

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Posting Opinions**

**Will this Opinion be Published?** Yes

**Bankruptcy Caption:** In re Gordon Green

**Bankruptcy No.:** 21 B 06189

**Date of Issuance:** March 9, 2022

**Judge:** Jacqueline P. Cox

**Appearances of Counsel:**

*Attorney for Movant:* Chapter 7 Trustee, David P. Leibowitz  
Law Offices of David P. Leibowitz, LLC

*Attorney for Respondent:* Ben L. Schneider  
Schneider & Stone

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 7
	)	
Gordon Green,	)	Case No. 21 B 06189
	)	
Debtor.	)	Judge Jacqueline Cox

**Amended Order Sustaining Objection to Exemption (Docket 18)**

Before the court is the objection of Chapter 7 Trustee David Leibowitz (“Trustee”) to Debtor Gordon Green’s (“Debtor”) claim of exemption relating to a retirement plan organized under Canadian law.

**I. Jurisdiction**

Federal district courts have “original and exclusive jurisdiction” of all cases filed under title 11 of the United States Code, the Bankruptcy Code. 28 U.S.C. § 1334(a). Federal district courts also have “original but not exclusive jurisdiction” of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). District courts may refer these cases to the bankruptcy judges for their district. 28 U.S.C. § 157(a). The District Court for the Northern District of Illinois has referred its bankruptcy cases to the Bankruptcy Court for the Northern District of Illinois. N.D. Ill. Internal Operating Procedure 15(a).

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred by their district court, and may enter appropriate orders and judgments, subject to review under 28 U.S.C. § 158(a)(1). 28 U.S.C. §§ 157(b)(1) and 158(a)(1).

This court has authority to enter a final judgment or order in this core matter pursuant to

28 U.S.C. § 157(b)(2)(B): allowance or disallowance of exemptions from property of the bankruptcy estate.

## **II. Background**

The Debtor claims as exempt in his Schedule C: The Property You Claim as Exempt, his \$72,300 interest in a Retirement Fund: Sun Life: Life Income Fund (“Sun Life Fund”). Docket 1, p. 16.

## **III. Analysis**

The commencement of a bankruptcy case creates an estate comprised of all of the debtor’s legal and equitable interests in property. 11 U.S.C. § 541(a)(1). Trustees are responsible for identifying and liquidating those interests and distributing the funds to the creditors that file claims. 11 U.S.C. § 704(a). Section 522 of the Bankruptcy Code allows debtors to exempt property from the bankruptcy estate and the claims of creditors according to either federal law or state law. Each state is allowed to “opt out” of the federal exemptions for debtors who reside in their state. 11 U.S.C. § 522(b)(2)–(3). However, debtors in “opt out” states like Illinois can claim both state law exemptions through § 522(b)(3)(A) and the exemptions in § 522(b)(3)(B)–(C). *In re Bauman*, No. 11 B 32418, 2014 WL 816407, at \*12 n.12 (Bankr. N.D. Ill. Mar. 4, 2014) (“When . . . debtor’s property includes an interest in retirement funds, he can claim any applicable state law exemption and also the retirement exemption in section 522(b)(3)(C).”)

The Debtor does not rely on the federal retirement plan exemption under § 522(b)(3)(C). That section exempts from property of the bankruptcy estate retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under the Internal Revenue

Code (“I.R.C.”) §§ 401, 403, 408, 408A, 414, 457, or 501(a). The court notes it to shed light on how certain sections of the Internal Revenue Code define exemptions to the exclusion of other sections of that code.

### **A. Illinois Bankruptcy Exemption**

For the most part, Illinois law controls what a debtor domiciled in Illinois may exempt in a bankruptcy case. Under the Bankruptcy Code, either the applicable state or the federal exemptions may be selected pursuant to 11 U.S.C. § 522(d), unless a state chooses to “opt out” of the federal exemption scheme. 11 U.S.C. § 522(b)(2). Illinois has opted out. Residents of Illinois who seek bankruptcy relief may claim the exemptions provided by Illinois law:

Bankruptcy exemption. In accordance with the provision of Section 522(d) of the Bankruptcy Code of 1978, (11 U.S.C. [§] 522(b)), residents of this State shall be prohibited from using the federal exemptions provided in Section 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. [§] 522(d)), except as may otherwise be permitted under the laws of Illinois.

