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# Midwest Regional Bankruptcy Seminar

*Consumer Track*

## **Hot Topics in Consumer Filings**

**Christal L. Caudill**

Caudill Law Group | Dublin, Ohio

**Donald W. Mallory**

Wood + Lamping LLP | Cincinnati

**Matthew T. Schaeffer**

Bailey Cavalieri LLC | Columbus, Ohio

**Myron N. Terlecky**

Strip Hoppers Leithart McGrath & Terlecky Co., LPA | Columbus, Ohio

## 2025 Midwest Regional Bankruptcy Seminar

August 12, 2025

### 11 U.S.C. §522 Exemption Analysis Residency-Based Exemption Eligibility

Christal L. Caudill  
Caudill Law Group  
Dublin, Ohio



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## What You Need to Know First

Before filing, determine where your client has lived for the **730 days** prior to the bankruptcy petition date.

### Step 1: Residency Timeline

**Ask: Where has your client lived during the 730 days before filing?**

-  If your client lived **only in the state where you plan to file**, you may use that state's exemptions. **Stop here.**
  -  If **not**, you **cannot** use Ohio's exemptions — continue the analysis.
- 

## Step 2: Gather Residency History

You will need:

- A list of **all states** your client has lived in for the past **730 days**, including specific **dates**.
  - Also gather residency information for the **180-day period prior to those 730 days** (i.e., the period between 730–910 days before filing).
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### Analysis Under §522(b)(3)(A) Example:

- **Current Residence:** Ohio
- **Filing Date:** July 25, 2025
- **Date Moved to Ohio:** January 1, 2025
- **Time in Ohio Before Filing:** 206 days

## **Look-Back Period: 730–910 Days Before Filing**

- **Period to Analyze:** January 27, 2023 – July 25, 2023

### **Domicile Analysis:**

<b>Dates</b>	<b>State</b>	<b>Days</b>
01/01/2019 – 12/31/2024	Alabama	2,192 days
01/01/2025 – 07/25/2025	Ohio	206 days

- Can't use Ohio exemptions- does not meet the 730-day domiciliary requirement of 522(b)(3)(A) – 524 days short.
- Domicile during the 180-day look-back period: **Alabama**
- Domiciled in AL for the longest portion (180 days) of the 180 day period
- ► **Apply Alabama's exemptions**

## **Next Question: Can You Use Alabama's Exemptions?**

- Is Alabama an **opt-out state**?
  - Some **state exemptions are only available to current residents**.
  - If **non-resident debtors** are ineligible for *any* state exemptions:
- **Per §522(b)(3)(C):** If the debtor is ineligible for **any exemption under (A)**, they may elect to use **Federal exemptions**.

1. Is the IRA my spouse left me exempt? **Yes**. Is the IRA I inherited from my mom exempt? **No**.

a) SCOTUS examined this issue in *Clark v. Rameker*, 573 U.S. 122 (2014). In *Clark*, the Debtor inherited a \$450,000.00 IRA from her mother. *Clark* at 126. She elected to take monthly payments from the account. *Id.* Later, her and her spouse filed a Chapter 7 bankruptcy and claimed the entirety of the inherited IRA as exempt. *Id.* The trustee objected. *Id.* The Bankruptcy Court agreed with the Trustee and disallowed the exemption. *Id.*

b) Justice Sotomayor wrote the opinion for a unanimous court. In her opinion, she drew a distinction between IRAs that are left to a spouse, and IRAs that are left to anyone else:

An inherited IRA is a traditional or Roth IRA that has been inherited after its owner's death. See §§ 408(d)(3)(C)(ii), 408A(a). If the heir is the owner's spouse, as is often the case, the spouse has a choice: He or she may "roll over" the IRA funds into his or her own IRA, or he or she may keep the IRA as an inherited IRA (subject to the rules discussed below). See Internal Revenue Service, Publication 590: Individual Retirement Arrangements (IRAs), p. 18 (Jan. 5, 2014). When anyone other than the owner's spouse inherits the IRA, he or she may not roll over the funds; the only option is to hold the IRA as an inherited account.

*Clark* at 125.

c) Basically, if your spouse dies and leave you their IRA, you can treat it as if it were your own, OR you can treat it as if it were an inherited IRA. If the decedent was not your spouse, you can only treat it as an inherited IRA.

The Seventh Circuit had recognized the same distinction below:

If a married holder of an IRA dies, the decedent's spouse inherits the account and can keep it separate or roll it over into his or her own IRA. Either way, the money remains "retirement funds" in the same sense as before the original owner's death: the surviving spouse cannot withdraw any of the money before age 59½ without paying a penalty tax and must start withdrawals no later than the year in which the survivor reaches 70½. Because the money entered the IRA without being subject to the income tax, all withdrawals are taxed at ordinary rates.

*In re Heffron-Clark*, 714 F.3d 559, 560 (7th Cir. 2013).

d) The distinction relies on the operative language in §§ 408(d)(3)(C)(ii) referenced in *Clark* provides:

(ii) Inherited individual retirement account or annuity. An individual retirement account or individual retirement annuity shall be treated as inherited if—

(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, **and**

(II) **such individual was not the surviving spouse of such other individual.**

26 U.S.C.S. § 408

- e) The updated version of the IRS Publication referenced in *Clark* also contemplates allowing a rollover for a surviving spouse which maintains the funds characteristic as retirement funds. *IRS Publication 590-A*, p. 20, (2024).
- f) At least two Bankruptcy Courts post-*Clark* have recognized the distinction between spouse/non-spouse beneficiaries. See *In re Kelly*, No. 22-00089, 2023 Bankr. LEXIS 974, at 6 (Bankr. N.D. Iowa Apr. 11, 2023); *Richardson v. Sobeck (In re Sobeck)*, No. 15-42208-MGD, 2015 Bankr. LEXIS 4450, at \*4 (Bankr. N.D. Ga. Dec. 8, 2015). *Sobeck* expressly stated that *Clark* does not control the result when the source of the IRA was a deceased spouse:

*Clark* deals only with "inherited IRAs". That term is defined in the Internal Revenue Code to explicitly exclude IRAs inherited from a spouse. This is because spousal IRAs are governed by different tax rules. Unlike inherited IRAs, spousal IRAs can be rolled over into another IRA and additional contributions can be made. Thus, *Clark* is not controlling.

*Sobeck* at 4.

- 2. Debtor's counsel needs to remain aware that the exemption as to IRAs is not unlimited. Pursuant to 11 U.S.C. § 522(n) the amounts exempted for an IRA "shall not exceed \$1,711,975 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require." 11 U.S.C. § 522(n).
  - a) This limit may apply even in opt-out jurisdictions. See *In re Andre*, No. BK-S-09-10361-LBR, 2011 Bankr. LEXIS 5808, at \*6-7 (Bankr. D. Nev. May 13, 2011). In *Andre* the issue was whether Nevada's cap of \$500,000.00 or the federal cap, then \$1,000,000.00, applied. The Court examined 11 U.S.C. § 522(b) and reasoned that in "opt-out" states, section (b)(3) controlled. That section include retirement funds subject only to the limit in subsection (n).
  - b) This would appear to imply that if you elect statement exemptions, and your state has no limits on retirement funds 11 U.S.C. § 522(n) may still apply.

## What if You Inherit an IRA?

If you inherit a traditional IRA, you are called a beneficiary. A beneficiary can be any person or entity the owner chooses to receive the benefits of the IRA after the owner dies. Beneficiaries of a traditional IRA must include in their gross income any taxable distributions they receive.

### Inherited From Spouse

If you inherit a traditional IRA from your spouse, you generally have the following three choices.

1. Treat it as your own IRA by designating yourself as the account owner.
2. Treat it as your own by rolling it over into your IRA, or to the extent it is taxable, into a:
  - a. Qualified employer plan,
  - b. Qualified employee annuity plan (section 403(a) plan),
  - c. Tax-sheltered annuity plan (section 403(b) plan), or
  - d. Deferred compensation plan of a state or local government (section 457 plan).
3. Treat yourself as the beneficiary rather than treating the IRA as your own.

**Treating it as your own.** You will be considered to have chosen to treat the IRA as your own if:

- Contributions (including rollover contributions) are made to the inherited IRA, or
- You don't take the RMD for a year as a beneficiary of the IRA.

You will only be considered to have chosen to treat the IRA as your own if:

- You are the sole beneficiary of the IRA, and
- You have an unlimited right to withdraw amounts from it.

However, if you receive a distribution from your deceased spouse's IRA, you can roll that distribution over into your own IRA within the 60-day time limit, as long as the distribution isn't a required distribution, even if you aren't the sole beneficiary of your deceased spouse's IRA. For more information, see *When Must You Withdraw Assets? (Required Minimum Distributions)* in Pub. 590-B for more information on RMDs.

### Inherited From Someone Other Than Spouse

If you inherit a traditional IRA from anyone other than your deceased spouse, you can't treat the inherited IRA as

your own. This means that you can't make any contributions to the IRA. It also means you can't roll over any amounts into or out of the inherited IRA. However, you can make a trustee-to-trustee transfer as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA owner for the benefit of you as beneficiary. See Pub. 590-B for more information.

Like the original owner, you generally won't owe tax on the assets in the IRA until you receive distributions from it. You must begin receiving distributions from the IRA under the rules for distributions that apply to beneficiaries.

**More information.** For more information about rollovers, required distributions, and inherited IRAs, see:

- [Rollovers](#), later, under *Can You Move Retirement Plan Assets*;
- *When Must You Withdraw Assets? (Required Minimum Distributions)* in Pub. 590-B; and
- *IRA Beneficiaries under When Must You Withdraw Assets? (Required Minimum Distributions)* in Pub. 590-B.

## Can You Move Retirement Plan Assets?

You can transfer, tax free, assets (money or property) from other retirement programs (including traditional IRAs) to a traditional IRA. You can make the following kinds of transfers.

- Transfers from one trustee to another.
- Rollovers.
- Transfers incident to a divorce.

This chapter discusses all three kinds of transfers.

**Transfers to Roth IRAs.** Under certain conditions, you can move assets from a traditional IRA or from a designated Roth account to a Roth IRA. For more information about these transfers, see [Converting From Any Traditional IRA Into a Roth IRA](#), later in this chapter, and [Can You Move Amounts Into a Roth IRA?](#) in chapter 2.

**Transfers to Roth IRAs from other retirement plans.** Under certain conditions, you can move assets from a qualified retirement plan to a Roth IRA. For more information, see [Can You Move Amounts Into a Roth IRA?](#) in chapter 2.

**2025 Midwest Regional Bankruptcy Seminar**

**August 12, 2025**

**Reasonably Necessary for Support Standard**

**ORC §2329.66 (A)**

Myron N. Terlecky, Esq.  
Strip, Hoppers, Leithart, McGrath & Terlecky  
Columbus, Ohio

The Ohio exemption statute, Revised Code § 2329.66(A), provides that a debtor's right to exempt payments received under certain retirement plans and settlement agreements from the bankruptcy estate is allowed to the extent "reasonably necessary for the support of the person and any of the person's dependents." R.C. § 2329.66. Under the Ohio exemption statute, as applied by the bankruptcy courts of the Sixth Circuit, the standard for determining the extent to which benefits are reasonably necessary for the debtor's support is not whether the debtor has sufficient funds to sustain their former lifestyle, but whether they have enough to sustain their present and future needs, taking into account any special needs of a particular debtor. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 723 (6th Cir. 1999). The lower bankruptcy courts and state courts likewise agree on application of the statute. See e.g., *In re Parker*, 219 B.R. 972, 974-75 (Bankr.S.D.Ohio 1998); *In re Hoppes*, 202 B.R. 595, 598 (Bankr.N.D.Ohio 1996); *Mid-America Fed. Sav. & Loan Ass'n v. Gateway Manor Congregate Apartments*, 94 Ohio App.3d 521, 527-28 (8th Dist. 1999).

Courts in the Sixth Circuit have clarified that this determination involves a fact-specific inquiry into the debtor's financial situation, including consideration of factors such as:

1. The debtor's present and anticipated living expenses;
2. The debtor's present and anticipated income from all sources;
3. The age of the debtor;
4. The health of the debtor;
5. The debtor's ability to work and earn a living;
6. The debtor's job skills, training, and education;
7. The debtor's other assets;
8. Liquidity of other assets;
9. The debtor's ability to save for retirement;

10. Special needs of the debtor; and

11. The debtor's financial obligations (e.g., alimony or support).

*Hamo* at 723, citing *Parker* at 975; See also *In re Abbott*, 466 B.R. 118, 130 (Bankr.S.D.Ohio 2012). The court is not required to address each factor explicitly in every case, but must consider the totality of the circumstances. *Abbott* at 130, citing *Hamo* at 723.

***In re Guikema* – Not “Reasonably Necessary”**

In *In re Guikema*, the court applied the test to determine whether a retirement annuity was reasonably necessary for the debtors’ support under R.C. § 23329.66(A)(10)(b). *In re Guikema*, 329 B.R. 607, 619 (Bankr.S.D.Ohio 2005). The Chapter 7 trustee in the case objected to a claimed exemption of a VALIC retirement annuity. The court found the exemption not reasonably necessary for the debtors’ support for various reasons. The debtors were a married couple, and the wife was 50 years old at the time of the petition and had been employed as a registered nurse for 13 years. She earned about \$60,000 per year and received regular annual salary increases. The husband was 52 years old and was a self-employed photographer, with a monthly net income of about \$300. Both debtors were in good health and had no dependents.

The debtors owned a single-family home valued at \$135,000, which was encumbered by two mortgages securing obligations totaling \$165,000. The combined monthly payment on the two mortgages was about \$1,650. Other than the residence, their assets were as follows:

<b>Asset</b>	<b>Value</b>
Cash/bank accounts	\$ 332
Household goods	\$ 1,800
Family books and pictures	\$ 100
Clothing and bedding	\$ 200
Jewelry	\$ 400
Whole-life insurance	\$ 1,100
Annuity	\$ 19,000
Profit sharing plan account	\$ 28,000
Automobile	\$ 2,000

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<b>Asset</b>	<b>Value</b>
Camera equipment	\$ 1,200
Partnership bank account	\$ 350
Partnership business assets	\$ 150
<b>Total</b>	<b>\$ 54,732</b>

The debtors' monthly expenses totaled approximately \$4,200.

The debtors tried to argue that because both the Ohio and the federal exemption statutes limited exemptions in retirement assets to the amounts "reasonably necessary for the support of the debtor and the debtor's dependents," that the court should look at the terms and legislative history of the federal statute § 522(d)(10)(E) and read out of it a legislative intent that the statute only disallowed such exemptions for debtors with substantial retirement savings of more than \$200,000. *Id.* at 614-15. The court said that, contrary to the debtors' contentions, neither the express terms or the legislative history of § 522(d)(10)(E) supported the conclusion that the "reasonably necessary" language contained in the statute was aimed primarily at high earners who accumulated hundreds of thousands of dollars in retirement funds. *Id.* at 617.

While it was true that the "reasonably necessary" limitation emanated from the exemption statute *proposed* by the Commission on Bankruptcy Laws, and that note 8 to the Commission's proposed exemption statute was directed at "members of professional corporations and [corporate] officers" having "very substantial benefits," the text of the Commission's proposed exemption statute did not define the phrase "reasonably necessary for the maintenance and support of the debtor and his dependents" or otherwise suggest that this limitation should apply only to high earners. More importantly, there was no indication in the legislative history accompanying the version of the federal exemption statute that *actually* became law that the "reasonably-necessary" limitation was aimed primarily at high earners. *Id.*

In applying the *Hamo* factors, the court said that while the debtor-wife had no plans to pursue a managerial position at the hospital she worked at, she did expect to receive modest yearly pay raises until she retired at the age of 65. The debtor-husband said he was continuing to search for more lucrative work, so his income had the potential to increase substantially if he obtained a position similar to the one he formerly held. *Id.* at 619-20. While the debtors' living expenses exceeded their income by about \$500 per month, the court said this shortfall could be eliminated by reducing their monthly housing-related expenditures, such as by finding a better housing situation in the same area for less than \$1,000 per month, which the court said was a feasible option. *Id.* The court said that while the debtors would prefer to stay in their current home, the "reasonably necessary" analysis with respect to annuities does not allow a court to consider a debtor's former "station in life." *Id.*, citing *In re Kochell*, 732 F.2d 564, 566 (7th Cir. 1984).

The remaining factors were either neutral or weighed against a finding that the annuity was reasonably necessary for the debtors' support. The debtors respectively had 13 and 15 years to work before reaching the age of 65, so while they were not on the threshold of retirement, they had limited time to work and save for retirement before reaching age 65. With reasonable budgetary adjustments, the debtors likely would have sufficient time to replace the annuity and accumulate additional retirement savings. The debtors had adequate job skills and training to remain employed until at least age 65. The debtors had no significant assets – liquid, or otherwise – other than the annuity, a profit sharing plan, and their residence, which was over-encumbered. The debtors had no dependents, as their children were both married and were attending graduate school at the time. *Id.* at 621. The debtors did not present any special needs related to age or infirmity for the court to consider. *Id.*; see also *Silagy v. Bank One, Akron, N.A. (In re Collin*, 182 B.R. 763, 767 (Bankr.N.D.Ohio 1995).

As such, the court found that the trustee had shown by a preponderance of the evidence that he annuity was not reasonably necessary for the debtors' support, and could not be exempted under Ohio Revised Code § 2329.66(A)(10)(b).

#### ***In re Michel* – “Reasonably Necessary” Established**

In *In re Michel*, the court evaluated whether settlement proceeds were reasonably necessary for the debtor's support. *In re Michel*, 332 B.R. 557, 558 (Bankr.N.D.Ohio 2005). The debtor in this case objected to the Chapter 7 trustee's motion to turnover certain settlement proceeds. The debtor was a 51-year old widower whose sole income was about \$1,000 per month received in the form of Social Security Disability Income (SSDI). *Id.* Prior to the bankruptcy petition, the debtor was involved in a products liability suit involving the death of his wife, in which he eventually received a cash settlement of \$300,000. Of that amount, the trustee sought to turn over approximately \$26,000. Which was the amount representing the outstanding allowed claims filed in the case. *Id.* The debtor claimed an exemption under R.C. § 2329.66(A)(12)(b), which allows for exemption of “[a] payment on account of the wrongful death of an individual of whom the person was a dependent on the date of the individual's death, to the extent reasonably necessary for the support of the person and any of the person's dependents.” *Id.*, citing R.C. 2329.66(A)(12)(b).

The court said that of the *Hamo* factors, many weighed in favor of the debtor, with the strongest being factors (4) and (10). *Id.* at 560. The debtor's overall health condition was poor, and he had been diagnosed with numerous medical problems requiring ongoing treatment. To financially meet these medical conditions, the debtor needed over \$500 per month to pay for medication and another \$250 to cover recurring expenditures for other medical necessities, like exams and procedures. These medical conditions created a situation where he was consistently at risk for unexpected hospitalizations and procedures which could add to the list of expenses for which he was responsible. *Id.* The court said that the debtor's monthly income was barely sufficient

to meet the needs specifically identified, let alone any other unexpected ones that could arise. *Id.* at 561. Evidence also showed that outside of the settlement proceeds, the debtor had no access to other funds to help him with his expenses. The debtor had even moved into an apartment with a roommate to split his housing expenses. *Id.* at 561

The court also strongly emphasized *Hamo* factor (9), and that because of the debtor's various medical conditions, a turnover of the funds sought by the trustee would have a significant effect on his ability to save for retirement. In sum, when considering his health, the basic needs of the debtor were great in comparison to his income, leaving him with no real way to meet his basic needs and thus, the trustee failed to meet its burden of showing that the settlements funds exemption was not reasonably necessary for the maintenance and support of the debtor. *Id.*

***In Re Bellisari – Not all annuities are created equal!***

*In re Bellisari*, 544 BR 440 (Bankr.S.D. Ohio 2016). The issue in this case was whether the debtor's right to receive payments under an Annuity is exempt under Ohio Revised Code §§2329.66 (A)(6)(e) and 3923.19. Brian Bellisari, a Chapter 7 debtor, was receiving monthly Annuity payments of \$2,000. The payments were disclosed as income on the debtor's Schedule "I", but the Annuity was not initially disclosed on Schedule "B" or exempted on Schedule "C". The Annuity stemmed from a 1990 personal injury settlement because of a motor vehicle accident involving an uninsured motorist.

Debtor amended Schedules B and C claiming the Annuity exempt as "solely a benefit under a policy of accident insurance, paying the liabilities of a defendant of a claim arising from personal injuries to the Debtor - the claim resolved by the settlement offering this annuity" Ohio Rev. Code Ann. §§ 2329.66(A)(6)(e), 3923.19(A), 2329.66(A)(12)(c), 2329.66(A)(6)(b), 3911.10, 3911.12, 3911.14. The Debtor argued that the Annuity payments retained their character as personal injury benefits. The Trustee objected, stating that the exemptions are not applicable to the debtor's Annuity.

The Court found "that Trustee has illustrated that Ohio Revised Code § 3923.20 precludes the application of Ohio Revised Code § 3923.19 to the Insurance Policy, and that Debtor's right to payments under the Annuity is therefore not exemptible under Ohio Revised Code §§ 2329.66(A)(6)(e) and 3923.19(A)" *Id.* Debtor was entitled to an exemption under Ohio Rev. Code § 2329.66(A)(12)(c) up to \$23,000; however, because the Court found the annuity payments stem from an uninsured motorist provision of a motor vehicle liability policy, and thus § 3923.19 did not apply and the Court did not need to determine the reasonably necessary for support issue. The case was converted to Chapter 13 with a 100% distribution to the unsecured creditors.

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Case 3:20-ap-03004 Doc 25 Filed 03/15/21 Entered 03/15/21 16:40:47 Desc Main Document Page 1 of 31

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 15, 2021



*Guy R. Humphrey*  
\_\_\_\_\_  
Guy R. Humphrey  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

*In re:* :  
 :  
 : Case No. 19-31851  
 CARROLL MARCELLUS WYMAN : Chapter 7  
 JUDY ELLA WYMAN, : Judge Humphrey  
 :  
 :  
 *Debtors.* :

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Erin C. Renneker, Chapter 7 Trustee, :  
 :  
 *Plaintiff,* :  
 :  
 v. : Adv. No.20-3004  
 :  
 Judy Ella Wyman, :  
 :  
 *Defendant.* :  
 :

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DECISION ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT (DOCS. 16 & 17) IN ADVERSARY PROCEEDING, AND TRUSTEE'S OBJECTION TO MOTOR VEHICLE AND WILDCARD EXEMPTIONS IN ESTATE CASE

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## I. Introduction

This adversary proceeding and its related contested matter arise out of the objection of Erin C. Renneker, the Chapter 7 trustee (the “Trustee”) to debtor Judy Wyman’s (“Judy”) exemption in a motor vehicle, raise issues of whether Judy and her husband Carroll Wyman (“Carroll”)<sup>1</sup> engaged in permissible pre-bankruptcy exemption planning when Carroll transferred the title of a motor vehicle from his name to a joint title with Judy, and if that transfer may be avoided as either an actual or constructive fraudulent transfer. The proceeding and contested matter involve the intersection of the law concerning exemptions and fraudulent conveyances.

For the reasons to be explained, a material issue of fact exists as to Carroll’s intent in transferring the vehicle, precluding summary judgment on the Trustee’s actual fraudulent conveyance claim under 11 U.S.C. § 548(a)(1)(A). However, the Trustee is entitled to judgment against Judy under § 548(a)(1)(B) avoiding the transfer of the one-half interest conveyed by Carroll to Judy as constructively fraudulent. A material issue of fact also exists as to the value of the vehicle on the date of transfer and, therefore, the court will not enter judgment pursuant to 11 U.S.C. § 550(a)(1) until the value of the vehicle is established at trial or otherwise. The court denies the Trustee’s objection to Judy’s motor vehicle and wildcard exemptions. Judy’s motion for summary judgment is also denied.

## II. Factual and Procedural Background

In January 2017 Carroll purchased a 2011 Chevy Tahoe for \$17,031.70 (the “vehicle”). Stipulation of Facts at ¶ 7 (doc. 13) (“Stipulations”). From the time it was acquired until May 29, 2019, Carroll was listed as the sole owner on the certificate of title. Stipulations at ¶ 8. Then on May 29th, approximately one week before the petition date, Carroll transferred title to the vehicle

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<sup>1</sup> Carroll died on December 22, 2019. Estate Doc. 36.

into the joint names of Carroll and Judy. Stipulations at ¶ 9; Exhibit 2. Judy paid Carroll no consideration for the transfer of the one-half interest in the vehicle. Stipulations at ¶ 10. Since the time title was transferred into their joint names, Judy has been listed as the primary driver on the vehicle insurance. Affidavit of Judy, Exhibit B at ¶ 4 (Doc. 17). After Carroll retired due to health issues, Judy was the only member of the household required to drive to her place of employment and the vehicle was the only source of transportation for the household. *Id.* at ¶¶ 2, 4. Judy has used the vehicle in her employment as a driver delivering newspapers. *Id.* at ¶ 4.

On June 8, 2019 Carroll and Judy filed their joint Chapter 7 bankruptcy petition initiating this case. Estate Doc. 1. They scheduled an interest held by Carroll in their residence, which they intended to surrender, with a value of \$159,500 and a secured claim against it in the amount of \$203,094. *Id.* at 10, 18. They also scheduled an interest in the vehicle, noting that it had 267,000 miles on it and a value of \$9,100. *Id.* at 11. The remainder of their property interests were scheduled as totaling approximately \$10,000. *Id.* at 15.

Carroll and Judy claimed two exemptions in the vehicle: \$8,000 (\$4,000 each) pursuant to Ohio Revised Code § 2329.66(A)(2) – the Ohio motor vehicle exemption – and an additional exemption of \$1,100 pursuant to § 2329.66(A)(18) – the Ohio wildcard exemption. *Id.* at 16-17. Judy and Carroll are entitled to a \$4,000 motor vehicle exemption under § 2329.66(A)(2), and a wildcard exemption of \$1,325 under § 2329.66(A)(18) to the extent they each owned an interest in the vehicle. *In McVicker*, 546 B.R. 46, 60 n. 23 (Bankr. N.D. Ohio 2016); *In re Gazvoda*, Case No. 10-20715, 2011 Bankr. LEXIS 2786, at \*3-4 (Bankr. N.D. Ohio July 21, 2011).<sup>2</sup>

On September 12, 2019 the Trustee filed an objection to Carroll and Judy's claims of exemptions in the vehicle. Estate Doc. 17. The Trustee's objection asserts that the transfer by

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<sup>2</sup> It appears that Carroll and Judy claimed less than the full wildcard exemption because they valued the vehicle at \$9,100 on Schedule A/B. Estate Doc. 1 at 11.

Carroll of the vehicle from his name to he and Judy constituted a fraudulent conveyance of the one-half interest conveyed to Judy. Judy and Carroll filed a response to the Trustee's objection to the exemptions asserted in the vehicle. On January 17, 2020 the Trustee filed the adversary proceeding alleging that an intentional and constructively fraudulent transfer took place when Carroll transferred title to the vehicle into their joint names. Adv. Doc. 1.

Both the Trustee and Judy have filed motions for summary judgment in the adversary proceeding. Adv. Docs. 16, 17.

### III. Positions of the Parties

Judy contends that she and Carroll always considered that they both owned the vehicle, and that Judy was the primary driver. Judy contends that she was added to the vehicle title out of "an abundance of caution prior to the filing" because the vehicle was the only one in the household and was essential to her employment. Adv. Doc. 17 at 4. To show ownership of a vehicle in Ohio, an individual's name generally must be on the certificate of title. Ohio Rev. Code § 4505.04. Therefore, it is Judy's position that she was added to the title pre-petition to ensure she would retain the vehicle.<sup>3</sup> Judy contends the title transfer was permissible pre-bankruptcy exemption planning and not a fraudulent transfer as she did not intend to deceive, harm, or defraud creditors.

The Trustee's position is that the transfer of the vehicle constitutes both an actual and a constructively fraudulent transfer of Carroll's interest to Judy, and the value of the transferred interest is recoverable for the bankruptcy estate.

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<sup>3</sup> Case law pertaining to Ohio debtors and Ohio motor vehicle titles provides that a debtor may not claim an exemption in a motor vehicle unless the debtor is listed as an owner of the vehicle on the vehicle's title. See *In re Toland*, 346 B.R. 444, 449 (Bankr. N.D. Ohio 2006); *In re Whitt*, 534 B.R. 320 (Bankr. N.D. Ohio 2015).

#### IV. Analysis

##### A. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and Amended General Order 05-02 of the United States District Court for the Southern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H) and (O), and this court has constitutional authority to enter final judgment by the knowing and voluntary consent of the parties. Doc. 7. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

##### B. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a), made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure 7056, sets forth the standard to address the parties' filings. It states, in part, that a court must grant summary judgment to the moving party "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, the movant, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

##### C. Analysis of the Applicable Law

###### 1. Separate Estates, But Jointly Administered, With the Same Trustee

Only an individual and the individual's spouse may file a joint bankruptcy petition. 11 U.S.C. § 302. However, as the Trustee aptly points out, unless the court orders otherwise, while joint cases are usually administered jointly, a joint debtors' bankruptcy estates, unless consolidated, are to remain separate. *See* Fed. R. Bankr. P. 1015(b); *Reider v. FDIC (In re Reider)*,

31 F.3d 1102, 1105 (11th Cir. 1994); *In re Toland*, 346 B.R. 444, 449 (Bankr. N.D. Ohio 2006).

While only one trustee is generally appointed over joint cases, Rule 1015(b) provides that separate trustees may be appointed for each estate in a joint case to protect “creditors of different estates against potential conflicts of interest.” Fed. R. Bankr. P. 1015(b).

While the Trustee acknowledges that the estates are separate, the estate for which she is seeking relief is not identified:

The Vehicle at issue is a rapidly depreciating asset for which turn over and liquidation would not restore **the bankruptcy estate** to same position it held had the Transfer nine days prior to the bankruptcy filing not taken place...Further, a sale of the diminished asset would incur further expense to the estate and reduce **the dividend available to unsecured creditors**... A monetary judgment to the Trustee would place **the estate** in the same position it held absent the transfer. A judgment for the non-exempt equity of \$5,175.00 in the Vehicle would **save the estate money and provide a guaranteed return to Debtor’s creditors**.

Adv. Doc. 24 at 4 (emphasis added). The estate which would benefit from the Trustee’s course of action, and which must be the “estate” referenced in the above-quoted paragraph, would be Carroll’s estate. Similarly, any “guaranteed return” would need to be to Carroll’s creditors, not to Judy’s separate creditors.<sup>4</sup>

By seeking to avoid the transfer of the one-half interest in the vehicle to Judy, the Trustee is seeking to recover that interest after the exemption is applied, or in the alternative, a monetary judgment against Judy for the value of the interest transferred. Because if the one-half interest in the vehicle would remain in Judy’s bankruptcy estate it would be fully exempt, or in the alternative,

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<sup>4</sup> Carroll’s and Judy’s schedules reflect individual debts of Carroll, individual debts of Judy, and joint debts. Similarly, there are individual assets and joint assets. The mortgage debt related to the surrendered and abandoned residential property (1213 Pine Knoll Court, Miamisburg, Ohio) was scheduled as solely being owned by Carroll, as well as the debt associated with that property. There were 10 proofs of claim filed by creditors. Of those 10 proofs of claim filed, claims 1, 2, and 6 appear to be individual debts of Carroll (\$834.02; \$14,843.20; and \$137.60). Claims 8 and 9 appear to be joint credit card debt (\$1,393 and \$2,050.18). Claims 4, 5, and 7 are joint tax liabilities (City of Miamisburg \$657 priority and \$674.20 nonpriority; Internal Revenue Service \$51,176.02 nonpriority; and State of Ohio (\$194.43 priority and \$11,473.50 nonpriority)). The court was unable to determine whether Claims 3 (\$649.41) and 10 (\$20) were joint or individual debts.

if a monetary judgment was rendered it would be directly against Judy (and not her bankruptcy estate), the court finds that no actual conflict exists arising out of the Trustee's service as the trustee in both bankruptcy estates.<sup>5</sup>

## 2. The Exemption Scheme

### a. 11 U.S.C. § 522

The debtor's interests in property of any nature to create the bankruptcy estate, and those property interests are known as "property of the estate." See 11 U.S.C. § 541(a); *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005). However, debtors may exempt certain property interests to help them obtain a fresh start. *Clark v. Rameker*, 573 U.S. 122, 124 (2014) (citing *Rousey*, 544 U.S. at 325). For example, within certain monetary limits, a debtor may exempt her car or home from liquidation by the bankruptcy trustee. *Rousey*, 544 U.S. at 325. A debtor's right to claim exemptions in property is determined as of the petition date. *White v. Stump*, 266 U.S. 310, 313 (1924); *In re Wengerd*, 453 B.R. 243, 250 (B.A.P. 6th Cir. 2011); *In re Kyle*, 510 B.R. 804, 809 (Bankr. S.D. Ohio 2014). And in a joint case, such as this one, each debtor is entitled to claim separate exemptions. 11 U.S.C. § 522(m); Ohio Rev. Code § 2329.66(A) ("Every person who is domiciled in this state may hold property exempt . . .").

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<sup>5</sup> The following recitation in *In re Hurt* exemplifies the precarious nature of a trustee in a joint case suing one of the debtors to recover an alleged avoidable transfer from that debtor on behalf of the estate for the other joint debtor:

When the court asked the Trustee in closing argument about the avoidance of Mrs. Hurt's interest in the bank account for the benefit of Mr. Hurt's estate, the Trustee responded that he would not sue one joint estate for recovery from the other joint estate. Transfers between spouses in joint cases present additional procedural problems because the trustee must also consider whether he must lift the stay in one case to pursue the transfer made by the other joint debtor or whether there is any creditor who would actually benefit from such litigation.

542 B.R. 798, 804 (Bankr. E.D. Tenn. 2015).

Section 522 provides exemptions which may be claimed in a bankruptcy case. Under subsections (b)(2) and (b)(3), exemptions claimed may be either the federal exemptions listed in § 522(d), or the state law exemptions if the particular state opted out of the federal bankruptcy exemptions. 11 U.S.C. § 522(b). Ohio has opted out of the federal exemptions to the fullest extent that it may do so. *See* 11 U.S.C. § 522(b)(3)(A); Ohio Rev. Code § 2329.662; *Storer v. French (In re Storer)*, 58 F.3d 1125, 1130 (6th Cir. 1995).<sup>6</sup>

**b. The Ohio Exemptions**

Most of Ohio's exemptions are contained within Ohio Revised Code § 2329.66. As mentioned, the two exemptions at issue are the motor vehicle exemption provided by § 2329.66(a)(2) which exempts "[t]he person's interest, not to exceed three thousand two hundred twenty-five dollars, in one motor vehicle", and the wildcard exemption of § 2329.66(a)(18) which exempts "[t]he person's aggregate interest in any property, not to exceed one thousand seventy-five dollars."<sup>7</sup> Other than her claim that the transfer to Judy of the one-half interest in the vehicle

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<sup>6</sup> However, despite Ohio having opted out of the federal exemptions, certain provisions of § 522 still apply to Ohio debtors. For example, exemptions applicable to debtors in opt-out states for retirement accounts are exempt from taxation under §§ 401 and 403 and other provisions of the Internal Revenue Code. 11 U.S.C. § 522(b)(3)(C). With limited exceptions, property that is held exempt shall not be liable for the payment of any administrative expense. 11 U.S.C. § 522(k). The exempt value in a homestead shall be reduced by any nonexempt property which the debtor disposed of during the previous 10 years and converted into equity in the residence by reinvesting those proceeds in the homestead residence. 11 U.S.C. § 522(o). A debtor is prohibited from claiming a homestead exemption exceeding \$170,350 if the debtor: a) acquired the homestead over the 1215 day period preceding the filing of the bankruptcy case, but excluding family farmers and rollover equity from a prior residence owned by the debtor in the same state; or b) was convicted of certain federal felonies which demonstrate that the filing of the case was an abuse of the Code. 11 U.S.C. § 522(p) and (q).

<sup>7</sup> Ohio law provides for adjustment of this exemption amount:

On April 1, 2010, and on the first day of April in each third calendar year after 2010, the Ohio judicial conference shall adjust each dollar amount set forth in this section to reflect the change in the consumer price index for all urban consumers, as published by the United States department of labor, or, if that index is no longer published, a generally available comparable index, for the three-year period ending on the thirty-first day of December of the preceding year.

Ohio Rev. Code § 2329.66(B). The adjusted dollar amounts do not appear in the text of the statute; however, that information may be accessed by visiting the Ohio Judicial Conference website. Ohio Judicial Conference, <http://www.ohiojudges.org/resources/publications> (follow "Exemptions" hyperlink). At the time that Carroll and Judy

is an avoidable fraudulent conveyance, the Trustee has not asserted any other basis for denying Judy's claim of exemptions in the vehicle.

Ohio exemptions are to be construed liberally on behalf of the debtor. *Daugherty v. Cent. Trust Co. of Ne. Ohio, N.A.*, 504 N.E.2d 1100, 1103 (Ohio 1986); *Baumgart v. Alam (In re Alam)*, 359 B.R. 142, 147-48 (B.A.P. 6th Cir. 2006) (applying Ohio law); *In re Wycuff*, 332 B.R. 297, 300 (Bankr. N.D. Ohio 2005) (exemptions to be liberally construed in favor of the debtor "to effectuate [the statute's] remedial purpose: affording the debtor life's basic necessities"). The purposes of exemptions are: "(1) providing the debtor with that property which is necessary for their survival; (2) enabling the debtor to rehabilitate themselves; and (3) protecting the debtor's family from the adverse effects of impoverishment." *In re McVicker*, 546 B.R. 46, 60 (Bankr. N.D. Ohio 2016) (quoting *In re Felgner*, No. 11-32274, 2011 Bankr. LEXIS 4118 at \*4, 2011 WL 5056994 at \*2 (Bankr. N.D. Ohio Oct. 24, 2011)). The homestead exemption has been said to prevent debtors from being "forced to sell their residence to satisfy creditors, potentially leaving the debtor homeless, shifting the costs of the debtor's care, at least temporarily, onto housing shelters or government programs[.]" *In re Way*, No. 12-60209, 2014 Bankr. LEXIS 3985, at \*8, 2014 WL 4658745, at \*3 (Bankr. N.D. Ohio Sept. 17, 2014). Similarly, the motor vehicle exemption can be said to prevent debtors from losing their means of transportation to their jobs, healthcare, food markets, and many other places vital to their well-being and, also, helping to alleviate or decrease their need to rely upon government programs for their support and maintenance. Therefore, exemptions play a vital role not only in the bankruptcy system, but also in the functioning of society.

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filed their bankruptcy petition, the adjusted dollar amounts for the motor vehicle exemption was \$4,000, and for the wild card exemption was \$1,325. These figures became effective on April 1, 2019.

Like the federal exemptions, the Ohio exemptions also contains exceptions to their applicability. For example, exemptions exist for pensions, benefits, annuities, retirement allowances, accumulated contributions, and deferred compensation programs offered by the state of Ohio and any state governmental unit or municipal corporation. Ohio Rev. Code § 2329.66(A)(10)(a). However, it provides exceptions to that exemption, including for theft in office and other felonies committed while serving in a public position and orders of domestic relations courts providing for marital distributions. Similarly, Ohio provides an exemption for payments received from a stock bonus or profit-sharing plan on account of illness, disability, death, age, or length of service and provides similar exceptions. Ohio Rev. Code. § 2329.66(A)(10)(b). In addition, Ohio exempts payments and benefits under Individual Retirement Accounts and Keogh accounts, with the following exceptions: “. . . any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code[.]” Ohio Rev. Code § 2329.66(A)(10)(c) and (d). Exemptions exist for most personal injury settlements. Ohio Rev. Code § 2329.66(A)(12)(c) and (d). Similarly, wages, to a defined amount, are exempt. Ohio Rev. Code § 2329.66(A)(13).

Much like the federal exemption scheme, Ohio has adopted an extensive exemption scheme with numerous exemptions protecting debtors with particular exceptions to those exemptions for limited situations.

### 3. *Law v. Siegel and Its Progeny*

In 2014 the Supreme Court decided *Law v. Siegel*, 571 U.S. 415 (2014). In *Siegel* the lower courts permitted the Chapter 7 trustee to surcharge and recover from the debtor’s equity in his residence substantial expenses incurred by the trustee in establishing that a mortgage lien on the debtor’s residence was fraudulently placed on the property by the debtor. *Id.* at 419-20. These

expenses otherwise would have been subsumed by the debtor's homestead exemption. *Id.* The lower courts found that there was a bad faith basis to allow the exempt value in the residence to be invaded by the trustee. *Id.* The Court reversed the lower courts, finding that a bad faith or equitable exception to exemptions did not exist, stating:

[Section] 522 sets forth a number of carefully calibrated exceptions and limitations, some of which relate to the debtor's misconduct. For example, § 522(c) makes exempt property liable for certain kinds of prepetition debts, including debts arising from tax fraud, fraud in connection with student loans, and other specified types of wrongdoing. Section 522(o) prevents a debtor from claiming a homestead exemption to the extent he acquired the homestead with nonexempt property in the previous 10 years "with the intent to hinder, delay, or defraud a creditor." And § 522(q) caps a debtor's homestead exemption at approximately \$150,000 (but does not eliminate it entirely) where the debtor has been convicted of a felony that shows "that the filing of the case was an abuse of the provisions of" the Code, or where the debtor owes a debt arising from specified wrongful acts—such as securities fraud, civil violations of the Racketeer Influenced and Corrupt Organizations Act, or "any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years." § 522(q) and note following § 522. The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.

*Id.* at 424. The Court went on to state that "[i]t is of course true that when a debtor claims a *state-created* exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption." *Id.* at 425 (italics in original). The court emphasized that "*federal law* provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." *Id.* (italics in original). Finally, the court noted that:

We acknowledge that our ruling forces Siegel to shoulder a heavy financial burden resulting from Law's egregious misconduct, and that it may produce inequitable results for trustees and creditors in other cases. We have recognized, however, that in crafting the provisions of § 522, "Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors." The same can be said of the limits imposed on recovery of administrative expenses by trustees. For the reasons we have explained, it is not for courts to alter the balance struck by the statute.

*Id.* at 426-27 (citations omitted).

a. *Ellmann v. Baker*

Following *Law v. Siegel*, the Sixth Circuit decided *Ellmann v. Baker (In re Baker)*, 791 F.3d 677 (6th Cir. 2015). In *Baker*, the debtors' residence was foreclosed upon pre-petition. *Id.* at 679. The debtors did not schedule this house, or any cause of action relating to it, or the foreclosure. *Id.* After they obtained a Chapter 7 discharge and their case was closed, the debtors sued the holder of the sheriff's deed to the property and its legal counsel. *Id.* at 680. The case lasted over four years. *Id.* Upon discovering this lawsuit, the trustee was granted permission to reopen the bankruptcy case to administer that cause of action as property of the bankruptcy estate. *Id.* The debtors then amended their schedules to add the cause of action and to claim a wildcard exemption in it. *Id.*

The trustee objected to the amendment of the debtors' schedules to add the exemption in the cause of action, asserting that: 1) the debtors' delinquent omission of the cause of action on their schedules interfered with the trustee's administration of the bankruptcy estate; (2) the debtors concealed the cause of action; (3) the exemption claims were asserted in bad faith; and (4) even if they did not know about the cause of action when the bankruptcy case was closed, the debtors nevertheless needed to amend their schedules sooner to include the cause of action. *Id.* The trustee eventually settled the cause of action and the bankruptcy court denied the trustee's objection to the wildcard exemption in part because *Law v. Siegel* prohibited the denial of exemptions on bad faith or equitable grounds. *Id.* On appeal, the trustee argued that *Siegel* did not apply to a case which was closed and for which the debtors were seeking to reopen the case to add an omitted asset and claim of exemption, relying on *Lucius v. McLemore*, 741 F.2d 125 (6th Cir. 1984), which permitted courts to deny motions to amend exemptions if the debtor attempted to conceal the related property

or acted in bad faith. *Id.* at 681. The Sixth Circuit affirmed the bankruptcy court's decision and noted that to the extent *Lucius* conflicts with *Siegel*, it has been effectively overruled. *Id.* at 682-83. The court held that "under *Siegel*, bankruptcy courts do not have authority to use their equitable powers to disallow exemptions or amendments to exemptions due to bad faith or misconduct." *Id.* at 683.<sup>8</sup>

**b. *In re Hurt***

Following *Law v. Siegel* and *Ellmann*, was the bankruptcy court decision of *In re Hurt*, 542 B.R. 798 (Bankr. E.D. Tenn. 2015). In *Hurt* the Chapter 7 trustee objected to the exemption claimed by the debtor wife in funds held in a bank account that was solely her account. *Id.* at 799. The account was opened three days before the joint bankruptcy case was filed by Mr. and Mrs. Hurt, with funds obtained by Mr. Hurt from the sale of a piece of real estate which he and his brother inherited. *Id.* at 800. The debtors opened one account in his name and one account in her name and split the proceeds from the inherited real estate between the two accounts. *Id.* Tennessee is an "opt out" state and has a \$10,000 per debtor personal property exemption which each debtor claimed in their respective bank accounts. *Id.* at 804-05. The trustee only objected to the wife's claim of exemption in the funds in her account and asserted three bases for denying the exemption: 1) the deposit in the wife's account was a transfer by Mr. Hurt which was a fraud on his creditors recoverable under §§ 548 and 551; 2) the Tennessee personal property exemption statute did not allow an item obtained under such circumstances to be exempted; and 3) the debtor wife's exemption claim was fraudulently asserted. *Id.* at 799. See Fed. R. Bankr. P. 4003(b)(2) ("trustee

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<sup>8</sup> While the Sixth Circuit recognized that some courts view the Supreme Court's discussion concerning the prohibition of the denial of exemptions on bad faith or other equitable grounds as dicta, since the case concerned the surcharging of an exemption as opposed to its disallowance, the court noted that "[l]ower courts are obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *Ellman v. Baker (In re Baker)*, 791 F.3d 677, 682 (6th Cir. 2015).

may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption.”). With respect to the first argument, the court found that Mr. Hurt did not intend to defraud his creditors in opening the two separate accounts, but did so assuming the proceeds were joint marital property and that the Hurts were otherwise engaged in permissible exemption planning, citing *Ellmann v. Baker* and *Law v. Siegel*. *Id.* at 800-04. With respect to the second argument as to the Tennessee exemption statute precluding the use of the exemption, the court cited the statute which prohibits the exempting of assets acquired with fraudulently obtained funds:

An item shall not be eligible, in whole or in part, for the personal property exemption provided by this part, if the item has been purchased with or maintained by fraudulently obtained funds, or if ownership of the item has been maintained using fraudulently obtained funds. A court shall be required to find by a preponderance of evidence that an item was purchased with or maintained by funds obtained by defrauding another person or that ownership of an item was maintained by funds obtained by defrauding another person in order to disqualify the item from eligibility for the personal property exemption.

Tenn. Code § 26-2-103(b).<sup>9</sup> *Id.* at 805. While the court found that the trustee met his burden of proving a prima facie case, after the debtors put on their defense and the court weighed the evidence, it ultimately determined that the trustee did not carry his burden of proving by a preponderance of the evidence that the opening of the separate accounts with the proceeds split between the two accounts was done fraudulently. *Id.* at 807-08. Accordingly, the court rejected all of the trustee’s arguments for denying Mrs. Hurt’s exemption on the funds held in the bank account established in her name. *Id.* at 808.

However, in denying the trustee’s objection, the court explained that allowing exemptions under circumstances such as in *Hurt* does not open the flood gates to exemptions being created through fraudulently transferred property:

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<sup>9</sup> Ohio does not have a comparable statute.

This court's ruling that the Bankruptcy Code allows even property fraudulently transferred to be the subject of an exemption raises concerns that debtors are being given a green light to commit fraud. However, the Trustee is not left without any remedy against intentional fraudulent transfers made in contemplation of bankruptcy. The Bankruptcy Code still provides remedies to defrauded creditors including the denial of discharge under 727(a)(1) or the dischargeability of a particular debt under section 523(a)(2), dismissal of the case, or, if the fraud was in connection with the transfer of an asset, avoidance of the transfer and recovery of the asset. The debtor may temporarily gain a \$10,000 exemption but find her ownership interest avoided and subject to turn over. She may face a judgment for the value of the transfer under 11 U.S.C. §§ 548 and 550(a) which is no longer dischargeable. The limitations on the amount of exemptions will also serve as a governor on run away debtors.

*Id.* at 804. (citation omitted).

**c. *Goodrich v. Fuentes***

*Goodrich v. Fuentes*, CV-15-2080-MWF, 2015 U.S. Dist. LEXIS 192763 (C.D. Cal. Sept. 23, 2015), *aff'd* 687 Fed. Appx. 542 (9th Cir. 2017), followed *Siegel, Baker, and Hurt. Fuentes* involved the issue of “whether a fraudulent transferee spouse is entitled to a homestead exemption in property fraudulently transferred by his spouse, who is a Chapter 7 debtor in a separate bankruptcy case.” *Id.* at \*1. Debtor Rudy Fuentes’ wife, Aida Fuentes, originally owned the property in question in her sole name as her sole property. *Id.* at \*2. In 2011, five years after marrying Rudy, she conveyed the property to him. *Id.* They both continuously resided in the property. *Id.* In 2013 Aida filed a Chapter 7 bankruptcy case. *Id.* The trustee of her estate pursued the conveyance to Rudy as a fraudulent transfer and the bankruptcy court found that it was a fraudulent conveyance. *Id.* at \*3-4. In 2014 Rudy filed his own Chapter 7 bankruptcy and asserted a possessory homestead exemption claim against the property under California law, to which the trustee objected. *Id.* The trustee asserted that Rudy could not assert an exemption in property that was fraudulently conveyed to him. *Id.* at \*4. The Bankruptcy Court rejected this contention, stating that:

[E]ven though the Court has determined that the Trustee is entitled to judgment as a matter of law, thereby avoiding the Transfer as a constructively fraudulent transfer, the Court does not find that Debtor loses his right to the claimed homestead exemption in light of Debtor's continuous residency in the Property. Under § 541(a)(1), "property of the estate" includes "all legal or equitable interests of the debtor." 11 U.S.C. § 541(a)(1). Trustee Goodrich has not demonstrated how Debtor's possessory interest would not fall within the broad category of an equitable interest.

*Id.* at \*5. The Bankruptcy Court also found that "neither Debtor's receipt of an allegedly fraudulently transferred deed, Debtor's claim of a homestead exemption in fraudulently transferred property, nor Debtor's bankruptcy filing to protect the Property from avoidance provides a sufficient basis to deny Debtor's claimed homestead exemption." *Id.* at \*5-6. Finally, the Bankruptcy Court held that, under *Siegel*, a bankruptcy court could not deny an exemption for bad faith absent an appropriate statutory basis, and no basis existed under California law to deny it. *Id.* at \*6.

On appeal to the District Court, the trustee asserted that "by allowing the homestead exemption of \$175,000 of the fraudulent transferee in this case, the Bankruptcy Court sustained the positive fraud of Rudy and Aida Fuentes, and contravened the policies of the Bankruptcy Code and the purpose and intent of section 522(g) and section 548, along with various provisions of California law" and "if upheld, the Bankruptcy Court's decision would provide debtors with a blueprint for insulating certain fraudulent transfers to third parties, and would discourage trustees from pursuing fraudulent transfers." *Id.* at \*17. The trustee argued that the policy behind § 522(g)(1), which prohibits a debtor taking an exemption in property which the debtor voluntarily transfers and which the trustee recovers for the benefit of the bankruptcy estate, supported denying the homestead exemption to Rudy and permitting the exemption would just allow debtors like Aida to skirt § 522(g)(1) by obtaining the benefit of the exemption through their spouse. *Id.* The District Court rejected these arguments holding that "in the absence of case law directly addressing

the question of whether a fraudulent transfer can invalidate the *transferee's* claimed exemption, the Court finds the reasoning of these cases instructive. While both cases [*Siegel* and *Elliott v. Weil* (*In re Elliott*), 523 B.R. 188 (B.A.P. 9th Cir. 2014)] specifically address bad faith, their articulation of the rule is actually much broader.” *Id.* at \*21. The court then went on to explain that the Supreme Court “made clear that while “[a] debtor need not invoke an exemption to which the statute entitles him; [] if he does, the court may not refuse to honor the exemption absent a valid statutory basis for doing so.” *Id.* at \*22. The trustee further argued that allowing an exemption in property fraudulently transferred to the debtor would conflict with the Uniform Fraudulent Transfer Act and the Bankruptcy Code’s fraudulent transfer section, § 548. *Id.* at 24. The court also rejected those arguments, finding that the trustee “failed to establish that Rudy Fuentes *actually violated* any provision that specifically limits a claimed exemption, and therefore they cannot form the basis for such an invalidation here.” *Id.* at \*24-25 (italics in original). Consequently, the District Court affirmed the bankruptcy court’s allowance of Rudy’s homestead exemption despite Rudy having received his interest in the property through a fraudulent conveyance.

The Ninth Circuit affirmed the District Court, finding that without “a valid statutory basis for doing so,” the bankruptcy court could not “refuse to honor” the exemption and the trustee failed to elicit any such statutory basis or other federal or state law ground for denying the exemption. *Goodrich v. Fuentes* (*In re Fuentes*), 687 Fed. Appx. 542, 544-45 (9th Cir. 2017) (quoting *Law v. Siegel*, 571 U.S. 415, 424 (2014)).

**d. *In re Rosich***

The Bankruptcy Court for the Western District of Michigan confronted a similar situation in the case of *Carol K. Rosich*, Case No. 13-06483, which spawned a number of reported decisions

on various issues.<sup>10</sup> The debtor transferred a piece of real estate from herself or a revocable trust to herself and her husband, who did not file a bankruptcy petition, through a deed which created an estate by the entirety. The trustee pursued the conveyance as a fraudulent conveyance and objected to exemptions claimed by the debtor, but initially did not object to the homestead exemption claimed by the debtor in that property. The trustee belatedly attempted to object to the asserted exemption through Rule 4003, which allows objections to be asserted within one year after the closing of the case “if the debtor fraudulently asserted the claim of exemption.” Fed. R. Bankr. P. 4003(b)(2). Through the series of reported decisions, the court determined that the transfer to the debtor was avoidable as being constructively fraudulent. The court then noted, however, that avoiding a transfer under § 548 and the remedies provided by § 550 for avoided transfers are separate determinations.<sup>11</sup> Under § 550, the court could either provide for the recovery of the transferred property by the trustee or, in the alternative, it could award a monetary judgment in favor of the trustee for the value of the transfer. The court determined that, despite finding that the transfer of the property was constructively fraudulent, the homestead exemption claimed by the debtor in the property protected the debtor’s interest in the property from recovery by the trustee. However, the court reserved for trial the determination of whether it should award judgment against the debtor and her husband for the value of the transfer under § 550.

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<sup>10</sup> *In re Rosich*, 558 B.R. 199 (Bankr. W.D. Mich. 2016); *Moyer v. Rosich (In re Rosich)*, 561 B.R. 668 (Bankr. W.D. Mich. 2016); *Moyer v. Rosich (In re Rosich)*, 562 B.R. 682 (Bankr. W.D. Mich. 2017); *Moyer v. Rosich (In re Rosich)*, 570 B.R. 278 (Bankr. W.D. Mich. 2017); *Moyer v. Rosich (In re Rosich)*, 582 B.R. 694 (Bankr. W.D. Mich. 2018); *Moyer v. Rosich (In re Rosich)*, 585 B.R. 868 (Bankr. W.D. Mich. 2018).

<sup>11</sup> See *Harrison v. Brent Towing Co. (In re H & S Transp. Co.)*, 939 F.2d 355, 358 (6th Cir. 1991) (“The Code specifically ‘separates the identification of avoidable transfers (§ 547) from the identification of those who must pay (§ 550)’. . . . If it is determined that the transfer is a preference under section 547(b) and none of the exceptions under section 547(c) apply, we then look to section 550(a) to determine to whom the trustee may look for recovery of the property.” (citations and footnote omitted)); *Ray v. City Bank and Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1493 (6th Cir. 1990) (“11 U.S.C. § 547 specifies which transfers the trustee may avoid. 11 U.S.C. § 550, however, determines from whom the trustee may recover those voidable transfers or preferences.”).

#### 4. Fraudulent Conveyance Law

The Trustee contends that she may avoid the transfer of the one-half interest in the vehicle to Judy because it was actually fraudulent (actual intent to hinder, delay, or defraud creditors) and was constructively fraudulent (conveyed by the debtor while the debtor was insolvent or which caused insolvency, without having received reasonably equivalent value). 11 U.S.C. § 548(a)(1)(A) and (B).

##### a. Actual Intent to Hinder, Delay, or Defraud Creditors

A trustee may avoid a transfer that was made within two years before the bankruptcy petition was filed if the debtor “made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted[.]” 11 U.S.C. § 548(a)(1)(A).

The burden lies with the Trustee to prove a fraudulent transfer claim by a preponderance of the evidence. *Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 789 (Bankr. S.D. Ohio 2009). Judy contends that the actions of the Debtors were pre-bankruptcy exemption planning and therefore the transfer of the vehicle title cannot be avoided because such planning is not fraudulent, but rather permissible. “The general rule which has emerged from the decisional law is that mere conversion of property from non-exempt to exempt status on the eve of bankruptcy does not establish fraud.” *In re Beckman*, 104 B.R. 866, 869 (Bankr. S.D. Ohio 1989). See *In re Wadley*, 263 B.R. 857, 859-60 (Bankr. S.D. Ohio 2001) (“[C]onversion of non-exempt assets into exempt assets does not, by itself, establish fraud.” The court explained, through a review of legislative history, that “[e]ven if a debtor converts the assets with the intent to place them beyond the reach of creditors, the debtor’s intent cannot be fraudulent because it is in line with the very purpose of exemptions.”). Because pre-bankruptcy exemption planning is permissible and in line with

legislative history, extrinsic evidence of an intent to defraud creditors must be shown for a court to consider determine that such a transfer is avoidable. *Beckman*, 104 B.R. at 870.

