chapter 7

Is Your Retirement Plan Really Safe? Protecting Qualified Plans and IRAs From Creditors

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Table of Contents

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I. INTRODUCTION

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. Prior to BAPCPA, debtor and creditor rights with regard to such assets were in a state of great confusion both within and outside of federal bankruptcy. For debtors in financial distress under the federal bankruptcy laws, BAPCPA not only provides clarification but actually extends bankruptcy protection for the debtor's retirement funds. For debtors in financial distress who are subject to state attachment and garnishment proceedings outside of bankruptcy, the confusion continues.

II. THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 ("BAPCPA")

A. Key Points of BAPCPA for Retirement Plan Assets.

1. BAPCPA makes significant changes in bankruptcy rules and adds specific protections for tax-qualified retirement plans and IRAs. BAPCPA is effective for bankruptcy petitions filed on or after October 17, 2005.

2. BAPCPA exempts retirement plan assets from a debtor's bankruptcy estate if such assets are held by an Internal Revenue Code Section 401(a) tax-qualified retirement plan, a section 403(b) plan, a section 457 plan, or an IRA (including traditional IRAs, Roth IRAs, SEPs and SIMPLEs) under Sections 408 or 408A. The retirement plan exemption applies regardless of whether the debtor elects the federal or state bankruptcy exemptions. 11 USC § 522(d)(12).

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3. The exemption for IRAs is limited to $1,000,000 (increased by COLAs to $1,245,475). However, the $1,000,000 limit does not apply to employer-sponsored IRAs (*e.g.*, SEPs or SIMPLEs). Additionally, rollovers into IRAs from qualified plans are also exempt from the $1,000,000 limit. It appears that a rollover from a SEP or SIMPLE-IRA would receive only $1,000,000 of protection since a Code Section 408(d)(3) rollover is not one of the rollovers sanctioned under Bankruptcy Code Section 522(n).

   In order to make sure that an individual receives the full $1,000,000 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. 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). BAPCPA thereby increases the importance of obtaining an individual IRS determination letter for a qualified plan.

5. 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.

   a. But see: *In re: Butler*, 379 B.R. 732 (Bankr. N.D. Ohio 2007) where the court found that repayment of a 401(k) loan constituted a circumstance of the Debtor's financial situation to be considered in determining abuse. As a result, the court dismissed the Debtor's voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

6. In summary, under BAPCPA, qualified plan, SEP, and SIMPLE assets are protected with no dollar limitation. IRAs and Roth IRAs are protected to $1,000,000. However, rollover assets in an IRA are not subject to the $1,000,000 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.

B. Further Analysis Under BAPCPA.

1. Determination of the Tax Qualified Status of Plan.

As noted above, the bankruptcy exempted funds or accounts must be exempt from taxation under the Internal Revenue Code (I.R.C. or Code). Section 522(b)(4) of the Bankruptcy Code provides a very lenient rule in determining whether funds or accounts are exempt from taxation under the Code. 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). Additionally, a fund or account is considered exempt from tax even if it has not received a favorable IRS ruling provided that it is in substantial compliance with the Code. Lastly, even if the fund or account has neither a favorable ruling nor is in substantial compliance with the Code, it is still considered exempt for bankruptcy law purposes if the debtor is not materially responsible for its noncompliance.

At least one court has held that a prototype or volume submitter opinion letter from the IRS is not considered to be a favorable ruling from the IRS for bankruptcy purposes. *In re: Daniels*, 452 B.R. 335 (Bankr. D. Mass. 2011), affd., 482 B.R. 1 (D. Mass. 2012). Therefore, it is a good idea for such plans to file for individual determination letters from the IRS in order to assure maximum creditor protection.

Since IRS Ann. 2011-82 and Rev. Proc. 2012-6 limit the issuance of individual determination letters for pre-approved plans to volume submitter plans that modify the terms of the pre-approved specimen plan, we will need to monitor developments on this issue.

2. 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 Royal Plunk*, 481 F.3d 302 (5th 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. In *Plunk* the Fifth Circuit limited its prior ruling in *Matter of Youngblood*, 29 F.3d 225 (5th Cir. 1994) (holding that it is the IRS and not the courts who determine a plan's tax-qualified status) to cases where the IRS has reviewed the alleged disqualifying defect and ruled that the plan is still qualified.

