



# Is Your Retirement Plan Really Safe?

## Protecting Qualified Plans and IRAs From Creditors

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### I. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")

#### A. Key Points of BAPCPA for Retirement Plan Assets.

1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made significant changes in bankruptcy rules and adds specific protections for tax-qualified retirement plans and IRAs.

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2. **BAPCPA exempts retirement plan assets from a debtor's bankruptcy estate if such assets are held by:**

- a. an Internal Revenue Code **§401(a) tax-qualified retirement plan**,
- b. a section **403(b) plan**,
- c. a section **457 plan**, or
- d. an **IRA** (including traditional IRAs, Roth IRAs, SEPs and SIMPLEs) under **§§408 or 408A**.

11 USC §522(d)(12).

11 USC §522(b)(3)(C).

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3. The exemption for IRAs is limited to \$1,000,000. The \$1,000,000 has been increased by COLAs to \$1,362,800. However, the \$1,000,000 (adjusted) limit does not apply to employer-sponsored IRAs (e.g., SEPs or SIMPLEs). Additionally, rollovers into IRAs from qualified plans are not subject to the \$1,000,000 (adjusted) limit. In other words, SEPs, SIMPLEs, and IRA rollovers from qualified plans have an unlimited exemption. It appears that a rollover from a SEP or SIMPLE-IRA receives only \$1,362,800 of protection.

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### Practice Hint:

In order to make sure that an individual receives the full \$1,362,800 exemption on contributory IRAs and the unlimited exemption on IRA rollovers, it is a good idea to **establish separate IRA rollover and contributory IRA accounts**. This will make it easier to track the separate pools of assets.



4. BAPCPA exempts assets in retirement plans that satisfy the applicable requirements of the Internal Revenue Code. A retirement plan is deemed to be qualified under BAPCPA if it has received a favorable determination letter from the IRS.

BAPCPA thereby increases the importance of obtaining an IRS determination letter for a qualified plan.



5. **Retirement Plan Loans:** BAPCPA exempts payroll deductions to repay plan loans from the automatic stay provisions. Therefore, payroll deduction repayments may continue during the pendency of the bankruptcy proceeding.

Additionally, retirement plan loan obligations are not discharged in bankruptcy.



6. In summary, under BAPCPA, qualified plan, SEP and SIMPLE assets, and IRA rollovers are protected with no dollar limitation. IRAs and Roth IRAs are protected to \$1,362,800. BAPCPA only applies to assets in bankruptcy. One must look to state law for protection of IRA assets in state law (e.g., garnishment) actions.



## **B. Further Analysis Under BAPCPA.**

### **1. Determination of the Tax Qualified Status of Plan.**

For bankruptcy law purposes, there is a presumption of exemption from tax if the fund or account has received a favorable ruling from the IRS (*e.g.*, an IRS favorable determination letter issued to an employer-sponsored tax-qualified retirement plan).



If the retirement funds are in a retirement fund that has received a favorable determination letter under IRC §7805, and that determination letter is in effect as of the date of the filing of the bankruptcy petition, those funds shall be presumed to be exempt from the estate.  
11.U.S.C. §522(b)(4)(A).



If the plan has not received a favorable determination letter, the debtor must demonstrate that:

- a. neither the IRS nor a court has made a determination that the plan is not qualified, and
- b.
  - i. the plan is in substantial compliance with the Internal Revenue Code, or
  - ii. the plan is not in substantial compliance but the debtor is not materially responsible for the failure.

11 USC §522(b)(4)(B).



The IRS has made it increasingly difficult to obtain an individual determination letter.

IRS Announcement 2011-82, Rev. Proc. 2014-6, and Rev. Proc. 2016-37 limit the issuance of individual determination letters.

IRS Rev. Proc. 2020-4 further updates the Determination Letter Program.



Courts are split on whether an IRS Prototype or Volume Submitter Opinion Letter (Pre-Approved Plan Opinion Letter) is the equivalent of an IRS determination letter for bankruptcy exemption purposes.



Cases ruling (or implying) that an opinion letter is **NOT** the equivalent of a determination letter for bankruptcy purposes:

- *In re: Daniels*, 452 B.R. 335 (Bankr. D. Mass. 2011), Affirmed, 482 B.R. 1 (D. Mass. 2012).
- *In re: Bauman*, 2014 Bankr. Lexis 724 (Bankr. N.D. Ill. 2014)
- *In re: Rogers*, 538 B.R. 158 (Bankr. N.D. Ga. 2015).
- *In re: Jie Xiao*, 592 B.R. 258 (Bankr. D. Conn. 2018), Affirmed, *Xiao v. Chorches*, Case No. 18-cv-1477-MPS (D. Conn. Sept. 20, 2019).



These cases state that an opinion letter for a prototype or volume submitter plan applies only to the "form" of the plan and not the "operation" of the plan.

These cases therefore conclude that an opinion letter is not the equivalent of a determination letter.



As a consequence of such rulings, debtors were required to present evidence to prove the additional points noted above in order to demonstrate the tax qualified status of the retirement plans in question.





