

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WISCONSIN

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In re

KENNETH BEATTIE and  
DEBRA BEATTIE,

Case No. 98-30856-MDM

Debtors.

Chapter 7

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MEMORANDUM DECISION ON CHAPTER 7 TRUSTEE'S  
OBJECTION TO PROPERTY CLAIMED AS EXEMPT

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The Chapter 7 trustee objected to the exemption the debtors claimed in the potential proceeds of a personal injury lawsuit or settlement under 11 U.S.C. § 522(d)(11)(E). For the reasons set forth below, this case shall remain open for a future determination of the amount to which the debtors are entitled to claim exempt, depending on the outcome of the pending state court personal injury claim.

STATEMENT OF FACTS AND ARGUMENTS

The debtors filed their chapter 7 bankruptcy petition on October 28, 1998. On their schedules they listed a personal injury action with an unknown value as exempt. The action arose from an injury the debtor, Debra Beattie, sustained when she twisted her ankle walking up a set of stairs at an estate sale. The debtors later amended their schedules to list the current market value of the personal injury claim as \$30,000. According to the debtors, the amended amount reflects the estimated settlement value of the lawsuit. The debtors claimed the personal injury action as exempt using § 522(d)(5), the wild card exemption, § 522(d)(11)(D), the

exemption for personal bodily injury, and § 522(d)(11)(E), the exemption for payment in compensation of loss of future earnings.

The trustee retained a new attorney to pursue the lawsuit. The trustee also filed an objection to the claim of exemption under § 522(d)(11)(E), stating that any “loss of future earnings” should be calculated as of the date of the bankruptcy filing. Thus, if the debtor were compensated for a loss of earnings between the date of the injury and the date of filing, this award would not be exempt as future earnings. The debtors disagree and contend that the debtor suffered a loss of future earnings as of her date of injury, May 1, 1997. If this view prevails, any award relating to earnings would fall under the exemption as “future earnings.”

#### DISCUSSION

Bankruptcy Rule 4003(c) places the burden of proving that an exemption has been improperly claimed on the party objecting to the exemption. Additionally, exemption statutes are to be liberally construed in favor of the debtor. *Matter of Harris*, 50 B.R. 157, 159-60 (Bankr. E.D. Wis. 1985). Section 522(d)(11)(E) provides:

(d) The following property may be exempted under subsection (b)(1) of this section:

...

(11) The debtor’s right to receive, or property that is traceable to –

...

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

11 U.S.C. § 522(d)(11)(E).

This subsection requires a two-part test. First, the court determines if the award contains any payment to compensate the debtor for loss of future earnings and what portion of the award

falls into that category. Then the court decides whether and to what extent the award is reasonably necessary for the support of the debtor. *In re Bova*, 205 B.R. 467, 477 (Bankr. E.D. Pa. 1997); *In re Rockefeller*, 100 B.R. 874, 877 (Bankr. E.D. Mich.), *aff'd*, 109 B.R. 725 (E.D. Mich. 1989). At this time, since liability on the personal injury claim has not been determined and it is unliquidated, the case shall remain open pending the outcome of the lawsuit. When the amount due the debtor, if any, is decided or settled, the principles for interpreting section 522(d)(11)(E) can be applied. *See In re Sidebotham*, 77 B.R. 504 (Bankr., E.D. Pa. 1987).

Most settlement agreements, and many court awards, do not specify what portion of the settlement is allocated to personal injury, property damage, pain and suffering, medical expenses, or lost earnings. How an award is allocated may affect a debtor's claim of exemptions. The allocation may also be subject to manipulation when a bankruptcy occurs before the personal injury claim is concluded. Therefore, it is sometimes necessary for the bankruptcy court to analyze a personal injury award or settlement to determine the appropriate apportionment of damages. *See, e.g., In re Cramer*, 130 B.R. 193 (Bankr. E.D. Pa. 1991); *In re Haga*, 48 B.R. 492 (Bankr. E.D. Tenn. 1985) (bankruptcy courts determined exempt portion of judgments). Even a stipulated allocation of the settlement proceeds may not necessarily be binding on this court. *See In re Territo*, 36 B.R. 667, 670 (Bankr. E.D.N.Y. 1984) (bankruptcy court is free to ignore state court labels and examine the facts in order to determine the true nature of the debtor's obligations); *In re Ashley*, 41 B.R. 67, 72-73 (Bankr. E.D. Mich. 1984) (self-serving attempt by debtor to maximize net recovery not binding upon trustee or court). Since the parties have already identified one area of difficulty in interpreting a claim of exemption under § 522(d)(11)(E), the court will provide guidance by addressing the question here and now.