The Trustee has, in part, relied upon *Butz v. Wheeler (In re Wheeler)*, 17 B.R. 85 (Bankr. S.D. Ohio 1981) in support of her argument that she may recover the transfer of the one-half interest to Judy. *Wheeler* involved an adversary proceeding through which the Chapter 7 trustee sought to avoid the transfer of a one-half interest in tax refunds by the debtor husband to the debtor wife as a preferential or fraudulent transfer. Particularly, the Trustee relies upon the court's conclusion that the exemption planning defense to fraudulent transfers does not apply between separate people, such as spouses. In other words, he concluded that the exemption planning negation of fraudulent intent in converting nonexempt property into exempt property only applies if the debtor is converting property the debtor owns from nonexempt to exempt property, such as by transferring money from a nonexempt bank account in the debtor's name to an Individual Retirement Account in the debtor's name, not from one debtor to another debtor. That being so, the court opined:

Although the pre-Petition conversion of property into non-exempt property has been considered proper under both the Bankruptcy Act and Code (facetiously referred to as "bankruptcy estate planning"), the instant transfer involves the conversion of non-exempt property of one Debtor to exempt property of another Debtor. In two-party situations such as this, the rule condoning property conversion from non-exempt to exempt property is inapplicable if the elements of a fraudulent conveyance are determined to exist, since, by definition, an inter vivos "gift" . . . is impermiss[ible] if within one year of the donor's bankruptcy Petition filing.

*Id.* at 89. However, this proposition has come into dispute following *Siegel*. In *Hurt*, after referencing *Wheeler*, the court stated:

In the past year there have been significant rulings in cases involving a debtor who claims an exemption in bad faith or who has engaged in misconduct. An objection based on bad faith or concealment of the property can no longer be sustained absent specific statutory authorization. This holding requires the court to address whether the two party fraudulent transfer exception to exemptions still applies in light of the recent rulings by the Supreme Court and the Sixth Circuit Court of Appeals.

*In re Hurt*, 542 B.R. at 802 (citation omitted). The *Hurt* court then rejected the proposition that the two-party rule could still be applied to deny an exemption claim post *Siegel*.

To make a determination as to fraudulent intent, courts look at certain “badges of fraud” which if present may constitute an intent to defraud. *In re Crescent Cmty., Inc.*, 298 B.R. 143, 149 (Bankr. S.D. Ohio 2003). These badges include:

- (1) Whether the transfer . . . was to an insider;
- (2) Whether the debtor retained possession . . . of the property transferred after the transfer;
- (3) Whether the transfer. . . was disclosed or concealed;
- (4) Whether before the transfer was made . . . the debtor had been sued or threatened with suit;
- (5) Whether the transfer was of substantially all of the assets of the debtor;
- (6) Whether the debtor absconded;
- (7) Whether the debtor removed or concealed assets;
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred . . . ;
- (9) Whether the debtor was solvent or became insolvent shortly after the transfer was made . . . ;
- (10) Whether the transferred occurred shortly before or shortly after a substantial debt was incurred; and
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

*Grove-Merritt*, 406 B.R. at 794. “If the party alleging fraud is able to demonstrate a sufficient number of badges, the burden of proof then shifts to the defendant to prove that the transfer was not fraudulent.” *Crescent Cmty.*, 298 B.R. at 149 (citation and quotation marks omitted).

**b. Constructive Fraud**

The Trustee also contends that she may avoid the transfer of the one-half interest in the vehicle to Judy because the transfer was constructively fraudulent under § 548(a)(1)(B). That

provision provides that a trustee may avoid a transfer that was made within two years before the bankruptcy petition was filed if the debtor:

(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B). Further, “ ‘value’ means property or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.” 11 U.S.C. § 548(d)(2)(A).

**c. Fraudulent Conveyance Claims Under § 548 Are Post-Petition Claims Not Discharged Under the Debtor's Discharge**

With the Trustee suing Judy on behalf of Carroll's estate, the issue arises as to whether the Trustee's claims against Judy are prepetition claims or post-petition claims. This issue is critical because if the Trustee's claims against Judy are prepetition claims, they may have been discharged since Judy received her discharge on October 23, 2019. Section 727(b) provides that, except for a debt that is nondischargeable under § 523 of the Code, a discharge granted under subsection (a) “discharges a debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case[.]” 11 U.S.C. § 727(b). The Trustee's claims could not have arisen until the case was filed since: a) they are based on and arise out of

§ 548 and, because of this, could not come into existence until the case was filed; and b) the Trustee’s authority to pursue such claims did not arise until the Trustee was appointed after the case was filed. Therefore, even though the transfer to Judy occurred prepetition, such claims could not be prepetition claims which were discharged under § 727(b). *Guttman v. Fabian (In re Fabian)*, 458 B.R. 235, 258 (Bankr. Md. 2011) (“A bankruptcy trustee’s causes of action to recover fraudulent conveyances and preferential transfers, are independent of, and separate from, prepetition causes of action possessed by the debtor outside of bankruptcy. These actions arise after the petition date, and therefore are not themselves property of the estate.”) *See also Hurt*, 542 B.R. at 804 (“[The debtor] may face a judgment for the value of the transfer under 11 U.S.C. §§ 548 and 550(a) which is no longer dischargeable.”); *Brown v. Barclay (In re Barclay)*, BAP No. SC-17-1068-AKuS, 2018 Bankr. LEXIS 1524, at \*22, 2018 WL 2308267, at \*8 (B.A.P. 9th Cir. May 21, 2018) (concurring opinion) (“[T]he trustee’s avoiding powers have no existence independent of the bankruptcy case and never accrue to the debtor. In other words, the trustee’s avoidance claims arise, if at all, postpetition and vest in the trustee as the representative of the bankruptcy estate.”) (footnote omitted).<sup>12</sup>

**D. Conclusions of Law**

**1. Summary Judgment Is Inappropriate on the Issue of Intent Under § 548(a)(1)(A)**

The Trustee argues that the following badges of fraud are present and establish that the transfer was fraudulent under § 548(a)(1)(A): transfer to an insider, Carroll retained the use and benefit of the vehicle post-transfer, the transfer was not disclosed in the filings, legal actions were pending on the petition date, the transfer of the interest was substantially all of Carroll’s and Judy’s

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<sup>12</sup> See also *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 986 F.3d 633 (6th Cir. 2021) (State law malpractice claim was a post-petition claim and not property of the debtors’ Chapter 7 bankruptcy estate because the claim accrued post-petition when the debtors’ discharge was denied.).

assets, Carroll was insolvent at the time of the transfer, and Carroll received no consideration for the transfer. The parties stipulated that Carroll was insolvent at the time of the transfer and that Judy paid no consideration for the transfer of the one-half interest to her, both of which does support badges of fraudulent intent. Adv. Doc. 13 at ¶¶ 5 and 10.

However, Judy disputes the presence of many of the “badges” of fraud. and argues that the badges of fraud do not establish an intent to defraud. Although Carroll theoretically “retained the use and benefit” of the vehicle after the transfer of the title into both their names, Judy states that she was the only person in the household actually driving the vehicle so this “badge” does not weigh in favor of finding a fraudulent intent. With regard to disclosure, although Carroll and Judy did not disclose the title transfer in their filings, they did disclose the transfer at the meeting of creditors. Additionally, regarding the lawsuits, question #9 of their Statement of Financial Affairs shows that the most recent lawsuit was filed in 2010 and, therefore, Judy argues that pending lawsuits did not trigger the transfer of the title in an attempt to defraud creditors. Doc. 1 at 39. Also, Judy points out that Schedule A/B shows that the transfer of the interest the vehicle did not constitute “substantially all of their assets.” Doc. 21 at 4.

Judy argues that Carroll added her to the certificate of title when planning for their allowed exemptions to make sure that Judy would be able to retain their only working vehicle.<sup>13</sup> She further argues that there was no intent to defraud the creditors, but rather Carroll and Judy engaged in permissible pre-bankruptcy exemption and estate planning. She further argues that Carroll’s intent in transferring title into both his and Judy’s name was not to defraud creditors, but rather, to

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<sup>13</sup> Judy argues that the evidence establishes that the title was transferred by Carroll into both his and Judy’s names to allow the exemption to be claimed by both he and Judy. See footnote 3, *supra*. “[Judy and Carroll] chose to be ‘honest and fair’ Debtors by following the titling laws of the state of Ohio; thereby ensuring the protection of their main source of transportation needed to generate income for their household and properly claimed the bankruptcy exemptions which are to be construed liberally in favor of Debtors.” Adv. Doc. 21 at 4. In addition, it appears that Judy argues that there was an estate planning motive for transferring the title into both their names.

recognize reality that the vehicle was as much Judy's as his and to ensure that Judy would continue to be able to use the vehicle to provide for their sustenance.

Under these facts, the intent issue is a material question of fact as to the Trustee's establishing a claim under § 548(a)(1)(A). First, the court must weigh the facts, particularly the facts as they support or do not support the "badges of fraud" involved in determining fraudulent intent. A court is not to engage in the weighing of evidence in rendering summary judgment. Further, much of Judy's position depends upon her own statements and testimony. Of course, the court cannot assess her credibility without a trial. As recently stated by the Sixth Circuit, in ruling on a motion for summary judgment, the court is not to weigh the evidence or to determine the truth. *Thompson v. Fresh Prods., LLC*, 985 F.3d 509, 523 (6th Cir. 2021). *See also Nat'l Elec. Annuity Plan v. Henkels & McCoy, Inc.*, \_\_\_ Fed. Appx. \_\_\_, 2021 WL 567868, at \*3, 2021 U.S. App. LEXIS 4296, at \*9 (6th Cir. Feb. 16, 2021) (At the summary judgment stage, "[t]he court does not engage in credibility determinations or weigh evidence[.]"). Further, the standard for granting summary judgment does not change "simply because the parties present cross-motions" for summary judgment. *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991).

For these reasons, a material issue of fact, namely Carroll's intent in transferring title to the vehicle precludes the rendering of summary judgment in favor of either party under the Trustee's claim under § 548(a)(1)(A). *See Rentas v. Gomez (In re Indrescom Sec. Tech. Inc.)*, 559 B.R. 305, 318 (Bankr. P.R. 2016) ("The existence of fraudulent intent is a factual question, usually inappropriate for summary judgment."); *In re Lehman Bros. Holdings v. JP Morgan Chase Bank, N.A.*, 541 B.R. 551, 577 (S.D.N.Y. 2015) ("Determining the existence of actual fraudulent intent is typically a question of fact that precludes summary judgment.").

**2. The Trustee Established that the Transfer of the One-Half Interest in the Vehicle to Judy Was Constructively Fraudulent**

Judy stipulated that she did not provide consideration for the transfer of the interest in the vehicle to her. Adv. Doc. 13 at ¶ 10. However, Judy argues that she provided value in services she performed for Carroll stating:

Additionally, Male Debtor's health problems limited his ability to drive and travel alone. With the Defendant now on the title, Defendant was able to also go to the Bureau of Motor Vehicles to renew registration on the Vehicle with[out] Defendant requiring Male Debtor to accompany her to take care of these tasks. This is beyond the "love and care of a spouse" but value at a minimum, of the cost by Male Debtor of hiring someone or a service to transport him to his and other places. There is reasonably equivalent value received by Male Debtor in not needing to take care of these types of issues.

Adv. Doc. 21 at 4. However, as noted, "value . . . does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A). The court views Judy's assertion as, at the time of the transfer, an unperformed promise to furnish support and, therefore, not qualifying as value as that term is defined. 11 U.S.C. § 548(d)(2)(A); Adv. Doc. 21 at 4. Further, despite making that argument, Judy did not cite anything in the record, as required by Federal Rule of Civil Procedure 56(c), to support that assertion.

A party opposing summary judgment has the burden to present "affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). Judy failed to submit any evidence that she provided reasonably equivalent value to Carroll in exchange for the transfer of the one-half interest in the vehicle. Thus, the court finds that the Trustee has established that Carroll was insolvent at the time of the transfer and that Judy failed to provide reasonably equivalent value in exchange for the one-half interest she received in the vehicle and, therefore, is entitled to summary judgment under § 548(a)(1)(B).

### 3. Judy is Entitled to the Use of the Motor Vehicle and Wildcard Exemptions

Because Carroll and Judy engaged in permissible pre-bankruptcy planning, she is entitled to use the exemptions to retain the vehicle. Under Ohio law, a court generally cannot recognize an interest in a motor vehicle “unless it is evidence[d] on the certificate of title.” *In re Miller*, 427 B.R. 616, 619 (Bankr. N.D. Ohio 2009). In *Miller*, the debtor-wife attempted to claim an exemption in a vehicle that was titled solely in the name of the debtor-husband. The court determined that because her name was not on the title of the vehicle, debtor-wife held only a “de-minimis” interest in the vehicle and therefore was not entitled to claim an exemption. *Id.* at 620. See also *In re Toland*, 346 B.R. 444, 449 (Bankr. N.D. Ohio 2006) (holding that debtor-husband was “not entitled to claim an exemption in his wife’s vehicle.”).

Here, Carroll specifically added Judy to the certificate of title of the vehicle prior to the bankruptcy filing so that her interest would be recognized under Ohio law and she would be entitled to claim such an exemption and retain the vehicle for her use. The Trustee has not asserted any basis for denying the exemptions which Judy claims other than because she received her interest in the vehicle as a result of a fraudulent conveyance made by Carroll for exemption and estate planning purposes, as the vehicle was the only vehicle which either of the debtors owned.

Under *Seigel* and *Baker*, an exemption survives an attempt to avoid the transfer of property to a debtor as a fraudulent conveyance. In both the *Fuentes* and *Rosich* decisions the courts specifically held that the exemptions protect the property transferred to the debtor despite the trustee’s proof that the exempt property was fraudulently conveyed to the debtor. There is no statutory basis for denying Judy’s exemptions in the vehicle. As noted in *Siegel*, § 522 provides a “meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions” and bankruptcy courts “are not authorized to create additional exceptions.” *Siegel*, 571 U.S. at 424. Further, as noted in *Fuentes*, while § 522(g) prohibits the transferor who

voluntarily transfers property from claiming an exemption in that property if the trustee recovers that property, it does not preclude the transferee from claiming an exemption in that transferred property. Similarly, § 2329.66 contains numerous exemptions and exceptions to those exemptions, but no exception to Judy's motor vehicle and wildcard exemptions apply. While the Supreme Court noted in *Siegel* that state law could provide such an exception to an exemption, the Trustee has not pointed one out and the court is not aware of such an exception.

Ohio allows “[e]very person who is domiciled in this state [to] hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order,” including \$4,000 in a motor vehicle. Ohio Rev. Code § 2329.66(A)(2). Under the wildcard exemption, § 2329.66(A)(18), another \$1,325 in the vehicle may be exempted. In consequence, because Judy is entitled to the motor vehicle and wildcard exemptions in the vehicle, the Trustee may not execute against or cause the vehicle to be sold under § 550.

The court cannot envision a situation more compelling than this one for enforcing the purpose of the exemption laws – to allow the debtor to retain discreet interests in minimal property so that the debtor can survive – in this case a simple mode of transportation to Judy's work and as part of her employment as a delivery driver, to her medical appointments, and to the grocery store. Judy has only requested that her \$4,500 interest in her and Carroll's joint motor vehicle on the date the bankruptcy was filed be preserved for her benefit – a modest request. Accordingly, the Trustee's objection to Judy's motor vehicle and wildcard exemptions in the vehicle is denied.

**4. Despite Judy's Entitlement to the Exemptions in the Vehicle, the Trustee is Entitled to Judgment for the Value of the One-Half Interest in the Vehicle Transferred to Judy. However, the Value of the Vehicle Must Be Established at Trial.**

The Trustee is entitled to judgment against Judy under §§ 548(a)(1)(B) and 550(a)(1) on account of the transfer of the one-half interest in the vehicle being constructively fraudulent. Based

upon the evidence submitted, the Trustee established that Judy failed to provide reasonably equivalent value to Carroll at the time of the transfer in exchange for the one-half interest in the vehicle conveyed by Carroll to Judy and that Carroll was insolvent at the time of the transfer. Thus, the Trustee established entitlement to judgment under § 548(a)(1)(b). *See Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 805 (Bankr. S.D. Ohio 2009). And under § 550(a)(1), the Trustee “may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . . from the initial transferee of such transfer . . . [.]” 11 U.S.C. § 550(a)(1).

While Judy’s interest in the vehicle is exempt, prohibiting the Trustee from executing against her in rem interest in the vehicle or causing its sale, she is not immune from liability on an in personam basis for the fraudulent transfer under §§ 548(a)(1)(B) and 550(a)(1). Thus, while the exemptions protect her in rem interests in the vehicle from execution by the Trustee, because the Trustee’s claim is a nondischargeable post-petition claim against Judy, the court may enter an in personam judgment under § 550(a)(1). *See Hurt*, 542 B.R. at 804 (Despite an exemption in the transferred property, the debtor “may face a judgment for the value of the transfer under 11 U.S.C. §§ 548 and 550(a) which is no longer dischargeable.”); *Rosich*, 570 B.R. 278, 287 (Bankr. W.D. Mich. 2017) (“[T]he court will grant the Motion to the extent the Trustee seeks an order avoiding the challenged transfer, but deny the Motion to the extent he seeks recovery of the Property . . . but will permit the Trustee, at trial, to attempt to persuade the court to exercise its discretion under § 550(a) in favor of awarding monetary relief against both Defendants.”).

The Trustee has requested that the court enter judgment in the amount of \$5,175 for the value of the interest transferred to Judy. Adv. Doc. 18 at 4; Adv. Doc. 24 at 4. While the Trustee asserts that value in her memoranda, the Trustee has not submitted evidence in support of that value. Further, while the transfer occurred approximately ten days before the bankruptcy was filed,

Carroll and Judy scheduled the vehicle at that time as having a value of \$9,100. While the court can grant summary judgment on the basis of an undisputed fact, Judy disputed the vehicle's value in her answer, and the Trustee has only raised value in her request for relief and has not supported the vehicle's value with evidence. Fed. R. Civ. P. 56(e) and (f). The court finds that the vehicle's value on the transfer date is a disputed issue of material fact.

#### V. Conclusion

For the foregoing reasons, the Trustee's objection to Judy's exemptions in the vehicle is denied. The Trustee's summary judgment motion is granted in part and denied in part as follows:

- (1) The Trustee is denied summary judgment to avoid the transfer to Judy of the one-half interest in the vehicle as an actual fraudulent transfer under § 548(a)(1)(A).
- (2) The Trustee is granted summary judgment to avoid the transfer to Judy of the one-half interest in the vehicle as a constructively fraudulent transfer under § 548(a)(1)(B).
- (3) However, since the value of the vehicle on the date of the transfer has not been established and is a material issue of fact, judgment in favor the Trustee pursuant to § 550(a)(1) cannot be entered at this time, and summary judgment is denied as to that count.

Upon establishment of the value of the vehicle, the court will enter judgment on behalf of the Trustee in the amount of one-half the value of the vehicle on the date of transfer pursuant to § 550(a)(1). The court will issue a separate order scheduling for trial the Trustee's claim under § 548(a)(1)(A) and the issue of the value of the vehicle on the date of the transfer.<sup>14</sup> Judy's motion for summary judgment is denied. The court is contemporaneously entering orders consistent with this decision.

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<sup>14</sup> Of course, the parties may stipulate to the value of the vehicle, and otherwise resolve any issues remaining in advance of the scheduled trial.

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Copies to:

Erin C. Renneker, 576 Mound Court, Suite B, Lebanon, Ohio 45036 (Plaintiff)

Counsel for the Defendant

▲ Caution  
As of: July 25, 2025 6:45 PM Z

[Hamo v. Wilson \(In re Hamo\)](#)

United States Bankruptcy Appellate Panel for the Sixth Circuit  
March 30, 1999, Submitted ; May 24, 1999, Decided ; May 24, 1999, Filed  
Nos. 98-8073, 98-8074

**Reporter**

233 B.R. 718 \*; 1999 Bankr. LEXIS 570 \*\*; Bankr. L. Rep. (CCH) P77,929; 41 Collier Bankr. Cas. 2d (MB) 1715; 1999 FED App. 0007P (6th Cir.)

In re: RONALD L. HAMO, Debtor. RONALD L. HAMO, Appellant. v. RICHARD A. WILSON, TRUSTEE, Appellee.

**Prior History:** **[\*\*1]** Appeal from the United States Bankruptcy Court for the Northern District of Ohio at Akron. No. 95-52282.

**Disposition:** AFFIRMED.

**Core Terms**

bankruptcy court, exemption, Properties, omissions, schedules, reasonably necessary, clearly erroneous, retirement, factors

**Case Summary**

**Procedural Posture**

Debtor appealed from the United States Bankruptcy Court for the Northern District of Ohio at Akron, arguing that the bankruptcy court's findings that he was entitled to only a partial exemption of his IRA, as reasonably necessary for his support, was clearly erroneous and that the denial of his discharge pursuant to [11 U.S.C.S. § 727](#) was also clearly erroneous.

**Overview**

Debtor claimed his IRA as exempt in his Chapter 7 bankruptcy case, and the trustee filed an objection. The bankruptcy court

conducted a trial to determine the extent to which the funds were reasonably necessary for the support of debtor pursuant to [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(c\)](#). Because debtor had no dependents, his wife was able to fully support him, he had not applied for unemployment, had erroneously testified that he had been denied Social Security disability, and had no assets for his creditors to attach, the bankruptcy court found that he needed only \$ 20,000 of his IRA to sustain his basic needs. The trustee filed an adversary proceeding to deny debtor his discharge, and established that debtor had failed to disclose items to the court. The court denied discharge pursuant to [11 U.S.C.S. §§ 727\(a\)\(4\)\(A\)](#) and [\(B\)](#) for knowingly and fraudulently making a false oath or account. On appeal, the decision was affirmed, the court reasoning that in light of the nature and extent of the omissions, the bankruptcy court did not err in concluding debtor made knowing and fraudulent false oaths or accounts which warranted a denial of discharge.

**Outcome**

The court affirmed the order of the bankruptcy court denying debtor's discharge and the order allowing debtor a partial exemption of his IRA because in light of the nature and extent of debtor's omissions, the bankruptcy court did not err in concluding debtor made material omissions and inaccuracies with a reckless indifference to the truth, which amounted to

Christal Caudill

233 B.R. 718, \*718; 1999 Bankr. LEXIS 570, \*\*1

knowing and fraudulent false oaths or accounts and warranted a denial of discharge. [HN2](#) **Standards of Review, De Novo Standard of Review**

### LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

#### [HN1](#) **Judicial Review, Bankruptcy Appeals Procedures**

The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard pursuant to *Fed. R. Bankr. P. 8013*. A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

The bankruptcy court's interpretation of Ohio's exemption statute is reviewed under the de novo standard as it involves a question of law. Under the de novo standard, the Bankruptcy Appellate Panel determines questions of law independent of the trial court's determination.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

Bankruptcy Law > Exemptions > General Overview

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers

#### [HN3](#) **Exemptions, Bankruptcy Code Exemptions**

Ohio has opted out of the federal exemptions, pursuant to *11 U.S.C.S. § 522(b)*.

Bankruptcy Law > Exemptions > General Overview

#### [HN4](#) **Bankruptcy Law, Exemptions**

See *Ohio Rev. Code Ann. § 2329.66(A)(10)(c)*.

Bankruptcy Law > Exemptions > General Overview

#### [HN5](#) **Bankruptcy Law, Exemptions**

Under the Ohio retirement exemption statute, as applied by the bankruptcy courts, the standard for determining to what extent the pension benefits are reasonably necessary for the debtor's support is not whether he has sufficient funds to sustain his former lifestyle,

233 B.R. 718, \*718; 1999 Bankr. LEXIS 570, \*\*1

but whether he has enough to sustain his present and future needs, taking into account any special needs of the particular debtor. The burden is on the trustee to establish, by a preponderance of the evidence, that the exemption should be disallowed. The trial court must analyze the facts and circumstances of each case.

### [HN7](#) **Bankruptcy Law, Discharge & Dischargeability**

See U.S.C.S. [§ 727\(a\)\(4\)\(A\)](#).

Bankruptcy Law > Discharge & Dischargeability > General Overview

### [HN8](#) **Bankruptcy Law, Discharge & Dischargeability**

Under U.S.C.S. [§ 727\(a\)\(4\)](#), the trustee has the burden of proving, by a preponderance of the evidence, that a debtor's omissions constitute an intent to hinder, delay, or defraud his creditors. A debtor's intent may be inferred from circumstantial evidence or from "the debtor's course of conduct."

Bankruptcy Law > Exemptions > General Overview

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### [HN6](#) **Bankruptcy Law, Exemptions**

Bankruptcy courts uniformly consider eleven factors in making the determination of the amount of the retirement funds necessary to sustain a debtor's needs: The debtor's present and anticipated living expenses; the debtor's present and anticipated income from all sources; the age of the debtor; the health of the debtor; the debtor's ability to work and earn a living; the debtor's job skills, training, and education; the debtor's other assets; liquidity of other assets; the debtor's ability to save for retirement; special needs of the debtor; and the debtor's financial obligations (e.g., alimony or support). A bankruptcy court's analysis is not restricted to these factors, nor is a bankruptcy court required to specifically discuss each factor in every case. However, these factors are appropriate for a trial court's consideration in its analysis of the totality of facts and circumstances in each case.

Bankruptcy Law > Discharge & Dischargeability > General Overview

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Embezzlement & False Representations

Bankruptcy Law > Discharge & Dischargeability > General Overview

Bankruptcy Law > Discharge & Dischargeability > Liquidations > General Overview

Bankruptcy Law > ... > Liquidations > Denial of Discharge > General Overview

Business & Corporate Compliance > ... > Liquidations > Denial of Discharge > Concealment & Fraudulent Transfers

Bankruptcy Law > ... > Liquidations > Denial of Discharge > Concealment & Fraudulent Transfers

Business & Corporate

Compliance > ... > Liquidations > Denial of  
 Discharge > False Accounts & Oaths  
 Bankruptcy  
 Law > ... > Liquidations > Denial of  
 Discharge > False Accounts & Oaths

Bankruptcy Law > Discharge &  
 Dischargeability > Exceptions to  
 Discharge > Malicious & Willful Injury

### [HN9](#) Exceptions to Discharge, Embezzlement & False Representations

A party objecting to a debtor's discharge pursuant to U.S.C.S. [§ 727\(a\)\(4\)\(A\)](#) must establish that, (1) the debtor made a statement while under oath, (2) the statement was false, (3) the statement related materially to the bankruptcy case, (4) the debtor knew the statement was false, and (5) the debtor made the statement with fraudulent intent. Statements in bankruptcy schedules are given under oath, and a fact is material if it concerns discovery of assets, business dealings or the existence or disposition of property. Knowledge may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information. A false statement or omission that is made by mistake or inadvertence is not sufficient grounds upon which to base the denial of a discharge, but a knowingly false statement or omission made by the Debtor with reckless indifference to the truth will suffice as grounds for the denial of a Chapter 7 general discharge.

**Counsel:** ON BRIEF: Thomas C. Pavlik, RUBENSTEIN, NOVAK, EINBUND & PAVLIK, Cleveland, Ohio, for Appellant.

ON BRIEF: Richard A. Wilson, Kent, Ohio, for Appellee.

**Judges:** Before: BROWN, STOSBERG, and WALDRON, Bankruptcy Appellate Panel Judges.

## Opinion

### [\*720] OPINION

The bankruptcy court rendered two separate decisions in this case, and the Debtor appealed both. First, the bankruptcy court denied the Debtor's discharge, pursuant to [11 U.S.C. §§ 727\(a\)\(2\)\(A\) & \(B\)](#) and [\(a\)\(4\)\(A\)](#), finding that he intentionally omitted information on his petition and made a false oath or account on the petition and other documents filed with the bankruptcy court. Second, the bankruptcy court determined that only \$ 20,000 of the Debtor's \$ 96,000 IRA was exempt under [OHIO REV. CODE ANN. § 2329.66\(A\)\(10\)\(c\)](#) as reasonably necessary for the support of the Debtor. For the reasons set forth below, the Panel **affirms** the bankruptcy court's decision on both matters.

### [\*721] I. ISSUES ON APPEAL

There are two issues in this appeal. The first issue is whether the bankruptcy court's finding, that the **[\*\*2]** Debtor was entitled to only a partial exemption in the amount of \$ 20,000 of his IRA, as reasonably necessary for his support, is clearly erroneous. The second issue is whether the bankruptcy court's finding that the Debtor's conduct satisfied the requisite fraudulent intent for denial of his discharge pursuant to [11 U.S.C. § 727](#) is clearly erroneous.

### II. JURISDICTION AND STANDARD OF REVIEW

The Panel has jurisdiction over final orders of the bankruptcy courts of the Northern District of Ohio pursuant to [28 U.S.C. § 158\(a\)\(1\)](#) and (c). The bankruptcy court's orders, denying the Debtor a discharge pursuant to [§§](#)

233 B.R. 718, \*721; 1999 Bankr. LEXIS 570, \*\*2

[727\(a\)\(2\)\(A\)](#) and [\(B\)](#) and [\(a\)\(4\)\(A\)](#) and determining the amount of the Debtor's IRA that is exempt pursuant to [OHIO REV. CODE ANN. § 2329.66\(A\)\(10\)\(c\)](#), are final and appealable orders.

The bankruptcy court determined that the Debtor was entitled to exempt only \$ 20,000 of the IRA and that he possessed the requisite intent to warrant denial of discharge. In reaching these conclusions, [HN1](#) the bankruptcy court entered findings of fact which are reviewed under the clearly erroneous standard. FED. R. BANKR. P. 8013. See [United States v. Mathews \(In re Mathews\)](#), 209 B.R. [\*\*3] 218 (B.A.P. 6th Cir. 1997). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *Id.* (citing [Anderson v. City of Bessemer City](#), 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)).

[HN2](#) The bankruptcy court's interpretation of Ohio's exemption statute is reviewed under the de novo standard as it involves a question of law. [Corzin v. Fordu \(In re Fordu\)](#), 209 B.R. 854, 857 (B.A.P. 6th Cir. 1997). Under the de novo standard, the BAP determines questions of law independent of the trial court's determination. *Id.*

### III. FACTS

Ronald L. Hamo (the "Debtor") filed bankruptcy on December 15, 1995. The case began as a joint Chapter 13 with his wife, who later deconsolidated her portion of the case. On May 30, 1996, the Debtor converted his case to Chapter 7 and claimed, as exempt, his IRA in the amount of \$ 71,257.73. The Trustee filed an objection to the Debtor's exemption claim.

On June 1, 1998, the bankruptcy court

conducted a trial to determine the extent to which the IRA funds were "reasonably necessary [\*\*4] for the support of the person and any of the person's dependents" pursuant to [OHIO REV. CODE ANN. § 2329.66\(A\)\(10\)\(c\)](#). The value of the IRA had appreciated to \$ 96,000 by the time of the hearing. The Debtor, age 54, underwent by-pass surgery in 1993 and has continued to suffer periodic heart attacks. His physician estimates that the by-pass will be effective for approximately seven years and testified that the Debtor's prognosis for the immediate future is "relatively good," though he may require additional invasive procedures. Additionally, since the massive heart attack in 1993, the Debtor has suffered from severe depression, and he is currently taking several medications. At the time of the heart attack in 1993, the Debtor owned and operated several restaurants and bars in Ohio and Florida; however, he has remained unemployed since 1993 and has no income of his own.

The Debtor has no dependents as his children are grown and self-supporting. Mrs. Hamo is and has been gainfully employed for several years at her current position. She has been able to fully support the Debtor in the past, and her income is adequate for her to continue to support the Debtor in the future.

[\*722] The Debtor [\*\*5] stated that he is unable to work at the present time, but other than contacting friends, he has not made an attempt to gain employment, and his physicians have not found him unable to work. He is not receiving, nor has he applied for, unemployment. Initially, he testified that he had been denied Social Security disability, but later at trial, he corrected his testimony to establish that he had never applied for Social Security. Nonetheless, he has not withdrawn any money from his pension funds. Because of the denial of his discharge, he is now saddled with \$ 260,000 in unsecured debt; however,

the Debtor himself has relatively no assets for his creditors to attach. The bankruptcy court fully analyzed factors applied by various bankruptcy courts in Ohio and found, based on the particular facts of this case, that the Debtor needed only \$ 20,000 of the IRA to sustain his basic needs in the future. On appeal, the Debtor admitted that he may not need the entire \$ 96,000, but argued that he needs more than \$ 20,000.

The Trustee filed an adversary proceeding to deny the Debtor his discharge. The Debtor again testified with respect to his medical problems, including psychological problems **[\*\*6]** stemming from depression, which he contends cause memory loss. A review of the trial transcript, however, establishes that with regard to some matters, he was able to articulate specific dates and particulars of events in detail, while often providing evasive answers to questions posed by the Trustee.

The Trustee proved conclusively at trial that the Debtor failed to disclose that he was president of a company called Freedom Properties, Inc. ("Freedom Properties"). The Debtor and his 30-year friend and lawyer, A. Richard Valore ("Valore"), formed Freedom Properties as a vehicle for the Debtor to repay Valore for money he had loaned the Debtor over many years, totaling approximately \$ 75,000. Freedom Properties purchased nine real properties, which it then attempted to sell for profit, and the sale proceeds were used to pay down Valore's debt. The Debtor acted as the sole operator of Freedom Properties from its inception in 1989. The Debtor hired the contractors who rehabilitated the properties, arranged for the closings, signed the tax returns for the corporation from 1993 through 1996, and signed the sale documents on seven of the nine properties which were sold. One of the properties **[\*\*7]** was sold within two days preceding the Debtor's bankruptcy, filed



December 15, 1995. The remaining properties were sold after the filing. The Debtor was actively engaged in selling these properties for Freedom Properties, yet he failed to disclose that he was president of the corporation on his schedules. Moreover, the Debtor used the net sale proceeds from these sales to reduce Valore's debt by \$ 38,000 after the filing. He also admitted granting Valore a mortgage on the residence (recorded on December 14, 1995, the day before the bankruptcy filing), but failing to disclose the mortgage in the schedules.

The Debtor also failed to list a \$ 50,000 personal injury claim resulting from a car accident in 1993, which claim the Debtor filed in state court in 1995. Not until the Trustee presented evidence at trial that the lawsuit had been voluntarily dismissed pursuant to a settlement did the Debtor disclose the lawsuit in his third amended schedules and acknowledge that the case had been pending at the time of the bankruptcy filing.

The Debtor also failed to list a \$ 62,304 judgment he and others obtained against Financial America, a company in which the Debtor had invested substantial **[\*\*8]** money. The Debtor admitted his failure to list the judgment lien but attempted to justify the omission by claiming the judgment was worthless.

#### IV. DISCUSSION

##### A. The IRA Exemption.

**HN3**  Ohio has opted out of the federal exemptions, pursuant to [11 U.S.C. § 522\(b\)](#). [Wicheff \*\*\[\\*723\]\*\* v. Baumgart \(In re Wicheff\), 215 B.R. 839, 842 \(B.A.P. 6th Cir. 1998\)](#). **HN4**  The Ohio statute provides debtors with an exemption in retirement benefits:

(A) Every person who is domiciled in this state may hold property exempt from

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execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

...

(10)(c) . . . the person's right in the assets held in, or to receive any payment under, any individual retirement account, individual retirement annuity, or Keogh or "H.R. 10" plan that provides benefits by reason of illness, disability, death, or age, to the extent reasonably necessary for the support of the person and any of the person's dependents.

[OHIO REV. CODE ANN. § 2329.66\(A\)\(10\)\(c\)](#) (Anderson 1995) (emphasis added).

[HN5](#) Under the Ohio retirement exemption statute, as applied by the bankruptcy courts, the standard for determining to what extent the pension [\\*\\*9](#) benefits are reasonably necessary for the debtor's support is not whether he has sufficient funds to sustain his former lifestyle, but whether he has enough to sustain his present and future needs, taking into account any special needs of the particular debtor. See, e.g., [In re Parker, 219 B.R. 972, 974-75 \(Bankr. S.D. Ohio 1998\)](#); [In re Hoppes, 202 B.R. 595, 598 \(Bankr. N.D. Ohio 1996\)](#); [In re Baumgardner, 160 B.R. 572, 573-74 \(Bankr. S.D. Ohio 1993\)](#); and [In re Herzog, 118 B.R. 529, 532 \(Bankr. N.D. Ohio 1990\)](#). See also [Mid-America Fed. Sav. & Loan Assoc. v. Gateway Manor Congregate Apartments, 94 Ohio App. 3d 521, 641 N.E.2d 229 \(Ohio Ct. App. 1994\)](#) (state courts likewise agree on the application of the statute).

The burden is on the trustee to establish, by a preponderance of the evidence, that the exemption should be disallowed. [Hoppes, 202 B.R. at 597](#); [Baumgardner, 160 B.R. at 573](#). The trial court must analyze the facts and circumstances of each case. [Parker, 219 B.R. at 974-75](#); [Herzog, 118 B.R. at 532](#). [HN6](#) Bankruptcy courts uniformly consider eleven

factors in making the determination of the amount of the retirement funds necessary to sustain a [\\*\\*10](#) debtor's needs:

1. The debtor's present and anticipated living expenses;
2. The debtor's present and anticipated income from all sources;
3. The age of the debtor;
4. The health of the debtor;
5. The debtor's ability to work and earn a living;
6. The debtor's job skills, training, and education;
7. The debtor's other assets;
8. Liquidity of other assets;
9. The debtor's ability to save for retirement;
10. Special needs of the debtor; and
11. The debtor's financial obligations (e.g., alimony or support).

[In re Parker, 219 B.R. 972, 975 \(Bankr. S.D. Ohio 1998\)](#). A bankruptcy court's analysis is not restricted to these factors, nor is a bankruptcy court required to specifically discuss each factor in every case. However, these factors are appropriate for a trial court's consideration in its analysis of the totality of facts and circumstances in each case.

In this particular case, the bankruptcy court accurately set forth this test and analyzed each of the eleven factors in accordance with the circumstances of the Debtor as presented through the evidence at trial. The bankruptcy court determined that the Debtor, age 54, suffers from a degenerative heart condition [\\*\\*11](#) and depression. The Debtor has no dependents, as his two children are grown and his wife is self-supporting. The Debtor has been unemployed since 1994, but has not applied for public assistance or Social Security benefits and maintains that he is unable to find a job, although his efforts at obtaining employment have been minimal. The [\\*724](#) Debtor, who attended college for

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several years, previously earned a living owning and managing bars and restaurants.

Mrs. Hamo has been able to fully support the Debtor, including all medical needs and insurance coverage, and no evidence was presented to indicate that the Debtor's future living expenses would substantially increase or that his wife would become unable to continue to pay his expenses. The Debtor has been able to subsist without withdrawing any money from the IRA, which is his only asset, other than a \$ 150,000 life insurance policy with a cash surrender value of \$ 8,000. Ms. Hamo owns all of the assets, including a \$ 185,000 marital residence in which there is equity of approximately \$ 37,000. She also owns stock worth \$ 20,000 and has a pension valued at \$ 46,000.

The Debtor's special needs include ongoing medical treatment, most of **[\*\*12]** which is covered by insurance, and \$ 400 per month in medication not covered by insurance. He has no secured debts, no unsecured priority debts, and \$ 260,000 in unsecured, nonpriority debts resulting from the denial of his discharge. He has no assets for creditors to attempt to attach, except for the life insurance policy with an \$ 8,000 cash surrender value and any portion of the IRA determined not to be entitled to an exemption pursuant to [OHIO REV. CODE ANN. § 2329.66\(A\)\(10\)\(c\)](#).

The bankruptcy court found that the bulk of the IRA was not necessary for the Debtor's present support as his basic needs have been continually met despite his unemployment. The Debtor's operation of Freedom Properties post-petition, when he demonstrated his ability to manage and effectuate the resale of real properties, buttresses the bankruptcy court's finding that the Debtor could obtain some employment. The bankruptcy court found \$ 20,000 of the IRA exempt as reasonably necessary to sustain his basic needs in the

future. While the bankruptcy court did not set forth in mathematical detail how it arrived at the figure of \$ 20,000, the Panel may infer the appropriate findings in this regard from the **[\*\*13]** detail in which the bankruptcy court discussed the factors in its slip opinion. See [Dolph v. Pennsylvania Higher Educ. Assistance Agency \(In re Dolph\)](#), 215 B.R. 832, 834 (B.A.P. 6th Cir. 1998) ("Where facts which will support a judgment can be inferred from a [trial] court's other findings, an appellate court will deem that such inferences were drawn." (citation omitted)). The bankruptcy court's findings and conclusions are not clearly erroneous, and the record fully supports the bankruptcy court's order sustaining, in part, the Trustee's objection to the Debtor's claimed exemption in the IRA.

#### B. Denial of Discharge.

On September 21, 1998, the bankruptcy court issued an opinion and entered a judgment denying the Debtor's discharge pursuant to [11 U.S.C. §§ 727\(a\)\(4\)\(A\)](#) and [727\(a\)\(2\)\(A\)](#) and [\(B\)](#).

[HN7](#)  Section [§ 727\(a\)\(4\)\(A\)](#) provides:


(a) The court shall grant the debtor a discharge, unless --

....

(4) the debtor knowingly and fraudulently, in or in connection with the case --

(A) made a false oath or account.

[11 U.S.C. § 727\(a\)\(4\)\(A\) \(West 1998\)](#).

[HN8](#)  Under [§ 727\(a\)\(4\)](#), the trustee has the burden of proving, by a preponderance of the evidence, that a **[\*\*14]** debtor's omissions constitute an intent to hinder, delay, or defraud his creditors. See [Barclays/ American Business Credit, Inc. v. Adams \(In re Adams\)](#), 31 F.3d 389, 393-94 (6th Cir. 1994) (citing [Grogan v. Garner](#), 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991)). A debtor's intent may be inferred from

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circumstantial evidence or from "the debtor's course of conduct." *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 159 (Bankr. N.D. Ohio 1998); *Fahey Banking Co. v. Parsell (In re Parsell)*, [\*725] 172 B.R. 226, 231 (Bankr. N.D. Ohio 1994).

**HN9** "A party objecting to a debtor's discharge pursuant to [§ 727\(a\)\(4\)\(A\)](#) must establish that, (1) the debtor made a statement while under oath, (2) the statement was false, (3) the statement related materially to the bankruptcy case, (4) the debtor knew the statement was false, and (5) the debtor made the statement with fraudulent intent." *Sowers*, 229 B.R. at 158. Statements in bankruptcy schedules are given under oath, and "a fact is material if it 'concerns discovery of assets, business dealings or [the] existence or disposition of property.'" *Id.* (citations omitted). "Knowledge may be shown by demonstrating [\*15] that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information." *Id.* A false statement or omission that is made by mistake or inadvertence is not sufficient grounds upon which to base the denial of a discharge, but a knowingly false statement or omission made by the Debtor with reckless indifference to the truth will suffice as grounds for the denial of a Chapter 7 general discharge. See *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992).

The bankruptcy court concluded that the Debtor demonstrated a "continued pattern . . . of making omissions and false statements in his bankruptcy schedules" and exhibited reckless indifference for the truth, notwithstanding any memory loss. The bankruptcy court based its decision on the following omissions from Debtor's schedules and amendments: the Debtor's position as president of Freedom Properties; his debt-reduction agreement with Valore; his \$ 50,000 personal injury action, listed only in the third

amended schedules as a pending claim; and the Debtor's \$ 62,304 judgment lien against Financial America. The Debtor had knowledge of his involvement with Freedom Properties but asserted that [\*16] he did not consider it an asset of the bankruptcy estate because he had no ownership interest in the company. He also knew that Financial America owed him money but explained that he thought the claim was worthless and did not know a judgment had been rendered. We agree that the "recalcitrant debtor may not escape a [section 727\(a\)\(4\)\(A\)](#) denial of discharge by asserting that the admittedly omitted or falsely stated information concerned a worthless business relationship or holding; such a defense is specious." *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11 Cir. 1984). Moreover, Debtor's detailed account at trial of his accident refutes his assertion that he could not remember the personal injury claim until his third amended schedule. The bankruptcy court had the opportunity to observe the demeanor and credibility of the Debtor and Valore during their testimonies and did not credit the testimony that these were innocent oversights and instead concluded that the Debtor had been recklessly indifferent to the accuracy and completeness of his bankruptcy filings. Despite the Debtor's denial of the materiality of his omissions, they had a direct effect on the Trustee's and [\*17] creditors' ability to discover assets and business dealings because the omissions left them with a significantly abridged view of the Debtor's income and assets.

The very purpose of . . . [11 U.S.C. § 727\(a\)\(4\)\(A\)](#), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be

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made by the parties in interest based on fact rather than fiction . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.

....

A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo. The [\*726] successful functioning of the bankruptcy code hinges upon the bankrupt's veracity and his willingness to make a full disclosure.

*Hillis v. Martin, Martin v. Martin (In re Martin)*, 124 B.R. 542, 545, 547-58 (Bankr. N.D. Ind. 1991) (quoting *In re Tully*, 818 F.2d 106, 110 (1st Cir. 1987) and [\*18] *In re Krich*, 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988)). Where the trier of fact is faced with evidence supporting more than one reasonable inference, the choice among them cannot be clearly erroneous. See *Sicherman v. Diamoncut, Inc. (In re Sol Bergman Estate Jewelers, Inc.)*, 225 B.R. 896, 904 (B.A.P. 6th Cir. 1998). Accordingly, in light of the nature and extent of the omissions, the bankruptcy court did not err in concluding the Debtor made material omissions and inaccuracies with a reckless indifference to the truth, which amounted to knowing and fraudulent false oaths or accounts and warranted a denial of discharge pursuant to § 727(a)(4)(A). See, e.g., *Hatton v. Spencer (In re Hatton)*, 204 B.R. 477, 483 (E.D. Va. 1997) (affirming a denial of discharge under § 727(a)(4)(A) where the bankruptcy court found the debtors' credibility lacking and rejected their "protestations of innocent naivete . . . in favor of a darker story of fraud and willful misconduct.").

Appellate review of the bankruptcy court's decision under § 727(a)(2)(A) and (B) is unnecessary because § 727(a)(4)(A) provides

an independent basis for denying the Debtor's discharge. See *Coggin v. Coggin* [\*19] (*In re Coggin*), 30 F.3d 1443, 1452 (11th Cir. 1994). Accordingly, we affirm the bankruptcy court's decision under § 727(a)(4)(A) and do not address the court's decision regarding § 727(a)(2)(A) and (B).

## V. CONCLUSION

We **AFFIRM** the order of the bankruptcy court denying the Debtor's discharge and the order of the bankruptcy court allowing the Debtor a partial exemption in his IRA in the amount of \$ 20,000.

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**User Name:** Christal Caudill

**Date and Time:** Friday, July 25, 2025 2:52 PM EDT

**Job Number:** 258692448

**Document (1)**

1. [In re Bellisari, 554 B.R. 440](#)

**Client/Matter:** Seminar


**Search Terms:** bankruptcy cases discussing Ohio Revised Code 2329.66 (A)(6)(e)

**Search Type:** Natural Language

**Narrowed by:**

Content Type
Cases

Narrowed by
-None-

 Neutral  
As of: July 25, 2025 6:52 PM Z

[In re Bellisari](#)

United States Bankruptcy Court for the Southern District of Ohio, Eastern Division

July 26, 2016, Decided

Case No. 14-56215, Chapter 7

**Reporter**

554 B.R. 440 \*; 2016 Bankr. LEXIS 2905 \*\*

In re: Brian Lee Bellisari, Debtor.

**LexisNexis® Headnotes**

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**Core Terms**

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exemption, Annuity, insurance policy, underinsured motorist coverage, uninsured, benefits, insured, settlement agreement, liability insurance, accident insurance, coverage, sickness, supplementary, policies, motor vehicle accident, uninsured motorist, motorist coverage, right to payment, bankrupt estate, settlement, monthly

Business & Corporate  
Compliance > Bankruptcy > Estate  
Property > Contents of Estate  
Bankruptcy Law > Estate  
Property > Contents of Estate

Bankruptcy Law > Exemptions > State Law  
Exemptions > Opt Out Powers

Bankruptcy Law > Exemptions

**Case Summary**

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**Overview**

**HOLDINGS:** [1]-Where debtor was injured in an automobile accident, and settled with an insurer pursuant to the insured's uninsured motorist coverage, monthly payments due under an annuity did not lose their character as benefits or proceeds of the insurance policy simply because the annuity supplanted the benefits due under the policy; [2]-Debtor's right to payments under the annuity was not exemptible under [Ohio Rev. Code Ann. §§ 2329.66\(A\)\(6\)\(e\)](#) and [3923.19\(A\)](#) because the coverage was the type of supplementary coverage referenced in [Ohio Rev. Code Ann. § 3923.20\(A\)](#).

**Outcome**

Objection sustained in part and overruled in part.

**[HN1](#)  Estate Property, Contents of Estate**

The commencement of a **bankruptcy case** under any chapter of the Bankruptcy Code creates an estate. [11 U.S.C.S. § 541](#). A debtor's bankruptcy estate consists of all legal or equitable interests of the debtor in property as of the commencement of the case. [11 U.S.C.S. § 541](#). However, pursuant to [11 U.S.C.S. § 522\(b\)](#), debtors are permitted to exempt certain property from the estate. An exemption withdraws an interest from the bankruptcy estate, and consequently from the creditors, for the benefit of the debtors. A state may authorize its residents to invoke the exemptions set forth in [§ 522\(d\)](#), or may limit its residents to the exemptions available under state law and applicable federal law, other than those listed in [§ 522\(d\)](#). [11 U.S.C.S. §](#)

Christal Caudill

[522\(b\)](#). The state of Ohio has elected to "opt-out" of the federal exemption scheme provided by [§ 522\(d\)](#), and thus, a debtor who is domiciled in Ohio is limited to the exemptions available under Ohio law and other applicable federal law. [Ohio Rev. Code Ann. § 2329.662](#).

Bankruptcy Law > Exemptions > Claims & Objections

Evidence > Burdens of Proof > Preponderance of Evidence

### [HN2](#) Exemptions, Claims & Objections

There is a prima facie presumption that an exemption claimed by a debtor is proper. A party objecting to claimed exemptions must prove that the exemption is not properly claimed by a preponderance of the evidence. [Fed. R. Bankr. P. 4003\(c\)](#) provides that, in any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. Upon the introduction of sufficient evidence to rebut the prima facie validity of the exemption, the burden shifts to the debtors to demonstrate that the exemption is proper. Exemptions under Ohio law are to be construed liberally in favor of the debtor and any doubt in interpretation should be in favor of granting the exemption.

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

### [HN3](#) State Law Exemptions, Specific Exemptions

[Ohio Rev. Code Ann. § 2329.66\(A\)\(6\)\(e\)](#) allows a person to hold exempt the person's interest in the portion of benefits under policies of sickness and accident insurance and in lump sum payments for dismemberment and other losses insured under those policies, as

exempted by [Ohio Rev. Code Ann. § 3923.19](#). [Ohio Rev. Code Ann. § 2329.66\(A\)\(6\)\(e\)](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

### [HN4](#) State Law Exemptions, Specific Exemptions

See [Ohio Rev. Code Ann. § 3923.19](#).

Bankruptcy Law > Exemptions

### [HN5](#) Bankruptcy Law, Exemptions

A debtor's right to an exemption depends on the underlying nature of the asset.

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

### [HN6](#) State Law Exemptions, Specific Exemptions

[Ohio Rev. Code Ann. § 3923.19](#) exempts benefits under all policies of sickness and accident insurance. [Ohio Rev. Code Ann. § 3923.19](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

### [HN7](#) State Law Exemptions, Specific Exemptions

See [Ohio Rev. Code Ann. § 3923.01](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

### [HN8](#) State Law Exemptions, Specific Exemptions

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See [Ohio Rev. Code Ann. § 3923.20\(A\)](#).

**Counsel:** **[\*\*1]** For Brian Lee Bellisari, Debtor: Joshua James Brown, Columbus, OH.

For William B Logan, Trustee: William B Logan, Jr, Lead Attorney, Columbus, OH; Kenneth M Richards, Columbus, OH.

**Judges:** C. Kathryn Preston, United States Bankruptcy Judge.

**Opinion by:** C. Kathryn Preston

## Opinion

### **[\*441] MEMORANDUM OPINION AND ORDER ON TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED CLAIMS OF EXEMPTION**

This cause came on for hearing on October 22, 2015 (the "Hearing"), upon Trustee's Objection to Debtor's Amended Claims of Exemption (Doc. #35) ("Objection"), Debtor's memorandum contra to Trustee's Objection (Doc. #36), and Debtor's additional memorandum in support of his memorandum contra (Doc. #42). Present at the hearing were Debtor, attorney Joshua Brown as counsel for Debtor, and attorney Ken Richards as counsel for Trustee. After the hearing, Debtor and Trustee filed additional documents in support **[\*442]** of their respective positions (Doc. #46 and #47, respectively).<sup>1</sup>

## **I. Jurisdiction**

<sup>1</sup> On March 8, 2016, the Court received a letter from Debtor's mother, Sheila Manasco, requesting that the Court rule in favor of Debtor. The Court filed the letter as a support document (Doc. #51); however, because the letter constitutes an *ex parte* communication and because Ms. Manasco is **[\*\*2]** not a party to this proceeding and has not obtained leave of Court to intervene, the Court did not consider the document in making its determination.

The Court has jurisdiction over this matter pursuant to [28 U.S.C. § 1334](#) and General Order 05-02, entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. Venue in this Court is proper pursuant to [28 U.S.C. §§ 1408](#) and [1409](#). This is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(B\)](#).

## **II. Factual and Procedural Background**

Brian Lee Bellisari ("Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on August 30, 2014. William B. Logan, Jr. is the duly appointed Chapter 7 trustee ("Trustee"). On July 30, 2015, Debtor filed an Amended Schedule B (Doc. #34) to disclose his interest in an annuity, which he described on the Amended Schedule B as "Annuity - solely a benefit under a policy of accident insurance, paying the liabilities of a defendant of a claim arising from personal injuries to the Debtor - the claim resolved by the settlement offering this annuity" (the "Annuity"). Debtor also filed an Amended Schedule C (Doc. #34) to claim his interest in the Annuity exempt under [Ohio Revised Code §§ 2329.66\(A\)\(6\)\(e\)](#) and [3923.19\(A\)](#), **[\*\*3]** [Ohio Revised Code §§ 2329.66\(A\)\(6\)\(b\)](#), [3911.10](#), [3911.12](#) and [3911.14](#), and [Ohio Revised Code § 2329.66\(A\)\(12\)\(c\)](#). On the amended schedules, Debtor stated the value of his interest in the Annuity, and the value of each exemption claimed in the Annuity, as "unknown." On his Schedule I (Doc. #1), Debtor disclosed monthly income from the Annuity in the amount of \$2,000.00.

The Annuity arose from the settlement of a personal injury claim stemming from a motor vehicle accident with an uninsured motorist that occurred on May 25, 1990, in which Debtor was injured. The settlement agreement

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was executed on January 3, 2000 (the "Settlement Agreement")<sup>2</sup> by and among Sheila Manasco ("Ms. Manasco"), individually and as the parent of Debtor<sup>3</sup> (who was a minor at the time), the Diocese of Columbus<sup>4</sup> the Buckeye Union Insurance Company ("Buckeye"), and the uninsured motorist. As no party in this matter produced a copy of the insurance contract with Buckeye (the "Insurance Policy"), the specific details of the Insurance Policy are unclear. According to the Settlement Agreement, however, Buckeye was the insurer of the Diocese of Columbus and/or Ms. Manasco, and "would be obligated to pay any judgment against the uninsured motorist which is covered by the underinsured motorist coverage and [\*443] underinsured [\*4] [sic] motorist coverage of its policy."<sup>5</sup> Settlement Agreement at 1.

In part, the Settlement Agreement required Buckeye to make monthly payments to Debtor in the amount of \$2,000.00, for the life of Debtor, but for a minimum of 240 payments. The Settlement Agreement further provided that Buckeye would assign its liability to make the monthly payments to Jamestown Life Insurance Company ("Jamestown"), and that [\*5] Jamestown would fund the periodic payments with the Annuity. Trustee and Debtor stipulated that Jamestown is the owner

<sup>2</sup> The parties stipulated to the authenticity and admissibility of the Annuity, which was attached as Exhibit A to the parties' Stipulations Relating to Trustee's Objection to Debtor's Amended Claims of Exemption (Doc. #41) and includes a copy of the Settlement Agreement.

<sup>3</sup> At the time the Settlement Agreement was executed, Debtor was known as Brian Kirk.

<sup>4</sup> The Diocese of Columbus operated a school at which Debtor was a student at the time of the accident.

<sup>5</sup> In the stipulations filed with the Court (Doc. #41), the parties stipulated that the Annuity was funded by the tortfeasor or the tortfeasor's insurance company. At the Hearing, however, counsel for Trustee acknowledged that this stipulation may be incorrect, inasmuch as, according to the Settlement Agreement, the tortfeasor was uninsured.

of the Annuity, that Debtor is the annuitant or payee, and that Debtor has received the monthly payments due under the Annuity since the date of filing of this bankruptcy case.

On August 26, 2015, Trustee timely filed his Objection to Debtor's claims of exemptions in the Annuity. Trustee asserted that the Annuity may not be claimed exempt under any section set forth on Debtor's Amended Schedule C, and thus requested that the claimed exemptions be disallowed in their entirety. At the hearing held on October 22, 2015, Trustee conceded that Debtor is entitled to claim an exemption in the Annuity under Ohio Revised Code § 2329.66(A)(12)(c) up to the applicable statutory limit of \$23,000.00, and Debtor conceded that Ohio Revised Code §§ 2329.66(A)(6)(b), 3911.10, 3911.12 and 3911.14 are inapplicable to the Annuity. The only remaining issue before the Court is whether Debtor may properly claim the rest of his interest in the Annuity, or the payments therefrom, exempt pursuant to Ohio Revised Code §§ 2329.66(A)(6)(e) and 3923.19(A).

