

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1213

2007 HOUSE JUDICIARY

HB 1213

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1213

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/23/07

Recorder Job Number: 1723

Committee Clerk Signature

APenrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1213.

Lori Weisz: I am an attorney in private practice in Harvey, ND. This also addresses debtor/creditor law and bankruptcy law. The new bankruptcy law makes it very difficult for debtors under the new bankruptcy laws. There are some other people who would like to testify and would ask that this hearing be kept open. I brought a Bankruptcy Basics handout. I had a client named Jeff, who was married and had 3 small children. He was a construction worker, making over \$20/hr. supporting his family, very proudly. He was at a stoplight and hit from behind by another driver. He became permanently disabled because of the accident. He hired a personal injury attorney, and he sued the driver of the other vehicle. That person had nothing for him to collect other than their automobile insurance. The attorneys reached a settlement and Jeff got a settlement from his accident. The terms of the settlement were that he got \$20,000 up front, which he had to pay his attorney out of and then he got an annuity. The reason he chose to get an annuity, rather than his entire settlement award up front, was because he was told by his attorney and the insurance agency, and professionals in the banking industry that if he took an annuity, he would get an income stream for the rest of his life, that he could support his children with. Whereas, if he took the other \$80,000, he may end

up blowing it, buying cars, etc. So he did the prudent thing, he took an income stream, an annuity. This annuity only gave him \$290/month, but he would receive that for the rest of his life and it also had what is called a "term certain". That meant that if Jeff died, he would get 30 years of payments that would go to his wife independent. Jeff also applied for SS disability income and was awarded that. That would somewhere around \$800/month. To support his wife and three children, he now had about \$1,000/month. Fifteen to twenty years later, he had some very difficult medical problems, huge medical bills, something happened with a credit card. He wasn't living the high life. He had a small home in Harvey, ND. His wife was working minimum wage jobs and they were barely living. He started getting pursued by the creditors for the doctors and the credit card companies. He filed bankruptcy. The bankruptcy trustee believed that this annuity should go to his creditors, rather than to support his family. There was a hearing and the bankruptcy judge agreed that he should give up the annuity. He now doesn't have the annuity. There were two theories, this ended up going to appeal. First, under section #3 in the first page, line 15, the trustee alleged and the bankruptcy judges agreed that the language that starts after the comma, after that, at the end of line 15, "upon the death of the insured it would be payable to the spouse". The theory of issue #1 is that an annuity or pension or life insurance policy should only be exempt if it's only paid after the death of the insured. But we didn't believe that this is how this should be interpreted. We believed that a pension, and you are retired, that is also supposed to be exempt. I'm worried about the far reaching effects of this. This would mean that any pension that you have, in addition to an annuity and life insurance policy, if it pays during your lifetime, i.e. after you're 65 and retired, then it is subject to collection. We need a balance between the rights of the creditor and the debtor. We do not want to impoverish so that they can't live. There is some protection in this statute for pensions, annuities and life insurance policies. If you look on the next page, it says

that they cannot exceed, on line 3, up to \$100,000 for each pension, etc. or a limitation of \$200,000 for all of them. So there is a cap in ND. I'm sure that the bankruptcy trustee will tell you that the debtor shouldn't be allowed to keep that large of an asset, but the person may live for 20 years or more and will need the income to live on. Jeff's situation was not an abuse of the system. There is definitely an abuse of creditor's law and bankruptcy law; on both sides, by collection agencies and by some attorneys who protect the debtors and some debtors who try to get out of their bills. We believe that pensions and annuities should not be subject; you can only exempt them if they are only payable after you die. The second issue that happened in Jeff's case, is that they said because his annuity was purchased with funds from a lawsuit from which he had a personal injury, he is subject to a limitation which we find on page 2, paragraph 4, subsection b, where it says that the annuity, even if we didn't have the first problem that it be payable only after death, we have a second problem that Jeff's \$290/month is limited to \$7,500 present value. I would propose that we take language and add it to paragraph 4, a and b similar to the language that is on line 6, "the dollar limit does not apply to the extent this property is reasonably necessary for the support of the resident and the resident's dependents." So that Jeff, who is using \$290/mo to support his wife and children in his home, could prove that he does need that to buy them food, medical supplies, and put a roof over their heads. I was given a copy of Mike Wagner's testimony today and he has some amendments and ideas. I am not going to address all of those at this point. Again, I would like this to be kept open; there is a good possibility that you may find some middle ground between the two sides. Some bankruptcy attorneys feel that this entire section should be rewritten. Maybe we should have a study resolution to look at this. The concern is that if you raise the exemption from \$20 to \$40 in garnishment actions, in 10 years you're going to have

to come back and say that \$40 is not enough because there has been inflation and now the poverty level has risen again.

