

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

WILLIAM H. PAYNE and
ARTHUR R. MORALES,

Plaintiffs,

v.

CIVIL NO. 97-266 MCA/LFG

NATIONAL SECURITY AGENCY,

Defendant,

UNITED STATES OF AMERICA,

Garnishor,

and,

SANDIA LABORATORY FEDERAL CREDIT UNION
AND ITS SUCCESSORS OR ASSIGNS
ATTENTION: LOSS PREVENTION,

Garnishee.

**PRE-HEARING MEMORANDUM OF LAW ON
UNITED STATES' OBJECTION TO CLAIMS OF EXEMPTION**

Plaintiffs William H. Payne and Arthur R. Morales, the debtors in this garnishment proceeding, have presented affidavits to Sandia Laboratory Federal Credit Union ("Credit Union"), the Garnishee, claiming that the funds held by the Garnishee pursuant to the Writ of Garnishment are exempt. Garnishee has filed these documents with the Court. See Supplement to File, Docket No. 133. The United States filed an Objection to Claims of Exemption and Request for Hearing. Docket No. 135. The Court has now set a hearing for

March 25, 2008, on the claims of exemption pursuant to 28 U.S.C. § 3014(b)(2). Docket No. 142.

Under the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001, et seq. (“FDCPA”), the United States has the right to garnish property in the hands of third parties to enforce a judgment debt. See 28 U.S.C. § 3205(a). Property is defined as including community property. 28 U.S.C. § 3002(12). The Act further provides that: “Co-owned property shall be subject to garnishment to the same extent as co-owned property is subject to garnishment under the law of the State in which such property is located.” 28 U.S.C. § 3205(a); see also 28 U.S.C. § 3010(a). Under New Mexico law, community property is generally subject to garnishment or execution for community debts. N.M. Stat. Ann § 40-3-11. Community debts include debts incurred during marriage by either party subject to certain limited exceptions not applicable here. N.M. Stat. Ann § 40-3-9. The FDCPA allows an individual debtor to elect to exempt property listed in either 28 U.S.C. § 3014(a)(1) (property specified in the Bankruptcy Code at 11 U.S.C. § 522(d)) or 28 U.S.C. § 3014(a)(2) (any property exempt under other Federal, State or local law). Further, the burden is on the debtors to establish the applicability of any exemption claimed unless it is reasonably evident that the exemption applies. 28 U.S.C. § 3014(b)(2).

The basis for the claim of exemption by Mr. Morales appears to be that the source of \$11,018 of the funds in one of his Credit Union accounts was a distribution from a retirement account. Docket No. 133, Affidavit of Arthur R. Morales, ¶ 2. The answer filed by the Credit Union states that Mr. Morales had three deposit accounts totaling \$24,921.75 as of the date of the answer. Docket No. 132, p. 3. Mr. Morales does not state the nature of the retirement

account or the statutory or other basis for his claim of exemption. However, even if the claims of exemption were allowed in the amounts stated in the affidavit of Mr. Morales, funds sufficient to pay the \$11,018 which the United States seeks to garnish from Mr. Morales were still available in his Credit Union accounts.

The basis of the claim of exemption by Mr. Payne appears to be that the source of \$1,950 of the funds in one of his Credit Union accounts was a distribution from a traditional IRA. Docket No. 133, Affidavit of William H. Payne, ¶ 2. The answer filed by the Credit Union states that Mr. Payne had five deposit accounts totaling \$20,819.32 as of the date of the answer. Docket No. 131, p. 3. Again Mr. Payne does not state the statutory or other basis for his claim of exemption. However, the United States again notes that, based on the Credit Union's answers, funds sufficient to pay the \$11,018 which it seeks to garnish from Mr. Payne were available in his Credit Union accounts even if the claims of exemption were allowed in the amount stated in Mr. Payne's affidavit. Mr. Payne acknowledges that \$9,068 in the account was subject to garnishment since its source was his wife's wages. Docket No. 133, Affidavit of William H. Payne, ¶ 3.