### III. Analysis

HN1 [↑] The commencement of a bankruptcy case under any chapter of the Bankruptcy Code creates an estate. 11 U.S.C. § 541. A debtor's bankruptcy estate consists of "all legal or equitable interests [\*6] of the debtor in property as of the commencement of the case." *Id.* However, pursuant to 11 U.S.C. § 522(b), debtors are permitted to exempt certain property from the estate. "An exemption withdraws an interest from the bankruptcy estate, and consequently from the creditors, for the benefit of the debtors." Baumgart v. Alam (In re Alam), 359 B.R. 142, 146-47 (B.A.P. 6th Cir. 2006) (citing Wicheff v. Baumgart (In re Wicheff), 215 B.R. 839, 842 (B.A.P. 6th Cir. 1998)). A state may authorize its residents to invoke the exemptions set forth

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in [11 U.S.C. § 522\(d\)](#), or may limit its residents to the exemptions available under state law and applicable federal law, other than those listed in [§ 522\(d\)](#). [11 U.S.C. § 522\(b\)](#). The state of Ohio has elected to "opt-out" of the federal exemption scheme provided by [§ 522\(d\)](#), and thus, a debtor who is domiciled in Ohio is limited to the exemptions available under Ohio law and other applicable federal law. See [Ohio Rev. Code § 2329.662](#).

**HN2**<sup>(↑)</sup> There is a *prima facie* presumption that an exemption claimed by a debtor is proper. See [In re Kimble, 344 B.R. 546, 551 \(Bankr. S.D. Ohio 2006\)](#). "A party objecting to claimed exemptions must prove that the exemption is not properly claimed by a preponderance of the evidence." *Id.* (quoting [In re Roselle, 274 B.R. 486, 490 n. 4 \(Bankr. S.D. Ohio 2002\)](#)). See also [Fed. R. Bankr. P. 4003\(c\)](#) ("In any hearing under this rule, the objecting party has the [\*444] burden of proving that the exemptions are not properly claimed."). "Upon the introduction of sufficient evidence to rebut the *prima facie* validity of the exemption, [\*7] the burden shifts to the debtors to demonstrate that the exemption is proper." [In re Rhinebolt, 131 B.R. 973, 975 \(Bankr. S.D. Ohio 1991\)](#). Exemptions under Ohio law "are to be construed liberally in favor of the debtor and any doubt in interpretation should be in favor of granting the exemption." [Alam, 359 B.R. at 147-48](#).

The Court initially notes that the parties appear to have haphazardly framed this matter as whether Debtor may properly claim "the Annuity" exempt. To reach that question, the Annuity contract itself would first have to be property of Debtor's bankruptcy estate. However, because the Annuity is owned by Jamestown and not Debtor, the Annuity is not property of Debtor's bankruptcy estate. See [In re Abbott, 466 B.R. 118, 129 \(Bankr. S.D. Ohio 2012\)](#) (finding that an annuity of which the debtor was a beneficiary, but not the owner,

was not property of the estate). Nonetheless, the right to receive payments pursuant to the Annuity is property of Debtor's bankruptcy estate unless eligible to be claimed exempt. See *id.* Thus, the Court must determine whether Debtor's right to the Annuity payments are exempt under [Ohio Revised Code §§ 2329.66\(A\)\(6\)\(e\)](#) and [3923.19](#).<sup>6</sup>

**HN3**<sup>(↑)</sup> [Section 2329.66\(A\)\(6\)\(e\) of the Ohio Revised Code](#) allows a person to hold exempt "[t]he person's [\*8] interest in the portion of benefits under policies of sickness and accident insurance and in lump sum payments for dismemberment and other losses insured under those policies, as exempted by [section 3923.19](#) of the Revised Code." [Ohio Rev. Code § 2329.66\(A\)\(6\)\(e\)](#). [Ohio Revised Code § 3923.19\(A\)](#)<sup>7</sup> provides:

**HN4**<sup>(↑)</sup> Benefits under all policies of sickness and accident insurance are not liable to attachment or other process, or to be taken, appropriated, or applied by any legal or equitable process or by operation of law, either before or after payment of the benefits, to pay any liabilities of the person insured under any such policy to the extent that the benefits are reasonably necessary for the support of the debtor and any dependents of the debtor. When a policy provides for a lump sum payment because of a dismemberment or other loss insured, the payment is exempt from execution by the insured's creditors.

[Ohio Rev. Code § 3923.19](#).

<sup>6</sup>It is clear from the parties' briefs and arguments at the Hearing that the question at issue is whether the right to payments under the Annuity is exempt.

<sup>7</sup>Although [Ohio Revised Code § 2329.66\(A\)\(6\)\(e\)](#) does not limit the authorized exemption to that given in [subsection \(A\) of § 3923.19](#), Debtor specifically claimed the exemption on his Amended Schedule C (Doc. #34) pursuant to [Ohio Revised Code § 3923.19\(A\)](#), and has not asserted that any other subsection of [§ 3923.19](#) applies.

### A. Character of the Annuity Payments

Debtor contends, and the Court agrees, that the monthly payments due under the Annuity do not lose their character **[\*\*9]** as benefits or proceeds of the Insurance Policy simply because the Annuity supplanted the benefits due under the Insurance Policy. On that point, the Court finds persuasive the case of [In re Lindsay, 261 B.R. 209 \(Bankr. S.D. Ohio 2001\)](#).

In *Lindsay*, the debtor suffered an injury in 1984 while working for General Motors Corporation ("GM"). As a result of the injury, the debtor was rendered disabled and received workers' compensation **[\*445]** payments of \$234.00 per week until February 1996, when the debtor received a lump sum payment in the amount of \$40,000.00. At that time, GM also purchased an annuity policy to fund an additional \$30,000.00 that it owed to the debtor. Under the annuity, the debtor was to receive payments of \$300.00 per month, for a period of ten (10) years. The debtor claimed the annuity exempt pursuant to an Ohio statute that allows a debtor to exempt workers' compensation, and the trustee objected. The Court looked to the original obligation of GM that the annuity was intended to fund, and found that the right to payments under the annuity constituted workers' compensation and were thus fully exempt. [Id. at 212](#). See also [In re Abbott, 466 B.R. 118, 126 \(Bankr. S.D. Ohio 2012\)](#) ("[C]ourts have concluded that **[HN5]** a debtor's right to an] exemption depends on the underlying nature of the asset." (citation **[\*\*10]** and internal quotation marks omitted)).

In the instant case, Debtor's right to payments under the Annuity arose from the settlement of Debtor's personal injury action, and the Annuity was purchased to fund the payment obligation of Buckeye pursuant to the Settlement Agreement. Thus, although the

Annuity supplanted the benefits due under the Insurance Policy, the Court finds that the periodic payments due under the Annuity may be characterized as benefits paid pursuant to the uninsured motorist coverage included in the Insurance Policy, as a result of the settlement of Debtor's personal injury action arising from a motor vehicle accident.

The Court must next determine whether the Insurance Policy falls within the scope of "sickness and accident insurance," to which [Ohio Revised Code § 3923.19](#) applies.

### B. Applicability of Ohio Revised Code § 3923.19

**[HN6]** [Ohio Revised Code § 3923.19](#) exempts "[b]enefits under all policies of sickness and accident insurance." [Ohio Rev. Code § 3923.19](#) (emphasis added). Debtor contends that the language of [§ 3923.19](#) coupled with the definition of "sickness and accident insurance" in [§ 3923.01](#) indicates the Ohio legislature's intent that the exemption be broadly applied. Trustee, on the other hand, posits that [§ 3923.20](#) excludes any benefits of the Insurance Policy from the scope of the exemption set forth **[\*\*11]** in [§ 3923.19](#). The Court agrees with Trustee.

Section [§ 3923.01 of the Ohio Revised Code](#) provides:

**[HN7]** As used in this chapter, "policy of sickness and accident insurance" includes any policy, contract, or certificate of insurance against loss or expense resulting from the sickness of the insured, or from the bodily injury or death of the insured by accident, or both, that is delivered, issued for delivery, renewed, or used in this state on or after the date occurring six months after the effective date of this amendment.

[Ohio Rev. Code § 3923.01](#) (emphasis added).

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While such language defines "policy of sickness and accident insurance," as used in [chapter 3923 of the Ohio Revised Code](#), quite broadly, [section 3923.20](#) expressly limits the applicability of the provisions of such chapter. That section provides, in part:

**HN8** [Sections 3923.01 to 3923.22](#), inclusive, of the Revised Code, do not apply to or affect:

(A) (1) Any policy of liability insurance, with or without supplementary expense coverage therein;

(2) Any policy of motor vehicle liability insurance with supplementary coverage protecting the insured against loss **[\*446]** where said insured has secured a judgment against a party for bodily injury or death as a result of a motor vehicle accident and where said judgment remains unsatisfied.

(3) Any policy of motor vehicle liability insurance with supplementary **[\*\*12]** coverage which insures against the hazards which arise out of a motor vehicle accident as defined in [section 4509.01\(J\)](#)<sup>8</sup> of the Revised Code.

[Ohio Rev. Code § 3923.20\(A\)](#) (emphasis added). Thus, to the extent the Insurance Policy falls within one of the above categories, [Ohio Revised Code § 3923.19](#) cannot apply to exempt the benefits thereof.

In the instant case, Debtor sustained injuries in a motor vehicle accident due to the alleged negligence of an uninsured motorist. It was the uninsured motorist coverage and/or the underinsured motorist coverage of the

<sup>8</sup> [Section 4509.01\(J\)](#) provides: "Accident" or "motor vehicle accident" means any accident involving a motor vehicle which results in bodily injury to or death of any person, or damage to the property of any person in excess of four hundred dollars." [Ohio Rev. Code § 4509.01](#).

Insurance Policy that gave rise to Buckeye's obligation to Debtor. "Uninsured Motorist Coverage" is defined by Black's Law Dictionary as "insurance that pays for the insured's injuries and losses negligently caused by a driver *who has no liability insurance*." BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Similarly, "underinsured motorist coverage" is defined as "[i]nsurance that pays for the insured's losses and injuries negligently caused by a driver [who] *does not have enough **[\*\*13]** liability insurance to cover the damages*." *Id.* (emphasis added). Thus, uninsured and underinsured motorist coverage, because it covers losses when liability insurance of the tortfeasor is either nonexistent or insufficient, cannot, in and of itself, be considered a policy of liability insurance or a policy of motor vehicle liability insurance, as used in [Ohio Revised Code § 3923.20\(A\)](#). Nonetheless, for the reasons stated below, the Court finds that the Insurance Policy with Buckeye falls within the categories of insurance policies described in [Ohio Revised Code § 3923.20\(A\)](#), with the uninsured and/or underinsured motorist coverage in the Insurance Policy merely being the type of supplementary coverage referenced in such section.

The Settlement Agreement expressly states that Buckeye "would be obligated to pay any judgment against the uninsured motorist which is covered by the underinsured motorist coverage and underinsured [*sic*] motorist coverage of its policy." Settlement Agreement at 1 (emphasis added). Such language implies that there was at least one additional type of insurance coverage under the Insurance Policy, and thus, that the uninsured and/or underinsured motorist coverage was supplementary to, or at least in addition to, that other **[\*\*14]** type of insurance.<sup>9</sup> Furthermore,

<sup>9</sup>Notably, the Court has not found any case law or treatise **discussing** uninsured or underinsured motorist insurance as

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when the accident occurred in 1990, [Ohio Revised Code § 3937.18](#) mandated that every "automobile liability or motor vehicle liability policy of insurance" include uninsured and underinsured motorist coverage, unless the named insured expressly rejected such coverage. [Ohio Rev. Code § 3937.18](#) (1993) (effective January 5, 1988).<sup>10</sup> See also [Allgire v. Allstate Ins. Co.](#) 81 Ohio App. 3d 479, 611 N.E.2d 412, 413 (Ohio Ct. App. 1992) [\*447] (noting the legal effect of [Ohio Revised Code § 3937.18](#)). That statute went on to set forth the coverage requirements and additional regulations relating to uninsured and underinsured motorist coverage. After a comprehensive search, the Court was unable to locate any section of the Ohio Revised Code, other than those sections relating to motor vehicle liability insurance, [Ohio Revised Code §§ 3937.18, et seq.](#), that specifically regulated uninsured or underinsured motorist coverage at the time of Debtor's accident.<sup>11</sup> This leads the Court to the conclusion that most, if not all, of the uninsured and underinsured motorist coverage provided in the state of Ohio was issued pursuant to, and governed under, [Ohio Revised Code § 3937.18](#), which necessarily made such coverage supplementary to an "automobile liability or motor vehicle liability policy of insurance." [Ohio Revised Code § 3937.18](#). Although the Court is unable to find any authority interpreting the scope of [Ohio Revised Code § 3923.20\(A\)](#), the Court finds that the plain [\*15] language of the statute

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a stand-alone policy.

<sup>10</sup> Unless otherwise noted, any references to [Ohio Revised Code § 3937.18](#) are to the statute in effect at the time of Debtor's motor vehicle accident.

<sup>11</sup> The Court has found other sections of the Ohio Revised Code that reference uninsured and/or underinsured motorist insurance; however, no such sections purport to create regulations or requirements with respect to such insurance. See, e.g., [Ohio Rev. Code § 3313.201](#) (1993) (effective January 16, 1980).

encompasses policies described in [Ohio Revised Code § 3937.18](#), and that it is more probable than not that the Insurance Policy with Buckeye was an automobile liability and/or motor vehicle liability policy issued pursuant to and/or governed by such section.

Finally, the Court notes that Debtor has not cited any case law, and the Court likewise has been unable to locate any case law, suggesting that payments arising from a judgment or settlement relating to a personal injury action are exempt pursuant to [Ohio Revised Code § 3923.19](#). Debtor points to several cases that have allowed a claim of exemption in such payments, or a portion thereof, under [11 U.S.C. § 522\(d\)\(10\)](#) or an analogous exemption statute under state [\*16] law.<sup>12</sup> None of the cases cited by Debtor, however, address a statute such as [Ohio Revised Code § 3923.20](#), that excludes the applicability of the exemption statute to certain policies of liability insurance, and there was no argument advanced by Debtor at the Hearing or in his pleadings suggesting that [Ohio Revised Code § 3923.20](#) did not apply to the Insurance Policy.

The Court finds that Trustee has illustrated that [Ohio Revised Code § 3923.20](#) precludes the application of [Ohio Revised Code § 3923.19](#) to the Insurance Policy, and that Debtor's right to payments under the Annuity is therefore not exemptible under [Ohio Revised Code §§ 2329.66\(A\)\(6\)\(e\)](#) and [3923.19\(A\)](#). Having made such a determination, the Court need not address the parties' other arguments relating to this matter, and need not determine whether the Annuity payments are necessary for Debtor's support.

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<sup>12</sup> In [Baumgart v. Alam \(In re Alam\)](#), 359 B.R. 142, 148 (6th Cir. B.A.P. 2006), the Bankruptcy Appellate Panel for the Sixth Circuit noted that [Ohio Revised Code § 3923.19](#) is substantially similar to [11 U.S.C. § 522\(d\)\(10\)](#).

**IV. Conclusion**

In light of the foregoing, it is hereby

**ORDERED AND ADJUDGED** that Trustee's Objection to Debtor's Amended Claims of Exemption (Doc. #35) is SUSTAINED, in part, and OVERRULED, in part. It is further

**ORDERED AND ADJUDGED** that Debtor's claim of exemption in payments under the Annuity, and the right to payments **[\*448]** under the Annuity is hereby ALLOWED in the amount of \$23,000.00 **[\*\*17]** (as of the date of commencement of this case), pursuant to [Ohio Revised Code § 2329.66\(A\)\(12\)\(c\)](#). It is further

**ORDERED AND ADJUDGED** that all other claims of exemption in payments under the Annuity, and the right to payments under the Annuity, set forth on Debtor's Amended Schedule C (Doc. #34) are DISALLOWED.

**IT IS SO ORDERED.**

**Dated: July 26, 2016**

/s/ C. Kathryn Preston

C. Kathryn Preston

United States Bankruptcy Judge

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End of Document



Neutral

As of: September 11, 2012 10:07 AM EDT

### In re Guikema

United States Bankruptcy Court *for* the Southern District of Ohio, Eastern Division

April 14, 2005, Decided

Case No. 04-55750, Chapter 7

**Reporter:** 329 B.R. 607; 2005 Bankr. LEXIS 1558

In re: Harvey J. Guikema and Debra L. Guikema, Debtors.

#### Notice:

#### Core Terms

exemption, retirement, annuity, reasonably *necessary*, exemption statute, factors, funds, save, anticipated, benefits, monthly, pension, legislative history, contributed, special needs, reasonably *necessary*, expenses, mortgage, bankruptcy court, bankruptcy law, lifestyle, projected, circumstances, preponderance, accustomed, revised, annual, fresh, distributions, disability

#### Case Summary

##### Procedural Posture

The debtors filed a petition *for* Chapter 7 bankruptcy. The trustee objected to their claim of an exemption *for* retirement funds under *Ohio Rev. Code Ann. § 2329.66(A)(10)(b)* (2001 & Supp. 2003).

##### Overview

One of the debtors had a retirement account. She claimed an exemption under *Ohio Rev. Code Ann. § 2329.66(A)(10)(b)* (2001). The trustee objected to the exemption. In sustaining the objection, the court determined that the eleven factor test set forth in *Hamo* applied to both the Ohio statute and its federal counterpart, *11 U.S.C.S. § 522(d)(10)(E)*. Under this analysis, the court determined that the retirement annuity was not reasonably *necessary for* the debtors' maintenance and *support*. The court found that the following factors were dispositive: the debtors were in good health, they had a long time left to work before they retired, the debtors' current and anticipated future income, their anticipated retirement income from other sources, and their ability to replace the annuity and save additional sums *for* retirement if reasonable adjustments were made to their current budget. The court rejected the debtors' contention that the "reasonably *necessary*" language in both the Ohio and federal statute was primary designed to preclude only high-salaried professionals and executives from exempting retirement funds.

##### Outcome

The trustee's objection was sustained.

## LexisNexis® Headnotes

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers  
 Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions  
 Bankruptcy Law > Exemptions > Claims & Objections  
 Bankruptcy Law > Exemptions > State Law Exemptions > General Overview  
 Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions  
 Bankruptcy Law > Procedural Matters > General Overview

**HN1** Under [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)](#) (2001 & Supp. 2003), a person's right to receive a payment under any pension, annuity or similar plan is exempt to the *extent* that the payment is reasonably *necessary for* the *support* of the person and the person's dependents. In determining the exemptibility of retirement funds under either the Ohio exemption statute or its federal counterpart, [11 U.S.C.S. § 522\(d\)\(10\)\(E\)](#), bankruptcy courts have uniformly applied the 11-factor test approved by the United States Court of Appeal *for* the Sixth Circuit Bankruptcy Appellate Panel to assess whether the funds are reasonably *necessary for* the *support* of debtors and their dependents.

Bankruptcy Law > Exemptions > State Law Exemptions > General Overview  
 Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers  
 Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions  
 Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions

**HN2** The "reasonably *necessary*" language contained in [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)](#) (2001 & Supp. 2003) and [11 U.S.C.S. § 522](#) was not primarily designed to preclude high-salaried professionals and executives from exempting retirement funds.

Bankruptcy Law > Estate Property > Contents of Estate

**HN3** The filing of a petition under the bankruptcy code creates an estate consisting of all legal or equitable interests of the debtor in property as of the commencement of the case. [11 U.S.C.S. § 541\(a\)\(1\)](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers  
 Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions  
 Bankruptcy Law > Estate Property > General Overview  
 Bankruptcy Law > Exemptions > Federal Nonbankruptcy Law Exemptions  
 Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > Protection of Debtors  
 Bankruptcy Law > Exemptions > State Law Exemptions > General Overview  
 Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

**HN4** Federal bankruptcy law allows a debtor to exempt some of his property--mainly basic necessities--from the bankruptcy estate. The exemptions can afford the debtor some economic and social stability, which is important to the fresh start guaranteed by bankruptcy. [11 U.S.C.S. § 522\(b\)](#). Exemptions give the debtors a so-called "grub-stake" to begin their fresh start and act as a safety net, so that the debtor and his family are not completely impoverished due to creditor collection action or bankruptcy such that they become wards of the state. [Section 522\(b\)\(1\)](#) offers debtors a choice between exempting the property specified in [§ 522\(d\)](#) or exempting the property protected by federal nonbankruptcy law or state law unless the State law that is applicable to the debtor specifically does not so authorize. [§ 522\(b\)\(1\)](#). Ohio has chosen to "opt out" of the federal exemption scheme; thus, Ohio residents who file *for* bankruptcy relief are limited to the exemptions provided under law. [Ohio Rev. Code Ann. § 2329.662](#) (2001 & Supp. 2003).

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Evidence > Burdens of Proof > General Overview  
 Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties  
 Bankruptcy Law > Exemptions > Claims & Objections  
 Bankruptcy Law > Exemptions > General Overview  
 Evidence > Burdens of Proof > Initial Burden of Persuasion

**HN5** The party objecting to an exemption has the burden of proving the objection is not properly claimed. [Fed. R. Bankr. P. 4003\(b\)](#). A party objecting to claimed exemptions must prove that the exemption is not properly claimed by a preponderance of the evidence. Upon the introduction of sufficient evidence to rebut the prima facie validity of the exemption, the burden shifts to the debtors to demonstrate that the exemption is proper. If, however, the trustee fails to carry the burden of proving by a preponderance of the evidence that the exemption should be disallowed, the exemption will stand.

Bankruptcy Law > Exemptions > State Law Exemptions > General Overview  
 Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution  
 Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

**HN6** See [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)](#) (2001 & Supp. 2003).

Bankruptcy Law > Exemptions > State Law Exemptions > General Overview

**HN7** An exemption claimed under [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)](#) (2001 & Supp. 2003) requires a three-part analysis: (1) a right to receive payment under an annuity or similar plan; (2) the payment must be on account of illness, disability, death, age, or length of service; and (3) the payment must be reasonably **necessary for** the **support** of the debtor or his dependents.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

**HN9** See [11 U.S.C.S. § 522\(d\)\(10\)\(E\)](#).

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions  
 Governments > Legislation > Interpretation  
 Bankruptcy Law > Exemptions > State Law Exemptions > General Overview

**HN8** Ohio bankruptcy courts have looked to the legislative history of [11 U.S.C.S. § 522](#) in determining the meaning of the reasonably-**necessary** limitation.

Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions  
 Bankruptcy Law > Exemptions > State Law Exemptions > General Overview  
 Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers  
 Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

**HN10** The reasonably **necessary** standard under [11 U.S.C.S. § 522\(d\)\(10\)\(E\)](#) requires that the court take into account other income and exempt property of the debtor, present and anticipated and that the appropriate amount to be set aside **for** the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim. Courts applying the Ohio exemption statute have likewise employed this basic-needs analysis, determining whether retirement benefits are reasonably **necessary for** a debtor's **support** not by looking to "whether he has sufficient funds to sustain his former lifestyle, but instead whether he has enough to sustain his present and, future needs, taking into account any special needs of the par-

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ticular debtor. In determining what payments are “reasonably *necessary*,” the court does not have to decide whether a debtor has sufficient funds to sustain a former lifestyle. Instead, the inquiry is whether there is enough to sustain present and future needs, taking into account any special circumstances.

Family Law > Marital Termination & Spousal *Support* > Spousal *Support* > General Overview  
 Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions  
 Family Law > ... > Spousal *Support* > Obligations > General Overview  
 Pensions & Benefits Law > ... > Defined Contribution Plans > Plan Types > Individual Retirement Accounts

**HN11** Bankruptcy courts uniformly consider eleven factors in making the determination of the amount of retirement funds *necessary* to sustain a debtor’s needs. These factors include: (1) Debtors’ present and anticipated living expenses; (2) Debtors’ present and anticipated income from all sources; (3) Age of the debtors and dependents; (4) Health of the debtors and dependents; (5) Debtors’ ability to work and earn a living; (6) Debtors’ job skills, training, and education; (7) Debtors’ other assets, including exempt assets; (8) Liquidity of other assets; (9) Debtors’ ability to save *for* retirement; (10) Special needs of the debtors and dependents; and (11) Debtors’ financial obligations, e.g., alimony or *support* payments. A bankruptcy court’s analysis is not restricted to the necessity factors, nor is a bankruptcy court required to specifically discuss each factor in every case. However, these factors are appropriate *for* a trial court’s consideration in its analysis of the totality of facts and circumstances in each case.

Bankruptcy Law > Exemptions > General Overview

**HN12** A debtor’s eligibility *for* an exemption must be gauged from the time the debtors’ joint bankruptcy petition is filed, and as a consequence, later changes that occur in a debtor’s set of circumstances are ignored.

Bankruptcy Law > Exemptions > State Law Exemptions > General Overview

**HN13** Although *Ohio Rev. Code Ann. § 2329.66(A)(10)(b)* (2001 & Supp. 2003) permits the exemption of the amount reasonably *necessary for* the *support* of debtor and his dependents, the court may not permit the exemption of an amount expended on behalf of an adult child that is not a dependent.

Bankruptcy Law > Exemptions > Bankruptcy Code Exemptions

**HN14** Courts often base a determination that retirement assets are reasonably *necessary for* the maintenance and *support* of debtors and their dependents on debtors’ health-related problems and their resultant inability to work. The special needs of retired, infirm and elderly debtors should be taken into account.

**Counsel:** [\*\*1] *For* Harvey J Guikema, dba General Partner in the Focal Point, Debtor: Nicholas W Jones, Delaware, OH.

*For* Debra L Guilema, Joint Debtor: Nicholas W Jones, Delaware, OH.

*For* Susan L Rhiel, Trustee: Susan L Rhiel, Columbus, OH.

**Judges:** Judge Hoffman.

**Opinion by:** John E. Hoffman, Jr.

Christal Caudill

Opinion
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**[\*608] MEMORANDUM OPINION**

This contested matter arises from the objection (“Objection”) filed by Susan L. Rhiel, the Chapter 7 trustee (“Trustee”), to Debra L. Guikema’s claim of an exemption [\*609] in a VALIC retirement annuity (“Annuity”). *HNI* Under [§ 2329.66\(A\)\(10\)\(b\) of the Ohio Revised Code](#), a “person’s right to receive a payment under any pension, annuity or similar plan” is exempt to the *extent* that the payment is “reasonably *necessary for* the *support* of the person and the person’s dependents.” [Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)](#) (Anderson 2001 & Supp. 2003) (“Ohio Exemption Statute”). In determining the exemptibility of retirement funds under either the Ohio Exemption Statute or its federal counterpart, [11 U.S.C. § 522\(d\)\(10\)\(E\)](#) (“Federal Exemption Statute”), bankruptcy courts have uniformly applied the 11-factor test approved [\*\*2] by the Sixth Circuit Bankruptcy Appellate Panel (“BAP”) in [Hamo v. Wilson \(In re Hamo\)](#), 233 B.R. 718, 723 (B.A.P. 6th Cir. 1999) to assess whether the funds are reasonably *necessary for* the *support* of debtors and their dependents. Having considered the factors listed by the BAP in [Hamo](#), the Court concludes that the Annuity is not reasonably *necessary for* the Debtors’ maintenance and *support*. The factors figuring prominently in the Court’s analysis are the Debtors’ age and good health, their current and anticipated future income, their anticipated retirement income from other sources, and, most importantly, their ability to replace the Annuity and save additional sums *for* retirement if they make reasonable adjustments to their current budget. In reaching the conclusion that the Annuity may not be exempted under [Ohio Rev. Code § 2329.66\(A\)\(10\)\(b\)](#), the Court rejects the Debtors’ contention that *HN2* the “reasonably *necessary*” language contained in both the Ohio and Federal Exemption Statutes was primarily designed to preclude high-salaried professionals and executives from exempting retirement funds and thus should not limit Mrs. Guikema’s exemption [\*\*3] in this case.

This memorandum opinion constitutes the Court’s findings of fact and conclusions of law. [Fed. R. Civ. P. 52](#) (made applicable here by [Fed. R. Bankr. P. 7052](#) and [9014](#)).

## I. Jurisdiction

The Court has jurisdiction over this matter pursuant to [28 U.S.C. §§ 157](#) and [1334](#) and the general order of reference entered in this district. This is a core proceeding. [28 U.S.C. § 157\(b\)\(2\)](#).

## II. Factual and Procedural Background

### A. The Debtors and Their Employment History

Harvey and Debra Guikema (collectively, “Debtors;” individually, “Mr. Guikema” or “Mrs. Guikema”) filed a voluntary petition *for* relief under Chapter 7 of the Bankruptcy Code on April 14, 2004 (“Petition Date”). As of the Petition Date, Mrs. Guikema was 50 years old and had been employed as a registered nurse at Grady Memorial Hospital (“Grady Memorial”) in Delaware, Ohio *for* 13 years. At the evidentiary hearing on the Objection (“Hearing”), Mrs. Guikema testified that she earns approximately \$ 60,000 a year and receives regular, annual increases [\*\*4] in salary.

Mr. Guikema is 52 years old and currently is self employed as a photographer. His monthly net income is approximately \$ 300. He has been so employed since the closing of Focal Point, a pho-

tography shop in Delaware that Mr. Guikema operated along with a business partner. It was the failure of this start-up business that precipitated the Debtors' Chapter 7 filing. As of the date of the Hearing, Mr. Guikema also worked as salesperson in training--on a "commission-only" basis--for NRC Corporation ("NRC"), a collection agency, but had yet to receive any commission income from NRC. Mr. Guikema anticipated that he would leave his position with NRC [\*610] shortly and seek alternative employment. Before launching the Focal Point venture, Mr. Guikema worked for Cord Camera, a large chain of camera stores based in central Ohio. While employed there, Mr. Guikema contributed to Social Security.

The Debtors are in good health. They have no dependents; both of their children are married and attend post-graduate institutions.

**B. The Debtors' Assets and Liabilities**

The Debtors own a single-family residence in Delaware, Ohio, which they value in their schedules at \$ 135,000 ("Residence"). [\*\*5] The Residence is over-encumbered: Delaware County Bank and Skybank hold, respectively, first and second mortgages on the property securing obligations totaling approximately \$ 165,000. At the Hearing, Mrs. Guikema testified that the Debtors intend to remain in the Residence and had negotiated reaffirmation agreements with the first and second mortgage holders. Debtors' combined monthly payment on these two mortgages approximates \$ 1,650.

The schedules of assets and liabilities filed by the Debtors list total assets of \$ 189,632 and total liabilities at \$ 303,510. Debtors' liabilities include secured debt of \$ 171,300 and \$ 132,210 in unsecured indebtedness, consisting of \$ 38,600 in priority tax debt owing to the Internal Revenue Service and the State of Ohio and \$ 93,610 in nonpriority debt. More than two-thirds of the Debtors' nonpriority, unsecured debt is business-related, having been incurred in connection with Mr. Guikema's failed photography-shop venture.

In addition to the Residence, the Debtors list the following assets in their schedules:

Asset	Value
Cash/bank accounts	\$ 332
Household goods	\$ 1,800
Family books and pictures	\$ 100
Clothing and bedding	\$ 200
Jewelry	\$ 400
Whole-life insurance	\$ 1,100
Annuity	\$ 19,000
Profit sharing plan account	\$ 28,000
Automobile	\$ 2,000
Camera equipment	\$ 1,200
Partnership bank account	\$ 350
Partnership business assets	\$ 150
Total	\$ 54,732

[\*\*6] See Schedule B - Personal Property.

Aside from the Residence, the only significant assets listed in the Debtors' schedules are the Annuity and Mrs. Guikema's interest in a profit sharing plan sponsored by Grady Memorial ("PSP Account"). The Annuity is a tax-sheltered retirement account valued at \$ 19,194.90 as of March 31,

2004. Trustee Ex. 1. <sup>1</sup> AIG VALIC manages the Annuity, which is invested in a series of mutual funds on a percentage [\*611] basis. *Id.* Mrs. Guikema contributed \$ 100 a month to the Annuity during the first quarter of 2004 and has contributed \$ 12,050 over the life of the Annuity. *Id.*

[\*\*7] The PSP Account was valued at \$ 28,834.92 as of March 31, 2004. *Id.* AIG VALIC also manages the PSP Account, which, like the Annuity, is invested in a series of mutual funds on a percentage basis. *Id.* All contributions to the PSP Account (aside from an initial \$ 1,127.45 transfer to the account <sup>2</sup>) have come from Grady Memorial, which has contributed \$ 20,125.20 to the PSP Account since its inception. During her 13-year tenure at the hospital, Grady Memorial has contributed an annual average of approximately \$ 1,550 to the PSP Account. No suggestion was made at the Hearing that Grady Memorial would cease making these contributions to the PSP Account in the future.

**C. The Debtors’ Current Income and Expenses**

Debtors’ Schedule I lists total, net monthly income of \$ 3,714.36. Schedule I - Current Income of Individual Debtor(s). Their Schedule J lists the following monthly expenses:

<sup>1</sup> At the conclusion of the Hearing, the Court directed the parties to supplement the record by providing account balances for the Annuity and the PSP Account as well as documentation establishing projected distributions to the Debtors at retirement from the Annuity, the PSP Account and Social Security. The Trustee filed a document entitled “Submission of Exhibits for Determination of Trustee’s Objection to Claim of Exempt Property” (Doc. 35) (“Trustee’s Submission”), which included the following exhibits:

Trustee Exhibit (“Ex.”)	Document
1	Account statement for Mrs. Guikema as of March 31, 2004 for both the Annuity and PSP Account;
2	Annuity payment comparison (assuming distributions from the PSP Account only);
3	Annuity payment comparison (assuming distributions from both the PSP Account and Annuity);
4	Estimated Social Security benefits for Mrs. Guikema; and
5	Estimated Social Security benefits for Mr. Guikema.

<sup>2</sup> The record is silent as to the source of this payment and the date it was made.

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<b>Expense</b>	<b>Amount</b>
Rent or home mortgage payment	\$ 800
Utilities: Electricity and heating fuel	\$ 250
Water and sewer	\$ 60
Telephone	\$ 120
Home maintenance (Repairs and upkeep)	\$ 50
Food	\$ 400
Clothing	\$ 75
Laundry and dry cleaning	\$ 50
Medical and dental expenses	\$ 250
Transportation (not including car payments)	\$ 200
Recreation, clubs and entertainment, newspapers, magazines, etc.	\$ 100
Charitable contributions	\$ 75
Insurance:	
Life	\$ 50
Auto	\$ 65
Installment Payments:	
Auto	\$ 180
Other: Delaware County Bank, Second Mortgage	\$ 850
Other: School or work lunches	\$ 125
Other: Internal Revenue Service	\$ 500
<b>TOTAL MONTHLY EXPENSES</b>	<b>\$ 4,200</b>

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[\*\*8] See Schedule J - Current Expenditures of Individual Debtor(s).

#### D. The Debtors' Projected Future Income

According to the Trustee's Submission, at the time Mrs. Guikema reaches age 65 the Annuity and PSP Account will have, respectively, cash values of \$ 25,798.94 and \$ 40,316.83. Trustee Exs. 2 and 3.<sup>3</sup> The Trustee's Submission also reflects that at [\*612] age 65 Mrs. Guikema will receive monthly distributions of \$ 149.77 from the Annuity and \$ 234.06 from the PSP Account. *Id.* The projections of the future values of the Annuity and the PSP Account and the anticipated distributions from these funds are conservative because they assume (1) an annual growth rate of only 2%; (2) no additional contributions to the Profit Sharing Plan will be made by Grady Memorial; and (3) no additional retirement savings by Mrs. Guikema. *Id.* The Trustee's Submission further provides that Mr. and Mrs. Guikema, upon reaching the age of 66, will receive monthly Social Security benefits of \$ 1,138 and \$ 1,675, respectively. Trustee Exs. 4, 5.

#### [\*\*9] III. Arguments of the Parties

The Trustee asserts that "no portion of the [Annuity is] reasonably *necessary* [for the Debtor's maintenance and *support*] pursuant to the standards established by the case law applying the [Ohio Exemption] Statute." Objection at 1. Weighing against a finding that the Annuity is reasonably *necessary*, the Trustee argues, are the Debtors' age (both are in their early 50s and have nearly 15 years to work before retirement), their good health, the fact that they have no dependents, their anticipated retirement income (from both Social Security and the PSP Account) and their discharge of over \$ 90,000 in unsecured debt.

The Debtors argue that the Ohio Exemption Statute was not intended to limit exemption claims by debtors--like the Guikemas--who have retirement assets totaling less than \$ 50,000. Rather, they contend that the "*reasonably-necessary-for-maintenance-and-support*" limitation contained in both the Ohio and Federal Exemption Statutes was designed to thwart exemption claims made by high-salaried professionals and executives who accumulate substantial retirement assets and attempt to evade the claims of their creditors by taking compensation [\*\*10] in the form of retirement benefits instead of straight salary. Thus, the Debtors maintain that the Court need not undertake an analysis of the factors set forth in *Hamo*. Debtors argue, in the alternative, that application of the factors listed in *Hamo* warrants a finding that the Annuity is exempt in its entirety. Given their age and limited earning capacity, the Debtors have a less sanguine view than the Trustee of their ability to meet their financial needs at retirement. They assert that even the approximate \$ 47,000 total value of the Annuity and the PSP Account will be "*insufficient for* reasonable *support* of [their] retirement needs." Response to Objection to Claim of Exemption, P 1.

#### IV. Legal Analysis

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<sup>3</sup> Two of the exhibits attached to the Trustee's Submission appear to have been mislabeled. Trustee Ex. 2 purports to set forth a projected future payment stream from the "Profit Sharing Plan only." But the projected \$ 25,798.94 future value of the PSP Account (as of the date Mrs. Guikema reaches age 65) contained in Trustee Ex. 2 is approximately \$ 3,000 less than its current value of \$ 28,834.92, which makes no sense given the assumed annual growth rate of 2%. Thus, the projection set forth in Trustee Ex. 2 must have been intended to refer solely to the Annuity, given its current value of \$ 19,194.30 and the assumed future annual growth rate of 2%. Similarly, the projected \$ 40,316.83 value contained in Trustee Ex. 3, which purports to state the value of "both [the PSP Account] and Annuity" (as of the date that Mrs. Guikema reaches age 65), is nearly \$ 8,000 less than their combined, current value of \$ 48,029.22. The projection contained in Trustee's Ex. 3 accordingly must have been intended to refer solely to the PSP Account, given its current value of \$ 28,834.92 and assumed annual growth rate of 2%.

## A. The Bankruptcy Estate

**HN3** The filing of a petition under the Bankruptcy Code creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." [11 U.S.C. § 541\(a\)\(1\)](#). See [Owen v. Owen](#), 500 U.S. 305, 308, 114 L. Ed. 2d 350, 111 S. Ct. 1833 (1991) ("An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well [\*\*11] as those interests recovered or recoverable through transfer and lien avoidance provisions."); [Forbes v. Lucas \(In re Lucas\)](#), 924 F.2d 597, 600 (6th Cir.), cert. denied, 500 U.S. 959 (1991) ("The filing of a bankruptcy petition under Title 11 of the United States Code creates an estate comprised of 'all legal or equitable interests of the debtor as of the commencement of the case.'") (quoting [11 U.S.C. § 541\(a\)\(1\)](#)). Here, there is no dispute that the Annuity is property of the Debtors' bankruptcy estate.

## [\*613] B. Exemptions from the Estate

**HN4** "Federal bankruptcy law allows a debtor to exempt some of his property--mainly basic necessities--from the bankruptcy estate. The exemptions can afford the debtor some economic and social stability, which is important to the fresh start guaranteed by bankruptcy." [Sheehan v. Morehead \(In re Morehead\)](#), April 14, 2005, 283 F.3d 199, 202-203 (4th Cir. 2002) (citing [Williams v. United States Fidelity & Guaranty Co.](#), 236 U.S. 549, 554-55, 59 L. Ed. 713, 35 S. Ct. 289 (1915)). See [11 U.S.C. § 522\(b\)](#); [Rousey v. Jacoway](#), 544 U.S. 320, 161 L. Ed. 2d 563, 125 S. Ct. 1561, 1565-66 (2005) [\*\*12] ("To help the debtor obtain a fresh start, the Bankruptcy Code permits him to withdraw from the estate certain interests in property, such as his car or home, up to certain values.") (citations omitted); [Owen](#), 500 U.S. at 308 ("An exemption is an interest withdrawn from the estate (and hence from creditors) *for* the benefit of the debtor. [Section 522](#) determines what property a debtor may exempt."); [Holland v. Star Bank, N.A. \(In re Holland\)](#), 151 F.3d 547, 548 (6th Cir. 1998) ("The Bankruptcy Code allows debtors to exempt certain property from the bankruptcy estate."); [Storer v. French \(In re Storer\)](#), 58 F.3d 1125, 1127 (6th Cir.), cert. denied, 516 U.S. 990 (1995) ("[Bankruptcy Code § 522\(d\)](#) entitles debtors to exempt certain property from their bankruptcy estate."). Exemptions "give the debtors a so-called 'grub-stake' to begin their fresh start and...act as a safety net, so that the debtor and his family are not completely impoverished due to creditor collection action or bankruptcy such that they become wards of the state." [In re Robinson](#), 292 B.R. 599, 606 (Bankr. S.D. Ohio 2003) [\*\*13] (quoting [In re Sumerell](#), 194 B.R. 818, 826 (Bankr. E.D. Tenn. 1996)).

[Section 522\(b\)\(1\)](#) of the Code offers debtors a choice between exempting the property specified in [§ 522\(d\)](#) or exempting the property protected by federal nonbankruptcy law or state law "unless the State law that is applicable to the debtor...specifically does not so authorize." [11 U.S.C. § 522\(b\)\(1\)](#). Ohio has chosen to "opt out" of the federal exemption scheme; thus, Ohio residents who file *for* bankruptcy relief, like the Debtors, are limited to the exemptions provided under law.<sup>4</sup> See [Storer](#), 58 F.3d at 1127 ("Ohio has replaced the federal exemptions with its own state exemptions, which are those generally available to debtors under Ohio's general debtor-

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<sup>4</sup> [Ohio Rev. Code Ann. § 2329.662](#) provides:

Pursuant to the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, [11 U.S.C.A. 522\(b\)\(1\)](#), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, [11 U.S.C.A. 522\(d\)](#).

[Ohio Rev. Code Ann. § 2329.662](#) (Anderson 2001).

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creditor law.”).

#### [\*\*14] C. Burden of Proof in Exemption Litigation

**HN5** The party objecting to an exemption—here, the Trustee—has the burden of proving the objection is not properly claimed. See *Fed. R. Bankr. P. 4003(b)* (“A party in interest may file an objection to the list of property claimed as exempt....”); *Robinson*, 292 B.R. at 612 n.9. “The Trustee, as the objecting party, has the burden of producing evidence which rebuts the prima facie presumption that the exemption is correct.” *In re Mann*, 201 B.R. 910, 915 (Bankr. E.D. Mich. 1996) (citing *Lester v. Storey*, (*In re Lester*), 141 B.R. 157, 161 (Bankr. S.D. Ohio 1991)). See also *In re Rhinebolt*, 131 B.R. 973, 975 (Bankr. S.D. Ohio 1991) (“The initial burden of producing evidence to rebut the propriety of a [\*614] claimed exemption rests on the objecting party.”) (citing *Fed. R. Bankr. P. 4003(c)*).

“A party objecting to claimed exemptions must prove that the exemption is not properly claimed by a preponderance of the evidence.” *In re Roselle*, 274 B.R. 486, 490 n.4 (Bankr. S.D. Ohio 2002) (citing [\*15] *Fed. R. Bankr. P. 4003(c)*). See also *Hamo*, 233 B.R. at 723 (“The burden is on the trustee to establish, by a preponderance of the evidence, that the exemption should be disallowed.”). “Upon the introduction of sufficient evidence to rebut the prima facie validity of the exemption, the burden shifts to the debtors to demonstrate that the exemption is proper.” *Rhinebolt*, 131 B.R. at 975. If, however, “the trustee fails to carry the burden of proving by a preponderance of the evidence that the exemption should be disallowed, the exemption will stand.” *Mann*, 201 B.R. at 915 (citing *In re Baumgardner*, 160 B.R. 572, 573-74 (Bankr. S.D. Ohio 1993)).

#### D. The Ohio Exemption Statute

Debtors claim the Annuity is exempt under *§ 2329.66(A)(10)(b) of the Ohio Revised Code*, which provides that:

**HN6** (A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

(b) Except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, [\*16] *the person’s right to receive a payment under any pension, annuity, or similar plan or contract, not including a payment from a stock bonus or profit-sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of the person’s dependents, except if all the following apply:*

- (i) The plan or contract was established by or under the auspices of an insider that employed the person at the time the person’s rights under the plan or contract arose.
- (ii) The payment is on account of age or length of service.
- (iii) The plan or contract is not qualified under the “Internal Revenue Code of 1986,” 100 Stat. 2085, *26 U.S.C. 1*, as amended.

*Ohio Rev. Code Ann. § 2329.66(A)(10)(b)* (emphasis added).

**HN7** “An exemption claimed under *Ohio Revised Code Section 2329.66(A)(10)(b)* requires [a] three-part analysis: (1) a right to receive payment under an annuity or similar plan; (2) the payment must be on account of illness, disability, death, age, or length [\*17] of service; and (3) the pay-

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ment must be reasonably *necessary for* the *support* of the debtor or his dependents." *In re Meyers*, 139 B.R. 858, 862 (Bankr. N.D. Ohio 1992). The parties' dispute in this case centers on whether the Annuity is reasonably *necessary for* the Debtors' *support*. **E. The "Reasonably-Necessary" Limitation**

Both the Ohio and the Federal Exemption Statutes limit an exemption in retirement assets to the amount "reasonably *necessary for* the *support* of [the debtor and the debtor's dependents]." *Ohio Rev. Code Ann. § 2329.66(A)(10)(b)*; *11 U.S.C. § 522(d)(10)(E)*.<sup>5</sup> But the phrase "reasonably [\*615] *necessary for* the *support* of [the debtor and the debtor's dependents]" is not defined in either the Bankruptcy Code or the Ohio Revised Code. Because there is no legislative history *for* Ohio statutes,<sup>6</sup> *HN8* Ohio bankruptcy courts have looked to the legislative history of the Federal Exemption Statute in determining the meaning of the reasonably-*necessary* limitation. See *In re Phillips*, 45 B.R. 529, 533 (Bankr. N.D. Ohio 1984) ("The Ohio statute does not provide a definition of reasonably *necessary*, [\*\*18] therefore, the court looks to the legislative history [of the Federal Exemption Statute] and the case law to establish a standard.").

Debtors argue that both the legislative history of the Federal Exemption Statute and case law establish that the "reasonably *necessary*" language was designed to disallow exemption claims made by debtors with substantial retirement savings--which they define as \$ 200,000 to \$ 300,000 or more--and thus should not limit their exemption in the Annuity here. To fully address the Debtors' argument, an explanation of the sequence of events leading to the enactment of the Federal Exemption Statute is required. The bankruptcy court in *Warren v. Taff (In re Taff)*, 10 B.R. 101 (Bankr. D. Conn. 1981) chronicled this history as follows:

In attempting to discover the origin of [the reasonably *necessary*] [\*\*20] language, one is led first to the Report of the Commission on Bankruptcy Laws of United States, H.R.Doc.No. 93-137, 93rd Cong., 1st Sess. (1973). The Commission on Bankruptcy Laws (Commission) was established in 1970 by the Congress to study, analyze, evaluate and recommend changes in the bankruptcy laws of the United States. In 1973, it filed its report together with a proposed completely revised bankruptcy statute. Although previous bankruptcy laws had deferred to the states *for* the enactment of the exemptions to be allowed to a bankrupt in the state of his domicile, the Commission proposed a "federal" list of exemptions to be of nationwide application in place of the

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<sup>5</sup> [Section 522\(d\)\(10\)\(E\) of the Bankruptcy Code](#) provides, as follows: *HN9* (d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive--

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, *to the* extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under [section 401 \(a\)](#), [403\(a\)](#), [403\(b\)](#), or [408 of the Internal Revenue Code of 1986](#).

<sup>11</sup> [U.S.C. § 522\(d\)\(10\)\(E\)](#) (emphasis added).

<sup>6</sup> See *Mascio v. Public Emples. Retirement Sys.*, 160 F.3d 310, 325 (6th Cir. 1998) ("There is no legislative history per se for Ohio statutes."); *State v. Bryant*, 1998 Ohio App. LEXIS 3308, 1998 WL 399863, at \*4 (Ohio Ct. App. July 17, 1998) ("There is no legislative history in Ohio, generally."); *In re Smith*, 5 B.R. 227, 229 (Bankr. S.D. Ohio 1980) (same).

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state exemptions. In § 4-503(c)(6) of its proposed bankruptcy act, the Commission allowed as exempt

before or after retirement, such rights as the debtor may have under a [profit sharing,] pension [stock bonus, annuity or similar plan] which is established *for* the primary purpose of providing benefits upon retirement by reason of age, health, or length of service...to the *extent*...the debtor's interest therein is reasonably *necessary for* the *support* of the debtor and his dependents.

[\*616] Resolution of the problems [\*\*21] of the standard of *support* to be sustained, and the effect of other resources of the debtor, was not provided *for* in the proposed bankruptcy act. While the Commission proposal was before Congress, the National Conference of Commissioners on Uniform State Laws promulgated in August, 1976 a Uniform Exemptions Act (UEA) which sought to conform state exemption laws generally to the Commission's proposals. Section 6 of the UEA followed the Commission's proposed list of exemptions except that UEA § 6(b) defined the phrase "property to the *extent* reasonably *necessary for* the *support* of [the debtor] and his dependents" to mean

property required to meet the present and anticipated needs of the individual and his dependents as determined by the court after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt.

The Bankruptcy Code of 1978 wound its way through Congress until the day of enactment in two separate versions--one in the House and one in the Senate. When in 1977, the House Judiciary Committee reported out its version of a new bankruptcy law, it included an option *for* a [\*\*22] debtor to choose either state law exemptions or the federal exemptions. In its list of federal exemptions, the House Bill exempted pension plans *without* limitation. The *House Report* No. 95-595, 95th Cong. 1st Sess. (1977), 361..., U.S. Code Cong. & Admin. News 1978, pp. 5787, 6317 noted as to the federal exemptions: "They are derived in large part from the Uniform Exemption Act, promulgated by the Commissioners of Uniform State Laws in August, 1976." The Senate Judiciary Committee's version of a new bankruptcy law retained the former law's policy of looking only to state law *for* exemptions and omitted alternative federal exemptions. In the compromise measure which was enacted by Congress in 1978 to become the present law, the option provision in the House version *for* the debtor to choose between exemption systems was retained, and the "reasonably *necessary*" language was inserted with respect to pension plans [and other retirement assets].

*Id.* at 105-06 (emphasis added) (footnote omitted).

As the Taff court explained, the statute proposed by the Commission on Bankruptcy Laws ("Commission") was not enacted. Nevertheless, a law review article written [\*\*23] by a consultant to the Commission has been cited by one bankruptcy court as authority *for* the proposition that the reasonably-*necessary* limitation contained in the Federal Exemption Statute was aimed at the circumstance in "which an officer of a large corporation or a professional person could accrue very large vested pension benefits beyond that which would be reasonably *necessary for* their *support*." *In re Miller*, 33 B.R. 549, 553 & n.10 (Bankr. D. Minn. 1983) (citing William T. Plumb, Jr., *The Recommendations of the Commission on the Bankruptcy Laws--Exempt and Immune Prop-*

329 B.R. 607, \*616; 2005 Bankr. LEXIS 1558, \*\*23

erty, 61 Va. L. Rev. 1,59(1975)).<sup>7</sup> The law review article cited by [\*617] the *Miller* court discussed the exemption statute proposed by the Commission, which contained a reasonably-*necessary-for-maintenance-and-support* limitation, and noted that this language was included "because of the well-known fact that a corporate officer or member of a professional corporation may be entitled to vested pension benefits aggregating hundreds of thousands of dollars." Plumb, 61 Va. L. Rev. at 59 (quoting Commission note 8 to Proposed Bankruptcy Act § 4-503, which states that the [\*\*24] reasonably-*necessary* limitation was "placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits.") (citing S. Rep. No. 91-552, 91st Cong., 1st Sess. 201, 271 (1969)).

[\*\*25] Contrary to the Debtors' contention, neither the express terms or the legislative history of the Federal Exemption Statute *support* the conclusion that the "reasonably *necessary*" language contained in the statute was aimed primarily at high earners who have accumulated hundreds of thousands of dollars in retirement funds. True, the reasonably-*necessary* limitation did emanate from the exemption statute proposed by the Commission. And it is true also that note 8 to the Commission's proposed exemption statute states that the reasonably-*necessary* limitation was directed at "members of professional corporations and [corporate] officers" having "very substantial benefits." *Id.* But the text of the Commission's proposed exemption statute did not define the phrase "reasonably *necessary for* the maintenance and *support* of the debtor and his dependents" or otherwise suggest that this limitation should apply only to high earners. More importantly, there is absolutely no indication in the legislative history accompanying the version of the Federal Exemption Statute that actually became law that the reasonably-*necessary* limitation was aimed primarily at high earners. *See* H.R. Rep. No. 595, 95th [\*\*26] Cong., 1st Sess. 361-62 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317-18. Indeed, the legislative history accompanying the Federal Exemption Statute makes no mention of either the Commission's proposed exemption statute or its concern that high-earning corporate executives and professionals could shield unneeded assets from creditors absent a limitation on the exemptibility of retirement assets. *See id.*

Rather than referencing the Commission's proposed exemption statute and accompanying notes, the Federal Exemption Statute's legislative history simply indicates that the federal exemptions were "based on the Uniform Exemptions Act ("UEA"), promulgated by the Commissioners of Uniform State Laws in 1976." *Gilbert v. Osburn, (In re Osburn), 56 B.R. 867, 875 (Bankr. S.D. Ohio 1986)* (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317). "Section 6[b] of the [UEA] [\*618] defined the phrase 'property to the *extent* reasonably *necessary for* the *support* of [the debtor] and his dependents' as 'property required to meet the present and anticipated needs of the individual and his dependents as determined... after [\*\*27] consideration of the individual's responsibilities and all of the present and anticipated property and income of the individual, including that which is *exempt*.'" *Id.* (citing *Kochell, 732 F.2d at 565*; *Phillips, 45 B.R. at 533*). As a leading bankruptcy treatise notes, "this

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<sup>7</sup> Several other reported decisions also have cited the law review article relied on by the *Miller* court, but not as support for the proposition that Congress included the reasonably-necessary limitation in the Federal Exemption Statute in order to prevent high-earning executives and professionals from placing substantial retirement assets beyond the reach of creditors. These decisions simply note that one legal commentator has suggested that the reasonably-necessary limitation contained in the Commission's proposed exemption statute was directed at high earners who have amassed substantial retirement assets. *See In re Kochell, 732 F.2d 564, 565 (7th Cir. 1984)* ("One commentator has suggested that the limitation was added to prevent officers of large corporations and professionals from placing large amounts of their assets into pension funds that would remain unavailable to their creditors, despite the fact that the individual might not have any real need for the assets.") (citing Plumb, 61 Va. L. Rev. at 58-59). *Samore v. Graham (In re Graham), 726 F.2d 1268, 1272 (8th Cir. 1984)* ("It was with private plans particularly in mind that the Commission on Bankruptcy Laws proposed the reasonable support limitation, because of the well-known fact that a corporate officer or a member of a professional corporation may be entitled to vested pension benefits aggregating hundreds of thousands of dollars.") (quoting Plumb, 61 Va. L. Rev. at 59).

329 B.R. 607, \*618; 2005 Bankr. LEXIS 1558, \*\*27

standard does not focus on 'the debtor's station in life and the standard of living to which he has been accustomed,' as does the standard generally applicable to alimony and *support*." 2 William L. Norton, Jr., *Norton Bankruptcy Law and Practice* 2d § 46:8 (1998) (quoting UEA, Comment 7 to § 6, 13 U.L.A. Civ. Proc. & Rem. Laws 226 (1986)). "Rather, the [UEA] 'requires the court to direct its attention to the individual's needs and responsibilities.'" *Id.* (footnote omitted). "Given the evolutionary relationship between the [UEA] and the Code, this definition carries great weight." *Id.* (footnote omitted).

Because the legislative history of the Federal Exemption Statute states that the federal exemptions are derived from the UEA, courts have looked to the definition of reasonably-*necessary* property contained in § 6[b] of the UEA and its accompanying Comment [**\*\*28**] 7 *for* guidance in interpreting the "reasonably *necessary*" language contained in the statute. *See, e.g., Kochell, 732 F.2d at 565 HN10* ("The reasonably *necessary* standard requires that the court take into account other income and exempt property of the debtor, present and anticipated...and that the appropriate amount to be set aside *for* the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim.") (quoting *Taff, 10 B.R. at 107*); *In re Flygstad, 56 B.R. 884,889-890 (Bankr. N.D.Iowa 1986)* (same). Courts applying the Ohio Exemption Statute have likewise employed this basic-needs analysis, determining whether retirement benefits are reasonably *necessary for* a debtor's *support* not by looking to "whether he has sufficient funds to sustain his former lifestyle, but [instead] whether he has enough to sustain his present and future needs, taking into account any special needs of the particular debtor." *Hamo, 233 B.R. at 723*. "In determining what payments are [**\*\*29**] 'reasonably *necessary*', this Court does not have to decide whether a debtor has sufficient funds to sustain a former lifestyle. Instead, the inquiry is whether there is enough to sustain present and future needs, taking into account any special circumstances." *Roselle, 274 B.R. at 490* (citing *Hamo, 233 B.R. at 723*; *In re Parker, 219 B.R. 972, 974-75 (Bankr. S.D. Ohio 1998)*); *In re Erbaugh, 199 B.R. 367, 368 (Bankr. S.D. Ohio 1996)* ("The appropriate amount to be set aside *for* the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim.").