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. 11 USC § 522(b)(4)(D). It is unclear whether such distributions are protected for more than 60 days if they are not rolled over to an IRA or to another qualified plan. Minimum required distributions and hardship distributions are not protected since they are not eligible rollover distributions.

4. Owner Only Plans are Protected in Bankruptcy.

As will be detailed below, 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. 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. 11 U.S.C. § 522(b)(1). 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. As a general rule, either the federal or 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 Section 522(b)(3)(C) which creates an exception to the "anti-stacking" clause of Bankruptcy Code Section 522(b)(1). The anti-stacking clause generally requires that a debtor choose between federal and state law exemptions. Under Section 522(b)(3)(C), even if the debtor chooses the state law exemptions, he 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 Sections 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code. *In re: Thiem*, 107 AFTR 2d 2011-529, (Bankr. D. Ariz. 2011). *In re: Patrick*, 411 B.R. 659 (Bankr. C.D. Cal. 2008).

The U.S. Ninth Circuit Court of Appeals 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 dollar limitation in § 522(n). Congress' intent was to preempt conflicting state emption 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." H.R. Rep. No. 109-31(1), pt. 1 at 63-64 (2005) as reprinted in 2009 U.S.C. C.A.N. (Legislative History) 88, 132-33." *In re: Hamlin*, 465 B.R. 837 (B.A.P. 9th Cir. 2012).

The anti-stacking rule for retirement plan assets goes both ways — it provides both the federal <u>and</u> the state exemptions for such assets. As shown in *In re: Reinhart*, No. 09-4028, 109 AFTR 2012, (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. 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.

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

1. <u>*Clark v. Rameker*</u>.

As noted in II.B.5. above, Bankruptcy Code (11 U.S.C.) Section 522(b)(3)(C) and 522(d)(12) exempt "retirement funds" if such funds are in an account that is exempt from tax under I.R.C. §§ 401, 403, 408, 408A, 414, 457 or 501(a). The U.S. Supreme Court unanimously held in *Clark v. Rameker*, 134 S.Ct. 2242, 573 U.S. ____ (June 12, 2014) that the phrase "retirement funds" does <u>not</u> include an inherited IRA. In *Clark*, the deceased IRA owner's daughter was the beneficiary. 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. I.R.C. § 219(d)(4).

b. Holders of inherited IRAs are required to receive distributions from the account regardless of their age. I.R.C. §§ 408(a)(6), 401(a)(9)(B).

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. I.R.C. § 72(t)(2)(A)(ii).

2. Spouse as Beneficiary.

The Supreme Court in *Clark* notes that "If the heir is the owner's spouse, as is often the case, the spouse has a choice: he or she may "rollover" the IRA funds into his or her own IRA, or he or she may keep the IRA as an inherited IRA (subject to the rules discussed below)." … "When anyone other than the owner's spouse inherits the IRA, he or she may not rollover the funds; the only option is to hold the IRA as an inherited account." *Clark*, 573 U.S. at ____.

Clark involved a non-spouse beneficiary. Therefore, statements regarding spousal beneficiaries may be treated as dicta. Mindful that we are interpreting dicta, the Court seems to imply that an IRA rolled over by a spouse beneficiary will be treated as the spouse's IRA, rather than an inherited IRA, and such IRA will be an exempt asset. If the spouse chooses to treat the IRA as an inherited IRA, however, it may not be an exempt asset.

3. Possible State Law Exemptions.

As noted in II.B.5-6 above, 11 U.S.C. § 522(b)(3)(C) provides an exemption to the anti-stacking clause of 11 U.S.C. § 522(b)(1). The effect is that a debtor in an "opt-out" state gets both the federal and state law exemptions with respect to retirement plan assets. If a state exemption statute specifically exempts inherited IRAs, those exemptions should still apply if the state is an opt-out state.

Alaska, Arizona, Florida, Indiana, Missouri, North Carolina, Ohio, South Carolina, and Texas have statutes which specifically exempt inherited IRAs. The state law that applies is the state where the debtor lives.

