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Tuesday, December 18, 2001

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

DEPAK and KUSUM STOKES,

No. 99-12603

[Debtor](#)(s).

Memorandum re Pension Plans

Debtors Depak and Kussum Stokes are both medical doctors. In the latest version of their [schedules](#), they listed as assets two pension plans: the Kusum Stokes, M.D. Corporate Pension [Plan](#) and the Center for Women Health Care Pension Plan. The debtors are the sole beneficiaries of both plans. The debtors claimed both plans exempt pursuant to California Code of Civil Procedure § 704.115 as a private retirement plan. [Creditor](#) Northwest Farm Credit Services objects. The applicable law is clearly stated in *In re Phillips*, 218 B.R. 520, 522 (N.D.Cal.1998):

[I]t is well settled that a "private retirement plan" is not exempt by mere virtue of its name. *Bloom v. Robinson (In re Bloom)*, 839 F.2d 1376, 1378 (9th Cir.1988); *Yaesu Electronics Corp. v. Tamura*, 28 Cal.App.4th 8, 14, 33 Cal.Rptr.2d 283 (1994) (adopting *Bloom*). The Ninth Circuit has interpreted the statute as requiring that a retirement plan be "designed and used" for retirement purposes. *Id.* See also *In re Daniel*, 771 F.2d 1352 (9th Cir. 1985).

In this case, the evidence was convincing that the debtors did not use the Corporate Pension Plan for retirement purposes. They took loans from the plan without properly documenting them, repaying them or providing for interest on them, forgave debts owed to the plan, caused the plan to loan money to controlled corporations, and transferred assets in

and out of the plan as it suited them. Having failed to use the plan properly, they cannot exempt it. The objection to the [claim](#) of exemption in the Corporate Pension Plan must accordingly be sustained. Similarly, the debtors used the Center for Womens Care Pension Plan for non-retirement purposes including the satisfaction of personal debts. The objection to the exemption of this plan must also be sustained. As a fall-back position, the debtors rely on *In re Moses*, 167 F.3d 470 (9th Cir. 1999), and argue that the pension plans are not property of the [bankruptcy estate](#). The court in *Moses* held that if a pension plan contains a spendthrift provision enforceable under state law, then the plan is excluded from the bankruptcy estate by § 541(c)(2). However, the evidence established that the spendthrift provisions in the plans are not enforceable. According to *Moses*, a spendthrift provision in a pension plan does not remove the plan from the estate if the debtors created the plan, administered the plan, had the ability to terminate or amend the plan, or had unfettered access to the plan assets. 167 F.3d at 473. The debtors' arguments probably fail on all counts. At the very least, the debtors' unrestrained and improper use of the pension plan assets renders their spendthrift provisions unenforceable under *Moses*. Counsel for Northwest shall submit an appropriate form of order sustaining its objection to the exemption of the two scheduled pension plans and directing the debtors to turn over the assets of the plans to the [trustee](#).

Dated: December 18, 2001

Alan Jaroslovsky

U.S. [Bankruptcy Judge](#)

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