

# Is It In or Out?

## *Exemption Issues Revisited*

***Hon. Marci B. McIvor***

U.S. Bankruptcy Court (E.D. Mich.); Detroit

***Claire Ann Resop***

von Briesen & Roper, SC; Madison, Wis.

***Susan Jill Rice***

Brandt, Fisher, Alward & Pezzetti, P.C.  
Traverse City, Mich.

***Lason Smalarz***

Gold Lange & Majoros, PC; Southfield, Mich.

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**Inherited IRAs: Exempt Asset or Windfall?**

**Honorable Marci B. McIvor  
United States Bankruptcy Court, Eastern Michigan**

## **Inherited IRAs: Exempt Asset or Windfall?**

An issue which seems to be arising with some frequency is whether funds in a Debtor's IRA account may be exempted under 11 U.S.C. § 522(d)(12) when the source of those funds is a rollover from a decedent's IRA. 11 U.S.C. § 522(d)(12) provides that retirement funds may be fully exempted "to the extent "that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."

### **I. *Chilton v. Moser (In re Chilton)*, \_\_ F.3d \_\_, 2012 WL 762924 (5<sup>th</sup> Cir.)**

In a case of first impression at the circuit court level, the Fifth Circuit Court of Appeals held that an inherited IRA directly transferred to debtors prepetition is exempt under 11 U.S.C. § 522(d)(12) because the funds in the IRA were set apart for retirement and exempt from taxation pursuant to 26 U.S.C. § 408(e).

**Facts:** Debtor's mother established an IRA account for herself and designated Debtor the beneficiary. Debtor's mother died and the assets in the account passed to Debtor, who, in compliance with all relevant tax laws, established an "inherited IRA" and had the assets transferred to the trustee of the inherited IRA. Shortly thereafter, Debtor filed a voluntary chapter 7 bankruptcy petition and claimed that the \$170,000 in the inherited IRA was exempt from creditors under 11 U.S.C. § 522(d)(12). The bankruptcy trustee objected to the exemption claiming that the funds were not "retirement funds" as to Debtor and that the inherited IRA account was not tax exempt pursuant to any of the sections of the IRS code set forth in § 522(d)(12). The bankruptcy court denied the exemption. *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Texas, 2010). That denial was reversed by the district court for the Eastern District of Texas. The district court was affirmed by the Fifth Circuit Court of Appeals.

**Analysis:** A bankruptcy exemption under 11 U.S.C. § 522(d)(12) must meet two requirements: (1) the amount the debtor seeks to exempt must be “retirement funds” and (2) those retirement funds must be exempt from income taxation under one of the Internal Revenue Code provisions specified in the bankruptcy statute. One of the specified IRS code sections is 408 which provides a tax exemption for IRAs.

The trustee argued before the bankruptcy court that an inherited IRA did not contain “retirement funds” because retirement funds are funds set apart for the specific objective of retirement. According to the trustee, the funds in an inherited retirement account are neither set apart for a specific objective of the beneficiary nor designated for retirement as to the beneficiary. The bankruptcy court agreed. The bankruptcy court then considered whether the funds in an inherited IRA are “in a fund or account that is exempt from taxation under section . . . 408. . . of the Internal Revenue Code of 1986.” The bankruptcy court found that an inherited IRA was a vehicle for receiving a distribution from a tax exempt account rather than a tax exempt account defined by section 408(e)(1) of the IRS code.

The district court and the court of appeals disagreed with the bankruptcy court and held that an IRA account set up with funds inherited from someone else’s IRA account satisfied both the “retirement funds” and “tax exempt” requirements of 11 U.S.C. § 522(d)(12). Those courts found that the defining characteristic of “retirement funds” is the purpose for which the funds are set apart, not what happens to the funds after they are set apart. Because the funds at issue in the case were set apart for retirement at the time they were deposited by the mother into the mother’s IRA, they remained “retirement funds” when sitting in the inherited IRA.

The district and appellate also held that inherited IRAs do not lose their original status as retirement funds under federal law due to the transfer from one tax exempt account to another. An inherited IRA remains tax exempt under section 408(e)(1) of the IRS code.

The *Chilton* case is the first inherited IRA case taken up by a circuit court, although the 8<sup>th</sup> Circuit BAP addressed the issue in *Doeling v. Neesa (In re Neesa)*, 426 B.R. 312 (8<sup>th</sup> Cir. BAP, 2010). The *Nessa* court held that inherited IRA accounts were exempt under § 522(d)(12).

The majority of bankruptcy courts which have considered the issue is in accord with the appellate court in *Chilton*. See *In re Kuchta*, 434 B.R. 837 (Bankr. N.D. Ohio 2010); *Bierbach v Tabor (In re Tabor)*, 433 B.R. 469 (Bankr. M.D. Pa. 2010); *In re Thiem*, 2011 WL 182884 (Bankr. D. Ariz. Jan. 19, 2011); *In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. Aug. 30, 2010). These cases all focus on the plain meaning of the words “retirement funds” and find that because the funds were originally set aside from retirement, the funds remain “retirement funds” when transferred to a beneficiary. Each of these cases also holds that funds in the inherited IRA account are exempt from taxation. Therefore both requirements of § 522(d)(12) are satisfied.

The only cases which have held that funds in an inherited IRA are **not** exempt under § 522(d)(12) have all been reversed on appeal. See *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. 2010), *rev'd* 444 B.R. 858 (E.D. Tex. 2011); *In re Clark*, 450 B.R. 858 (Bankr. W.D. Wis. 2011), *rev'd* No. 11-cv-482, 2012 WL 233990 (W.D. Wis. Jan. 5, 2012)(interpreting analogous provision 11 U.S.C. § 522(b)(3)(C)); *In re Stephenson*, 201 WL 6152960 (E.D. Mich., Dec. 12, 2010)(reversing oral pronouncement of bankruptcy judge that inherited IRA was not exempt from bankruptcy estate).

Notwithstanding the trend of the case law, Trustees in the Sixth and Seventh Circuits should consider continuing to argue that inherited IRAs are NOT exempt under 11 U.S.C. § 522(d)(12). An argument can still be made that an inherited IRA is an inheritance, not a retirement fund. The focus of the case law has been that the status of a retirement account does not change upon distribution to a beneficiary if the beneficiary (debtor) rolls the account into a tax qualified IRA. The beneficiary (debtor) now has a “retirement fund” that may be exempted under 11 U.S.C. § 522(d)(12). An argument that has been ignored in the case law is that the IRS regulations which control inherited IRAs precludes an inherited IRA from being saved for the beneficiary’s retirement.

The primary purpose of allowing beneficiaries of an IRA to roll the inherited IRA into another IRA is to defer the tax consequences of the inheritance. *Chilton*, 426 B.R. at 416. The bankruptcy court in *Chilton* explained:

The inherited IRA must be set up and maintained in the name of the deceased IRA owner for the benefit of the beneficiary. See 26 U.S.C. § 402(c)(11)(A); Publication 590 at 20. The beneficiary may make no contributions to the new account, nor may he or she rollover the inherited funds into another retirement plan. See 26 U.S.C. §§ 402(c)(11)(A)(ii), 408(d)(3). Beneficiaries of inherited IRAs may make withdrawals at any time, without penalty and must either start taking lifespan-measured withdrawals within one year or take the entire amount within five years. See 26 U.S.C. §§ 401(a)(9)(B)(ii), 402(c)(11)(A)(iii), 408(a)(6). See also Publication 590 at 37.

*In re Chilton*, 426 B.R. 612, 617 (Bankr. E.D. Tx. 2010). The beneficiary pays the taxes on the withdrawal at the time of the withdrawal.