735 ILCS 5/12-1201 (2021).

The purpose of the “opt out” statutory scheme “is to afford a state an opportunity to substitute its judgment for that of the Congress with respect to what property ought to be excluded from the bankruptcy estate.” *In re Geise*, 992 F.2d 651, 658 (7th Cir. 1993).

Recall, however, that § 522(b)(3)(C) provides an additional exemption for certain retirement accounts for debtors from “opt out” states.

#### **1. Exemption of Interests in Retirement Plans**

The Chapter 7 Trustee objects to the Debtor’s claim of exemption relating to the Sun Life Fund, arguing that it is not a qualified retirement plan under the Internal Revenue Code. The

Debtor valued it at \$73,200.<sup>1</sup> The Debtor's Schedule C claims this asset as exempt pursuant to Illinois law, 735 ILCS 5/12-1006(a) which states:

(a) A debtor's interest in or right, whether vested or not, to the assets held in or to receive pensions, annuities, benefits, distributions, refunds of contributions, or other payments under a retirement plan is exempt from judgment, attachment, execution, distress for rent, and seizure for the satisfaction of debts if the plan (i) intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986, as now or hereafter amended, or (ii) is a public employee pension plan created under the Illinois Pension Code, as now or hereafter amended.

735 ILCS 5/12-1006(a) (2021).

## **2. Internal Revenue Code Qualification Requirement**

As the objecting party, under Federal Rule of Bankruptcy Procedure 4003(c), the Trustee has the burden of proving that the exemption has not been properly claimed. *In re Ritter*, 190 B.R. 323, 325 (Bankr. N.D. Ill. 1995). The standard of proof is presumably a preponderance of the evidence. *Id.* at 326.

The Debtor responded that the Trustee did not clearly explain how section 1006 plans organized under other countries' laws do not qualify as exempt. The Trustee replied by explaining that what qualifies as a retirement plan is covered in I.R.C. § 401(a) which states: “[a] trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section.”

Section 401(a)(1) covers who can contribute to the trust; section 401(a)(2) covers whether it is impossible, at any time prior to the satisfaction of all liabilities with respect to

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<sup>1</sup> Apparently it is undisputed that the Debtor has provided a statement indicating that he withdrew \$78, 233.87 from the Fund in the year before he sought bankruptcy relief.

employees and their beneficiaries for any part of the corpus or income to be used for purposes other than for the exclusive benefit of employees.

The Debtor does not dispute that his retirement plan is a Registered Retirement Income Fund under Canadian tax law.<sup>2</sup>

The Debtor argues that his Canadian retirement plan is exempt under 735 ILCS 5/12-1006(a) because it was “intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986, as now or hereafter amended . . . .” Sur-reply, Docket 36, p. 2. He posits that the broad reach of the Illinois provision was intended to qualify the Debtor’s interest in the plan in question under I.R.C. § 404A, which he says deals with qualified foreign plans. Section 404A does not define qualified plans; it deals with deductibility of employers’ contributions to qualified foreign plans. It does not expand or nullify the “created or organized in the United States” language in I.R.C. § 401(a).

According to the Debtor, the “intended in good faith” language in 735 ILCS 5/12-1006(a) is intentionally broad to provide for many different kinds of retirement plans that were intended in good faith to qualify under the Internal Revenue Code. However, the Internal Revenue Code requires that a qualified plan be “[a] trust created or organized in the United States.” I.R.C. § 401(a). The Debtor’s plan was organized in Canada; it does not meet this standard.

Had the Debtor relied on it, the Trustee’s objection would be supported by the additional federal exemption provision mentioned above, 11 U.S.C. § 522(b)(3)(C), which exempts

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<sup>2</sup> See Docket 18 n. 2 (citing Canada.ca, *Registered Retirement Income Fund (RRIF)*, <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/registered-retirement-income-fund-rrif.html> (last visited Mar. 9, 2022)).

retirement accounts that are exempt from taxation under several sections of the Internal Revenue Code: sections 401, 403, 408, 408A, 414, 457, or 501(a). Review of Bankruptcy Code section 522(b)(3)(C) shows that federal law does not provide an exemption for retirement plans by way of I.R.C. § 404A as it not included in § 522(b)(3)(C)'s delineation of tax-exempt retirement plans.