If this language is a mistake and Mr. Payne intended to claim some exemption for the amounts deposited in the account from his wife's wages, the only exemption for wages under New Mexico law is for a percentage of "disposable earnings" paid by the employer, not earnings deposited and commingled in a community bank account. N.M. Stat. Ann § 35-12-7. This exemption is based on the Consumer Credit Protection Act, 15 U.S.C. § 1673. It has been long established that the protection of such earnings does not extend to deposits in the debtor's bank

accounts after the earnings have been paid by the employer. Kokoszka v. Belford, 417 U.S. 642, 651 (1974) (earnings are “limited to periodic payments of compensation and [do] not pertain to every asset that is traceable in some way to such compensation.”); Usery v. First Nat’l Bank of Ariz., 586 F.2d 107, 109 (9th Cir. 1978); United States v. Laws, 352 F. Supp. 2d 707, 713 (E.D. Va. 2004).

Further, there is no general exemption under New Mexico law for retirement accounts, see N.M. Stat. Ann. §§ 42-10-1, et seq., but only for state administered retirement accounts of state and local governmental employees. See, e.g., N.M. Stat. Ann. § 11-10-135 and § 22-11-42. Thus, the only basis for claiming an exemption would be under the Bankruptcy Code or other federal law.

If the debtors are claiming an exemption under the bankruptcy laws at 11 U.S.C. § 522(d)(10) for payments under a pension plan, that exemption is limited by its express terms to “[t]he debtor’s right to receive” such payments. As stated in In re Cesare, 170 B.R. 37, 39 (D. Conn. 1994): “Under the plain language of the statute, any funds due a debtor under such a plan or contract lose their exempt character once the debtor receives the fund.” The court there also noted that the immediately following exemption section of the Bankruptcy Code did expressly include “traceability” language, unlike 11 U.S.C. § 522(d)(10). See also, In re Ekanger, No. 99-10571-SSM, 1999 WL 671866, at * 2 (E.D. Va. May 17, 1999); In re McCollum, 287 B.R. 750, 753-54 (E.D. Mo. 2002). Likewise, the Bankruptcy Code exempts “[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation.” 11 U.S.C. § 522(d)(11). Debtors have not asserted that any of their Credit Union accounts are exempt from

taxation. Finally, under 11 U.S.C. § 522(d)(10)(E), the exemption for the right to payments under pension plans is also limited to “the extent reasonably necessary for the support of the debtor and any dependent.” Debtors have made no claim or showing that the funds on deposit in the Credit Union accounts are reasonably necessary for their support.

Likewise, if the debtors are asserting an exemption under the anti-assignment provisions for ERISA-qualified pension plans, see 29 U.S.C. § 1056(d), these provisions do not apply to garnishment of pension benefits once they are paid to and received by the beneficiary. Guidry v. Sheet Metal Workers Nat’l Pension Fund, 39 F.3d 1078, 1083 (10th Cir. 1994) (ERISA qualified pension benefits protected “from garnishment only until paid to and received by plan participants or beneficiaries.”), cert. denied, 514 U.S. 1063 (1995).

In addition to the exemptions, Mr. Payne raises in another affidavit what appear to be objections to the service of the garnishment paperwork on him. Docket No. 136. First, in a letter incorrectly filed in another case, Morales et al v. Baca, CIV 01-634 WFD (Docket No. 76), Mr. Payne asserts that the package he received did not actually include the form “Notice of Garnishment and Instructions for Objecting to the Answer.” When this alleged error was brought to the attention of undersigned counsel, Mr. Payne was re-served by certified mail, return receipt requested, on February 13, 2008, with a copy of the form “Notice of Garnishment and Instructions for Objecting to the Answer.” See Declaration of Lois Agnes attached hereto as Exhibit A. Copies of the letters to Mr. Payne and the postal return receipts signed by him are attached to Ms. Agnes’ Declaration. While Mr. Payne in his subsequent affidavit (Docket No. 136) asserts that the certification of service originally filed on January 28, 2008 is therefore

wrong, the attached Declaration from Ms. Agnes is adequate proof of the dates of original service and re-service upon him of all the documents.