Because the IRS requires that a beneficiary liquidate an inherited IRA within five years of the rollover, an inherited IRA cannot be saved for retirement. While the “plain meaning” argument has a great deal of appeal for courts considering the issue, a “plain meaning” analysis could also support an argument that if funds are not for the purpose of retirement either when they are transferred or when they are withdrawn by the beneficiary, they are no longer, in reality, funds for retirement. Given that a “plain meaning” analysis supports arguments on both sides of the exemption

issue, it may be appropriate to make an argument that Congress could not have intended for debtors to exempt funds that are essentially a windfall.

#### STATE EXEMPTION STATUTES

Most states have statutes which exempt funds in tax qualified IRA accounts from the claims of creditors. Debtors who are required to use state exemptions because their state has “opted out” of the federal exemption scheme, (11 USC 522(b)(2)), or who choose to use state exemptions (11 USC 522 (b)(3)), may exempt funds in an inherited IRA under their respective state statutes. Courts are split as to whether an inherited IRA may be exempted under a state statute.

The cases which have held that an inherited IRA may be exempted under a state statute generally follow the same reasoning adopted by the Fifth Circuit in *Chilton*. See *In re Stephenson*, 2011 WL 6152960 (E.D. Mich.); *In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. 2010); *Bierbach v. Tabor (In re Tabor)*, 433 B.R. 469 (Bankr. M.D. Pa. 2010); *In re Thiem*, 2011 WL 182884 (Bankr. D. Ariz. Jan. 19, 2011); *In re Kutcha*, 434 B.R. 837 (Bankr. N.D. Ohio 2010). These decisions are all relatively recent and appear to reflect the same trend exhibited by the cases decided under 11 USC 522(d) (12)

There are however, several cases in which the bankruptcy court has held that an inherited IRA may not be exempted under a state exemption statute. See *In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006); *In re Sims*, 241 E.D. Tex. 2008); *In re Greenfield*, 289 B.R. 146 (Bankr. S.D. Cal. 2003). These cases have generally distinguished an IRA established by the debtor with debtor’s own contributions, and an inherited IRA. The cases find that the latter has more in common with an inheritance than it does with a retirement fund. These cases hold that an inherited IRA is not an IRA within the meaning of the applicable state exemption statute.

## **CONCLUSION**

The trend in the case law is clearly to find that an inherited IRA may be exempted under either 11 USC 522(d)(12) or a state exemption statute. Notwithstanding this trend, given how much money is at stake, it seems likely that trustees outside the Fifth and Eighth Circuits, will continue to challenge the exemption of inherited IRAs.

**How Courts are Interpreting *Schwab v. Reilly***

**Jason P. Smalarz**  
**Gold Lange & Majoros, P.C., Southfield, Michigan**

## How Courts are Interpreting *Schwab v. Reilly*

- ***Schwab v. Reilly***, 130 S. Ct. 2652 (2010): In *Schwab* the debtor scheduled assets in the amount of \$10,718.00 and claimed exemptions in those assets in the total amount of \$10,718.00. The trustee determined that the value of the assets was \$17,200.00 and sought to recover the non-exempt equity for the benefit of the bankruptcy estate. The debtor objected, arguing that by exempting what she believed to be the full fair market value of the assets, they were fully exempt. The trustee argued that the debtor's claiming of her exemptions in an amount that she believed to be the full value of the assets did not make the assets themselves fully exempt with respect to value. The Supreme Court held that where the debtor's schedule of exempt property accurately describes an asset and declares the value of the claimed exemption in that asset to be an amount within the dollar limits that the Bankruptcy Code provides, an interested party is entitled to rely upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value expressly claimed exempt. If the asset has a value in excess of the amount claimed, the excess may be administered by the trustee even if the debtor had additional unused exemptions. The Court ruled that creditors or parties in interest are not obligated or required to object to exemptions merely because assets might have value in excess of the amount claimed exempt in order to preserve the right to recover excess value. Any excess value over and above the exemption is still preserved for the benefit of the bankruptcy estate. The Court described two types of objections that a trustee or party in interest can file if the three requirements are not met:
  1. if the exemption allows the asset itself to be completely or entirely exempted, the party in interest only need object if the asset claimed as exempt does not fit within the definition of the exemption; or
  2. if the exemption claimed has a dollar limit, the party in interest must object if the amount claimed as exempt exceeds the dollar limit for the exemption or if the debtor has attempted to claim the entire value exempt by, for example, taking the exemption in an amount of "unknown", "to be determined" or "100% of fair market value." (The asset sought to be exempt must still fit within the definition of the exemption.)

As the case law interpreting *Schwab v. Reilly* is still emerging, to date, only a few courts have considered *Schwab* and rendered decisions on related exemption issues. The following is a list of recent cases from courts in the 6<sup>th</sup> Circuit, 7<sup>th</sup> Circuit, State of Michigan and various Circuit Courts of Appeal and Circuit Bankruptcy Appellate Panels (B.A.P.). These cases generally hold that when a debtor claims an exemption in property, the debtor only exempts from the bankruptcy estate a certain dollar value in equity in the property up to the value of the exemption claimed, unless the exemption itself allows for the asset to be exempted in its entirety.

- ***In re Crommier***, 382 B.R. 377 (Bankr. W.D. Mich. 2008): If the scheduled value of an asset and the listed exemption amount are identical, that in and of itself, does not result in a so-called in-kind exemption, which completely removes the property from the bankruptcy estate.
- ***In re Livingston***, 2011 Bankr. LEXIS 2664 (Bankr. W.D. Mich. Jun. 23, 2011): The debtor's personal property remains property of the bankruptcy estate notwithstanding an exemption of an interest in that property.

- ***In re O'Brien***, 443 B.R. 117 (Bankr. W.D. Mich. 2011): A trustee is not required to object to the debtor's scheduled value of property in connection with claiming an exemption when the amount of the claimed exemption is within the limits prescribed under the statutory exemption. Exemptions represent a debtor's attempt to reclaim assets, or, more often, reclaim a certain interest in assets to the detriment of creditors. When a debtor claims a legally valid exemption under §522(b), a party in interest is not required to object to the debtor's scheduled value of the exempt property.
- ***In re Laker***, 2012 Bankr. LEXIS 376 (Bankr. N.D. Ohio Jan. 27, 2012): Debtor listed a life insurance policy with cash surrender value of \$1,000.00 in her Schedule B. The debtor elected to exempt the life insurance policy on Schedule C in the amount of \$1,000.00 under Ohio Rev. Code §2329.66(A)(2). The trustee did not object to the exemption. Subsequently the trustee filed a motion for turnover of property in the underlying bankruptcy case asking the bankruptcy court to enter an order directing the debtor to turn over the value of any cash value life insurance policies the debtor may have had over and above what she exempted (as of the date of the petition). The debtor did not oppose the motion but failed to turn over any cash value life insurance proceeds. The trustee filed a motion to revoke debtor's discharge for failing to comply with the court order for turnover. The debtor filed a cross-motion for summary judgment arguing that she was not required to turn over the full cash value of the life insurance policy because it was exempt in full. The court rejected the debtor's argument, citing *Schwab v. Reilly* and noting that even though the trustee did not object to the debtor's exemption in the life insurance policy, the debtor would still have been required to turn over any cash surrender value over and above what was exempt because she only claimed \$1,000.00 exempt. The court noted that the debtor would not be entitled to claim additional exemptions unless she formally amended her Schedule C.
- ***In re Ellis***, 2011 Bankr. LEXIS 4169 (Bankr. S.D. Ind. Oct. 27, 2011). Debtor listed a 23.64% membership interest in an Illinois limited liability company on his Schedule B and assigned it a value of "undetermined." On Schedule C the debtor claimed an exemption in the asset of "100%" both under Section 522(b) of the Bankruptcy Code and under Indiana state law. A creditor filed an objection to the exemption asserting that Debtor's exemption was an attempt at an in-kind exemption, against the principles of *Schwab v. Reilly*. The bankruptcy court ordered the debtor to amend his Schedule C to exempt a specific dollar value for the membership interest. The debtor's amended Schedule B valued the membership interest at zero; however, the amended Schedule C contained an exemption under the Indiana Code again, exempting the amount of the asset at "100%." A subsequent objection to the exemption is still pending in the bankruptcy court.
- ***In re Lantz***, 451 B.R. 843 (Bankr. N.D. Ill. 2011): Where a debtor lists a dollar amount as the value of a claimed exemption, debtor is only claiming an exemption up to that value and the trustee need not object to the exemption to preserve the estate's ability to recover value in the asset beyond the dollar value expressly declared exempt.
- ***In re Evanson***, 2010 Bankr. LEXIS 3937 (Bankr. E.D. Wis. Nov. 3, 2010): An unsecured creditor objected to the trustee's proposed abandonment of the debtor's farm based on an appraised value of the farm the creditor obtained suggesting that the property had a value exceeding the outstanding liens on the property, as well as the exemption claimed by the debtor. The bankruptcy court denied the trustee's proposed abandonment of the property, ordering the trustee to determine the present fair market value and liquidate the farm for the benefit of the bankruptcy estate. The court held that the Bankruptcy Code allows the debtor to exempt only an interest in certain property up to the value