In Ohio, O.R.C. § 2329.66(A)(10)(e) specifically exempts inherited IRAs from creditor claims. Thus, inherited IRAs of an Ohio domiciled debtor are exempt from creditor claims both in and outside of bankruptcy.

4. Tax Qualified Retirement Plans.

As noted in IV.A. below, *Paterson v. Shumate*, 112 S.Ct. 2242 (1992) is still good law. In *Paterson*, the Supreme Court held that "ERISA plans" are excluded (not exempted) from the bankruptcy estate. Therefore, the examination in *Clark* should not impact inherited accounts in ERISA plans and such accounts should not be attachable in bankruptcy.

However, owner-only plans are not ERISA Title I plans and, therefore, may not be excluded from the estate. Owner-only plans are still IRC § 401 plans and exempt in bankruptcy under BAPCPA.

An attorney representing a debtor with an inherited account in an ERISA Title I plan should argue that the plan is excluded from the bankruptcy estate so one never gets to the analysis of whether it is exempt.

A debtor with an inherited account in an owner-only plan may be subject to the same analysis used by the Supreme Court in *Clark* and the asset may be judged as not an asset in a retirement fund and not exempt.

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.

For example, an inherited IRA in California is not exempt from creditor claims under CA. CCP § 701.140(b)(10)(G).

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

III. 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.[1]

[1] *See* ERISA § 206(d), 29 U.S.C. § 1056(d)(1).

In order for the anti-alienation clause to be effective, the underlying plan must constitute a "pension plan" under ERISA. Such a plan is any "plan, fund or program which ... provides retirement income to employees."[2] Therefore, a plan that does not benefit any common-law employee is not an ERISA pension plan. This may be the case with Keogh as well as corporate plans in which only the owners participate. See the discussion below regarding owner-only plans.

B. Internal Revenue Code.

Buttressing ERISA, the Internal Revenue Code (hereafter 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."[3]

The Treasury Regulations provide that "under [Code] § 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated, or subject to attachment, garnishment, levy, execution or other legal or equitable process."[4] Thus, a retirement plan will not attain qualified status unless it precludes both voluntary and involuntary assignments.

Neither ERISA nor Code protections apply to assets held under individual retirement arrangements, (including SEPs and SIMPLE-IRAs), government plans, or most church plans.[5]

C. Exceptions.

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

1. Qualified domestic relations orders ("QDROs"), as defined in Code § 414(p), may be exempted.[6] This means that retirement plan assets are a marital asset subject to division in divorce and attachment for child support.

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2 ERISA § 3(2)(A). An ERISA "pension" plan, therefore, generally encompasses pension, profit-sharing, and § 401(k) plans.

3 I.R.C. § 401(a)(13)(A).

4 Treas. Reg. § 1.401(a)-13(b)(1).

5 ERISA §§ 4(b) and 201; I.R.C. § 401(a) and DOL Reg. § 2510.3-2(d).

6 I.R.C. § 401(a)(13)(B), ERISA § 206(d)(3).

2. Up to 10% of any benefit *in pay status* may be voluntarily and revocably assigned or alienated.[7]

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.[8]

4. Federal tax levies and judgments are exempted. The Treasury Regulations under Code § 401(a)(13) provide that plan benefits are subject to attachment by the IRS in common-law and community property states.[9]

   The logic of this exemption is that ERISA may not be construed so as to alter, amend, modify, or supersede any law of the United States.[10] Thus, under this "savings clause," the IRS tax levy authority is deemed to override ERISA's anti-alienation rule.[11]

   a. The IRS has issued a Field Service Advice Memorandum[12] 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.

      The Ninth Circuit Court of Appeals has held that the IRS cannot enforce a lien in bankruptcy prior to the time that the participant is entitled to a distribution from a tax-qualified retirement plan. *U.S. v. Snyder*, 343 F.3d 1171 (9th Cir. 2003).

   b. In Chief Counsel Advice Memorandum (CCA) 199936402 the IRS ruled that it may step into the participant's shoes and make an early retirement election. In IRS Legal Memo 200032004 (May 10, 2000) the IRS ruled that an IRS levy can attach to all present rights that a participant has under a plan, including the present right to future payment and the present right to elect a form of distribution. Thus, the IRS can claim the taxpayer's right to future payment but the plan administrator is not required to honor the levy until the participant retires or

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7 I.R.C. § 401(a)(13)(A); Reg. § 1.401(a)-13(d)(1), ERISA § 206(d)(2).

