UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 05-41161**
ROBERT ELKO,	*	
	*	**CHAPTER 7**
	*	
Debtor.	*	**HONORABLE KAY WOODS**
	*	

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M E M O R A N D U M O P I N I O N
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Background and Facts

Debtor, Robert Elko ("Debtor"), commenced this Chapter 7 case by filing a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code on March 10, 2005. Andrew W. Suhar ("Trustee") is the duly appointed, qualified and acting Chapter 7 Trustee in this case.

On May 21, 2005, Trustee filed the Objection to Exemption ("Objection") and on June 16, 2005, the Debtor filed Response to Objection to Exemptions ("Response"). Pursuant to notice, a hearing on the Objection was scheduled for June 23, 2005. The hearing was rescheduled for August 18, 2005 and subsequently rescheduled for September 1, 2005, then October 13, 2005 and finally October 27, 2005. The allowance or disallowance of the claimed exemption is based on an interpretation of law rather than a factual dispute. As a consequence, at the hearing on October 27, 2005, the parties agreed and the Court ordered the parties to submit and file a joint stipulation of facts by November 14, 2005 and simultaneous briefs on November 18, 2005. The Court stated that it would then rule on the pleadings.

The parties submitted and filed Joint Stipulations on

November 17, 2005 that contained all admitted and uncontested facts and set forth the contested legal issue. The admitted and uncontested facts are as follows:

> 1. From 1998 until August 5, 2004 the Debtor had an Individual Retirement Account with Wachovia Securities, account number 324-8150 ("IRA"). The balance in the IRA was $43,166.98 on August 5, 2004.
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> 2. On August 6, 2004 the amount in the IRA (less $2.67) was transferred into Wachovia Securities, account number 1876-3053. This account was a SEP-IRA ("SEP-IRA").
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> 3. On August 9, 2004 the Debtor transferred an additional $3,000.00 in to the SEP-IRA from non-exempt sources. The Debtor transferred the additional amount contemplating that he might have to file bankruptcy. The Debtor has agreed to turn that amount over to the Trustee forth-with.
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> 4. The Debtor filed his voluntary petition under Chapter 7 of the Bankruptcy Code on March 10, 2005. The balance in the SEP-IRA on that date was $54,642.55.
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> 5. The Debtor has scheduled as an asset his interest in the SEP-IRA with a balance on hand at the date of the filing of the petition herein of approximately $38,000.00. The Debtor has claimed such funds as exempt under the provisions of Section 2329.66(A)(10)(c) of the Ohio Revised Code.
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> 6. The Trustee timely objected to the Debtor's claim of exemption.
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> 7. If the funds in the SEP-IRA from the IRA had remained in the IRA, the Debtor's claim of exemption would be valid.
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> 8. If the Court rules in favor of the Trustee the entire amount of the SEP-IRA, less any applicable tax, is property of the estate. If the Court rules in favor of the Debtor, the Debtor only owes the estate the $3,000.00 for the transfer of the non-exempt assets into the SEP-IRA.
>
> 9. There are no other factual issues to be

determined by the Court prior to ruling on the contested legal issues.

The contested legal issue was described in the Joint Stipulations as: "1. Whether the Debtor may claim his interest exempt under Section 2329.66(A)(10)(c) of the Ohio Revised Code?"

On November 17, 2005, the Trustee filed "Andrew W. Suhar, Trustee's Brief in Support of Objection to Exemptions." The Debtor failed to timely file a brief, but belatedly, on November 28, 2005, filed Brief of Debtor.[1]

Section 522 of the Bankruptcy Code codifies the property that a debtor can exempt from property of the estate, as defined in § 541 of the Bankruptcy Code. Pursuant to § 522(b)(2) of the Bankruptcy Code, a state can "opt out" of the federal exemptions. Because Ohio has elected to opt out, the exemptions of a debtor who files a bankruptcy petition in Ohio are governed by state law. As a consequence, Ohio Revised Code ("O.R.C.") § 2329.66(A)(10) provides the exemption for a debtor's right to a "pension, benefit, annuity, retirement allowance, or accumulated contributions. . . ." O.R.C. § 2329.66(A)(10)(a).

The Court adopts paragraphs 1-9 of the Joint Stipulations as its findings of fact. Set forth herein are the Court's conclusions of law. *See*, FED. R. BANKR. P. 7052.

Trustee's Position

The Trustee relies on an unreported decision of the Sixth Circuit Court of Appeals, *Lampkins v. Golden*, 28 Fed. App. 409 (6th Cir. 2002), and argues that O.R.C. § 2329.66(A)(10)(c) is preempted

[1]Although Debtor failed to timely file a brief, the Court has read and considered Debtor's brief in reaching its decision on the Objection.

by the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*. The Trustee notes that, in a bankruptcy context, Judge Clark in the Southern District of Ohio held that "a § 408(k) SEP meets the definition of an employee benefit plan under ERISA because it is established or maintained by employers for employees." *In re Buzza*, 287 B.R. 417 at 421 (Bankr. S.D. Ohio, 2002). The Trustee argues that by applying O.R.C. § 2329.66(A)(10)(c) to the SEP-IRA, the statute relates to an employee benefit plan covered by ERISA. Accordingly, ERISA preempts Ohio's exemptions in O.R.C. § 2329.66(A)(10) because 29 U.S.C. § 1144 (formerly § 514(a)) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

The Trustee contends that if Debtor's SEP-IRA is covered by the exemption in O.R.C. § 2329.66(A)(10)(c), then ERISA preempts that application and the SEP-IRA is not exempt.

