CASE NO. 23-2841

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In the matter of	)	
	)	
GORDON GREEN,	)	
Debtor/Appellant,	)	
	)	
	)	**Oral Argument Requested**
	)	
v.	)	
	)	
	)	
DAVID LEIBOWITZ	)	
Trustee/Appellee.	)	

Appeal from the Bankruptcy Court for the Northern District of Illinois
Bankruptcy Number 21 B 6189
The Honorable **Jacqueline P. Cox**, Judge Presiding
and
From the District Court for the Northern District of Illinois
District Court Number 22 CV 1402
The Honorable **Sharon Johnson Coleman** Presiding

SECOND AMENDED BRIEF OF APPELLANT GORDON GREEN

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Appellate Court No: 23-2841

Short Caption: Gordon Green v. David P. Leibowitz

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Gordon Green

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Schneider & Stone

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Gordon Green is the only debtor in this matter.

Attorney's Signature: /s/ Matthew Lee Stone Date: December 14, 2023

Attorney's Printed Name: Matthew Lee Stone

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This is an appeal pursuant to 28 U.S.C § 158(a)(1) of a final order sustaining an objection to the Debtor/Appellant's claim of an exemption in a bankruptcy proceeding. A notice of appeal was properly filed with the bankruptcy court pursuant to F.R.B.P. 8002. A notice of appeal was then properly filed with the District Court pursuant to F.R.A.P. 4. The Court has subject matter jurisdiction of this bankruptcy matter pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES PRESENTED

1. **Whether the Bankruptcy Court made an error of law when it imposed a country-of-origin requirement on all exempt retirement plans under the Illinois Statute.**

2. **Whether the Bankruptcy Court and District Court made an error of law when they ruled that Appellant's Canadian retirement fund was not an exempt asset.**

APPLICABLE STANDARD OF APPELLATE REVIEW

Findings of law are reviewed de novo. Findings of fact are reviewed under a 'clearly erroneous' standard. Mixed questions of law and fact are subject to de novo review. *Stamat v. Neary,* 635 F.3d 974, 982 (7th Cir. 2011). "A debtor's entitlement to a bankruptcy exemption is a question of law.... Matters of statutory interpretation are likewise questions of law." *In re Hernandez*, 918 F.3d 563, 566 (7th Cir. 2019), certified question answered, 2020 IL 124661.

STATEMENT OF THE CASE

Debtor/Appellant Gordon Green ("Appellant") filed his Chapter 7 Voluntary Petition for Bankruptcy on May 11, 2021. ("Petition"), Appendix, 17. The Petition lists Appellant's Sun Life: Life Income Fund ("Sun Life Fund"). Schedule C of the Petition claims an exemption for the entire balance of the Sun Life Fund pursuant to 735 ILCS 5/12-1006 ("Section 1006").

During the pendency of this appeal, the Trustee was issued a check from Sun Life for the then balance of the Sun Life Fund totaling $66,685.76 Canadian, which he is still holding pending resolution of this appeal and the underlying bankruptcy matter.

The Sun Life Fund is a Registered Retirement Savings Plan organized under the laws of the Province of Ontario, Canada. Appellant earned the entire balance of the Sun Life Fund when working as a Visiting Professor at the University of Western Ontario.

Trustee David Leibowitz ("Trustee") objected to discharge, arguing that the Sun Life Fund is organized under the laws of Ontario, and therefore "cannot be exempt under Illinois law." Objection, Appendix Page 69, ¶ 8. Appellant responded that foreign retirement plans are addressed in 26 U.S.C. § 404A(e)[1], which contemplates "Qualified Foreign Plans," and that plans under that Section are "intended in good faith" to qualify as exempt retirement plans. It is not disputed that the Sun Life Fund is a Qualified Foreign Plan under I.R.C. § 404A(e).

The Trustee argued that only a "Qualified Retirement Plan" pursuant to I.R.C. § 401(a) was entitled to exemption and because I.R.C. § 401(a) only contemplates trusts "created or organized in the United States," foreign retirement plans can never be exempt.

The Bankruptcy Court sustained the Trustee's objection citing 11 U.S.C. § 522(b)(3)(C) to "shed light on how certain sections of the Internal Revenue Code define exemptions to the

[1] For brevity, all future citations to the Internal Revenue Code (26 USC 101 *et seq.*) are referred to as "I.R.C."

exclusion of other sections of that code." Amended Bankruptcy Court Order ("BK Order"), Appendix Pg. 10. The bankruptcy court adopted the Trustee's reasoning that any qualified plan must be a "trust created or organized in the United States" per I.R.C. § 401(a). BK Order, 12. The court reasoned that I.R.C. § 404A "does not define qualified plans" but merely "covers deductions." BK Order, 14. The Bankruptcy Court made no mention of I.R.C. § 404A(e), and instead agreed with the Trustee that all retirement plans are defined by I.R.C. § 401(a). The Court thus concluded by stating "the "country of origin" requirement is in the federal statute, I.R.C. 401(a), which the Illinois statute incorporates by reference." BK Order, 14.

Appellant appealed the Bankruptcy Court's ruling to the District Court. There, Judge Sharon Coleman heard oral arguments before issuing a Memorandum Opinion and Order (the "District Order"), Appendix Page 1, which is also the subject of this appeal.

Judge Coleman noted that the parties agree the Sun Life Fund is a Qualified Foreign Plan under I.R.C. § 404A(e) and thus identified the central question "is a plan under I.R.C. § 404A a tax-qualified retirement plan?" District Order, 4. The District Court agreed with Appellant that tax-qualified retirement plans need not fall under I.R.C. 401(a) and rejected the Bankruptcy Court's contention that retirement plans carry a "country of origin requirement." District Order, 5. However, the District Court argued that plans under I.R.C. § 404(a) are "qualified for the purpose of deductions" but not "qualified retirement plans." District Order, 6. The District Court further agreed that the Sun Life Fund "was likely intended for retirement," but concludes that it was "simply not a 'retirement plan' under the [Tax] Code." *Id*.

Appellant once again appeals.

SUMMARY OF ARGUMENT

Illinois has opted out of the Federal exemption statute, so Illinois law governs which assets are exempt from inclusion in a debtor's bankruptcy estate. Illinois' Section § 1006 provides an exemption to any plan "intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code." I.R.C. § 404A is such an applicable "tax qualified" provision. The Debtor's Sun Life Fund account is a Qualified Foreign Plan under I.R.C. § 404A, intended in good faith to qualify as a retirement plan" and therefore entitled to exemption under the Illinois statute.

This Court will interpret exemption statutes liberally in order to carry out their intended purpose. Section 1006(a) references "provisions" of the Internal Revenue Code rather than a specific provision, because it can apply to a variety of retirement account, including 401(k) accounts, 403(b) accounts, personal IRAs, or deferred compensation plans. The Bankruptcy Court erred in ruling that all retirement plans are governed by the provisions of I.R.C. § 401, and specifically § 401(a), which defines a "Qualified Trust" as "created in the United States."

Rather, the Internal Revenue Code acknowledges that there is such a thing as a "Retirement Plan" which was not formed in the United States and is still entitled to special tax treatment. Such plans are defined in I.R.C. § 404A. This Court should therefore affirm the District Court's rejection of the Bankruptcy Court's country-of-origin requirement. However, this Court should also overrule the District Court's finding that Qualified Foreign Plans are otherwise not "tax qualified."

The Trustee, as the objecting party, has the burden of proving that the exemptions are not properly claimed. The Trustee has failed to dispute that the Sun Life Fund is a "Qualified Foreign Plan as defined by I.R.C. § 404A(e).

The Sun Life Fund meets the Supreme Court's definition of a retirement plan because it is a sum of money set aside for the day the Appellant stops working. More specifically, (i) the Sun Life Fund can be added to if Appellant returns to work for the University, (ii) mandates withdrawals begin at retirement, and (iii) cannot typically be withdrawn on prior to retirement without penalty. The Sun Life Fund is also held in trust for the benefit of Appellant.

The Sun Life Fund is also "tax qualified." While the District Court separates plans which are "qualified for the purpose of deductions" and "qualified retirement plans," this distinction is not meaningful here. Qualified Retirement Plans are plans intended to qualify for one or more forms of preferred tax treatment, including for deductions which were recognized by the District Court. Courts have described both deferred taxation and deductions as "preferred tax treatment" in other contexts and that comparison should apply here. The tax treatment afforded Qualified Foreign Plans is comparable to that provided to domestic deferred compensation plans under I.R.C. § 72, which have also been considered "tax qualified." Finally, the Sun Life Fund is distinguishable from "top hat" deferred compensation plans which are, by design, meant for compensation that exceeds limits placed on traditional deferred compensation plans that are "tax qualified" and exempt.

Because the Sun Life Fund is a Qualified Foreign Plan, intended in good faith as a retirement plan under I.R.C. § 404A, it is "tax qualified" and therefore entitled to an exemption. The Bankruptcy Court and District Court must therefore be reversed.

ARGUMENT

Illinois' Section § 1006 provides a broader class of retirement exemptions than the Federal exemption statute or the exemption statutes of other states, granting exemption to any plan "intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code." The Bankruptcy Code erred when it improperly imposed a country-of-origin requirement on all qualified retirement plans rather than only those under I.R.C. § 401. The District Court further erred when it excluded I.R.C. § 404A from those provisions of the Internal Revenue Code which are "tax qualified."

I. THE RETIREMENT PLAN EXEMPTION IN SECTION 1006 IS NOT LIMITED TO PLANS CREATED IN THE UNITED STATES.

A. The Applicable Exemption Statute Is Section 1006.

The filing of a bankruptcy petition creates a "bankruptcy estate" which includes all property of the debtor listed in 11 USC § 541. In a Chapter 7 filing, a trustee is then appointed to "collect and reduce to money" all assets of the bankruptcy estate pursuant 11 USC § 704(a)(1) before distributing them to creditors according to the terms of 11 USC § 726.

The Bankruptcy Code provides that certain property of a debtor may be "exempt from property of the estate," and therefore not subject to liquidation by the trustee. 11 USC § 522(a). The Bankruptcy Code determines which assets are deemed exempt "unless the State law that is applicable to the debtor… specifically does not so authorize." 11 USC § 522(b). Illinois has opted out of the Federal exemption statute.

"Exemptions for debtors in Illinois rest on state law, for it has exercised its right under 11 U.S.C. § 522(b)(2) to make local exemptions exclusive." *Matter of Burciaga*, 944 F.3d 681, 683 (7th Cir. 2019) *citing* 735 ILCS 5/12-1201. As such, the Illinois Code of Civil Procedure

determines what property is exempt from inclusion in the bankruptcy estate of an Illinois debtor. *See generally* 735 ILCS 5/12-1001 *et seq.*

"Retirement Plans" are specifically exempt from collection pursuant to 735 ILCS 5/12-1006 ("Section 1006"), which states, in pertinent part.

> *(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) is 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.*
>
> *(b) "Retirement plan" includes the following:*
> *(1) A stock bonus, pension, profit sharing, annuity or similar plan or arrangement, including a retirement plan for self-employed individuals or a simplified employee pension plan;*
> *(2) A government or church retirement plan or contract;*
> *(3) An individual retirement annuity or individual retirement account; and*
> *(4) A public employee pension plan created under the Illinois Pension code, as now or hereafter amended.*

Section 1006(a) provides the criteria for qualifying as an exempt retirement plan. Section 1006(b) provides examples of plans that would meet the criteria in Section 1006(a). As the present case does not concern a public employee pension plan created under the Illinois Pension Code, the analysis must focus on Section 1006(a)(1), plans intended in good faith to qualify under the applicable provisions of the Internal Revenue Code. Section 1006(b)(2) is also instructive in that it contemplates a "government… retirement plan" like the Sun Life Fund – a Registered *Retirement* Savings *Plan* organized by the *government* of Ontario.

The Bankruptcy Court tried to draw a parallel from Section 1006 to the default retirement exemptions under the Bankruptcy Code. 11 U.S.C. § 522(b)(3)(c) provides a specific list of Internal Revenue Code sections which are subject to exemption including I.R.C. §§ 401, 403,

408, 408A, and 457 among others. The Trustee likewise compared Illinois' exemption law to New York's exemption statute which similarly only exempts plans under a specific list of Internal Revenue Code sections. New York Debtor and Creditor Law § 282(iii)(2)(f) (exempting plans under IRC §§ 401, 408 and 408A only).

Rather than showing the limitations of Section 1006, these comparisons illustrate its breadth. Illinois does not limit exemptions to a specific list of Internal Revenue Code sections and instead encompasses *any* plan intended in good faith to qualify under any applicable provision of the Internal Revenue Code.

B. Exempt Plans Need Not Satisfy the Country-of-Origin Requirement of I.R.C. 401.

"A bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 420–21 (2014) (overruling a bankruptcy court's effort to circumvent a state mandated homestead exemption). "This circuit and the courts in Illinois have consistently held that personal property exemption statutes should be liberally construed in order to carry out the legislature's purpose in enacting them — to protect debtors." *In re Barker,* 768 F.2d 191, 196 (7th Cir., 1985). Federal Courts will apply Illinois law when interpreting Illinois statutes, including "interpretive canons against surplusage and absurdity." *In re Hernandez*, 918 F.3d at 569.

Section 1006(a) references "provisions" of the Internal Revenue Code rather than a specific provision, and indeed multiple such provisions have yielded exemptions in the past. *See e.g. Matter of Dunn*, 988 F.2d 45, 47 (7th Cir., 1993), *citing* I.R.C. 401 (ERISA plans); *In re Ritter*, 190 B.R. 323, 325 (Bankr. N.D. Ill. 1995) *citing* I.R.C. §§ 402 and 408 (IRA and Keough accounts and proceeds from the same).

Given the broad reference to "provisions of the Internal Revenue Code" in Section 1006(a) or the inclusive terminology referencing any "similar plan or arrangement" and any "government… retirement plan" in Section 1006(b), the best interpretation of Section 1006 is that it at least refers to a plan under any retirement provision in the Internal Revenue Code. The title of the "400s" section of the Internal Revenue Code also tracks the language in Section 1006(b)(1), being titled "Pension, Profit-Sharing, Stock Bonus Plans, etc."

The Bankruptcy Court erred in believing that all retirement plans are governed by the provisions of I.R.C. § 401, and specifically § 401(a), which defines a "Qualified Trust" as "created in the United States." The Bankruptcy Court held that the country-of-origin requirement in I.R.C. § 401(a) was incorporated by reference into Section 1006 as applying to all retirement accounts. BK Order, 14.

Retirement plans are not all governed by I.R.C. § 401, though many do have their own country-of-origin requirement. For example, IRAs are defined separately in I.R.C. § 408(a), State Employee Annuities are defined in I.R.C. § 403, and Deferred Compensation Plans are defined in I.R.C. 457. IRAs are also required to be "created or organized in the United States," but as stated in § 408(a) itself. State Employee Annuities under I.R.C. § 403 must be for "State" employees, thus invoking a country-of-origin requirement under I.R.C. § 403(b)(1)(ii). Deferred Compensation Plans likewise are only for State employees pursuant to I.R.C. § 457(e)(1)(A). I.R.C. §§ 403 and 457 also allow for charitable organizations to create exempt plans, but those organizations are also required to be domestic by I.R.C. § 501.

I.R.C. § 404A discusses precisely what the Bankruptcy Court claims does not exist. I.R.C. § 404A addresses how foreign retirement plans are treated. Thus far, all of the retirement vehicles considered by the 400's Section of the Internal Revenue Code are domestic, but the

United States is not the only country with retirement accounts. How should the Internal Revenue Code treat contributions and distributions from foreign trusts, pensions or other instruments which it recognizes as having the same characteristics as domestic retirement assets? § 404A answers that question.

The Internal Revenue Code acknowledges that there is such a thing as a "Retirement Plan" which was not formed in the United States and is still entitled to special tax treatment. Section 1006 asks whether the Sun Life Fund was intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code. § 404A is the applicable provision, despite the lack of country-of-origin requirement. The Internal Revenue Code provides the relevant definition in I.R.C. § 404A(e) for the plan. I.R.C. § 404A(a) and (b) of the code define the crux of the special tax benefits that they enjoy.

II. QUALIFIED FOREIGN PLANS, INCLUDING THE SUN LIFE FUND, ARE EXEMPT PURSUANT TO SECTION 1006.

Section 1006 is "unequivocal in protecting any interest a debtor may have in the assets of a pension or retirement plan and any right to receive benefits, distributions, or other payments under such a plan." *In re West*, 507 B.R. 252, 259 (Bankr. N.D.Ill., 2014). The Trustee, as the objecting party, has the burden of proving that the exemptions are not properly claimed. F.R.B.P. 4003(c). "This is in marked contrast to the rule in Illinois state courts where the person alleging an exemption in property has the burden of proving it. *Ritter*, 190 B.R. at 325. "The standard of required proof is presumably a preponderance of the evidence." *Id.*

A. The Sun Life Fund Is a Qualified Foreign Plan Under I.R.C. § 404A.

I.R.C. § 404A(e), defines a Qualified Foreign Plan as follows:

> *"For purposes of this section, the term "qualified foreign plan" means any written plan of an employer for deferring the receipt of compensation but only if—*
> *(1) such plan is for the exclusive benefit of the employer's employees or their beneficiaries,*
> *(2) 90 percent or more of the amounts taken into account for the taxable year under the plan are attributable to services—*
> *(A) performed by nonresident aliens, and*
> *(B) the compensation for which is not subject to tax under this chapter, and*
> *(3) the employer elects (at such time and in such manner as the Secretary shall by regulations prescribe) to have this section apply to such plan.*

The Sun Life Fund satisfies each of the above elements. First, it was accrued while Appellant was employed as a Visiting Professor at the University of Western Ontario. The Plan was offered to the employees of the university and was for the exclusive benefit of its employees. Appellant is the current beneficiary of the Sun Life Fund and his beneficiaries are named as successor beneficiaries.

Second, the University of Western Ontario is a Canadian Provincial school that can be presumed to have a staff of at least 90% Canadians; and the Sun Life Fund has never been subject to tax under the Internal Revenue Code.

Finally, the University of Western Ontario elected to have § 404A(e) apply to the Retirement Fund plan per the "Can-U.S. Treaty." United States-Canada Income Tax Convention, 1984 WL 23337, *See also* Rev. Rul. 89-95, 1989-2 C.B. 131 Sec(s) 894 (permitting Canadian registered retirement savings plans to "defer U.S. income taxation with respect to income accrued in the plan").

While Appellant did not present evidence to support the allegations concerning these prongs, it would be the trustee's burden to present such evidence. F.R.B.P. 4003(c). No such evidence was offered, the trustee has not alleged that any prong was not met and neither lower

Court has considered any argument to the contrary. Given the above analysis, the Sun Life Fund may properly be considered a Qualified Foreign Plan pursuant to § 404A.

B. The Sun Life Fund is a Qualified Retirement Fund Under Illinois Law.

While Section 1006 contemplates funds which are "intended to qualify as a retirement plan" under the Internal Revenue Code, "retirement plan" or "retirement fund" are not defined terms in the Internal Revenue Code or the Bankruptcy Code. Noting this issue, the United States Supreme Court relied on the American Heritage Dictionary to give the term its ordinary meaning. *Clark v. Rameker*, 573 U.S. 122, 127 (2014). *Clark* defines "retirement funds" as "sums of money set aside for the day an individual stops working." *Id.* at 122 (2014).

The Illinois Appellate Court applied the *Clark* standard in determining whether inherited IRAs would be deemed qualified retirement plans under Section 1006. *In re Marriage of Branit*, 2015 IL App (1st) 141297 ¶ 23. There, the Court excluded inherited IRAs because they lacked three characteristics also noted in *Clark's* analysis under the Federal Statute. Those characteristics are: (1) whether additional money may be invested in the account; (2) whether the time for mandatory withdrawal is tied to retirement age; and (3) whether the balance of the account may be drawn upon without penalty. *Id*.

Registered Retirement Savings Plans ("RRSPs"), like the Sun Life Fund, meet all three of these criteria. Appellant could make additional contributions by returning to work for the Ontario university system. Appellant is forbidden from withdrawing funds but will be required to make withdrawals once he reaches the age of retirement. While the Trustee is correct that a special exception was made by the province of Ontario for residents to make a one-time withdrawal from their retirement accounts during Covid, Appellant is not seeking to treat those

withdrawn funds as exempt on the basis of Section 1006. Only the funds that remain in the Sun Life Fund are the subject of this appeal and Appellant has no authority whatsoever to touch them until retirement.[2] These facts were also not disputed at the lower level and it would have been the Trustee's burden to do so. F.R.B.P. 4003(c).

The Sun Life Fund is therefore a "retirement plan" or "retirement fund" as contemplated by Illinois law. The only question remaining is whether the Internal Revenue Code has a relevant provision which provides it special tax treatment.

C. The Sun Life Fund Is Tax Qualified Under the Internal Revenue Code.

In order to qualify as exempt under Section 1006, a retirement plan must meet two criteria. First, "the retirement plan must be held in 'a trust or equivalent arrangement." *In Re West*, 507 B.R. at 259 *citing In re Schoonover*, 331 F.3d 575 (7th Cir., 2003). Second, the retirement plan "must come within the Internal Revenue Code provisions for tax qualified retirement plans." *Id. quoting* Section 1006. The question of whether the Sun Life Fund was held in trust was addressed above and consists of "sums of money set aside for the day an individual stops working." *Clark*, 573 U.S. at 122.

As to the second prong, the District Court makes a distinction between plans "qualified for the purpose of deductions" and "qualified retirement plans." The District Court uses the term "tax qualified retirement plans" and "non-qualified plans." District Order, 6. In support of this proposition, the Court relies on *In re Jokiel* which states that "the Illinois exemption only applies to retirement plans that are intended to qualify for one or more forms of preferred tax treatment."

[2] This rule was the basis for the Agreed Order (Appendix, 16) which altered the Court's original ruling from requiring Appellant to turn over funds to requiring Appellant to merely cooperate with the Trustee to recover funds from the Canadian fund manager.

453 B.R. 743 (Bankr. N.D. Ill. 2011). The District Court never states what the "preferred tax treatment" is if not deductions.

This Court has also made a similar distinction in *Wittman v. Koenig* concerning the Wisconsin exemption statute. There, the central question was whether an annuity would "'comply with' the Internal Revenue Code?" 831 F.3d 416, 421 (7th Cir. 2016). The answer, according to Wisconsin's bankruptcy courts, was whether the annuity would be eligible to receive tax deferral applicable to annuities. "Since the Internal Revenue Code taxes most income in one way or another, the critical issue in taxing an annuity is whether the taxpayer can benefit from deferred taxation of the implicit appreciation of the principal paid up front for the stream of later income." *Id*.

In *Wittman*, the Court found that the annuity in question did receive favorable tax treatment under I.R.C. § 72. There, the annuity in question was required to meet the criteria stated in I.R.C. § 72 including only paying benefits "by reason of of age, illness, disability, death or length of service" in order to receive the deductions prescribed by that section. *Id.*

The cases cited by the Bankruptcy Court, namely *In Re Jokiel* and *O'Malley*, relying on essentially the same logic, both concern "top hat" plans which are typically not subject to the same tax benefits as standard deferred compensation plans. In *O'Malley*, Appellant had interests in two plans, a Traditional and an Auxiliary Plan. *Helms v. Metro. Life Ins. Co. (In re O'Malley)* 633 B.R. 332, 347 (Bankr. N.D. Ill. 2021). The Traditional Plan was designed to take advantage of tax preferred treatment. The Auxiliary Plan was specifically designed "to provide to certain participants ... the excess amount [of deferred compensation] that would have been payable under the [Traditional] Plan in the absence of [IRC] limitations." *Id.* The Court only denied

exemption to the Auxiliary Plan because it was that plan that did not take advantage of the tax benefits in a standard deferred compensation plan. *Id*.

Jokiel similarly concerns two plans – a "General Plan" and a "Supplemental Plan." 453 B.R. at 746. There, the General Plan was exempt under I.R.C. § 401, but the Supplemental Plan, by design, did not receive special treatment as it exceeded the contribution limits set forth in I.R.C. § 415. Only the Supplemental Plan was denied protection under Section 1006.

Qualified Foreign Plans like the Sun Life Fund do receive favorable tax treatment, as has been recognized by both the Bankruptcy Court and the District Court. The Bankruptcy Court notes that I.R.C. § 404A "deals with the deductibility of employers' contributions to qualified foreign plans." Bankruptcy Order, 5. The District Court similarly states that "Qualified Foreign Plans" are defined by 404A(e) for the purpose of these deductions. District Order, 3 and 6.

Deductions are a tax preferred treatment. *See e.g. Arrowsmith v. Commissioner*, 344 U.S. 6, 9. (1952) (describing deductions as a "preferred tax position"). The deduction benefits in I.R.C. § 404A(a)-(b), as well as the carryover rights for those deductions granted 404A(b)(4) track similar rights granted under I.R.C. § 457(a) for domestic Deferred Compensation Plans.

If the Court prefers to consider deferral of income rather than deductions, IRS Rev. Rul. 89-95, 1989-2 CV 131, 1 specifically notes that "Article XXIX, Paragraph 5 of the United States − Canada Income Tax Convention, 1986- 2 C.B. 258, (Convention) provides that a beneficiary of a Canadian RRSP may elect, under rules established by the competent authority of the United States, to defer U.S. income taxation with respect to income accrued in the plan but not distributed, until such time as a distribution is made from such plan, or any plan substituted therefor." The Canadian Statute is specifically inviting I.R.C. § 404A, as contemplated by the United State – Canada Income Tax Convention, as a means to defer income.

Qualified Foreign Plans are also not "top hat" plans like those in *Jokiel* or *O'Malley*. In fact, there are caps on contributions which contemplate both limits under the Internal Revenue Code and the Foreign law of the country where the Plan is based. I.R.C. 404A(d). There are foreign plans that are "qualified" under 404A and there are plans that are not. *Jokiel* and *O'Malley* only denied exemption to plans that specifically did not qualify, did not meet the provisions of the Internal Revenue Code and did not qualify for special tax treatment like deductions. Plans that do qualify for such treatment are exempt. Foreign plans are no different.

The Sun Life Fund is a Qualified Foreign Plan. Appellant deferred certain compensation to that plan and the funds were subsequently held in trust by the Province of Ontario department that administered it. Those funds were set aside for retirement – indeed the Sun Life Fund is called a Registered Retirement Savings Plan under Canadian law. And those funds are entitled to special tax treatment because they satisfy special requirements set forth in I.R.C. § 404A which allow for deductions not provided to ordinary income. I.R.C. § 404A is a valid provision of the Internal Revenue Code to gain an exemption under Section § 1006.

CONCLUSION

The Sun Life Fund is a Qualified Foreign Plan pursuant to I.R.C. § 404A. Qualified Foreign Plans are intended in good faith to qualify as retirement plans according to the Internal Revenue Code and enjoy the tax benefits provided by that statute. Therefore, they are exempt from collection under Section 1006 and as property of the bankruptcy estate under 11 USC § 522. The decisions of the Bankruptcy Court and District Court must therefore be reversed.

/s/ Matthew Lee Stone
Respectfully Submitted

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF system.

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SHORT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: GORDON GREEN, Debtor.	Bankruptcy No. 21 B 6189 Judge Jacqueline P. Cox
GORDON GREEN, Debtor / Appellant. v. DAVID LEIBOWITZ, Trustee / Appellee.	Case No. 22-cv-01402 Judge Sharon Johnson Coleman

MEMORANDUM OPINION AND ORDER

Before the Court is Debtor Gordon Green's appeal of the Bankruptcy Court's March 9, 2022 Ruling sustaining Trustee David Leibowitz's objection to Green's claimed exemption for a $73,200 Sun Life: Life Income Fund (the "Fund"). Having reviewed the briefs and heard from both parties in oral argument, the Court affirms the Bankruptcy Court's ruling.

Background

Green filed for Chapter 7 bankruptcy on May 11, 2021. In his voluntary petition, Green claimed an exemption for the Fund. This Fund is a Registered Retirement Savings Plan ("RRSP") organized under Canadian law that Green earned when he worked as a Visiting Professor at the University of Western Ontario. The Trustee filed an objection, arguing that this foreign Fund did not qualify for an exemption under Illinois law.

The Bankruptcy Court agreed with the Trustee that the Fund was not exempt from Green's bankruptcy estate. In its Order, the Bankruptcy Court noted that the federal bankruptcy code exempts retirement funds that are also exempt from taxation under the Internal Revenue Code

("I.R.C."), 26 U.S.C. §§ 401, 403, 408, 408A, 414, 457, or 501(a).[1] *See* 11 U.S.C. § 522(b)(3)(C) ("Section 522"). Focusing on I.R.C. § 401(a), which defines "trust[s] created or organized in the United States," the Bankruptcy Court found that the Canadian plan was not a qualified retirement plan because it was organized outside the United States. Although Green emphasized that his Fund fell under I.R.C. § 404A, which defines "qualified foreign plan[s]," the Bankruptcy Court noted that this provision only deals with the deductibility of employers' contributions to plans. The Bankruptcy Court also discussed how Section 522, which identifies tax-exempt retirement plans, did not include Section 404A. In conclusion, the Bankruptcy Court found that this Fund did not qualify for an exemption. Green timely appealed the Bankruptcy Court's decision.

Legal Standard

Federal district courts have jurisdiction over appeals from final orders of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). District courts review the bankruptcy court's legal conclusions de novo and factual findings for clear error. *See in re Chicago Mgmt. Consulting Grp., Inc.*, 929 F.3d 803, 809 (7th Cir. 2019). Both a debtor's entitlement to an exemption and matters of statutory interpretation are questions of law. *See in re Hernandez*, 918 F.3d 563, 566 (7th Cir. 2019).

Discussion

The main dispute before the Court is whether the Fund is exempt from Green's bankruptcy estate under Illinois state law. Green relied on the Illinois Bankruptcy exemption for retirement funds as the basis for his exemption. This provision 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 is (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.

[1] In this Opinion, this Court uses I.R.C. to refer to 26 U.S.C. § 401 *et seq.*

> (b) "Retirement Plan" includes the following: (1) a stock bonus, pension, profit sharing, annuity or similar plan or arrangement, including a retirement plan for self-employed individuals or a simplified employee pension plan; (2) a government or church retirement plan or contract; (3) an individual retirement annuity or individual retirement account; and (4) a public employee pension plan created under the Illinois Pension Code, as now or hereafter amended.

735 ILCS 5/12-1006 ("Section 12-1006"). Exemption statues like this one should be interpreted liberally to help protect the debtor, *in re Barker*, 768 F.2d 191, 196 (7th Cir. 1985), but courts should still "be mindful to avoid interpreting an exemption statute in a way not contemplated by the legislature," *In re O'Malley*, 601 B.R. 629, 645 (Bankr. N.D. Ill. 2019) (internal citation omitted). The Trustee, who objects to the exemption, has the burden of proving that the debtor did not properly claim the exemption. *See in re Ritter*, 190 B.R. 323, 325 (Bankr. N.D. Ill. 1995).

The parties agree that the Fund does not fall within the scope of Section 12-1006(b) and is not a public employee pension plan. Therefore, this Court must consider whether the Fund was "intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code." Section 12-1006(a)(1). Green asserts that this provision must be read broadly. He claims that while Section 12-1006(b) tracks provisions of the Internal Revenue Code, Section 12-1006(a)(1) is a catch-all term, encompassing various *other* provisions of the Internal Revenue Code, such as Section 404A.

I.R.C. § 404A deals with "[d]eduction[s] for certain foreign deferred compensation plans." Under Section 404A(e), the Internal Revenue Code defines what constitutes a "qualified foreign plan" for the purpose of these deductions. Green argues that because the Code defines qualified foreign plans, it recognizes that foreign retirement plans exist. This, to Green, is sufficient to show that plans falling within this provision, like the Fund, are "intended in good faith to qualify as a retirement plan under the applicable provisions of the Internal Revenue Code." The Trustee does not dispute that the plan is a qualified foreign plan but contends that any fund governed by this provision is not a qualified retirement plan under the Internal Revenue Code.

As the Trustee maintained in oral argument, no court has found that a foreign plan qualifies as a retirement plan under the Internal Revenue Code—both parties have only pointed to one case that considered a similar issue, and while this case discusses Canadian retirement plans, it does not mention Section 404A at all. *See in re Ondrey*, 227 B.R. 211 (Bankr. W.D.N.Y. 1998). Thus, how to interpret Section 404A, and specifically how to interpret it within the Illinois bankruptcy code, is a novel issue.

Courts in this Circuit that have considered whether supposed retirement accounts fall within Section 12-1006(a)(i)'s reach have found that only tax-qualified retirement plans under the Internal Revenue Code are exempt. *See, e.g., in re West*, 507 B.R. 252, 259 (Bankr. N.D. Ill. 2014) ("To qualify for the Illinois exemption, the retirement plan . . . must come within the Internal Revenue Code provisions for tax-qualified retirement plans."); *in re O'Malley*, 601 B.R. at 646 ("[T]he Court holds that § 12-1006(a) exempts only retirement plans that are intended to be tax-qualified."); *in re Weinhoeft*, 275 F.3d 604, 606 (7th Cir. 2001) (discussing that 5/12-1006 includes "only tax qualified plans"). The question then remains: is a plan under Section 404A a tax-qualified retirement plan?

Attempting to show that Section 404A "qualified foreign plans" are not tax-qualified retirement plans, the Trustee focuses on the Illinois appellate court decision *In re Marriage of Branit*, 41 N.E.3d 518, 397 Ill. Dec. 107 (1st Dist. 2015) and maintains that this decision showed that "tax-qualified" retirement plans are those identified in Section 522. The *Branit* court considered a different issue: whether Inherited Individual Retirement Accounts ("IRAs") are "retirement plans." The *Branit* court explained "[t]he fact that the Illinois legislature intended section 12-1006 to be used in bankruptcy cases indicates that it was meant to be the Illinois equivalent of section 522 of the Bankruptcy Code." *Id.* at 523. Green argues this only means that the statutes have the same purpose, to protect *retirement* accounts, not that courts should interpret Section 12-1006 the same as it would Section 552. The Court agrees that the *Branit* court analogized the purpose of these

exemptions—to set aside funds for the purpose of retirement—and thus finds that the Trustee interprets *Branit* too narrowly when he maintains that *Branit* specifically instructed courts to interpret Section 12-1006 consistently with Section 522.

Instead, the Court finds another case cited by the Trustee, *In re Jokiel*, 453 B.R. 743 (Bankr. N.D. Ill. 2011) more instructive. There, the bankruptcy court considered whether a supplemental retirement plan qualified as a "retirement plan" under the Illinois statute. The Court found that "the Illinois exemption only applies to retirement plans that are intended to qualify for one or more []forms of preferred tax treatment." *Id.* at 747. As for why the Illinois statute was written broadly and does not identify specific Internal Revenue Code provisions like Section 522 of the Federal Bankruptcy Code, the Court determined that Illinois legislators drafted their statute with broader language to account for the fact that the Internal Revenue Code frequently changes. *Id.* at 749. This analysis reiterates how plans must be tax-qualified retirement plans to fall within the Illinois exemption, but also suggests why it is useful to consider the Federal Bankruptcy Code when determining *which* Internal Revenue Code provisions cover such plans.

Green nevertheless maintains that a plan under Section 404A is one of these tax-qualified retirement plans, pointing to *Wittman v. Koenig*, 831 F.3d 416 (7th Cir. 2016). But *Wittman* discussed Wisconsin's exemption statute, which does not "draw a clear, objective line separating retirement from non-retirement assets." *Id.* at 422. And although the Circuit references qualifying plans under §§ 401–409, it does not specify that § 404A covers qualified retirement plans. Thus, the Court does not find *Wittman* persuasive in this instance.

The Court agrees with Green that a tax-qualified retirement plan is not limited to plans under § 401(a), which was the crux of the Bankruptcy Court's analysis. Therefore, this Court disagrees with the Bankruptcy Court that Section 12-1006 incorporates by reference Section 401(a)'s specific country-of-origin requirement. Nonetheless, the Court finds that simply being mentioned in

the Internal Revenue Code provisions is not enough: a plan must be a tax-qualified retirement plan, and Section 404A does not define retirement plans but rather foreign deferred compensation plans more broadly. Section 404A plans indeed receive some sort of tax benefit, but that does not necessarily mean that they are qualified retirement plans. Retirement plans, like ERISA plans or IRAs, are subject to the Code's very specific requirements. These foreign qualified plans, although defined as "qualified" under the Code, are qualified for the purpose of *deductions*—the Code does not say anything more about whether they are qualified *retirement* plans, a term which otherwise covers plans governed by strict requirements. *See, e.g., in re O'Malley*, 601 B.R. at 637, 649 (distinguishing between nonqualified deferred compensation plans governed by I.R.C. § 409A and tax-qualified retirement plans).

Furthermore, although this Court does not solely base its analysis on the Federal Bankruptcy Code, Section 522 is instructive because it identifies certain Internal Revenue Code provisions associated with retirement plans to the exclusion of Section 404A. Thus, the Court concludes that Section 404A does not define qualified retirement plans. Although the Court sympathizes with Green that his specific Fund was likely intended for retirement, it concludes that Green has not pointed to an applicable provision of the Internal Revenue Code under which this Fund falls such that it qualifies for an exemption under Section 12-1006.

Finally, the parties spent time at oral argument discussing the "intended in good faith" requirement. This provision applies when an employee in good faith believes they are contributing to a qualifying plan, but it later turns out the plan did not qualify "because of some operational defect." *In re Bauman*, No. 11 B 32418, 2014 WL 816407, at *16 (N.D. Ill. Mar. 4 2014); *see also in re Jokiel*, 453 B.R. at 739 ("[B]y the clear language of the statute the intent must be to qualify under the tax code, and not simply that the plan was intended to be used for retirement."). Here, there is no operational defect: the foreign qualified plan is simply not a "retirement plan" under the Code.

Therefore, whether the Fund was intended in good faith to comply with Section 404A is not relevant, and the Court does not further consider whether the Fund meets the criteria established in Section 404A.[2]

Conclusion

The Court holds that plans governed by Section 404A are not tax-qualified retirement plans under the Internal Revenue Code, and thus are not exempt under Section 12-1006. Consequently, the Court affirms the Bankruptcy Court's ruling that the Fund is not exempt from the bankruptcy estate.

IT IS SO ORDERED.

Date: 8/31/2023

Entered: _____
SHARON JOHNSON COLEMAN
United States District Judge

[2] In his reply brief, Green advances a new argument, relying on portions of *Branit* to suggest why his Fund is tax qualified. Nothing in this analysis changes the Court's conclusion that plans governed by Section 404A are not tax-qualified retirement plans. The specific status of this Canadian retirement plan is thus not relevant.

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.[1] 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 employees

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[1] 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.

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.[2]

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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[2] *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: Jacqueline P. Cox

J. P. Cox

Jacqueline P. Cox
United States Bankruptcy Judge