In order to determine whether any or all of the Annuity is reasonably *necessary for* the Debtors' *support*, the Court "must consider both the present and future needs of the debtors." *Parker, 219 B.R. at 974* (citing *In re Bogart, 157 B.R. 345, 347 (Bankr. N.D. Ohio 1993)*). The Court "must look to the time when both husband and wife will be in retirement[.]" *id. at 975*, and make [**\*\*30**] its determination based on the facts existing on the date the [**\*619**] Debtors filed their petition.<sup>8</sup> As the BAP explained in *Hamo, HNII* "bankruptcy courts uniformly consider eleven factors in making the determination of the amount of retirement funds *necessary* to sustain a debtor's needs." *Hamo, 233 B.R. at 723*. These factors ("Necessity Factors") include:

1. Debtors' present and anticipated living expenses;
2. Debtors' present and anticipated income from all sources;

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<sup>8</sup> "The right to claim an exemption from property of the bankruptcy estate arises and is fixed in a voluntary case on the date the petition is filed." *In re Lude, 291 B.R. 109, 110 (Bankr. S.D. Ohio 2003)* (citing *Armstrong v. Peterson (In re Peterson), 897 F.2d 935 (8th Cir. 1990)*). "Changes in either a debtor's factual circumstances or the law after the petition date do not change the status of an exemption properly claimed as of the petition filing date." *Id.* (citing *Peterson, 897 F.2d at 937-938*). "Ohio law holds that in bankruptcy, a debtor's eligibility for an exemption must be gauged from the time the debtors' joint bankruptcy petition is filed, and as a consequence, later changes that occur in a debtor's set of circumstances are ignored." *In re Greer, 242 B.R. 389, 398 (Bankr. N.D. Ohio 1999)* (citations omitted).

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3. Age of the debtors and dependents;
4. Health of the debtors and dependents;
5. Debtors' ability to work and earn a living;
6. Debtors' job skills, training, and education;
7. Debtors' other assets, including exempt assets;
8. Liquidity of other assets;
9. Debtors' ability to save *for* retirement;
10. Special needs of the debtors and dependents; [and]11. Debtors' financial obligations, e.g., alimony or *support* payments.

*Id.* See also *In re Conkle*, 275 B.R. 530, 531 (Bankr. S.D. Ohio 2002) (applying Necessity Factors and "determining [that] annuity is [not] reasonably *necessary for* the *support* of the debtors") (citing *Mann*, 201 B.R. at 915-16; [\*\*31] *Parker*, 219 B.R. at 975); *Erbaugh*, 199 B.R. at 369 (determining individual retirement account was reasonably *necessary* based on application of Necessity Factors); *In re Webb*, 189 B.R. 144, 145-146 (Bankr. S.D. Ohio 1995) (same); *Mid-Arn. Fed. Sav. & Loan Ass'n v. Gateway Manor Congregate Apts.*, 94 Ohio App. 3d 521, 641 N.E.2d 229, 233 (Ohio Ct. App. 1994) (applying Necessity Factors and holding that Keogh plan was not reasonably *necessary for* judgment debtor's *support* and thus not exempt from garnishment).

[\*\*32] "A bankruptcy court's analysis is not restricted to the[] [Necessity] Factors, nor is a bankruptcy court required to specifically discuss each factor in every case. However, these factors are appropriate *for* a trial court's consideration in its analysis of the totality of facts and circumstances in each case." *Hamo*, 233 B.R. at 723. See also *Roselle*, 274 B.R. at 490 ("When analyzing the facts and circumstances of each case, the court is not restricted to these factors, nor is the court required to specifically address each factor."). **F. Application of the Necessity Factors**

### **1. Present/Future Income & Expenses (Necessity Factors 1, 2) Ability to Save *for* Retirement (Necessity Factor 9)**

The Debtors' lifestyle is by no means lavish. Together, they net \$ 3,714 in monthly income, and they estimate their monthly expenses at \$ 4,200, resulting in a monthly budget shortfall of nearly \$ 500. See Schedule I - Current Income of Individual [\*620] Debtor(s); Schedule J - Current Expenditures of Individual Debtor(s). Most of the Debtors' income is obtained from Mrs. Guikema's \$ 60,000 a year position as a registered nurse, a job she has held [\*\*33] *for* 13 years. While Mrs. Guikema has no plans to pursue a managerial position at Grady Memorial, which, she testified, would result in a significant pay raise, she does expect to receive modest yearly pay raises until her planned retirement in 15 years when she reaches age 65. Mr. Guikema nets \$ 300 a month from his current photography work. He testified that he continues to search *for* more lucrative employment. Mr. Guikema has substantial experience as a photographer and also worked at Cord Camera *for* several years. His income has the potential to increase substantially if he obtains a position similar to that which he held at Cord Camera but likely will not decrease in the future.

Although Debtors living expenses exceed their income by nearly \$ 500 a month, they could eliminate this shortfall by reducing their \$ 2,010 in total monthly housing-related expenditures-- which is the one item in the Debtors' budget that appears to be clearly out of line considering

329 B.R. 607, \*620; 2005 Bankr. LEXIS 1558, \*\*33

their income level. Debtors' total monthly housing-related costs, which consume nearly 60% of their total monthly income, include the following items.

Home mortgage	\$ 800
Second mortgage	\$ 850
Electricity and heating fuel	\$ 250
Water and sewer	\$ 60
Home maintenance	\$ 50
Total	<sup>9</sup> \$ 2010

[\*\*34] These expenses would be reduced significantly by relocation to an apartment. Debtors could certainly find suitable housing in the Delaware, Ohio area *for* no more than \$ 1,000 per month by simply moving to an apartment in their community. A reduction in their housing-related expenditures by approximately \$ 1,000 a month would result in the elimination of Debtors' current \$ 500 monthly budget shortfall and allow them to save or invest the remaining \$ 500 a month in savings *for* their retirement needs.

As discussed above, in assessing whether the Annuity is reasonably *necessary for* the *support* of the Debtors, the Court [\*\*35] must look to whether the Debtors can sustain their basic needs, not whether they can maintain their former status in society or the lifestyle to which they were accustomed. *See, e.g., Hamo, 233 B.R. at 723; Roselle, 274 B.R. at 490; Parker, 219 B.R. at 975; Erbaugh, 199 B.R. at 368.* By obtaining more affordable housing, Debtors will be able to sustain their basic needs and save substantial sums *for* their retirement. *See Roselle, 274 B.R. at 490-491* (concluding that debtor's entire \$ 2,453.30 monthly disability insurance benefit was not reasonably *necessary* based, in part, on finding that debtor's housing expenses could be substantially reduced by his relocation to an apartment). The Debtors undoubtedly would prefer to stay in their current residence. But, in determining whether the Annuity is reasonably *necessary*, the Court is not permitted to consider Debtors' former station in life. *See Kochell, 732 F.2d at 566; Phillips, 45 B.R. at 534; Taff, 10 B.R. at 107.* Simply put, "the fresh start guaranteed by bankruptcy, and *supported* by the exemption scheme, [\*\*36] does not entitle a debtor to maintain the lifestyle to which he was accustomed [\*\*621] in better times." *Morehead, 283 F.3d at 207.*<sup>10</sup>

Further, the Debtors' future income should be sufficient to sustain their basic needs. Estimates from the Social Security Administration show that Debtors, collectively, will receive [\*\*37] \$ 2,813 in monthly benefits upon their retirement, Trustee Exs. 4, 5, and that Mrs. Guikema will receive an additional \$ 234.06 per month upon retirement from her PSP Account, Trustee Ex. 3. The monthly payment Mrs. Guikema is projected to receive from the PSP Account assumes a mere 2% rate of growth and that Grady Memorial will make no future contributions to the plan. This latter assumption does not appear reasonable given the fact that Grady Memorial has contributed a yearly average of \$ 1,550 to her PSP Account over the past 13 years. If this contribution level were to continue *for* another 15 years, Mrs. Guikema's interest in the PSP Account would increase by at least \$ 23,250 (which does not include a rate of return on the additional contributions). Thus, it is reasonable to assume that the monthly distribution Mrs. Guikema will receive from

<sup>9</sup> Line items for real estate taxes and homeowners' insurance are not included in Debtors' Schedule J. It is therefore unclear whether or not the \$ 1650 in total mortgage payments includes real estate taxes and homeowners' insurance. Thus, if Debtors' real estate taxes and insurance are not escrowed and paid by their mortgage holder, their monthly housing-related costs may actually exceed \$ 2010.

<sup>10</sup> As a practical matter, Debtors' ability to reduce their housing costs will be complicated by their execution of reaffirmation agreements with their first and second mortgage holders. But the fact that the Debtors may have made an ill-advised, post petition decision to reaffirm their mortgage obligations cannot factor into the Court's analysis of whether the Annuity is reasonably necessary for the Debtors' maintenance and support. "[A] *HNI2* debtor's eligibility for an exemption must be gauged from the time the debtors' joint bankruptcy petition is filed, and as a consequence, later changes that occur in a debtor's set of circumstances are ignored." *Greer, 242 B.R. at 398.*

the PSP Account at retirement will be in excess of that projected in Trustee Ex. 3. More importantly, if Debtors decrease their monthly housing costs, they will be able to save substantial sums over the course of their remaining work lives and use these savings to help fund their retirement needs.<sup>11</sup>

## [\*\*38] 2. The Remaining Necessity Factors

The remaining Necessity Factors are either neutral or weigh against a finding that the Annuity is reasonably *necessary for* the Debtors' *support*. Mr. Guikema (age 52) and Mrs. Guikema (age 50) have, respectively, 13 and 15 years to work before reaching the age of 65. (Necessity Factor 3). Thus, while they are not on the threshold of retirement, they have a limited time to work and save *for* retirement before reaching age 65. But, as discussed above, with reasonable budgetary adjustments, the Debtors should have sufficient time to replace the Annuity and accumulate additional retirement savings. Debtors have adequate job skills and training to remain employed until at least age 65. (Necessity Factors 5 and 6). The Debtors have no significant assets--liquid, or otherwise--other than the Annuity, Profit Sharing Plan and their Residence, which is over-encumbered. (Necessity Factors 7 and 8). The Debtors have no dependents, as their children are both married and currently attend graduate school. (Necessity Factors 4 and 10).<sup>12</sup>

[\*\*39] [\*622] *HN14* Courts often base a determination that retirement assets are reasonably *necessary for* the maintenance and *support* of debtors and their dependents on debtors' health-related problems and their resultant inability to work. "The special needs of retired, infirm and elderly debtors should be taken into account." *In re Donaghy*, 11 B.R. 677, 680 (Bankr. S.D.N.Y. 1981) (finding that 62 year-old debtor had established that a \$ 21,992.87 pension plan payment was reasonably *necessary for* his *support* under Federal Exemption Statute based upon his and his 64 year-old wife's poor health and their combined inability to work). See also *Parker*, 219 B.R. at 975-76 (finding that entire amount of \$ 20,733 IRA was reasonably *necessary for* the *support* of 67 year-old debtor due to his deteriorating health, age, and level of education, which put into question his ability to work or contribute to his retirement account); *Bogart*, 157 B.R. at 348 (finding that a 58 year-old debtor, presently on medical leave and with a \$ 130 monthly pension, who will retire in two years and is unlikely to gain other employment, is permitted to exempt a \$ 5,545 IRA account but [\*40] must turn over \$ 2,083 in another IRA account). In this case, however, the Debtors have testified to no health problems or any other special needs. (Necessity Factors 4 and 10). See *Silagy v. Bank One, Akron, N.A. (In re Collin)*, 182 B.R. 763, 767 (Bankr. N.D. Ohio 1995) ("Unlike *Donaghy*, the Debtor in this case has not presented any special needs related to age or infirmity *for* the court to consider.").

## V. Conclusion

*For* these reasons, the Court concludes that the Trustee has shown by a preponderance of the evidence that the Annuity is not reasonably *necessary for* the Debtors' maintenance and *support*

<sup>11</sup> If the Debtors reduce their monthly housing costs by \$ 1,000 and save \$ 500 a month over the remaining 15 years of Mrs. Guikema's work life, they will have at least an additional \$ 90,000 (plus more, assuming even a modest rate of return on the additional savings) when Mrs. Guikema reaches age 65.

<sup>12</sup> Adult non-dependents do not figure in the Court's determination whether the Annuity is reasonably necessary for the support of the Debtors. *HN13* "Although [Ohio Rev. Code Ann.] § 2329.66(A)(10)(b) permits the exemption of the amount reasonably necessary for the support of Debtor and his dependents, the court may not permit the exemption of an amount expended on behalf of an adult child that is not a dependent." *Hunter v. Ohio Citizens Bank (In re Hotchkiss)*, 93 B.R. 546, 548-549 (Bankr. N.D. Ohio 1988) (citing *In Re Bari*, 43 B.R. 253, 256 (Bankr. D. Minn. 1984); *In Re Fill*, 84 B.R. 332, 339 (Bankr. S.D.N.Y. 1988)).

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and thus may not be exempted under [\*Ohio Rev. Code Ann. § 2329.66\(A\)\(10\)\(b\)\*](#). A separate order sustaining the Trustee's Objection to Mrs. Guikema's claim of exemption in the Annuity will be entered.

**IT IS SO ORDERED.**

**2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR**

**AUGUST 12, 2025**

**MCA LOANS: ARE THEY SALES? ARE THEY LOANS?**

Myron N. Terlecky<sup>1</sup>  
Strip, Hoppers, Leithart, McGrath & Terlecky Co., LPA  
575 South Third St.  
Columbus, Ohio 43215

Merchant Cash Advance (“MCA”) loans are becoming prevalent to individuals and businesses who need additional cash to operate their business. The MCA lenders enter into a transaction with the business that purchases future receivables in exchange for funds being paid to the debtor. An MCA Agreement includes high interest rates along with origination fees. These transactions are basically payroll advance loans for businesses. The MCA Agreement is interpreted under New York law (at least for now). Upon default, the MCA lender files suit in a New York State Court.

**The Loan**

The MCA lender is typically given access to the business’s bank account so that the MCA lender may monitor deposits and ensure that receivables are being collected. There is typically an ulterior motive behind such a scenario.

A UCC financing statement is filed and contains variations of the following:

1. All accounts, accounts receivables, and deposit accounts now existing or hereafter acquired or arising, together with all accessions and proceeds related thereto.
2. All Accounts Receivable, and all proceeds thereof. NOTICE: PURSUANT TO AN AGREEMENT BETWEEN DEBTOR AND SECURED PARTY, DEBTOR HAS AGREED NOT TO FURTHER ENCUMBER THE COLLATERAL DESCRIBED HEREIN. THE FURTHER ENCUMBRANCE OF THE COLLATERAL IS A BREACH OF THE AGREEMENT AND MAY CONSTITUTE TORTIOUS INTERFERENCE WITH THE AGREEMENT BETWEEN DEBTOR AND SECURED PARTY

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<sup>1</sup> With research skills by Adi Mars, a law clerk at our firm.

3. Receivables- All assets now owned or hereafter acquired and wherever located, including but not limited to, the following subcategories of assets: a. Accounts including but not limited to, credit card receivables; b. Chattel Paper; c. Inventory; d. Equipment; e. Instruments, including but not limited to, Promissory Notes; f. Investment Property; g. Documents; h. Deposit Accounts; i. Letter of Credit Rights; j. General Intangibles; k. Supporting Obligations; and l. Proceeds and Products of the foregoing

There are instances where the MCA lender also files the financing statement and names the owner or guarantor as Debtor in the UCC filing.

### **Bankruptcy Issues**

The characterization of the MCA agreement either as a loan or a sale of receivables is impacted by a bankruptcy filing and that characterization determines what is property of the bankruptcy estate. Courts evaluating whether an MCA agreement is a true sale or a disguised loan typically focus on three elements:

- (a) Whether the payment amount can be adjusted based on the business's actual revenue (i.e., the presence of a reconciliation clause);
- (b) Whether there is a set repayment schedule; and
- (c) Whether the funder has recourse, either directly against the debtor in bankruptcy or against a guarantor.

*LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D. 3d 664; 122 N.Y.S.3d 309 (2020).

Three recent bankruptcy decisions demonstrate how courts determine whether an MCA agreement is a true sale or a disguised loan.

1. *In re JPR Mechanical Inc.*, 2025 WL 1550541 (Bankr. S.D.N.Y. May 30, 2025);
2. *Guttman v. EBF Holdings, LLC (In re Global Energy Servs., LLC)*, No. 21-17305-NVA, 2025 Bankr. LEXIS 774 (Bankr. D.Md. Mar. 31, 2025); and

3. *Apex Funding Source LLC v. Williams Land Clearing, Grading, and Timber Logger, LLC (In re Williams Land Clearing, Grading, & Timber Logger, LLC)*, No. 22-02094-5-PWM, 2025 WL 1426503 (Bankr. E.D.N.C. May 16, 2025).

Despite only one of the cases being filed in New York, all three MCA agreements in these cases were governed by New York law. Each case therefore analyzed the three-factor test articulated in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, decided by the New York Appellate Division and adopted in the Second Circuit in *Fleetwood Services, LLC v. Ram Capital Funding, LLC*. Under the *LG Funding* test, courts evaluating whether an MCA agreement is a true sale or a disguised loan typically focus on three elements:

- (a). Whether the payment amount can be adjusted based on the business's actual revenue (i.e., the presence of a reconciliation clause);
- (b). Whether there is a set repayment schedule; and
- (c). Whether the funder has recourse, either directly against the debtor in bankruptcy or against a guarantor.

*LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 122 N.Y.S.3d 309 (2020).

The courts used the same analysis when applying these elements. With respect to element (a), a meaningful reconciliation clause - which required payment adjustments based on actual collections - shifts risk to the funder and supports a finding that the MCA agreement is a true sale, whereas clauses deemed "illusory" like that in *JPR* and *Williams Land* failed to shift risk to the MCA lender. That factor indicates it is a loan. With respect to element (b), a finite or *de facto* fixed term, as found in *JPR* and *Williams Land*, suggests that an MCA agreement is a loan by implying a repayment schedule independent of receivables. In *Global Energy*, there was no time limit imposed. Finally, as to element (c), recourse in bankruptcy such as personal guaranties, security interests, or the ability to file proofs of claim in bankruptcy, indicates that an MCA agreement is a loan, as was the case in *JPR* and *Williams Land*. The MCA agreement in *Global Energy* which

contained an express assumption of insolvency risk and lack of default upon bankruptcy favored a finding that the MCA agreement was a true sale.

Beyond the three factors each court analyzed, most bankruptcy courts emphasize a single overarching question: who bears the risk of non-payment? In a true sale, the funder's recovery depends on the merchant's actual receivables, while with respect to a loan transaction, the funder is entitled to repayment regardless of performance. In *JPR* and *Williams Land*, the courts found that the MCA lenders bore little to no risk of repayment in the event the debtor failed to pay its obligations. Payments were fixed, reconciliation was limited, and recourse against the debtor, its property, and/or guarantors was available. In *Global Energy*, the court found that the MCA lender bore the risk, as payments were contingent on collected receivables, reconciliation was enforceable, and there was no recourse in bankruptcy. Thus, whether an MCA agreement is characterized as a loan or a sale often comes down to who bears the risk in the event the debtor is unable to pay its debts.

The Court in *JPR* characterized the MCA transaction as a loan and allowed the Chapter 7 Trustee to recover the payments as a preference. Factors considered were whether the MCA lender was guaranteed payment regardless of collections of the accounts receivable. The MCA lender provided a set repayment date; personal guarantees, acceleration clauses, and enforcement rights. The court determined that is how a lender operates, not a receivable buyer. Also, the business's bank account was drafted daily regardless of sales. Accordingly, that made it a loan. The MCA lender took a lien on all payments and not specific receivables.

#### **The MCA Lender's Ulterior Motive**

The MCA lender has two ulterior motives for obtaining visual access to the debtor's bank account. One motive is to monitor payments that are being received. The MCA lender then is able

to obtain the identity of the debtor's customers who are making payments (such as a general contractor if the Debtor is a subcontractor). The MCA lender then can contact the debtor's customer and advise the customer that all its accounts now belong to the MCA lender. A demand is made under UCC 9-406 that the customer put a hold on any funds owed to the debtor, not pay those funds to the debtor and instead to pay those funds directly to the MCA lender as the secured party. The MCA lender puts the debtor's customer on notice that it has an obligation to pay those funds to the MCA lender and under UC9C9.406(a) may only discharge that obligation by paying the funds to the MCA lender.

The second advantage that the MCA lender has by obtaining knowledge of the debtor's bank account is that upon taking a judgment, typically in New York, it will then send a garnishment notice directly to the debtor's bank. This notice is typically given to the bank in a location outside of Ohio. This procedure is done without domesticating the judgment in Ohio or Kentucky prior to garnishing the bank account. When the bank receives notice of the judgment in New York, they will typically freeze the bank account or send the funds to the MCA lender in New York.

**The consent agreement with the New York Attorney General.**

The Attorney General for the State of New York recently entered into a Consent Order and Judgment against an MCA lender for merchant cash advances and it barred a number of entities from engaging in any merchant cash advance business. See, *People of the State of New York against Yellowstone Capital LLC et al.*, Supreme Court of the State of New York, County of New York, Index No. 450750/2024, 1-16-2025.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by  
LETTITIA JAMES, Attorney General of the  
State of New York,

Petitioner,

– against –

YELLOWSTONE CAPITAL LLC, *et al.*,

Respondents.

Index No. 450750/2024

IAS Part 47

Assigned to Justice Goetz

CONSENT ORDER AND JUDGMENT

Upon reading the Verified Petition (“Petition”) (Doc. No. 1) of Petitioner, the People of the State of New York, by their attorney Letitia James, Attorney General of the State of New York (“NYAG”), the Affirmation of Adam J. Riff in support of the Petition (Doc. No. 4), and exhibits in support thereof (Doc. Nos. 5-476), alleging that Respondents engaged in repeated fraudulent, deceptive and illegal conduct in violation of Executive Law § 63(12) and General Business Law § 349 through conduct including (i) issuance and servicing of so-called purchases of receivables, also called merchant cash advances (“Merchant Cash Advances”) to merchants (“Merchants”); (ii) obtaining of personal guarantees from individuals (“Guarantors”); (iii) collection and receipt of payments from Merchants and Guarantors in connection with such Merchant Cash Advances; (iv) engaging in civil and criminal usury in violation of General Obligations Law § 5-501(1) and Penal Law § 190.40, respectively; (v) making of high-interest loans without a license in violation of Banking Law §§ 340 and 356; and upon the Motion to Dismiss filed by

AMERICAN BANKRUPTCY INSTITUTE

Yitzhak ("Isaac") Stern ("Isaac Stern") and Jeffrey Reece ("the Settling Officers") (Doc. Nos. 541, 542, 543, 544, 545, 546, 547), and all papers filed therewith; and upon Petitioner's Opposition to Respondents' Motions to Dismiss (Doc. Nos. 582 and 583); and upon the Consent and Stipulation, dated December 2, 2024, which is incorporated by reference herein and in which the parties thereto consent to entry of this Consent Order and Judgment ("Consent Order"); and upon all other papers and proceedings had herein;

WHEREAS, the Settling Officers neither admit nor deny all of these and the other allegations the NYAG asserted in the Petition;

WHEREAS, in response to the Petition, the Settling Officers filed a motion to dismiss all of the Claims asserted in the Petition, which is pending at the time of this Consent Order;

IT NOW APPEARS that the Settling Officers and Petitioner are willing to enter this Consent Order to resolve all claims in the Petition as to the Settling Officers;

NOW, on application of LETITIA JAMES, Attorney General of the State of New York, attorney for Petitioner (Adam J. Riff and Oluwadamilola E. Obaro, of counsel), and upon consent of the Settling Officers and their counsel (collectively, the "Parties");

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows.

FINDINGS

1. This Court has jurisdiction over the Parties and the subject matter of this action.

2. Each Party has executed the Consent and Stipulation filed contemporaneously with this Consent Order consenting to entry of this Final Judgment without further notice.

3. Entry of this Consent Order and satisfaction of the provisions herein are in the public interest and the interests of substantial justice.

4. Entry of this Consent Order and satisfaction of the provisions herein is a complete settlement of the Claims against the Settling Officers.

PROHIBITION OF UNLAWFUL ACTS

5. The Settling Officers shall not engage in any acts or practices in violation of General Obligations Law § 5-501(1), Penal Law § 190.40, Banking Law §§ 340 and 356, General Business Law § 349, or Executive Law § 63(12).

TERMINATION OF MERCHANT CASH ADVANCE OPERATIONS

6. As of the entry of this Consent Order, the Settling Officers are permanently barred from engaging in any Merchant Cash Advance business, except for performing the actions required under paragraph 15 herein. In order to effect this provision, the Settling Officers are specifically restrained and enjoined from each of the following actions ("Enjoined Actions"):

- a. Marketing, advertising, or offering for sale any Merchant Cash Advance;
- b. Underwriting, planning, managing, administering, or servicing any Merchant Cash Advance;
- c. Receiving or collecting any money owed or purportedly owed in connection with any Merchant Cash Advance;

- d. Receiving any proceeds, profits, dividends, or other financial benefit in connection with the sale, issuance, and servicing of any Merchant Cash Advance or collecting or receiving any money from Merchants or Guarantors in connection with such transactions;
- e. Assisting or supervising any person or entity engaged in any of the Enjoined Actions; or
- f. Serving, whether directly or through an entity or entities, as a director, officer, owner, shareholder, member, employee, contractor, consultant, representative, or agent of any person or entity engaged in any of the Enjoined Actions.

7. Nothing in the foregoing paragraph shall prohibit the Settling Officers from carrying out obligations pursuant to this Consent Order.

MONETARY RELIEF

8. The Settling Officers agree, within five (5) calendar days of the signing of this Consent Order by the Court, to pay to the NYAG by wire transfer to the State the total amount of 12.7 Million Dollars (\$12,700,000.00) ("Settlement Amount") and comply fully with the terms of this Consent Order. Settling Officers shall use the wire instructions provided by the NYAG.

9. If the NYAG reasonably determines that Isaac Stern has materially failed to comply with the terms of this Consent Order, including paragraph 15 below, the NYAG shall provide written notice of such non-compliance sufficient for Stern to cure any issues. If Stern fails to cure an instance of material non-

compliance within sixty (60) days of his receipt of the NYAG's notice (the "Cure Period") then this Consent Order shall constitute a judgment pursuant to New York Executive Law § 63(12) against Stern, in favor of the NYAG on behalf of the People of the State of New York, in the total amount of Thirty Million Dollars (\$30,000,000.00) less any cash settlement payments previously made by the Settling Officers or Yellowstone Capital LLC ("Judgment Amount").

10. Any payment and all correspondence related to this Consent Order shall reference Index No. 450750/2024.

11. The NYAG shall apply any monetary relief obtained from the Settling Officers to restitution for Merchants and/or Guarantors, penalties, costs of investigation, or costs of administering restitution and debt relief, as determined by the NYAG in its sole discretion.

COOPERATION

12. The Settling Officers agree to cooperate fully in any investigation or legal proceeding by the NYAG, including the above-captioned proceeding, concerning the non-settling Respondents named in the Petition but not party to the Consent and Stipulation (the "Non-Settling Respondents"), or individuals or entities affiliated with the Non-Settling Respondents, or other individuals or entities involved in the Merchant Cash Advance business. Such cooperation includes but is not limited to the Settling Officers, upon reasonable notice, making themselves available to the NYAG for interviews, depositions, or sworn investigatory hearings and providing complete and truthful answers to the questions asked; providing truthful testimony, written or oral, under oath before the NYAG and any other

tribunal or court of law; and providing documents and information as requested by the NYAG. The Settling Officers retain the right to assert valid and applicable privileges, including the attorney-client privilege. This paragraph does not alter Settling Officers' independent obligation to provide documents and testimony pursuant to subpoena.

#### COMPLETE SETTLEMENT OF CLAIMS

13. Upon receipt of the full Settlement Amount, this Consent Order shall resolve all claims brought by Petitioner, or which could have been brought by Petitioner, against the Settling Officers concerning their Merchant Cash Advance business prior to the date of the filing of the fully executed Consent and Stipulation, as well as trusts organized for the benefit of Mr. Stern, Mr. Reece, or their family members, their successors and assigns, entities they own or control, including Sokaor Capital LLC, JLR Capital, Inc., and YDS2 Capital, Inc., but excluding any Non-Settling Respondents, and merged or acquired entities and wholly-owned subsidiaries of such Non-Settling Respondents, concerning the Yellowstone Entities' Merchant Cash Advance business prior to the date of the filing of the fully executed Consent and Stipulation, which is incorporated herein.

14. The terms of the Consent Order were agreed upon as a compromise, and the Settling Officers' acceptance of its terms do not constitute, and may not be construed as, admissions of liability or wrongdoing.

GUARANTY OF PERFORMANCE OF  
YELLOWSTONE CONSENT ORDER

15. Isaac Stern shall use his best efforts to ensure the full and punctual performance and observance by the Yellowstone Entities (as herein defined) of the terms, covenants, obligations, and conditions that are to be kept, performed, or observed by the Yellowstone Entities in Paragraphs 4 through 18 inclusive and Paragraph 25 through 27 inclusive of the Consent Order and Judgment resolving the claims asserted by Petitioner against the Yellowstone Entities (the "Yellowstone Consent Order").

16. The "Yellowstone Entities" are Yellowstone Capital LLC, Fundry LLC, ABC Merchant Solutions, LLC, Advance Merchant Services LLC, Business Advance Team LLC, Capital Advance Services LLC, Capital Merchant Services, LLC, Cash Village Funding LLC, Fast Cash Advance LLC, Fundzio LLC, Green Capital Funding LLC, HFH Merchant Services LLC, High Speed Capital LLC, Merchant Capital Pay LLC, Merchant Funding Services LLC, Midnight Advance Capital LLC, Mr. Advance Capital LLC, Ocean 1213 LLC, Simply Equities LLC, TVT Cap Fund LLC, TVT Capital HR, LLC, Thryve Capital Funding LLC, WCM Funding LLC, West Coast Business Capital LLC, World Global Capital LLC, and their respective parent, subsidiary, or affiliate entities.

17. Isaac Stern's obligations under paragraph 15, above, commence upon the Court's signing of the Yellowstone Consent Order.

18. In the case of a judicial finding of the invalidity, illegality, or unenforceability of the Yellowstone Consent Order, Isaac Stern shall be excused

from any performance of those parts of the Yellowstone Consent Order that have been deemed invalid, illegal or unenforceable.

19. In the event Isaac Stern's ability to comply with paragraph 15, above, is impaired for reasons beyond his control, and provided that the creation and existence of such impairment was/is also beyond his control, and provided that he has acted in good faith, then Isaac Stern shall be excused from compliance with paragraph 15 only to the extent, and for the duration, of such impairment. Isaac Stern is precluded from relying upon this paragraph as a defense unless he has, during the Cure Period, demonstrated the basis for such reliance to the NYAG.

#### ENFORCEMENT

20. This Court shall retain jurisdiction to hear any proceeding seeking to enforce the terms of this Consent Order. The Court shall also retain jurisdiction of this action for the purpose of carrying out or modifying the terms of this Consent Order or granting such further relief as the Court deems proper.

21. The Settling Officers shall reimburse reasonable costs paid by the NYAG to third parties (e.g., translators, court fees, court reporters, etc.) related to any action to enforce this Consent Order.

22. In any subsequent civil litigation or claim by the NYAG against Isaac Stern to enforce any provision of this Consent Order, including the NYAG's rights to any payment, money judgment, or other relief pursuant to this Consent Order, such as a nondischargeability complaint in any bankruptcy case, Isaac Stern agrees that he shall not contest the facts set forth in the Petition, which shall be taken as true, without further proof thereof. These facts are sufficient to establish all the

elements necessary to sustain a nondischargeability action by the NYAG pursuant to section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Consent Order shall have collateral estoppel effect for such purposes. However, if a court, including a bankruptcy court, deems the facts in the Petition insufficient to establish the elements to necessary to sustain an action by the NYAG pursuant to § 523(a)(2)(A) of the Bankruptcy Code, such a determination shall not itself constitute a default of this Consent Order. The Settling Officers specifically reserve their rights to deny and contest the facts set forth in the Petition where such facts are asserted by any party other than the NYAG.

23. Each of the Settling Officers represent and warrant for his own part each of the following: (i) that the Financial Asset Summaries ("FAS") provided by him to the NYAG were materially accurate and complete, to the best of his knowledge, information and belief at the time such FAS was provided; (ii) that he did not exclude any material assets from the FAS he provided, (iii) that his FAS did not exclude any assets with a fair market value greater than \$10,000.00; and (iv) that he exercised best efforts to diligently discover all relevant assets prior to submitting his FAS to the NYAG.

24. Isaac Stern represents and warrants that as of the date of the Consent and Stipulation, he does not have any intention or plans to file a bankruptcy petition, and has no knowledge of any third-party's intention or plans to file a bankruptcy petition, for any of the following: (i) Isaac Stern; (ii) the Yellowstone Entities; or (iii) any parent company of the Yellowstone Entities, including Pinnex Capital Holdings, LLC.

25. Should any of the representations and warranties of Isaac Stern described in the foregoing paragraphs 23 and 24 be materially false, then upon application by the NYAG, the Court shall determine that Isaac Stern is in non-curable material non-compliance under paragraph 9 of this Consent Order.

MISCELLANEOUS PROVISIONS

26. Petitioner and the Settling Officers waive all rights to seek judicial review or otherwise challenge or contest the validity of this Consent Order.

27. Nothing in this Consent Order shall be construed as relieving Settling Officers of their obligation to comply with all state, city, and federal laws and regulations, nor shall any of the terms of this Consent Order be deemed to grant Settling Officers permission to engage in any acts or practices prohibited by such laws and regulations. Acceptance of this Consent Order by the NYAG shall not be deemed approval by the NYAG of any of the practices or procedures referenced herein, and Settling Officers shall make no representation to the contrary.

28. Any failure of the NYAG to exercise any right under any provision of this Consent Order shall not constitute a waiver of any rights of the NYAG hereunder.

29. Nothing contained in this Consent Order shall be construed to deprive any individual or entity of any private right of action under the law.

30. This Consent Order (along with the Consent and Stipulation that is incorporated by reference into this Consent Order) sets forth all of the promises, covenants, agreements, conditions, and understandings between the parties, and supersedes all prior and contemporaneous agreements, understandings,

## 2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

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RECEIVED NYSCEF: 01/16/2025

inducements, or conditions, express or implied, between the parties. There are no representations, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Consent Order that are not fully expressed herein.

31. Settling Officers shall not state or cause to be stated that the NYAG has approved, sanctioned, or authorized any practice, act, or conduct of Settling Officers.

32. Settling Officers shall not take any action or make any statement denying the propriety of this Consent Order, or expressing the view that this Consent Order is without basis. Nothing in this provision affects Settling Officers' (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which the NYAG is not a party.

33. The terms, duties, and obligations in this Consent Order are not transferable to parties which are not the Settling Officers.

34. Settling Officers waive any further notice of submission of this Consent Order to and filing thereof with this Court and agree to accept service of a conformed copy by email to the email addresses stated in Paragraph 36.

35. This Consent Order shall be administered, construed, and enforced according to the laws of the State of New York.

36. Any notices, statements or other written documents required by this Consent Order shall reference Index No. 450750/2024, and shall be provided by electronic mail to the intended recipient at the addresses set forth below, unless a different address is specified in writing by the party changing such address.

AMERICAN BANKRUPTCY INSTITUTE

For Petitioner:

Adam J. Riff, Esq.  
Assistant Attorney General  
Office of the New York State Attorney General  
Bureau of Consumer Frauds and Protection  
28 Liberty Street  
New York, NY 10005  
Adam.Riff@ag.ny.gov

Or, in his absence, to the person holding the title of Bureau Chief at the  
Office of the New York State Attorney General Bureau of Consumer Frauds and  
Protection.

For the Settling Officers:

Andrew St. Laurent, Esq.  
Harris, St. Laurent & Wechsler LLP  
40 Wall Street  
53<sup>rd</sup> Floor  
New York, NY 10005  
andrew@hs-law.com

37. Settling Officers shall provide the NYAG with written notice within  
thirty (30) days of any changes to the information in the foregoing paragraph.

38. The Clerk is hereby directed to enter this Consent Order and  
Judgment forthwith.

*[Signature]*  
J.S.C.  
HON. PAUL A. GOETZ  
J.S.C.

1-6-25

**FILED**  
Jan 16 2025  
NEW YORK  
COUNTY CLERK'S OFFICE

*Milton Adam Tunglung*  
Clerk

**2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR**

NYSCEF DOC. NO. 643

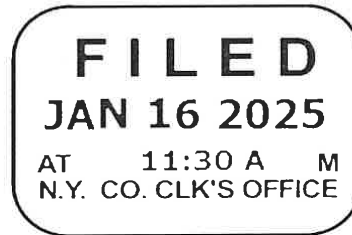
RECEIVED NYSCEF: 01/16/2025

450750/2024

People Of The State Of New York, By Letitia James, Attorney General Of The State Of New York  
v.

Yellowstone Capital Llc, Fundry Llc, Delta Bridge Funding Llc, Cloudfund Llc, Abc Merchant Solutions, Llc, Advance Merchant Services Llc, Business Advance Team Llc, Capital Advance Services Llc, Capital Merchant Services, Llc, Cash Village Funding Llc, Fast Cash Advance Llc, Fundzio Llc, Green Capital Funding Llc, Hfh Merchant Services Llc, High Speed Capital Llc, Merchant Capital Pay Llc, Merchant Funding Services Llc, Midnight Advance Capital Llc, Mr. Advance Capital Llc, Ocean 1213 Llc, Simply Equities Llc, Tvt Cap Fund Llc, Tvt Capital Hr, Llc, Thryve Capital Funding Llc, Wcm Funding Llc, West Coast Business Capital, Llc f.k.a. YELLOWSTONE CAPITAL WEST LLC, World Global Capital Llc, David Glass, Yitzhak Stern a.k.a. Isaac Stern, Jeffrey Reece, Bartosz Maczuga a.k.a. Bart Maczuga, Vadim Serebro, Tsvi Davis a.k.a. Steve Davis, Aaron Davis, Matthew Melnikoff, Mark Sanders, David Singfer

Judgment



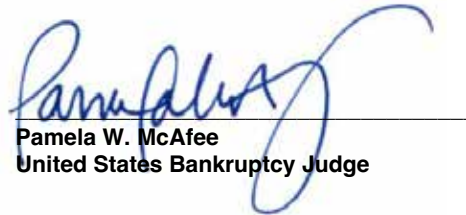
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SO ORDERED

SIGNED this 16 day of May, 2025.

  
Pamela W. McAfee  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

IN RE:

Williams Land Clearing, Grading, and  
Timber Logger, LLC,

Debtor.

Case No.  
22-02094-5-PWM  
Chapter 11

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Williams Land Clearing, Grading, and  
Timber Logger, LLC,  
Plaintiff,

Adversary Proceeding  
No. 23-00024-5-PWM

v.

Apex Funding Source LLC and Yehuda  
Klein a/k/a Jay Klein,  
Defendants.

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Commercial Funding, Inc.,  
Intervenor Plaintiff,

v.

Williams Land Clearing, Grading, and  
Timber Logger, LLC, Apex Funding Source LLC,  
and Yehuda Klein a/k/a Jay Klein,  
Intervenor Defendants.

ORDER ALLOWING IN PART AND DENYING IN PART  
MOTIONS FOR SUMMARY JUDGMENT

The matters before the court are the motions for partial summary judgment filed by the Intervenor Plaintiff, Commercial Funding, Inc. (CFI), D.E. 91, and the motions for summary judgment filed by the Defendants and Intervenor Defendants, Apex Funding Source LLC (Apex) and Yehuda Klein a/k/a Jay Klein, D.E. 99 and 95, respectively. The motions were fully briefed and a hearing was conducted in Raleigh, North Carolina on March 18, 2025. At the hearing, the court indicated that summary judgment would be granted in favor of Mr. Klein on all claims asserted against him in the Amended Complaint and the Intervenor Complaint, that summary judgment would be granted in favor of Apex on the tortious interference with contract claim asserted in the Intervenor Complaint, and that the remaining claims would be taken under advisement.

After full consideration, and for the reasons set forth below, the court holds as follows:

Mr. Klein's motions for summary judgment on all claims in the Amended Complaint and the Intervenor Complaint are ALLOWED;

Apex's motion for summary judgment on Williams Land's claim to avoid fraudulent transfers pursuant to 11 U.S.C. § 548 is ALLOWED;

Apex's motion for summary judgment on Williams Land's objection to its claim is DENIED;

Apex's motion for summary judgment on Williams Land's claim for unfair and deceptive trade practices pursuant to chapter 75 of the North Carolina General Statutes is DENIED IN PART and ALLOWED IN PART;

Apex's motion for summary judgment on Williams Land's claim to avoid preferential payments pursuant to 11 U.S.C. § 547 is DENIED and summary judgment will be entered in favor of Williams Land on this claim;

Apex's motion for summary judgment on Williams Land's claim to recover avoided transfers pursuant to 11 U.S.C. § 550 is DENIED and summary judgment will be entered in favor of Williams Land on this claim;

Apex's motion for summary judgment on Williams Land's claim for equitable subordination is DENIED;

CFI's motion for summary judgment seeking a declaratory judgment that any transfers should be avoided for its benefit and not the benefit of the estate is DENIED, and summary judgment will be entered in favor of Williams Land on this claim;

CFI's motion for summary judgment on its claim for conversion against Apex is DENIED, and Apex's motion for summary judgment on CFI's claim for conversion against it is ALLOWED; and

Apex's motion for summary judgment on CFI's claim for tortious interference with contract is ALLOWED.

### PROCEDURAL HISTORY

Williams Land Clearing, Grading, and Timber Logger, LLC (Williams Land) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on September 16, 2022. Its liquidating chapter 11 plan was confirmed on October 30, 2023. Williams Land filed the complaint in this adversary proceeding on April 26, 2023, asserting the following claims against Apex and Mr. Klein: Avoidance of Fraudulent Transfers of Receivables pursuant to 11 U.S.C. § 548 (both Defendants); Objection to Claim (Apex); Unfair and Deceptive Trade Practices pursuant to chapter 75 of the North Carolina General Statutes (Apex); in the alternative, Avoidance of Preference Payments pursuant to 11 U.S.C. § 547 (both Defendants); and, Recovery of Avoided Transfers pursuant to 11 U.S.C. § 550 (both Defendants). Apex and Mr. Klein filed a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, made applicable in this adversary proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, on June 26, 2023, D.E. 9. On July 21, 2023, Williams Land filed an Amended Complaint, D.E. 14, asserting the same claims as the original complaint and adding a claim for equitable subordination. Apex and Mr. Klein filed a motion to dismiss the Amended Complaint on August 28, 2023, D.E. 24.

The court conducted a hearing on the motion to dismiss the Amended Complaint on December 14, 2023, and denied the motion by written order on February 8, 2024, D.E. 62. Apex and Mr. Klein filed an interlocutory appeal and motion for leave to appeal that order, which was denied by the United States District Court for the Eastern District of North Carolina on August 5, 2024, D.E. 87.

In the interim, on July 7, 2023, CFI filed its Motion to Intervene, D.E. 11, asserting that as the senior secured creditor, it was entitled to payment of any funds recovered in the adversary proceeding, and also advancing claims against Apex and Mr. Klein for conversion of its collateral and tortious interference with contract. Williams Land filed a limited response, D.E. 15, not opposing the Motion to Intervene but reserving the right to oppose CFI's claim for direct payment of any proceeds of the litigation. Apex and Mr. Klein opposed the Motion to Intervene, D.E. 18. After a hearing conducted on September 19, 2023, the court directed CFI to supplement its Motion to Intervene with a proposed pleading, and invited Apex and Mr. Klein to submit a further response thereafter. D.E. 30. CFI supplemented its Motion to Intervene on September 27, 2023, D.E. 34, and Apex and Mr. Klein filed no further response. The court allowed the Motion to Intervene by order dated November 15, 2023, DE. 39.

CFI filed its Intervenor Complaint on November 28, 2023, D.E. 42, and Apex and Mr. Klein filed a motion to dismiss the Intervenor Complaint pursuant to Rules 12(b)(1) and 12(b)(6) on January 23, 2024, D.E. 60. The court denied the motion to dismiss the Intervenor Complaint on March 22, 2024, D.E. 73. In that order, the court found that it has constitutional authority to enter a final order and judgment on all the claims in the Amended Complaint and the Intervenor Complaint. *Id.* On April 4, 2024, the court issued an order directing the parties to proceed with

pretrial scheduling and discovery pending the district court's consideration of the motion for leave to appeal the order denying the motion to dismiss the Amended Complaint, D.E. 75.

On December 17, 2024, CFI filed its motion for partial summary judgment on its claim for declaratory judgment that any recovery by Williams Land on its avoidance action should be for the benefit of CFI, and not the estate as a whole, and on its claim for conversion against Apex and Mr. Klein. On December 20, 2024, Apex and Mr. Klein filed motions for summary judgment on all claims in the Amended Complaint and the Intervenor Complaint. After a number of extensions of time to respond were allowed, the motions were fully briefed as of February 7, 2025, and a hearing was conducted on March 18, 2025.

In the briefing, CFI conceded that it did not have evidentiary support for its intervenor claims for tortious interference with contract against either Apex or Mr. Klein. At the hearing, CFI conceded that it also did not have evidentiary support for its claim for conversion against Mr. Klein. CFI further clarified at the hearing that its claim for declaratory judgment is not based on a right to litigation proceeds recovered by Williams Land on its chapter 5 claims against Apex due to CFI's security interest in those proceeds (as it had briefed), but instead that this claim is based entirely on CFI's conversion claim against Apex.<sup>1</sup> Also at the hearing, Williams Land conceded that it had no evidentiary support for any of its claims against Mr. Klein.

### JURISDICTION

This bankruptcy court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a statutorily core proceeding under 28 U.S.C.

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<sup>1</sup> This claim and argument are addressed more fully below. However, CFI did suggest at the hearing that because its claim to the litigation proceeds is entirely due to its independent claim against Apex, then Apex could be subject to double payment – once to the debtor for its chapter 5 claims, and once to CFI for its conversion claim. It seems to the court, then, that CFI is not asserting any right to the debtor's litigation recovery, but instead simply contends that it has a separate claim against Apex for the same sums.

§ 157(b)(1) that this court is authorized to hear and determine. The United States District Court for the Eastern District of North Carolina has referred this case and this proceeding to this court under 28 U.S.C. § 157(a) by its General Order of Reference entered on August 3, 1984. This proceeding is constitutionally core, and this court may enter final orders herein.<sup>2</sup> Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

#### STANDARD FOR SUMMARY JUDGMENT

Summary judgment “is proper ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In evaluating a summary judgment motion, a court “must consider whether a reasonable jury could find favor in the non-moving party, taking all inferences to be drawn from the underlying facts in the light most favorable to the non-movant.” *In re Apex Express Corp.*, 190 F.3d 624, 633 (4th Cir. 1999). The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate the existence of specific, material facts that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant’s position is insufficient to withstand the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248.

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<sup>2</sup> Apex challenged this court’s jurisdiction in its motions to dismiss the Amended Complaint and the Intervenor Complaint, but it did not reassert those challenges in its motions for summary judgment.

Because CFI, Apex, and Mr. Klein have each filed motions for summary judgment, the burden to come forward to show there is a genuine issue of material fact varies with each motion. Fed. R. Civ. P. 56(c)(1).

### UNDISPUTED FACTS

On July 12, 2021, Williams Land entered into an agreement with CFI pursuant to which CFI purchased certain of Williams Land's future accounts receivable, and Williams Land granted CFI a security interest in all of its assets, including its accounts receivable.<sup>3</sup> See Claim No. 69-1 and exhibits thereto. On June 22, 2021, CFI filed a UCC-1 financing statement with the North Carolina Secretary of State, thereby perfecting CFI's security interest in Williams Land's assets including its accounts receivable. *Id.* at Ex. 5. CFI filed a proof of claim in the amount of \$770,976.84, asserting that its claim is fully secured. Claim No. 69-1.

On March 8, 2022, Williams Land entered into a Standard Merchant Cash Advance Agreement (MCA Agreement) with Apex, pursuant to which Apex purported to purchase \$337,500 of Williams Land's future receivables for a cash payment to Williams Land in the amount of \$250,000.<sup>4</sup> See Summ. J. Ex. 1, D.E. 97-1 at 1. On the same day, Apex filed a UCC-1 financing statement with the North Carolina Secretary of State, perfecting its asserted security interest in all of Williams Land's assets, including accounts receivable. Summ. J. Ex. 2, D.E. 97-1 at 1 at 21. As between CFI and Apex, CFI holds the first priority security interest in Williams Land's receivables. Neither Apex nor its attorney, Mr. Klein, conducted a UCC search to determine whether there were any senior liens against Williams Land's receivables, but Apex instead relied upon the

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<sup>3</sup> There has been no challenge to the asserted nature of the CFI transaction as a true sale or traditional factor.

<sup>4</sup> Although there is no disputed fact as to the terms and language of the MCA Agreement, there is significant dispute as to the legal interpretation of that agreement. Accordingly, any relevant language of the MCA Agreement is set forth in the discussion below.

representation of Williams Land contained within the MCA Agreement that no prior lien existed. Accordingly, Apex asserts, and CFI does not dispute, that Apex did not have actual knowledge of the CFI security interest.

Pursuant to the terms of the MCA Agreement, Williams Land made eight weekly payments to Apex in the amount of \$18,750 through May 4, 2022. *See* D.E. 14, Ex. C. After Williams Land defaulted on its contractual payments, on May 10, 2022, Apex through its counsel Mr. Klein filed a lawsuit in the Supreme Court of the State of New York to collect \$187,500 remaining due under the MCA Agreement, plus \$75,000 in contractual costs and \$2,500 in default account fees. On July 11, 2022, Williams Land and Apex signed a Stipulation of Settlement in which the parties agreed that Williams Land would pay Apex the sum of \$165,000 through monthly payments of \$19,285.71, with one payment of \$30,000 to be paid by wire transfer or check “on behalf of” Williams Land. Summ. J. Ex. 5, D.E. 97-1 at 44. Williams Land defaulted on the terms of the Stipulation of Settlement, after which a judgment was entered in favor of Apex in the amount of \$138,577.17. Summ. J. Ex. 7, D.E. 97-1 at 49. The request for entry of judgment acknowledges receipt of \$30,159.42 pursuant to the Stipulation of Settlement. Summ. J. Ex. 6, D.E. 97-1 at 48.

Meanwhile, between June 9, 2022, and October 6, 2022, Williams Land became entitled to \$133,878.38 in payments from its customer, Domtar Corporation. On May 9, 2022, Mr. Klein, as attorney for Apex, sent a letter to Domtar asserting Apex’s lien in the Domtar accounts payable and demanding that Domtar make payments directly to Apex. In response to this letter, Domtar paid Apex (through its attorney) the sums of \$48,782.06 on June 9, 2022, and \$30,159.42 on July 14, 2022, for a total of \$78,941.48.<sup>5</sup> Although CFI asserts that it held the senior secured lien on the

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<sup>5</sup> The July 14, 2022 payment was also made with the agreement of Williams Land pursuant to the Stipulation of Settlement. For purposes of this decision, it is not necessary to determine whether the payment was also in response to the UCC letter.

Domtar receivable, it does not contend that the Domtar receivable was one that it had purchased under its agreement with Williams Land. CFI also concedes that it had not taken steps to enforce its lien on the Domtar receivable.

In total, Apex received the sum of \$228,941.48 from either Williams Land or its customers pursuant to the MCA Agreement. Apex filed a proof of claim asserting a fully secured balance due in the amount of \$120,652.07. Claim No. 64-1. The attachments supporting the proof of claim include the MCA Agreement, the guarantee of performance executed by Williams Land's principal, and the UCC Financing Statement, but not the judgment or other documents related to the collection action. *See id.*

#### CONTENTIONS

Based on these facts, Williams Land contends that the MCA Agreement is not a true sale, but instead is a usurious loan that is void under New York law. If the agreement is void, Williams Land contends that as a matter of law it received no reasonably equivalent value for the payments made to Apex, rendering those payments avoidable under § 548 of the Bankruptcy Code. Williams Land further contends that the \$30,159.42 payment Apex received from Domtar is an avoidable preference under § 547 of the Bankruptcy Code. Williams Land's claim for unfair and deceptive trade practices is also grounded in part on its claim that the MCA Agreement is, in reality, a usurious loan. Apex, on the other hand, contends that the MCA Agreement is a true sale and that all of Williams Land's claims fail as a matter of law because they are dependent upon the recharacterization of the agreement as a loan.

Also relying on the undisputed facts, CFI contends Apex converted its collateral by directing Domtar to pay to Apex monies owed to Williams Land in contravention of CFI's senior lien on receivables. Apex, on the other hand, contends that the undisputed facts defeat any claim

for conversion; specifically, that it did not know that CFI asserted a security interest in the Domtar receivable and that CFI made no demand for the return of its collateral.

## DISCUSSION

### APEX'S MOTION FOR SUMMARY JUDGMENT ON WILLIAMS LAND'S CLAIMS

As noted above, Williams Land's Amended Complaint asserts claims that require a preliminary determination of whether the MCA Agreement is a sale or loan under New York law, which applies by virtue of a choice of law provision within the agreement.<sup>6</sup> According to Williams Land, if the MCA Agreement is a loan, it is criminally usurious under New York law and, by operation of statute, void. Williams Land's claims for avoidable transfers and unfair and deceptive trade practices and its objection to Apex's claim are dependent on and arise from an ultimate conclusion that the MCA Agreement is void.

Apex, on the other hand, contends that usury laws are inapplicable because the MCA Agreement is a true sale and not a loan. *See LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 122 N.Y.S.3d 309, 312 (N.Y. App. Div. 2020) ("The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be."). For the same reason, Apex maintains that the payments received from Domtar are not avoidable preferences or constructively fraudulent transfers as a matter of law because Williams Land had no interest in the property transferred by Domtar – the account was already owned by Apex. Apex also contends that even if the court construes the agreement to be a loan, New York's criminal usury statutes may not be used

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<sup>6</sup> In its motion to dismiss the Amended Complaint, Apex contended that if the agreement is construed as a loan, the choice of law provision in the MCA Agreement should be disregarded, maintaining that North Carolina requires application of North Carolina interest law to any North Carolina borrower. *See* D.E. 10. The court disagreed, D.E. 62, and Apex sought leave to appeal the court's interlocutory order denying Apex's motion to dismiss, D.E. 69, which the district court denied. D.E. 87. Apex has not reasserted the choice of law argument on summary judgment.

affirmatively by a plaintiff to void an agreement, but may only be used defensively where a lender seeks to collect on the loan.

Accordingly, the threshold issues for the court before considering the delineated claims are whether the MCA Agreement is a loan or a sale, and, if it is a loan, whether and how the New York usury laws apply.

### **The Nature of the MCA Agreement**

While the determination of whether an agreement is a sale or is a loan is typically a factually-intensive one, *see Cap Call, LLC v. Foster (In re Shoot the Moon, LLC)*, 635 B.R. 797, 820 (Bankr. D. Mont. 2021), the parties here provided no forecast of evidence as to the course of dealing between the parties other than the MCA Agreement itself and the payment history. Thus, the court must construe the agreement based solely on its language to determine whether it constitutes a loan or a sale under New York law.

The MCA Agreement does contain language designed to reflect the intent of the parties for the transaction to be a sale of receivables. For example, the summary of the transaction lists a “purchase price” and “receivables purchased amount.” *See* Summ. J. Ex. 1, D.E. 97-1 at 1. Paragraph 1 of the Terms and Conditions is entitled “Sale of Future Receipts” and provides that Williams Land sells, assigns, and transfers to Apex “all of [Williams Land]’s future accounts . . . from contract rights, and other obligations arising from or relating to the payment of monies” from Williams Land’s customers for payment for Williams Land’s services. *Id.* Paragraph 15 of the Terms and Conditions provides that the purchase price is “in exchange for the Receivables Purchased Amount” and “is not intended to be, nor shall it be construed as a loan[.]” *Id.* at 4.

Under New York law, however, the question of whether an agreement constitutes a loan is governed by its substance, not its form. *Fleetwood Servs., LLC v. Richmond Cap. Grp. LLC*, No.

22-1885-CV, 2023 WL 3882697, at \*2 (2d Cir. June 8, 2023); *see also Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 621–22 (N.Y. 2021). Courts generally evaluate three factors to determine whether a transaction is a loan under New York law: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy. *LG Funding, LLC*, 122 N.Y.S.3d at 312. These considerations take into account the totality of the circumstances, and “a court need not find the presence of all three factors in concluding that a transaction is a loan.” *Fleetwood Servs., LLC v. Ram Cap. Funding, LLC*, No. 20-CV-5120 (LJL), 2022 WL 1997207, at \*9 (S.D.N.Y. June 6, 2022).

Other courts consider additional factors that inform the analysis of the primary three factors. For example, the bankruptcy court in *Shoot the Moon* identified these considerations:

- (1) whether the buyer has a right of recourse against the seller;
- (2) whether the seller continues to service the accounts and commingles receipts with its operating funds;
- (3) whether there was an independent investigation by the buyer of the account debtor;
- (4) whether the seller has a right to excess collections;
- (5) whether the seller retains an option to repurchase accounts;
- (6) whether the buyer can unilaterally alter the pricing terms;
- (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and
- (8) the language of the agreement and the conduct of the parties.

635 B.R. at 813. While the *Shoot the Moon* court was applying Montana law, the evaluative factors appear to overlap.

At its core, the analysis looks to which party bears the risk of non-payment on the accounts that the “buyer” purports to purchase. *See id.* at 819. (“[A] consideration that overlays and unites the factors is how the parties allocated *risk*.”). Professor Kara Bruce of the University of North

Carolina School of Law has written extensively on the risk allocation issue, and, in collecting recent cases, has the following observations:

When weighing whether a transaction styled as a sale is a true sale, the core of the inquiry is to assess which party—buyer or seller—holds the risks, benefits, obligations, and other attributes we typically associate with ownership. When an item of property is sold, the buyer takes on the upside and downside risk of that item’s future performance. With a secured loan, in contrast, the lender’s entitlement to payment is not dependent on the performance or value of the underlying collateral. Further, in a typical sale transaction, the buyer controls the asset and must take on the obligations associated with ownership, such as servicing accounts.