8 Reg. § 1.401(a)-13(e).

9 Reg. § 1.401(a)-13(b). *See In re: Martin M. Carlson*, 75 AFTR 2d Par. 95-497 (Jan. 9, 1995); *In re: Vermande*, 94 TNT 190-9 (Bankr. N.D. Ind. 1994); *Gregory v. United States*, 96-CV-70603-DT (D.C. Mich. 1996); *McIntyre V. United States*, Case No. 98-17192 (9th Cir. 2000).

10 ERISA § 514(d).

11 *United States v. Sawaf*, 74 F.3d 119 (6th Cir. 1996).

12 FSA 199930039; see also CCA 199936041 and CCA 200102021.

otherwise becomes eligible to receive benefits from the plan. Additionally, 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.

c. See also, CCA 200249001 where the IRS Chief Counsel states that although a federal tax lien attaches to a taxpayer's vested interest in a pension plan, the levy does not reach amounts payable to a beneficiary as death benefits even where the levy occurs prior to the death of the taxpayer.

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.[13] If the participant is married at such time as his or her plan benefits are offset and if the survivor annuity provisions of ERISA § 205 or Code § 401(a)(11) apply to distributions under the plan, the participant's spouse must consent in writing to the offset. An exception to such spousal consent would pertain if the spouse is also involved in the fiduciary violation or crime or if the spouse retains the right to receive his or her survivor annuity.

6. Federal Criminal Penalties.

a. 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."

The IRS cited favorably three federal district court cases which concluded that ERISA plans are subject to garnishment to satisfy criminal fines pursuant to the Federal Debt Collection Procedures Act of 1977 ("FDCPA"), 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. 1196 (N.D. Okla. 2002).

The IRS accepted the reasoning of the federal courts which held that section 3713(c) of the FDCPA (which provides that

[13] Code §§ 401(a)(13)(C); ERISA §§ 206(d)(4).

"an order of restitution … is a lien in favor of the United States on all property of the person fined as if the liability of the person fined were liability for a tax assessed under the Internal Revenue Code…") was to be treated as if it were a tax lien so that it fell within the exception to the anti-alienation provision listed in Treasury Regulation section 1.401(a)-13(b)(2)(ii) for "collection by the United States on a judgment resulting from an unpaid tax assessment."

b. In PLR 200426027, the IRS further reviewed the issues regarding the treatment by retirement plans of federal criminal penalties assessed against a plan participant. Citing the *Tyson* and *Clark* cases as authority, the IRS reiterated its position that federal court judgments imposing a fine payable to the United States or enforcing an order of restitution are to be treated as tax liabilities. Based on this position, the IRS issued five separate rulings in the PLR:

   i. Honoring such garnishment orders will not result in the failure of the plan to meet the anti-alienation provisions of I.R.C. § 401(a)(13). This conclusion applies regardless of whether the purpose of the garnishment is to collect (a) a fine payable to the United States Government; (b) criminal restitution amounts payable to the U.S. Government; (c) criminal restitution amounts payable to the U.S. Government for the benefit of private parties; or (d) criminal restitution amounts payable to the U.S. Government for the benefit of a state or local governmental entity.

   ii. A plan will not violate the exclusive benefit rule of I.R.C. § 401(a)(2) when paying some or all of a participant's or beneficiary's benefit to the U.S. Government when ordered to do so pursuant to an order of garnishment.

   iii. The lien created pursuant to 18 U.S.C. § 36(c) attaches immediately, but the U.S. Government (1) cannot collect from the plan until the participant or beneficiary has a right to a distribution under the plan, (2) steps into the shoes of the participant or the beneficiary and can elect distribution on behalf of that person when the person could elect a distribution; and (3) is subject to the qualified joint and survivor annuity rules and other plan provisions to the same extent as the participant or beneficiary.