of the claimed exemption. Any post-petition appreciation of estate property accrues to the benefit of the estate until the property is liquidated or abandoned by the trustee.

- ***Pulice v. Botsford Gen. Hosp.***, 2012 Mich. App. LEXIS 407 (Mich. App. Mar. 6, 2012): Plaintiff was a debtor in a Chapter 7 bankruptcy case. Debtor’s Schedule B listed a potential malpractice lawsuit, valuing the lawsuit as “unknown.” Debtor claimed an exemption in the lawsuit of \$20,200.00. The debtor received a Chapter 7 discharge and the trustee issued a final report stating that he was unable to satisfy any of the plaintiff’s debts from the assets in the estate. While the debtor’s bankruptcy case was pending, the debtor commenced his malpractice lawsuit in the state court. Defendant moved for summary judgment arguing that plaintiff lacked the capacity to sue because only the trustee as a representative of the bankruptcy estate could pursue the cause of action. Noting that his claim of exemption in the malpractice lawsuit was unchallenged by the trustee, the plaintiff/debtor argued that his cause of action was no longer part of the bankruptcy estate and reverted to him, thereby giving him standing to assert his claim in the state court. The Court of Appeals, following *Schwab v. Reilly*, held that if the debtor claims a valid exemption in a cause of action, the exempted property does not become the property of the bankruptcy estate but rather remains with the debtor, up to the value of the exemption claimed. The court also noted that amount in controversy concerns were not triggered by the fact that the debtor’s claimed exemption was less than the dollar threshold for circuit court jurisdiction.
- ***Szyszo v. Akowitz***, 2012 Mich. App. LEXIS 561 (Mich. App. Mar. 22, 2012): The Michigan Court of Appeals rejected the argument that a trustee must abandon an estate’s interest in a lawsuit before the plaintiff/debtor could pursue his claim in the state court. The debtor is entitled to claim an exemption in a lawsuit and can pursue the lawsuit despite filing for bankruptcy. If there is a recovery, the debtor is entitled to retain the amount claimed as exempt and the bankruptcy trustee is entitled to anything in excess of the amount claimed exempt.
- ***In re Massey***, 465 B.R. 720 (B.A.P. 1st Cir. 2012): The Chapter 13 trustee objected to the debtors’ attempt to exempt both their homestead and a vehicle in the amount of “100% of fair market value.” In addition, the trustee objected to the confirmation of debtors’ Chapter 13 plan, arguing that the debtors’ exemption of “100% of fair market value” exceeded the statutory limits and potentially affected liquidation, making it impossible to confirm the plan. The Bankruptcy Appellate Panel affirmed the decision of the bankruptcy court sustaining the trustee’s objection to exemptions and stated that the debtors’ exemptions were limited to the maximum statutory exemption amount available to the debtors as of the date of the filing of the petition.
- ***In re Messina***, 2011 U.S. Dist. LEXIS 9637 (D.N.J. Jan. 31, 2011): On remand from the Third Circuit Court of Appeals (386 Fed. Appx. 152; 2010 U.S. App. LEXIS 14167). Debtors listed their residence in Schedule A and claimed an exemption in the amount of \$37,000.00. According to the debtors’ bankruptcy schedules, there was no equity in the residence at the time the bankruptcy case was filed. The trustee did not object to the debtors’ exemption and subsequently was successful in avoiding the debtors’ mortgages, selling the house and realizing a profit for the bankruptcy estate. Trustee moved to have debtors’ exemption in their residence determined to be zero. The trustee argued that since there was no equity in the house as of the commencement of the case, there was no equity to which the debtors’ exemption could attach. Debtors moved to have their exemption enforced and for the debtors to be paid their exemption from the net sale proceeds. The bankruptcy court ruled in favor of the trustee and set the debtors’ exemption at zero. On appeal, the District Court for the District of New Jersey reversed the bankruptcy court’s decision ruling that the trustee’s

motion was essentially an untimely objection to exemptions under Bankruptcy Rule 4003. On appeal to the Third Circuit, the court vacated the district court's order and remanded back so that the district court could make findings consistent with Schwab v. Reilly. On remand, the district court considered whether the trustee had a duty to object to the debtors' claimed exemption within the 30-day limits imposed by Bankruptcy Rule 4003. The district court affirmed the Bankruptcy Court's decision finding that the trustee's duty to object does not extend to objections over the estimated total market value of the asset, and as a result, the trustee was under no obligation to object to the debtors' claim of exemption of residence. Although the debtors' homestead exemption was valid on its face, the court agreed with the trustee's argument that the avoided mortgage proceeds were a separate and distinct asset from any potential equity debtor sought to exempt in their residence, and therefore, not subject to Bankruptcy Rule 4003's 30-day objection deadline.

- **In re Gebhart**, 621 F. 3d. 1206 (9th Cir. 2010): So long as a Chapter 7 bankruptcy case remains open, post-petition appreciation accrues to the benefit of the bankruptcy estate. When the debtor filed his Chapter 7 bankruptcy, the amount of equity in his home was less than the exemption amount available under the Arizona Homestead Exemption. Debtor continued living in the home. Three years after the petition was filed, the Chapter 7 trustee filed a motion to employ a realtor to sell the debtor's house. The 9th Circuit Court of Appeals held that the debtor only had exempted a dollar value in his residence and that his residence remained property of the estate. The court also ruled that the debtor was not able to take advantage of the fact that the Arizona Homestead Exemption had actually increased since the debtor filed for bankruptcy despite the fact that the trustee was able to take advantage of the appreciation of the property.
- **In re Messer**, 2012 Bankr. LEXIS 999 (B.A.P. 9th Cir. Mar. 9, 2012): While Schwab v. Reilly does provide some guidance to debtors who intend to exempt the full market value of an asset by listing an asset exempt as "100% of fair market value," the Supreme Court did not authorize a debtor to claim an exemption in an asset in such a manner when the applicable exemption statute expressly limits the exemption to a maximum cash value. Debtor sought to claim exempt "100% of fair market value" of her vehicle that she listed as having a value of \$12,000.00. This amount was in excess of the \$5,000.00 statutory limit for a vehicle exemption under Arizona law. The trustee's objection to the debtor's exemption was sustained and the bankruptcy court's decision was affirmed on appeal, limiting the debtor's exemption in her vehicle to the \$5,000.00 statutory limit.
- **In re Mwangi**, 432 B.R. 812 (B.A.P. 9th Cir. 2010): Even where an interested party does not object to the claimed exemption within the time prescribed in Bankruptcy Rule 4003, title to the asset claimed as exempt will remain with the bankruptcy estate and the debtor will only be guaranteed a payment in the dollar amount of the exemption.
- **In re Stasz**, 2001 Bankr. LEXIS 1786 (B.A.P. 9th Cir. Apr. 5, 2011): Trustee was under no duty to object to an exemption that the debtor never properly asserted.