Cases ruling that an opinion letter **IS** the equivalent of a determination letter for bankruptcy purposes:

- ***In re: Gilbraith***, 523 B.R. 198 (Bankr. D. Ariz. 2014)
- ***In re: Pomeroy***, 2016 WL 3564378 (Bankr. E.D. Cal. 2016)



Both the ***Gilbraith*** and ***Pomeroy*** courts cited IRS Rev. Proc. 2005-16 (§§19.01, 19.04) for the proposition that an employer adopting a pre-approved plan may rely on the Plan's IRS determination letter if:

- The sponsor of the Plan has a currently valid favorable opinion letter; and
- The employer has followed the terms of the Plan.



IRS Rev. Proc. 2005-16 has been updated by Rev. Procs. 2011-49, 2015-36, and 2017-41 which contain language similar to the language cited in [Gilbraith](#) and [Pomeroy](#).



IRS Rev. Proc. 2017-41, §7.04 provides:

.04 Reliance Equivalent to Determination Letter — If an employer may rely on an Opinion Letter pursuant to this section, the Opinion Letter will be equivalent to a determination letter. For example, the Opinion Letter is treated as a determination letter for purposes of §23 of Rev. Proc. 2017-4 (as updated annually), regarding the effective of a determination letter.



The **Pomeroy** (California) court distinguished **Rogers** and **Daniels** by stating that in such cases there was no expert evidence linking the IRS Opinion Letter approving the form plan to the debtor's retirement plan.

Thus, it appears that expert testimony may be essential to link the debtor's plan to the prototype or volume submitter plan IRS opinion letter.



The court in **Gilbraith** also gave weight to an IRS Compliance Statement received by the plan in response to a post-bankruptcy petition filing under the IRS Voluntary Compliance Program (VCP).



The court in *In re: Ortiz*, (Bankr. D. Puerto Rico 2016) reviewed the "limited case law" discussing what qualifies as a "favorable determination" from the IRS for purposes of the presumption under §522(b)(4)(A).



However, since the *Ortiz* court found that the debtor demonstrated that the funds were exempt under §522(b)(4)(B), it did not need to decide the issue of whether an opinion letter is equivalent to a determination letter for bankruptcy exemption purposes.



## **2. Power of Court to Examine Plan's Qualified Status.**

### **a. Loss of Plan's Tax-Qualified Status.**

Another issue of concern is the extent to which a court can examine a plan to determine if its tax qualified status should be revoked. The United States Fifth Circuit Court of Appeals held in *In the Matter of Don Royal Plunk*, 481 F.3d 302 (5<sup>th</sup> Cir. 2007) that a bankruptcy court can determine whether a retirement plan has lost its tax-qualified status, and therefore its protection in bankruptcy, because the debtor misused the plan assets.



### **b. Retirement Plan May be Able to Regain Tax-Qualified Status.**

In *In re: Richey*, 2011 WL 4485900 (9<sup>th</sup> Cir. BAP 2011), a Bankruptcy Appellate Panel for the U.S. 9<sup>th</sup> Circuit Court of Appeals affirmed a judgment by a bankruptcy court permitting a debtor to file a retirement plan with the IRS under the Voluntary Compliance Program (VCP). The Court accepted the IRS VCP compliance ruling thereby permitting the retirement plan to repair plan defects which would have jeopardized the plan's tax-qualified status.



The 9<sup>th</sup> Circuit acknowledged in *Richey* the well-established rule that exemption rights are fixed as of the filing date of the petition in bankruptcy.



The 9<sup>th</sup> Circuit ruled, however, that the debtor possessed a right under federal tax law to participate in the VCP and to cure any potentially disqualifying defects to retroactively bring the plans back into compliance.



Following *In re: Richey*, the court in *In re: Gilbraith*, 523 B.R. 198 (Bankr. D. Ariz. 2014) ruled that the debtor's bankruptcy filing neither restricted nor expanded the debtor's right to participate in VCP. The right to participate in VCP included the benefit of the retroactive effect of the IRS-approved corrective measures.



Affirming a bankruptcy court ruling declining to permit a debtor to attempt to correct "substantial violations" via VCP, the court in *Xiao v. Chorches* (D. Conn. 2019) stated that:

"Given that *Richey* and *Gilbraith* are already in tension with the basic rule that exemptions are determined as of the petition date, I decline the invitation to, not only adopt, but dramatically extend their holdings."



### 3. Retirement Plan Distributions.

BAPCPA provides limited post-bankruptcy protection for distributions of retirement plan assets to plan participants. "Eligible rollover distributions" retain their exempt status after they are distributed. Minimum required distributions and hardship distributions are not protected since they are not eligible rollover distributions.



### 4. Owner Only Plans are Protected in Bankruptcy.

There is case law and Department of Labor ("DOL") Regulations holding that a qualified retirement plan that benefited only the business owner (and/or the owner's spouse) was not an Employee Retirement Income Security Act ("ERISA") Plan and, therefore, could not invoke ERISA anti-alienation protections either inside or outside of bankruptcy. ***Yates v. Hendon***, 541 U.S. 1 (2004). Within a federal bankruptcy proceeding, this concern has been eliminated to the extent that the debtor has a favorable ruling from the IRS or is otherwise deemed to have a tax-exempt plan as noted above.





