

CREDITOR PROTECTION OF RETIREMENT PLAN ASSETS



RICHARD A. NAEGELE, J.D., M.B.A., of Wickens, Herzer, Panza, Cook & Batista Co. in Avon, Ohio, is an attorney whose practice focuses on pensions and employee benefits. Mr. Naegele is a Fellow of the American College of Employee Benefits Counsel. He can be contacted at (440) 695-8074 or RNAegele@WickensLaw.com.

MARK P. ALTIERI, J.D., L.L.M., CPA, PFS, is special tax counsel with Wickens, and Professor of Accounting at Kent State University. Mr. Altieri can be contacted at (440) 695-8072 or MAltieri@WickensLaw.com.



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Assets in qualified retirement plans and individual accounts (IRAs) total more than \$20 trillion and represent 34% of U.S. household assets.¹ Clients and their advisers are rightfully concerned about insulating those assets from potential creditor claims both inside and outside a federal bankruptcy action.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) brought much needed clarity to debtor and creditor rights relative to retirement assets in a federal bankruptcy proceeding. For debtors in financial distress under the federal bankruptcy laws, BAPCPA not only provided clarification but actually extended bankruptcy protection for the debtor’s retirement funds in both tax qualified retirement plans and IRAs. For debtors in financial distress who are subject to state attachment and garnishment proceedings outside of bankruptcy, the non-alienation provisions of ERISA provide protection for most assets in tax-qualified retirement plans. Debtors outside of bankruptcy with IRA assets must look to state law for protection.

BAPCPA: KEY POINTS OF BAPCPA FOR RETIREMENT PLAN ASSETS

BAPCPA made significant changes in bankruptcy rules and added specific protections for tax-qualified retirement plans (a formal employer sponsored plans like Section 401(k), profit-sharing and pension plans) and IRAs. It is effective for bankruptcy petitions filed on or after October 17, 2005.

BAPCPA exempts retirement plan assets from a debtor’s bankruptcy estate if such assets are held by a

Section 401(a) tax-qualified retirement plan, a Section 403(b) annuity plan, a section 457(b) eligible deferred compensation plan, or an IRA (including traditional IRAs, Roth IRAs, SEPs and SIMPLEs) under Sections 408 or 408A.²

The exemption for IRAs was originally limited to \$1,000,000. The exemption amounts have been increased by COLAs to \$1,283,025 effective in 2016. However, the \$1,283,025 limit does not apply to employer-sponsored IRAs (*i.e.*, SEPs or SIMPLEs). Additionally, rollovers into IRAs from qualified plans are not subject to the \$1,283,025 limit. It appears that a rollover from a SEP or SIMPLE-IRA would receive only \$1,283,025 of protection since a Code Section 408(d) (3) rollover is not one of the rollovers sanctioned under the bankruptcy law.³

Practice Hint: In order to make sure that an individual receives the full \$1,283,025 exemption on owner-established traditional and Roth IRAs and the unlimited exemption on IRA rollovers from tax-qualified retirement plans, it is good practice to establish separate IRA rollover and contributory IRA accounts. This will make it easier to track the separate pools of assets.

BAPCPA exempts assets in retirement plans that satisfy the applicable requirements for general tax qualification under the Internal Revenue Code. As elaborated on below, a retirement plan is generally 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 individual IRS determination letter for a qualified plan.

RETIREMENT PLAN LOANS

BAPCPA also exempts payroll deductions to repay plan loans from the bankruptcy automatic stay provisions. Retirement plan loan obligations are not discharged in bankruptcy. This is good for the debtor in that plan loans will not necessarily go into default and be included as taxable income of the debtor.

In summary, under BAPCPA, qualified plan, SEP, and SIMPLE assets are protected with no dollar limitation. IRAs and Roth IRAs are protected to \$1,283,025. However, rollover assets to an IRA that were originally in a tax-qualified retirement plan are not subject to the \$1,283,025 limit. BAPCPA only applies to assets in bankruptcy.

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).⁴ The IRS has made it increasingly difficult to obtain an individual favorable determination letter.⁵

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.⁶

Courts are split on the issue of whether an IRS Prototype or Volume Submitter Opinion Letter is the equivalent of an IRS Determination Letter for bankruptcy exemption purposes.