**Is It In or Out? - Exemption Issues Revisited  
Selected Exemption Cases**

**Susan Jill Rice  
Brandt, Fisher, Alward & Pezzetti, P.C., Traverse City, Michigan**

## Is It In or Out? - Exemption Issues Revisited Selected Exemption Cases

This article summarizes recent cases involving exemptions. As the cases suggest, debtors often fail to disclose all of their assets on their “first try” in completing their schedules. When an omitted asset is discovered, the Debtors often amend the schedules to claim an exemption in the asset. Courts appear to be somewhat lenient in allowing such amendments unless they find that a debtor has acted fraudulently in attempting to hide the asset. Exemptions of annuities, litigation claims, and IRAs (covered in the other panelists’ materials) appear to be the hotly contested issues. Moving debtors also pose difficulties for counsel and the courts in determining which state’s exemptions should apply.

### Amendments/Bad Faith/Estoppel

1. *In re Varney*, 449 B.R. 411 (Bankr. D. Idaho 2011).

Facts: Debtor failed to disclose a retroactive Social Security Disability award that she received one week after filing her petition. She placed the monies in her father’s account and later used the money to buy a vehicle and to pay certain pre-petition creditors. The Debtor explained that she opened the account in her father’s name because she had caused a loss to the bank and could not open her own account there. The Debtor had been denied the benefit twice before her Chapter 7 case. She talked to her attorney about her pending claim prior to her filing and he indicated that she likely would not receive the benefit. In addition, he said that if she received the funds, they would be exempt. The Debtor did not mention the benefits at the creditors’ meeting. Instead she testified about the facts as they were on the petition date.

Following the creditors’ meeting, the Debtor received an additional award of benefits for her daughter. Thereafter, the Trustee discovered the undisclosed vehicle. When asked about the vehicle, the Debtor explained that she had purchased it with the disability award. The Trustee filed a motion for turnover of the vehicle. On the same date the Debtor amended her schedules to claim the Social Security Disability award as exempt. The Trustee objected.

Holding: The disability award was exempt and the Debtor did not act in bad faith in failing to schedule it. Although “[a] debtor’s concealment of assets is one common example of conduct supporting a finding of bad faith,” the facts did not amount to an intentional effort to hide assets. 449 B.R. 411, 418. The court determined that the Debtor had disclosed her disability claim to her attorney and believed that she would not receive the award. Her explanation for opening the bank account in her father’s name was credible. *Id.* The court found that the Trustee had failed to carry his burden of showing that the Debtor’s conduct amounted to bad faith or an intent to deceive the Trustee. *Id.* at 421.

2. *Rossi v. Westenhoefer (In re Rossi)*, Case No. 11-8048, 2012 WL 913732 (B.A.P. 6th Cir. Mar. 20, 2012).

Facts: Debtors claimed exemptions of \$2,200 for household goods, furnishings and clothing. After the creditors' meeting, the Trustee filed a no asset report. Twelve days later, the Debtors lost their home and personal property in a fire. They filed an insurance claim for a \$45,924.88 loss of personal property and living expenses (including their daughter's property). Despite being offered a settlement by the insurance company, the Trustee filed a second no-asset report and the Debtors' case was closed. The Debtors filed a lawsuit against the insurance company for failure to pay the insurance claim. They removed the action to the bankruptcy court and then filed a motion to remand, arguing that the insurance claim was not property of the estate or, alternatively, that the funds were exempt. The defendants objected, submitting that the funds were property of the estate and the Debtors were estopped from claiming a value higher than what they listed in their schedules.

First appeal: The bankruptcy court granted the remand and the defendants appealed to the Sixth Circuit Bankruptcy Appellate Panel. The BAP dismissed the first appeal pursuant to 11 U.S.C. § 1447(d) which provides that remand of a case (except civil rights claims) is non-appealable.

Complaint to Deny Discharge: While the first appeal was pending, the United States Trustee filed a complaint to deny Debtors' discharge based on their undervaluing of their personal property. Debtors moved to amend their schedules to increase the value and to exempt certain medical equipment not originally listed. The Chapter 7 Trustee and insurance company objected. The Debtors filed a motion to continue to employ their attorney in the insurance lawsuit. The insurance company objected, submitting that the Debtors' insurance claims were property of their bankruptcy estate.

Bankruptcy court's ruling: Based on the doctrines of equitable and judicial estoppel, the Debtors were not entitled to amend their exemptions. In addition, the bankruptcy court denied the motion for continued employment of Debtors' counsel, finding that the claim for breach of the insurance contract was property of the estate. The Debtors, however, had the right to pursue any post-petition tort claims against the insurance company and hire their own counsel to bring those claims.

In a Motion to Alter or Amend Debtors argued that the ruling on the first appeal precluded the objections to their exemptions and that the Trustee had irrevocably abandoned all interest in the insurance policy upon closing of the bankruptcy case. The bankruptcy court found that the first appeal did not require it to determine whether or not the insurance claim was exempt. The court further determined under 11 U.S.C. § 554(d) that the Trustee did not abandon the insurance policy or related claims because the policy had not been listed in the schedules.

Second appeal: The Debtors raised three issues in their appeal to the BAP: (1) whether or not the Chapter 7 Trustee irrevocably abandoned the insurance claims when he filed his second no asset report and closed the case; (2) whether or not the "law of the case" doctrine precluded the bankruptcy court from determining that the insurance claims remained property of the estate; and (3) if the bankruptcy court erred in disallowing the Debtors' amended claim of exemptions on estoppel grounds.

The BAP found that the Debtors had not been given an opportunity to submit evidence to support their position that they inadvertently failed to include proper values in their schedules and had not acted in bad faith. Thus, equitable estoppel did not preclude the amendment. The BAP noted that the Chapter 7 Trustee was aware of the Debtors' insurance claim when he closed the case the first time. Also, a replacement Trustee appointed in the case was given the chance to challenge the amendments. The BAP also distinguished the Debtors' insurance contract (an unsecured asset) and their personal property (scheduled assets), stating:

Funds recovered for the destroyed property are proceeds of the insurance contract, not proceeds of the destroyed property listed in the Debtors' schedules. If the Debtors' insurance policy permits a recovery based on replacement value, there is nothing inherently inconsistent in the Debtors' estate recovering more in insurance proceeds than the fair market value of the Debtors' household goods prior to their destruction in the fire.

2012 WL 913732, at \*10 (citing *In re Hauffpauir*, 258 B.R. 447, 455 (Bankr. D. Idaho 2001)).

The BAP found no evidence that creditors detrimentally relied on the original schedules. The BAP remanded the case to allow the Debtors to present "exculpatory evidence" concerning the value of their property and their intent. *Id.* at \*11.

*Query* - Should Debtors now routinely list all insurance policies as assets in their bankruptcy schedules? What facts would be needed to show good faith in the filing of the original schedules and/or the amendments?

### Annuities

3. *In re Olson*, 424 B.R. 770 (Bankr. E.D. Mich. 2010) (McIvor, J.).

