemptions unless he can establish that the plan is excluded from ERISA under 29 U.S.C. § 1003(b). My reasons for these conclusions follow.

At first, the contentions of the parties centered around the issue of whether Mr. Kane's special termination agreement was a "retirement plan or pension" within the meaning of Oregon's exemption in O.R.S. 23.170(1)(d) which is applicable in bankruptcy under 11 U.S.C. § 522(b)(1). At the court's request, the parties briefed the issue of whether the benefits were a pension under 29 U.S.C. § 1002(2)(a). The 1983 agreement with G.P. was silent on whether the benefits could be assigned or garnished. Under ERISA, the benefits would not be property of the estate under 11 U.S.C. § 541(c)(2) as interpreted recently in Patterson v. Shumate, _____U.S. ______, 112 S. Ct. 2242, 119 L.Ed.2d 519, (1992) if the prohibition against alienation in 29 U.S.C. § 1056(d)(1) were applicable.

In this case, Mr. Kane's annuity is a pension under both federal law and Oregon law. Where the issue involves garnishment or the involuntary alienation of pensions or retirement benefits, the federal definition of a pension under ERISA must be considered as controlling because the state law is preempted to the extent it conflicts with ERISA under Mackey v. Lanier, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed.2d 836 (1988) and Guidry v. Sheet Metal Workers, 493 U.S. 365, 110 S. Ct. 680, 107 L.Ed.2d 782 (1990). The preemption applies even if the state law provides greater protection to the fund than the federal law.

29 U.S.C. § 1002(2)(a) defines a pension plan as any plan, fund, or program established by an employer "to the extent that, by its express terms or as a result of surrounding circumstances, such plan or fund or program . . . . (i) provides retirement income to the employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contribution made to the plan, the

method of calculating the benefits under the plan, or the method of distributing benefits under the plan." A plan, such as the present plan, will not be excluded from ERISA coverage because it covered only a single employee, contemplated immediate retirement, or was in the form of a letter. Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991). It is further immaterial whether payments under the plan continue beyond the death of the employee or his spouse. Ullman v. Sunset-McKee Co., 221 F.2d 128, 129 (9th Cir. 1955). The fact that payments are funded out of general assets as here is not material. Hollingshead v. Burford Equipment Co., 747 F.Supp 1421 (D. Ala. 1990).

The agreement which was reached in 1983 at the approximate time of Mr. Kane's termination contemplated the deferral of income by the debtor for periods beyond his termination. The circumstances surrounding the creation of the 1983 agreement point to retirement as its purpose within the meaning of 29 U.S.C. § 1002(2)(a). Further, the benefits were intended to be in recognition of a period of employment by G.P. within the meaning of O.R.S. 23.170(1)(d)(C). The fact that Mr. Kane also was entitled to a lump sum payment from the company's stock bonus plan does not change the retirement purpose of the parties in negotiating an additional annuity.

Applicability of ERISA does not depend upon whether the plan qualifies for favorable tax treatment. Fruend v. Marshall, 485 F.Supp 629 (W. D. Wisc. 1979). Under the "plain language" standard of statutory construction in Patterson v. Shumate, 29 U.S.C. § 1056(d)(1) cannot be construed so that it only applies to tax qualified plans. A pension subject to Part 2 of Chapter 18 of ERISA (29 U.S.C. § 1051 - 1061) would not be an asset of the estate under 11 U.S.C. § 541(c)(2), regardless of the presence of an anti-alienation clause. Mackey, 108 S.Ct. at 2188-89, J. Gordon Christy and Sabrina Skeldon, Shumate and Pension Benefits in Bankruptcy, 2 J. Bankr. L. & Prac., 719, 721 n.11 (1992).

This plan is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a highly-compensated employee. Mr. Kane was one of the five most highly compensated executive officers of G.P. in the year before his resignation. (Georgia-Pacific Notice of 1983 Annual Meeting of Shareholders and Proxy Statement, Page 11, Exhibit B to Affidavit of Diane Durgin.) As discussed elsewhere, the fund is deferred compensation in recognition of Mr. Kane's services. As such, the plan falls within the scope of 29 U.S.C. § 1051(2), and is excepted from the provisions of § 1051 - 1061, including the protections of § 1056(d).

The compensation agreement was spread out over 15 years and called for payments to start at the normal retirement age.

The agreement was completely unfunded in spite of a somewhat convoluted method chosen to determine the amount of the payments. Mr. Kane, at the time of the negotiation in 1983, was entitled to approximately $940,000 under the stock purchase plan. He was also in personal financial trouble sufficiently serious to threaten bankruptcy and to be an embarrassment to G.P. if he continued as chief financial officer. The parties knew that the size of the stock bonus dividend precluded further periodic payments under an existing salaried executive officer's retirement plan. Mr. Kane used the leverage he had from his years with the company to bargain for a pension from G.P. to insure that he and his wife, who was living at the time, would not be destitute if he could not solve the financial problems that threatened him with bankruptcy, even after receiving the stock bonus dividend.

Mr. Kane invested 28 years with G.P. mostly as a senior executive, and the termination benefits involved here logically were in recognition for his years of service. Labelling the payments as severance, a buy-out, or something other than a pension only restates the problem because these labels are consistent with the purpose of retirement or a pension. This case is not a "buy-out" where the employee's future rights are based on what he leaves behind for a successor as in Fraver v. North Carolina Farm Bureau Mutual Ins. Co., 801 F.2d 675, 676

(4th Cir. 1986).

Without the protection of 29 U.S.C. § 1056(d), the plan is property of the estate. It does not qualify as a spendthrift trust under state law. There is no separate fund, and there is no provision which prohibits alienation of the proceeds.

The plan is a retirement plan as that term is described in O.R.S. 23.170(1)(d)(C). Absent preemption, Mr. Kane would be entitled to exempt the fund under O.R.S. 23.170(2). However, in this case, the Oregon statute relates to an employee benefit plan that is described in § 1003(a). Unless the plan is excepted from ERISA under § 1003(b), the state law is superceded by ERISA. 29 U.S.C. § 1144, Pitrat v. Garlikov, 947 F.2d 419 (9th Cir. 1991).

The parties did not argue the applicability of the excess benefit plan exceptions of 29 U.S.C. § 1003(b)(5), 1002(36) or whether the benefits exceeded the limitations of 26 U.S.C. § 415. In the event that the exception applies, ERISA would not cover the pension and there would not be preemption under Mackey. The pension would then be exempt under O.R.S. 23.170(d). The debtor has ten (10) days from the date this order is entered to submit additional material on the 1003(b)(5) exception. If nothing further is submitted by that date, I will enter an order sustaining the creditors' objection to the claimed exemption.

DATED this 30th day of October, 1992.

____
DONAL D. SULLIVAN
Bankruptcy Judge

cc: Bradley O. Baker
Peter C. McKittrick
Bruce H. Orr
U. S. Trustee