### **3. Statutory Interpretation Issues**

The Debtor argues in his sur-reply that the Trustee did not carry his burden of proof to show how I.R.C. § 404A does not apply to his foreign retirement plan. Docket 36, p. 2. The court has to interpret both Illinois law and federal law to rule on this objection. Under Illinois law, the primary objective in interpreting a statute is to determine the intent of the legislature. The best indication of the legislature's intent is the language of the statute, which has to be construed as a whole, with each word, clause and sentence being given a reasonable meaning. No part of a statute should be rendered superfluous. *Pogge v. Nothdurft (In re Nothdurft)*, 526 B.R. 780, 784 (N.D. Ill. 2015) (internal citations omitted).

Acceptance of the Debtor's interpretation of "intended in good faith to qualify as a retirement plan" in 735 ILCS 5/12-1006(a) ignores the I.R.C. § 401(a) language: "[a] trust created or organized in the United States . . . ." A retirement plan has to be associated with a trust created or organized in the United States to qualify under the Illinois exemption law.

The Debtor also argues that I.R.C. § 404A defines a "qualified foreign plan" to recognize foreign plans for purposes of the Illinois exemption statute. It does not.

The U.S. Supreme Court instructs that our inquiry into a statute's meaning must begin with a presumption that the legislature says in a statute what it means and means what it says

there. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Section 404A(a) addresses deductions for contributions to certain foreign deferred compensation plans. It states that “amounts paid or accrued by an employer under a qualified foreign plan shall not be allowable as a deduction . . . , but if they would otherwise be deductible . . . , shall be allowed as a deduction under that section for the taxable year for which such amounts are properly taken into account.” I.R.C. § 404A(a). Following I.R.C. § 404A(a) is subsection (b) which includes rules for deductions regarding qualified funded plans. This Internal Revenue Code section covers deductions; it does not define qualified plans. Section 404A is not an exception to I.R.C. § 401(a)’s definition of a qualified pension plan as “[a] trust created or organized in the United States . . . .” The Debtor’s retirement plan was organized under Canadian tax law; it was not part of a trust created or organized in the United States.

Applying canons of statutory interpretation to the Internal Revenue Code sections at issue, §§ 401(a) and 404A(a), this court finds that the “intended in good faith” language in the Illinois statute does not nullify the requirement that a qualified plan be a trust created or organized in the United States; that language does not expand the definition of qualified retirement plans. The Debtor has not shown that I.R.C. § 401(a) contains an “intended in good faith” exception to the requirement that a plan be created or organized in the United States; I.R.C. § 404A(a) does not address qualified domestic plans.

The Debtor accuses the Trustee of imposing a “country of origin” requirement in the Illinois statute, 735 ILCS 5/12-1006(a); this criticism is misguided. The country of origin requirement is in the federal statute, I.R.C. § 401(a), which the Illinois statute incorporates by reference in defining which retirement plans are exempt.



To be eligible for exemption under the 735 ILCS 5/12-1006(a) provision, an annuity must come within the Internal Revenue Code provisions for tax-qualified retirement plans. *In re Ellis*, 274 B.R. 782, 787 (Bankr. S.D. Ill. 2002). The Debtor has not shown how his retirement plan, organized under Canadian law, comes within the Internal Revenue Code's provisions.

#### **IV. Conclusion**

The Trustee's objection is sustained. The Trustee has shown by a preponderance of the evidence that the Debtor is not entitled to claim the exemption. The exemption claimed in the Sun Life Fund in the amount of \$73,200 is disallowed.

The Debtor shall remit \$73,200 to the Trustee on or before March 21, 2022.

The Debtor shall file an Amended Statement of Financial Affairs detailing the disposition of the \$78,233.87 he withdrew from the Sun Life Fund during the year prior to the filing of this Chapter 7 case.

**Date: March 9, 2022**

**ENTERED:**

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**Jacqueline P. Cox**  
**United States Bankruptcy Judge**