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It is thus important to approach a true-sale analysis by remembering that “the substance of MCA transactions may belie the contracts’ careful descriptions of risk allocation.” Courts must look beyond the contract’s window-dressing to evaluate the true commercial nature of these transactions. The ultimate question, again, is whether the buyer has acquired the risks and rewards of the purchased receivables (in line with a true sale) or has instead contracted for a repayment that does not vary based on the performance of the assets (in line with a secured loan).

Kara J. Bruce, *Revenue-Based Finance in Bankruptcy and Beyond*, 45 No. 4 Bankruptcy Law Letter NL 1 at 6 (April 2025) (citations omitted). The court finds her discussion to be persuasive, and with these concepts in mind, has considered the three factors as supplemented by the considerations identified in *Shoot the Moon* to evaluate the allocation of risk. Because the court finds the “recourse in bankruptcy” factor to be the best indicator that the risk of nonpayment is not truly shifted to Apex through the MCA Agreement, the bulk of the following discussion is devoted to that factor.

#### Factors I and II: Reconciliation and Finite Term

While there is a reconciliation provision in the MCA Agreement, Summ. J. Ex. 1, D.E. 97-1 at 2, ¶ 4, there are no facts before the court to establish whether there is a true opportunity to adjust payments. Further, invocation of the reconciliation provision does not change the amount ultimately owed, but only the amount of the payment to be made in a particular week. Similarly,

while there is no stated “finite” term, the term is easily calculated based on simple math – weekly payments of \$18,750 until the amount of \$337,500 is received, *see id.* at 1, which results in a term of 18 weeks. Absent invocation of the reconciliation provision, the term is readily discernable. *See, e.g., AKF, Inc. v. Haven Transp. Bus. Sols., Inc.*, No. 1:22-cv-269 (MAD/CFH), 2024 WL 2941746, at \*7 (N.D.N.Y. June 11, 2024) and cases cited therein. Without additional context including course of dealing, however, the court finds that neither of these factors is dispositive of the characterization as either a sale or a loan.

#### Factor III: Recourse in Bankruptcy

Many courts find “recourse in bankruptcy” where the agreement provides that default remedies are triggered by the merchant’s bankruptcy, thereby accelerating any unpaid purchased amount. *See, e.g., Fleetwood Servs.*, 2022 WL 1997207, at \*9; *LG Funding, LLC*, 122 N.Y.S.3d at 313 . Apex denies that it has recourse in Williams Land’s bankruptcy because bankruptcy is not a delineated event of default within the MCA Agreement. It is true that bankruptcy itself does not trigger a default under the Apex MCA Agreement, but that does not end the inquiry, because a number of other defaults occur by necessity when a bankruptcy is filed (for example, changing the depository account into which receivables are paid by the opening of a DIP account), which, by the terms of the MCA Agreement, do result in acceleration of all amounts due. Summ. J. Ex. 1, D.E. 97-1 at 4-5, ¶ 17.

More importantly, in this court’s view, the often-used “bankruptcy as an event of default” analysis conflates the question of whether Apex’s remedies are triggered by a bankruptcy filing with the question of whether Apex has the ability to collect – *i.e., recourse* – notwithstanding Williams Land’s bankruptcy. To phrase it differently, the question is whether Apex has a means to recover payment if Williams Land stops operating and no longer generates the future receivables

that Apex purports to have purchased. If Apex truly bore the risk and had no recourse in bankruptcy, it would have no ability to recover once the payment stream to Williams Land stopped.

Here, Apex's own actions suggest that it believes it has recourse against both Williams Land and its guarantor: Apex filed a secured proof of claim in the Williams Land chapter 11 case for the full amount it contends is due, including fees and costs, Claim No. 64-1. Courts consider the filing of a proof of claim to be relevant to this factor. *See, e.g., JCS Hospitality LLC v. LG Funding LLC (In re JCS Hospitality)*, Adv. Pro. No. 24-00034-5-PWM (Bankr. E.D.N.C. Sept. 16, 2004) (Slip Op., D.E. 18 at 8) (finding that the filing of a secured proof of claim indicates that an MCA lender believes it has recourse to recover defaulted amounts in the bankruptcy case); *AKF*, 2024 WL 2941746, at \*7 (“Despite the[] assertions in the Agreement of being left without recourse in the event of a bankruptcy, it seems virtually certain that FundKite would be able to file a claim in any bankruptcy proceeding, as a secured creditor, for any remainder of the [amount] owed.”). Through its proof of claim, Apex asserts that it has a blanket lien on assets (which is a separate question from whether the lien is supported by collateral), and that it has a claim for the total balance due (which is a separate question from whether there will be a distribution on the claim). As evidence of additional means of collection, Apex also pursued recovery against the principal's guaranty through its collection litigation. *See* Summ. J. Exs. 3-7, D.E. 97-1 at 21-51.

The blanket lien on assets, the filed proof of claim, and the guaranty allow Apex, in some way, to collect on its debt from Williams Land even if the debtor stops generating receivables. Those remedies are evidence of recourse in the event of bankruptcy. With no recourse, there would be no source of payment once purchased future accounts were no longer being generated. Instead, Apex has multiple alternate methods to recover on its claim even where there are no new receivables, making it readily apparent to the court that Apex has burdened itself with very little

risk through the MCA Agreement, if Apex has taken on any risk at all. Because the risk of nonpayment by a customer is not shifted to Apex, the court concludes as a matter of law that the MCA Agreement is a loan, and not a true sale.

Other Provisions Informing the Analysis

While the court finds that Apex's recourse in bankruptcy is sufficient to conclude that the risk of loss remains with Williams Land under the MCA Agreement and that the agreement is a loan, the MCA Agreement also contains additional indicia (as identified in *Shoot the Moon*) that the risk of loss remains with Williams Land. Specifically, Apex's lien extends beyond the assets that it purported to purchase to also include all accounts and inventory and all proceeds; Apex obtained (and pursued) a personal guaranty of Williams Land's principal; and the default provisions, found at Summ. J. Ex. 1, D.E. 97-1 at 4-5, ¶ 17, include "aggressive loan-like remedies that [spring] into effect if the merchant default[s]," *Haymount Urgent Care PC v. GoFund Advance, LLC*, 609 F. Supp. 3d 237, 249 (S.D.N.Y. 2022), such as acceleration of amounts due, an assignment of lease, power of attorney, and additional costs of collection and attorney's fees. In addition, there is no evidence that Apex took over servicing the accounts or that Williams Land segregated the funds, and there is no evidence that Apex investigated the customers to determine the collectability of the purchased accounts.

Indeed, to the last point, Apex did not purport to purchase specific accounts. Instead, its agreement purports to purchase "all" accounts "until the amount [of \$337,500] has been delivered" by Williams Land to Apex, with 13% of all receivables to be delivered weekly until the amount is paid in full. In this way, Apex is purchasing whichever accounts pay first – again, taking only the minor risk that *none* of Williams Land's customers will pay, rather than taking the risk that specific accounts will not be paid. This is consistent with a scenario described by Professor Bruce:

The funder takes an interest in an unspecified share of receivables, which means, quite simply, the funder always gets the good ones. The funder draws its payment from whatever money the debtor has available, which include accounts that have been paid, funds from other MCA companies, and any other monies that happen to be in the debtor's deposit account. In this way, the MCA funder's recovery is in no way tied to the performance of any individual account. If 20% of the accounts go uncollected, or 50%, or 70%, the funder's ultimate recovery remains payable from the first dollars received by the merchant. A reconciliation of the MCA, if available, could adjust the *timeframe* for repayment, but would not alter the principal amount owing.

Bruce, Revenue-Based, 45 No. 4 Bankruptcy Law Letter NL 1 at 7 (citations omitted). Based on this analysis, and considering the MCA Agreement as a whole, the court finds that Apex's many sources of recourse and other indicia of its lack of risk lead to only one conclusion: that the MCA Agreement is a loan, and not a sale, as a matter of law.

#### **The MCA Agreement is Void as Usurious under New York Law**

Having determined that the MCA Agreement is a loan and not a true sale, the court turns to whether New York's usury statutes apply and, if so, the consequences of those statutes. Under New York law, an interest rate of more than 25% per annum is usurious. Here, a calculation of the effective rate of interest based on the funds advanced and the contractual term of repayment of 18 weeks results in an annual simple interest rate of 101.1%. D.E. 14 at ¶ 46. Accordingly, the terms of the MCA Agreement bring it within the New York usury statutes.

New York law also specifies the consequences of usury. Pursuant to New York Penal Law § 190.40, "[a] person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period." N.Y. Penal Law § 190.40. Separately, New York's General Obligations Law § 5-511(1) provides for the voidability of those contracts. *Adar Bays*, 179 N.E.3d at 621. Construing both statutes, New York's highest

court has held that, where a loan is found to be criminally usurious, the proper remedy is to render the agreement void *ab initio*. *Id.* at 615-20 (providing a detailed discussion of the history of New York’s criminal usury laws and the extension of those laws to voiding usurious contracts involving corporate borrowers).

Apex maintains that Williams Land may not bring an affirmative action for criminal usury, and as a general matter, this court agrees. Likewise, New York courts have held that the general prohibition on corporations asserting (noncriminal) usury as a defense should also be read to prohibit corporations from bringing affirmative claims alleging criminal usury. *Haymount Urgent Care PC v. GoFund Advance, LLC*, 635 F. Supp. 3d 238, 242–43 (S.D.N.Y. 2022) (citing *Intima-Eighteen, Inc. v. A.H. Schreiber Co.*, 568 N.Y.S.2d 802, 172 A.D. 2d 456, 457–58 (N.Y. App. Div. 1991)). However, a corporation may assert *criminal* usury as a defense, and use of that defense is broad; General Obligations Law § 5-521(3) provides that corporations may interpose the defense of criminal usury in “*any action.*” *Haymount Urgent Care PC*, 635 F. Supp. 3d at 244 (emphasis in original).

“[A]ssertion of criminal usury, to the extent the Debtor utilizes such assertion as a defense to repayment of Defendant’s claim, is procedurally proper under applicable New York law.” *In re GMI Grp., Inc.*, 606 B.R. 467, 483 (Bankr. N.D. Ga. 2019). Here, Apex filed a proof of claim, and the Amended Complaint includes an objection to claim as part of the relief sought. It is this important difference that distinguishes this case from this court’s decision in *Azalea Gyn., P.A. v. Mint Funding Inc. (In re Azalea Gyn., P.A.)*, Adv. Pro. No. 24-00107-5-PWM (Bankr. E.D.N.C. Dec. 6, 2024) (Slip Op., D.E. 10 at 8), in which the plaintiff/debtor could not assert usury laws as an affirmative claim against an MCA creditor that had filed no claim in the bankruptcy case.

Here, using an annual simple interest calculation, the rate of interest under the MCA Agreement is 101.1%, exceeding the 25% threshold prescribed in New York Penal Law § 190.40. Pursuant to applicable New York statutory and case law, the MCA Agreement is criminally usurious. By application of General Obligations Law § 5-511(1), it is also void *ab initio*. The effect of this finding, however, must be assessed with respect to the specific claims for relief in the Amended Complaint, to which the court now turns.<sup>7</sup>

**First Claim for Relief: Avoidance of Fraudulent Transfers under 11 U.S.C. § 548**

As relevant here, § 548 of the Bankruptcy Code provides for the avoidance of constructively fraudulent transfers of an interest of the debtor in property where the debtor received less than reasonably equivalent value in exchange for the transfer and the debtor was insolvent. Williams Land seeks to avoid all of the payments made to Apex by it or by Domtar, contending that because the MCA Agreement is void, Williams Land did not receive reasonably equivalent value for the payments. Apex, on the other hand, contends that the claim fails as a matter of law because no interest of the debtor was transferred: because the MCA Agreement is a sale and not a loan, Williams Land did not have an interest in the funds paid to Apex.

The court turns first to Apex's argument. Because the court has found as a matter of law that the MCA Agreement is a loan, Williams Land did have an interest in the funds transferred both by Williams Land and by Domtar, and Apex's "no transferred interest" argument in defense of the § 548 claim necessarily fails.

However, although the court has also found the MCA Agreement to be void under New York law, this determination alone does not answer the question of whether reasonably equivalent value was received by Williams Land for the payments it or Domtar made to Apex. Reasonably

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<sup>7</sup> The claims are discussed in a different sequence than how they are set forth in the Amended Complaint.

equivalent value is based on the actual value given and received, not necessarily the value(s) contemplated by the contract. There is no dispute that Apex did advance funds in the amount of \$245,000 to Williams Land, and that advance constitutes value. It is also undisputed that the payments made by or on behalf of Williams Land to Apex total less than the \$245,000 advanced to Williams Land by Apex.<sup>8</sup> Accordingly, the court concludes as a matter of law that Williams Land did receive reasonably equivalent value for the funds transferred by or on behalf of Williams Land. Apex's motion for summary judgment on this claim will be ALLOWED.

**Fifth and Sixth Claims for Relief: Avoidance of Preference under 11 U.S.C. § 547 and Recovery of Avoided Transfers under 11 U.S.C. § 550**

Pursuant to § 547 of the Bankruptcy Code, a debtor in possession may avoid a transfer made within 90 days of the petition date on account of an antecedent debt that enables a creditor to receive more than it would have received in a chapter 7 case had the transfer not been made. It is undisputed that on or about July 14, 2022, within the 90 days preceding the filing of Williams Land's bankruptcy petition, Apex received the amount of \$30,159.42 from Domtar to be applied to the Williams Land obligation. Based on its assertion that the MCA Agreement is a true sale, Apex disputes both that the funds were property of Williams Land and that there was an antecedent debt.

The court has concluded that the MCA Agreement was a loan and not a sale, effectively determining the elements of antecedent debt and transfer of an interest of the debtor in property as a matter of law. Because Apex is under or unsecured, that payment allowed Apex to receive more than it would have received in a chapter 7 liquidation. Consequently, the elements of a preference

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<sup>8</sup> The court expresses no opinion on whether a finding of criminal usury as a defense to a proof of claim also may be used as part of an affirmative § 548 claim to establish lack of reasonably equivalent value where the debtor has paid to the MCA entity more than the funds advanced, as those are not the facts before the court.

have been established through the undisputed facts and this court's prior conclusions of law, and summary judgment is appropriate unless a defense under § 547(c) applies.

As noted above, Williams Land and Apex entered a Stipulation of Settlement on July 11, 2022, which contemplated a payment of \$30,000 to be made to Apex "on behalf of" Williams Land. Summary Judgment Ex. 5, D.E. 97-1 at 44. There is no dispute that the \$30,159.42 payment made by Domtar to Apex is the payment contemplated in the Stipulation of Settlement. Apex contends that because the parties agreed this payment would be made, their agreement is sufficient to characterize the payment as having been made in the ordinary course of business under § 547(c)(2).

To establish ordinary course for purposes of § 547(c)(2), Apex is required to show that the transfer was "made in the ordinary course of business or financial affairs of the debtor and the transferee; or made according to ordinary business terms." 11 U.S.C. § 547(c)(2). The record before the court shows that the ordinary course of business between Williams Land and Apex consisted of weekly payments in the amount of \$18,750.<sup>9</sup> In light of that established pattern, the payment of \$30,159.42 was a unique, one-time event made after collection litigation was pursued, the parties reached a settlement, and Apex sent a UCC demand letter to Domtar. This was well outside the ordinary course of dealings between Williams Land and Apex. In addition, there is nothing before the court to establish that this payment could fall within ordinary business terms in the industry.

Because there are no material issues of disputed fact, the court concludes as a matter of law that the transfer made by Domtar on July 11, 2022 in the amount of \$30,159.42 is avoidable under

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<sup>9</sup> The court expresses no opinion of whether a similarly-situated creditor would prevail on an ordinary course defense for payments made under similar contract terms within the 90 days prior to filing; the court notes simply that the Domtar payment here was not consistent with the established pattern of payments between these parties.

§ 547. The motion for summary judgment by Apex on this claim will be DENIED, and summary judgment will be entered in favor of Williams Land. Similarly, Williams Land is entitled to recover the avoided transfer in the amount of \$30,159.42 for the benefit of the estate pursuant to § 550. The motion for summary judgment by Apex on the § 550 claim will be DENIED, and summary judgment will be entered in favor of Williams Land.

#### **Fourth Claim for Relief: Unfair and Deceptive Trade Practices**

The Amended Complaint asserts that Apex holds itself out as an alternative funding source that personalizes solutions to a specific business's individual needs, preying on small, insolvent businesses and issuing disguised loans that are criminally usurious. D.E. 14 at 10-11, ¶¶ 78-82. The Amended Complaint also asserts that Apex's lending practices were unethical and predatory, and further that Apex falsely recorded payments made on or behalf of Williams Land, artificially inflating the amount still owed by Williams Land and asserted in the proof of claim. *Id.* at 11, ¶¶ 88-90. Williams Land contends that these are unfair and deceptive acts in or affecting commerce that entitle it to treble damages and attorney's fees<sup>10</sup> under chapter 75 of the North Carolina General Statutes, the Unfair or Deceptive Trade Practices Act (UDTPA). That act prohibits "unfair or deceptive acts or practices in or affecting commerce," N.C. Gen. Stat. § 75-1.1(a), with

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<sup>10</sup> § 75-16. Civil action by person injured; treble damages. If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

§ 75-16.1. Attorney fee. In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that: (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

“commerce” defined to include “all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.” N.C. Gen. Stat. § 75-1.1(b). Case law informs that the factfinder (typically a jury) finds the “facts,” then the court decides as a matter of law whether the facts found by the jury satisfy the conduct standard under the statute. *See, e.g., Hardy v. Toler*, 288 N.C. 303, 310 (1975) (establishing these roles for the jury and for the court in § 75-1.1 cases). In the summary judgment context, the court must consider whether the undisputed facts constitute unfair or deceptive acts in or affecting commerce.

In its motion for summary judgment, Apex makes two legal arguments. The first is that the filing of an allegedly incorrect proof of claim is not an act in or affecting commerce, rendering the UDTPA inapplicable. Apex is correct that the act of filing a proof of claim is not “in or affecting commerce.” *Winter v. Suddenlink (In re Winter)*, Adv. Pro. No. 15-00013-5-DMW, 2015 Bankr. LEXIS 2839, at \*8–9 (Bankr. E.D.N.C. Aug. 26, 2015). Accordingly, the court determines as a matter of law that Williams Land cannot prevail on its UDTPA claim for the “act” of filing an inaccurate proof of claim. However, the allegation that the proof of claim itself is unfair or deceptive is only one of the bases on which Williams Land seeks to recover under the UDTPA, so this holding does not resolve the entire claim for relief.

Apex’s second legal argument is that any claim related to the terms of the MCA Agreement was released in the Stipulation of Settlement. The court previously considered and rejected this contention. In its order denying the motion to dismiss the amended complaint, the court noted that

under New York law as cited by WLC, a ‘settlement agreement purporting to compromise and release a borrower’s usury claim is void and unenforceable if the original usurious obligation transcends into the parties’ subsequent agreement. *Adar Bays, LLC v. 5Barz Int’l, Inc.*, 2018 U.S. Dist. LEXIS 139843, at \*16 (S.D.N.Y. August 16, 2018) (citation omitted). Accordingly, the claim objection and other claims based on the allegation of usury have not been waived.

D.E. 62 at 15-16. The Stipulation of Settlement provided a compromised repayment schedule for Williams Land to satisfy the obligation established through the MCA Agreement, and thus the original usurious obligation transcended into the Stipulation of Settlement. The crux of the UDTPA claim is that the MCA Agreement was marketed as an individualized solution to Williams Land's financing needs, purported to be a sale, and was, in fact, a usurious loan. Thus, the UDTPA claim is largely based on the allegation of usury, and the court concludes that the UDTPA claim was not released by the Stipulation of Settlement.

On substantive review of that claim, Apex did not present the court with a threshold demonstration that there is no genuine issue of material fact on this claim sufficient to shift the burden to Williams Land. Instead, the only "facts" provided by Apex are a self-serving statement that it does not prey on small and insolvent businesses, Decl. of Apex Funding Source, LLC, Summary Judgment Ex. 8, D.E. 97-2 at ¶ 6, and its Declaration and discovery responses that address the alleged failure to properly apply all payments received from Domtar to the Williams Land account. *See, e.g.* Decl. of Apex Funding Source, LLC, Summary Judgment Ex. 8, D.E. 97-2 at ¶¶ 66, 67, 71, 73; Apex Response to CFI's Interrogatories, Summary Judgment Ex. 10, D.E. 97-4 at 14-15, Int. No. 7. There is no evidence in the record (undisputed or otherwise) as to how Williams Land came to enter the MCA Agreement with Apex or what representations were made and by whom at the time the agreement was entered, other than the representations contained in the agreement itself.

Accordingly, the court finds that Williams Land cannot prevail on its UDTPA claim for the "act" of filing an inaccurate proof of claim and Apex's motion summary judgment will be ALLOWED IN PART. With respect to all other allegations of unfair or deceptive acts or practices, Apex has failed to demonstrate that there are no issues of material fact that would require judgment

in its favor as a matter of law on the UDTPA claim, and Apex's motion for summary judgment is therefore DENIED IN PART.<sup>11</sup>

**Second Claim for Relief: Objection to Claim**

Apex moved for summary judgment on all claims in the Amended Complaint, but the motion does not specifically address the objection to claim other than to the extent that a finding in favor of Apex with respect to the characterization of the MCA Agreement would necessarily require a finding in its favor on the objection to claim. Based on the court's conclusion that the MCA Agreement is void as criminally usurious as well as its conclusion that Apex received an avoidable preference, the final amount of Apex's claim in the case will have to be determined at trial. Accordingly, Apex's motion for summary judgment on the objection to claim is DENIED.

**Third Claim for Relief: Equitable Subordination**

Just as the motion for summary judgment does not specifically address the objection to claim, it does not specifically address the claim for equitable subordination. Accordingly, the court finds that Apex has not shown that there are no disputed issues of material fact, and summary judgment is DENIED.

**MOTIONS FOR SUMMARY JUDGMENT ON CFI'S CLAIMS IN THE INTERVENOR COMPLAINT**

**CFI's Claim for Declaratory Judgment that Transfers Recovered by Williams Land Remain Subject to CFI's Lien**

CFI's Intervenor Complaint and brief in support of summary judgment sought a declaratory judgment that, because it held a senior lien on the funds transferred to Apex, any payments avoided by Williams Land remain subject to its lien and should be avoided for its benefit, not the benefit of the estate. Specifically, CFI maintained in its Intervenor Complaint and in its brief that Williams

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<sup>11</sup> It is not clear to the court what damages may have been suffered by Williams Land as a result of the asserted unfair or deceptive acts; however, the court acknowledges that the measure of damages may differ from the evaluation of reasonably equivalent value for purposes of the § 548 claim.

Land transferred property that was subject to CFI's properly-perfected security interest, and that because avoidance of the transfers does not operate to remove a properly perfected lien in the transferred funds, the funds remained subject to CFI's lien. *See* D.E. 92 at 12-13. Therefore, CFI maintained, its rights to the transferred funds are senior to the rights of Williams Land. *Id.*

At the hearing, CFI conceded that it did not have a perfected lien on the *proceeds* of accounts receivable; put another way, it did not have a lien on funds once an account was collected and in the hands of Williams Land. This would include any funds paid directly to Apex by Williams Land as well as the funds paid by Domtar to Apex. Thus, CFI concedes that it has no lien on any funds Williams Land might recover under the debtor's chapter 5 avoidance powers. Because the court has already concluded that Apex is entitled to summary judgment on the fraudulent transfer claims, there will be no recovery by Williams Land of any funds transferred directly by Williams Land to Apex, rendering this argument largely academic unless CFI has any claim to the proceeds of Williams Land's avoided preference.

It is generally understood that recoveries of a postpetition avoidance action constitute postpetition property of the estate and are not subject to prepetition liens, "even if the recovered funds are traceable to prepetition collateral and the creditors would have an independent right of recovery against the avoidance defendants." *Hutson v. First-Citizens Bank & Tr. Co. (In re Nat'l Gas Distribs., LLC)*, Nos. 06-00166-8-ATS, S-06-00031-8-AP, 2007 Bankr. LEXIS 4703, at \*22 (Bankr. E.D.N.C. July 24, 2007); *see also* 5 Collier on Bankruptcy P 552.02 (16th 2025) ("On the whole, therefore, the more persuasively reasoned opinions do not permit secured creditors to share in recoveries obtained by bankruptcy trustees or estate representatives pursuant to the avoiding powers, even where such creditors may have independent, traceable rights to those funds."). CFI

conceded this at the hearing and stated that it does not contend it has a lien on any avoidance recovery.

Instead, CFI revised its argument to contend that its entitlement to the proceeds of this litigation is limited to the payments received by Apex from Domtar – a right that arises because “as soon as that receivable was paid out by Domtar to Apex, it gave [CFI] a cognizable cause of action against Apex for conversion.” March 18, 2025 Hearing audio at 42:40. At the same time, CFI argued that Apex could be subject to double liability: first to the debtor for avoided payments, and secondly to CFI for converted funds. From this, it appears to the court that CFI has recognized that it has no claim to any proceeds Williams Land may recover pursuant to Williams Land’s avoidance actions. Instead, CFI simply has direct claims against Apex that involve the same sums and that may or may not be impacted by Williams Land’s independent chapter 5 actions. Accordingly, the court denies CFI’s motion for summary judgment on its declaratory judgment claim, and will enter summary judgment in favor of Williams Land on this claim.

**Cross-motions on CFI’s Claim for Conversion**

CFI contends that Apex converted CFI’s collateral when Apex received funds from Domtar pursuant to the UCC letter Apex sent demanding that Domtar remit moneys owed to Williams Land to Apex. To be clear, CFI does not contend that it owned the Domtar receivable pursuant to its factoring arrangement, but only that it held a higher priority security interest in the Domtar receivable. Apex, on the other hand, maintains that CFI has not satisfied any of the required elements of conversion under New York law, all of which must be shown: specifically, CFI has not demonstrated that it had a present right to possession of the Domtar payments, that CFI made a demand for return of the collateral, that Apex had actual knowledge of CFI’s interest, or that the

funds were designated for a specific purpose and used for an unauthorized purpose. *See* D.E. 101 at 7-10.

The parties agree that New York law governs this claim. *See* D.E. 92 at 6-8; D.E 101 at 5-6. Under New York law, conversion is “any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property.” *Meese v. Miller*, 436 N.Y.S.2d 496, 500 (4th Dep’t 1981). New York courts have recognized a cognizable claim for conversion by a secured creditor against another secured creditor. *In re A.N. Frieda Diamonds, Inc.*, 616 B.R. 295, 317 (Bankr. S.D.N.Y. 2020), *aff’d*, 633 B.R. 190 (S.D.N.Y. 2021) (“The disposition by a junior creditor of collateral in which another creditor has a valid and perfected lien constitutes conversion of the senior creditor’s interests in the collateral.”); *HSCM Bermuda Fund Ltd. v. Newco Cap. Grp. VI LLC*, 619 F. Supp. 3d 434, 442 (S.D.N.Y. 2022) (plaintiffs plausibly stated a claim for conversion by alleging that defendant interfered with their property interest in borrower’s assets by asking borrower’s vendors to pay defendant in derogation of plaintiffs’ rights); *Bank of India v. Weg & Myers, P.C.*, 257 A.D.2d 183, 185–86, 691 N.Y.S.2d 439 (N.Y. App. Div. 1999) (bank awarded summary judgment against law firm for conversion where proceeds of collateral insurance policy were applied to legal fees and paid to debtor despite knowledge of bank’s interest in and entitlement to proceeds).

Apex contends that it had no knowledge of CFI’s senior security interest, and CFI agrees that the undisputed facts demonstrate that Apex did not search the public record to discover CFI’s perfected lien. However, Apex is deemed to have constructive knowledge of what is on the public record. *See A.N. Frieda Diamonds*, 616 B.R. at 310–13 (citing additional authorities). In *A.N. Frieda Diamonds*, the defendants maintained that they were not actually aware of the creditor

bank's perfected security interests; the court acknowledged this, but held that "even if that had been the case it was only because, by their own admission, they never bothered to check to see if a UCC financing statement was on file. . . . [T]he filed financing statement is deemed under New York law to constitute valid notice to other creditors." *Id.* at 313. "'Notice filings' would be meaningless if a creditor . . . could defeat the perfected rights of a senior creditor just by refusing to investigate and thereby deliberately avoiding actual knowledge of a senior secured claim that is readily ascertainable." *Id.* at 314. The same is true here.

Having found that Apex took possession of the Domtar payments with constructive knowledge of CFI's senior lien on all accounts, the court turns to whether CFI had a present right to possession of the funds at issue. In the cases cited above in which a New York court found conversion of a senior lender's collateral by a junior lienholder, the court either noted as undisputed or found as a fact that the debtor was in default to the senior secured creditor, giving that creditor a right to possession of the collateral. In this case, there is no evidence that CFI had declared a default, and CFI admitted at the hearing that it had taken no action to assert its right to the accounts. Accordingly, there is no evidence that CFI had a present right to possession of the Domtar accounts at the time that those funds were paid to Apex.

It is also undisputed that CFI made no demand for return of the collateral. Where the original possession of another's property is lawful, "a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property." *Schwartz v. Cap. Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993) (quoting *Johnson v. Gumer*, 94 A.D.2d 955, 464 N.Y.S.2d 318, 319 (4th Dep't 1983)); *see also Schloss v. Danka Bus. Sys. PLC*, No. 99 CIV. 0817 (DC), 2000 WL 282791, at \*7 (S.D.N.Y. Mar. 16, 2000), *aff'd*, 234 F.3d 1263 (2d Cir. 2000). There is nothing inherently unlawful about a junior lienholder taking possession of

its collateral; a junior lienholder would simply do so subject to a senior lienholder's rights. For conversion to occur where possession is lawful, Apex either had to refuse to return the funds after demand by CFI for those funds, or dispose of the funds without notice to CFI. CFI presented no evidence to establish that demand was made, and slim argument that this element is not required. Indeed, the cases cited above for the proposition that the senior lender had to have declared a default also included a clear demand and refusal to return the collateral or, in the case of *A.N. Frieda Diamonds*, disposal of the tangible collateral.

Finally, to establish a claim for conversion where the property in question is money, the funds must have designated for a specific purpose and used for an unauthorized purpose. In *Manufacturers Hanover Tr. Co. v. Chem. Bank*, 160 A.D.2d 113, 559 N.Y.S.2d 704 (1990), the plaintiff wired funds to the defendant to be credited to a specific account; when the defendant applied the funds to a different account and refused a demand for their return, it was liable for conversion. "An action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." *Id.* at 113; *see also E. Schodack Fire Co. v. Milkewicz*, 140 A.D.3d 1255, 1256, 34 N.Y.S.3d 640 (2016) (holding that "[w]here the property alleged to have been converted is money, 'it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner'" (quoting *Salatino v. Salatino*, 64 A.D.3d 923, 925, 881 N.Y.S.2d 721 (2009) (internal quotation marks omitted))). Here, there is no evidence that the Domtar funds were designated for a specific purpose and used for an unauthorized purpose. The Domtar account had not been purchased by CFI, it was simply one of many accounts on which CFI held a lien that otherwise was used for operation of Williams Land's business. CFI admitted at the hearing that if Domtar had paid Williams Land on its account and then Williams Land, in turn, paid Apex, CFI

would have no claim against Apex. It is difficult to see how CFI should be in a *better* position as a result of the direct payment from Domtar to Apex than it would have been in had Domtar paid Williams Land first.

In sum, the court finds that CFI did not establish the elements of conversion for either of the payments from Domtar to Apex<sup>12</sup> because, even with Apex's deemed constructive knowledge of CFI's superior lien, CFI failed to establish three elements of a conversion claim: that CFI had a right to possession, that the funds were designated for a specific purpose and used for an unauthorized purpose, and that CFI made a demand to Apex for the return of the funds. Accordingly, Apex's motion for summary judgment on CFI's claim for conversion is ALLOWED, and CFI's motion for summary judgment is DENIED.

#### **CFI's Claim for Tortious Interference**

In its brief and at the hearing, CFI conceded that it does not have evidence to support its claim for tortious interference. Accordingly, and as announced at the hearing, summary judgment will be entered in favor of Apex on the tortious interference claim.

#### **MR. KLEIN'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS**

Finally, and as noted above, at the hearing, Williams Land and CFI conceded that there is no evidentiary support for any of the claims asserted against Mr. Klein in the Williams Land Amended Complaint or in the Intervenor Complaint. Accordingly, summary judgment will be entered in favor of Mr. Klein on all claims.

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<sup>12</sup> Because the court finds that CFI has not established a claim for conversion for either payment, it need not consider whether the payment avoided by Williams Land as a preference could also be subject to a claim for conversion. The court has serious concerns about the viability of that claim as intruding on the rights conferred on a debtor in possession by the Bankruptcy Code, as well as subjecting a creditor to refunding the same sums twice with the ability to amend its claim to seek payment through the bankruptcy process only for the avoided preference payment. Indeed, the court has concerns about a secured creditor using a state law claim for conversion to assert rights to funds that the Bankruptcy Code allows a debtor to recover for the benefit of all creditors. But, that issue does not have to be resolved by the court today.

**CONCLUSION**

Based on the foregoing,

Mr. Klein's motions for summary judgment on all claims in the Amended Complaint and the Intervenor Complaint are ALLOWED and Mr. Klein is dismissed as a party to this proceeding;

Apex's motion for summary judgment on Williams Land's first claim for relief, avoidance of fraudulent transfers pursuant to 11 U.S.C. § 548, is ALLOWED;

Apex's motion for summary judgment on Williams Land's second claim for relief, objection to claim, is DENIED;

Apex's motion for summary judgment on Williams Land's fourth claim for relief, unfair and deceptive trade practices pursuant to chapter 75 of the North Carolina General Statutes, is DENIED IN PART and ALLOWED IN PART;

Apex's motion for summary judgment on Williams Land's fifth claim for relief, avoidance of preferential payments in the amount of \$30,159.42 pursuant to 11 U.S.C. § 547, is DENIED and summary judgment will be entered in favor of Williams Land on this claim;

Apex's motion for summary judgment on Williams Land's sixth claim for relief, recovery of avoided transfers pursuant to 11 U.S.C. § 550, is DENIED and summary judgment will be entered in favor of Williams Land on this claim in the amount of \$30,159.42;

Apex's motion for summary judgment on Williams Land's third claim for relief, equitable subordination, is DENIED;

CFI's motion for summary judgment on its claim for declaratory judgment is DENIED, and summary judgment will be entered in favor of Williams Land on this claim;

CFI's motion for summary judgment on its claim for conversion against Apex is DENIED, and Apex's motion for summary judgment on CFI's claim for conversion against it is ALLOWED; and

Apex's motion for summary judgment on CFI's claim for tortious interference with contract is ALLOWED.

The remaining issues, including Williams Land's objection to Apex's claim in the chapter 11 case, Williams Land's claim for unfair or deceptive trade practices, and Williams Land's claim for

equitable subordination, will be set for trial. Appropriate judgments will be entered at the conclusion of all matters before the court.

**END OF DOCUMENT**

2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**NOT FOR PUBLICATION**

<p>In re:</p> <p>J.P.R. MECHANICAL INC. d/b/a JPR MECHANICAL, <i>et al.</i>,</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 7</p> <p>Case No. 19-23480 (DSJ)</p>
<p>MARIANNE T. O'TOOLE, solely in her capacity as Chapter 7 Trustee of the Estate of J.P.R. Mechanical Inc. d/b/a/ JPR Mechanical,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>RADIUM2 CAPITAL, LLC, f/k/a RADIUM2 CAPITAL, INC.</p> <p style="text-align: center;">Defendant.</p>	<p>Adv. Pro. No. 21-07079 (DSJ)</p>
<p>MARIANNE T. O'TOOLE, solely in her capacity as Chapter 7 Trustee of the Estate of J.P.R. Mechanical Services Inc.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>RADIUM2 CAPITAL, LLC, f/k/a RADIUM2 CAPITAL, INC.</p> <p style="text-align: center;">Defendant.</p>	<p>Adv. Pro. No. 21-07082 (DSJ)</p>

**DECISION ON MOTION OF PLAINTIFF FOR PARTIAL SUMMARY JUDGMENT**

**APPEARANCES:**

**LAMONICA HERBST & MANISCALCO, LLP**  
*Counsel to Plaintiff Chapter 7 Trustee*  
3305 Jerusalem Ave., Suite 201

Wantagh, NY 11793

By: Holly R. Holecek  
Salvatore LaMonica

**THE KANTROW LAW GROUP, PLLC**

*Counsel to Defendant*  
732 Smithtown Bypass, Suite 101  
Smithtown, NY 11787  
By: Fred S. Kantrow

**DAVID S. JONES**  
**UNITED STATES BANKRUPTCY JUDGE**

The summary judgment motions before this Court seek to avoid three transfers made to the defendant pursuant to merchant cash advance agreements. Numerous decisions of New York state courts, several decisions of the District Court, and one opinion of the Second Circuit have analyzed agreements like these to determine whether they constitute loans notwithstanding that they are styled as being, or at least resembling, asset-sale agreements. Usually, those decisions deal with claims of usury or civil-RICO violations. This decision addresses how the avoidable preference provisions of the Bankruptcy Code apply to merchant cash advance agreements. The Court concludes that here the Trustee has established an absence of any material factual dispute and is entitled to avoid the transfers at issue.

Frequently under merchant cash advance agreements, a funder advances money to a company in exchange for a specified percentage of that company's future revenues up to a certain amount, while the funder and the company agree on an estimate of those future revenues such that the funder may draw a fixed sum from the company's bank account daily until the funder receives the agreed-upon amount. Also frequently, the company may request a change to the daily draw amount if its revenues drop, and the agreements generally provide for reconciliation of the daily draw amounts against the company's actual revenues. Courts

determining whether these arrangements are true asset sales, or, on the other hand, are in reality loans, look to the substance of the parties' conduct and their agreements.

In bankruptcies, transfers made by a struggling and soon to be bankrupt company under a merchant cash advance agreement may be the subject of clawback demands by the company's bankruptcy trustee, with a central issue being whether the payments were on account of debt owed to the merchant cash advance provider. Here, the Trustee argues that she is entitled to summary judgment allowing the estate to avoid three transfers, all made under a merchant cash advance agreement at a time when the future debtor was insolvent. The Court agrees, drawing heavily from Judge Liman's thorough and well-reasoned decision in *Fleetwood Services, LLC v. Ram Capital Funding, LLC*, No. 20-cv-5120 (LJL), 2022 WL 1997207 (S.D.N.Y. June 6, 2022) ("*Fleetwood*"). At bottom, the parties' agreements and their course of conduct – including even that Radium2 filed proofs of claim in this case labeling itself a creditor who is owed money on account of the agreements at issue – establishes that the obligations that led to the transfers constituted debts as a matter of law, and, as such, were subject to avoidance in the circumstances the Trustee has shown are present here.

### **JURISDICTION**

This Court has jurisdiction over this bankruptcy case, these adversary proceedings, and these motions pursuant to 28 U.S.C. §§ 157(b), 1334, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.). These adversary proceedings and these motions are core proceedings under 28 U.S.C. § 157(b)(2)(F) as proceedings to avoid and recover alleged preferences.

**BACKGROUND**

J.P.R. Mechanical Inc. (“Debtor” or “JPR”) filed for Chapter 7 bankruptcy on August 16, 2019. J.P.R. Mechanical Services Inc. (“Services” and together with JPR, the “Debtors”), an affiliate of JPR, filed for bankruptcy at the same time. The Debtors operated as an HVAC subcontractor on large projects that proved beyond their ability to viably carry out. Trying to stave off collapse, they turned to merchant cash advance financing with multiple funders, including defendant Radium2 Capital, LLC (“Radium2” or “Defendant”).

The Debtors ultimately failed. Their claims registers reflect around \$200 million in claims. Marianne T. O’Toole, the Chapter 7 Trustee of the Debtors’ procedurally consolidated bankruptcy estates (“Trustee” or “Plaintiff”), brought two adversary proceedings to recover certain prepetition transfers made to Radium2 as avoidable preferences and disallow claims filed by Radium2.<sup>1</sup> The Trustee served detailed requests for admissions, to which Radium2 failed to respond. The Trustee has moved for summary judgment in the JPR Lawsuit and the Services Lawsuit, and Radium2 also failed to timely respond to those motions, although it did file an untimely response and oppose the motions at a hearing. The Trustee’s motion was accompanied by the statement required by Local Bankruptcy Rule 7056-1 identifying material facts as to which the movant asserts there is no genuine dispute; Radium2 filed a counterstatement that failed to specifically respond to each assertedly undisputed fact identified by the Trustee. This failure by Radium2 violated the express requirements of the Local Bankruptcy Rule which dictate that a failure to file specifically-targeted responses is deemed an admission of the matters

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<sup>1</sup> The first adversary proceeding is *O’Toole v. Radium2 Capital, LLC*, No. 21-07079 (the “JPR Lawsuit”), brought to recover two transfers made by the Debtor. The second adversary proceeding is *O’Toole v. Radium2 Capital, LLC*, No. 21-07082 (the “Services Lawsuit” and its claims register the “Services Claims Register”), brought to recover a transfer made by Services. Citations to the docket or claims register of the procedurally-consolidated main bankruptcy case, *In re J.P.R. Mech. Inc.*, No. 19-23480, will read “Main Case” and “JPR Claims Register,” respectively. Citations to the docket or claims register of the Services bankruptcy case, *In re J.P.R. Mech. Servs. Inc.*, No. 19-23481, will read “Main Services Case” and “Services Claims Register,” respectively.

stated in the movant's statement. Radium2 did file short and somewhat conclusory declarations of its principal. *See* Aff. of Troy Caruso, JPR Lawsuit, ECF No. 39; Aff. of Troy Caruso, Services Lawsuit, ECF No. 40.

### **FACTS**

In the months before filing for bankruptcy, JPR had entered into at least four agreements with Radium2, each titled "Agreement for the Purchase and Sale of Future Receipts." Of those agreements, three are at issue in these adversary proceedings: the one effective April 8, 2019, Holecek Decl. Ex. M, JPR Lawsuit, ECF No. 26-16 (the "April Agreement"), the one made as of June 28, 2019, Holecek Decl. Ex. O, JPR Lawsuit, ECF No. 26-18 (the "June Agreement"), and the one dated July 26, 2019, Holecek Decl. Ex. M, Services Lawsuit, ECF No. 27-16 (the "July Agreement" and together with the April Agreement and the June Agreement, the "Agreements"). *See* Examination of Troy C. Caruso ("Tr.") 84:2-10, 70:2-22, Holecek Decl. Ex. L., JPR Lawsuit, ECF No. 26-15. New York law governs the Agreements. April Agreement § 20; June Agreement § 20; July Agreement § 20. Each of the Agreements provides for an immediate cash advance to JPR and purports to sell twenty-five percent of JPR's future receipts to the Defendant up to certain specified targets, *see, e.g.*, April Agreement at 1, with the Defendant to collect the supposedly purchased receivables through daily transfers from JPR's designated bank account, *see, e.g.*, April Agreement at 1, and with JPR restricted from diverting revenue to affiliated businesses, *see, e.g.*, April Agreement § 13.11. The Agreements' relevant terms are detailed in this decision's legal analysis section and, to avoid repetition, not here.

On May 31, 2019, JPR wired \$1,470,102.02 to the Defendant (the "May Transfer"). Debtor's May 2019 Bank Statement from Signature Bank for Account ending \*6727 (the "May Statement") at 10, Holecek Decl. Ex. D, JPR Lawsuit, ECF No. 26-7. On July 3, 2019, JPR

wired \$750,002.50 to the Defendant (the “July 3 Transfer”). Debtor’s July 2019 Bank Statement from Signature Bank for Account ending \*6727 (the “July Statement”) at 4, Holecek Decl. Ex. E, JPR Lawsuit, ECF No. 26-8. On July 17, 2019, Services transmitted \$850,000 from its bank account to the Defendant (the “July 17 Transfer” and together with the May Transfer and the July 3 Transfer, the “Transfers”). Services’ July 2019 Bank Statement from Signature Bank for Account ending \*6743 (the “July Services Statement”) at 5, Holecek Decl. Ex. D, Services Lawsuit, ECF No. 27-7. The May Transfer and the July 3 Transfer pertain to the JPR Lawsuit and the April and June Agreements; the July 17 Transfer pertains to the Services Lawsuit and, at most, the June or July Agreements.

The Court takes judicial notice that Radium2 filed proofs of claim in sums certain, identifying itself as a “creditor” holding a “claim” against the Debtors on account of unpaid amounts under the Agreements. *See* Claims 105 and 106, JPR Claims Register; Claim 14, Services Claims Register. Further, Radium2 has failed to raise any factual dispute as to the following facts set forth in the Trustee’s requests for admissions in the JPR Lawsuit:

- Defendant received the May Transfer and the July 3 Transfer.
- For the May Transfer and the July 3 Transfer, neither the Defendant nor JPR intended either transfer to be in exchange for new value to be conveyed contemporaneously.
- For the May Transfer and the July 3 Transfer, no new value was exchanged contemporaneously.
- For each obligation paid by the May Transfer or the July 3 Transfer, such obligation was paid in a manner inconsistent with the prior course of business dealings between the Defendant and JPR.

- For each obligation paid by the May Transfer or the July 3 Transfer, such obligation was paid in a manner inconsistent with the practices of Defendant's industry.
- For each obligation paid by the May Transfer or the July 3 Transfer, such obligation was paid in a manner inconsistent with the practices of JPR's industry.
- For each obligation paid by the May Transfer or the July 3 Transfer, the obligation was not incurred by JPR as part of its normal business or financial affairs with the Defendant.
- The May Transfer and the July 3 Transfer were each inconsistent with ordinary business terms.
- The May Transfer and the July 3 Transfer were made for the benefit of the Defendant or another creditor.

Reqs. for Admis. at 4-6, Holecek Decl. Ex. C, JPR Lawsuit, ECF No. 26-6. Separately, in her un-responded-to requests for admissions in the Services Lawsuit, the Trustee requested that the Defendant admit that:

1. Defendant received the July 17 Transfer.
2. The July 17 Transfer was made during the ninety days before the petition date.
3. Defendant had a right to receive the July 17 Transfer in satisfaction of or on account of a then-existing obligation or debt owed by Services at the time the July 17 Transfer was made.
4. The July 17 Transfer was for the benefit of the Defendant or a creditor.
5. At the time the Defendant received the July 17 Transfer it was a creditor of Services.
6. The July 17 Transfer, when made, was on account of an antecedent debt owed to the Defendant by Services.

7. Services was insolvent at the time of the July 17 Transfer.
8. The Defendant has no evidence to rebut the presumption of insolvency during the ninety days before the petition date.
9. With respect to the July 17 Transfer, the Defendant received a greater percentage of what was owed to it, with respect to the obligations or debts satisfied by the July 17 Transfer, than it would have received had the July 17 Transfer not been made and Services liquidated under Chapter 7 of the Bankruptcy Code on the petition date.
10. With respect to the July 17 Transfer, the Defendant held no fully perfected security interest in the assets of Services, other than the July 17 Transfer, equal to or exceeding the amount of the July 17 Transfer that secured satisfaction of the obligation or debt on account of which the July 17 Transfer was made.
11. Neither the Defendant nor Services intended the July 17 Transfer to be in exchange for new value to be conveyed contemporaneously.
12. No new value was exchanged contemporaneously with the July 17 Transfer.
13. For each obligation paid by the July 17 Transfer, such obligation was paid in a manner inconsistent with the prior course of business dealings between the Defendant and Services.
14. For each obligation paid by the July 17 Transfer, such obligation was paid in a manner inconsistent with the practices of the Defendant's industry.
15. For each obligation paid by the July 17 Transfer, such obligation was paid in a manner inconsistent with the practices of the industry in which Services operated.
16. For each obligation paid by the July 17 Transfer, the obligation was not incurred by Services as part of its normal business or financial affairs with the Defendant.

17. The July 17 Transfer was inconsistent with ordinary business terms.

18. The Transfers were made for the benefit of the Defendant or another creditor.

Reqs. for Admis. at 4-6, Holecek Decl. Ex. C, Services Lawsuit, ECF No. 27-6.

Defendant never responded to the Trustee's requests for admissions. Holecek Decl. ¶ 7, JPR Lawsuit, ECF No. 26-3; Holecek Decl. ¶ 7, Services Lawsuit, ECF No. 27-3. Nor did Defendant's untimely counterstatements under Local Bankruptcy Rule 7056-1 identify evidence to rebut each assertedly undisputed fact listed in the Trustee's properly submitted statements of undisputed facts.

### **LEGAL STANDARDS**

#### **A. General Procedural Rules Governing Summary Judgment**

Federal Rule of Bankruptcy Procedure 7056 applies Rule 56 of the Federal Rules of Civil Procedure to adversary proceedings. Fed. R. Bankr. P. 7056. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotations omitted). Absent such a contest from the non-moving party, "[t]he moving party is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted).

However, the "failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment." *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d

241, 244 (2d Cir. 2004). This Court could have deemed the Trustee’s motions unopposed due to the Defendant’s failure to timely file an opposition in violation of a clear order of the Court. *See Watson v. Geithner*, 355 F. App’x 482, 483 (2d Cir. 2009) (citing *Davidson v. Keenan*, 740 F.2d 129, 132 (2d. Cir. 1984)); *compare, e.g.*, Order Respecting Mots. to Withdraw, JPR Lawsuit, ECF No. 33 (setting deadline of February 12, 2025 for Defendant to file an opposition to these motions) *with* Def’s. Mem. of Law in Opp’n to Trustee’s Mot. for Summ. J. (“Def’s. Mem. Regarding JPR”), JPR Lawsuit, ECF No. 38 (dated February 17, 2025 and filed February 19, 2025) *and* Def’s. Mem. of Law in Opp’n to Trustee’s Mot. for Summ. J. (“Def’s. Mem. Regarding Services”), Services Lawsuit, ECF No. 39 (dated February 17, 2025 and filed February 19, 2025). Particularly because substantive review of a movant’s showing is always required, this decision nevertheless takes into account Defendant’s untimely opposition.

**B. Procedural Rules Governing Requests for Admissions and Statements of Undisputed Material Fact**

The Federal Rules of Bankruptcy Procedure apply Federal Rule of Civil Procedure 36 in adversary proceedings. Fed. R. Bankr. P. 7036. Under that civil rule, “A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.” Fed. R. Civ. P. 36(a)(3). Meanwhile, the Local Rules of this Court require parties seeking summary judgment to file a statement of the material facts as to which the moving party contends there exists no triable dispute; the non-moving party must file a counter-statement, and “[e]ach numbered paragraph in the statement of material facts required to be served by the moving party shall be deemed admitted for purposes of the motion unless specifically

controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.” S.D.N.Y. Local Bankr. R. 7056-1(d).

The Trustee incorporated into her statements of undisputed material facts the facts deemed admitted by the Defendant’s failure to respond to her requests for admissions. *See* Statement of Undisputed Material Facts ¶¶ 18-52, JPR Lawsuit, ECF No. 26-2; Statement of Undisputed Material Facts ¶¶ 13-32, Services Lawsuit, ECF No. 27-2. Those facts now sit doubly outside the Defendant’s challenge. The Court’s analysis in this decision not only applies those facts, but also explains why some of the Defendant’s untimely attempts to challenge them would fail even if not procedurally barred.

**C. Merits: 11 U.S.C. §§ 547(b), (c)**

Section 547 of the Bankruptcy Code defines which transfers of a debtor’s property a bankruptcy trustee may avoid as preferential. This section promotes several policies of the Code, including 1) reducing the incentives creditors have to race to the courthouse when a viable enterprise faces temporary challenges, 2) preventing failing enterprises from favoring some creditors over others, and 3) promoting equality of distribution among similarly-situated creditors. *See Butler v. David Shaw, Inc.*, 72 F.3d 437, 441 n.6 (4th Cir. 1996); *DeRosa v. Buildex Inc. (In re F & S Cent. Mfg. Corp.)*, 53 B.R. 842, 846 (Bankr. E.D.N.Y. 1985). The provision empowers a bankruptcy trustee to avoid any transfer of an interest of the debtor in property:

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if--
  - (A) the case were a case under chapter 7 of this title;

- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The Trustee has the burden to prove the Transfers avoidable under Section 547(b); if the Trustee does so, the Defendant has the burden to establish the elements of any statutory defenses. *See id.* § 547(g). “One who relies upon an affirmative defense to defeat an otherwise meritorious motion for summary judgment must adduce evidence which, viewed in the light most favorable to and drawing all reasonable inferences in favor of the non-moving party, would permit judgment for the non-moving party on the basis of that defense.” *Domino Media, Inc. v. Kranis*, 9 F. Supp. 2d 374, 385 (S.D.N.Y. 1998) (quoting *Frankel v. ICD Holdings S.A.*, 930 F. Supp. 54, 65 (S.D.N.Y. 1996)), *aff’d*, 173 F.3d 843 (2d Cir. 1999). Defendant’s untimely opposition papers raise the following issues:

- 1) Whether the Agreements are loans; if the Trustee establishes that they are, that advances the Trustee’s affirmative case, and
- 2) Whether the Defendant and JPR and Services entered into and performed the contracts between them, including making the Transfers, in the ordinary course of business and according to ordinary business terms; if the Defendant establishes this, it would make out the ordinary transaction defense under Section 547(c)(2), and
- 3) Whether, through the Transfers, the Defendant received more than it would have received in a liquidation of the Debtors on the petition date.

*See* Def’s. Mem. Regarding JPR at 3-9; Aff. of Troy Caruso, JPR Lawsuit; Def’s. Mem.

Regarding Services at 3-9; Aff. of Troy Caruso, Services Lawsuit, ECF No. 40.

**ANALYSIS OF THE TRUSTEE'S AFFIRMATIVE CASE****A. The Agreements are Loans**

To find a transfer avoidable as a preference, a court must find that the debtor made the transfer to or for the benefit of a creditor, for or on account of an antecedent debt owed before the debtor made the transfer. 11 U.S.C. § 547(b)(1)-(2). A creditor is an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.”

*Id.* § 101(10)(A). The Code defines a “claim” as any:

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

*Id.* § 101(5). The Code also defines a “debt” as “liability on a claim.” *Id.* § 101(12). Loans to a debtor made prepetition and not paid off before the petition date count as “claims” in that debtor’s bankruptcy. *Id.* § 101(5).

Thus, if the Trustee can establish that the Agreements are loans, then it will follow that 1) JPR made the May Transfer and the July 3 Transfer to a creditor and 2) JPR made the May Transfer and the July 3 Transfer “on account of an antecedent debt owed by the debtor before such transfer was made.” *Id.* § 547(b). This follows because “[a] debt is incurred, for purposes of 11 U.S.C. § 547(b)(2), when it arises and not when payment becomes due.” *Cassirer v. Herskowitz (In re Schick)*, 234 B.R. 337, 347 (Bankr. S.D.N.Y. 1999) (citations omitted). Thus, if the Agreements count as loans, the Debtor made the May Transfer and the July 3 Transfer “on account of an antecedent debt owed by the debtor,” 11 U.S.C. § 547(b)(2). *See Nisselson v. Salim (In re Big Apple Volkswagen, LLC)*, No. 11-2251 (JLG), 2016 Bankr. LEXIS 834, at \*31-32 (Bankr. S.D.N.Y. Mar. 17, 2016).

“Under New York law, the initial interpretation of a contract is a matter of law for the court to decide.” *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1996) (internal quotations omitted). If the Court finds the contract ambiguous, the proper interpretation of the contract becomes a question of fact. *Id.* As to whether the Agreements constitute loans under New York law, neither party argues that any of the contractual language here is ambiguous. The Court therefore will evaluate that language to classify the Agreements as a matter of law. *Cf. Broker Genius, Inc. v. Volpone*, 313 F. Supp. 3d 484, 500 (S.D.N.Y. 2018) (“Here, the parties have not suggested that the Terms of Use are ambiguous. Nor have they directed the Court to any extrinsic evidence of the contract's meaning. The Court therefore follows the parties’ lead . . . . Since the Terms of Use are unambiguous, it is for the Court to interpret them as a matter of law.” (internal citations and quotations omitted)); *see also, e.g., Fleetwood Servs., LLC v. Ram Cap. Funding, LLC*, No. 20-cv-5120 (LJL), 2022 WL 1997207, at \*8-14 (S.D.N.Y. June 6, 2022) (interpreting a contract as a matter of law to classify it as a loan under New York law); *In re Grand Union Co.*, 219 F. 353, 356-59 (2d Cir. 1914) (same).

“The hallmark of a loan is that the lender ‘is absolutely entitled to repayment under all circumstances,’ or put otherwise, the ‘principal sum’ ‘is repayable absolutely.’” *Fleetwood*, 2022 WL 1997207, at \*9 (quoting *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 122 N.Y.S.3d 309, 312 (App. Div. 2d Dep’t 2020)). “Under New York law, which governs the Agreement[s], ‘substance—not form—controls’ when a court determines whether a transaction is a loan.” *Fleetwood Servs., LLC v. Richmond Cap. Grp. LLC*, No. 22-1885-cv, 2023 WL 3882697, at \*2 (2d Cir. June 8, 2023) (quoting *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 621-22 (N.Y. 2021)). “New York courts usually weigh three factors in making that determination: ‘(1) whether there is a reconciliation provision in the agreement; (2) whether the

agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy.” *Id.* (quoting *Principis Cap., LLC v. I Do, Inc.*, 160 N.Y.S.3d 325, 327 (App. Div. 2d Dep’t 2022)). Within the first two of these factors, courts examine whether the merchant could practicably invoke the reconciliation provision, *see Fleetwood*, 2022 WL 1997207, at \*13 (“The Fleetwood Agreement nominally has a reconciliation provision . . . . But that provision functions in such a way that renders it largely illusory.”), and whether, even if the agreement purports to have no maturity date, it has a “de facto fixed term,” *Lateral Recovery LLC v. Queen Funding, LLC*, No. 21 Civ. 9607 (LGS), 2022 U.S. Dist. LEXIS 129032, at \*16 (S.D.N.Y. July 20, 2022).