In the cases of *In re Rogers*⁷, *In re Daniels*⁸ and *In re Bauman*⁹, U.S. Bankruptcy Courts in Georgia, Massachusetts, and Illinois have ruled, or at least implied, that an opinion letter is not the equivalent of a determination letter. As a consequence of such rulings, debtors in such plans 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.

Contrary positions were taken in the cases of *In re Gilbraith*¹⁰ and *In re Pomeroy*¹¹ in which U.S. Bankruptcy

Courts in Arizona and California ruled that an IRS opinion letter is the equivalent of a favorable determination letter, within the meaning of 11 U.S.C. section 522(b)(4)(A), with respect to retirement plans that properly adopted prototype or volume submitter plan documents. The court in *Pomeroy* distinguished *Rogers* and *Daniels* by stating that there was no evidence by anyone other than the debtor and, thus, no expert testimony linking the debtor's plan with the IRS letter approving the form plan. With respect to *In re: Bauman*, the *Pomeroy* court stated that there was no testimony identifying the debtor's plan with the IRS letter approving the form plan. Both *Gilbraith* and *Pomeroy* cite IRS Revenue Procedure 2005-16 for the proposition that an employer adopting a prototype or volume submitter plan may rely on that plan's opinion letter if the sponsor of such plan has a currently valid favorable opinion letter and the employer has followed the terms of the plan. Thus, it appears that expert testimony is essential to link the debtor's plan to the prototype or volume submitter opinion letter.

POWER OF COURT TO EXAMINE PLAN'S 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 Royle Plunk*¹² 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.

RETIREMENT PLAN DISTRIBUTIONS

BAPCPA provides limited post-bankruptcy protection for distributions of tax-qualified retirement plan assets to plan participants. "Eligible rollover distributions" retain their exempt status after they are distributed.¹³ Minimum age required distributions and hardship distributions are not protected since they are not eligible rollover distributions.

OWNER ONLY PLANS ARE PROTECTED IN BANKRUPTCY

As will be detailed below, there is pre-BAPCPA 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) is not an Employee Retirement Income Security Act ("ERISA")

Plan and, therefore, could not invoke ERISA anti-alienation protections (detailed below) either inside or outside of bankruptcy. 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.

“OPT-OUT” STATES AND EXCEPTION TO “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. Thirty-two states have elected to “opt-out” of the federal bankruptcy exemptions. Thus, 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.

BAPCPA added U.S.C. Section 522(b)(3)(C) which creates an exception to the “anti-stacking” clause of Bankruptcy Code Section 522(b)(1) for retirement funds. As just noted, the anti-stacking clause of the bankruptcy laws generally requires that a debtor choose between federal bankruptcy and state law insolvency exemptions. Under BAPCPA, even if the debtor generally chooses the state law exemptions, he can still exempt from his bankruptcy estate any of his retirement assets under the BAPCPA exemptions for such assets noted earlier. 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 non-retirement property. For example, this new exemption is applicable for states such as Ohio that have chosen to opt out of the Federal exemptions and create their own statutory exemptions.¹⁴ BAPCPA provides for this exemption for retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under Sections 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code.

The U.S. Ninth Circuit Court of Appeals¹⁵ reviewed this issue and held “As a result, 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 exemption under §522(b)(3)(C), subject to any applicable dollar limitation in §522(n).” Congress’ intent 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.” This is an important point to note—particularly for debtors in states like California which provide very limited protection for IRAs under state law.¹⁶

The exception to the anti-stacking rule for retirement plan assets goes both ways—it provides both the federal and the state exemptions for such assets. As shown in *In re: Reinhart*¹⁷, 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. 10th Circuit Court of Appeals followed the decision of the Utah Supreme Court that as long as a retirement plan “substantially complies” with the I.R.C. §401(a) requirements, the plan was covered by the Utah bankruptcy exemption statute. Further, a plan was in substantial compliance with §401(a) if its defects fell within the scope of the defects that “could” be corrected under the IRS EPCRS program.

INHERITED IRAS

In *Clark v. Rameker*,¹⁸ the 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:

- The holder of an inherited IRA cannot contribute additional funds to the account;
- Holders of inherited IRAs are required to receive distributions from the accounts regardless of their age;
- 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.