Rep. Koppelman: On page 2, item 4, you were talking about the exemption. Are you saying that the same kind of language on line 6, is that similar to what is found in (a) for the reasonable support of the debtor and dependents.

Lori Weisz: Actually it would not need to be added to 4a. Only added to 4b.

Rep. Klemin: This bill starts off by saying that it is relating to bankruptcy exemptions, but really that's not the only thing it relates to. It relates to exemptions from anything, even if you're not in bankruptcy; if you have a judgment against you or whatever. Is that correct.

Lori Weisz: You are exactly correct. The exemption in the NDCC applies both to someone who files bankruptcy, but they would also apply for someone who is simply being sued. So the exemption has to do with two different types of losses.

Rep. Klemin: A point of clarification then on the context of the amendment, first the change would say that pensions and annuity policies are exempt not only if they are the type that would be payable on death to spouse or children, or other relative, so that is the effect for putting that semicolon there on line 15.

Lori Weisz: Yes I agree.

Rep. Klemin: I'm not sure I quite understand the effects of that particular change on the caps.

Lori Weisz: Basically it would say that anyone that gets a personal injury award, if they need that money to support their family they could use it.

Rep. Klemin: I'm talking about the caps at the top of page 2, the \$100,000 and \$200,000 caps. Is there an effect there on those caps?

Lori Weisz: No, it would not affect those caps. That's my understanding.

Chairman DeKrey: Thank you. Further testimony in support.

Jim Kohl: I am here in support of this bill and I represent myself on this. I would have to say that this section of the law dealing with the exemptions has made more grammar and punctuation scholars of judges and lawyers in this state, than my 8th grade teacher. This section of the law has been diagramed so many ways it is unbelievable. Most of those cases are in the bankruptcy court. Even though the bankruptcy court does not necessarily provide us with binding precedents in our state courts, I can tell you from experience, that our district court judges, it simply is a matter of practice, because the issues become so finely focused in the context of bankruptcy. If you look through the Century Code you will see many, many references on exemptions in bankruptcy cases. I think it is pretty clear that our judges look to what our bankruptcy court does. I don't see this as a change in the law. I guess as I read this statute, I always read it and understood it, to be that pensions were exempt, annuity policies were exempt, annuity plans were exempt and finally life insurance policies payable on death were exempt. That's the way I read it. I would have failed that question in the 8th grade grammar because of the way it's written and punctuated, that whole laundry list of items is subject to the payable on death. I believe that is what this amendment does. It says that it stands alone. You can exempt your pension, exempt your annuity plan or policy and you can exempt your life insurance that's payable on your death and it goes to your spouse or dependents. I think it really clarifies what the law has always been in the case of a contrary judicial decisions. I don't think it is cutting any new ground. It is important that these aren't unlimited. If you read basically the next page over, where it talks about the dollar limits. They relate back to this whole laundry list of items which are exempt. I think the 8th circuit once used the phrase the whole hog approach. That was a MN case, not ours. We don't have a whole hog approach. We have articulated reasonable limitations on our exemptions. I think that is why they've always stood up because we've always had that limitation. One other thing

that I would like to point out, in analyzing any of these questions that come up with exemptions, especially in the context of bankruptcy, if the issue comes up, and say, look what this guy exempted, he had this huge pension plan or whatever, he protected all this money. It is very important to remember that many of those assets are not protected under state law; they are protected under federal law. The ERISA, which my accounting instructor said it's "Every Ridiculous Idea Since Adam" is for employee retirement income security act that protects any plan under it. It is possible that you can have someone file bankruptcy and they can have a half million dollars and if it is under an ERISA qualified plan, it is not even considered a bankruptcy asset. Any plan under ERISA has its own separate umbrella.

Rep. Koppelman: Your explanation of the laundry list that you're talking about, you said that all those things stand alone, like insurance policies upon the death of the insured would be payable. That wouldn't make any sense, would it, because it would be redundant language? Isn't the definition of the life insurance policy something that is payable on death.

