UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In re TRAVER CHRISTOPHER BIEHN,	)	**Chapter 7 Proceedings**
	)	**Case No. 2-05-03303-PHX-CGC**
	)	
	)	**UNDER ADVISEMENT DECISION RE: MOTION FOR RE-CONSIDERATION OF ORDER REQUIRING TURNOVER**
Debtor.	)	
	)	
	)	

The issue presented to the Court is whether Arizona Revised Statute (A.R.S.) section 33-1126[1] may be applied to require turnover by Debtor Traver Biehn of approximately $2,000 paid into to his 401(k) account during the 120 days prior to bankruptcy. The answer is no. Although the motion to reconsider will be granted, the matter requires explanation, as neither party properly analyzed the issue (nor did the Court in deciding the initial motion).

The United States Supreme Court in *Patterson v Shumate,* 504 U.S. 753 (1992), established that qualified plans that conform with ERISA are excluded from property of the estate by 11 U.S.C. section 541(c)(2). There is no dispute here that the debtor's 401(k) plan is "ERISA qualified." Thus, all funds in the plan on the petition date are excluded from the estate. Because the Arizona statute only applies to exempt from creditors' claims certain property of the estate, its application never arises in this situation where the funds in the 401(k) never were

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[1]A.R.S. section 33-1126, in relevant part, provides as follows:

> **B.** Any money or other assets payable to a participant in or beneficiary of, or any interest of any participant or beneficiary in, a retirement plan under § 401(a), 403(a), 403(b), 408, 408A or 409 or a deferred compensation plan under § 457 of the United States internal revenue code of 1986, as amended, shall be exempt from any and all claims of creditors of the beneficiary or participant. This subsection shall not apply to any of the following:
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> * * *
>
> 2. Amounts contributed within one hundred twenty days before a debtor files for bankruptcy.

property of the estate. *Patterson* remains good law and its holding is explicit.[2]

The Trustee urged at oral argument that such a holding would encourage "loading up" by debtors' transferring non-exempt assets into qualified plans on the eve of bankruptcy. This concern is ill founded. First, contributions to employer-sponsored qualified plans (the only type of plans governed by ERISA) are tightly controlled and strictly limited, both in type and amount, by both federal law and the plans themselves. Second, A.R.S. section 33-1126 remains applicable to other non-qualified ERISA plans, most notably IRA's (authorized under IRC section 408), or any other retirement vehicle authorized under any of the cited sections of the IRC in section 33-1126, except those specifically relating to ERISA qualified plans. The reach back provisions of A.R.S. section 33-1126 will therefore continue to limit the exemption a debtor can claim for IRA contributions.

In short, the critical issue in determining the applicability of Section 33-1126(B) to retirement plans is wether they are ERISA qualified: 401K plans are, IRA's are not. The same question must be asked for any other type of retirement vehicle authorized under any of the cited sections of the IRC.

Therefore, Debtor's motion for reconsideration is granted. Debtor is to submit a form of order consistent with this decision for the Court's signature.

So ordered.

DATED: March 28, 2006

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed or sent via facsimile this 28th day of March, 2006, to:

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[2]The decision in *Reed v. Drummond (In re Reed),* 985 F.2d 1026 (9th Cir. 1993), issued post-*Patterson* and upon remand after *Patterson,* simply reaffirmed this principle. The first *Reed* case, *Reed v. Drummond (In re Reed),* 951 F.2d 1046 (9th Cir. 1991), has no bearing on the issue as it was specifically withdrawn by the Ninth Circuit.

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