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.”¹⁹

State Law Exemption

If a state is an opt-out state, as noted earlier, 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, Arizona²⁰, 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.²¹

Tax Qualified Retirement Plans

“ERISA plans” are excluded (not exempt) from the bankruptcy estate. *Paterson 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 and would presumably be subject to the analysis in *Clark* since the exemption for such plans is under the same bankruptcy section reviewed in *Clark*.

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.

For example, an inherited IRA in Kansas is not exempt from creditor claims under Kan. Stat. Ann. §60-2308(b).²²

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

ERISA and Internal Revenue Code Anti-Alienation Provisions

Distinct from the debtor protections for retirement assets in bankruptcy are the anti-alienation provisions of ERISA and the Internal Revenue Code (hereafter the “Code”).

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.²³

Internal Revenue Code

Buttressing ERISA, 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.”²⁴

Exceptions

There are a number of exceptions to ERISA’s and the Code’s anti-alienation provisions:

- Qualified domestic relations orders, as defined in Code §414(p), may be exempted.²⁵
- Up to 10% of any benefit in pay status may be voluntarily and revocably assigned or alienated.
- 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.
- Federal tax levies and judgments are exempted. The IRS has issued a Field Service Advice Memorandum 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.²⁶ 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.

- 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.²⁷
- Federal Criminal Penalties. In Private Letter Ruling (PLR) 200342007 the IRS ruled that "the general anti-alienation rule of Code Section 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."²⁸

ERISA PREEMPTION

The above-described anti-alienation provisions of ERISA are given force by the additional "preemption" provisions also contained in ERISA. ERISA provides that its provisions supersede state laws insofar as such laws relate to employee benefit plans.²⁹ The ERISA anti-alienation and preemption provisions combine to make state attachment and garnishment laws inapplicable to an individual's benefits under any ERISA-covered employee benefit plan.³⁰

GENERAL CREDITORS OF THE SPONSORING EMPLOYER

The general creditors of a corporation or other sponsoring employer cannot reach the assets contained in an 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.

ADDITIONAL ANALYSIS: UNITED STATES SUPREME COURT

In 1992, the U.S. Supreme Court in *Patterson v. Shumate* held that ERISA's prohibition against the assignment or alienation of pension plan benefits is a restriction on the transfer of a debtor's beneficial interest in a trust that is enforceable under that non-bankruptcy law. Thus, a debtor's interest in an ERISA pension plan was excluded from the bankruptcy estate and not subject to attachment by creditors' claims. 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 from bankruptcy.³¹

OWNER-ONLY PLANS ARE AT RISK OUTSIDE OF BANKRUPTCY

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.

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).³² 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.

In *Yates v. Hendon*³³, the U.S. Supreme Court noted that Department of Labor Advisory Opinion 99-04A interprets ERISA³⁴ 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."

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.³⁵

As noted above, BAPCPA³⁶ provides that "eligible roll-over distributions" retain their exempt status in bankruptcy after they are distributed.

INDIVIDUAL RETIREMENT ACCOUNTS: IRAS IN BANKRUPTCY – BAPCPA

As earlier detailed, traditional IRAs and Roth IRAs are exempt to \$1,283,025. SEPs and SIMPLE-IRAs are exempt without a dollar limitation. Rollovers into IRAs from tax-qualified retirement plans, section 403(b) plans or section 457(b) plans are not subject to the \$1,283,025 exemption limitation. Rollovers from such plans into IRAs are exempt without a dollar limitation. It appears that a rollover from a SEP or SIMPLE-IRA would receive only \$1,283,025 of protection since a Code §408(d)(3) rollover is not one of the rollovers sanctioned under Bankruptcy Code §522(n).

IRAS IN STATE LAW (NON-BANKRUPTCY) CREDITOR ACTIONS

Here we find a potential dichotomy between IRAs constituted as parts of SEP and SIMPLE IRAs and individually created and funded traditional and Roth IRAs. To follow this analysis, we need to explore some of the intricacies of ERISA as well as state law protections for IRAs.

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”.³⁷ Thus, the typical pension, profit-sharing or Section 401(k) plan constitutes an ERISA pension plan. SEP and SIMPLE IRAs have been held to be ERISA pension plans due to the employer involvement in such arrangements.³⁸ Conversely, traditional and Roth IRAs that are created and funded without employer involvement are not ERISA pension plans.