## 5. "Opt-Out" States and the Anti-Stacking Rule.

The Bankruptcy Code allows debtors to claim certain property as exempt, using either exemptions allowed under state law, or exemptions provided in the Bankruptcy Code. While this choice is available in a few states, the majority of states mandate that debtors use only the exemptions provided under state law. 11 U.S.C. §522(b)(1).

Thus, states can "opt-out" of the exemptions provided by the Bankruptcy Code.



32 states have elected to "opt-out" of the federal bankruptcy exemptions.

As a general rule, either the federal or the state exemptions apply.

An "anti-stacking" rule provides that a debtor using the state law exemptions is not also entitled to the federal exemptions.



## 6. Exception to "Anti-Stacking" Rule.

BAPCPA added Bankruptcy Code §522(b)(3)(C) which creates an exception to the "anti-stacking" clause of Bankruptcy Code §522(b)(1). The anti-stacking clause generally requires that a debtor can use only the federal or state law exemptions. Under §522(b)(3)(C), even if the state law exemptions apply, the debtor can still exempt from his bankruptcy estate any of his "retirement funds" under federal law exemptions.



In enacting BAPCPA, Congress created a new class of exemptions for certain retirement funds regardless of whether the state of domicile of the debtor has opted out of the federal scheme for other property. For retirement funds, 11 U.S.C. §522(b)(3)(C) is applicable to opt-out states and 11 U.S.C. §522(d)(12) applies in the federal exemption scheme. The two provisions are identical and provide for an exemption for: retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under §§401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code.



The U.S. 9<sup>th</sup> Circuit Court of Appeals held that:

"... debtors in opt-out states [like Arizona] are not limited to the IRA exemption provided by state law but may, independent of state law, claim the [Federal law] exemption under §522(b)(3)(C) ..."

*In re: Hamlin*, 465 B.R. 837 (B.A.P. 9<sup>th</sup> Cir. 2012).

This case is important since some states in the 9<sup>th</sup> Circuit (e.g., California) provide very weak protection for IRA assets.



The exception to the anti-stacking rule for retirement plan assets goes both ways — it provided both the federal **and** the state law exemptions for plan and IRA assets.

As shown in *In re: Reinhart*, 109 AFTR 2010 (10 Cir. 2012) if the state law exemptions provide greater protection for retirement plan assets than the federal exemptions, the state law exemptions will apply.



In ***Reinhart***, the U.S. 10<sup>th</sup> Circuit Court of Appeals followed the decision of the Utah Supreme Court that as long as a retirement plan "substantially complies" with the IRC §401(a) requirements, the plan was covered by the Utah bankruptcy exemption statute. Further, a plan was in substantial compliance if its defects fell within the scope of defects that "could" be corrected under the IRS EPCRS program.



### C. Inherited IRAs — ***Clark v. Rameker***.

1. ***Clark v. Rameker*, 134 S.Ct. 2242, 573 U.S. (June 12, 2014).**

U.S. Supreme Court held that inherited IRAs are not "retirement funds" under Bankruptcy Code Section 522(b)(3)(C) and not exempt in bankruptcy. The case involved a debtor who inherited an IRA from her mother.



The Supreme Court ruled that assets in an inherited IRA are not "retirement funds" for three reasons:



- a. The holder of an inherited IRA cannot contribute additional funds to the account.
- b. Holders of inherited IRAs are required to receive distributions from the accounts regardless of their age.
- c. The holder of an inherited IRA can withdraw the entire balance of the account at any time regardless of age and use the funds for any purpose without a 10% premature distribution penalty.



## 2. Spouse as Beneficiary.

The Court in *Clark* implied in dicta that if a surviving spouse rolls over an inherited IRA into his or her own IRA it will not be treated as an inherited IRA and will be exempt.

If the spouse chooses to treat the IRA as an inherited IRA, however, it may not be an exempt asset. The Supreme Court stated that "the spouse has a choice."



## 3. State Law Exemption.

If a state is an opt-out state, an exemption to the anti-stacking rules provides the debtor with both the state law and bankruptcy code exemptions with respect to retirement plan assets. Ohio Rev. Code §2329.66(A)(10)(e) specifically exempts inherited IRAs from creditor claims for a debtor domiciled in Ohio.

Alaska, Arizona, Florida, Indiana, Missouri, North Carolina, South Carolina, and Texas provide similar exemptions for inherited IRAs.



U.S. Bankruptcy Courts in New Jersey have determined that an inherited IRA is excluded from the bankruptcy estate.

- ***In re: Norris***, 550 B.R. 271 (Bankr. D. N.J. 2016)
- ***In re: Andolino***, 525 B.R. 588 (Bankr. D. N.J. 2015).



Courts in Illinois and Kansas have ruled that inherited IRAs are NOT exempt under the exemption statutes in such states.

- ***In re: Marriage of Branit***, (Ill. App. Ct. 1<sup>st</sup> Dist. 2015)
- ***In re: Penny v. Hamm***, Bankr. N.D. Ill. 2018).
- ***In re: Mosby v. Clark***, 2015 WL 6610988 (D.C. Kan. 2015).