Jim Kohl: The phrase payable on death, definitely relates to life insurance. The problem is, as was the case that Ms. Weisz was talking about, the court said no, it modified all of the items that come before it. It modified pensions, annuity, etc.

Rep. Koppelman: That's what I'm saying, isn't it redundant language to say a life insurance policy that is payable on death of the insured.

Jim Kohl: You have to read that in its entirety. What they are protesting is your insurance that you pay to your spouse or dependent or someone who depends on you. A brother lives independently and you've got a life insurance policy, you wouldn't be able to exempt that, let's say you've got a cash value in it of \$25,000 and you die, it will go to your brother. Well your brother has his own living, under the statute that wouldn't be exempt because it's not payable on your death to any of the listed individuals.

Rep. Koppelman: I thought Ms. Weisz was saying that the case she cited, the interpretation was different, her reading of the law was that this dealt with annuity policies including that phrase, payable on death, but that it would only relate to the portions that were exempt but that the court found that only the portion that was payable after death would be exempt and therefore they could attach the portion that wasn't.

Jim Kohl: I believe that is what the courts said. The problem with that is that with any exemption, you almost have to go back and look, what is the purpose of the exemption. Why are we exempting pensions when we exempt annuity policies? Well, because the calculation is that at some point, we don't want these people going on welfare. We'd like to see the creditors get their money, but on the other hand if we have these individuals and they are stripped of all their pension money and 401k's and all that, they are going to be on the public dole. As a taxpayer, I say let's leave them something, again there are limitations on the dollar amounts.

Lori Weisz: The bankruptcy court case said his entire annuity, both the payable during the lifetime and after death, was not exempt under this statute because of the language that followed the life insurance policy.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Michael Wagner, Bankruptcy Trustee: (see attached testimony).

Rep. Koppelman: Are you saying that if an annuity is part of retirement, it should make sense to exempt it, because we are exempting retirement as a policy decision, but if that annuity is part of a disability scenario, even though it's income, that it shouldn't be exempt.

Michael Wagner: That's why I included language to say that if you've got someone who is disabled and they've got an annuity because of that disability, they've lost income and for that

reason they entered into this annuity contract and that's why they have this annuity, I can understand that. But let's put it in the statute then so we can all read it and understand it.

Rep. Klemin: What about pensions. It says pensions and annuities. Are you looking at exempting all the pension funds?

Michael Wagner: If it's in a pension. If you look at the language which I suggested, if that account is exempt from taxation under section 401-403, anyone of those pension statutes, then it is exempt.

Rep. Klemin: Looking at the language, the way it is presented to us now, it says pensions, annuities policies or plans, are you talking about pensions and annuities.

Michael Wagner: No, I'm saying let's keep them absolutely distinct. If that annuity is in a fund that is exempt from taxation, that's fine. I don't think you're going to find one, but I suppose it's possible.

Rep. Klemin: Let's just talk about pension, forget about annuities. Right now, the way this reads, as I understand that case, pensions would only be exempt to the extent that they would be payable to the spouse, children, or relative on the death of the person with the pension. What about pension, I see your point about annuities, what about pensions.

Michael Wagner: Pensions should not be linked to upon the death of the insured. They shouldn't.

Rep. Klemin: So a pension up to \$100,000 cap is okay, is that what you're saying.

Michael Wagner: Under this statute, yes. The only reason I hesitate is that I see so many cases where debtors have \$200,000 in a retirement account, they've gone and racked up the credit cards to put on a new garage and file bankruptcy and their \$200,000 retirement is exempt plus they have a new garage. I have a little bit of a problem with allowing someone to exempt a \$100,000 pension in the first place.

Chairman DeKrey: Thank you. We will recess the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1213

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/6/07

Recorder Job Number: 2909, 2952

Committee Clerk Signature

A. Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1213. I am passing around an amendment that I had prepared.

Rep. Koppelman: There was some talk about line 24, inserting the same kind of language that is on line 19 and 20.

Rep. Klemin: I think what this says, basically that annuity policies and plans, and personal injury awards are exempt to the extent that it is reasonably necessary for the support of the debtor and dependents, no limits.

Rep. Koppelman: I suppose the court can determine what is reasonably necessary.