iv. Citing *Murillo v. Commission*, T.C. Memo 1998-13, payments made pursuant to the orders of garnishment are not subject to the 10% additional income tax imposed under I.R.C. § 72(t).

v. Payments made pursuant to such orders may be treated as "eligible rollover distributions" subject to the mandatory 20% federal income tax withholding requirements.

c. In *U.S. v. Novak*, 476 F.3d 1041 (9th Cir. 2007), the U.S. Ninth Circuit Court of Appeals held that the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, in conjunction with 18 U.S.C. § 3613, constitutes a statutory exception to ERISA's anti-alienation provisions. The Ninth Circuit overturned a district court judgment quashing a writ of garnishment. The writ of garnishment had been issued at the request of the U.S. Attorney pursuant to the garnishment provisions of the FDCPA (cited above).

D. ERISA Preemption.

The above-described 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. Supreme Court Acknowledgment Outside of Bankruptcy.

The U.S. Supreme Court has held that the ERISA anti-alienation provisions are extremely broad. In *Guidry v. Sheet Metal Workers National Pension Fund*,[14] the Supreme Court held that ERISA prevents a federal court from imposing a "constructive trust" on pension benefits payable to a former union official who was convicted of embezzling more than $377,000.00 from the union. The Court held that "§ 206(d) reflects a congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them."[15]

[14] 110 S. Ct. 680 (1990).

[15] 110 S. Ct. at 687.

F. 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.[16] 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.[17] Since the settlor/employer does not have any significant rights with respect to the trust assets, its creditors have no rights regarding the trust assets.

IV. ADDITIONAL ANALYSIS

A. *Patterson v. Shumate*.

1. In 1992, the U.S. Supreme Court resolved a split among the U.S. Circuit Courts of Appeals by holding 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 applicable 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.[18]

2. The Supreme Court stated that Bankruptcy Code § 541(c)(2) "encompasses any relevant non-bankruptcy law, including federal law such as ERISA."[19] The Court also noted that its decision ensures that treatment of pension benefits will not vary because of a beneficiary's bankruptcy status and gives full effect to ERISA's goal of protecting pension benefits.

3. 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.

B. *Yates v. Hendon.*

1. *In Raymond B. Yates, M.D., P.C. Profit Sharing Plan et al. v. Hendon, Trustee*, 124 S. Ct. 1330 (2004), the United States Supreme Court held

[16] Code § 401(a)(1); Treas. Reg. § 1.401-1(b).

[17] Code § 401(a)(2); Treas. Reg. § 1.401-2.

[18] *Patterson v. Shumate,* 112 S. Ct. 2242 (1992).

[19] 112 S. Ct. at 2244.

that the working owner of a business (here, the sole shareholder and president of a professional corporation) may qualify as a "participant" in a pension plan covered by ERISA. If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies.

2. The impact of the holding of the Supreme Court in *Yates* was that the retirement plan benefits of a business owner are protected from the claims of creditors if at least one non-owner employee (other than the owner's spouse) is also a participant in the retirement plan.

C. 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).[20] 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*, cited above, 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."

4. In *Lowenschuss v. Selnick*, 117 F.3d 673 (9th Cir. 1999) the Ninth Circuit held that an employee pension benefit plan that had been

[20] 29 C.F.R. § 2510.3-3(b), (c)(1).

properly established and maintained pursuant to ERISA can lose its ERISA-qualified status for bankruptcy purposes through the mere attrition of non-owner participants where it covered only the owner-employee at the time of the bankruptcy filing.

D. 403(b) Plans May Not Be Protected Outside of Bankruptcy.

1. The United States Sixth Circuit Court of Appeals held in *In re: Adams*, 302 B.R. 535 (BAP 6th Cir. 2003) that only assets that are held "in a trust" are excludable from property of the bankruptcy estate by 11 U.S.C. § 541(c)(2).

   The Bankruptcy Court for the Southern District of Ohio held that the 403(b) plans (for the husband and wife) were "ERISA-qualified" as contemplated by the Supreme Court in *Patterson v. Shumate*. As such, they were not the property of the (bankruptcy) estate, and were not subject to administration by the (bankruptcy) Trustee.