Facts: The Debtor was the joint owner of an annuity purchased with settlement proceeds from her husband's claim for injuries sustained in a motorcycle accident. The Debtor asserted that the annuity was not property of her estate because her husband was the sole source of the funds used to purchase the annuity. Alternatively, the Debtor argued that her interest in the annuity was exempt under 11 U.S.C. § 522(b)(3) and Mich. Comp. Laws § 500.4054, or 11 U.S.C. § 522(d)(10)(E).

Holding: The Debtor's interest in the annuity was not exempt under Michigan law because the statute protects the annuity from claims of creditors of a beneficiary of an insurance policy or annuity contract – not from claims of the insured's own creditors. 424 B.R. at 774 (quoting Mich. Comp. Laws § 500.4054). The court also observed that the annuity did not appear to be exempt under 11 U.S.C. § 522(d)(10)(E), which exempts a debtor's right to receive annuity payments "**on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor . . .**" Because this issue was not fully briefed, the court gave the parties additional time to brief that issue. *Id.*

4. *In re Jones*, 446 B.R. 466 (Bankr. D. Kan. 2011).

Facts: The Debtor was entitled to an annuity payment of \$200,000 for a settlement relating to an injury that occurred during his employment. The Debtor and his spouse filed their bankruptcy case in 2001. The Debtor told his attorney about the remaining annuity payment to be received in 2023, but the attorney failed to list it in the schedules. The attorney advised that the payment “was too remote and insignificant in 2001, so it did not have to be disclosed.” 446 B.R. at 474. The Trustee learned about the annuity payment in 2009 when the Debtor tried to sell it. The Trustee moved to reopen the case to administer the asset and the Debtor amended his schedules to exempt the annuity payment.

Holding: The annuity payment was exempt as a disability pension. The Debtor reasonably relied on the advice of his counsel in good faith in failing to disclose it. The court found, however, that the Debtor’s actions caused harm to the Trustee and ordered the Debtor to pay the Trustee \$5,000 in compensation for his expenses incurred in his efforts to recover the payment.

5. *In re Kosakowski*, No. 11-20120, 2011 WL 3793690 (Bankr. D. Conn. 2011).

Facts: On the petition date Debtor had the right to a future payment in 2015 of \$39,686.62 under a structured settlement agreement. The Debtor exempted a portion of the future payment representing the present value under 11 U.S.C. § 522(d). The Trustee objected, submitting that he had the right to keep the case open until the date of the future payment, pay the Debtor the exempted amount and keep the remainder for the estate. The Debtor testified that the highest offer that he received for purchase of the structured settlement was just under \$26,000. The Trustee produced no evidence of value, except the value on the maturity date.

Holding: The court found that the appropriate time for valuing a structured settlement payment is the petition date as opposed to the maturity date. The court determined that the value of the future payment was \$26,000 and it was fully exempt.

Avoided Liens and Transfers

6. *Messina v. Neuner (In re Messina)*, No 07-1677, 2011 WL 322018 (D. N.J. 2011)

Facts: Debtors claimed a homestead exemption in real estate covered by two mortgages which exceeded the property’s value. One of the mortgages was avoidable due to a defect in the acknowledgment. Upon avoidance of the mortgage, the Debtors argued that equity would exist in the property in which they could claim an exemption. The Trustee took the position that the Debtors’ exemption in the property should be zero because the mortgage only was avoidable by a third party without notice (or a Trustee with the status of a bona fide purchaser without notice) and was not avoidable by the Debtors themselves. The Debtors argued that the Trustee’s objection was untimely.

Holding: The bankruptcy court found that the Debtors failed to give the Trustee appropriate notice of their intent to claim an exemption in the property because they failed to make their amendment under § 522(g) which allows exemptions in proceeds of property sold by a Trustee after lien avoidance. 2011 WL 322018, at \*3. Therefore, the Trustee’s objection was not too “late.” On

remand after an appeal, the district court affirmed, holding that the Debtors' exemption of the equity in the property did not include new-found equity resulting from the Trustee's avoidance action. Debtors were not entitled to the exemption because they had no independent right to avoid the mortgage. *Id.* at \*8.

7. *In re Moise*, 463 B.R. 197 (Bankr. D. Mass. Jan. 17, 2012).

Facts: The Debtors had a bank account designated as a trust account established for the benefit of their son. No actual trust agreement existed. The Debtors funded this account within four years prior to their bankruptcy filing while they were insolvent. The Debtors used the account as a "family savings account," depositing and withdrawing funds as they saw fit. They claimed the account as exempt under 11 U.S.C. § 522(d)(5). The Trustee objected, submitting that he could avoid the transfers into the account and the Debtors were not entitled to exempt the funds pursuant to § 522(g).

Holding: Based on Massachusetts law, the court found that the account "was always property of the [Debtors], reachable by their creditors" and that "transfer of funds [into and out of the account] prior to their bankruptcy petition date amounted to nothing more than moving their own money from one pocket to another." 463 B.R. at 200. The Debtors were not seeking to exempt the funds pursuant to § 522(g). The court accordingly overruled the Trustee's objection.

8. *In re Pfister*, 449 B.R. 422 (Bank. D. N.Mex. 2011).

Facts: The Trustee recovered a preference payment to a credit card company. The Debtor had transferred monies to this unsecured creditor pursuant to the terms of a marital settlement agreement with his ex-spouse.

Holding: The court found that the transfer was voluntary. Title 11 U.S.C. § 522(g) accordingly precluded the Debtor from exempting the recovered funds.

#### Bankruptcy-Specific Exemption Statute

9. *In re Reinhart*, 460 B.R. 466 (Bankr. E.D. Mich. 2011) (Rhodes, J.).

Facts: Michigan law provides two options for debtors who do not wish to use the federal bankruptcy exemptions. First, they can choose the Michigan statute which exempts any property that "is 'exempt from levy and sale under any execution'" under Michigan law. 460 B.R. at 467 (quoting M.C.L. § 600.6023). Second, they can elect the exemptions set forth in M.C.L. § 600.5451, which lists property that "is 'exempt from property of the estate' in bankruptcy." *Id.* (quoting § 600.5451). The Debtor claimed the bankruptcy-specific exemptions. The Trustee argued that the Michigan bankruptcy-specific statute, § 600.5451, is unconstitutional.

Holding: The court held that Congress did not intend for Debtors to be able to select bankruptcy-specific exemptions under state law. Rather than holding the statute unconstitutional, the court found that the statute "is simply ineffective in establishing a list of exemptions that a debtor can claim under 11 U.S.C. § 522(b)(3)(A) and the debtor cannot utilize it to claim exemptions in bankruptcy." *Id.* at 468.

*Cf.*, *In re Schafer*, 455 B.R. 590 (B.A.P. 6th Cir. 2011) (McIvor, J); *In re Pontius*, 421 B.R. 814 (Bankr. W.D. Mich. 2009 (Gregg, J.); and *In re Wallace*, 347 B.R. 626 (Bankr. W.D. Mich. 2006) (Hughes, J.) (Michigan’s bankruptcy-specific exemption statute is unconstitutional because it violates the Supremacy Clause of the United States Constitution). These courts have determined that only the federal courts have the power to enact uniform bankruptcy laws and that concurrent bankruptcy jurisdiction is not sufficient to confer to them the authority to “enact their own bankruptcy laws.” 455 B.R. 590, 601-02 and 604 (citations omitted).

#### Conversion of Non-Exempt Assets

10. *In re Osejo*, 447 B.R. 352 (Bankr. S.D. Fla. 2011).

Facts: The Debtor sold non-exempt assets and used them to buy and improve a home. The Trustee objected to the homestead exemption, asserting that the Debtor acted with intent to hinder, delay or defraud creditors in enhancing her homestead exemption prior to the bankruptcy filing.