Rep. Klemin: Well it does now, but let's say if a person did bankruptcy planning. What happens here, under federal law says you can either claim your federal exemptions or the state exemptions. What we have here our state exemptions which are better than the federal exemptions already. So we're making the state exemptions even better for a bankrupt debtor than we are now, because most people, who file bankruptcy, do engage in some kind of bankruptcy planning if they've got any assets at all; because the point of a chapter 7 bankruptcy is elimination. Whatever is not exempt is distributed to creditors. Because of the exemptions, most of the bankruptcy cases now are non-asset cases. There isn't anything

available to distribute to creditors because of the exemptions. So if you are able to have an annuity policy, under the amount that is exempt, then what you do in bankruptcy planning, is if you've got money sitting there that you can use, you go out and buy yourself an annuity then you can exempt it. Then also, in the event you have a wrongful death payment, right now it is limited to \$7,500. That would be income that you received because someone that was a parent, spouse, was killed and there was a lawsuit brought for wrongful death and the jury awarded a verdict of whatever amount. Right now you can only exempt \$7,500 of that from your debt. This would say that you can exempt all of it from your debts. Then the last one deals with personal bodily injury, not including pain and suffering. I'm not sure how that's in place, but the same would apply there, whatever the verdict that you received, it can now only be exempt up to \$7,500, and under this amendment it would all be exempt. That's the way I understand it.

Rep. Delmore: Under this, you could exempt all of it.

Rep. Klemin: Under these amendments, you could exempt everything that applied to those exemptions.

Rep. Onstad: When we try and make a rule change here, it seems to create a problem somewhere else. I am wondering if this is something that needs to be studied, so you look at the whole gamut of that issue. Can we turn it into a study?

Chairman DeKrey: If I would have an amendment drawn up that would change this to a study, how would you feel about that.

Rep. Delmore: I think it would be a good idea.

Chairman DeKrey: It wouldn't be a shall study, it would be a "may" study.

Rep. Delmore: I'm not even sure that this bill addresses what is wrong.

Rep. Klemin: I think it would be a good idea to study it because we had testimony from Michael Wagner who is the bankruptcy trustee for the western part of the state, and he said that this whole section 3 needs a lot of work, and we received email from the trustee in Fargo, who basically said the same thing.

Chairman DeKrey: I will have an amendment drawn up to make this into a study.

(Reopened later in the day)

Chairman DeKrey: We will take a look at HB 1213.

Rep. Delmore: I move the DeKrey amendment.

Rep. Wolf: Second.

Chairman DeKrey: Voice vote. Motion carried.

Rep. Delmore: I move a Do Pass as amended.

Rep. Meyer: Second.

13 YES 0 NO 1 ABSENT DO PASS AS AMEND CARRIER: Rep. Boehning

PROPOSED AMENDMENTS TO H.B. 1213

Page 1, line 15, after "plans" insert "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor"

Page 2, line 18, replace "," with ". ^{Seven} The limit of ~~seventy~~ thousand five hundred dollars would not apply"

Page 2, line 18 after "." insert "The limit of seven thousand five hundred dollars would not apply to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

Renumber accordingly.

House Amendments to HB 1213 (70482.0101) - Judiciary Committee 02/06/2007

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of state bankruptcy exemptions."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - BANKRUPTCY EXEMPTIONS. The legislative council shall consider studying, during the 2007-08 interim, the current state exemptions for bankruptcy and the desirability of updating these exemptions. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-first legislative assembly."

Renumber accordingly

Date: 2/6/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1213

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Meyer

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad		
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Boehning

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1213: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1213 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of state bankruptcy exemptions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - BANKRUPTCY EXEMPTIONS. The legislative council shall consider studying, during the 2007-08 interim, the current state exemptions for bankruptcy and the desirability of updating these exemptions. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-first legislative assembly."

Renumber accordingly

2007 SENATE JUDICIARY

HB 1213

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1213

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 28, 2007

Recorder Job Number: 4116 & 1213

Committee Clerk Signature

Maria L. Solberg

Minutes: Relating to an act to provide for a legislative council study of state bankruptcy exemptions.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following hearing:

Testimony in Favor of the Bill:

Rep. Duane DeKrey, Dist. #14 Introduced the bill stating when bill was first introduced and the complications it presented caused the bill to be changed into a study. This is an area that need to be studied. The committee discussed having already done work on a bill that related to this one and turned it into a study. They discussed the possibility of killing or combining bills to not have duplicates.

Testimony Against the bill:

None

Testimony Neutral to the bill:

None

Senator David Nething, Chairman closed the hearing.

Job Number: 1213

Senator David Nething, Chairman opened the hearing.

Sen. Lyson made the motion to Do Pass HB 1213 and **Sen. Marcellais** seconded the motion.

All members were in favor and the motion passes.

Carrier: **Sen. Marcellais**

Senator David Nething, Chairman closed the hearing.

REPORT OF STANDING COMMITTEE

HB 1213, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1213 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1213

Comments to HB 1213
House Judiciary
January 23, 2007 08:30am

Michael Wagner
Bankruptcy Trustee
PO Box 639
Bismarck ND 58502-0639
701-530-9410
trustee@bt7.us

I have been an attorney since 1988 and a bankruptcy trustee since 1995. I am appointed by the United States Trustee's office to administer chapter 7 cases in western North Dakota. In the 10 years as a trustee, I have heard approximately 10,000 cases.

Exemptions are an important part of the bankruptcy process. North Dakota exemptions are among the most liberal in the nation. While I am of the opinion that all of chapter 28-22 is in need of major revisions and I encourage an interim committee be charged with the task of doing so, we are today only concerned with section 28-22-03.1(3). I suggest that section be amended to read:

28-22-03.1(3): Retirement funds that have been in effect for at least one year, to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. The value of such assets exempted shall not exceed \$100,000 for any one account or \$200,000 aggregate for all accounts. The dollar limit does not apply to the extent this property is reasonably necessary for the support of the resident and that resident's dependents. Retirement funds are not exempt from enforcement of any order to pay spousal support or child support, or a qualified domestic relations order under sections 15-39.1-12.2, 39-03.1-14.2, and 54-52-17.6. As used in this subsection, "reasonably necessary for the support" means required to meet present and future needs, as determined by the court after consideration of the resident's responsibilities and all the present and anticipated property and income of the resident, including that which is exempt.

The above language simplifies the section. The first sentence describes the exemption in simple terms. This is the same language used in the federal exemptions pertaining to retirement funds. See 11 U.S.C. § 522(d)(12).

If annuities or life insurance are to be exempt, they should be in a different subsection. Annuities, in and of themselves, are nothing more than an investment just like stocks or bonds. Granted, they are a bit more complicated due to a stream of payments, but they are an investment nonetheless and there is a significant market to buy and sell annuities.

Accordingly, with respect to exemptions, it does not make sense to single out annuities any more than it does to single out stock traded on the New York Stock Exchange.

Annuities are common in disability payouts (usually related to disability insurance), to shelter assets with respect to nursing home planning, and in tort settlements. However, if you simply state that annuities are exempt, a person could take \$100,000 out of their savings account (a limited amount of which would be exempt) and purchase an annuity (theoretically allowing the entire \$100,000 to be exempt). The better approach would be to describe the type of payment that is exempt no matter the form such payment takes, such as 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." See 11 U.S.C. § 522(d)(9)(e) [emphasis added]. That is exactly what 28-22-03.1(4) does. An annuity could be exempt under such section to the extent it does not exceed the value limitation.

Sample of cases which cause me concern over the North Dakota exemption statutes:

Case No 98-32163: Doctor was receiving \$120,000 per year from disability policy. In 12 months prior to filing, he transferred \$130,000 to non-filing spouse. Also in previous 5 years, he transferred \$600,000 apartment complex to wife.

Case No 98-30406: Debts of \$147,000. Pension (fully exempt) totaled \$349,000.

Case No 0031603: Debtor's pension contained \$141,000 and 401(k) contained \$78,000. Both were fully exempt.

Case No 98-30946: Annual income of \$85,000. Credit cards totaled \$54,000. \$100,000 in retirement (fully exempt).

Case No 00-30016: Retired and receiving \$36,000/yr from retirement. In few years prior to filing, charged \$30,000 on credit card the funds of which were used to build a new garage, bathroom, and other improvements to fully exempt homestead.

Case *:** Debtor owned farmland worth just under \$80,000. A few months prior to filing, he moved a 5th wheel on to the land, surrounded it with hay bales and erected an outhouse. The court held the property was homestead and fully exempt.

Case *:** Debtor owned land worth \$60,000 and mobile home worth \$80,000. Since the mobile home sat on the land, Debtor claimed mobile home exempt under 28-22-02(10) [unlimited mobile home exemption] and land exempt under 28-22-02(7). While the court did not allow the combined exemption, the statutes need to more clearly state the two are mutually exclusive. Given the value of some mobile homes, 28-22-02(10) should be capped at the homestead limit.