   The Sixth Circuit reversed the Bankruptcy Court and remanded the case for further proceedings based on the fact that the debtors had not shown that the section 541(c)(2) "in a trust" language had been satisfied. The Sixth Circuit held that only assets of an ERISA plan held in a trust would be excluded from the bankruptcy estate and that assets in a custodial account may not be excluded.

2. BAPCPA specifically protects Section 403(b) plans in bankruptcy and does not distinguish between trust and custodial accounts.

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

The United States Court of Appeals for the First Circuit held that the anti-alienation provisions of ERISA and the I.R.C. do not restrict the alienation of pension benefits that have already been distributed to plan participants or beneficiaries. 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 (1st Cir. 2004); cert. denied (Dkt. No. 04-424), U.S. Sup. Ct. (2004).

As noted in Section II.B.3. above, however, 11 USC § 522(b)(4)(D) provides that "eligible rollover distributions" retain their exempt status in bankruptcy after they are distributed.

F. Impact of Bankruptcy on a Qualified Domestic Relations Order.

The U.S. Sixth Circuit Court of Appeals ruled that pension benefits awarded a participant's former spouse before the participant filed for bankruptcy do not constitute property of the participant's bankruptcy estate and, therefore, the debtor cannot discharge the payment obligation.[21] The Sixth Circuit held that the divorce decree created a constructive trust to protect the interest awarded to the alternate payee/former spouse in the pension plan even though the divorce decree did not use the words "constructive trust."

The Sixth Circuit opinion was consistent with the ruling of the Ohio Supreme Court in *Erb v. Erb*.[22] In *Erb*, the Ohio Supreme Court ruled that the wife's property interest in the husband/participant's pension would neither be part of the husband's bankruptcy estate nor be subject to the jurisdiction of the bankruptcy estate.

V. INDIVIDUAL RETIREMENT ACCOUNTS

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

1. Traditional IRAs and Roth IRAs are exempt to $1,000,000 (increased by COLAs to $1,245,475).

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 $1,000,000 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 $1,000,000 of protection since a Code Section 408(d)(3) rollover is not one of the rollovers sanctioned under Bankruptcy Code Section 522(n).

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

1. <u>IRAs under ERISA</u>. Here we find a fascinating 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.

   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 Section 3(2)(A)]. Thus, the typical pension, profit-sharing or Section 401(k) plan constitutes an ERISA pension plan. Although contributions under both SEP and SIMPLE

[21] *McCaferty v. McCaferty, No.* 95-3919 (6th Cir. September 18, 1996)

[22] 75 Ohio St. 3d 18 (1996).

IRAs are immediately allocated among the individually owned IRAs of the participating employees, the DOL [preamble to DOL Regulation Section 2520.104-48] and the Federal Court of Appeals [*Garratt v. Walker,* 164 F. 3d 1249 (10th Cir. 1998)] have 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. As note above, ERISA pension plans are afforded extensive anti-alienation creditor protection both inside and outside of bankruptcy. [ERISA Section 206(d)]. However, these extensive anti-alienation protections do not extend to an IRA arrangement under Code Section 408 even if the IRA constitutes an ERISA pension plan due to being established as a SEP or SIMPLE IRA [ERISA Section 4(b) and 201]. ERISA also contains specific preemption provisions [ERISA Section 514(a)] 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.

c. Thus, the SEP and SIMPLE IRA is in a quandary outside of bankruptcy – this IRA is 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 actions.

The U.S. Sixth Circuit case of *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. 2002) 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 garnishment.

2. <u>Non-SEP and SIMPLE IRAs</u>. As just noted, 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 chapter.

a. The state of residency of the IRA owner/participant determines which state law applies to the IRA for exemption purposes.

b. 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 million dollars worth of protection in a bankruptcy proceeding.