In any event, the FDCPA does not require that the debtor be served with a particular document entitled “ Notice Of Garnishment and Instructions For Objecting To The Answer.” 28 U.S.C. § 3205(c)(3) merely requires:

(3) **Service of writ.**—The United States shall serve the garnishee and the judgment debtor with a copy of the writ of garnishment and shall certify to the court that this service was made. The writ shall be accompanied by—

(A) an instruction explaining the requirement that the garnishee submit a written answer to the writ; and

(B) instructions to the judgment debtor for objecting to the answer of the garnishee and for obtaining a hearing on the objections.

The Declaration of Ms. Agnes reflects that the debtors were served, at the very least, with a copy of the Writ of Garnishment and the Clerk’s Notice of Post-Judgment Garnishment and Instructions to Debtor on January 28, 2008, whether or not the form “Notice Of Garnishment and Instructions For Objecting To The Answer” was inadvertently omitted. See Exhibit A. Postings on the debtor’s website reflect that Mr. Payne did receive the Writ of Garnishment and the Clerk’s Notice of Post-Judgment Garnishment and Instruction to Debtor on January 29, 2008. See Exhibit B attached hereto. The Clerk’s Notice of Post-Judgment Garnishment and Instruction to Debtor includes instructions to the judgment debtor for objecting to the garnishment, claiming exemptions and requesting a hearing. These instructions satisfy the requirements of the statute. This information is virtually the same information included in the

Notice of Garnishment and Instructions for Objecting to the Answer. Whether or not Mr. Payne received a separate document entitled “Notice of Garnishment and Instructions for Objecting to the Answer” duplicating the instructions contained in the Clerk’s Notice, the requirements for notice under the FDCPA were met.

Further, there is no prejudice from any purported error in service. Mr. Payne obviously has received documents satisfying the FDCPA’s notice requirements and has in fact asserted exemptions and had an opportunity to raise objections. The United States has requested a hearing and the Court has now set a hearing on the applicability of any claimed exemptions by debtors and Mr. Payne will have a further opportunity to challenge the garnishment of the Credit Union accounts at that time. Likewise, the Garnishee has timely answered and will have an opportunity to appear at the hearing as well. The Declaration of Lois Agnes is sufficient evidence of proper service under the FDCPA in light of these facts.

Similarly, Mr. Morales complains in an affidavit he has filed some of the documents with which he was served had the wrong names or addresses on them. See Docket No. 137. Again the Declaration of Ms. Agnes reflects that the letter serving the documents was mailed to the correct address and Mr. Morales in fact signed a postal return receipt form. Further, Mr. Morales has acknowledged in his affidavit that he did actually receive the package with the document forms. See Docket No. 137 (“Yet the Department of Justice was aware of my address because the certified envelope in which these writs of garnishment were enclosed had my proper current address...”). He has not asserted that he was confused or unable to assert exemptions or objections, and in fact he has done so. As noted above with respect to Mr. Payne,

Mr. Morales will have a further opportunity to challenge the garnishment of the Credit Union accounts at the hearing set in this matter. Thus, any typographical errors in the documents were harmless and have not deprived Mr. Morales of an opportunity to be heard on his claim of exemption or any objections.

WHEREFORE, the United States requests that the claims of exemption by the debtors be disallowed, that the technical objections they have raised with respect to service or typographical errors in the garnishment paperwork be denied, and that the Court enter an order directing the Garnishee to pay to the United States the funds held pursuant to the Writ in the amount of \$11,018 as to each debtor, and for such other and further relief as may be appropriate.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

/s/ Electronically filed March 6, 2008
JOHN ZAVITZ
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103-0607
(505) 224-1414
(505) 346-6884 (facsimile)
E-mail: john.zavitz@usdoj.gov

I HEREBY CERTIFY that a true copy of the foregoing pleading was mailed, postage prepaid, on March 6, 2008, to the following non-participants in the CM/ECF electronic filing system:

William H. Payne at 13015 Calle De Sandias NE, Albuquerque, New Mexico 87111-2924;
Arthur Morales at 1400 Camino Amparo NW, Albuquerque, New Mexico 87107-2608; and
Sandia Laboratory Federal Credit Union, c/o Kevin D. Hammar, Attorney for Garnishee, 1212 Pennsylvania NE, Albuquerque, New Mexico 87110.

/s/ JOHN ZAVITZ
JOHN ZAVITZ
Assistant United States Attorney

N:\JZavitz\FLU\Payne\Payne Objection Memo ch.wpd