Holding: The court sided with the Trustee, noting that the Debtor failed to disclose the sale of non-exempt assets in her schedules, failed to timely amend her schedules to report the sale and failed to make numerous additional disclosures in her schedules and Statement of Financial Affairs until the Trustee hired an attorney. The court concluded:

“This Debtor’s nondisclosures were, as a whole, material and intentional. She gambled, and she lost. That the Debtor amended her schedules after the Trustee smelled fraud, continued the 341, and hired counsel does not exonerate her.”

447 B.R. 352, 355.

*Query*: If the Debtor had disclosed the enhancement of the homestead first, would the result have been different?

#### Disqualified IRA Is Not Exempt

11. *In re Daley*, 459 B.R. 270 (Bankr. E. D. Tenn. 2011).

Facts: Debtor held a self-directed Merrill Lynch IRA that was not in compliance with the Internal Revenue Code. In establishing the IRA, the Debtor signed an agreement granting Merrill Lynch a security interest in the funds held in the IRA to cover his indebtedness.

Holding: The grant of a security interest in the IRA amounted to an extension of credit by the IRA to the Debtor in violation of 26 U.S.C. § 4975(c)(1)(B) and (D). Therefore, the IRA was not exempt.

*Note*: Not every account that looks like an IRA qualifies with the requirements of the Internal Revenue Code. Transfers in and out of the account may be a clue that the account is not a qualifying IRA. Trustees and creditors would be wise to review account records to determine if an IRA is exempt.

Domicile/Extraterritorial Application of State Exemptions in Real Estate (Court Split)

12. *In re Welton*, 448 B.R. 76 (Bankr. M.D. Fla. 2011).

Facts: The Debtor-husband owned a business and corporations in Georgia for 25 years. The Debtors purchased a home in Georgia in 1985, and made renovations in 2004 and 2005. In 2005 Debtors purchased a Florida condominium. They obtained a certificate of occupancy in 2007. In 2009 a creditor obtained a judgment against Debtors and two of their corporations. Debtors filed their Chapter 7 case in 2010 in Florida and claimed a Florida homestead exemption in the condominium.

Holding: Debtors were not entitled to use the Florida exemptions because their domicile was not located within Florida for 730 days immediately before their bankruptcy filing, or for the 180 days that preceded that period. 448 B.R. at 78. Factors which influenced the court's decision included: (1) a Florida vehicle registration was sent to the Debtors' Georgia address in 2009; (2) the Debtor-wife's IRA statements were mailed to the Georgia address in 2009 and 2010; (3) unemployment statements were sent to the Debtor-husband at the Georgia address; (4) the Debtors' debit card transactions showed that they were primarily in Georgia in the two years prior to filing; (5) the Debtor-wife was employed in Georgia up to three months before the filing; (6) the Debtors' financial statements issued in the two years before filing listed Georgia as their address; and (7) Debtors admitted that they did not live in Florida for the majority of the time leading up to the filing of their bankruptcy case. 448 B.R. at 80. The court denied Debtors' Florida exemptions but permitted them to amend their schedules to claim the exemptions permitted under the appropriate state law. *Id.* at 84.

13. *In re Fernandez*, No. EP-11-CV-123-KC, 2011 WL 3423373 (W.D. Tex. Aug. 5, 2011).

Facts: The Debtor bought a home and lived in El Paso, Texas, until 2000. Upon losing his job, the Debtor moved to Nevada to find work. He kept his home in Texas, always planning to go back there. In 2009 he moved back to his home in Texas and filed his Chapter 7 case. He claimed an unlimited exemption in his residence under Texas law. When the Trustee objected, he amended his schedules and claimed the homestead as exempt under Nevada law. The Trustee objected.

Holding: The bankruptcy court found that the Debtor was not eligible to claim the property as exempt under Nevada law. On appeal, the district court reversed, stating that 11 U.S.C. § 522(b) now provides that "a debtor must live in a state before being able to claim that state's exemptions, from the greater part of 180 days to 730 days." 2011 WL 3423373, at \*3 (citing BAPCPA, Pub. L. No. 109-8, § 307, 119 Stat. 23, 81 (2005); *In re Varanasi*, 394 B.R. 430, 434 n.5 (Bankr. S.D. Ohio 2008) (citing *In re Virissimo*, 332 B.R. 201, 203 (Bankr. D. Nev. 2005))). The Debtor may use the exemptions permitted by federal law or the state or local law:

"in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

....

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d) [the federal exemptions].”

*Id.* (quoting 11 U.S.C. § 522(b)).

Since the debtor did not live in Texas for 730 days before the petition date, he had to use Nevada’s exemption laws “where he lived for the 180 days preceding 730 days prior to filing his petition.” *Id.* at \*5. If Nevada exemption laws would not allow him to exempt out-of-state property, he would be stuck with the federal exemption amount of \$20,200.

The court found a split of case law in interpreting the language of § 522(b). One view – “**the anti-extraterritoriality interpretation**” – is “that state exemption laws can never apply extraterritorially.” *Id.* at \*6 (citing the lower court, *In re Fernandez*, 445 B.R. 790, 816 (Bankr. W.D. Tex. 2011)). A second position, called the “**state-specific interpretation**,” is “that while states may not apply their exemption laws outside their borders, in the bankruptcy context it is the federal government giving the laws extraterritorial effect, so it is permissible to apply state exemption laws to nonresidents and out-of-state property to the extent that the state laws, by their terms, allow for it.” *Id.* (citing *Arrol v. Broach (In re Arrol)*, 170 F.3d 934, 935-36 (9th Cir. 1999); *Stephens v. Holbrook (In re Stephens)*, 402 B.R. 1, 4-6 (B.A.P. 10th Cir. 2009)). This view is held by the majority of courts. The final “**preemption view**” is “that a state’s exemption laws may be applied to nonresidents and to out-of-state property, regardless of whether that state’s laws allow for such extraterritorial effect or not.” *Id.* (citing *Garret*, 435 B.R. 434, 451-52 (Bankr. S.D. Tex. 2010)). The court determined that the “state-specific interpretation” was correct and found that nothing in Nevada law prohibited debtors from using the Nevada homestead exemption for property located outside Nevada. *Id.* at \*27.

*But see, In re Stephens*, No. 10-41450, 2011 WL 1790777 (Bankr. D. Idaho 2011), in which the court held that a Debtor who lived in Idaho and moved into property that he owned in Alaska after the petition date could not claim a property owned in Alaska exempt as his residence under Idaho law. The court found that Idaho law did not allow a homestead exemption in out-of-state property. *Id.* at \*2 (citations omitted).

#### Homestead Exemption/Adjoining Lot

14. *In re Keen*, No. 09-14663, 2011 WL 6293219 (Bankr. W.D. Wisc. 2011).

Facts: Debtors sought to exempt their home and a 22.7 acre parcel adjoining their property. The two parcels were purchased at the same time with no roads separating them. The Debtors used the adjacent property for firewood to heat their home, hunting and sometimes gardening. The Trustee objected to exemption of the vacant lot.

Holding: The Debtors did not use the vacant lot as their residence within the meaning of 11 U.S.C. § 522(d)(1), and could not exempt it. The fact that Wisconsin law defines a “homestead” as “the dwelling and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home, but not less than one-fourth acre, if available, and not exceeding 40 acres,” did not alter

the court's conclusion. 2011 WL 6293219, at \*3 (quoting Wis. Stat. § 990.01(13)(a)). The vacant lot was "not 'reasonably necessary' for its use as a home." *Id.* Debtors' listing of the lot separately from their home on their schedules "implic[d] that they did not intend to use the vacant lot as a residence." *Id.*

Homestead Exemption/Does Not Apply to Property Not Used as Residence on Petition Date

15. *In re Lawson*, No. 10-11001, 2011 WL 1219225 (Bankr. E.D. Tenn. 2011).