#### 4. Tax Qualified Retirement Plans.

"ERISA plans" are excluded (not exempt) from the bankruptcy estate. *Patterson v. Shumate*, 504 U.S. 753 (1992).

Therefore, an inherited account in an ERISA Title I Plan should be excluded in bankruptcy and not subject to the analysis in *Clark*.



"Owner-Only" Plans covering only an owner and/or the owner's spouse are not Title I plans. *Yates v. Hendon*, 541 U.S. 1 (2004). Such plans may be subject to the analysis in *Clark* since the exemption for such plans is under the same bankruptcy section reviewed in *Clark*.





## 5. Inherited IRAs Outside of Bankruptcy.

Creditor cases involving IRAs outside of bankruptcy are governed by state, rather than federal, law. As a result, the exemption statute of the state where the debtor is domiciled will control and the analysis will be based on the specific language of the exemption statute.



See the chart at the end of this outline for a state-by-state analysis of IRAs as exempt property.



## II. ERISA and Internal Revenue Code Anti-Alienation Provisions

### A. ERISA.

Title I of ERISA requires that a pension plan shall provide that benefits under the plan may not be assigned or alienated; *i.e.*, the plan must provide a contractual "anti-alienation" clause. [\[See ERISA §206\(d\), 29 U.S.C. §1056\(d\)\(1\).\]](#)



### B. Internal Revenue Code.

Buttressing ERISA, the Internal Revenue Code (the "Code") provides that "a trust shall not constitute a qualified trust under this Section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." [\[Code §401\(a\)\(13\)\(A\).\]](#)



### C. Exceptions.

There are a number of exceptions to ERISA's and the Code's anti-alienation provisions (IRC §401(a)(13)(B); ERISA §206(d)(3)):

1. Qualified domestic relations orders ("QDROs"), as defined in Code §414(p), may be exempted.
2. Up to 10% of any benefit in pay status may be voluntarily and revocably assigned or alienated.
3. A participant may direct the plan to pay a benefit to a third party if the direction is revocable and the third party files acknowledgment of lack of enforceability.



4. Federal tax levies and judgments are exempted.
  - a. The IRS has issued a Field Service Advice Memorandum (FSA) and a Chief Counsel Advice Memo (CCA) advising that a retirement plan does not have to honor an IRS levy for taxes to the extent that the taxpayer is not entitled to an immediate distribution of benefits from the plan. **FSA 199930039; CCA 199936041.**



b. CCA 199936041 provides the following conclusions:

1. The Service may serve a levy upon a plan even if a participant has no immediate right to commence receipt of benefits as long as the taxpayer has a vested right to a future distribution from the plan. However, the Service may not force the plan administrator to immediately distribute any assets pursuant to the Service's levy until the taxpayer obtains an immediate right to commence receipt of the benefits under the Plan.
  2. The Service may levy upon and collect the assets in a taxpayer's pension plan when the taxpayer has an immediate right to elect early retirement benefits but has not yet elected to do so (i.e., Service may make an election on behalf of the taxpayer).
- The IRS "steps into the shoes" of the Plan Participant. The rights of the IRS to Plan assets cannot exceed the rights of the Participant.



- c. If the plan is subject to spousal qualified joint and survivor annuity requirements, the only collection avenue available to the IRS is through joint and survivor annuity payments unless the IRS can obtain the spouse's consent to receive a lump-sum distribution from the plan to satisfy the levy. **CCA 199936041.**



- d. In [CCA 201927019](#), the IRS Chief Counsel's Office stated that the procedures for levying on funds in retirement plans are found in [IRM 5.11.6.3](#).
- e. [IRM 5.11.6.3](#) provides:
  - (8) The taxpayer may be able to withdraw money in a lump sum from a retirement plan. If the taxpayer is eligible to receive such a withdrawal, then a levy can reach that right. However, remember that a levy only reaches the taxpayer's present rights under the plan. This means that a current levy can reach a taxpayer's vested present rights under a plan, but a levy does not accelerate payment and it is only enforceable when the taxpayer is eligible to receive the benefits. The terms of the plan may need to be reviewed to determine a taxpayer's present rights.



- 5. Criminal or civil judgments, consent decrees and settlement agreements may permit the offset of a participant's benefits under a plan and order the participant to pay the plan due to a fiduciary violation or crime committed by the participant against the plan.



## 6. **Federal Criminal Penalties.**

In Private Letter Ruling (PLR) 200342007 the IRS ruled that "the general anti-alienation rule of Code §401(a)(13) does not preclude a court's garnishing the account balance of a fined participant in a qualified pension plan in order to collect a fine imposed in a federal criminal action."

See also: [PLR 200426027](#) and [U.S. v. Novak](#), 476 F.3d 1041 (9<sup>th</sup> Cir. 2007).



## D. **ERISA Preemption.**

The anti-alienation provisions of ERISA are given force by the preemption provisions also contained in ERISA. ERISA §514(a) provides that the provisions of ERISA supersede state laws insofar as such laws relate to employee benefit plans. The ERISA anti-alienation and preemption provisions combine to make state attachment and garnishment laws inapplicable to an individual's benefits under an ERISA-covered employee benefit plan.