3. <u>Impact of Rousey v. Jacoway</u>. *Rousey v. Jacoway*, 125 S. Ct. 1561 (2005), was a significant U.S. Supreme Court pre-BAPCPA decision. In *Rousey*, the Court determined that IRAs are a "similar plan or contract" to pension and profit-sharing plans for purposes of the limited exemption found at Bankruptcy Code Section 522(d)(10)(E). This decision, although largely irrelevant under post-BAPCPA bankruptcy law, may be authoritative in those very few states that protect pension and profit-sharing plans but do not specifically protect IRAs. In a non-bankruptcy proceeding in such a state involving traditional or Roth IRAs, the Court's logic of equating IRAs to traditional retirement plans might be persuasive.

4. In *State Farm Mutual Auto Ins. v. Lincow*, 792 F. Supp.2d 806 (E.D. PA. 2011), the court held that an exemption under a Pennsylvania Statute shielding an IRA from attachment is contingent on the debtor/IRA owner proving that the funds in the IRA had been continuously held in tax qualified plans.

C. Ohio Law.

1. Ohio Rev. Code § 2329.66(A)(10)(c) was amended effective March 22, 1999 to specifically exempt Individual Retirement Accounts, Roth IRAs, and Education IRAs (now Coverdell Education Savings Accounts) from execution, garnishment, attachment or sale to satisfy a judgment or order. Although SEPs and SIMPLE IRAs are types of IRAs, they are not protected under Ohio law. Assets rolled over from a SEP or SIMPLE into a rollover IRA would, however, be entitled to protection from creditor claims under these provisions.

2. There are exceptions under Ohio law. Portions of the otherwise protected IRA that are deposited for the purpose of evading the payment of any debt continue to be subject to execution, garnishment, attachment, or sale to satisfy a judgment creditor. Moreover, the entire IRA is still subject to a court order to withhold money from those assets to pay child support. Additionally, the law relocates the statutory location for but does not change the previous-law standards for holding Keogh plan assets exempt from attachment only to the extent "reasonably necessary for the support of the person and any of the person's dependents."[23]

D. Treatment of IRAs with Prohibited Transactions.

1. <u>Prohibited Transaction Defined</u>.

a. Code Section 4975(c)(1) states that the term "prohibited transaction" means any direct or indirect:

i. sale or exchange, or leasing, of any property between an 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 Section 4975(e)(2).

c. The term "plan" for purposes of applying the prohibited transaction rules includes an IRA. Code Section 4975(e)(1).

[23] Ohio Rev. Code § 2329.66(A)(10)(d).

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 I.R.C. § 408(a), engages in any transaction that is prohibited under I.R.C. § 4975, the IRA ceases to be an IRA as of the first day of the taxable year in which the transaction occurs. See I.R.C. § 408(e)(2)(A). This means the special tax benefits accorded the IRA are lost. Similarly, if the IRA owner of an individual retirement annuity, as described in I.R.C. § 408(b), borrows any amount from the contract, the contract ceases to be an IRA as of the first day of the taxable year in which the borrowing occurs. See I.R.C. § 408(e)(3).

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 I.R.C. § 408(e)(2)(B).

a. Example. Sue has a traditional IRA funded with deductible contributions. The IRA is a custodial account maintained with a bank. On June 1, Sue sells property to her IRA for fair market value ($20,000). The total value of the IRA as of the prior January 1 (i.e., the beginning of Sue's taxable year in which the transaction occurred) is $75,000. Although the sale was for fair market value, Sue has engaged in a prohibited transaction with her IRA under I.R.C. § 4975(c)(1)(A) and she did not obtain an exemption for this transaction. The result is that her IRA ceases to be an IRA. In addition, the fair market value of the IRA as of the January 1 which precedes the date of the transaction is includible in her gross income for that taxable year, resulting in additional income of $75,000.

4. No excise tax on IRA owner when IRA ceases to be an IRA.

When an individual retirement account ceases to be an IRA by reason of I.R.C. § 408(e)(2)(A), the IRA owner (or beneficiary) is exempt from the excise taxes with respect to the transaction that caused the IRA to cease to be an IRA. See I.R.C. § 4975(c)(3).