More broadly, “[t]he ‘three factors provide only a guide’ to the analysis; ‘they do not dictate the conclusion.’” *Lateral Recovery, LLC v. Cap. Merch. Servs., LLC*, 632 F. Supp. 3d 402, 452 (S.D.N.Y. 2022) (quoting *Fleetwood*, 2022 WL 1997207, at \*9). Courts also consider whether the agreement at issue identifies the accounts purchased and whether the “purchaser” may possess, use or convey them, which party bears responsibility for collecting the accounts, and the number of payments a merchant can miss before finding itself in default. *Fleetwood*, 2022 WL 1997207, at \*10-11. Courts also at times consider a question the parties did not emphasize here: whether the daily payment rates appear to be good faith estimates of the merchant’s revenues. *Davis v. Richmond Cap. Grp., LLC*, 150 N.Y.S.3d 2, 4 (App. Div. 1st Dep’t 2021). “The root of all of these factors is the transfer of risk. Where the lender has *purchased* the accounts receivable, the borrower’s debt is extinguished and the lender’s risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor.” *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 1995) (emphasis in original).

As noted, the Agreements are styled as agreements by which Radium2 purchased future receivables, with a cash payment to JPR up front and a stream of daily payments in specified amounts in exchange. April Agreement at 1; June Agreement at 1; July Agreement at 1. The Agreements allow the Debtor to request changes to the daily payment. *See* April Agreement § 2; June Agreement § 2; July Agreement § 2. However, the Debtor could request such a modification only once per month, and only on a going-forward basis. April Agreement § 2; June Agreement § 2; July Agreement § 2. Nothing in the Agreements requires the Defendant to remit back to the Debtors any amounts by which the Debtors have been overcharged during any given month. Thus, the Agreements lack true reconciliation provisions. *Compare K9 Bytes, Inc. v. Arch Cap. Funding, LLC*, 57 N.Y.S.3d 625, 632–33 (Sup. Ct. 2017) (“The reconciliation provisions allow the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof). If a merchant is doing poorly, the merchant will pay less, and will receive a refund of anything taken by the company exceeding the specified percentage.”) *and IBIS Cap. Grp., LLC v. Four Paws Orlando LLC*, No. 608586/16, 2017 WL 1065071, at \*3 (N.Y. Sup. Ct. Mar. 10, 2017) (“In order to ensure that IBIS will not inadvertently receive any money other than the purchased future sales proceeds, the Agreement provides a reconciliation mechanism by which IBIS will return to Four Paws anything that does not represent future sales proceeds.”) *with Queen Funding*, 2022 U.S. Dist. LEXIS 129032, at \*15 (ruling a merchant cash advance agreement to be a usurious loan even when it had a reconciliation provision because such reconciliation provision did not bind the purported lender to actually perform the reconciliation). Applying these principles here, the Agreements lacked reconciliation provisions that would cause Radium2 not to receive more than the share of receivables purportedly purchased because the Agreements do not bind the Defendant to pay back any money collected

that exceeds the specified percentage of the Debtors' revenues. This factor accordingly weighs in favor of classifying the Agreements as loans.

The Agreements have no stated maturity date or finite term, but the Defendant's principal admitted in a deposition in this case, offered by the Trustee and uncontroverted by Defendant, that the Agreements had de facto fixed terms. *See* Tr. 51:20-23 (When asked "How long is this out there for?" Defendant's principal responded "They're all different. It depends. Usually it's an amount of days, it's the payment deducted by what you're purchasing."). For this reason, the Agreements lack the indefinite term that characterizes transfers of ownership. *Cf. Fleetwood*, 2022 WL 1997207, at \*11 ("Richmond [the purported lender] has none of the rights of ownership—it does not have the right to possess, use, or convey any of the accounts it supposedly has purchased." (citing *Ownership*, *Black's Law Dictionary* (11th ed. 2019) ("Ownership rights are general, permanent, and heritable."))). As another judge in this District has observed in similar circumstances, "a de facto fixed term plausibly exists. The period of payment can be easily calculated by dividing the amount [] owe[d] by the amount of daily payments. A failure to pay will not indefinitely extend the term because the [Agreements] provide[] that a default will occur if [more than four] daily payments are not made during the term of the [A]greements and the [the Debtors] do[] not contact [the Defendant] in advance." *Queen Funding*, 2022 U.S. Dist. LEXIS 129032, at \*16; April Agreement § 15; June Agreement § 15(h); July Agreement § 15(h). This factor too weighs in favor of classifying the Agreements as loans.

Although not dispositive, the third frequently-considered factor—the availability of recourse in the event of bankruptcy—does not point to classifying the Agreements as loans. The Agreements do not list the Debtor's bankruptcy as an event of default, and they even include

language contemplating that the Debtor could go into bankruptcy and not default. *See* April Agreement § 4 (“[I]f the full Purchased Amount is never remitted because [Debtor’s] business went bankrupt . . . and [Debtor] has not breached this Agreement, [Debtor] would not owe anything to [Defendant] and would not be in breach of or default under this Agreement.”); June Agreement § 4 (same); July Agreement § 4 (same).

However, the power of this factor is limited because Defendant is not entirely “without recourse” in the event the Debtor’s bankruptcy caused the Debtor to fail to pay the Purchased Amount to the Defendant. The Defendant holds personal guarantees of “prompt and complete performance of all of [Debtor’s] obligations under the [Agreements]” from the Debtor’s principal, which the Defendant could exercise against the guarantor without first exercising any remedies under the Agreements. *See* Personal Guaranty of Performance §§ 2, 4, April Agreement Ex. A; Personal Guaranty of Performance §§ 2, 4, June Agreement Ex. A; Personal Guaranty of Performance §§ 2, 4, July Agreement Ex. A. Furthermore, default under any of the Agreements meant “the full uncollected Purchased Amount plus all fees and charges (including legal fees) due under this Agreement will become due and payable in full immediately” and “[Defendant] may debit [Debtor’s] depository accounts wherever situated by means of ACH debit or facsimile signature on a computer-generated check drawn on [Debtor’s] bank account or otherwise for all sums due to [Defendant].” April Agreement § 16; June Agreement § 16; July Agreement § 16.

Almost any bankruptcy filing and the resulting automatic stay – especially the Chapter 7 liquidation the Debtor filed – would necessarily “interfere[] with [Defendant’s] right to collect,” April Agreement § 15; June Agreement § 15; July Agreement § 15, and therefore cause a default. Furthermore, it seems unlikely that, in the event of bankruptcy, the Debtor could or would avoid another contractual event of default by “provid[ing] timely notice to [the Defendant] such that in

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any given calendar month” no more than four “ACH transactions attempted by [Defendant]” would be rejected by Debtor’s bank. *See* April Agreement § 15; June Agreement § 15; July Agreement § 15. Thus, the Agreements’ provisions, despite not expressly defining bankruptcy as an event of default, make events that almost certainly would occur if a “seller of receivables” commenced a bankruptcy count as defaults, with results including triggering the personal guarantees. However, as the scope of the guarantor’s liability does not extend beyond the scope of the Debtor’s liability, this factor may weigh slightly but not decisively against classifying the Agreements as loans. *See Pirs Cap., LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 129 N.Y.S.3d 734, 740 (Sup. Ct. N.Y. Cnty. 2020) (“At the same time, though, the scope of O’Neil’s obligations under the recourse provision of the guarantee is itself limited by the contingent nature of the *merchant’s* obligations under the Agreement in light of the reconciliation provision.”).

From a broader perspective, the Agreements have little similarity to an asset sale despite purporting to be one. The Defendant “purchased” a specified percentage of “all payments made by cash, check, ACH or other electronic transfer, credit card, debit card, bank card, charge card . . . or other form of monetary payment in the ordinary course of [the Debtor’s] business.” April Agreement at 1; June Agreement at 1; July Agreement at 1. “That language is so broad as to be essentially vacuous. It captures not just future accounts from [Debtor’s] customers but gives [Defendant] the right to *all* [Debtor’s] revenues[.]” *Fleetwood*, 2022 WL 1997207, at \*11 (emphasis in original). Meanwhile, the Agreements lack provisions one would expect of a true asset purchase; for example, they do not empower the Defendant to collect directly from any of the Debtor’s customers, and they do not identify any specific accounts receivable purchased by the Defendant. And, as the *Fleetwood* court found to be a significant indicator of a loan, “so long as [Debtor] has enough money to cover the daily payment amount . . . [the Debtor] can use the

proceeds [] however it likes—the receipts need not be deposited in an escrow account or otherwise held in trust for [Defendant’s] benefit. [Debtor] enjoys the use of the proceeds.” *Id.*

Further, under the Agreements, the Debtor, rather than the Defendant, faces the risk that any specific customer will fail to pay; a customer’s failure to pay will not reduce the amount that the Debtor must transfer to the Defendant, or, put another way, the Debtor owes Radium2 the same daily amount whether Debtor does or does not collect on any given receivables, or all receivables. And, if the “Initial Daily Amount,” *see* April Agreement at 1; June Agreement at 1; July Agreement at 1, is not in the Debtor’s bank account when Defendant seeks to draw it, “[the Defendant] is entitled to remedies against [the Debtor] and not against the account debtors.” *Fleetwood*, 2022 WL 1997207, at \*10. These economic features, most fundamentally the reality that the Debtor bears the risk of non-collection of receivables with Radium2 bearing little if any of that risk, powerfully show the Agreements to be loans.

Finally, there is a virtually dispositive undisputed fact here: Radium2 has admitted under oath in proofs of claim that it filed in the JPR bankruptcy case that it is a “creditor” who has a “claim” for money it is owed by JPR. Radium2 filed Claims 105 and 106 against JPR on January 15, 2020. *See* JPR Claims Register. The proofs of claim filed by the Defendant state, “This form is for making a claim for payment in a bankruptcy case”; “Who is the current creditor?” to which the Defendant responded “Radium2 Capital, LLC”; and “How much is the claim?” to which the Defendant respectively responded “\$1,854,474.86,” and “\$1,638,975.00.” *See* Claims 105 and 106, JPR Claims Register. The Defendant’s attorney signed the proofs of claim under penalty of perjury. For these reasons, the Defendant cannot deny that it is a creditor of the Debtor under 11 U.S.C. § 547(b)(1).

Weighing all the factors reviewed above, there is no genuine dispute of material fact that the Debtor made the Transfers to the Defendant “to or for the benefit of a creditor” and “on account of an antecedent debt owed by the debtor.”

**B. The Defendant Has Also Admitted It Received the July 17 Transfer from Services on Account of an Antecedent Debt**

The admitted facts cause the same result as to the July 17 Transfer at issue in the Services Lawsuit. The Defendant admitted 1) that it received the July 17 Transfer “in satisfaction of or on account of a then-existing obligation or debt owed to Defendant” by Services, 2) that “[t]he July 17 Transfer was for the benefit of Defendant,” 3) that “[a]t the time Defendant received the July 17 Transfer, Defendant was a creditor of” Services, and 4) that the July 17 Transfer “was, at the time it was made, on account of an antecedent debt owed to Defendant by” Services. Statement of Undisputed Material Facts ¶¶ 16, 18-21, Services Lawsuit (citing Reqs. for Admis. at 4, Services Lawsuit). These admitted facts establish that the July 17 Transfer was a “transfer of an interest of the debtor in property (1) to or for the benefit of a creditor [and] (2) for or on account of an antecedent debt owed by the debtor before such transfer was made.” 11 U.S.C. § 547(b)(1)-(2). In addition, Radium2 filed Claim 14 against Services on the same day it filed Claims 105 and 106 against JPR. *See* Services Claims Register. That proof of claim, like the others, states, “This form is for making a claim for payment in a bankruptcy case”; “Who is the current creditor?” to which the Defendant responded “Radium2 Capital, LLC”; and “How much is the claim?” to which the Defendant responded “\$1,638,975.00.” *See* Claim 14, Services Claims Register. The Defendant’s attorney signed the proof of claim under penalty of perjury. For these reasons, the Defendant cannot deny that it is a creditor of Services under 11 U.S.C. § 547(b)(1).

**C. The Transfers Occurred Within the 90 Days Before the Petition Date**

The Debtor made the May Transfer on May 31, 2019 and the July 3 Transfer on July 3, 2019. May Statement at 10; July Statement at 4. Services made the July 17 Transfer on July 17, 2019. July Services Statement at 5. The Debtor and Services filed for bankruptcy on August 16, 2019. Radium2 disputes none of these facts, which the Trustee has established in support of her motion. As all Transfers occurred after May 18, 2019, the Transfers occurred within the 90 days before the petition date.

**D. The Insolvency of JPR and Services**

Section 547(f) of the Bankruptcy Code presumes a debtor insolvent “on and during the 90 days immediately preceding the date of the filing of the petition.” 11 U.S.C. § 547(f). “Where the transferee offers no evidence regarding solvency, the trustee may rely upon the statutory presumption.” *In re Ajayem Lumber Corp.*, 143 B.R. 347, 351 (Bankr. S.D.N.Y. 1992). The Defendant’s (untimely) opposition and the affidavit and counterstatement regarding material facts offer no evidence of Debtors’ solvency at the time of the Transfers and do not otherwise challenge this presumption with respect to either JPR or Services. The Trustee thus has met her burden on this element in both lawsuits.

**E. The Defendant Received More Than It Would Have in a Liquidation of JPR**

There also is no genuine dispute that, had the Transfers not been made, the Defendant would not have received as much as it received through the Transfers for the debts JPR owed to it. Dime Community Bank held a UCC-1 financing statement dated January 17, 2019 encumbering all JPR’s personal property and fixtures, including all bank accounts. UCC Financing Statement, Holecek Decl. Ex. Q, JPR Lawsuit, ECF No. 26-20. This financing

statement predated the Agreements, and the Defendant does not challenge the financing statement's validity.

The Defendant argues that it could have recovered the Transfers through the Chapter 7 liquidation process even if they had not been made because the Defendant had "purchased" the "receivables" at issue. Under the strongest version of the Defendant's argument, through its asserted status as a "purchaser" under N.Y. U.C.C. Law § 9-332(b) it could have claimed the funds at issue from the Debtor's bank account free from the interest of Dime Community Bank. However, as found above, the Defendant never did "purchase" any receivables but rather made a loan to the Debtor. For this reason, had the Transfers not been made, the Defendant could not have successfully asserted its status as a "purchaser" to claim funds from the Debtor's bank account free of other parties' interests; it would have been determined to be a creditor with interests junior to those of Dime Community Bank. And there is no dispute that the liquidation of JPR and Services would yield creditors who were junior to Dime Community Bank little if anything, and decidedly less than the substantial payments whose avoidance the Trustee seeks.

Finally, although this decision's discussion of this element omits some corroborating detail, further discussion is unnecessary because the element's satisfaction is established by the Defendant's deemed admission of facts included in the Trustee's statement of undisputed facts. *See* Statement of Undisputed Material Facts ¶¶ 35-36, JPR Lawsuit (citing Reqs. for Admis. at 5, JPR Lawsuit).

**F. The Defendant Received More Than It Would Have in a Liquidation of Services**

Similarly, the Defendant concedes that the July 17 Transfer caused it to receive more than it would have received in a liquidation of Services absent that transfer. The Defendant admits "Defendant received a greater percentage of what was owed to Defendant (with respect to the

obligation(s) or debt(s) satisfied by the July 17 Transfer) than Defendant would have received if the July 17 Transfer had not been made and [Services] conducted a liquidation of its business pursuant to Chapter 7 of the Bankruptcy Code on the Petition Date.” Statement of Undisputed Material Facts ¶ 24, Services Lawsuit (citing Reqs. for Admis. at 5, Services Lawsuit). For this reason, the July 17 Transfer counts as preferential, because through it the Defendant received more than it would have in the counterfactual situation in which Services never made the July 17 Transfer and liquidated on the petition date.

In sum, no genuine issues of material fact exist on any of the elements of Section 547(b) in either lawsuit, and, again, this conclusion is reinforced by the failure of Radium2 to respond to the Trustee’s requests for admissions. The Trustee thus has established by uncontroverted evidence every element of her affirmative case that the Transfers qualify as avoidable preferences.

**RADIUM2’S ONLY NON-WAIVED DEFENSE (THE ORDINARY TRANSACTION DEFENSE) FAILS**

As noted above, the Defendant has the burden to prove each element of each affirmative defense it asserts under 11 U.S.C. § 547(c). 11 U.S.C. § 547(g). The Defendant’s answers asserted multiple affirmative defenses under Section 547(c). However, as also noted above, in its (untimely) opposition briefs and supporting documents the Defendant argued and cited evidence to support only one of those defenses, the ordinary transaction defense of 11 U.S.C. § 547(c)(2). Defendant thereby waived the remainder of its asserted affirmative defenses for purposes of this motion. *Domino Media, Inc. v. Kranis*, 9 F. Supp. 2d 374, 385 (S.D.N.Y. 1998) (“One who relies upon an affirmative defense to defeat an otherwise meritorious motion for summary judgment must adduce evidence which, viewed in the light most favorable to and drawing all reasonable inferences in favor of the non-moving party, would permit judgment for the non-moving party on

the basis of that defense.” (quoting *Frankel v. ICD Holdings S.A.*, 930 F. Supp. 54, 65 (S.D.N.Y. 1996)), *aff’d*, 173 F.3d 843 (2d Cir. 1999); *see also Internet L. Libr., Inc. v. Southridge Cap. Mgmt., LLC*, No. 01 Civ. 6600 (RLC), 2005 WL 3370542, at \*4 (S.D.N.Y. Dec. 12, 2005) (quoting same), *aff’d sub nom. ITIS Holdings Inc. v. Southridge Cap. Mgmt. LLC*, 329 F. App’x 299 (2d Cir. 2009); *Am. Auto. Ins. Co. v. Advest, Inc.*, No. 08 CIV. 6488 (LAK), 2009 WL 3490060, at \*2 (S.D.N.Y. Oct. 28, 2009) (“[W]here the nonmoving party relies upon an affirmative defense to defeat summary judgment, it must adduce evidence which, viewed in the light most favorable to and drawing all reasonable inferences in favor of the non-moving party, would permit judgment for the non-moving party on the basis of that defense.” (internal quotations omitted)).

To establish the ordinary transaction defense, a defendant must prove that 1) the debtor incurred the debts at issue in the ordinary course of the business or financial affairs between itself and the transferee and 2) either (A) the transfer at issue was made in the ordinary course of business of the debtor and the defendant (thus making it “subjectively” ordinary) or (B) the transfer at issue was made according to ordinary business terms (thus making it “objectively” ordinary). *See* 11 U.S.C. § 547(c). As detailed below, Radium2 failed to respond to requests for admission of facts that establish the non-applicability of this defense. That alone is dispositive, and, at any rate, the defense lacks merit.

#### **A. The Ordinary Transaction Defense Fails on the Merits in the JPR Lawsuit**

While the Debtor may have entered into the Agreements in the ordinary course of business, neither the May Transfer nor the July 3 Transfer were subjectively ordinary, and the Defendant points to no facts showing either was objectively ordinary.

In the ordinary course of business between them, JPR paid \$13,673.47 per day to the Defendant under the April Agreement and intended to pay \$107,142.86 per day to the Defendant under the June Agreement. *See* April Agreement at 1; June Agreement at 1. The May Transfer, for \$1,470,102.02, *see* May Statement at 10, vastly exceeded the size of the daily payments under the April Agreement. It also far exceeded the 25% “specified percentage” of that day’s receipts in JPR’s designated bank account. *See id.* at 4-5. The Defendant has the burden to show such a transfer is “ordinary,” 11 U.S.C. § 547(g), and the Defendant’s papers give no explanation and identify no facts to support the improbable conclusion that a transfer from a debtor to a defendant that is more than 100 times larger than the routine transfers required by their contract falls within the ordinary course of business. This is especially so because the April Agreement lacked any set maturity date and, according to the Defendant’s own expectations, its de facto maturity date fell in mid-November 2019, *see* Transaction History at 1, Holecek Decl. Ex. I, JPR Lawsuit, ECF No. 26-12 (listing an “E. Remittance Date” for the April Agreement as November 12, 2019). *Cf. HLI Creditor Tr. v. Metal Techs. Inc. (In re Hayes Lemmerz Int’l, Inc.)*, 337 B.R. 49, 54, 60, 62 (Bankr. D. Del. 2006) (ruling that a payment made five days ahead of a contractual repayment date counted as a payment made outside the ordinary course of business).

JPR also never made any of the contemplated seven \$107,142.86 daily payments that were supposedly called for under the June Agreement, *see* Transaction History at 2; with respect to the June Agreement, Defendant’s only payment was the July 3 Transfer of \$750,002.50, *see id.*; *see also* July Statement at 4-10. The absence of any other payments puts the lie to any suggestion that the standalone payment of \$750,002.50 was in the ordinary course of business; that payment too falls outside the protection of Section 547(c)(2)(A).

The Defendant argues that because (allegedly) the Debtor and the Defendant made the Agreements in the ordinary course of business, “the ordinary course of business defense is applicable to repayment of such debt.” Def’s. Mem. Regarding JPR at 7. Leaving aside the Trustee’s disagreement that JPR and the Defendant made the Agreements in the ordinary course of business, the Defendant’s argument errs on the law. The statute states, “The trustee may not avoid under this section a transfer to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, **and** such transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee.” 11 U.S.C. § 547(c)(2)(A) (emphasis added). The Defendant must prove that it and the Debtor made the Agreements in their ordinary course of business **and** that JPR made the transfers at issue in the ordinary course of business. *See Kapila v. Media Buying, Inc. (In re Ameri P.O.S. Inc.)*, 355 B.R. 876, 883-84 (Bankr. S.D. Fla. 2006) (emphasis added) (evaluating these two questions separately). The authorities cited by the Defendant are not to the contrary and thus fail to support its position. Each cited case analyzes the question of ordinariness of the contract separately from the question of the ordinariness of the challenged transfer. *See id.*; *In re Magic Circle Energy Corp.*, 64 B.R. 269, 273-74 (Bankr. W.D. Okla. 1986). The undisputed facts here show that JPR made neither the May Transfer nor the July 3 Transfer in the ordinary course of business between itself and the Defendant, and that alone defeats Defendant’s asserted defense.

In addition, the Defendant presents no argument that the Debtor made the Transfers according to ordinary business terms. The Defendant’s purported Local Rule 7056-1 counterstatement says conclusorily, “Defendant received payments consistent with the industry standard,” Def’s. Counterstatement ¶ 4, JPR Lawsuit, ECF No. 40, but that paragraph’s citation

to the affidavit of the Defendant's principal for factual support fails. The affidavit of the Defendant's principal makes no factual allegation that the Transfers occurred according to ordinary business terms as would arise between other parties to transactions like these. *See* Aff. of Troy Caruso, JPR Lawsuit (nowhere mentioning how other parties in the Debtor's industry or the Defendant's industry tend to make payments under contracts like these). The belated and conclusory statement in the Defendant's counterstatement is also foreclosed by JPR's failure to respond to the Trustee's request that the Defendant admit that the May Transfer and the July 3 Transfer were "inconsistent with ordinary business terms." Reqs. for Admis. at 6, JPR Lawsuit. As the Defendant never responded to the requests for admissions, the Defendant has admitted the May Transfer and the July 3 Transfer were inconsistent with ordinary business terms. *See* Holecek Decl. ¶ 7, JPR Lawsuit; Fed. R. Bankr. P. 7036; Fed. R. Civ. P. 36(a)(3).

**B. The Admitted Facts Mean the Ordinary Transaction Defense Fails in the Services Lawsuit**

The record shows that Services made the July 17 Transfer to the Defendant outside of the ordinary course of business. The July Services Statement records five payments of \$400.00 each made by Services to the Defendant in July 2019 leading up to the \$850,000.00 July 17 Transfer. *See* July Services Statement at 4-5.

The admitted facts also establish that the ordinary transactions defense cannot protect the July 17 Transfer. Per the Statement of Undisputed Material Facts in the Services Lawsuit, "For each invoice or other obligation paid by the July 17 Transfer, the invoice or obligation was not incurred by [Services] as part of its normal business or financial affairs with Defendant." Statement of Undisputed Material Facts ¶ 31, Services Lawsuit (citing Reqs. for Admis. at 6, Services Lawsuit).

The Defendant has also admitted by operation of Rule 7036 and Local Bankruptcy Rule 7056-1 that “for each invoice or other obligation paid by the July 17 Transfer,” such “obligation was paid later, earlier, or in a manner otherwise inconsistent with” 1) “the prior course of business dealings” between the Defendant and Services, 2) “the general practices of Defendant’s industry,” and 3) the general practices of the industry in which Services operated. *Id.* ¶¶ 28-30 (citing Reqs. for Admis. at 5, Services Lawsuit). Lastly, by not controverting the facts set forth in the Statement of Undisputed Material Facts, Defendant has admitted that “The July 17 Transfer made by [Services] was inconsistent with ordinary business terms.” *Id.* ¶ 32 (citing Reqs. for Admis. at 6, Services Lawsuit).

To the extent the Defendant challenges any of this in its untimely opposition papers, it makes the same futile argument it made in the JPR Lawsuit: that because (allegedly) Services and the Defendant made their agreement in the ordinary course of business, “the ordinary course of business defense is applicable to repayment of such debt.” Def’s. Mem. Regarding Services at 7. This argument fails because the Defendant must show both that it made its agreement with Services in the ordinary course of business **and** that Services made the July 17 Transfer either 1) in the ordinary course of business or 2) according to ordinary business terms. Proof of the first element does not prove either of the latter two alternative elements. At no point did the Defendant cite any evidence in the record in its favor regarding whether the July 17 Transfer occurred in the ordinary course of business or according to ordinary business terms. Thus, the Defendant’s ordinary transaction defense fails in both lawsuits.

### **THE COURT DISALLOWS DEFENDANT’S CLAIMS**

The Trustee has established that the Transfers count as avoidable preferences under Section 547(b) and that the Defendant has no defenses that protect the Transfers. Accordingly,

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under Section 550 of the Bankruptcy Code, the Trustee may recover the value of the Transfers from the Defendant. 11 U.S.C. § 550(a). For the same reason, because no party has disputed that the Defendant also has not “paid the amount[] or turned over any such property[] for which [the Defendant] is liable” under 11 U.S.C. § 550, *see id.* § 502(d), the Court disallows all the Defendant’s claims against JPR and Services. To be precise, the Court disallows Claims No. 105 and 106 filed against JPR and Claim No. 14 filed against Services.

**CONCLUSION**

The Court GRANTS the Trustee’s motions and overrules the Defendant’s objections to them. The Trustee shall submit an order effectuating this ruling. Defendant’s time to appeal will run from the entry of that order.

It is so ordered.

Dated: New York, New York  
May 30, 2025

s/ David S. Jones  
Honorable David S. Jones  
United States Bankruptcy Judge



**User Name:** Myron Terlecky

**Date and Time:** Thursday, August 7, 2025 5:34 PM EDT

**Job Number:** 259739917

**Document (1)**

1. [Guttman v. EBF Holdings, LLC \(In re Global Energy Servs.\)](#)

**Client/Matter:** seminar

**Search Terms:**

**Search Type:** Natural Language

**Narrowed by:**

Content Type

Narrowed by

-None-

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[Guttman v. EBF Holdings, LLC \(In re Global Energy Servs.\)](#)

United States Bankruptcy Court for the District of Maryland, Baltimore Division

March 31, 2025, Decided; March 31, 2025, Entered

CASE NO. 21-17305-NVA, CHAPTER 7, ADVERSARY NO. 23-00188

**Reporter**

2025 Bankr. LEXIS 774 \*; 2025 LX 369165

In re: GLOBAL ENERGY SERVICES, LLC, Debtor.ZVI GUTTMAN, CH. 7 TRUSTEE, Plaintiff, v. EBF HOLDINGS, LLC, Defendant.

**Counsel:** [\*1] For Coon & Cole, LLC, Attorney (1:21bk17305): Marc E. Shach, Coon & Cole, LLC, Lutherville, MD.

For Ferguson Enterprises, LLC, c/o Jill D. Caravaggio, Creditor (1:21bk17305): Jill D. Caravaggio, Law Office of Jill D. Caravaggio, Frederick, MD.

For PNC Bank, National Association, Creditor (1:21bk17305): Keith M. Lusby, Baltimore, MD; Michael David Nord, Gebhardt & Smith LLP, Baltimore, MD.

For Shepherd Electric Company, Inc., c/o Douglas H. Seitz, Esquire, Creditor (1:21bk17305): Douglas H. Seitz, Wright, Constable & Skeen, Towson, MD.

For United States Surety Company, Peckar & Abramson, P.C., Creditor (1:21bk17305): Michael C. Zisa, Peckar & Abramson, P.C., Washington, DC.

For Pension Benefit Guaranty Corporation, Creditor (1:21bk17305): Andrea Wong, LEAD ATTORNEY, Soo Min Kim, Pension Benefit Guaranty Corporation, Washington, DC.

For Travelers Indemnity Company, Creditor (1:21bk17305): Lisa Bittle Tancredi, Womble Bond Dickinson US LLP, Baltimore, MD.

For Constellation New Energy Inc., Interested Party (1:21bk17305): Laurel Roglen, LEAD ATTORNEY, Ballard Spahr LLP, Wilmington, DE; Matthew G. Summers, Ballard Spahr LLP, Baltimore, MD.

For Fox Capital Group, Inc., Interested Party (1:21bk17305): [\*2] Shanna Kaminski, Kaminski Law, PLLC, Grass Lake, MI.

For Raymond J. Peroutka, Verity, LLC, Accountant (1:21bk17305): Zvi Guttman, The Law Offices of Zvi Guttman, P.A., Baltimore, MD.

For ROC Funding Group, LLC, Interested Party (1:21bk17305): Shanna Kaminski, Kaminski Law, PLLC, Grass Lake, MI.

For Zvi Guttman, c/o The Law Offices of Zvi Guttman, P.A., Trustee (1:21bk17305): James T. Dunn, Cannon Law Group PLLC, Salt Lake City, UT; Richard Marc Goldberg, Shapiro Sher Guinot & Sandler, Baltimore, MD; Gary R. Greenblatt, LEAD ATTORNEY, Coon & Cole, LLC, Timonium, MD; Zvi Guttman, c/o The Law Offices of Zvi Guttman, P.A., Baltimore, MD; Zvi Guttman, The Law Offices of Zvi Guttman, P.A., Baltimore, MD; Marc E. Shach, Coon & Cole, LLC, Lutherville, MD.

Myron Terlecky

## 2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

2025 Bankr. LEXIS 774, \*2

For US Trustee - Baltimore, Garmatz Federal Courthouse, U.S. Trustee (1:21bk17305): Omnia Shedid, Ust, Baltimore, MD.

For Zvi Guttman, Plaintiff (23-00188): Gary R. Greenblatt, LEAD ATTORNEY, Coon & Cole, LLC, Timonium, MD; Marc E. Shach, Coon & Cole, LLC, Lutherville, MD.

For EBF Holdings, LLC, Defendant (23-00188): Owen Glen Hare, Friedman, Framme & Thrush P.A., Owings Mills, MD.

**Judges:** NANCY V. ALQUIST, UNITED STATES BANKRUPTCY JUDGE.

**Opinion by:** NANCY V. ALQUIST [\*3]

### Opinion

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#### MEMORANDUM OPINION

In this adversary proceeding, the chapter 7 trustee (the "Trustee"), seeks to recover approximately \$145,000 that the debtor, Global Energy Services, LLC ("Global"), paid to the defendant, EBF Holdings, LLC d/b/a Everest Business Funding ("EBF") and to disallow the proof of claim filed by EBF. [ECF No. 13]. EBF filed a motion to dismiss the Trustee's amended complaint (the "Motion to Dismiss"), to which the Trustee filed a brief in opposition and EBF filed a reply in support. [ECF Nos. 18, 26, 30].

The underlying issue in this case involves a pre-petition agreement between EBF and Global entitled "Revenue Based Financing Agreement" (the "Funding Agreement"),<sup>1</sup> which is what is known in the industry as a merchant cash advance ("MCA") agreement.<sup>2</sup> A threshold question raised in this case is whether the MCA agreement constitutes a loan or a sale. The Trustee maintains that the Funding Agreement constitutes a disguised loan and among other things, is unenforceable because it has a usurious rate of interest. EBF insists that it is a true sale. The Court takes this opportunity to review relevant decisional law applied to MCA agreements, and in particular, to consider rulings [\*4] that have responded to the post-202 development of New York law (the law that governs the majority of MCA agreements, including the MCA agreement

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<sup>1</sup> A copy of the Funding Agreement is attached to EBF's proof of claim and as Exhibit 2 to the Trustee's amended complaint.

<sup>2</sup> "MCA agreements are financial products, often marketed to small businesses through high-pressure sales operations resembling 'boiler rooms,' that purport to purchase at a discount a portion of a business's future receivables." [Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237, 241 \(S.D.N.Y. 2022\)](#), motion to certify appeal denied, [2022 U.S. Dist. LEXIS 153514, 2022 WL 3677931 \(S.D.N.Y. Aug. 25, 2022\)](#).

MCAs are intended to provide financing to merchants in a way that differs from a traditional loan. In an MCA, the "purchaser" (here, EBF) pays the "seller" (here, US Info) for the right to receive a percentage of the seller's future accounts receivable. The seller receives upfront financing but its repayment obligations may be more onerous than those of a loan. This is because the purchaser assumes the risk that the seller's future accounts receivable may decrease or stop altogether, with the purchaser suffering any resulting loss.

[United States Info. Grp. LLC v. EBF Holdings, LLC, No. 22-CV-6661 \(PKC\), 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*1 \(S.D.N.Y. Sept. 22, 2023\)](#).

under consideration in this case). As discussed later, this Court has determined to adopt the majority view for purposes of this case - namely, to apply the non-exhaustive three-factor test articulated in [LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309 \(2020\)](#).

For the reasons that follow and as set forth herein, EBF's motion to dismiss will be granted, in part, and denied, in part.

### **Jurisdiction**

This Court has jurisdiction over this proceeding pursuant to [28 U.S.C. § 1334](#). Under [28 U.S.C. § 157\(a\)](#) and its Local Rule 402, the United States District Court for the District of Maryland has [\*5] referred this proceeding to this Court. This is a statutorily core proceeding under [28 U.S.C. §§ 157\(b\)\(1\)](#) and [\(b\)\(2\)](#). The Court has constitutional authority to enter final orders in this matter. To the extent this Court lacks such constitutional authority, this decision constitutes the Court's report and recommendation.

### **Relevant Background**

Global is a Maryland-based company that provides environmental services designed to increase energy efficiency in buildings through products and systems that decrease energy use and water consumption. On June 1, 2021, Global executed the Funding Agreement with EBF, pursuant to which EBF agreed to buy \$290,000 in Global's future receipts for a purchase price of \$200,000. The Funding Agreement provided for Global to make daily payments to EBF, from an EBF-approved bank account, in an amount calculated to reflect a percentage of Global's average monthly sales.<sup>3</sup> The Funding Agreement characterizes the transaction as a sale and provides that it is governed by, and construed under, New York law.

Global filed a chapter 11 petition on November 19, 2021.<sup>4</sup> Between June 1, 2021 and the petition date, EBF received approximately \$145,000 in daily payments pursuant to the Funding Agreement (the "Transfers"). EBF filed a proof of claim asserting a secured claim in the amount of \$146,525.92. The Trustee commenced the instant adversary proceeding on August 2, 2023 and filed an amended complaint on October 25, 2023 (the "Amended Complaint"). [ECF Nos. 1, 13]. The Amended Complaint contains nine causes of action which, collectively, seek to recover the \$145,000 in payments that EBF received from Global pre-petition and to disallow EBF's claim for the balance it is allegedly owed under the Funding Agreement:

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<sup>3</sup> The operative language of the Funding Agreement provides that

[Global] hereby sells, assigns and transfers to [EBF], without recourse, upon payment of the Purchase Price, the Purchased Amount of Future Receipts by delivering to [EBF] the Specified Percentage [\*6] of the proceeds of each future sale by [Global].

Funding Agreement at 1.

<sup>4</sup> On January 28, 2022, this bankruptcy case was converted to a case under chapter 7 on Global's motion.

## 2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

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- Count I (Claim Objection / Declaratory Relief). The Trustee seeks to disallow EBF's proof of claim on the theory that the claim lacks the evidentiary support required by [Rule 3001 of the Federal Rules of Bankruptcy Procedure](#), and a declaration that the Funding Agreement is unenforceable because it is a usurious, unenforceable loan and not a sale.
- Counts II and III (Avoidance of Fraudulent Transfers - Loan or Sale). The Trustee seeks to avoid the Transfers as fraudulent pursuant to [§ 548\(a\)\(1\)\(B\) of the Bankruptcy Code](#)<sup>5</sup> (Count I[\*7] II assumes the agreement is a loan, while Count III assumes the agreement is a sale).
- Counts IV and V (Avoidance of Fraudulent Transfers - Loan or Sale). The Trustee seeks to avoid the Transfers as fraudulent pursuant to [§ 544\(b\) of the Bankruptcy Code](#) and [Md. Comm. Law Code Ann. §§ 15-202 and 15-204](#) (Count IV assumes the agreement is a loan, Count V assumes the agreement is a sale).
- Count VI (Avoidance of Preference). The Trustee seeks to avoid the Transfers as preferences pursuant to [§ 547\(b\) of the Bankruptcy Code](#).
- Count VII (Turnover). The Trustee seeks turnover of the Transfers pursuant to [§ 542 of the Bankruptcy Code](#).
- Count VIII (Disallowance of Claim). The Trustee seeks disallowance of EBF's proof of claim pursuant to [§ 502\(d\) of the Bankruptcy Code](#).
- Count IX (Transferee Liability). The Trustee seeks recovery of the Transfers pursuant to [§ 550 of the Bankruptcy Code](#).

EBF filed a motion to dismiss the Amended Complaint, arguing pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), made applicable here by [Rule 7012 of the Federal Rules of Bankruptcy Procedure](#), that the Trustee had failed to state any cognizable claim for relief. EBF contends that, under New York cases interpreting New York law (which governs the Funding Agreement), the Funding Agreement is not a loan, but a sale to which a claim (or an affirmative defense in the context of the Trustee's claim objection) of usury cannot apply. As a result, EBF argues, the Trustee cannot state a claim [\*8] for relief to disallow EBF's claim under a usury theory (Count I) or to avoid the Transfers under [§§ 544](#) and [548](#) on the theory that the Funding Agreement is a loan (Counts II and IV). Moreover, EBF states that the amount Global received (\$200,000) far exceeds the amount of the Transfers (\$145,000), such that the Trustee cannot plead an essential element of its [§§ 544](#) and [548](#) claims: that Global did not receive reasonably equivalent value in exchange for the Transfers. EBF also states that the Trustee cannot plead an essential element of his preferential transfer and turnover counts - that the Transfers constitute property of the estate - because, pursuant to the Funding Agreement, Global's sale to EBF extinguished all of Global's legal or equitable interests in the Transfers pre-petition. Finally, EBF contends that the disallowance and recovery counts must be dismissed because they necessarily require success on one of the avoidance claims.

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<sup>5</sup> 11 U.S.C. § 101 et seq.

Briefs in opposition to, and in support of, the Motion to Dismiss were filed by the Trustee and EBF, respectively, and the Court conducted a hearing.

### **Legal Standards Governing Motions to Dismiss**

To defeat a motion to dismiss under [Civil Rule 12\(b\)\(6\)](#), as made applicable to this adversary [\*9] proceeding by [Bankruptcy Rule 7012](#), a complaint must contain factual allegations sufficient to state a claim that is plausible on its face. [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#); [Sher v. JPMorgan Chase Funding \(In re Thornburg Mortgage, Inc.\), 610 B.R. 807, 823-24 \(Bankr. D. Md. 2019\)](#). When assessing plausibility, well-pleaded factual allegations must be accepted as true and such facts and all reasonable inferences derived from those allegations must be viewed in the light most favorable to the non-moving party. See [Ibarra v. United States, 120 F.3d 472, 474 \(4th Cir. 1997\)](#). Plausibility is established when the complaint's factual allegations give rise to an inference of liability sufficient to move the claims "across the line from conceivable to plausible." [Iqbal, 556 U.S. at 678](#).

In deciding a motion to dismiss, the Court "'must accept as true all of the factual allegations contained in the complaint,' drawing 'all reasonable inferences' in the non-moving party's favor." [In re Birmingham, 846 F.3d 88, 92 \(4th Cir. 2017\)](#) (quoting [E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 \(4th Cir. 2011\)](#)), as amended (Jan. 20, 2017). See also [Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783 \(4th Cir. 1999\)](#); [Ibarra, 120 F.3d at 474](#); [In re Thornburg Mortgage, Inc., 610 B.R. at 823-24](#). The Court is not required to accept as true allegations that are contradicted by exhibits to the complaint or by matters subject to judicial notice. See [Southern Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 182 \(4th Cir. 2013\)](#); [Veney v. Wyche, 293 F.3d 726, 730 \(4th Cir. 2002\)](#).

### **Analysis and Discussion - MCA Agreements**

As stated, the Funding Agreement is what is known in the industry as an MCA agreement, and the threshold issue raised in the Amended Complaint and the Motion to Dismiss is whether the Funding Agreement is [\*10] a loan or a sale. In Count I, the Trustee objects to EBF's claim on the basis that it is unenforceable because the Funding Agreement is "a disguised loan that required [Global] to pay usurious interest and thus is *void ab initio* under New York law." [ECF No. 13 at 8]. Paragraph 4.5 of the Funding Agreement provides that it is governed and construed by New York law, and neither party has suggested that another state's law governs. This Court's analysis applies relevant New York law to determine whether the Trustee has alleged sufficient facts to plausibly state a claim for usury.

Under New York law, "[t]he rudimentary element of usury is the existence of a loan or forbearance of money and where there is no loan there can be no usury. In determining whether a transaction is usurious, the law looks not to its form, but to its substance, or real character." [IBIS Capital Group, LLC v. Four Paws Orlando LLC, No. 608586/16, 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071, at \\*1 \(N.Y. Sup. Ct. Mar. 10, 2017\)](#) (internal citations omitted). See also

[K9 Bytes, Inc. v. Arch Cap. Funding, LLC, 56 Misc. 3d 807, 57 N.Y.S.3d 625, 632 \(N.Y. Sup. Ct. 2017\)](#) ("In order to determine [whether the contracts are usurious], the Court must first determine whether the contracts are loans or not."); [Seidel v. 18 E. 17th St. Owners, Inc., 79 N.Y.2d 735, 744, 598 N.E.2d 7, 586 N.Y.S.2d 240 \(1992\)](#) ("Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract [\*11] may be.").

Moreover, "[i]n New York, there is a presumption that a transaction is not usurious." [K9 Bytes, 57 N.Y.S.3d at 632](#). See also [Womack v. Cap. Stack, LLC, No. 1:18-CV-04192 \(ALC\), 2019 U.S. Dist. LEXIS 148644, 2019 WL 4142740, at \\*4 \(S.D.N.Y. Aug. 30, 2019\)](#) ("There is a strong presumption against a finding of usury."); [Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226\(A\), 108 N.Y.S.3d 288 \(N.Y. Sup. Ct. 2018\)](#) ("[i]n New York there is a predisposition in this State against declaring that contracts are usurious."); [Zhavoronkin v. Koutmine, 52 A.D.3d 597, 860 N.Y.S.2d 561, 562 \(2008\)](#) ("There is a strong presumption against a finding of usury.").

New York courts apply a non-exhaustive three-factor test to guide the loan-or-sale analysis:

- (1) whether there is a reconciliation provision in the agreement;
- (2) whether the agreement has a finite term; and
- (3) whether there is any recourse should the merchant declare bankruptcy.

[US Info. Grp., 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*6](#) (quoting [LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 \(2020\)](#)). These factors do not determine the outcome, but serve "only [as] a guide to analysis." [Fleetwood Servs., LLC v. Ram Cap. Funding, LLC, No. 20-CV-5120 \(LJL\), 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at \\*9 \(S.D.N.Y. June 6, 2022\)](#). The keystone consideration concerns the transfer of risk:

Ultimately, the three guides reduce to one overarching principle. The hallmark of a loan is that the lender is absolutely entitled to repayment under all circumstances, or put otherwise, the principal sum is repayable absolutely. The root of the analysis involves the question of whether the transaction involves a transfer of risk.

[Lateral Recovery, LLC v. Cap. Merch. Servs., LLC, 632 F. Supp. 3d 402, 452 \(S.D.N.Y. 2022\)](#) (cleaned up). See also [Akf, Inc. v. Haven Transp. Bus. Sols., Inc., No. 1:22-CV-269 \(MAD/CFH\), 2024 U.S. Dist. LEXIS 103271, 2024 WL 2941746, at \\*6 \(N.D.N.Y. June 11, 2024\)](#) (outlining the three-factor test "to analyze who bears the ultimate [\*12] risk"); [Haymount, 609 F. Supp. 3d at 248](#) (rejecting mechanical application of *LG Funding* and finding that "the *LG Funding* decision's holding is ultimately about whether the transaction represented a real transfer of risk"); [K9 Bytes, Inc., 57 N.Y.S.3d at 632](#) (fundamental inquiry is "whether or not defendant is absolutely entitled to repayment under all circumstances"); [Rubenstein v. Small, 273 A.D. 102, 75 N.Y.S.2d 483, 486 \(1st Dept. 1947\)](#) ("For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard.").

"The law is well-settled that the parties' intention should be determined from the language employed within the four corners of the agreement, and that where the language is clear and unequivocal, interpretation is a matter of law to be determined by the Court." [Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.](#), 184 Misc. 2d 706, 710 N.Y.S.2d 756, 761 (Sup. Ct. 2000). See also [Calvary LLC v. EBF Holdings, LLC](#), No. 003081/2021, 2021 N.Y. Misc. LEXIS 5833, 2021 WL 5868324, at \*8 (N.Y. Sup. Ct. Oct. 05, 2021) ("Agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract.") (internal citations omitted).

Not all courts considering whether MCA agreements are loans or sales have agreed in their approach or their application of *LG Funding*.<sup>6</sup> This Court has exhaustively reviewed case law from New York federal and state courts, along with case law from [\*13] other federal jurisdictions, concerning the appropriate analytical framework and applicable test when faced with competing claims related to the characterization of MCA agreements. The Court's review has revealed that, by an overwhelming majority, courts apply the *LG Funding* non-exhaustive three-factor test to fact patterns similar to the one found in this case.<sup>7</sup> (The Court has uncovered no decisional law by the Fourth Circuit directly addressing the test for analysis of the MCA agreement as a disguised loan or a sale. The Fourth Circuit has, however, endorsed a framework for analyzing whether a related form of agreement - a "factoring agreement" - is a sale or a disguised loan, and that decision, discussed *infra*, is instructive.)

This Court is convinced that the analysis followed by the overwhelming majority of courts is persuasive and should be applied to this case to determine whether the MCA agreement at issue should be treated as a loan or a sale. Accordingly, the Court adopts the test set forth in the 2020 [LG Funding](#) case, as the Second Circuit and several [\*14] federal district courts in New

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<sup>6</sup> It is interesting to note that the non-exhaustive three-factor test articulated in *LG Funding* predates that 2020 decision, though in a less organized format. See, e.g., [IBIS Capital Group](#), 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071, at \*4-6; [K9 Bytes](#), 57 N.Y.S.3d at 632-33. And there is a substantial body of New York case law concluding that MCA transactions similar to the Funding Agreement here (i.e., a purchase of future receivables, a daily payment amount calculated as a percentage of future sales, a process to reconcile that daily payment based on actual receipts, and with contract language similar to that in this Funding Agreement) are sales, not loans. See [Womack](#), 2019 U.S. Dist. LEXIS 148644, 2019 WL 4142740, at \*7 n.9 (collecting cases).

<sup>7</sup> The Court has unearthed a few bankruptcy court decisions analyzing an MCA agreement to determine if it is a disguised loan or a true sale. Some have applied what will come to be colloquially referred to as the *LG Funding* factors. See, e.g., [In re GMI Grp., Inc.](#), 606 B.R. 467, 484-85 (Bankr. N.D. Ga. 2019). Others have considered a list of eight factors collected in a bankruptcy journal article (Robert D. Aicher William J., *Characterization of A Transfer of Receivables As A Sale or A Secured Loan Upon Bankruptcy of the Transferor*, 65 AM. BANKR. L.J. 181, 186-94 (1991)), which appear to be an amalgamation of factors various courts have considered, rather than a different or discrete multi-factor test like the one described in *LG Funding*. See, e.g., [In re Shoot The Moon, LLC](#), 635 B.R. 797, 813 (Bankr. D. Mont. 2021); [Official Comm. of Unsecured Creditors v. LG Funding, LLC \(In re Cornerstone Tower Servs.\)](#), No. A17-4051, 2018 Bankr. LEXIS 3562, 2018 WL 6199131, at \*5 (Bankr. D. Neb. Nov. 9, 2018); [In re R&J Pizza Corp.](#), No. 14-43066-CEC, 2014 Bankr. LEXIS 5461, 2014 WL 12973408, at \*2 (Bankr. E.D.N.Y. Oct. 14, 2014) (collecting cases); [Wawel Sav. Bank v. Jersey Tractor Trailer Training, Inc. \(In re Jersey Tractor Trailer Training, Inc.\)](#), 2007 Bankr. LEXIS 3365, 2007 WL 2892956, at \*7 (Bankr. D.N.J. Sept. 28, 2007), *aff'd sub nom. Yale Factors NJ LLC v. Wawel Savings Bank (In re Jersey Tractor Trailer Training Inc.)*, 2008 U.S. Dist. LEXIS 53512, 2008 WL 2783342 (D.N.J. July 15, 2008), *aff'd in part, vacated in part, remanded*, 580 F.3d 147 (3d Cir. 2009).

York have done,<sup>8</sup> and applies the three factors, and any others it finds relevant, in guiding its analysis whether the parties entered into a loan or a sale.

### Reconciliation Provision

The Funding Agreement contains a reconciliation provision which states that Global may request a reconciliation of the daily payment amount it is required to remit to EBF and that EBF "shall" adjust that daily payment amount upon EBF's verification of the information Global is required to provide with its reconciliation request. Funding Agreement at 2. As written, the reconciliation provision is mandatory in that it appears to give EBF no discretion on reconciling the daily payment amount if Global has provided the required information. Courts that considered similar reconciliation provisions concluded that they are evidence of a sale, not a loan. See, e.g., [US Info. Grp., 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*8; Streamlined Consultants, Inc. v. EBF Holdings LLC, No. 21-CV-9528 \(KMK\), 2022 U.S. Dist. LEXIS 171085, 2022 WL 4368114, at \\*4 \(S.D.N.Y. Sept. 20, 2022\); Hi Bar Capital LLC v. Parkway Dental Services, LLC, No. 533245/2021, 2022 WL 885723, at \\*2 \(N.Y. Sup. Ct. Mar. 25, 2022\); Am. Water Restoration, Inc. v. AKF Inc., 74 Misc. 3d 1203\(A\), 157 N.Y.S.3d 919 \(N.Y. Sup. Ct. 2022\)](#). In contrast, when finding that a reconciliation provision is illusory or meaningless, and thus that the underlying agreement is more likely a loan than a sale, courts have pointed to discretionary language in the reconciliation provision that permits, but does not require, the purchaser to reconcile the [\*15] daily payment amount. See, e.g., [Fleetwood Servs., 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at \\*13; LG Funding, 122 N.Y.S.3d at 312](#).

It is evident from the language in the Funding Agreement that the reconciliation provision here is mandatory, not discretionary. The Trustee's arguments that the reconciliation provision is illusory are neither plausible nor supported by the facts in this case. The Trustee has not alleged that the reconciliation provision did not function as intended, that EBF made unreasonable demands for information under the provision so as to render it functionally impossible for Global to obtain reconciliation, or that - as in the *Fleetwood* case - the reconciliation provision contains any default language triggered by Global's failure to pay the daily amounts. See, e.g., [US Info. Grp., 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*7](#) ("Plaintiffs do not allege that the Agreements' reconciliation process was unduly onerous or had a sham quality."). Nor does the Trustee allege that Global ever even sought a reconciliation. The nature of the reconciliation provision in the instant Funding Agreement supports a finding that the Funding Agreement is a sale, not a loan. See, e.g., [Rapid Cap. Fin., LLC v. Natures Mkt. Corp., 57 Misc. 3d 979, 66 N.Y.S.3d 797, 801 \(N.Y. Sup. Ct. 2017\)](#) (rejecting seller's argument that reconciliation provision was illusory because seller could not "control or [] enforce [purchaser's] compliance with [\*16] the reconciliation procedure"); *Hi Bar Capital*, 2022 WL 885723, at \*2 (finding reconciliation

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<sup>8</sup> See, e.g., [Fleetwood Servs., LLC v. Richmond Cap. Grp. LLC, No. 22-1885-CV, 2023 U.S. App. LEXIS 14241, 2023 WL 3882697 \(2d Cir. June 8, 2023\); Rsr. Funding Grp. LLC v. Cal. Organic Fertilizers, Inc., No. 24-CV-1112 \(ARR\) \(LB\), 2024 U.S. Dist. LEXIS 67438, 2024 WL 1604195 \(E.D.N.Y. Apr. 12, 2024\); Lateral Recovery, LLC v. Cap. Merch. Servs., LLC, 632 F. Supp. 3d 402 \(S.D.N.Y. 2022\); Haven Transportation, 2024 U.S. Dist. LEXIS 103271, 2024 WL 2941746](#).

provision that permitted purchaser to request additional documentation mandatory and not illusory).

### Finite Term

The second guiding factor is whether the Funding Agreement explicitly or implicitly contains a finite term, which is indicative of a loan, or an indeterminate term, which is indicative of a sale. This factor goes hand-in-glove with the reconciliation provision factor: since the daily payment amount could be reconciled to more closely reflect Global's actual receipts, and since those receipts depended on the generation of sales and payments from customers, the parties could not have known when the Agreement would terminate with full payment to EBF. "[A]s the amount of the monthly payments could change, the term of the agreement was not finite." [\*Principis Cap., LLC v. I Do, Inc.\*, 201 A.D.3d 752, 160 N.Y.S.3d 325, 327 \(2022\)](#). The Funding Agreement here provides in relevant part as follows: "[T]here is no time period during which the Purchased Amount must be collected by the Purchaser." Funding Agreement at 2. Further, the Funding Agreement contains no explicit term or ending date. *See generally id.*

[T]he Agreement's lack of a specific ending date is consistent with the contingent nature of each and [\*17] every collection of future sales proceeds under the contract. Because IBIS' collection of sales proceeds is contingent upon Four Paws actually generating sales and those sales actually resulting in the collection of revenue, neither party could have known when the Agreement might end because IBIS' collection of sales proceeds was wholly contingent upon the outside factor of customers actually shopping at Four Paws and paying for products and services. The existence of this uncertainty in the length of the Agreement is an express recognition by the parties of the wholly contingent nature of this Agreement.

[\*IBIS Capital Group\*, 2017 N.Y. Misc. LEXIS 884, 2017 WL 1065071, at \\*3.](#)

### Recourse in the Event of Bankruptcy or Going Out of Business

The third factor considers whether EBF "has any recourse in the event of [Global's] bankruptcy." [\*Pirs Cap., LLC v. D & M Truck, Tire & Trailer Repair Inc.\*, 69 Misc. 3d 457, 129 N.Y.S.3d 734, 740 \(N.Y. Sup. Ct. 2020\)](#). In two other cases involving EBF, New York courts have discussed this factor at length.

Third and finally, the Funding Agreement does not contain any provisions establishing any recourse for EBF should Streamlined Consultants declare bankruptcy. The declaration of bankruptcy does not constitute an event of default under the terms of the Funding Agreement, (see Funding Agreement 7-8), nor does the declaration of bankruptcy constitute [\*18] a breach of the Funding Agreement, (see *id.* at 3 ("[Streamlined Consultants] going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement")). Moreover, the only other two provisions in the Funding Agreement which make any reference to bankruptcy are a warranty that Streamlined Consultants was not insolvent at the time the Funding Agreement was signed and a clause that requires Streamlined Consultants to notify EBF in the event Streamlined Consultants

declares bankruptcy. (*See id.* at 7, 8.) Therefore, this factor also militates against a finding that the Funding Agreement is a usurious loan.

[\*Streamlined Consultants\*, 2022 U.S. Dist. LEXIS 171085, 2022 WL 4368114, at \\*5.](#)

Bankruptcy is not among the events of default identified in paragraph 3.1 of the Agreements. The Agreements' "Purchaser Acknowledgement" provision states: "Seller going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement." Paragraph 2.2 states that "Purchaser assumes the risk that ... the full Purchased Amount may never be remitted because Seller's business went bankrupt ...." This LG Funding factor weighs against the plausibility of plaintiffs' assertion that the transactions were loans and not MCAs.

[\*US Info. Grp.\*, 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*9.](#)

Like [\*19] the agreements in *Streamlined* and *US Info*, the Funding Agreement in this case does not list bankruptcy as an event of default and does not give EBF recourse against Global if Global files for bankruptcy. Like the agreements in *Streamlined* and *US Info*, the Funding Agreement in this case acknowledges the possibility that Global may go bankrupt or out of business and squarely places the risk of either scenario with EBF, not Global.