## E. General Creditors of the Sponsoring Employer.

**The general creditors of a corporation or other sponsoring employer cannot reach the assets contained in such employer's qualified retirement plan.** The statutory rationale is that a qualified retirement plan is established for the exclusive benefit of the employees and their beneficiaries. Furthermore, the terms of the trust must be such as to make it impossible, prior to the satisfaction of all liabilities to the employees and their beneficiaries, for any part of the funds to be diverted to purposes other than the exclusive benefit of the employees and their beneficiaries.



## III. Additional Analysis

### A. United States Supreme Court.

1. In *Patterson v. Shumate*, 504 U.S. 753 (1992) the U.S. Supreme Court held that ERISA's prohibition against the assignment or alienation of pension benefits is enforceable in bankruptcy.

Thus, a debtor's interest in an ERISA pension plan is excluded from the bankruptcy estate and not subject to attachment by creditor's claims.



2. Note that *Patterson v. Shumate* was decided prior to the enactment of BAPCPA and **excludes** "ERISA plans" from bankruptcy.

BAPCPA is not limited to ERISA plans but provides an **exemption** rather than an **exclusion** for bankruptcy.

3. *Patterson v. Shumate* is **still good law** and can be cited to protect retirement plan assets from creditor claims for both bankruptcy and non-bankruptcy debtors.



4. *In re: Pomeroy* (Bankr. Ct. ED Cal. 2016) stated that Congress' intent in exacting §522(b)(3)(C) was "to preempt conflicting state exemption laws and to expand the protection for tax-favored retirement plans or arrangements that may not be already protected under §541(c)(2) pursuant to *Patterson v. Shumate*, or other state or federal law." *Hamlin*, 465 B.R. at 870, quoting H.R. Rep. No. 109-31(1), Pt. 1 at 63-64 (2005), as reprinted in 2005 U.S.C.C.A.N. (Legislative History) 88, 132-33.





## **B. Owner-Only Plans Are At Risk Outside of Bankruptcy.**

1. BAPCPA draws no distinction between owner-only plans and other tax-qualified retirement plans with respect to bankruptcy exemption. Outside of bankruptcy, however, it appears that such plans may be subject to attachment by creditors.



2. Department of Labor Regulations provide that a husband and wife who solely own a corporation are not employees for retirement plan purposes. The Regulations further provide that a plan which covers only partners or only a sole proprietor is not covered under Title I of ERISA.



However, a plan under which one or more common-law employees (in addition to the owners) are participants will be covered under Title I and ERISA protections will be applicable to all participants (not just the common-law employees). **[29 C.F.R. §2510.3-3(b), (c)(1).]**

Thus, **inclusion of one or more non-owner employees transforms a non-ERISA plan into an ERISA-qualified plan and thereby protects the plan assets from the claims of creditors.**



3. In ***Yates v. Hendon***, 541 U.S. 1 (2004), the U.S. Supreme Court noted that Department of Labor Advisory Opinion 99-04A interprets 29 CFR §2510.3-3 to mean that the statutory term "employee benefit plan" does not include a plan whose only participants are the owner and his or her spouse, but does include a plan that covers as participants one or more common-law employees, in addition to the self-employed individuals. The Supreme Court noted that "[t]his agency view...merits the Judiciary's respectful consideration."



### C. ERISA Protections Do Not Apply to Funds After Distribution From Retirement Plan (But Bankruptcy Protections May Apply).

Once the benefits have been distributed from the plan, a creditor's rights are enforceable against the beneficiary, but not against the plan itself. *Hoult v. Hoult*, 373 F.3d 47 (1<sup>st</sup> Cir. 2004).

However, Bankruptcy Code §522(b)(4)(D) provides that "eligible rollover distributions" retain their exempt status in bankruptcy after they are distributed.

\* "Tracing" of amounts following distributions from a retirement plan or IRA can be very important.



## IV. Individual Retirement Accounts

### A. IRAs in Bankruptcy – 2005 Bankruptcy Act (BAPCPA).

1. Traditional IRAs and Roth IRAs are exempt to \$1,000,000 (currently \$1,362,800).
2. SEPs and SIMPLE-IRAs are exempt without a dollar limitation.
3. Rollovers into IRAs from qualified plans, section 403(b) plans or section 457 plans are not subject to the \$1,362,800 exemption limitation. Rollovers from such plans into IRAs are exempt without a dollar limitation.
4. It appears that a rollover from a SEP or SIMPLE-IRA would receive only \$1,362,800 of protection since a Code §408(d)(3) rollover is not one of the rollovers sanctioned under Bankruptcy Code §522(n).



## B. IRAs in State Law (Non-Bankruptcy) Creditor Actions.

1. a. ERISA defines a "pension" plan under its jurisdiction as any "plan, fund or program which is established or maintained by an employer... that provides retirement income to employees" **[ERISA §3(2)(A)]**. Thus, the typical pension, profit-sharing or Section 401(k) plan constitutes an ERISA pension plan. The DOL held that SEP and SIMPLE IRAs are ERISA pension plans due to the employer involvement in such arrangements. Conversely, traditional and Roth IRAs that are created and funded without employer involvement are not ERISA pension plans.