5. 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. One of the key issues decided by the trial court in *Willis* was whether the Bankruptcy Court has the jurisdiction to determine whether an IRA that received a favorable determination letter (in *Willis*, a Merrill Lynch IRA) can subsequently lose its exempt status thereby subjecting the assets in the IRA to the claims of creditors. The court in *Willis* held that the IRA's determination letter was significant, but where the debtor engages in prohibited transactions, the presumption of qualification is rebutted and the funds are not exempt.

6. <u>IRA Agreement with Indemnification Language may constitute Prohibited Transaction (PT)</u> and cause IRA to lose exemption from Creditor Claims.

a. Some IRA Agreements (*e.g.*, Merrill Lynch and Schwab) contain language whereby the IRA owner indemnifies the IRA custodian or grants the custodian a lien on all of the IRA owner's accounts with the custodian. Such provisions may constitute PTs and result in the loss of the IRA's exemption in bankruptcy.

b. In IRS Announcement 2011-81, the IRS granted limited temporary relief from such IRA agreements as long as such agreements have not been enforced. The IRS Announcement addresses only the potential tax issues.

c. In *In re: Daley*, 2011 Bankr. Lexis 3945 (Bankr. E.D. Tenn. Oct. 11, 2011), aff'd 3:11-CV-585 (E.D. Tenn. Sept. 17, 2012) a U.S. Bankruptcy Court denied the debtor's exemption in a Merrill Lynch IRA where the debtor signed an agreement granting Merrill Lynch a lien on all of the debtor's Merrill Lynch accounts.

d. However, the Bankruptcy Court in *Daley* was reversed by the Sixth Cir. Court of Appeals in *In re: Daley*, No. 12-6130 (6th Cir. June 17, 2013). The 6th Circuit stated that the "question is whether Daley used his IRA to obtain credit from Merrill

Lynch, resulting in an indirect extension of credit between Daley and the IRA." Citing IRS Announcement 2011-81, the Court held that the mere existence of a cross-collateralization agreement does not by itself disqualify an IRA from exempt status. This was particularly so in this case where Mr. Daley's sole account with Merrill Lynch was his IRA.

e. A class action lawsuit was filed against Schwab in *Yoshioka v. Charles Schwab Corp., et al.*, 2011 U.S. Dist. Lexis 147483 (N.D. Cal. Dec. 22, 2011) based on potential PTs arising from Schwab IRA Agreements.

STATE-BY-STATE ANALYSIS OF INDIVIDUAL RETIREMENT ACCOUNTS AS EXEMPT PROPERTY*

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Alabama	Ala. Code §19-3B-508	Yes	Yes	
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. Code of Civ. Proc. §704.115	No	No	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.

* 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 $1,000,000 (increased by COLAs to $1,245,475). However, rollover assets in an IRA are not subject to the $1,000,000 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.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
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.
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	No	No	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	Ill. Rev. Stat. Ch. 735, Para. 5/12-1006	Yes	Yes	
Indiana	Ind. Code §34-55-10-2	Yes	Yes	Indiana provides a specific exemption for inherited IRAs.
Iowa	Iowa Code §627.6	Yes	Yes	

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
Kansas	Kan. Stat. Ann. §60-2308	Yes	Yes	
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.
Louisiana	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.
Maine	Me. Rev. Stat. Ann. Tit. 14, §4422(13) (E)	No	No	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.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
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	Yes	Yes	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	
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 as defined in Section 456.630 of the Missouri Code, 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	Yes	The exemption is limited to $500,000 in present value held in an individual retirement account, which conforms with Sections 408 and 408A.

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
New Hampshire	N.H. Tit. 52 §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	
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. 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.
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)	Yes	Yes	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	

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
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	Yes	Yes	Specifically provides for exemption of inherited IRAs.
South Dakota	S.D. Cod. Laws 43-45-16; 43-45-17	Yes	Yes	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.
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	

STATE	STATE STATUTE	IRA EXEMPT	ROTH IRA EXEMPT	SPECIAL STATUTORY PROVISIONS
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	Yes	Yes	Exempt to the extent payments are made to the fund while solvent.

*Kentucky, Michigan, Ohio, and Tennessee: The U.S. Court of Appeals for the Sixth Circuit ruled in *Lampkins v. Golden*, 2002 U.S. App. LEXIS 900, 2002-1 USTC par. 50,216 (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.