The trustee states that any “loss of future earnings” should be calculated as of the date of the bankruptcy filing. The debtors contend that the debtor suffered a loss of future earnings as of her date of injury, May 1, 1997. Under Wisconsin law, lost future earnings are determined as of the date the damages are assessed, either by verdict or settlement. *See* Wisconsin Jury Instructions - Civil 1762. Loss of *past* earnings or earning capacity, on the other hand, are calculated from the date of the injury to the time of the verdict or settlement. *See* Wisconsin Jury Instructions - Civil 1760; *see also* *Klink v. Cappelli*, 179 Wis. 2d 624, 508 N.W.2d 435 (Ct. App. 1993) (“lost past earning capacity” is difference between amount injured plaintiff was capable of earning between time of accident and trial). Damage awards to compensate for loss of future earnings are covered under § 522(d)(11)(E); past earnings are not. *In re Buchholz*, 144 B.R. 443, 445 (Bankr. N.D. Iowa 1992). However, when the assessment of past and future wage loss occurs after the bankruptcy, part of the past earnings loss might be allocable to the time period before the bankruptcy, and part of the past earnings might be allocable to the period after filing. The trustee’s theory requires a further breakdown in the elements of damages which is not usually necessary under personal injury law, but it is consistent with the establishment of exemptions at the time of filing. The debtor’s theory would put all awards for lost earnings in the category of future earnings, which does not comport with common sense and established Wisconsin law. This court adopts the trustee’s view.

Wisconsin courts have considered various factors in calculating a plaintiff’s loss of future earnings.<sup>1</sup> The injured person’s physical and mental capacity and experience before and after

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<sup>1</sup>The courts have also used the terms “past loss of wages” and “lost earning capacity” to distinguish between past and future economic losses. *See, e.g., Spleas v. Milwaukee & Suburban Transp. Corp.*, 21 Wis. 2d 635, 641-42, 124 N.W. 593 (1963).

injury, age, education, training, the type of work performed prior to injury, and the amount of compensation received are relevant. *See Reinke v. Woltjen*, 32 Wis. 2d 653, 660, 146 N.W.2d 493 (1966); *Zintek v. Perchik*, 163 Wis. 2d 439, 481, 471 N.W.2d 522 (Ct. App. 1991). These factors will undoubtedly be used by this court if faced with an unallocated award, or a challenged allocation, in determining the debtor's exemption. One bankruptcy court having to decide the same question considered the debtor's continuing disability, his reduced income, and the speculative nature of any possibility that he would procure employment in the foreseeable future. *In re Territo*, 36 B.R. 667 (Bankr. E.D.N.Y. 1984).

In this case, the debtors' schedules reflect that Debra Beattie was not working prior to the injury. The debtors' Statement of Financial Affairs signed and dated October 27, 1998, reflects that the debtor-husband was the only source of income in 1996 and 1997. Nevertheless, a homemaker or a person unemployed at the time of an injury who has been employed periodically and offers credible proof of intention to resume work as of the time of injury will be permitted to recover for lost future earnings. *Carlson v. Drews of Hales Corners, Inc.*, 48 Wis. 2d 408, 417, 180 N.W.2d 546 (1970); *see also Zintek*, 163 Wis. 2d at 481 (injured woman's household services were part of her loss of earning capacity). The damages are for a person's earning *capacity*, even though the person might not be earning up to that capacity at the time of the injury.

If any portion of the future settlement is determined to be in compensation of loss of future earnings, or a portion of the past earnings represents the period after filing, the court will then determine what amount is reasonably necessary for the support of the debtor and her family. Courts have considered the present circumstances of the debtor, the debtor's present income,