#### The Parties' Intent and the Transfer of Risk

As previously discussed, the three *LG Funding* factors are non-exhaustive and not determinative of the outcome in deciding whether the Funding Agreement is a sale or a loan. The overarching consideration is whether the parties intended that the Funding Agreement transfer the risk of potential non-payment from Global to EBF and whether the Funding Agreement accomplishes that purpose (and thus constitutes a sale), or whether EBF is absolutely entitled to repayment in any circumstances (in which case the Funding Agreement is a loan).<sup>9</sup> "As the Second Circuit has explained, when determining whether a transaction was a true sale of receivables, '[t]he root

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<sup>9</sup>Although the Fourth Circuit has not spoken directly to whether an MCA agreement constitutes a loan or a sale, it has considered whether a factoring agreement was a disguised loan or a true sale of accounts receivable. [\*Nickey Gregory Co., LLC v. AgriCap, LLC\*, 597 F.3d 591, 598 \(4th Cir. 2010\)](#). The court affirmed the district court's decision that found the agreement to be a disguised loan and focused on the transfer of risk embodied in the agreement:

Whether the agreement is a secured loan or a true purchase of receivables turns on whether there was an actual transfer of the risk of loss from Robison Farms to AgriCap. A transfer of risk occurs when the account seller's debt is extinguished, and the account purchaser's "risk with regard to the performance of the accounts is direct." The determination of whether there was a true purchase of receivables requires a review of the substance of the parties' relationship, and all terms and provisions of the Agreement, without regard to how the transaction is labeled. This entails a review of whether there are other indicia of a secured transaction, such as a security agreement, UCC-1 financing statement, internal charges, and personal guarantees.

[\*Nickey Gregory Co., LLC v. AgriCap, LLC\*, 592 F. Supp. 2d 862, 875 \(D.S.C. 2008\)](#), *aff'd in part, vacated in part, remanded*, [\*597 F.3d 591 \(4th Cir. 2010\)\*](#) (internal citations omitted).

This Court points to this case as instructive because there are a number of functional similarities between factoring agreements and MCA agreements. But there are also significant differences, including that (1) factoring agreements are based on existing, unpaid invoices while MCA agreements are based on future sales projections; (2) factoring agreements involve lower risk because funding is tied to actual receivables, versus future sales; and, (3) factoring agreements typically have lower fees than MCA agreements because of the lower risk.

of [the analysis] is the transfer of risk." [Haymount, 609 F. Supp. 3d at 247](#) (quoting [Endico Potatoes Inc. v. CIT Group/Factoring Inc., 67 F.3d 1063, 1069 \(2d Cir. 1995\)](#)). See also [\*20] [Fleetwood Services, 2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at \\*10](#) ("The ultimate question, like that in *LG Funding*, relates to whether the transaction involves a transfer of risk.").<sup>10</sup>

"[W]hen determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it." [Zanfini v. Chandler, 197 A.D.3d 594, 595, 153 N.Y.S.3d 77 \(2d Dep't 2021\)](#) (cleaned up). At the same time, "[a] fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract." [Goldman v. White Plains Ctr. for Nursing Care, LLC, 11 N.Y.3d 173, 896 N.E.2d 662, 664, 867 N.Y.S.2d 27 \(2008\)](#). See also [Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436, 986 N.E.2d 430, 963 N.Y.S.2d 613 \(2013\)](#) ("Under New York law, written agreements are construed in accordance with the parties' intent..."); [Slamow v. Del Col, 79 N.Y.2d 1016, 1018, 594 N.E.2d 918, 584 N.Y.S.2d 424 \(1992\)](#) (best evidence of parties' intent "is what they say in their writing").

The Funding Agreement here contains the following pertinent terms and clauses:

- Seller hereby sells, assigns and transfers to Purchaser, without recourse, upon payment of the Purchase Price, the Purchased Amount of Future Receipts by delivering to Purchaser the Specified Percentage of the proceeds [\*22] of each future sale by Seller.
- There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Purchaser. Seller going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Purchaser is entering into this Agreement knowing the risks that Seller's business may slow down or fail, and Purchaser assumes these risks based on Seller's representations warranties and covenants in this Agreement, which are designed to give Purchaser a reasonable and fair opportunity to receive the benefit of its bargain.
- Seller represents and warrants that it is selling the Purchased Amount of Future Receipts to Purchaser in the ordinary course of Seller's business and the Purchase Price paid by Purchaser is good and valuable consideration for the sale. Seller is selling a portion of a future revenue stream to Purchaser at a discount, not borrowing money from Purchaser. Purchaser assumes the risk that Future Receipts will be remitted more slowly than Purchaser may have anticipated or projected because Seller's business has slowed down,

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<sup>10</sup> The emphasis on the transfer of risk is also the hallmark of cases that apply multi-factor tests different than the *LG Funding* test:

As with many multi-factor tests, no individual factor or combination thereof is determinative. The inquiry is not a quantitative exercise susceptible to replication by a computer program, but a comprehensive and heavily contextual endeavor. A court's "[a]nalysis of the various factors [\*21] and their impact on the nature of the parties' agreement is fact-intensive, and a determination must be made based on the totality of the circumstances." *That said, a consideration that overlays and unites the factors is how the parties allocated risk.*

[Shoot The Moon, 635 B.R. at 813](#) (internal citations and quotations omitted) (emphasis added).

or the full Purchased Amount may never be remitted because Seller's business [\*23] went bankrupt or otherwise ceased operations in the ordinary course of business. By this Agreement, Seller transfers to Purchaser full and complete ownership of the Purchased Amount of Future Receipts and Seller retains no legal or equitable interest therein.

See generally Funding Agreement at 1, 2, 5. In considering language identical to this, the Supreme Court of New York concluded that "[i]t is plain from the language of the Agreement that the parties intended the transaction to be a sale of a percentage of Calvary's future receipts and not a loan." [Calvary, 2021 N.Y. Misc. LEXIS 5833, 2021 WL 5868324, at \\*4.](#)

Considered both as a whole and within the framework of the three-factor [LG Funding](#) test, this Court concludes that the Funding Agreement unambiguously transfers the risk of non-payment from Global to EBF such that under the Funding Agreement, EBF is not entitled to repayment absolutely.

Having weighed all of the factors, the Court finds that the Arch agreements are sufficiently risky such that they cannot be considered loans, as a matter of law. Under no circumstances could Arch be assured of repayment, because its agreements are contingent on a merchant's success, and the term is indefinite. Accordingly, the Court dismisses the usury [\*24] claims against Arch in their entirety.

[K9 Bytes, 57 N.Y.S.3d at 633-34](#) (dismissing usury claims even though court concluded that recourse factor weighed in favor of loan finding). See also [Calvary, 2021 N.Y. Misc. LEXIS 5833, 2021 WL 5868324, at \\*8](#) ("Based on the foregoing analysis under the rubric articulated by the Second Department in [[LG Funding](#)], the Court concludes as a matter of law that the Agreement is not ambiguous, and that it unambiguously evidences a purchase and sale of a percentage of Calvary's future receivables, not a loan.").

The existence of language in the Funding Agreement granting EBF a security interest in Global's future sales and providing a personal guaranty does not alter the analysis. Unlike the security interest at issue in [Fleetwood Services](#) which was on "all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory" ([2022 U.S. Dist. LEXIS 100837, 2022 WL 1997207, at \\*4](#)) and which supported a finding in that case that the MCA agreement was really a disguised loan, the security interest at issue here is limited to Global's future sales and does not support a finding that the Funding Agreement is a loan. See, e.g., [US Info Grp., 2023 U.S. Dist. LEXIS 169605, 2023 WL 6198803, at \\*9](#). And the personal guaranty executed in support of the Funding Agreement concerns Global's obligations to do or not do certain things, but critically does not guarantee [\*25] payment to EBF in the event Global defaults. See Funding Agreement at 9, ¶ 5.1. Because EBF cannot rely on the personal guaranty to be repaid absolutely and the personal guaranty does not shift the risk of default away from EBF, the existence of the personal guaranty does not support a finding that the Funding Agreement is a loan.

In light of the foregoing, the Court concludes that the Funding Agreement constitutes a sale of future receipts, not a loan, and that the Trustee has not stated a cognizable claim based on a usury theory. Accordingly, the Court will dismiss that portion of Count I seeking declaratory relief, as well as Count II and Count IV.

The balance of Count I focuses on the alleged insufficiency of the proof of claim and its supporting documents, the requirements for which are set out in [Rule 3001 of the Federal Rules of Bankruptcy Procedure](#). The sufficiency of EBF's proof of claim goes to whether the claim is entitled to *prima facie validity*, not whether the claim should be allowed or disallowed. Allowance (or disallowance) of a claim is governed by [§ 502 of the Bankruptcy Code](#), where [subsection \(b\)](#) enumerates nine (9) distinct grounds on which a claim could be disallowed. The Trustee has not pled any facts that invoke any of the enumerated bases on which a claim [\*26] could be disallowed under [§ 502](#). Accordingly, the Court will also dismiss this remaining portion of Count I.

The Court has reviewed the allegations raised by the Trustee in the remainder of the Amended Complaint, and has carefully considered the briefs and arguments of the parties in support of and in opposition to dismissal. At this stage in the proceeding, the Court concludes that the Trustee has *plausibly* alleged claims for relief sufficient to survive dismissal as to the remaining claims in the Amended Complaint, which assume the Funding Agreement is a sale:

- Count III plausibly alleges each of the elements of a fraudulent transfer: while insolvent, the debtor transferred an interest in property for less than reasonably equivalent value;
- Count V plausibly alleges each of the elements necessary to avoid a fraudulent transfer: while insolvent, the debtor transferred an interest in property without fair consideration;
- Count VI plausibly alleges the elements of a preferential transfer: while insolvent, the debtor transferred an interest in property within ninety (90) days of the petition date to or for the benefit of EBF resulting in EBF receiving more than it would under a chapter 7 liquidation; [\*27]
- Count VII plausibly alleges the elements of a turnover action: EBF is in possession of property of the estate that would otherwise be available to the estate for use, sale, or lease;
- Count VIII plausibly alleges the elements of a disallowance action: EBF's proof of claim is disallowable because there is recoverable property or an avoidable transfer that has not been returned or repaid; and,
- Count IX plausibly alleges the elements of a recovery action: assuming the Trustee can avoid a transfer under one of the other counts identified above, he would be entitled to recover that transfer.

In seeking dismissal of these counts, EBF challenges the merits of the Trustee's allegations, raising arguments that are more appropriately considered on a motion for summary judgment or at trial. At this pleading stage, the Court accepts all of the Trustee's well-pled allegations as true. Pursuant to the standards applicable to motions to dismiss under Civil [Rule 12\(b\)\(6\)](#), the Court concludes that the Trustee has moved his claims "across the line from conceivable to plausible." [Iqbal, 556 U.S. at 678](#). Accordingly, the Court will deny EBF's Motion to Dismiss as to Counts III, V, VI, VII, VIII, and IX.

### **Conclusion**

In sum, as the Court has [\*28] explained, the Trustee's amended complaint fails to meet the plausibility requirement in alleging that the Funding Agreement is a loan. Under the non-exhaustive three-factor test set forth in *LG Funding*, and considering the Trustee's factual

## 2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

2025 Bankr. LEXIS 774, \*28

allegations in the most favorable light to the Trustee, the Court finds, on the record before it, that the Funding Agreement is a sale. Accordingly, dismissal of those counts and claims that are based on the presumption that the Funding Agreement is a loan is appropriate.

On the other hand, the Court concludes that at this stage, dismissal of the remaining counts (that are based on the presumption that the Funding Agreement is a sale) is not warranted. For those counts, the Trustee has alleged sufficient facts that, if proven at trial, could plausibly warrant the relief requested therein.

A separate Order will issue.

Entered: March 31st, 2025

Signed: March 31st, 2025

/s/ Nancy V. Alquist

**NANCY V. ALQUIST**

**U.S. BANKRUPTCY JUDGE**

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**User Name:** Myron Terlecky

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**Document (1)**

1. [LG Funding, LLC v United Senior Props. of Olathe, LLC](#)

**Client/Matter:** seminar

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**Search Type:** Natural Language

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**Content Type**

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-None-

[LG Funding, LLC v United Senior Props. of Olathe, LLC](#)

Supreme Court of New York, Appellate Division, Second Department

March 11, 2020, Decided

2018-09950

**Reporter**

181 A.D.3d 664 \*; 122 N.Y.S.3d 309 \*\*; 2020 N.Y. App. Div. LEXIS 1687 \*\*\*; 2020 NY Slip Op 01607 \*\*\*\*; 2020 WL 1161121

**[\*\*\*\*1]** LG Funding, LLC, Appellant, v United Senior Properties of Olathe, LLC, et al., Respondents.

**Counsel:** **[\*\*\*1]** Gene Rosen's Law Firm, a Professional Corporation, Kew Gardens Hills, NY, (Gene W. Rosen and Matin Emouna of counsel), for appellant.

**Judges:** ALAN D. SCHEINKMAN, P.J., SYLVIA O. HINDS-RADIX, HECTOR D. LASALLE, BETSY BARROS, JJ. SCHEINKMAN, P.J., HINDS-RADIX, LASALLE and BARROS, JJ., concur.

**Opinion**

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**[\*664] [\*\*311]** In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Kings County (Pamela L. Fisher, J.), dated May 7, 2018. The order denied the plaintiff's motion pursuant to [CPLR 3211 \(a\)](#) to dismiss the defendants' affirmative defenses and counterclaim, and for summary judgment on the complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the plaintiff's motion which was pursuant to [CPLR 3211 \(a\)](#) to dismiss the counterclaim, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, with costs to the plaintiff.

On February 7, 2017, the plaintiff and the defendant United Senior Properties of Olathe, LLC (hereinafter United), entered into a written merchant agreement (hereinafter the agreement), pursuant to which United sold and the plaintiff purchased **[\*\*\*2]** United's future receivables for the sum of \$100,990 (hereinafter the purchase price). In exchange for the purchase, United was obligated to authorize the plaintiff to debit from United's bank account 15% of United's daily revenue, capped at \$2,499 per week, until the plaintiff received the sum of \$129,267.20 (hereinafter the purchased amount). United also agreed that in the event of its default under the agreement, the full uncollected purchased amount plus all fees due under the agreement, including reasonable attorneys' fees, would become immediately due and payable in full to the plaintiff. The defendants Linda Julian and Paul Thoma executed a personal guaranty of performance of all the representations, warranties, and covenants made by United in the agreement. **[\*665]** On February 9, 2017, the plaintiff paid United the purchase price.

Myron Terlecky

## AMERICAN BANKRUPTCY INSTITUTE

181 A.D.3d 664, \*665; 122 N.Y.S.3d 309, \*\*311; 2020 N.Y. App. Div. LEXIS 1687, \*\*\*2; 2020 NY Slip Op 01607, \*\*\*\*1

In July 2017, the plaintiff commenced this action, inter alia, to recover damages for breach of contract. In their answer, the defendants denied the material allegations of the complaint and asserted various affirmative defenses and a counterclaim alleging **[\*\*312]** that the transaction at issue was a criminally usurious loan. Subsequently, the plaintiff moved pursuant **[\*\*\*3]** to [CPLR 3211 \(a\) \(1\)](#) and [\(7\)](#) to dismiss the defendants' affirmative defenses and counterclaim alleging that the transaction was a criminally usurious loan, and for summary judgment on the complaint. In an order dated May 7, 2018, the Supreme Court denied the plaintiff's motion. The plaintiff appeals.

"In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of **[\*\*\*\*2]** every reasonable inference" ([Bank of N.Y. v Penalver, 125 AD3d 796, 797, 1 NYS3d 825 \[2015\]](#) [internal quotation marks omitted]). "[I]f there is any doubt as to the availability of a defense, it should not be dismissed" ([Wells Fargo Bank, N.A. v Rios, 160 AD3d 912, 913, 74 NYS3d 321 \[2018\]](#)). Dismissal may be warranted under [CPLR 3211 \(a\) \(1\)](#) "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" ([Leon v Martinez, 84 NY2d 83, 88, 638 N.E.2d 511, 614 NYS2d 972 \[1994\]](#)). "When assessing a motion to dismiss a complaint or counterclaim . . . for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ([V. Groppa Pools, Inc. v Massello, 106 AD3d 722, 722, 964 NYS2d 563 \[2013\]](#); see [CPLR 3211 \[a\] \[7\]](#); [Dorce v Gluck, 140 AD3d 1111, 1112, 34 NYS3d 501 \[2016\]](#)).

The rudimentary element of usury is the **[\*\*\*4]** existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be (see [Seidel v 18 E. 17th St. Owners, 79 NY2d 735, 598 NE2d 7, 586 NYS2d 240 \[1992\]](#); [Abir v Malky, Inc., 59 AD3d 646, 649, 873 NYS2d 350 \[2009\]](#)). To determine whether a transaction constitutes a usurious loan, it "must be 'considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it' " ([Abir v Malky, Inc., 59 AD3d at 649](#), quoting [Ujueta v Euro-Quest Corp., 29 AD3d 895, 895, 814 NYS2d 551 \[2006\]](#) [internal quotation marks omitted]). The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" ([K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc 3d 807, 816, 57 NYS3d 625 \[\\*666\] \[Sup Ct, Westchester County 2017\]](#)). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (see [Rubenstein v Small, 273 App Div 102, 75 NYS2d 483 \[1947\]](#)). Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy (see [K9 Bytes, Inc. v Arch Capital Funding, LLC, 56 Misc 3d at 816-819](#); see also [Funding Metrics, LLC v D & V Hospitality, Inc., 62 Misc 3d 966, 970, 91 NYS3d 678 \[Sup Ct, Westchester County 2019\]](#)).

Here, with respect to a reconciliation provision, the agreement provides that the plaintiff "may, upon [United's] request, adjust the amount of any payment due under this Agreement at [its] sole discretion and as it deems appropriate" (emphasis added). The agreement **[\*\*\*5]** also contains provisions suggesting that United's obligation to repay was absolute and not contingent

## 2025 MIDWEST REGIONAL BANKRUPTCY SEMINAR

181 A.D.3d 664, \*666; 122 N.Y.S.3d 309, \*\*312; 2020 N.Y. App. Div. LEXIS 1687, \*\*\*5; 2020 NY Slip Op 01607, \*\*\*\*2

on its actual accounts receivable. **[\*\*313]** In this regard, the agreement provides that United's written admission of its inability to pay its debt or its bankruptcy constitute events of default under the agreement, which entitle the plaintiff to the immediate full repayment of any of the unpaid purchased amount (*cf. Champion Auto Sales, LLC v Pearl Beta Funding, LLC, 159 AD3d 507, 69 NYS3d 798 [2018]*). The agreement provides that in the event United files for bankruptcy or is placed under an involuntary filing, the plaintiff would be entitled to enforce the provisions of the personal guaranty executed by Julian and Thoma, United would be required to deliver to the plaintiff a confession of judgment in the amount of the purchased amount, and the plaintiff would be allowed to enter the confession of judgment as a judgment. These provisions suggest that the plaintiff did not assume the risk that United would have less-than-expected or no revenues. Thus, we agree with the Supreme Court's determination denying that branch of the plaintiff's motion which was pursuant to [CPLR 3211 \(a\) \(1\)](#) and [\(7\)](#) to dismiss the affirmative defenses alleging that the transaction at issue is a criminally usurious loan. **[\*\*\*6]**

Since the plaintiff failed to demonstrate the absence of triable issues of fact as to whether the transaction constitutes a criminally usurious loan, we agree with the Supreme Court's determination denying that branch of the plaintiff's motion which was for summary judgment on the complaint.

However, the Supreme Court should have granted that branch of the plaintiff's motion which was pursuant to [CPLR 3211 \(a\) \(7\)](#) to dismiss the counterclaim, alleging criminal usury **[\*667]**. Although the defendants may assert criminal usury as an affirmative defense (see [General Obligations Law § 5-521 \[3\]](#); [Limited Liability Company Law § 1104 \[c\]](#); [Penal Law § 190.40](#); [Fred Schutzman Co. v Park Slope Advanced Med., PLLC, 128 AD3d 1007, 1008, 9 NYS3d 682 \[2015\]](#); [Blue Wolf Capital Fund II, L.P. v American Stevdoring, Inc., 105 AD3d 178, 184 \[2013\]](#); [Nikezic v Balaz, 184 AD2d 684, 685, 585 NYS2d 86 \[1992\]](#); [Intima-Eighteen, Inc. v Schreiber Co., 172 AD2d 456, 457, 568 NYS2d 802 \[1991\]](#)), they may not assert criminal usury as the basis for a counterclaim (see [Intima-Eighteen, Inc. v Schreiber Co., 172 AD2d at 457](#)). Scheinkman, P.J., Hinds-Radix, LaSalle and Barros, JJ., concur.

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## Midwest Regional Bankruptcy Seminar 2025

### Life Insurance Exemption for Chapter 7 Debtors in Ohio

#### American Bankruptcy Institute

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**1. Life insurance and proceeds may be property of the estate; “180 Day Rule”**

The Debtor’s interest in life insurance policies, including cash value, could be property of the estate. Additionally, under 11 U.S.C. § 541(a)(5)(C), property of the estate includes any interest in property that the debtor acquires or becomes entitled to acquire within 180 days after the petition date as a beneficiary of a life insurance policy. But Ohio has generous exemptions.

**2. O.R.C. § 2329.66(A)(6)(b) – Interest in Life Insurance Contracts as Exempted by § 3911.10**

- ORC Ann. 3911.10 exempts life insurance policies and their proceeds from the claims of creditors of the insured person if the policy is taken out for the benefit of a spouse, children, dependents, or charitable or similar institutions. The exemption applies to both the proceeds and the cash surrender value of the policy.

**3. Requirements for the exemption under O.R.C. § 2329.66(A)(6)(b)**

The exemption applies if the following conditions are met:

- (1) the policy is a proper type of insurance contract;
- (2) the policy is on the life of the debtor who is also the insured person;
- (3) the policy is for the benefit of a spouse, children, dependents, or other qualifying entities; and,
- (4) if the first three factors are met, "then the contract and any proceeds or avails will be protected from the claims of the creditors of the insured person."

Menninger v. Schramm (In re Schramm), 431 B.R. 397 (6th Cir. BAP 2010).

**4. Does the exemption apply to the cash value of the policy? What if the Debtor and the beneficiary are both debtors of the same creditor? Would such an exemption still apply?**

If the conditions under the Schramm case are met, then the exemption applies. Lakhi v. Meritra Health Care, LLC, 2025-Ohio-466 (10<sup>th</sup> Dist.). In Lakhi, the judgment creditor attempted to garnish hundreds of thousands of dollars of cash value of insurance policies of three judgment debtors. The spouses of the judgment debtors were the beneficiaries, and they were also judgment debtors.

- The court emphasized that the exemption applies to the cash value of policies.
- Additionally, the creditor argued that O.R.C. § 3911.10 does not provide an exemption from garnishment of a life insurance policy in cases where both the insured and the beneficiary are debtors of the same creditor. The

court disagreed and held that, if the policy meets the three conditions of the statute, then the cash value is protected even if the insured and the spouse beneficiary are judgment debtors of the same creditor.

- The implication then is that if husband/wife debtors have a policy where one is the insured and the other the beneficiary, the policy is still likely exempt.

**5. Does the exemption under O.R.C. § 3911.10 apply to a Debtor who is not insured, but is instead the spousal beneficiary of an insured?**

Generally, no. While ORC § 3911.10 protects life insurance proceeds from the creditors of the insured person, it does not extend this protection to the creditors of the beneficiary. Courts have clarified that the exemption applies to the insured's creditors, but not to the beneficiary's creditors. Menninger v. Schramm (In re Schramm), 431 B.R. 397 (6th Cir. BAP 2010). So, if a husband and wife file bankruptcy, the husband is an insured under a life insurance policy and the wife is a beneficiary, and the husband passes away shortly after filing: the beneficiary wife does not have recourse to the exemption under § 3911.10.

**6. What if the Debtor makes premium payments in fraud of creditors?**

O.R.C. § 3911.10 limits a creditor's recovery of fraudulently paid premiums to the "proceeds" of the life-insurance contract. Huntington Nat'l Bank v. Winter, 2011-Ohio-1751, ¶ 26 (1<sup>st</sup> Dist. Ct. App.) noted that the few courts who have considered this issue under O.R.C. § 3911.10, or its former version, have held that the proceeds of the contract come into existence when the contract matures—either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract. So, proceeds aren't necessarily readily available.

In Doethlaff v. Penn Mut. Life Ins. Co., 117 F.2d 582 (6<sup>th</sup> Cir. 1941), the Sixth Circuit Court of Appeals held that the former version of O.R.C. § 3911.10 did not authorize the court to order a debtor who been accused of paying his premiums in fraud of his creditors to accept the cash surrender value of his life insurance policy so that he could repay his creditors. Instead, the court held that the creditors could only be paid from the proceeds of the policy and that the policy did not have any "proceeds" until it matured, which would occur when the debtor died. MTS comment: Smart prebankruptcy planning or an indication of a bad faith bankruptcy filing?

**7. O.R.C. §§ 2329.66(A)(6)(c) and 3917.05 – Interest in Group Life Insurance Contracts**

Group life insurance is treated a bit differently. There is no requirement in §§ 2329.66(A)(6)(c) and 3917.05 that the beneficiary be a dependent of the deceased-insured. There are three requirements for the exemption in § 3917.05 to apply: (1) the insurance policy must be a "policy of group insurance," (2) the deceased person must be covered under the policy, and (3) the proceeds must be paid to "any employee thereunder." In re Frederick, 495 B.R. 813, 818 (Bankr. N.D. Ohio 2013). Group life insurance is commonly provided by an employer to employees and their spouses or dependents.

## AMERICAN BANKRUPTCY INSTITUTE

In an example where a husband and wife file bankruptcy, the husband is an insured under a group life insurance policy provided by his employer and the wife is a beneficiary, and the husband passes away shortly after filing: the beneficiary wife does have recourse to the exemption under § 3917.05. This remains so, even if she were never an employee. The Frederick court considered this issue and, after canvassing other cases, concurred with those cases that the words "paid to any employee thereunder" should be interpreted to not require that the proceeds be paid directly to the deceased-insured, but merely paid on account of the insured person's death.

So, the takeaway from this is that these provisions are construed to protect the exemptions. The courts do not appear to be willing to stretch the language to deny the exemption, but at least seem to be willing to stretch a bit to protect the exemption.

▲ Last updated August 11, 2025 11:04:30 pm GMT

[Doethlaff v. Penn Mut. Life Ins. Co.](#)

United States Court of Appeals for the Sixth Circuit

January 17, 1941

Nos. 8421, 8422

**Reporter**

117 F.2d 582 \*; 1941 U.S. App. LEXIS 4281 \*\*; 20 Ohio Op. 110

DOETHLAFF v. PENN MUT. LIFE INS. CO. et al.; PENN MUT. LIFE INS. CO. v. DOETHLAFF et al.

**Prior History:** [\*\*1] Appeals from the District Court of the United States for the Northern District of Ohio, Eastern Division; Paul Jones, Judge.

**Core Terms**

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premiums, insured, dividends, insurance company, cash surrender value, insolvent, proceeds

**Case Summary**

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**Procedural Posture**

Appellants, an insurance company and a bankrupt, challenged an order from the United States District Court for the Northern District of Ohio, Eastern Division, ordering that all premiums paid by appellant bankrupt after his insolvency on a policy of life insurance, together with accumulated dividends and interest thereon, be paid to appellee bankruptcy trustee as payments made in fraud of creditors pursuant to Ohio General Code § 9394.

**Overview**

Appellant bankrupt challenged an order directing appellant insurance company to turn over to appellee bankruptcy trustee all premiums paid by appellant bankrupt after his insolvency on a policy of insurance on his life, together with accumulated dividends and interest thereon, as payments made in fraud of creditors pursuant to Ohio General Code § 9394. The statute created an exemption from claims of creditors for certain contracts of life insurance provided that the premiums were not paid in fraud of creditors. The court reversed and remanded, finding that the statute required a showing of the intent to defraud creditors in order to negate the exemption, and that there was no showing of intent by appellant bankrupt to defraud his creditors. The court further found that the statute required respondent, in the case of intent to defraud creditors, to be paid from the proceeds of the policy, and that the policy had no proceeds until it matured. Since the subject policy had not matured, there were no proceeds from which to pay respondent .

**Outcome**

The court reversed and remanded, finding that there was no evidence to indicate any actual intention on the part of appellant bankrupt to defraud his creditors by maintaining payment of life insurance policy premiums even after he was insolvent, and that absent such showing of intent the policy was exempt from claims of creditors.


**LexisNexis® Headnotes**

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Matthew Schaeffer


Doethlaff v. Penn Mut. Life Ins. Co.

[Bankruptcy Law > Exemptions > State Law Exemptions > General Overview](#)

[HN1](#)  **Exemptions, State Law Exemptions**

See Ohio General Code § 9394.


[Bankruptcy Law > Exemptions > State Law Exemptions > General Overview](#)

[HN2](#)  **Exemptions, State Law Exemptions**

A bankruptcy exemption statute is entitled to a construction liberal to the debtor.

[Bankruptcy Law > Exemptions > State Law Exemptions > General Overview](#)

[Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value](#)


[HN3](#)  **Exemptions, State Law Exemptions**

Under Ohio General Code § 9394, creditors have a remedy where premiums have been paid with intent to delay, hinder, and defraud them. The question of intent is one of ultimate fact to be determined upon a consideration of the attending facts and circumstances, such as the question of the insolvency of the insured, his attitude toward his debts, the amounts thereof, his prospective ability to liquidate them, whether the policy was issued before or after insolvency, its cash surrender value, and finally, whether after all he, in good faith, intended to provide by moderate premiums some protection to those who had a natural claim upon his bounty.

[Bankruptcy Law > Exemptions > State Law Exemptions > General Overview](#)

[Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value](#)

[Insurance Law > Claim, Contract & Practice Issues > Premiums > Refunds](#)

[HN4](#)  **Exemptions, State Law Exemptions**

Ohio General Code § 9394 provides that in the event of intent to defraud creditors the trustee can be paid only from the proceeds of the contracts and the contract is the policy and by its terms it can have no proceeds until it matures, either by the death of the insured or as an endowment.

**Counsel:** James H. Nacey, of Cleveland, Ohio, for Arthur George Doethlaff.

Walter A. Marting, of Cleveland, Ohio (Walter A. Marting and Jones, Day, Cockley & Reavis, all of Cleveland, Ohio, on the brief), for Penn Mut. Life Ins. Co.

Suggs Garber and Howard D. Burnett, both of Cleveland, Ohio, for Gardner, trustee.

**Opinion by:** HICKS

## Opinion

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Doethlaff v. Penn Mut. Life Ins. Co.

Before HICKS, ALLEN, and HAMILTON, Circuit Judges.

**[\*583]** HICKS, Circuit Judge.

This case was tried upon an agreed statement of facts.

On January 11, 1924, appellant, the Penn Mutual Life Insurance Company, issued a policy upon the life of Arthur George Doethlaff in the sum of \$4,000. A partner of Doethlaff was the original beneficiary; but on January 10, 1927, the policy was changed to make it payable to Bertha E. Doethlaff, wife of the insured, or to Arthur G. Doethlaff, Jr., son of the insured, if he should survive both his father and mother; otherwise to the administrator of the insured.

The insured was adjudged a bankrupt on September 3, 1937. He listed the policy in his schedule of assets. He had been **[\*\*2]** insolvent for four years and during the period had paid premiums on the policy in the amount of \$428.49. The cash surrender value thereof at bankruptcy was \$1,286.36 and this included the accumulated dividends of \$448.06. On petition of the trustee in bankruptcy the referee, upon stipulated facts, ordered the insurance company to turn over to the trustee the equivalent of the premiums it had received within the four-year period together with the accumulated dividends and interest thereon. The court confirmed the order. The beneficiaries were not made parties defendant to the petition although it is clear enough that they had a vital interest adverse to the claim of the trustee and should have been made parties defendant.

First, as to the premiums:

The referee and the court based the order upon the view that the payment of premiums by the insured while insolvent was "in fraud of creditors" under [HN1](#)<sup>1</sup> Ohio General Code, Section 9394, printed in the margin. <sup>1</sup> We do not agree.

**[\*\*3]** **[\*584]** The statute does not denounce the payment of such premiums as fraudulent in law. It does not define the phrase "in fraud of creditors." The case of [Lytle v. Baldinger, 84 Ohio St. 1, 95 N.E. 389](#), Ann. Cas. 1912B, 894, is cited as the nearest approach to an interpretation of the statute by an Ohio court but neither the present issues nor the statute were involved in the Lytle case. Nothing said in the Lytle case can be construed as an interpretation of the language "in fraud of creditors."

We are left therefore to our own view of the law and it must be kept in mind that we are dealing [HN2](#)<sup>1</sup> with an exemption statute which is entitled to a construction liberal to the debtor. [HN3](#)<sup>1</sup> We think its meaning is that creditors have a remedy where premiums have been paid with intent to delay, hinder and defraud them and that the question of intent is one of ultimate fact to be determined upon a consideration of the attending facts and circumstances, such as the question of the insolvency of **[\*\*4]** the insured, his attitude toward his debts, the amounts thereof, his prospective ability to liquidate them, whether the policy was issued before or after insolvency, its cash surrender value; and finally, whether after all he, in good faith, intended to provide by moderate premiums

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<sup>1</sup> " § 9394. Exemption of proceeds from claims of creditors: exception; change of beneficiary. All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature, and which have been or shall be taken out for the benefit of, or made payable, by change of beneficiary, transfer or assignment to, the wife or children, or any relative dependent upon such person, or any creditor, or to a trustee for the benefit of such wife, children, dependent relative or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free and clear from all claims of the creditors of such insured person or annuitants; provided, that, subject to the statute of limitations, the amount of any premium upon said contracts, endowments or annuities paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid."

Doethlaff v. Penn Mut. Life Ins. Co.

some protection to those who had a natural claim upon his bounty. See [Central Bank of Washington v. Hume, 128 U.S. 195, 9 S.Ct. 41, 32 L.Ed. 370](#); [Ross v. Minn. Mut. L. Ins. Co., 154 Minn. 186, 191 N.W. 428, 31 A.L.R. 46](#).

This view accords with the weight of authority [see Annotations under the Ross case, 31 A.L.R. 52]; and we are satisfied with it. There is no evidence to indicate any actual intention upon the part of the insured to defraud his creditors by keeping up the payments of the premiums upon the policy even after he was insolvent.

Moreover, the premiums to be returned to the trustee are to be paid by the insurance company out of the cash surrender value of the policy. We think that this was likewise erroneous. The statute is plain. [HN4](#) [↑] The trustee can be **[\*\*5]** paid only "from the proceeds of the contracts \* \* \* ." The contract is the policy and by its terms it can have no "proceeds" until it matures, either by the death of the insured or as an endowment. It has not matured. The bankruptcy did not mature it. The statute does not undertake thus to rewrite the policy. See [Greiman v. Metropolitan L. Ins. Co., 3 Cir., 96 F.2d 823](#). Again, the court was unauthorized to direct the premiums to be turned over out of the cash surrender value of the policy. Under the contract there could be no "cash surrender value" to be turned over except upon the surrender of the policy. The statute does not contemplate that the insured should surrender his policy upon bankruptcy and accept a cash surrender value in lieu thereof. He is not required to do so and he has not done so. The statute does contemplate that the policy may be kept alive "in accordance with its terms" and the turnover order recognized this by providing that the insured could keep it in force by paying directly to the trustee the amount which the insurance company was directed to pay or by borrowing the amount from the insurance company and directing it to pay it over to **[\*\*6]** the trustee.

Second, as to the dividends and interest thereon.

We cannot discover from the record the basis for the order to turn over the accumulated dividends and interest. We assume that the referee and the court were of the opinion that the statute did not exempt dividends and interest.

The contract itself provided that "dividend credits" would constitute "net proceeds" of the policy and the statute, as we have indicated, exempts "the proceeds or avails of such contracts" from the claims of creditors. The fact that the dividends might, under the policy, be left with the insurance company at interest and be used to accelerate the maturity of the policy did not change their nature nor take them out of the exempted class. [In re Keil, 2 Cir., 88 F.2d 7](#). The interest is no less "proceeds" than the dividends.

Appellee insists that the appeal of the insurance company should be dismissed because it did not seek a review of the referee's order. We need not pass upon the point further than to say that it is immaterial. The case is before us upon the appeal of the bankrupt and this is sufficient for a determination of the controversy.

The order appealed from **[\*\*7]** and the turnover order are set aside and the case remanded to the district court with directions to dismiss the petition and motion **[\*585]** of the trustee filed March 7, 1938, and for further proceedings not inconsistent herewith.

Reversed and remanded.

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## In re Frederick

United States Bankruptcy Court for the Northern District of Ohio

July 22, 2013, Decided; July 22, 2013, Filed, Entered

Case No. 12-15994, Chapter 7

### Reporter

495 B.R. 813 \*; 2013 Bankr. LEXIS 2959 \*\*; 2013 WL 3808160

In re: ROBERT L. FREDERICK (deceased), Debtor.

## Core Terms

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exemption, group life insurance policy, proceeds, group life insurance, thereunder, coverage, former employee, employees, spouse, insured, statutory language, group insurance, deceased-insured, covering, claim of exemption, deceased spouse, legislative intent, portability, ambiguous, drafters

## Case Summary

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### Procedural Posture

A Chapter 7 trustee objected to a debtor's claim of exemption under *Ohio Rev. Code Ann. §§ 2329.66(A)(6)(c)* and [3917.05](#) in the proceeds of a group life insurance policy paid to the debtor as the beneficiary of his deceased spouse.

### Overview

At issue was whether *Ohio Rev. Code Ann. §§ 2329.66(A)(6)(c)* and [3917.05](#) permitted the debtor to exempt the proceeds of a group life insurance policy, originally issued by his employer and covering the life of his spouse, that were paid to the debtor as the beneficiary of his deceased spouse. The court rejected those cases that held that [§ 3917.05](#) had to be read in conjunction with [Ohio Rev. Code Ann. § 3911.10](#) so as to require the debtor/beneficiary to be a dependent of the insured and held that there was no requirement in *Ohio Rev. Code Ann. §§ 2329.66(A)(6)(c)* and [3917.05](#) that the beneficiary be a dependent of the deceased-insured. The court also held that the debtor's deceased spouse qualified as an employee for purposes of [§ 3917.05](#), finding that the word "employee" was used in the statute to communicate that the group life insurance policy had to originally be provided by an employer to an employee. Once the policy was provided to the employee, anyone properly added to that policy qualified as an "employee thereunder."

### Outcome

The court overruled the trustee's amended objection to the debtor's claim of exemption.

## LexisNexis® Headnotes

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In re Frederick

Bankruptcy Law > Exemptions > Claims & Objections

Bankruptcy Law > Procedural Matters > Jurisdiction > Core Proceedings

### [HN1](#) Exemptions, Claims & Objections

An objection to a debtor's claim of exemption is a core proceeding under [28 U.S.C.S. § 157\(b\)\(2\)\(B\)](#).

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate  
Bankruptcy Law > Estate Property > Contents of Estate

### [HN2](#) Estate Property, Contents of Estate

[11 U.S.C.S. § 541](#) of the Bankruptcy Code provides that the commencement of a case creates an "estate," which, subject to a few specifically enumerated exceptions, is comprised of all the legal and equitable interests in property a debtor has at the commencement of the case.

Bankruptcy Law > Exemptions > General Overview

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers

### [HN3](#) Bankruptcy Law, Exemptions

[11 U.S.C.S. § 522](#) allows a debtor to claim certain property as exempt from the estate. States may adopt the federal exemptions provided in [§ 522](#) or establish their own exemptions.

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers

### [HN4](#) State Law Exemptions, Opt Out Powers

Ohio has elected to opt-out of the federal exemptions. [Ohio Rev. Code Ann. § 2329.662](#). Therefore, any property that a debtor domiciled in Ohio seeks to exempt must fall within an exemption authorized under Ohio law or nonfederal bankruptcy law.

Bankruptcy Law > Debtor Benefits & Duties > General Overview

Governments > Legislation > Interpretation

Bankruptcy Law > Exemptions > State Law Exemptions > Opt Out Powers


### [HN5](#) Bankruptcy Law, Debtor Benefits & Duties

The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. Exemptions further this policy goal by allowing a debtor to protect property which is necessary for the survival of both the debtor and the debtor's family. As such, exemptions are to be construed liberally in favor of the debtor. However, a liberal construction of a state's exemptions statute does not allow a court to enlarge the statute or strain its meaning.

In re Frederick

Bankruptcy Law > Exemptions > Claims & Objections

Evidence > Burdens of Proof > Preponderance of Evidence

[HN6](#)  **Exemptions, Claims & Objections**

An objecting party, has the burden of proving by a preponderance of the evidence that an exemption is not properly claimed. [Fed. R. Bankr. P. 4003\(c\)](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

[HN7](#)  **State Law Exemptions, Specific Exemptions**

See [Ohio Rev. Code Ann. § 2329.66\(A\)\(6\)\(c\)](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

[HN8](#)  **State Law Exemptions, Specific Exemptions**

See [Ohio Rev. Code Ann. § 3917.05](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Governments > Legislation > Interpretation

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

[HN9](#)  **State Law Exemptions, Specific Exemptions**

There is nothing in [Ohio Rev. Code Ann. § 3917.05](#) to suggest that [§ 3917.05](#) must be read together with [Ohio Rev. Code Ann. § 3911.10](#) to require that a beneficiary be a dependent of the deceased-insured. Further, if the Ohio legislature intended to limit the exemption to applying only to dependent beneficiaries, it could have done so by including the word "dependent" or other limiting language. Therefore, the United States Bankruptcy Court for the Northern District of Ohio finds that there is no requirement in [Ohio Rev. Code Ann. §§ 2329.66\(A\)\(6\)\(c\)](#) and [3917.05](#) that the beneficiary be a dependent of the deceased-insured.

In re Frederick

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

**[HN10](#)**  **State Law Exemptions, Specific Exemptions**

There are three requirements for the exemption in [Ohio Rev. Code Ann. § 3917.05](#) to apply: (1) the insurance policy must be a policy of group insurance (2) the deceased person must be covered under the policy; and (3) the proceeds must be paid to any employee thereunder.

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

**[HN11](#)**  **State Law Exemptions, Specific Exemptions**

[Ohio Rev. Code Ann. § 3917.01](#) defines the forms of group life insurance that constitute policies of group insurance for purposes of the exemption contained in [Ohio Rev. Code Ann. § 3917.05](#). Included among these forms of life insurance is continued group life insurance coverage to former employees and their dependents under [Ohio Rev. Code Ann. § 3917.01\(G\)](#).

Insurance Law > Types of Insurance > Life Insurance > General Overview


Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

**[HN12](#)**  **Types of Insurance, Life Insurance**

See [Ohio Rev. Code Ann. § 3917.01\(G\)](#).

Insurance Law > Types of Insurance > Life Insurance > General Overview

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

**[HN13](#)**  **Types of Insurance, Life Insurance**

See [Ohio Rev. Code Ann. § 3917.03\(A\)](#).

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

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Insurance Law &gt; ... &gt; Life Insurance &gt; Beneficiaries &gt; Creditors Rights Limitations

Insurance Law &gt; Claim, Contract &amp; Practice Issues &gt; Group Policies &gt; General Overview

**[HN14](#)**  **State Law Exemptions, Specific Exemptions**

The third requirement for the exemption in [Ohio Rev. Code Ann. § 3917.05](#) to apply is that the proceeds must be paid to "any employee thereunder." The word "thereunder" refers to the group life insurance policy. Therefore, the proceeds must be paid to "any employee" covered under the group life insurance policy. The United States Bankruptcy Court for the Northern District of Ohio concurs with the courts that have interpreted the words "paid to any employee thereunder" to not require that the proceeds be paid directly to the deceased-insured, but merely paid on account of the insured person's death.

Bankruptcy Law &gt; Exemptions &gt; State Law Exemptions &gt; Specific Exemptions

Civil Procedure &gt; Judgments &gt; Enforcement &amp; Execution &gt; Exemptions From Execution

Insurance Law &gt; ... &gt; Life Insurance &gt; Beneficiaries &gt; Creditors Rights Limitations

Insurance Law &gt; Claim, Contract &amp; Practice Issues &gt; Group Policies &gt; General Overview

**[HN15](#)**  **State Law Exemptions, Specific Exemptions**

[Ohio Rev. Code Ann. § 3917.05](#) includes group life insurance covering former employees under [Ohio Rev. Code Ann. § 3917.01\(G\)](#).

Governments &gt; Legislation &gt; Interpretation

**[HN16](#)**  **Legislation, Interpretation**

The primary goal in statutory interpretation is to give effect to the intent of the legislature. In determining legislative intent, a court first looks to the language of the statute. The court must give effect to all words of the statute. Further, unless there is ambiguity, legislative intent must be determined from the language of the statute itself. Where the words of a statute are ambiguous, interpretation is necessary. Ambiguity exists if the language of the statute is susceptible of more than one reasonable interpretation.

Bankruptcy Law &gt; Exemptions &gt; State Law Exemptions &gt; Specific Exemptions

Civil Procedure &gt; Judgments &gt; Enforcement &amp; Execution &gt; Exemptions From Execution

Governments &gt; Legislation &gt; Interpretation

Insurance Law &gt; ... &gt; Life Insurance &gt; Beneficiaries &gt; Creditors Rights Limitations

Insurance Law &gt; Claim, Contract &amp; Practice Issues &gt; Group Policies &gt; General Overview

**[HN17](#)**  **State Law Exemptions, Specific Exemptions**

[Ohio Rev. Code Ann. § 3917.05](#) should be interpreted to give the word "employee" purpose; however, the meaning of the word "employee" in [§ 3917.05](#) is ambiguous. In determining legislative intent when faced with an ambiguous

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statute, the court may consider several factors, including the object sought to be obtained, circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction.

Bankruptcy Law > Exemptions > State Law Exemptions > Specific Exemptions

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Governments > Legislation > Interpretation

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > Claim, Contract & Practice Issues > Group Policies > General Overview

### [HN18](#) [↓] **State Law Exemptions, Specific Exemptions**

After considering the legislative history of [Ohio Rev. Code Ann. § 3917.05](#), other courts' interpretations of the same phrase in their group life insurance exemption, and alternative interpretations of the word "employee," the United States Bankruptcy Court for the Northern District of Ohio believes that the word "employee" is used in [§ 3917.05](#) to communicate that the group life insurance policy must be originally provided by an employer to an employee. Once that policy is provided to the employee, anyone that is properly added to that policy under [Ohio Rev. Code Ann. § 3917.03](#) qualifies as an "employee thereunder." This interpretation also avoids the absurd result of group life insurance proceeds literally "paid to any employee thereunder" as a beneficiary not being exempt under [Ohio Rev. Code Ann. § 3917.05](#). Therefore, the court finds that [§ 3917.05](#) exempts all group life insurance policies, originally provided by an employer to an employee and covering the life of the actual employee or former employee and anyone properly added to the policy under [Ohio Rev. Code Ann. § 3917.03](#).

**Counsel:** **[\*\*1]** For Robert L. Frederick, Debtor: Charles J Van Ness, Mayfield Heights, OH.

For Virgil E Brown, Jr, Trustee: Joanne Brown, Cleveland, OH.

**Judges:** ARTHUR I. HARRIS, UNITED STATES BANKRUPTCY JUDGE.

**Opinion by:** ARTHUR I. HARRIS

## Opinion

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### **[\*815]** MEMORANDUM OF OPINION <sup>1</sup>

This matter is currently before the Court on the Chapter 7 trustee's amended objection to the debtor's claim of exemption (Docket #17) and the debtor's response (Docket #33). At issue is whether *Ohio Revised Code* §§ 2329.66(A)(6)(c) and [3917.05](#) permit the debtor to exempt the proceeds of a group life insurance policy, originally provided by the debtor's employer and covering the life of the debtor's spouse, paid to the debtor as the beneficiary of his deceased spouse. For the reasons that follow, the Court overrules the trustee's amended objection.

#### JURISDICTION

[HN1](#) [↑] An objection to a debtor's claim of exemption is a core proceeding under [28 U.S.C. § 157\(b\)\(2\)\(B\)](#). This Court has jurisdiction over core proceedings pursuant to [28 U.S.C. §§ 157\(a\)](#) and [1334](#) and Local General Order 2012-7 of the United States District Court for the Northern District of Ohio.

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<sup>1</sup> This opinion is not intended for official publication.

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## PROCEDURAL HISTORY AND BACKGROUND

Prior to the debtor retiring, the **[\*\*2]** debtor worked at Progressive Casualty Insurance Company ("Progressive"). While working at Progressive, the debtor purchased a group life insurance policy through his employer from Metropolitan Life Insurance Company ("MetLife"). The group life insurance policy provided coverage for the lives of the debtor and his dependent spouse.

In January 2011, the debtor's employment at Progressive ended. MetLife informed the debtor that the debtor's group life insurance policy included two options for the debtor to continue his coverage: portability or conversion. The debtor elected the portability option. The debtor's ported policy became effective in February 2011, and provided coverage for the life of the debtor's spouse in the amount of \$20,000. On July 19, 2011, the debtor's **[\*816]** spouse died. In September 2011, MetLife placed the proceeds from the group life insurance policy, paid to the debtor as the beneficiary of his deceased spouse, in a new bank account under the debtor's control.

On August 15, 2012, the debtor filed a voluntary petition for bankruptcy under Chapter 7. In the debtor's Schedule C, the debtor claimed an exemption under *Ohio Revised Code* §§ 2329.66(A)(6)(c) and [3917.05](#) in the **[\*\*3]** proceeds of the group life insurance policy paid to the debtor as the beneficiary of his deceased spouse. On November 14, 2012, the trustee objected to the debtor's claim of exemption. Also on November 14, 2012, the trustee filed an amended objection to the debtor's claim of exemption, and on December 11, 2012, the debtor responded.

Approximately one month later, on January 8, 2013, the debtor died. On June 5, 2013, the Court held an evidentiary hearing to determine whether the debtor's claim of exemption is proper. At the hearing, the trustee submitted nine exhibits, subject to redactions, and the debtor submitted four exhibits. No witnesses testified. After the evidentiary hearing, the Court took the matter under advisement.

## DISCUSSION

[HN2](#) [\[↑\]](#) [Section 541 of the Bankruptcy Code](#) provides that the commencement of a case creates an "estate," which, subject to a few specifically enumerated exceptions, is comprised of all the legal and equitable interests in property a debtor has at the commencement of the case. See [11 U.S.C. § 541](#). [HN3](#) [\[↑\]](#) [Section 522 of the Bankruptcy Code](#) allows a debtor to claim certain property as exempt from the estate. States may adopt the federal exemptions provided in [11 U.S.C. § 522](#) **[\*\*4]** or establish their own exemptions. See [11 U.S.C. § 522](#). [HN4](#) [\[↑\]](#) Ohio has elected to opt-out of the federal exemptions. See [Ohio Revised Code § 2329.662](#). "Therefore, any property that a debtor domiciled in Ohio seeks to exempt must fall within an exemption authorized under Ohio law or nonfederal bankruptcy law." [In re Schramm, 431 B.R. 397, 400 \(B.A.P. 6th Cir. 2010\)](#).

[HN5](#) [\[↑\]](#) "The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." [Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367, 127 S. Ct. 1105, 1107, 166 L. Ed. 2d 956 \(2007\)](#) (internal quotation marks and citations omitted). "Exemptions further this policy goal by allowing a debtor to protect property which is necessary for the survival of both the debtor and the debtor's family." [In re Schramm, 431 B.R. at 400](#). "As such, exemptions are to be construed liberally in favor of the debtor." *Id.* (citing [Daugherty v. Cent. Trust Co. of Ne. Ohio, N.A., 28 Ohio St. 3d 441, 28 Ohio B. 492, 504 N.E.2d 1100, 1104-05 \(1986\)](#)). However, a liberal construction of the Ohio exemptions statute does not allow a court to enlarge the statute or strain its meaning. [Daugherty, 504 N.E.2d at 1105](#). The trustee, as [HN6](#) [\[↑\]](#) the objecting party, has the burden **[\*\*5]** of proving by a preponderance of the evidence that the exemption is not properly claimed. See [Fed. R. Bankr. P. 4003\(c\)](#); [In re Wengerd, 453 B.R. 243, 246 \(B.A.P. 6th Cir. 2011\)](#).

At issue here is whether *Ohio Revised Code* §§ 2329.66(A)(6)(c) and [3917.05](#) permit the debtor to exempt the proceeds of a group life insurance policy, originally issued by the debtor's employer and covering the life of the debtor's spouse, paid to the debtor as the beneficiary of his deceased spouse. *Section 2329.66* provides in pertinent part:

[HN7](#) [\[↑\]](#) (A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, **[\*817]** or sale to satisfy a judgment or order, as follows:

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....  
 (6) . . .  
 ....

(c) The person's interest in a policy of group insurance or the proceeds of a policy of group insurance, as exempted by [section 3917.05](#) of the Revised Code[.]

Ohio Revised Code § 2329.66(A)(6)(c). [Section 3917.05](#) provides:

[HN8](#) No policy of group insurance, nor the proceeds thereof, when paid to any employee thereunder, is liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law, to pay any liability **[\*\*6]** of such employee, his beneficiary, or any other person who may have a right thereunder, either before or after payment.

[Ohio Revised Code § 3917.05.](#)

While neither party addressed the issue, the Court needs to make a determination as to whether the beneficiary of a group life insurance policy must be a dependent of the deceased-insured for the exemption in [§ 3917.05](#) to apply. Several courts have read into §§ 2329.66(A)(6)(c) and [3917.05](#) a requirement that the beneficiary be a dependent of the deceased-insured. See [In re Lewis, 327 B.R. 645 \(Bankr. S.D. Ohio 2005\)](#); [In re North, 108 B.R. 180 \(Bankr. S.D. Ohio 1989\)](#); [Matter of Heins, 83 B.R. 504 \(Bankr. S.D. Ohio 1988\)](#).

*Heins* was apparently the first case to adopt the requirement that the beneficiary be a dependent of the deceased-insured for the exemption in [§ 3917.05](#) to apply. The *Heins* court reasoned that "[i]n order to understand [§ 3917.05](#), it must be read together with [§ 3911.10](#), the statute exempting a debtor's individual life insurance policy and its proceeds, and in the context of § 2329.66's general exemption scheme." [Heins, 83 B.R. at 505](#) (footnote omitted). The *Heins* court concluded that for the exemption in [§ 3917.05](#) to apply, **[\*\*7]** the beneficiary must be a dependent of the deceased-insured. *Id.* ("The insurance exemptions found at § 2329.66(A)(6)(c) & (d), i.e., [§§ 3911.10](#) and [3917.05](#), when read together, appear to provide protection to a debtor, a debtor's spouse, child or other dependent relative, or creditor named as beneficiary, thus primarily evidencing a legislative intent to benefit the insured debtor and those dependent upon him.").

In *North*, the court agreed with the decision in *Heins* and found its analysis "to be well reasoned and thorough." [North, 108 B.R. at 183](#). The *North* court rejected the argument by the debtor in its case that "the court in *Heins* inappropriately engrafted the dependency requirements of [O.R.C. \[§ 3911.10\]](#) and [11 U.S.C. § 522\(d\)\(1\)\(C\)](#) on [O.R.C. § 3917.05](#)." *Id.* (citation and internal quotation marks omitted). In explaining its reasoning for rejecting the debtor's argument, the *North* court characterized the debtor's assertion as conclusory and stated that "the Debtor failed to support the allegation with legal argument, case law, or legislative history." *Id.* ("The Court is not [persuaded] by mere conclusory remarks and, as such, the Debtor's motion is not well-taken.").

In *Lewis*, the **[\*\*8]** court agreed with *Heins* and *North* "that the intent of [Ohio Revised Code § 3917.05](#) is to protect the dependent beneficiaries of an employee by allowing an exemption pursuant to *Ohio Revised Code* §§ 2329.66(A)(6)(c) and [3917.05](#)." [Lewis, 327 B.R. at 650](#). The parties involved in *Lewis* "agreed that [the debtor] was a dependent at 'all times relevant' to the exemption issue." *Id.* (citation omitted). Therefore, the *Lewis* court would have had the same result whether it did, or **[\*\*818]** did not, challenge the conclusion in *Heins* and *North* that a beneficiary must be a dependent of the deceased-insured for the exemption in [§ 3917.05](#) to apply.

In [In re Fahey, 352 B.R. 288 \(Bankr. D. Colo. 2006\)](#), the court interpreted a Colorado statute exempting group life insurance policies with language similar to [Ohio Revised Code § 3917.05](#), see [Colo. Rev. Stat. Ann. § 10-7-205](#), and disagreed with the decision in *Heins*. The *Fahey* court was not persuaded that limiting "the scope of the exemption by adding a requirement that the beneficiary be a dependent of the insured" was warranted by the language of the statute. [Fahey, 352 B.R. at 295](#). "[L]anguage present in one statute should [not] be engrafted onto a separate statute **[\*\*9]** passed at a separate time." [Id. at 296](#) (citation omitted). The *Fahey* court further reasoned

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that "[i]t is within the discretion of the General Assembly to make a policy distinction between proceeds of group life insurance and proceeds of individual life insurance." *Id.*

After considering the cases discussed above, this Court is not persuaded by the analysis in *Heins* that [§ 3917.05](#) must be read together with [§ 3911.10](#). [HN9](#) There is nothing in [§ 3917.05](#) to suggest that [§ 3917.05](#) must be read together with [§ 3911.10](#). Further, if the Ohio legislature intended to limit the exemption to applying only to dependent beneficiaries, it could have done so by including the word "dependent" or other limiting language. See, e.g., *Ohio Revised Code* § 2329.66(A)(10)(b) (Exempting a debtor's right to receive payments from several enumerated sources on account of several enumerated factors "to the extent reasonably necessary for the support of the person and any of the person's dependents . . ."); see also [11 U.S.C. 522\(d\)\(11\)\(C\)](#) (Exempting a debtor's right to receive "a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's **[\*\*10]** death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."). Therefore, this Court finds that there is no requirement in §§ 2329.66(A)(6)(c) and [3917.05](#) that the beneficiary be a dependent of the deceased-insured.

[HN10](#) There are three requirements for the exemption in [§ 3917.05](#) to apply: (1) the insurance policy must be a "policy of group insurance," (2) the deceased person must be covered under the policy, and (3) the proceeds must be paid to "any employee thereunder."