- b. ERISA pension plans are afforded extensive anti-alienation creditor protection both inside and outside of bankruptcy. **[ERISA §206(d)]**. However, these extensive anti-alienation protections do not extend to an IRA arrangement under Code §408 even if the IRA may constitute an ERISA pension plan due to being established as a SEP or SIMPLE IRA **[ERISA §4(b) and 201]**.



2. An individually-established and funded traditional or Roth IRA is not an ERISA pension plan. That being the case, state law that relates to such IRAs is not preempted under ERISA. Many states provide protection to IRAs based on the IRA owner's state of residency.
  - a. The state of residency of the IRA owner/participant determines which state law applies to the IRA for exemption purposes.



## **C. Treatment of IRAs with Prohibited Transactions.**

1. **Prohibited Transaction Defined.**
  - a. Code §4975(c)(1) states that the term "prohibited transaction" means any direct or indirect:
    - i. sale or exchange, or leasing, of any property between a plan and a disqualified person;
    - ii. lending of money or other extension of credit between a plan and a disqualified person;



- iii. furnishing of goods, services, or facilities between a plan and a disqualified person;
- iv. transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;



- v. act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or
- vi. receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.



- b. "Disqualified persons" include the person who established the IRA, members of his or her family, corporations, trusts or other entities owned or controlled by such individuals, and fiduciaries. Code §4975(e)(2).
- c. The term "plan" for purposes of applying the prohibited transaction rules includes an IRA. Code §4975(e)(1).



## **2. IRA ceases to be an IRA if owner engages in prohibited transaction.**

If the owner (or beneficiary) of an **individual retirement account**, as described in IRC §408(a), engages in any transaction that is prohibited under IRC §4975, the IRA **ceases to be an IRA as of the first day of the taxable year in which the transaction occurs**. See IRC §408(e)(2)(A). This means the special tax benefits accorded the IRA are lost.



### 3. Deemed distribution of IRA assets.

If an IRA ceases to be an IRA because of a prohibited transaction described in the prior paragraph, the entire value of the IRA, determined as of the first day of the taxable year for which the account or annuity ceases to be an IRA, is treated as distributed to the IRA owner (or beneficiary, in the case of an IRA for a deceased participant). See IRC §408(e)(2)(B).



### **Practice Hint:**

If a client wants to invest IRA assets in a non-traditional investment (e.g., real estate or an LLC), set up a **separate IRA** for that specific investment.





#### 4. Loss of Status as IRA May Result in Loss of Creditor Protection for Assets of (Former) IRA.

- a. As noted above, if there is even one minor prohibited transaction (PT), the rule is that the entire IRA is treated as terminated and all of its assets distributed to the owner on the first day of the year in which the PT occurred. Creditors are now analyzing the transactions of the IRAs of debtors to find PTs in order to destroy the account's status as an IRA and thereby make the assets of the former IRA subject to attachment.



- b. In *In re: Ernest W. Willis*, 2011 WL 1522383 (11 Cir. 2011) the U.S. Eleventh Circuit Court of Appeals affirmed the judgment of a U.S. Bankruptcy Court in Florida that as a result of a PT an IRA lost its status as an IRA and thereby lost its exemption in bankruptcy.
- c. Moral: Be very careful not to engage in prohibited transactions — especially with an IRA.



## State-By-State Analysis of Individual Retirement Accounts As Exempt Property\*

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Alabama</b>	Ala. Code §19-3B-508	Yes	Yes	
<b>Alaska</b>	Alaska Stat. §09.38.017	Yes	Yes	The exemption does not apply to amounts contributed within 120 days before the debtor files for bankruptcy. <b>Alaska provides a specific exemption for inherited IRAs.</b>
<b>Arizona</b>	Ariz. Rev. Stat. Ann. §33-1126(B)	Yes	Yes	The exemption does not apply to a claim by an alternate payee under a QDRO. The interest of an alternate payee is exempt from claims by creditors of the alternate payee. The exemption does not apply to amounts contributed within 120 days before a debtor files for bankruptcy. <b>Arizona provides a specific exemption for inherited IRAs.</b>

\* Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), qualified plan, SEP, and SIMPLE assets are protected with no dollar limitation. IRAs and Roth IRAs are protected to \$1,362,800. However, rollover assets in an IRA are not subject to the \$1,362,800 limit. BAPCPA only applies to assets in bankruptcy. One must look to state law for protection of IRA assets in state law (e.g., garnishment) actions or other creditor claims outside of bankruptcy.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Arkansas</b>	Ark. Code Ann. §16-66-220	Yes	Yes	A bankruptcy court held that the creditor exemption for IRAs violates the Arkansas Constitution — at least with respect to contract claims.
<b>California</b>	Cal. Code of Civ. Proc. §704.115	Limited	Limited	IRA's are exempt only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires.
<b>Colorado</b>	Colo. Rev. Stat. §13-54-102	Yes	Yes	Any retirement benefit or payment is subject to attachment or levy in satisfaction of a judgment taken for arrears in child support; any pension or retirement benefit is also subject to attachment or levy in satisfaction of a judgment awarded for a felonious killing.
<b>Connecticut</b>	Conn. Gen. Stat. §52-321a	Yes	Yes	IRA exemption for both participants and beneficiaries includes inherited IRAs. <i>In re: Archambault</i> , Bankr. Ct. D. Conn. 2019.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Delaware</b>	Del. Code Ann. Tit. 10, §4915	Yes	Yes	An IRA is not exempt from a claim made pursuant to Title 13 of the Delaware Code, which Title pertains to domestic relations order.
<b>Florida</b>	Fla. Stat. Ann. §222.21	Yes	Yes	IRA is not exempt from claim of an alternate payee under a QDRO or claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution.  <b>Florida provides a specific exemption for inherited IRAs.</b>
<b>Georgia</b>	Ga. Code Ann. §44-13-100	Limited	Limited	IRA's are exempt only to the extent necessary for the support of the debtor and any dependent.
<b>Hawaii</b>	Haw. Rev. Stat. §651-124	Yes	Yes	The exemption does not apply to contributions made to a plan or arrangement within three years before the date a civil action is initiated against the debtor.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Idaho</b>	Idaho Code §55-1011	Yes	Yes	The exemption only applies for claims of judgment creditors of the beneficiary or participant arising out of a negligent or otherwise wrongful act or omission of the beneficiary or participant resulting in money damages to the judgment creditor.
<b>Illinois</b>	Ill. Rev. Stat. Ch. 735, Para. 5/12-1006	Yes	Yes	Inherited IRAs are not exempt. <i>In re: Marriage of Branit</i> , (Ill. App. Ct. 1st Dist.) 05/14/2015; <i>In re: Penny v. Hamm</i> , Bankr. N.D. Ill. (7/9/2018).
<b>Indiana</b>	Ind. Code §34-55-10-2	Yes	Yes	<b>Indiana provides a specific exemption for inherited IRAs.</b>
<b>Iowa</b>	Iowa Code §627.6	Yes	Yes	
<b>Kansas</b>	Kan. Stat. Ann. §60-2308	Yes	Yes	Inherited IRAs are not exempt. <i>In re: Mosby v. Clark</i> , 2015 WL 6610988 (D.C. Kan. 10/30/2015).

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Kentucky*</b>	Ky. Rev. Stat. Ann. §427.150(2)(f)	Yes	Yes	The exemption does not apply to any amounts contributed to an individual retirement account if the contribution occurred within 120 days before the debtor filed for bankruptcy. The exemption also does not apply to the right or interest of a person in individual retirement account to the extent that right or interest is subject to a court order for payment of maintenance or child support.
<b>Louisiana</b>	La. Rev. Stat. Ann. Sects. 20-33(1) and 13-3881(D)	Yes	Yes	No contribution to an IRA is exempt if made less than one calendar year from the date of filing bankruptcy, whether voluntary or involuntary, or the date writs of seizure are filed against the account. The exemption also does not apply to liabilities for alimony and child support.
<b>Maine</b>	Me. Rev. Stat. Ann. Tit. 14, §4422(13) (E)	Limited	Limited	IRAs are exempt only to the extent reasonably necessary for the support of the debtor and any dependent.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Maryland</b>	Md. Code Ann. Cts. & Jud. Proc. §11-504(h)	Yes	Yes	IRA's are exempt from any and all claims of creditors of the beneficiary or participant other than claims by the Department of Health and Mental Hygiene.
<b>Massachusetts</b>	Mass. Gen. L.Ch. 235, §34A	Yes	Yes	The exemption does not apply to an order of court concerning divorce, separate maintenance or child support, or an order of court requiring an individual convicted of a crime to satisfy a monetary penalty or to make restitution, or sums deposited in a plan in excess of 7% of the total income of the individual within 5 years of the individual's declaration of bankruptcy or entry of judgment.
<b>Michigan*</b>	Mich. Comp. Laws 600.6023	Yes	Yes	The exemption does not apply to amounts contributed to an individual retirement account or individual retirement annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. The exemption also does not apply to an order of the domestic relations court

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Minnesota</b>	Minn. Stat. §550.37	Limited	Limited	Exempt to a present value of \$72,000 and additional amounts reasonably necessary to support the debtor, spouse or dependents.
<b>Mississippi</b>	Miss. Code Ann. §85-3-1	Yes	No	
<b>Missouri</b>	Mo. Rev. Stat. §513.430	Yes	Yes	If proceedings under Title 11 of United States Code are commenced by or against the debtor, no amount of funds shall be exempt in such proceedings under any plan or trust which is fraudulent as defined in Section 428.025 of the Missouri Code, and for the period such person participated within 3 years prior to the commencement of such proceedings. <b>Missouri provides a specific exemption for inherited IRAs.</b>
<b>Montana</b>	Mont. Code Ann. §31-2-106(3)	Yes	No	The exemption excludes that portion of contributions made by the individual within one year before the filing of the petition of bankruptcy which exceeds 15% of the gross income of the individual for that one-year period.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Nebraska</b>	Neb. Rev. Stat. §25-1563.01	Limited	Limited	The debtor's right to receive IRAs and Roth IRAs is exempt to the extent reasonably necessary for the support of the Debtor and any dependent of the Debtor.
<b>Nevada</b>	Nev. Rev. Stat. §21.090(1)(r)	Yes	Yes	The exemption is limited to \$1,000,000 in present value held in an individual retirement account, which conforms with Section 408 and 408A.
<b>New Hampshire</b>	N.H. Tit. 52 §511:2	Yes	Yes	Exemption only applies to extensions of credit and debts arising after January 1, 1999.
<b>New Jersey</b>	N.J. Stat. Ann. 25:2-1(b)	Yes	Yes	Inherited IRAs are excluded in bankruptcy. <i>In re: Norris</i> , 550 B.R. 271 (Bankr. D. N.J. 2016); <i>In re: Andolino</i> , 525 B.R. 588 (Bankr. D. N.J. 2015).
<b>New Mexico</b>	N.M. Stat. Ann. §42-10-1, §42-10-2	Yes	Yes	A retirement fund of a person supporting himself / herself or another person is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, fines, attachment, execution or foreclosure by a judgment creditor.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>New York</b>	N.Y. Civ. Prac. L. and R. §5205(c)	Yes	Yes	Additions to individual retirement accounts are not exempt from judgments if contributions were made after a date that is 90 days before the interposition of the claim on which the judgment was entered.
<b>North Carolina</b>	N.C. Gen. Stat. §1C-1601(a)(9)	Yes	Yes	<b>North Carolina provides specific exemptions for inherited IRAs.</b>
<b>North Dakota</b>	N.D. Cent. Code §28-22-03.1(7)	Limited	Limited	The account must have been in effect for a period of at least one year. Each individual account is exempt to a limit of up to \$100,000 per account, with an aggregate limitation of \$200,000 for all accounts. The dollar limit does not apply to the extent the debtor can prove the property is reasonably necessary for the support of the debtor, spouse, or dependents.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Ohio*</b>	Ohio Rev. Code Ann. §2329.66(A)(10)	Yes	Yes	<b>Ohio provides a specific exemption for inherited IRAs.</b>
<b>Oklahoma</b>	Okla. Stat. Tit. 31, §1(A)(20)	Yes	Yes	
<b>Oregon</b>	OR. Rev. Stat. 18.358	Yes	Yes	
<b>Pennsylvania</b>	42 PA. Cons. Stat. §8124	Yes	Yes	The exemption does not apply to amounts contributed to the retirement fund in excess of \$15,000 within a one year period and amounts contributed within one year before the debtor filed for bankruptcy.
<b>Rhode Island</b>	R.I. Gen. Laws §9-26-4	Yes	Yes	The exemption does not apply to an order of court pursuant to a judgment of divorce or separate maintenance, or an order of court concerning child support.

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STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>South Carolina</b>	S.C. Code Ann. §15-41-30	Yes	Yes	Specifically provides for exemption of inherited IRAs.
<b>South Dakota</b>	S.D. Cod. Laws 43-45-16; 43-45-17	Limited	Limited	Exempts "certain retirement benefits" up to \$1,000,000. Cites §401(a)(13) of Internal Revenue Code (Tax-Qualified Plan Non-Alienation Provision). Subject to the right of the State of South Dakota and its political subdivisions to collect any amount owed to them.
<b>Tennessee*</b>	Tenn. Code Ann. §26-2-105	Yes	Yes	Not exempt from claims of an alternate payee under a QDRO.
<b>Texas</b>	Tex. Prop. Code Ann. §42.0021	Yes	Yes	Texas provides a specific exemption for inherited IRAs.



STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Utah</b>	Utah Code Ann. §78B-5-505	Yes	Yes	The exemption does not apply to amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. Exemption does not apply to an alternate payee under a QDRO.
<b>Vermont</b>	Vt. Stat. Ann. Tit. 12 §2740(16)	Yes	Yes	Non-deductible traditional IRA contributions plus earnings are not exempt.
<b>Virginia</b>	Va. Code Ann. §34-34	Yes	Yes	Exempt from creditor process to the same extent permitted under federal bankruptcy law. An IRA is not exempt from a claim of child or spousal support obligations.
<b>Washington</b>	Wash. Rev. Code §6.15.020	Yes	Yes	
<b>West Virginia</b>	W.Va. Code §38-10-4	Yes	No	IRAs are exempt only to the extent reasonably necessary for the support of the debtor and any dependent.



STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
<b>Wisconsin</b>	Wis. Stat. §815.18(3)(j)	Yes	Yes	The exemption does not apply to an order of court concerning child support, family support or maintenance, or any judgments of annulment, divorce or legal separation.
<b>Wyoming</b>	Wyo. Stat. §1-20-110	No	No	

\* Kentucky, Michigan, Ohio, and Tennessee: The U.S. Court of Appeals for the Sixth Circuit ruled in [\*Lampkins v. Golden\*](#), 28 Fed. Appx. 409 (6<sup>th</sup> Cir. 2002) that a Michigan statute exempting SEPs and IRAs from creditor claims was preempted by ERISA. The decision appears, however, to be limited to SEPs and SIMPLE-IRAs.