Facts: Debtor and her spouse owned a rental property as tenants by the entirety. Prior to the filing of the petition, the Debtor conveyed her interest in the property to a third party. The Trustee had grounds to avoid the transfer based upon an inadequate legal description in the deed. The Debtor then tried to exempt the property from her estate as her "homestead."

Holding: Tenancy by the entireties property generally is exempt if it is exempt from process under state law. Title 11 U.S.C. § 522(g), however, prevents a Debtor from exempting an interest in property held as tenants by the entirety if the property is recovered in an avoidance action. 2011 WL 1219225, at \*1. In addition, under Tennessee law a Debtor cannot claim a valid homestead exemption in property that she did not use as her residence on the petition date. *Id.* at \*2 (quoting *In re Sivley*, 14 B.R. 905, 907-08 (Bankr. E.D. Tenn. 1981)).

In-Kind/Vague Description of Exemption Not Acceptable

16. *In re Wiczek*, 452 B.R. 762 (Bankr. D. Minn. 2011).

Facts: The Debtor claimed exemptions of his interests in businesses describing the values as "0.00" and "100%." 452 B.R. at 763. The Trustee objected to the extent that the exemptions exceeded the amount available to Debtors under the wildcard exemption of 11 U.S.C. § 522(d)(5). *Id.* Debtors did not contest the Trustee's objection and the court entered an order sustaining the objection. Later, Debtors obtained a new attorney and amended the exemptions to state: "100% of FMV." *Id.* at 764 (quoting Schedule C and adding emphasis). The Trustee objected, relying on the prior order.

Holding: Debtors could not circumvent the prior order - which had res judicata effect -- by amending their exemptions. *Id.* at 766. The court observed:

The Debtors' rights to retain the enterprise interests in the face of liquidation under Chapter 7 are statutorily delimited by value, in the text of § 522(d)(5). As a result, the Debtors have no intrinsic, preemptive right to retain the interests themselves, in-kind and without respect to their value. *Schwab v. Reilly*, 560 U.S. \_\_\_\_, \_\_\_\_, 130 S. Ct. 2652, 2661-2663, 177 L.Ed.2d 234 (2010). The "interest" that is protectible to them is measured by a dollar-value, eventually to be reduced to a number.

*Id.*

17. *In re Luckham*, 464 B.R. 67 (Bankr. D. Mass. Jan. 13, 2012).

Facts: The Debtors first claimed “100% of FMV” of their home as exempt, relying on 11 U.S.C. § 522(d)(1) and *Schwab v. Reilly*, 130 S.Ct. at 2668. The Trustee objected, taking the position that the claimed exemption exceeded the allowable federal exemption of \$21,600, because the home was worth \$185,000. The Debtors next claimed that “100% of Equity” in their home was exempt. The Trustee again objected.

Held: The court found that “neither the language ‘100% of FMV’ nor ‘100% of Equity’ adequately circumscribes the exemption consistent with the requirements of the Bankruptcy Code.” 464 B.R. at 73. The Bankruptcy Code requires a specific dollar amount which should be established on the petition date. *Id.* at 77. The Trustee properly objected to the non-specific value “in order to preserve for the bankruptcy estate any value that may be realized in the future.” *Id.*

#### Life Insurance

18. *Bierbach v. Walck (In re Walck)*, 459 B.R. 208 (Bankr. M.D. Pa. 2011)

Facts: The Debtor’s spouse died five days after the filing of their Chapter 7 petition. At the creditors’ meeting the Debtor testified that she would be receiving \$100,000 in life insurance. The Trustee demanded turnover of the funds and the Debtor complied. The Trustee issued a notice of final report which advised that each creditors’ claim would be paid in full. The Debtor then amended her schedules to claim the life insurance proceeds as a joint asset that was exempt. The Trustee argued that the amendment was untimely and prejudicial to creditors who would not receive any distribution if the exemption were allowed and had been informed that they would be paid in full. He also submitted that the insurance proceeds were not “reasonably necessary” for the Debtor’s support under 11 U.S.C. § 522(d)(11)(C).

Holding: The court found that the Trustee had not spent a significant amount of time seeking to recover the life insurance proceeds. (He requested it and the Debtor turned it over.) The Trustee’s time and effort in preparing and filing the final report was not sufficient cause alone to justify denial of the exemption. 459 B.R. 208, 213. Considering the Debtor’s “anticipated living expenses, her age, her diminishing ability to earn a living by doing manual labor, the unavailability of other assets to meet her needs, and her limited ability to save for retirement at this late date,” the court found that “the proceeds of the life insurance policy are necessary for her to meet her basic needs” and allowed the tardy exemption. *Id.* at 215 (quoting the factors set forth by the Uniform Exemption Act as set forth in *In re Collins*, 218 B.R. 580, 583 (Bankr. M.D. Pa. 2002) (citations omitted)).

*Query:* What would be needed to show sufficient prejudice to creditors to deny the exemption?

19. *In re Ladd*, 448 B.R. 207 (Bankr. N.D. Ohio 2011).

Facts: The Debtor-husband owned a life insurance policy under which his wife was a beneficiary. The policy was not listed on the couple’s bankruptcy schedules. The Debtor-husband died after the bankruptcy filing and his spouse received payment under the insurance policy. The Trustee filed a motion for turnover, submitting that the insurance proceeds (less costs associated with the

husband's death) were property of the bankruptcy estate. The wife objected, claiming the funds as fully exempt.

Holding: The court determined that the applicable Ohio law, O.R.C. § 2329.66(A)(6)(b) – which applied because the state has opted out of the federal exemption scheme – did not allow an exemption for insurance proceeds received by a beneficiary. The exemption is only for the interest of the person who is insured.

#### Pension Proceeds

20. *In re Kemp*, No. 09-00907, 2011 WL 4434996 (Bankr. D.C. 2011).

Facts: Debtor sought to exempt pension proceeds in his checking account under District of Columbia Code § 15-501(a)(7), which – similar to 11 U.S.C. §522(d)(10) – provides that a right to payment under a pension plan is exempt as reasonably necessary for the Debtor or his dependent's support. The Trustee objected, asserting that the exemption does not include pension funds already received.

Holding: The court sided with the Trustee and found that the statutes protect only the right to receive payments in the future and not payments already received.

#### Pre-Bankruptcy Planning/Annuity and Retirement Funds

21. *In re Hall*, 464 B.R. 896 (Bankr. D. Idaho Jan. 6, 2012).

Facts: Prior to filing their Chapter 7 bankruptcy case, the Debtors placed \$14,000 in their retirement account. They also purchased two annuities: one with funds from the sale of real estate and the other with monies from a tax refund. They obtained the second annuity less than four months prior to their bankruptcy filing. Prior to the purchase of the annuities, the Debtors were the subjects of lawsuits and one of their major creditors had filed an action to collect on a guaranty. The Debtors' pre-bankruptcy planning (if allowed) would have insulated substantially all of their assets from their creditors and occurred when they were insolvent. The Debtors partially concealed their tax refunds and omitted some information on their Statement of Financial Affairs.

The Trustee objected to their claimed exemption of these funds on the grounds that Debtors purchased the annuity “with the intent to shelter the funds and to defraud creditors, which does not qualify as a proper purpose [under applicable Idaho law].” 646 B.R. at 903. The Debtors withdrew their claim of exemption in the later purchased annuity.

Holding: “The law tolerates a certain amount of pre-bankruptcy exemption planning,” but courts must look to the facts to determine whether or not exemption planning on the eve of a bankruptcy filing is fraudulent. *Id.* at 904. The court found “on balance, that the Trustee has not demonstrated by a preponderance of the evidence that Debtors wilfully intended to defraud their creditors by converting non-exempt assets to a potentially exempt annuity in 2009.” *Id.* at 909.