The Sixth Circuit Court of Appeals held in *Lampkins, supra*,[2] that a Michigan statute that exempted certain pensions assets from garnishment was preempted by ERISA and, thus, the SEP in question was subject to garnishment by the creditor. *Lampkins* was not a bankruptcy case and the issue there did not impact any other federal law.

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[2]Since this decision was not published by the Sixth Circuit Court of Appeals, it is not binding precedent, but may be persuasive in the absence of controlling authority. See 6th Cir. R. 28(g); *Gibson v. Gibson* (*In re Gibson*), 219 B.R. 195, 201 n.2 (6th Cir. BAP 1998).

Debtor's Position

The Debtor acknowledges that the Sixth Circuit Court of Appeals has not issued a reported opinion directly on point and relies entirely on *Schlein v. Mills* (*In re Schlein*), 8 F.3d 745 (11th Cir. 1993) to urge the Court to overrule the Trustee's Objection. In *Schlein,* the Eleventh Circuit Court of Appeals held that Florida Statute ("FLA. STAT.") § 222.21(2)(a) relates to an ERISA benefit plan and, absent an applicable exception, is preempted by ERISA § 514(a). The Court noted, however, that "[b]ecause Congress invited the states to participate in determining what that 'fresh start' [in bankruptcy] would entail, ERISA preemption of every pension-related state exemption would substantially impair the ability of the Bankruptcy Code to ensure the envisioned 'fresh start'." *Id*. at 752. As a consequence, the Eleventh Circuit held that FLA. STAT. § 222.21(2) came within the ERISA saving clause and was not preempted.

> [T]he language of the ERISA saving clause applies whenever preemption would alter or amend or modify any federal law. A holding that state exemption statutes like the one involved in this case, are preempted would alter, amend, or modify the Bankruptcy Code's provision permitting states to set exemptions and the deliberate policy choices of Congress that underlie that provision.

Id. at 753-54.

Analysis

O.R.C. § 2329.66(A)(10)(c) exempts "any individual retirement account" to the extent that the "assets, payments, or benefits" are attributable to the limitations set forth in subsections (i), (ii) and (iii). In *Buzza*, *supra*, Judge Clark held that ERISA did not preempt a § 408(a) IRA that is not sponsored by either employers

or employee organizations because it did not fit within the definition of an employee benefit plan in 29 U.S.C. § 1003(a). As a consequence, that Court concluded that ERISA did not preempt O.R.C. § 2329.66(A)(10)(c) and that the debtors' exemptions in their IRAs were allowed. *Buzza* at 422. In contrast, however, that Court determined that a § 408(k) SEP met the definition of an employee benefit plan under ERISA because it is established or maintained by employers for employees. *Buzza* at 421.

As set forth in the Joint Stipulations, Debtor's account is a SEP-IRA (simplified employer pension IRA). *See* Joint Stipulations, ¶ 2. As a consequence, it is an employee benefit plan, as defined by ERISA § 1003(a). Debtor claims that the SEP-IRA is exempt pursuant to O.R.C. § 2329.66(A)(10)(c); that section is preempted by ERISA, absent an exception. The Court must address

whether the saving clause in 29 U.S.C. § 1144(d) limits ERISA's preemption under the circumstances of the instant case.

Although not necessary to the decision in *Buzza*, Judge Clark analyzed the saving clause in ERISA, which provides that ERISA "shall not be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. . . ." 29 U.S.C. § 1144(d). The Court noted that "[b]y allowing states to 'opt out' of the list of federal exemptions in favor of those created under state law, Congress clearly contemplated the important role state exemption statutes would play in bankruptcy." *Id.* at 423. Although dicta, the Court agreed with the Fifth, Eighth and Eleventh Circuit Courts of Appeal that state exemption statutes are not preempted by ERISA in the context of bankruptcy cases.

This Court agrees with the Trustee that the Debtor's SEP-IRA is an employee benefit plan that, absent an exception, would be preempted by ERISA. The Court disagrees with the Trustee, however, in concluding that ERISA preempts O.R.C. § 2329.66(A)(10)(c) in bankruptcy cases. The *Lampkins* case holds that ERISA preempts O.R.C. § 2329.66(A)(10) for purposes of garnishment, but that case is distinguishable from the instant case because no federal law was impacted by that decision. There is no Sixth Circuit Court of Appeals decision directly on point. This Court finds itself in agreement with Judge Clark in the Southern District of Ohio, who sided with the Fifth, Eighth and Eleventh Circuits in holding that ERISA does not preempt state exemption statutes in bankruptcy cases.

Conclusion

For the reasons set forth above, this Court overrules

the Trustee's Objection. As set forth in the Joint Stipulations, the Debtor shall transfer the Three Thousand Dollar ($3,000.00) non-exempt asset in the SEP-IRA to the Trustee within five (5) days of entry of this Order. Except as set forth in the previous sentence, the Debtor's claimed exemption in the SEP-IRA pursuant to O.R.C. § 2329.66(a)(10)(c) is allowed.

An appropriate order will follow.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
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ORDER OVERRULING TRUSTEE'S OBJECTION TO EXEMPTION
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For the reasons set forth in this Court's Memorandum Opinion entered this date, the Trustee's Objection to Exemption is overruled. The Debtor shall transfer the Three Thousand Dollar ($3,000.00) non-exempt asset in the SEP-IRA to the Trustee within five (5) days of entry of this Order. Except as set forth in the previous sentence, the Debtor's claimed exemption in the SEP-IRA pursuant to O.R.C. § 2329.66(a)(10)(c) is allowed.

IT IS SO ORDERED.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE