

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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September 1, 2004

John S. Lovald,
Chapter 7 Trustee
Post Office Box 66
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Counsel for Defendant
Post Office Box 668
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Subject: *John S. Lovald, Trustee v. Credit
Collection Services, Inc. (In re Schultz),
Adv. No. 04-4023; Chapter 7; Bankr. No. 03-40141*

Dear Trustee and Counsel:

The matter before the Court is Trustee John S. Lovald's complaint to obtain some wages that Defendant Credit Collection Services, Inc., garnished pre-petition from Debtors Tony D. and Sheri M. Schultz. This is a core proceeding under 28 U.S.C. § 157(b)(2) that has been submitted on stipulated facts and briefs. This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the subject garnished wages were not preferential transfers.

Summary. On May 19, 1999, Credit Collection Services, Inc., ("Credit Collection") obtained judgments against Tony Schultz for \$2,354.13 and for \$1,094.66. Credit Collection garnished Tony Schultz's wages from his Nebraska employer and obtained a "continuing lien" as provided by Nebraska law on October 28, 2002. Under the garnishment, Credit Collection received \$942.65 on November 25, 2002, and \$591.51 on January 6, 2003.¹ The lien expired on January 18, 2003, under the terms of the state court order. Credit Collection released the garnishment by pleading filed with the state court on January 7, 2003.

Tony Schultz and his wife Sheri M. Schultz filed a Chapter 7

¹ Other garnished funds are not at issue herein.

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petition on February 11, 2003. On May 7, 2004, case trustee John S. Lovald commenced an adversary proceeding against Credit Collection to recover the garnished wages that it received on November 25, 2002, and January 6, 2003, which were within ninety days of Debtors' petition.

The issue raised by the parties is when Credit Collection was deemed to "own" the garnished funds under Nebraska law. Credit Collection argued that Debtor's employer's liability arose when the employer was served with the garnishment summons and that the employer held the wages in *custodia legis* for it from the date the Nebraska state court ordered the employer to withhold funds. Credit Collection also argued that the continuing 90-day lien precluded any other creditor from acquiring an interest in the wages. Thus, Credit Collection argued that it acquired an interest in the November 25, 2002, and January 6, 2003, garnishments on October 28, 2002, when the lien was put in place, which was outside the ninety-day preference window, not when the checks were actually issued by the employer to it.

In his brief, Trustee Lovald essentially conceded that the subject garnished funds would fall outside the ninety-day preference period if the lien would have removed or isolated the funds from Debtor's bankruptcy estate.

Discussion. This issue has been answered in *Kristy J. Hogsett v. Credit Bureau of Scottsbluff, Inc. (In re Hogsett)*, Bankr. No. 00-82678, Adv. No. 01-8034, slip op. at 3 (Bankr. D. Neb. Oct. 9, 2001). Therein, the Court concluded, under similar facts,

The transfer occasioned by a garnishment becomes effective for purposes of a preference analysis when the debtor acquires rights in the property transferred. *In re Wade*, 219 B.R. at 821 and 11 U.S.C. § 547(e)(3). See also *In re Morehead*, 249 F.3d 445, 448 (6th Cir. 2001) (Applying Kentucky law and holding that when wages are earned during the preference period, transfer of those wages pursuant to a garnishment order is avoidable under 11 U.S.C. § 547(b)(4)(A); *In re White*, 258 B.R. 129 (Bankr. D.N.J. 2001).

Accordingly, any garnishment of wages earned by [the debtor] within ninety days of the bankruptcy petition, ..., is, as a matter of law, a preference and is hereby avoided.

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