As noted above, ERISA pension plans are afforded extensive anti-alienation creditor protection both inside and outside of bankruptcy.³⁹ However, these extensive anti-alienation protections do not extend to any type of IRA arrangement under Code Section 408, even if the IRA constitutes an ERISA pension plan due to it being established as an employer-sponsored SEP or SIMPLE IRA.⁴⁰

As noted earlier, ERISA also contains specific preemption provisions⁴¹ that supersede and make inoperative any state law relating to ERISA pension plans. Thus, state law protections specifically afforded to ERISA pension plans are preempted and inoperative.

Thus, SEP and SIMPLE IRAs may be in a quandary outside of bankruptcy—this IRA may be deemed an ERISA

pension plan but has no ERISA anti-alienation protection, and being an ERISA pension plan, any state law protecting its wealth may be preempted by ERISA and such accounts may be open to attachment under state law proceedings.

The U.S. Sixth Circuit case of *Lampkins v. Golden*⁴² appears to have adopted this position when it ruled that a Michigan statute exempting SEPs and IRAs was preempted by ERISA and, therefore, a SEP-IRA was subject to state-law garnishment.

NON-SEP AND SIMPLE IRAS

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. Ohio law, for example, specifically exempts traditional and Roth IRAs from execution, garnishment, attachment, or sale to satisfy a judgment or order. There is no cap under the Ohio exemption. A list of different state laws protecting IRAs is attached at the end of this article.

Assets rolled from a SEP or SIMPLE IRA into a rollover IRA should lose their characterization as parts of an ERISA pension plan, would not thereafter be subject to ERISA preemption, and could then take advantage of state law protections for non-SEP and SIMPLE IRAs. Such rolled-over IRAs should then be afforded unlimited protections under non-bankruptcy proceedings in states like Ohio and be allowed \$1,283,025 worth of protection in a bankruptcy proceeding.

TREATMENT OF IRAS WITH PROHIBITED TRANSACTIONS: PROHIBITED TRANSACTION DEFINED

Code Section 4975(c)(1) states that the term “prohibited transaction” means any direct or indirect:

- Sale or exchange, or leasing, of any property between an plan and a disqualified person;
- Lending of money or other extension of credit between a plan and a disqualified person;
- Furnishing of goods, services, or facilities between a plan and a disqualified person;
- Transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

- 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
- 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.

“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.⁴³ The term “plan” for purposes of applying the prohibited transaction rules includes an IRA.⁴⁴

IRA CEASES TO BE AN IRA IF OWNER ENGAGES IN PROHIBITED TRANSACTION

If the owner (or beneficiary) of an IRA engages in any transaction that is prohibited under Code Section 4975 (a “PT”), the IRA ceases to be an IRA as of the first day of the taxable year in which the transaction occurs.⁴⁵ This means the special tax benefits accorded the IRA are lost. On this occurrence, 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).⁴⁶

Thus, the loss of status as IRA may result in loss of creditor protection for assets of the (former) IRA. If there is even one minor 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. In *In re: Ernest W. Willis*,⁴⁷ 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.

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.

CONCLUSION

Assets in qualified retirement plans (pension, profit-sharing, and section 401(k) plans) possess the most extensive debtor protections both within and outside of a bankruptcy proceeding. Assets in IRAs are exempt from creditor claims in bankruptcy (up to \$1,283,025 for contributory IRAs and Roth IRAs and to an unlimited dollar amount for SEPs, SIMPLEs and rollover IRAs). Outside of bankruptcy, one must look to state law to determine the level of exemption for IRAs. 🍀