1. *The insurance policy must be a "policy of group insurance."*

The debtor's life insurance policy constitutes a "policy of group insurance" under Ohio law. [HN11](#) [Section 3917.01](#) defines the forms of group life insurance that constitute policies of group insurance for purposes of the exemption contained in [§ 3917.05](#). Included among these forms of life insurance is continued group life insurance coverage to former employees and their dependents under [§ 3917.01\(G\)](#). [Section 3917.01\(G\)](#) provides:

[HN12](#) Life insurance that is written under a policy issued to a trustee under a trust established by an insurer for the purpose of providing continued group life insurance coverage to those former employees, **[\*\*11]** former members, or former members and the employees of such members, and their dependents, previously covered under policies of group life insurance issued by the insurer to employers or trustees pursuant to division (A) of this section, to associations pursuant to division (D) of this section, to trustees pursuant to division (E) of this section, or to groups pursuant to division **[\*819]** (I) of this section, and that is evidenced by the issuance of a certificate of insurance or other evidence of insurance to such former employees or members as required by [section 3917.06](#) of the Revised Code; provided that the amount of the continued life insurance coverage made available to a former employee or member and to the employee's or member's dependents shall not exceed the amount of the group life insurance coverage previously provided to the employee or member and the employee's or member's eligible dependents at the time of the employee's separation from employment or the member's termination of membership.

[Ohio Revised Code § 3917.01\(G\)](#).

Here, the group life insurance policy was originally provided to the debtor by his employer, Progressive, through MetLife. Upon the debtor's termination of employment **[\*\*12]** with Progressive, he received a letter allowing him to continue his group life insurance policy by electing the portability option. The debtor elected the portability option. On February 24, 2011, the debtor received a letter from MetLife indicating that his enrollment in the Group Portable Insurance coverage was accepted, and included a certificate of insurance listing the policyholder and the group policy number. Accordingly, the debtor's group life insurance policy falls within the definition of "group life insurance" under [§ 3917.01\(G\)](#).

The trustee's main argument is that for the exemption in [§ 3917.05](#) to apply, "somewhere in the mix should be an employee." (Trustee's Evidentiary Hearing Brief, at Page 8, Docket #58.) The trustee further asserts that "the MetLife policy covering the life of [the debtor's spouse] was not based on any [employer/employee] relationship." (*Id.*

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at 9.) This argument fails to recognize that the Metlife group life insurance policy covering the life of the debtor's spouse was originally provided by the debtor's employer and, therefore, the policy was originally created under an employer-employee relationship.

2. *The deceased person must be covered under the [\*\*13] policy.*

The debtor's deceased wife was properly covered under the life insurance policy under Ohio law. [Section 3917.03](#) provides in pertinent part:

[HN13](#) [↑] Any life insurance policy issued pursuant to [section 3917.01](#) of the Revised Code . . . may be extended to insure an employee's dependents or member's dependents, as defined by the policy, or any class or classes of dependents, subject to the following:

(A) The premium for the insurance shall be paid either from the funds contributed by the employer, union, association, or other person to whom the policy has been issued, or from funds contributed by the covered persons, or from both. Except as provided in division (B) of this section, a policy on which no part of the premium for the dependent's coverage is derived from funds contributed by the covered persons shall insure the dependents of all eligible employees or members, or a class or classes of dependents.

[Ohio Revised Code § 3917.03\(A\)](#). Here, the policy was properly extended to cover the life of the debtor's spouse, and the trustee does not argue otherwise.

3. *The proceeds must be paid to "any employee thereunder."*

[HN14](#) [↑] The third requirement for the exemption to apply is that the proceeds must [\*\*14] be paid to "any employee thereunder." The word "thereunder" refers to the group life insurance policy. Therefore, the proceeds must [\*\*820] be paid to "any employee" covered under the group life insurance policy.

This Court concurs with the courts that have interpreted the words "paid to any employee thereunder" to not require that the proceeds be paid directly to the deceased-insured, but merely paid on account of the insured person's death. See [In re McCall, 383 B.R. 419, 423 \(Bankr. N.D. Ohio 2007\)](#) ("[A] cogent reading of [§ 3917.05](#) holds that, so long as a debtor otherwise falls into a protected class, the proceeds of a group life insurance policy do not need to be paid directly to the insured-employee to be claimed as exempt under [§ 3917.05](#)."; [Fahey, 352 B.R. at 291](#) ("Construing the phrase as applying to a deceased employee would require the employee to receive policy proceeds upon or after his death, which would be impossible."); [Heins, 83 B.R. at 505](#) ("In the case before us, the trustee objects to the claimed exemption, asserting that since the proceeds of the policy were paid directly to the beneficiary and were not 'paid to any employee' as required by [§ 3917.05](#), the debtor is prohibited [\*\*15] from claiming the exemption. . . . The correct focus of the inquiry is whether [the debtor] is of the class intended to be protected by the insurance exemption provisions.").

In addition, the Court has no difficulty interpreting [§ 3917.05](#) to include group life insurance covering *former* employees as opposed to just current employees. First, [§ 3917.01\(A\)](#) indicates that a group life insurance policy may provide that "employees" include "retired employees" or "former employees." Second, it makes no sense that retired or former employees with continued group life insurance coverage under [§ 3917.01\(G\)](#) should be treated different from retired or former employees with group life insurance coverage under [§ 3917.01\(A\)](#), particularly when the choice between coverage under [§ 3917.01\(A\)](#) or [§ 3917.01\(G\)](#) will generally be up to the individual's former employer. Plus, the individual's age or poor health may be the reason why the person is no longer a current employee. From a policy standpoint, it makes little sense to take away an individual's exemption for group life insurance simply because the individual, although covered under a continued group life insurance policy, is no longer healthy enough [\*\*16] to remain a current employee. Therefore, the Court holds that [HN15](#) [↑] [§ 3917.05](#) includes group life insurance covering former employees under [§ 3917.01\(G\)](#).

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The question remains as to whether the debtor's deceased spouse qualifies as an "employee" for the purposes of the exemption in [§ 3917.05](#). [HN16](#) [↑] "The primary goal in statutory interpretation is to give effect to the intent of the legislature." [Bailey v. Republic Eng. Steels, Inc., 91 Ohio St. 3d 38, 40, 2001 Ohio 236, 741 N.E.2d 121, 123 \(2001\)](#) (citation omitted). "In determining legislative intent, the court first looks to the language of the statute." *Id.* (citation omitted). "A court must give effect to all words of the statute." [Bryan v. Hudson, 77 Ohio St. 3d 376, 380, 1997 Ohio 261, 674 N.E.2d 678, 680 \(1997\)](#) (citations omitted). "Further, unless there is ambiguity, legislative intent must be determined from the language of the statute itself." *Id.* (citations omitted). "Where the words of a statute are ambiguous, interpretation is necessary." [Bailey, 91 Ohio St. 3d at 40](#) (citation omitted). "Ambiguity exists if the language of the statute is susceptible of more than one reasonable interpretation." *Id.* (citation omitted).

If [§ 3917.05](#) is interpreted to require a strict **[\*\*17]** reading of the word "employee," [§ 3917.05](#) would require payment to someone after their death. Alternatively, if the word "employee" is interpreted as a mere oversight by the drafters and actually **[\*\*821]** means any person when used in "paid to any employee thereunder," then this interpretation would not explain why the word "employee" appears again later in the same statute - "to pay any liability of such employee . . . ." See [Ohio Revised Code § 3917.05](#). [HN17](#) [↑] [Section 3917.05](#) should be interpreted to give the word "employee" purpose; however, the meaning of the word "employee" in [§ 3917.05](#) is ambiguous. "In determining legislative intent when faced with an ambiguous statute, the court may consider several factors, including the object sought to be obtained, circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction." [Bailey, 91 Ohio St. 3d at 40](#) (citations omitted).

In order to properly interpret the intent of the Ohio legislature in using the word "employee" in [§ 3917.05](#), the Court will first consider the legislative history of [§ 3917.05](#). In *Fahey*, the court interpreted a Colorado exemption in group life insurance containing the **[\*\*18]** same phrase as [Ohio Revised Code § 3917.05](#) - "when paid to any employee thereunder." The *Fahey* court provided a well-researched summary of the process that led to several states enacting a group life insurance exemption with the same phrase - "when paid to any employee or employees thereunder":

By the early 1900's, labor unions had established mutual benefit societies in order to provide their members' families with death benefits. In response, large employers sought to obtain group life insurance policies that provided coverage for their employees. Insurance companies that attempted to meet this need were hampered by various state laws or regulations that prevented issuing insurance without a medical examination or prevented issuing insurance for a group at a lower premium rate than that charged for individual term insurance.

In 1917, the National Convention of Insurance Commissioners ("NCIC") formed a committee to study the matter and to establish uniform standards for group life insurance. At the 1918 NCIC Session, held in Denver, the committee presented its report, which was adopted without any remarks. The committee report set forth proposed standard statutory language defining **[\*\*19]** group life insurance and requiring policies to contain certain provisions. The report also included proposed statutory language that was intended to exempt the proceeds of group life insurance policies. The proposed exemption included the phrase "when paid to any employee or employees thereunder." See *Proceedings of the 49th Session* (Nat'l Convention of Ins. Comm'rs), Sept. 10-13, 1918, at 29.

[Fahey, 352 B.R. at 291.](#)

Effective on September 2, 1935, the Ohio legislature enacted an exemption for group life insurance policies with the phrase as proposed by the NCIC - "when paid to any employee or employees thereunder." See Ohio General Code § 9426-4. The Ohio legislature later amended the exemption, effective on October 1, 1953. The amendment deleted the words "or employees," and resulted in the language present in the current version of [§ 3917.05](#) - "when paid to any employee thereunder."

While the Court cannot find any cases that address whether the exemption applies when the deceased spouse is not the actual employee that purchased the policy, two cases that addressed the phrase "when paid to any employee" have given it a broad construction. See [Fahey, 352 B.R. at 297](#) ("The intent of the **[\*\*20]** General

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Assembly in enacting [Colo. Rev. Stat. Ann. § 10-7-205](#) was to protect the proceeds of group life insurance from the claims of creditors . . . **[\*822]** [and a] broad construction of the statute best accomplishes this intent.") (citations omitted); [In re Fadeley, 09-31575, 2011 Bankr. LEXIS 423, 2011 WL 350508 \(Bankr. W.D.N.C. Feb. 1, 2011\)](#) (rejecting its earlier interpretation in [In re Fick, 249 B.R. 108 \(Bankr. W.D.N.C. 2000\)](#), and agreeing with the interpretation in *Fahey*).

This Court agrees with the *Fahey* court's list of possible explanations for why the NCIC, and the states that later adopted the NCIC's proposed statutory language, used the phrase "when paid to any employee or employees thereunder." "The drafters could have intended to include the beneficiary in the reference to the employee." [Fahey, 352 B.R. at 297](#) (citing Note, *Some Economic and Legal Aspects of Group Insurance Policies*, 36 Colum. L. Rev. 89, 96 (1936) ("Treating as a unity the employee and his beneficiary, the courts have generally considered the setup as triangular [insurer-employer-employee] rather than four-cornered [insurer-employer-employee-beneficiary].")). "Or, the drafters could have used the phrase to distinguish the situation **[\*\*21]** in which the proceeds were paid to the employer or a specific creditor." [Fahey, 352 B.R. at 297](#) (citation omitted). Or, "[t]he drafters could have intended the phrase to apply to the timing of the exemption, to make clear that the exemption was available when the proceeds were paid." [Fahey, 352 B.R. at 297](#). In addition, by using the word "any," in "any employee or employees thereunder," the drafters could have intended to include the scenario where more than one person would qualify as an "employee" for the purposes of the exemption.

[HN18](#) After considering the legislative history of [§ 3917.05](#), other courts' interpretations of the same phrase in their group life insurance exemption, and alternative interpretations of the word "employee," this Court believes that the word "employee" is used in [§ 3917.05](#) to communicate that the group life insurance policy must be originally provided by an employer to an employee. Once that policy is provided to the employee, anyone that is properly added to that policy under [§ 3917.03](#) qualifies as an "employee thereunder." This interpretation also avoids the absurd result of group life insurance proceeds literally "paid to any employee thereunder" as a beneficiary **[\*\*22]** not being exempt under [§ 3917.05](#). For example, in the present case, the proceeds of the group life insurance were paid to a former employee - *i.e.*, the debtor - as a beneficiary of the continued group life insurance coverage for former employees and their dependents under [§ 3917.01\(G\)](#). Therefore, the Court finds that [§ 3917.05](#) exempts all group life insurance policies, originally provided by an employer to an employee and covering the life of the actual employee or former employee and anyone properly added to the policy under [§ 3917.03](#). Here, the debtor's deceased-spouse qualifies as an "employee" under [§ 3917.05](#) because the group life insurance policy was originally provided by Progressive to the debtor, and the policy was properly extended under [§ 3917.03](#) to cover the debtor's spouse.

#### CONCLUSION

For the foregoing reasons, the Court overrules the trustee's amended objection to the debtor's claim of exemption (Docket #17).

IT IS SO ORDERED.

**The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on July 22, 2013, which may be different from its entry on the record.**

**IT **[\*\*23]** IS SO ORDERED.**

**Dated: July 22, 2013**

/s/ Arthur I. Harris

**ARTHUR I. HARRIS**

**UNITED STATES BANKRUPTCY JUDGE**

In re Frederick

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## [Lakhi v. Meritra Health Care, LLC](#)

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

February 13, 2025, Rendered

No. 24AP-98

### Reporter

2025-Ohio-466 \*; 2025 Ohio App. LEXIS 454 \*\*; 2025 LX 259403

Rani Lakhi, Plaintiff-Appellant, v. Meritra Health Care, LLC, et al., Defendants-Appellees.

**Prior History:** **[\*\*1]** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 19CV-554).

[Lakhi v. Meritra Health Care LLC, 2024 Ohio Misc. LEXIS 1 \(Ohio C.P., Jan. 29, 2024\)](#)

**Disposition:** Judgment affirmed.

## Core Terms

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life insurance policy, garnishment, exempt, trial court, beneficiary, life insurance, insured person, cash value, spouse, magistrate's decision, statutory language, judgment debtor, public policy, unambiguous, premium

## Case Summary

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### Overview

#### Key Legal Holdings

- [R.C. 3911.10](#) exempts the cash values of life insurance policies of judgment debtors from garnishment, even when the insured person and beneficiary are co-debtors of the same creditor.
- A garnishment order binds only the property of the judgment debtor in the garnishee's possession at the time of service of the order.
- To claim the garnishment exemption under [R.C. 3911.10](#), a judgment debtor must prove that their life insurance policy remains in effect.
- The trial court properly adopted the magistrate's decision concluding that the cash values of the appellees' life insurance policies were exempt from garnishment under [R.C. 3911.10](#) because the contracts at issue were individual contracts of life insurance that fell squarely within the coverage of [R.C. 2329.66\(A\)\(6\)\(b\)](#) and [3911.10](#); the policies of appellees were contracts of life insurance, and they were consequently taken out "on the life of" appellees; and all the life insurance policies were "for the benefit of" the spouses of appellees at the time of garnishment.

#### Material Facts

- Appellant obtained a judgment against appellees for \$1,126,124.70.

Matthew Schaeffer

## Lakhi v. Meritra Health Care, LLC

- Appellant garnished the cash values of appellees' life insurance policies.
- At the time of garnishment, appellees' spouses were the primary beneficiaries of their life insurance policies, except for appellee Veerla, who changed his beneficiary to his children after the garnishment order but before service on the garnishee.
- Appellees testified that their life insurance policies remained in effect and provided evidence to support their claims.

**Controlling Law**

- *R.C. 2329.66(A)(6)(b)* - Exempts a person's interest in life insurance contracts from execution, garnishment, attachment, or sale to satisfy a judgment.
- [R.C. 3911.10](#)- Exempts life insurance contracts and proceeds from claims of creditors of the insured person when the policy is payable to the spouse or children of the insured.
- [R.C. 2716.13\(B\)](#) - A garnishment order binds the property of the judgment debtor in the garnishee's possession at the time of service.

**Court Rationale**

The trial court properly adopted the magistrate's decision concluding that the cash values of the appellees' life insurance policies were exempt from garnishment under [R.C. 3911.10](#) because, the trial court determined that, based on the evidence presented, appellees proved their life insurance policies remained in effect. The court refused to rewrite the statute based on policy considerations. Regarding the change of beneficiary, the court held that under [R.C. 2716.13\(B\)](#), a garnishment order only binds property in the garnishee's possession at the time of service. Since the change occurred before service, it was valid. The court found that appellees provided sufficient evidence to prove their life insurance policies remained in effect, meeting the requirements for the [R.C. 3911.10](#) exemption.

**Outcome****Procedural Outcome**

The Court of Appeals overruled appellant's assignment of error and affirmed the judgment of the Franklin County Court of Common Pleas, which adopted the magistrate's decision that appellees' life insurance policies were exempt from garnishment under R.C. 3911.10.

**LexisNexis® Headnotes**

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Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

**[HN1](#)  Standards of Review, De Novo Review**

Interpretation of a statute is a question of law that courts review de novo. When statutory language is unambiguous, it must be applied as written, without resort to rules of statutory interpretation or considerations of public policy.

Lakhi v. Meritra Health Care, LLC

Governments &gt; Legislation &gt; Interpretation

**[HN2](#)**  **Legislation, Interpretation**

Courts may resort to considerations of public policy only after finding ambiguity in the language of a statute.

Bankruptcy Law &gt; Exemptions &gt; State Law Exemptions &gt; Specific Exemptions

Insurance Law &gt; ... &gt; Life Insurance &gt; Beneficiaries &gt; Creditors Rights Limitations

**[HN3](#)**  **State Law Exemptions, Specific Exemptions**

A federal bankruptcy appellate panel identified four requisite elements of the [Ohio Rev. Code Ann. § 3911.10](#) exemption: (1) the contract must be the proper type of insurance policy; (2) the policy must be on the life of the person; (3) the contract must be for the benefit of one of several categories of people, including the insured's spouse; and (4) if the first three factors are met, then the contract and any proceeds or avails will be protected from the claims of the creditors of the insured person.

Bankruptcy Law &gt; Exemptions &gt; State Law Exemptions &gt; Specific Exemptions

Family Law &gt; ... &gt; Property Distribution &gt; Classification &gt; Insurance Benefits

Insurance Law &gt; Types of Insurance &gt; Life Insurance &gt; Assignments &amp; Transfers

Insurance Law &gt; ... &gt; Life Insurance &gt; Beneficiaries &gt; Creditors Rights Limitations

**[HN4](#)**  **State Law Exemptions, Specific Exemptions**

[Ohio Rev. Code Ann. § 3911.10](#) encompasses life insurance policies taken out for the benefit of the spouse or children of the insured person.

Governments &gt; Legislation &gt; Interpretation

**[HN5](#)**  **Legislation, Interpretation**

It is not a court's function to rewrite a statute to express an intent that the legislature did not include, even if it is believed that the legislature intended to carve out an exception.

Business &amp; Corporate Compliance &gt; Bankruptcy &gt; Case Administration

Bankruptcy Law &gt; Case Administration

Civil Procedure &gt; Judgments &gt; Enforcement &amp; Execution &gt; Garnishment

Civil Procedure &gt; Remedies &gt; Provisional Remedies &gt; Garnishment

**[HN6](#)**  **Bankruptcy Law, Case Administration**

Lakhi v. Meritra Health Care, LLC

[Ohio Rev. Code Ann. § 2716.13\(B\)](#) states that a garnishment order shall bind the property of the judgment debtor in the possession of the garnishee at the time of service.

Governments > Legislation > Interpretation

[HN7](#) [↓] **Legislation, Interpretation**

Courts have a duty to apply unambiguous statutory language as it is written, even when public policy considerations might suggest a different interpretation.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN8](#) [↓] **Standards of Review, Abuse of Discretion**

Where there is evidence to support a factual determination by the trial court, it will not be disturbed on appeal absent an abuse of discretion. A trial court abuses its discretion where its attitude is unreasonable, arbitrary, or unconscionable.

Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

[HN9](#) [↓] **State Law Exemptions, Election of Exemptions**

The exemption of [Ohio Rev. Code Ann. § 3911.10](#) applies only to life insurance policies that remain in effect, pertaining only to contracts of life insurance which may hereafter mature.

Bankruptcy Law > Exemptions > State Law Exemptions > Election of Exemptions

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Civil Procedure > Judgments > Enforcement & Execution > Exemptions From Execution

Insurance Law > ... > Life Insurance > Beneficiaries > Creditors Rights Limitations

Insurance Law > ... > Life Insurance > Settlements > Viatical Settlements

[HN10](#) [↓] **State Law Exemptions, Election of Exemptions**

The exemption of [Ohio Rev. Code Ann. § 3911.10](#) is not limited to whole life insurance policies—it broadly exempts all contracts of life insurance from creditors of the insured person.

**Counsel:** On brief: Allen Stovall Neuman & Ashton LLP, Todd H. Neuman, and Jeffrey R. Corcoran, for appellant.

Argued: Todd H. Neuman.

**Judges:** LELAND, J. DORRIAN and EDELSTEIN, JJ., concur.

Lakhi v. Meritra Health Care, LLC

Opinion by: LELAND

## Opinion

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(REGULAR CALENDAR)

DECISION

LELAND, J.

**[\*P1]** Plaintiff-appellant, Rani Lakhi, appeals a decision of the Franklin County Court of Common Pleas that overruled appellant's objection and adopted the magistrate's decision. The magistrate's decision concluded (1) Ohio law exempts from garnishment the cash values of the life insurance policies of judgment debtors Chandra Veerla, Pavani Baddam, and Niranjana Patel (collectively "appellees"); (2) Veerla's change of beneficiary was valid and effective; and (3) appellees satisfied their respective burdens of proof to claim the [R.C. 3911.10](#) exemption.

### I. Facts and Procedural History

**[\*P2]** On September 20, 2021, the Franklin County Court of Common Pleas in a prior case granted appellant's motion for summary judgment, finding appellees liable for \$1,126,124.70 plus interest. See [Lakhi v. Meritra Health Care, LLC, 2022-Ohio-3062, ¶ 11 \(10th Dist.\)](#). On September 1, 2022, this court affirmed the trial court's judgment. [Id. at ¶ 47](#). On September 20, 2022, appellant commenced garnishments on **[\*\*2]** funds held by the life insurance companies of each appellee, including the cash value of each appellee's life insurance policy.

**[\*P3]** At the time the trial court issued the garnishment order, on September 20, 2022, the spouse of each appellee was the primary beneficiary of the corresponding appellee's life insurance policy. Veerla, however, changed his life insurance policy's beneficiary from his wife to his children on September 29, 2022. On November 14, 2022, the September 20, 2022 garnishment order was served on Veerla's insurer, New York Life Insurance Company ("New York Life").

**[\*P4]** The trial court held on deposit the various cash values of appellees' life insurance policies. On December 5, 2022, garnishee New York Life deposited with the trial court \$103,796.00, Veerla's interest in his life insurance policy, and \$38,916.36, Baddam's interest in her life insurance policy. On December 13, 2022, garnishee Penn Mutual Insurance and Annuity Company ("Penn Mutual") likewise deposited \$21,472.50, Patel's interest in his life insurance policy. Veerla did not oppose the garnishment of his brokerage or bank accounts.

**[\*P5]** On January 20, 2023, the magistrate held a hearing pursuant to [R.C. 2716.13](#). Appellees Veerla **[\*\*3]** and Baddam testified at the hearing. Jagruti Patel, the spouse of appellee Niranjana Patel, also testified. Veerla attested he did not default on his life insurance premiums and that his policy was therefore never surrendered. Jagruti Patel claimed, based on her knowledge of payments made from a joint bank account she shared with her husband, that her husband's life insurance premiums have been timely paid. The parties stipulated to the fact that Jagruti Patel was the beneficiary of appellee Patel's life insurance policy. Baddam testified next, confirming that although she stopped paying the premiums on her whole life insurance policy in June 2022, New York Life converted her existing policy to an extended-term policy extending into 2036. New York Life paid the new policy's premiums using the cash value of the previous whole life insurance policy. Baddam's testimony thus revealed she retained an extended-term life insurance policy at the time the garnishment order was served on New York Life on November 14, 2022.

**[\*P6]** On February 6, 2023, the magistrate filed a decision that found [R.C. 2329.66\(A\)\(6\)\(b\)](#) and [3911.10](#) exempted from garnishment each appellee's interest in his or her life insurance policy, including the **[\*\*4]** interest in the cash value of each policy. Further, the magistrate's decision held that because a garnishment order does not create a lien on a debtor's property until notice is served on the garnishee, Veerla's September 29, 2022 change of

Lakhi v. Meritra Health Care, LLC

beneficiary from his wife to his children was valid and effective. The magistrate concluded that all appellees met their burdens of proof to claim the garnishment exemption.

**[\*P7]** On March 24, 2023, appellant objected to the magistrate's decision. On January 29, 2024, the trial court issued a judgment in which it overruled appellant's objection and adopted the magistrate's decision. Appellant timely appeals.

## II. Assignment of Error

**[\*P8]** Appellant assigns the following error for our review:

The trial court erred in entering the January 29, 2024, *Decision and Entry Overruling Plaintiff's Objection on the Magistrate's Decision and Decision and Entry Adopting the Magistrate's Decision*.

(Emphasis in original.)

## III. Analysis

**[\*P9]** Taken literally, appellant asserts error only in the entry of the trial court's judgment. Appellant's brief, however, raises four issues with the substance of the trial court's judgment. First, appellant contends [R.C. 3911.10](#) does not provide an exemption from **[\*\*5]** garnishment of a life insurance policy in cases where both the insured and the beneficiary are debtors of the same creditor.

**[\*P10]** [HN1](#) Interpretation of a statute is a question of law we review de novo. [State ex rel. Peregrine Health Servs. of Columbus, LLC v. Sears, 2020-Ohio-3426, ¶ 23 \(10th Dist.\)](#), citing [Silver Lining Grp. EIC Morrow Cty. v. Ohio Dep't of Educ. Autism Scholarship Program, 2017-Ohio-7834, ¶ 33, 85 N.E.3d 789 \(10th Dist.\)](#). Courts "are not authorized to ignore statutory language. 'When statutory language is unambiguous, it must be applied as written, without resort to rules of statutory interpretation or considerations of public policy.'" [Elliot v. Durrani, 171 Ohio St. 3d 213, 2022-Ohio-4190, ¶ 19, 216 N.E.3d 641](#), quoting [State ex rel. Paluch v. Zita, 141 Ohio St. 3d 123, 2014-Ohio-4529, ¶ 13, 22 N.E.3d 1050](#).

**[\*P11]** Here, appellant calls our attention to two statutes that, in concert, exempt life insurance policies from garnishment, [R.C. 2329.66\(A\)\(6\)\(b\)](#) and [3911.10](#). [R.C. 2329.66\(A\)\(6\)\(b\)](#) states "[e]very person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: . . . [t]he person's interest in contracts of life or endowment insurance or annuities, as exempted by [section 3911.10 of the Revised Code](#)." [R.C. 3911.10](#), in relevant part, provides:

All contracts of life or endowment insurance . . . or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person . . . shall be held, together with the proceeds **[\*\*6]** or avails of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person.

Appellant seeks an exception to the general exemption in [R.C. 3911.10](#) for cases like the present one, in which the insured person and the beneficiary of a life insurance policy are co-debtors of the same creditor. Under these circumstances, appellant believes the law should allow creditors to garnish the cash values of such life insurance policies. [HN2](#) As already noted, however, we may resort to considerations of public policy only after finding ambiguity in the language of the statute. See [Durrani at ¶ 19](#). We turn first to comprehending the statutory text.

**[\*P12]** [HN3](#) A federal bankruptcy appellate panel identified four requisite elements of the [R.C. 3911.10](#) exemption: (1) "the contract must be the proper type of insurance policy"; (2) "the policy . . . must be on the life of the person"; (3) "the contract must be for the benefit of one of several categories of people, including the insured's spouse"; and (4) if the first three factors are met, "then the contract and any proceeds or avails will be protected from the claims of the creditors of the insured person." [In re Schramm, 431 B.R. 397, 402 \(6th Cir. 2010\)](#). Firstly,

Lakhi v. Meritra Health Care, LLC

the contracts at issue here **[\*\*7]** are individual contracts of life insurance that fall squarely within the coverage of *R.C. 2329.66(A)(6)(b)* and [3911.10](#). Secondly, the policies of appellees are contracts of life insurance, and they are consequently taken out "on the life of" appellees. *Id.* Thirdly, all the life insurance policies here were "for the benefit of" the spouses of appellees at the time of garnishment. *Id.* [HN4](#) Even if we accounted for Veerla's eventual change of beneficiary to his children, the statute encompasses life insurance policies "taken out for the benefit of . . . the spouse or children" of the insured person. *R.C. 3911.10*. The first three factors being satisfied, Ohio law exempts appellees' life insurance contracts from the claims of their creditors. [HN5](#) Even if appellant believes the Ohio General Assembly intended to carve out an exception for joint debtors from the *R.C. 3911.10* exemption, "it is not a court's function to rewrite a statute to express that intent." *In re Schramm at 403*, quoting *In re Huth, 1998 Bankr. LEXIS 856, \*6 (N.D. Ohio June 30, 1998)*.

**[\*P13]** Although appellant seizes on the outcome of *In re Schramm*, she ignores how that case involved the proceeds of a life insurance policy and the claims of creditors of the policy's beneficiary. Appellant's reliance on *In re Schramm* is unavailing because, here, appellees are the insured **[\*\*8]** persons, not the beneficiaries. Furthermore, as the life insurance policies now before us have yet to mature, there are no proceeds for appellant to garnish. See *Huntington Nat'l Bank v. Winter, 2011-Ohio-1751, ¶ 25 (1st Dist.)* ("[T]he proceeds of the [life insurance] contract come into existence when the contract matures—either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract."). The factual context of *In re Schramm* is thus largely irreconcilable with the present case.

**[\*P14]** Appellant next disputed the holding of *In re Bess, 40 B.R. 509 (Bankr. S.D. Ohio 1984)*, that, in regard to *R.C. 3911.10*, "[t]he legislature . . . has not made an exception in its insurance exemption for joint debtors." *In re Bess at 511*. Appellant, however, cites no textual support for her preferred reading of *R.C. 3911.10*, and the statute provides no explicit exception for joint debtors. If the Ohio legislature wanted to make such an exception, it would have said so. Regardless of this court's policy preferences, the text of *R.C. 3911.10* is not amenable to more than one interpretation. We are therefore obligated to apply this unambiguous law as it is written. Accordingly, *R.C. 3911.10* prohibits appellant from garnishing the cash values of appellees' life insurance policies. The trial court did not err as to appellant's first issue. **[\*\*9]**

**[\*P15]** Second, appellant argues appellee Veerla's post-garnishment change in beneficiary, from his wife to his children, was void. While our resolution of the first issue renders this second issue moot, we will nevertheless address appellant's argument. A timeline of the relevant events is instructive here. On September 20, 2022, the trial court issued the garnishment order. On September 29, 2022, Veerla changed his life insurance policy's beneficiary from his wife to his children. Then, on November 14, 2022, the garnishment order was served on New York Life, Veerla's insurer.

**[\*P16]** [HN6](#) Ohio law states that a garnishment order "shall bind the property . . . of the judgment debtor in the possession of the garnishee at the time of service." *R.C. 2716.13(B)*; see *Januzzi v. Ford Motor Co., 1990 Ohio App. LEXIS 1880, \*4, 3 Anderson's Ohio App. Cas. 250 (9th Dist. May 16, 1990)* ("The order binds the property of the judgment debtor in the garnishee's possession from the time of service."). On this basis, Veerla was free to change the beneficiary of his life insurance policy up until November 14, 2022, the date on which the garnishee, New York Life, received notice of the garnishment order. Veerla made the change on September 29, 2022. *R.C. 2716.13(B)* thus did not bar Veerla from making this adjustment. [HN7](#) Though appellant insists public policy demands **[\*\*10]** a reinterpretation of *R.C. 2716.13(B)*, it is this court's duty to apply unambiguous statutory language as it is written. *Durrani at ¶ 19*. Accordingly, the trial court did not err as to appellant's second issue.

**[\*P17]** Third, appellant claims a judgment debtor must prove his or her life insurance policy remains in effect in order to claim the garnishment exemption of *R.C. 3911.10*. Appellant's fourth issue asserts two of the three appellees, Baddam and Patel, failed to present evidence that their life insurance policies remained in effect. We will address these interrelated issues together.

**[\*P18]** The trial court determined that, based on the evidence presented, appellees proved their life insurance policies remained in effect. [HN8](#) "It is axiomatic that, where there is evidence to support a factual determination by the trial court, it will not be disturbed on appeal absent an abuse of discretion." *Fiscarelli v. Johnson, 1996 Ohio*

Lakhi v. Meritra Health Care, LLC

[App. LEXIS 1368, \\*3 \(10th Dist. Mar. 29, 1996\)](#), citing [Booth v. Booth, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 \(1989\)](#). A trial court abuses its discretion where its "attitude is unreasonable, arbitrary[,] or unconscionable." [Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 \(1983\)](#), citing [Steiner v. Custer, 137 Ohio St. 448, 31 N.E.2d 855 \(1940\)](#), [Conner v. Conner, 170 Ohio St. 85, 162 N.E.2d 852 \(1959\)](#), and [Chester Township v. Geauga Cty. Budget Comm., 48 Ohio St.2d 372, 358 N.E.2d 610 \(1976\)](#).

**[\*P19]** [HN9](#)<sup>↑</sup> Appellant correctly posits the exemption of [R.C. 3911.10](#) applies only to life insurance policies that remain in effect. See [R.C. 3911.10](#) (pertaining only to "contracts of life . . . insurance . . . which may hereafter mature"). The magistrate **[\*\*11]** considered the relevant evidence during the January 20, 2023 hearing and concluded all appellees met their burdens of proof to claim the garnishment exemption. In other words, the magistrate found the appellees proved their life insurance policies remained in effect. Appellant alleges Baddam surrendered her whole life insurance policy, but appellant also admits the policy's cash value was then used by New York Life to pay for an extended term life insurance policy. [HN10](#)<sup>↑</sup> The exemption of [R.C. 3911.10](#) is not limited to whole life insurance policies—it broadly exempts "[a]ll contracts of life . . . insurance" from creditors of the insured person. [R.C. 3911.10](#). Thus, even appellant acknowledges appellee Baddam held an active life insurance policy at the time of garnishment.

**[\*P20]** Next, appellant calls into question the status of appellee Patel's life insurance policy because it was his wife Jagruti Patel, rather than the appellee himself, who testified at the hearing before the magistrate. Regardless, the magistrate could have properly considered the following evidence: (1) Jagruti Patel's testimony that, based on her firsthand observations, she and appellee Patel "always" paid the premiums to Penn Mutual via automatic **[\*\*12]** withdrawals from their joint bank account; (2) garnishee Penn Mutual deposited \$21,472.50 with the trial court, representing Patel's interest in his life insurance policy; and (3) a stipulation by the parties that Jagruti Patel was the beneficiary of appellee Patel's Penn Mutual life insurance policy. (Tr. at 60-61; 67.) On this record, the trial court could find appellee Patel maintained a life insurance policy with Penn Mutual that remained in effect at the time of the garnishment order.

**[\*P21]** The record thus supports the trial court's findings that appellees maintained active life insurance policies at all relevant times, and for that reason appellees properly claimed the [R.C. 3911.10](#) exemption. Having discovered nothing "unreasonable, arbitrary[,] or unconscionable" in the trial court's findings of fact, we determine the trial court did not abuse its discretion. [Blakemore at 219](#). Accordingly, the trial court did not err as to appellant's third and fourth issues.

#### IV. Conclusion

**[\*P22]** Based on the foregoing, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

DORRIAN and EDELSTEIN, JJ., concur.

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## [Huntington Nat'l Bank v. Winter](#)

Court of Appeals of Ohio, First Appellate District, Hamilton County

April 13, 2011, Date of Judgment Entry on Appeal

APPEAL NO. C-090482

### Reporter

2011-Ohio-1751 \*; 2011 Ohio App. LEXIS 1537 \*\*; 2011 WL 1378727

HUNTINGTON NATIONAL BANK and MERCHANTS BANK & TRUST CO., Plaintiffs-Appellees, vs. STEVEN A. WINTER and FIVE STAR FINANCIAL CORPORATION, Defendants-Appellants.

**Subsequent History:** Discretionary appeal not allowed by [Huntington Nat'l Bank v. Winter, 2011 Ohio 5129, 2011 Ohio LEXIS 2428 \(Ohio, Oct. 5, 2011\)](#)

**Prior History:** **[\*\*1]** Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. EX-0800603

**Disposition:** Reversed.

## Core Terms

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life insurance policy, premiums, exemption, cash value, policies, garnish, transferred, fraudulent, proceeds, assigned error, trial court, defraud, surrender, matured, insurance policy, insured

## Case Summary

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### Procedural Posture

Appellee banks obtained judgments against appellant debtor in the Hamilton County Court of Common Pleas (Ohio). The banks attempted to partially satisfy the judgments by serving writs of execution on the debtor's insurance company to garnish the cash value of his life insurance policies. The debtor objected to the writs. The court found that the banks could execute on the cash value of the life insurance policies. The debtor appealed.

### Overview

The debtor defaulted on promissory notes and certain credit obligations owed to the banks. Thereafter, the debtor and his wife retained an attorney to form a revocable trust. Both the debtor and the attorney admitted in their depositions that the trust was created to protect the debtor's money from potential garnishment and execution. The attorney, acting as the trustee, paid an insurance company from the trust to cover the yearly premiums of the debtor's life insurance policies. On appeal, the court found that the banks were not required to file a separate motion asserting that the debtor had paid his premiums to defraud his creditors. Additionally, there was sufficient evidence to demonstrate the debtor's fraud under [R.C. 1336.04\(B\)](#). However, because the beneficiaries of the life insurance policies were the debtor's wife and children, and because the life insurance policies had not reached maturity, the exemption to the execution on life insurance policies contained in [R.C. 3911.10](#) was applicable and the trial court erred by permitting the banks to execute on the debtor's whole-life insurance policies.

### Outcome

The judgment was reversed.

Matthew Schaeffer

Huntington Nat'l Bank v. Winter

**LexisNexis® Headnotes**

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Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value

**[HN1](#) [↓] Enforcement & Execution, Garnishment**

[R.C. 3911.10](#) provides that the proceeds of a life insurance policy are exempt from execution except for the amount of the premiums for the policies that were paid to defraud creditors.

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Real Property Law > Purchase & Sale > Fraudulent Transfers

**[HN2](#) [↓] Enforcement & Execution, Fraudulent Transfers**

See [R.C. 1336.04\(A\)\(1\)](#).

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Evidence > Burdens of Proof > Allocation

Real Property Law > Purchase & Sale > Fraudulent Transfers

**[HN3](#) [↓] Enforcement & Execution, Fraudulent Transfers**

Because actual intent may be difficult to prove, a creditor may establish a debtor's fraudulent intent when the circumstances demonstrate the badges of fraud set forth in [R.C. 1336.04\(B\)](#). The creditor need not demonstrate all the statutorily defined badges of fraud; as few as three badges of fraud have been held to constitute evidence of actual fraudulent intent.

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Real Property Law > Purchase & Sale > Fraudulent Transfers

**[HN4](#) [↓] Enforcement & Execution, Fraudulent Transfers**

The badges of fraud set forth [R.C. 1336.04\(B\)](#) include, but are not limited, to the following: (1) whether the transfer or obligation was to an insider; (2) whether the debtor retained possession or control of the property transferred after the transfer; (3) whether the transfer or obligation was disclosed or concealed; (4) whether before the transfer

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was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) whether the transfer was of substantially all of the assets of the debtor; (6) whether the debtor absconded; (7) whether the debtor removed or concealed assets; (8) whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) whether the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value


[HN5](#)  **Enforcement & Execution, Fraudulent Transfers**

Under [R.C. 3911.10](#), even if a debtor had paid his premiums to an insurance company to defraud his creditors, the creditors are still prevented from garnishing the cash value of the policies until the policies have matured, which would only occur upon his death or when he voluntarily accepts the cash surrender value of the policies.

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value

[HN6](#)  **Enforcement & Execution, Garnishment**

See [R.C. 3911.10](#).

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value

[HN7](#)  **Enforcement & Execution, Garnishment**

[R.C. 3911.10](#) limits a creditor's recovery of fraudulently paid premiums to the proceeds of the life-insurance contract. The few courts who have considered [R.C. 3911.10](#), or its former version, have held that the proceeds of the contract come into existence when the contract matures—either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract.

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

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Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value

#### [HN8](#) **Enforcement & Execution, Fraudulent Transfers**

It was the Ohio Legislature's intent on life insurance policies to limit the recovery of premiums paid in fraud of creditors to the funds arising upon the maturity of the contract and this fund may arise by the insured voluntarily accepting the cash surrender value of the policies or upon the death of the insured.

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

Governments > Legislation > Interpretation

Insurance Law > Types of Insurance > Life Insurance > Assignments & Transfers

Governments > Legislation > Statutory Remedies & Rights

Insurance Law > Types of Insurance > Life Insurance > Cash Surrender Value

#### [HN9](#) **Enforcement & Execution, Garnishment**

[R.C. 3911.10](#) is an exemption statute that is to be construed in favor of the debtor.

**Counsel:** Kohnen & Patton LLP and Louis C. Schneider, for Plaintiff-Appellee Huntington National Bank.

Thompson Hine LLP and Bryce A. Lenox, for Plaintiff-Appellee Merchants Bank & Trust

Steven A. Winter, Pro se.

**Judges:** HILDEBRANDT, Presiding Judge. SUNDERMANN and FISCHER, JJ., concur.

**Opinion by:** HILDEBRANDT

## Opinion

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**HILDEBRANDT, Presiding Judge.**

**[\*P1]** Bringing forth four assignments of error, defendants-appellants, Steven Winter and his company, Five Star Financial Corporation, (collectively, "Winter") appeal the trial court's judgment granting Winter's creditors, plaintiffs-appellees Huntington National Bank and Merchants Bank & Trust Co. (collectively, "the Banks"), the right to garnish the cash values of Winter's life insurance policies. For the following reasons, we reverse.

**[\*P2]** In 2007, Winter had defaulted on promissory notes and certain credit obligations owed to the Banks. Thereafter, in October 2007, Winter and his wife, Sarah, retained Leo Grote to form a revocable trust titled "The Winter Family Trust." Grote stated that the trust was funded with \$700,000 from a payoff on a mortgage loan, \$650,000 in cashier's checks made payable to Sarah **[\*\*2]** Winter, which she endorsed over to the trust, and \$150,000 drawn on a line of credit from one of the Banks. Both Grote and Winter admitted in their depositions that the trust was created to protect Winter's money from potential garnishment and execution.

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**[\*P3]** In November 2007, Grote, acting as the trustee, paid The Prudential Insurance Company of America ("Prudential") \$144,000 from the trust to cover the yearly premiums of Winter's life insurance policies. Fourteen of the 16 life insurance policies were whole-life insurance policies with a total cash value of approximately \$133,000. The beneficiaries of the life insurance policies were Winter's wife and children. Winter had maintained these policies for many years.

**[\*P4]** In early 2008, the Banks obtained judgments against Winter and attempted to partially satisfy those judgments by serving writs of execution on Prudential to garnish the cash value of Winter's life insurance policies. Winter objected to the writs of execution, arguing that [R.C. 3911.10](#), which exempts the proceeds of life insurance policies from claims of creditors, applied. But the Banks argued that [R.C. 3911.10](#) made an exception to its exemption when an insured had paid the **[\*\*3]** insurance premiums to defraud its creditors.

**[\*P5]** Following a hearing on Winter's objections, a magistrate determined that the exemption contained in [R.C. 3911.10](#) was not applicable because Winter had paid his premiums to defraud his creditors, and that the Banks could therefore execute on the cash value of the life insurance policies. The trial court adopted the magistrate's decision. This appeal followed. Because the beneficiaries of the life insurance policies were Winter's wife and children, and because the life insurance policies had not reached maturity, we hold that the exemption to the execution on life insurance policies contained in [R.C. 3911.10](#) was applicable and that the trial court erred by permitting the Banks to execute on Winter's whole-life insurance policies.

**[\*P6]** In the first assignment of error, Winter contends that the trial court erred by permitting the Banks to garnish the cash value of Winter's life insurance policies absent the filing of a motion by the Banks to set aside a fraudulent transfer. We are unpersuaded.

**[\*P7]** Winter, citing *Civ.R. 6(D)* and *Loc.R. 14 of the Hamilton County Court of Common Pleas*, maintains that the Banks should have been required to file a motion **[\*\*4]** alleging that the trust funds paid into the policies had been fraudulently transferred to Prudential so that he would have had proper notice that the Banks were going to allege fraud at the exemption hearing. We find this argument disingenuous because Winter was the one who had requested the exemption hearing, but had failed to specify on the hearing-request form which property was exempt and why it was exempt. Nevertheless, at the hearing before the magistrate, he specifically stated that the life insurance policies were exempt from garnishment under [R.C. 3911.10](#). [HN1](#) [R.C. 3911.10](#) provides that the proceeds of a life insurance policy are exempt from execution except for the amount of the premiums for the policies that were paid to defraud creditors. Surely, Winter knew or should have known when he raised this exemption that the Banks would raise the issue of fraud. Further, Winter never asked for a continuance so that he could present witnesses or evidence demonstrating that he did not pay the premiums fraudulently. Although we are convinced that the Banks were not required to file a separate motion asserting that Winter had paid his premiums to defraud his creditors, we would hold, even **[\*\*5]** if they were required to do so, that Winter was not prejudiced by the absence of a separate motion. <sup>1</sup> Accordingly, the first assignment of error is overruled.

**[\*P8]** In the second assignment of error, Winter maintains that the trial court erred by allowing the cash value of his life insurance policies to be garnished absent evidence that he had made a fraudulent transfer. Essentially, Winter argues that there was insufficient evidence of fraud presented to the trial court. We disagree.

**[\*P9]** [R.C. 1336.04\(A\)\(1\)](#) provides that [HN2](#) "[a] transfer made \* \* \* by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made \* \* \* if the debtor made the transfer \* \* \* [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." [HN3](#) Because actual intent may be difficult to prove, a creditor may establish a debtor's fraudulent intent when the circumstances demonstrate the

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<sup>1</sup> See [Miley v. STS Systems, Inc., 153 Ohio App. 3d 752, 2003 Ohio 4409, 795 N.E.2d 1254, ¶126](#).

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badges of fraud set forth in [R.C. 1336.04\(B\)](#).<sup>2</sup> The creditor need not demonstrate all the statutorily defined badges of fraud; as few as three badges of fraud have been held to constitute **[\*\*6]** evidence of actual fraudulent intent.<sup>3</sup>

**[\*P10]** [HN4](#)<sup>4</sup> The badges of fraud set forth [R.C. 1336.04\(B\)](#) include, but are not limited, to the following:

**[\*P11]** "(1) Whether the transfer or obligation was to an insider;

**[\*P12]** "(2) Whether the debtor retained possession or control of the property transferred after the transfer;

**[\*P13]** "(3) Whether the transfer or obligation was disclosed or concealed;

**[\*P14]** "(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

**[\*P15]** "(5) Whether the transfer was of substantially all of the assets of the debtor;

**[\*P16]** "(6) Whether the debtor absconded;

**[\*P17]** "(7) Whether the debtor removed or concealed assets;

**[\*P18]** "(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

**[\*P19]** "(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

**[\*P20]** "(10) Whether the transfer occurred shortly before or shortly after **[\*\*7]** a substantial debt was incurred;

**[\*P21]** "(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor."

**[\*P22]** Here, there is sufficient evidence in the record to demonstrate Winter's fraud. Winter admitted in his deposition that he had created the Winter Family Trust in 2007, at a time when the Banks were already his creditors, and that he used that trust to shelter his assets from his creditors. Grote, Winter's attorney, also testified at his deposition that the trusts were created to get the money "away from the chaotic and disorderly seizures[,] into the trusts where, you know, the money can be more orderly distributed to creditors upon their agreement or upon order of bankruptcy court." Grote testified that, at the direction of Winter and his wife, he had transferred \$144,000 from the trust to Prudential in November 2007 to pay the premiums on Winter's life insurance policies. Winter retained an interest in that money after it was transferred, as that money was used to pay premiums on whole-life insurance policies that had a significant cash value. Although Winter had claimed that the transfer to Prudential came **[\*\*8]** from his wife's separate funds, it is evident that the money came from the Winter Family Trust, which both Winter and his wife created. Based on the foregoing, we hold that there was sufficient evidence to demonstrate that Winter had transferred funds to Prudential to defraud his creditors. The second assignment of error is overruled.

**[\*P23]** Winter contends, in the third assignment of error, that the trial court erred by ordering him to surrender the cash value of his life insurance policies to the Banks. Citing *Deal v. Menke*,<sup>4</sup> Winter argues [HNS](#)<sup>4</sup> under [R.C. 3911.10](#) that even if he had paid his premiums to Prudential to defraud his creditors, the Banks were still prevented

<sup>2</sup> [UAP-Columbus JV326132 v. Young, 10th Dist. No. 09AP-646, 2010 Ohio 485, ¶129; Blood v. Nofzinger, 162 Ohio App.3d 545, 2005 Ohio 3859, 834 N.E.2d 358.](#)

<sup>3</sup> [UAP-Columbus, supra, at ¶129.](#)

<sup>4</sup> [\(C.P.1939\), 14 O.O. 414, 29 Ohio Law Abs. 181.](#)

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from garnishing the cash value of the policies until the policies had matured, which would only occur upon his death or when he voluntarily accepts the cash surrender value of the policies We are constrained to agree with Winter.

[\*P24] [R.C. 3911.10](#) states in relevant part, [HN6](#) [↑] "All contracts of life or endowment insurance or annuities upon the life of any person \* \* \* which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary \* \* \* to the spouse or children [\*\*9] \* \* \* for the benefit of such spouse [or] children \* \* \* shall be held, together with the proceeds or avails of such contracts \* \* \* free from all claims of the creditors of such insured person. \* \* \* Subject to the statute of limitations, the amount of any premium upon such contracts \* \* \* paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts."

[\*P25] [HN7](#) [↑] [R.C. 3911.10](#) limits a creditor's recovery of fraudulently paid premiums to the "proceeds" of the life-insurance contract. The few courts who have considered [R.C. 3911.10](#), or its former version, have held that the proceeds of the contract come into existence when the contract matures—either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract.

[\*P26] In *Menke*, the court interpreted the former version of [R.C. 3911.10](#), which is substantially similar to the current version, and it stated that [HN8](#) [↑] it was the legislature's intent on "life insurance policies to limit the recovery of premiums paid in fraud of creditors to the funds arising upon the maturity of the contract [and that] this fund may arise by the insured voluntarily accepting the [\*\*10] cash surrender value of the policies or upon the death of the insured."<sup>5</sup> Further, in *Doethlaff v. Penn Mut. Life Ins. Co.*,<sup>6</sup> the Sixth Circuit Court of Appeals held that the former version of [R.C. 3911.10](#) did not authorize the court to order a debtor who had filed for bankruptcy and had been accused of paying his premiums in fraud of his creditors to accept the cash surrender value of his life insurance policy so that he could repay his creditors. Instead, the court held that the creditors could only be paid from the proceeds of the policy and that the policy did not have any "proceeds" until it matured, which would occur when the debtor died.<sup>7</sup>

[\*P27] Given these cases and the fact that [HN9](#) [↑] [R.C. 3911.10](#) is an exemption statute that is to be construed in favor of the debtor,<sup>8</sup> we hold that the trial court erred by ordering Winter to surrender the cash value of his life insurance policies to satisfy the Banks' judgments against him. If Winter had voluntarily cashed in the policies or had taken a loan against the cash value of the policies, that money would have been subject to execution by the Banks.<sup>9</sup> But that did not happen here, at least not on [\*\*11] the record before us. Accordingly, the third assignment of error is sustained.

[\*P28] Based on our resolution of the third assignment of error, Winter's fourth assignment of error, which challenges the trial court's ruling that payments made toward the premiums of term-life insurance policies could also be garnished, is moot.

[\*P29] We accordingly reverse the trial court's judgment permitting the Banks to garnish the cash value of Winter's whole-life insurance policies.

Judgment reversed.

**SUNDERMANN and FISCHER, JJ.**, concur.

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<sup>5</sup> Id.

<sup>6</sup> (*C.A.6, 1941*), *117 F.2d 582*.

<sup>7</sup> *Id. at 584*.

<sup>8</sup> Id.

<sup>9</sup> See *Kuhn v. Wolf (1938)*, *59 Ohio App. 15, 16 N.E.2d 1017*.

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# Faculty

**Christal L. Caudill** is an attorney with Caudill Law Group in Dublin, Ohio, and has more than 20 years of experience in representing clients through the estate planning and bankruptcy process. She focuses her practice on representing individuals and small business debtors in chapter 7 and chapter 13, as well as asset-protection planning. Ms. Caudill sits as a chapter 7 panel trustee in the Southern District of Ohio, and on the board of the Credit Education Coalition. She received her undergraduate degree from The Ohio State University and her J.D. from Capital University.

**Donald W. Mallory, CPA** is a partner of the law firm of Wood + Lamping, LLP in Cincinnati, where his practice focuses on insolvency, debtors' and creditors' rights with a focus on credit union representation, bankruptcy reorganizations, out-of-court workouts, financial and organizational corporate restructurings, complex litigation and general business matters. He has experience representing debtors, secured lenders, trustees and trade creditors in proceedings under chapters 7, 11 and 13 of the U.S. Bankruptcy Code, and in insolvency-related litigation such as receiverships and assignments for the benefit of creditors. Mr. Mallory has appeared and argued extensively in federal and state courts throughout the U.S. on a wide range of bankruptcy and collection-related issues, including appellate litigation. He also has been appointed a subchapter V trustee for the Southern District of Ohio. As part of his practice, Mr. Mallory represents clients in the investigation, prosecution and recovery of assets where fraudulent activity is found to exist such as Ponzi schemes, fraudulent transfers, bankruptcy fraud and similar conduct, and in discharge litigation. Additionally, he has significant experience negotiating and drafting complex contracts, loan documents and settlement agreements, and providing proactive legal advice relating to corporate law and litigation avoidance to clients' senior management. Mr. Mallory is a member of the Cincinnati, Ohio, American, Northern Kentucky and Kentucky Bar Associations and is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Courts for the Northern and Southern Districts of Ohio, the Eastern and Western Districts of Kentucky, and the Northern and Southern Districts of Indiana, the U.S. Tax Court and the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Sixth Circuit. He also is an ABI member and is active on the advisory board of its Midwest Regional Bankruptcy Seminar. Mr. Mallory received his B.B.A. in 1995 from the University of Cincinnati and his J.D. *magna cum laude* in 1999 from Northern Kentucky University, Chase College of Law, where he served on the *Northern Kentucky University Law Review* and was an officer of the Northern Kentucky University Moot Court Board.

**Matthew T. Schaeffer** is Of Counsel with Bailey Cavalieri LLC in Columbus, Ohio, where his practice focuses primarily on corporate reorganization and workouts, debtor/creditor rights, bankruptcy, commercial litigation and commercial matters. He has experience representing chapter 11 debtors, financial institutions, trustees, and a variety of secured and unsecured creditors in bankruptcy proceedings, litigation and workouts. Mr. Schaeffer is a member of the independent panel of chapter 11 subchapter V bankruptcy trustees and the panel of chapter 7 trustees for the Southern District of Ohio. He also has experience representing businesses in a variety of nonbankruptcy matters. Mr. Schaeffer previously was with an Am Law 100 firm. He was named a "Rising Star" in the *Journal of Law & Politics*, recognized as "Top Lawyer" by *Columbus CEO Magazine* in 2016, and listed as a *Super Lawyer* in 2018, 2019, 2020, 2021 and 2023. Mr. Schaeffer has been a member of the Local Rules

Committee, Pro Bono Project, Judicial Liaison Committee and Mediation Subcommittee of the U.S. Bankruptcy Court for the Southern District of Ohio. He also is a member of the Columbus Bar Association's Bankruptcy Committee, Ohio State Bar Association, Champaign County Bar Association, Thomas F. Waldron American Bankruptcy Law Forum and the Columbus Bar Association's Military Assistance Task Force. Mr. Schaeffer received his B.A. in political science from Ohio State University and his J.D. *cum laude* from Capital University School of Law, where he was admitted to the Order of the Curia and served as managing editor of the *Capital University Law Review*.

**Myron N. Terlecky** is a partner with Strip Hoppers Leithart McGrath & Terlecky Co., LPA in Columbus, Ohio, and his practice areas include debtor and creditor representation in commercial and consumer bankruptcy matters, business workouts, loan restructurings, business/asset acquisitions and transactions, and state court insolvency proceedings. He handles nearly all types of bankruptcy matters, including representing creditors in chapters 7, 11, 12 and 13, and representing debtors in chapters 7 and 11. Mr. Terlecky has been a member of the Panel of Chapter 7 Trustees for the Southern District of Ohio since 1990. He also has served as a court-appointed receiver of various companies and as a chapter 11 trustee. Mr. Terlecky is licensed to practice in all Ohio state courts and the Ohio U.S. District Courts, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court. A frequent speaker on bankruptcy issues, for the past 30 years he has presented at dozens of seminars or panels on bankruptcy matters to the Ohio State Bar Association, the Columbus Bar Association, Bankruptcy Law Institute and Bankruptcy Subcommittee, Creditor Education Coalition, Ohio Society of CPAs, Ohio Municipal League, National Business Institute, Ohio Collectors Association, Ohio County Treasurers Association, Region IX U.S. Trustee Training Seminar, Sterling Education Services, and the Fisher College of Business at The Ohio State University. Mr. Terlecky is a member of the Columbus, Ohio State and American Bar Associations, ABI, the National Association of Bankruptcy Trustees and the Creditor Education Coalition. He is a former chair of the Bankruptcy Committee of the Columbus Bar Association. Mr. Terlecky is AV-rated by Martindale-Hubbell, has been listed in *Ohio Super Lawyers* from 2010 to the present, and was recognized as a "Top Lawyer" in 2022. He received his B.A. in 1981 from John Carroll University and his J.D. in 1984 from Capital University Law School, where he served as president of the Student Bar Association and received the Dean's Award for Outstanding Service.