Notes

- 1 Investment Company Institute, March, 2016.
- 2 11 U.S.C. §522(d)(12); «Section» references are to the Internal Revenue Code of 1986, whereas references to the U.S.C. are to the BAPCPA.
- 3 11 U.S.C. §522(n).
- 4 11 U.S.C. §522(b)(4).
- 5 IRS Announcement 2011-82, Rev. Proc. 2014-6, and Rev. Proc. 2016-37 limit the issuance of individual determination letters.
- 6 11 U.S.C. §522(b).
- 7 *In re Rogers*, 538 B.R. 158 (Bankr. N.D.Ga. 2015).
- 8 *Agin v. Daniels* (*In re Daniels*), 452 B.R. 335 (Bankr. D. Mass. 2011).
- 9 *In re Bauman*, 2014 Bankr. LEXIS 742 (Bankr. N.D. Ill. Feb. 24, 2014).
- 10 *In re Gilbraith*, 523 B.R. 198 (Bankr. D. Ariz. 2014).
- 11 *In re Pomeroy*, 2016 WL 3564378 Bankr. E.D. Cal. June 21, 2016).
- 12 481 F.3d 302 (5th Cir. 2007).
- 13 11 U.S.C. §522(b)(4)(D).
- 14 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.
- 15 *In re Hamlin*, 465 B.R. 863, 870 (B.A.P. 9th Cir. 2012).
- 16 *In re Pomeroy*, supra.
- 17 *In re: Reinhart*, 477 Fed. Appx. 510 (10th Cir. 2012).
- 18 *Clark v. Rameker*, 134 S.Ct. 2242, 573 U.S. (2014).
- 19 *Id.* at 2245.
- 20 *In re Pacheco*, 537 B.R. 935 (Bankr. D. Ariz. 2015).
- 21 *In re Norris*, 550 B.R. 271 (Bankr. D. N.J. 2016); *In re: Andolino*, 525 B.R. 588 (Bankr. D. N.J. 2015).
- 22 *In re Mosby*, 2015 WL 6610988 (D. Kan. Oct. 30, 2015).
- 23 See ERISA §206(d), 29 U.S.C. §1056(d)(1).
- 24 I.R.C. §401(a)(13)(A).
- 25 I.R.C. §401(a)(13)(B), ERISA §206(d)(3).
- 26 FSA 199930039 (June 1, 1999).
- 27 Code §§401(a)(13)(C); ERISA §§206(d)(4).
- 28 28 U.S.C. §3205. See: *United States v. Tyson*, 265 F. Supp. 2d 788 (E.D. Mich. 2003); *United States v. Clark*, No. 02-X-74872 (E.D. Mich. June 11, 2003); *United States v. Rice*, 196 F. Supp. 2d

- 1196 (N.D. Okla. 2002); PLR 200426027 and U.S. v. Novak, 476 F.3d 1041 (9th Cir. 2007).
- 29 ERISA §514(a).
- 30 Code §401(a)(1); Treas. Reg. §1.401-1(b). Code §401(a)(2); Treas. Reg. §1.401-2.
- 31 Patterson v. Shumate, *supra*.
- 32 29 C.F.R. §2510.3-3(b), (c)(1).
- 33 541 U.S. 1 (2004).
- 34 29 C.F.R. §2510.3-3.
- 35 Houlst v. Houlst, 373 F.3d 47 (1st Cir. 2004), cert. denied, 543 U.S. 1002 (2004).
- 36 11 U.S.C. §522(b)(4)(D).
- 37 ERISA Section 3(2)(A).
- 38 Preamble to DOL Regulation Section 2520.104-48 and Garratt v. Walker, 164 F. 3d 1249 (10th Cir. 1998).
- 39 ERISA Section 206(d).
- 40 ERISA Section 4(b) and 201.
- 41 ERISA Section 514(a).
- 42 28 Fed. Appx. 409 (6th Cir. 2002).
- 43 Code Section 4975(e)(2).
- 44 Code Section 4975(e)(1).
- 45 Code Section 4975(e)(1).
- 46 See IRC §Section 408(e)(2)(B).
- 47 2011 WL 1522383 (11 Cir. Apr. 21, 2011).

**STATE-BY-STATE ANALYSIS OF
INDIVIDUAL RETIREMENT ACCOUNTS AS EXEMPT PROPERTY** ^{48†}

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Alabama	Ala. Code §19-3B-508	Yes	No	
Alaska	Alaska Stat. §09.38.017	Yes	Yes	The exemption does not apply to amounts contributed within 120 days before the debtor files for bankruptcy. Alaska provides a specific exemption for inherited IRAs.
Arizona	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. Arizona provides a specific exemption for inherited IRAs.
Arkansas	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.
California	Cal. Civ. Proc. Code §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.
Colorado	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.
Connecticut	Conn. Gen. Stat. §52-321a	Yes	Yes	
Delaware	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.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Florida	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. Florida provides a specific exemption for inherited IRAs.
Georgia	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.
Hawaii	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.
Idaho	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.
Illinois	735 Ill. Comp. Stat. 5/12-1006	Yes	Yes	Inherited IRAs are not exempt. In re Marriage of Branit, 41 N.E.3d 518 (Ill. App. Ct. 2015) 5
Indiana	Ind. Code §34-55-10-2	Yes	Yes	Indiana provides a specific exemption for inherited IRAs.
Iowa	Iowa Code §627.6	Yes	Yes	
Kansas	Kan. Stat. Ann. §60-2308	Yes	Yes	Inherited IRAs are not exempt. In re Mosby v. Clark, 2015 WL 6610988 (D.C. Kan. Oct. 30, 2015)
Kentucky [‡]	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.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Louisiana	La. Stat. Ann. §§ 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.
Maine	Me. Rev. Stat. Ann. tit. 14, §4422(13)(E)	Limited	Limited	IRA's are exempt only to the extent reasonably necessary for the support of the debtor and any dependent.
Maryland	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.
Massachusetts	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.
Michigan [†]	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
Minnesota	Minn. Stat. §550.37	Limited	Limited	Exempt to a present value of \$69,000 and additional amounts reasonably necessary to support the debtor, spouse or dependents.
Mississippi	Miss. Code Ann. §85-3-1	Yes	No	

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Missouri	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 and for the period such person participated within 3 years prior to the commencement of such proceedings. Missouri provides a specific exemption for inherited IRAs.
Montana	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.
Nebraska	Neb. Rev. Stat. §25-1563.01	No	No	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.
Nevada	Nev. Rev. Stat. §21.090(1)(r)	Yes	No	The exemption is limited to \$500,000 in present value held in an individual retirement account, which conforms with Section 408 and 408A.
New Hampshire	N.H. Rev. Stat. Ann. §511:2	Yes	Yes	Exemption only applies to extensions of credit and debts arising after January 1, 1999.
New Jersey	N.J. Stat. Ann. 25:2-1(b)	Yes	Yes	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).
New Mexico	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.
New York	N.Y. C.P.L.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.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
North Carolina	N.C. Gen. Stat. §1C-1601(a)(9)	Yes	Yes	North Carolina provides specific exemptions for inherited IRAs.
North Dakota	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.
Ohio [‡]	Ohio Rev. Code Ann. §2329.66(A)(10)	Yes	Yes	SEPs and SIMPLE IRAs are not exempt. Ohio provides a specific exemption for inherited IRAs.
Oklahoma	Okla. Stat. tit. 31, §1(A)(20)	Yes	Yes	
Oregon	Or. Rev. Stat. 18.358	Yes	Yes	
Pennsylvania	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 one year before the debtor filed for bankruptcy.
Rhode Island	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.
South Carolina	S.C. Code Ann. §15-41-30	Limited	Limited	The debtor's right to receive individual retirement accounts and Roth accounts is exempt to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. Specifically provides for exemption of inherited IRAs.
South Dakota	S.D. Codified 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.
Tennessee [‡]	Tenn. Code Ann. §26-2-105	Yes	Yes	Not exempt from claims of an alternate payee under a QDRO.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Texas	Tex. Prop. Code Ann. §42.0021	Yes	Yes	Texas provides a specific exemption for inherited IRAs.
Utah	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.
Vermont	Vt. Stat. Ann. tit. 12, §2740(16)	Yes	Yes	Non-deductible traditional IRA contributions plus earnings are not exempt.
Virginia	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.
Washington	Wash. Rev. Code §6.15.020	Yes	Yes	
West Virginia	W.Va. Code §38-10-4	Yes	No	
Wisconsin	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.
Wyoming	Wyo. Stat. §1-20-110	No	No	

† Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), qualified plan, SEP, and SIMPLE assets are protected with no dollar limitation. Individually established and funded traditional IRAs and Roth IRAs are protected to \$1,283,025. However, rollover assets in an IRA are not subject to the \$1,283,025 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.

‡ Kentucky, Michigan, Ohio, and Tennessee: The U.S. Court of Appeals for the Sixth Circuit ruled in *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th 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.