Despite these factors weighing against them, the Debtors were able to show the court that they purchased the annuity to provide a regular stream of income to pay their living expenses, and that

the Debtor-husband was working diligently to attempt to “settle most, if not all, his business debts” at the time that he purchased the first annuity. *Id.* at 907. The court found that the Debtor was truthful in stating that he thought in withdrawing \$50,000 from a business account shortly after leaving the business that he was simply “taking back” his investment in the business. *Id.* at 908. Finally, the court found that the Debtor’s explanation of the omissions on the Statement of Financial Affairs was credible. The court accordingly denied the objection to the exemption of the 2009 annuity.

*Note:* This case shows how difficult it is for a Trustee or creditor to prove an intent to defraud creditors. Multiple badges of fraud existed in this case. Yet, the court still ruled in favor of the Debtors and allowed their exemption. Attorneys would be wise to remember that the facts are everything in a case like this one. If the Debtor has a credible explanation for the action taken, he or she has a good chance of prevailing.

*Queries:* What role does the sophistication of the Debtor play in these cases? Is a more educated or knowledgeable Debtor likely to lose an exemption based on crafty pre-bankruptcy planning? When is reliance on counsel a good defense?

22. *In re Stanton*, 457 B.R. 80 (Bankr. D. Nev. 2011)

Facts: Debtor liquidated an investment account and gave the funds to her son who then paid off her homestead mortgage. The transfer took place within 10 years of the Debtor’s bankruptcy filing and after her sister obtained a judgment against her. The Debtor listed the property as exempt in her schedules based upon Nevada law. The Trustee challenged the exemption because the Debtor had held a Colorado license and voted in Colorado since filing her homestead declaration. The Debtor, however, regularly resided in Nevada, listed that state as her residence on tax returns, and received utility bills at that location.

Holding: The Debtor was entitled to an exemption in the home because it was her domicile. It was her “actual residence” and she had “a present intention to remain there” – notwithstanding the fact that she had changed her state of residency for voting purposes. 457 B.R. 80, 85 (quoting 4 *Collier on Bankr.* ¶ 522.06 (Henry Sommer & Alan Resnick, eds. (16th ed. 2011))). The court pointed out that “residency” and “domicile” are not interchangeable. A residence may be temporary. A domicile, on the other hand, requires an intention to stay there. *Id.* The Debtor, however, had to return the monies fraudulently transferred to her son and used to pay off the homestead mortgage.

Pre-Petition Causes of Action/Judicial Estoppel/Belated Exemption

23. *In re Bailey*, 464 B.R. 61 (B.A.P. 6th Cir. Mar. 9, 2011) (unpublished decision).

Facts: Prior to the filing of his and his spouse’s Chapter 7 petition, the Debtor was terminated from his job for misuse of sick time. The Debtor challenged the termination and entered into a settlement with his employer whereby he voluntarily resigned and was to receive a \$17,000 settlement payment. Debtor later sued his employer, claiming that he entered into the settlement agreement under duress. Debtor asserted a cause of action against the employer for breach of his collective bargaining agreement, reinstatement of his employment, back pay and benefits. This lawsuit was

pending when the Debtor and his spouse filed their Chapter 7 petition. The Debtors listed the cause of action in their schedules with a value of “NONE” and did not exempt it or the settlement proceeds due under the original settlement agreement. 464 B.R. 61, at \*3.

After entry of their discharge, the Chapter 7 Trustee filed a motion against the former employer for turnover of the \$17,000 in settlement proceeds. The Debtor objected and the Trustee withdrew the motion. The Trustee later filed a motion to approve a settlement between the Debtor and his former employer, whereby the estate would receive \$17,000 in exchange for a full release of claims against the employer. The Debtors objected. The bankruptcy court held an evidentiary hearing at which the Debtors stipulated that the claim was an estate asset which they did not claim as exempt. The bankruptcy court approved the settlement and the Debtors appealed the decision. The BAP dismissed the appeal, finding that the Debtors lacked standing to object to the settlement concerning an estate asset.

Following dismissal of the appeal, the Debtors amended their schedules to exempt the settlement proceeds as lost future wages. The Trustee objected. The bankruptcy court ruled in favor of the Trustee, finding that the Debtors had previously stipulated that the settlement proceeds were not property of the estate and were judicially estopped from changing their position. The court further found that no evidence existed showing that the funds represented payment for future earnings.

On appeal, the Debtors argued in part that they were given inaccurate advice about the availability of an exemption in the funds by their bankruptcy attorney and should not be held to their prior stipulation. The BAP found that the bad advice of Debtors’ prior counsel was not a sufficient reason to excuse the Debtors from the prior stipulation, noting that “Debtors may not avoid the consequences of their stipulation based upon their prior attorney’s acts, omissions or prior erroneous advice.” 464 B.R. 61, at \*6 (citing *Bailey v. Suhar (In re Bailey)*, 380 B.R. 486, 491 (B.A.P. 6th Cir. 2008) and additional cases). Judicial estoppel prevented the Debtors from changing their position in an attempt to obtain a different result. *Id.* The BAP affirmed the ruling of the bankruptcy court.

*Note:* In this case the Debtors’ claim that they acted on the bad advice of counsel was unsuccessful.

24. *Pulice v. Botsford General Hospital, et al*, No. 302092, \_\_ Mich. App. \_\_, \_\_ NW 2d \_\_ (Mich. App. Mar. 6, 2012) (unpublished).

Facts: Debtor had a claim for medical malpractice. He listed the claim as exempt for the maximum value of \$20,200, but listed the value as “unknown.” The schedules stated: “Debtor has consulted with 5 attorneys regarding a possible medical malpractice action, all attorneys have declined to take the case.” *Slip op.* at 1 (quoting the Schedule C). On August 5, 2008, the Debtor received a discharge. On March 20, 2009, he commenced the lawsuit without advising the Chapter 7 Trustee. The Trustee issued a final report abandoning all assets from the estate on June 7, 2010. The Defendants moved for summary judgment, arguing that only the Trustee could bring the action.

Holding: The trial court ruled in favor of the Defendants, noting that the Plaintiff exempted only \$20,200 for his medical malpractice claim and brought suit for a claim in excess of \$25,000 (the jurisdictional minimum for the trial court). The trial court had no information on whether the

Trustee had abandoned the assets or the bankruptcy case had been closed. On reconsideration, the court again ruled in favor of the Defendants.

Appeal: The appellate court reversed, holding “the a cause of action that is properly claimed as an exemption and that is not objected to by the trustee may be pursued without formal abandonment by the trustee.” *Slip op.* at 5 (citing *Wissman v. Pittsburg Nat’l Bank*, 942 F.2d 867, 870-872 (4th Cir. 1991)). Plaintiff had the right to sue for the amount of the entire claim and any recovery over and above that amount would go to the Chapter 7 Trustee for the benefit of the Plaintiff’s creditors. Finally, the court found that the Plaintiff was not judicially estopped from bring the claim because he had identified the lawsuit as a “worthless case” in his schedules. *Id.* at 8.

*Query:* How would you feel about this ruling if you were the Chapter 7 Trustee? Did the Debtor mislead the Trustee about the value of the lawsuit by stating that five attorneys had turned down the case? Does the Debtor have an affirmative duty to advise the Trustee in a closed case about his or her recovery of monies that are non-exempt?

25. *Szyszlo v. Akowitz, et al.*, No. 299570, \_\_\_ Mich. App. \_\_\_; \_\_\_ NW 2d \_\_\_ (Mich. App. Mar. 22, 2012).

Facts: The Debtor held a medical malpractice claim which he listed on his amended schedules with an unknown value. In another location in the schedules, the Plaintiff listed the value of the lawsuit at \$15,000. He also claimed an exemption of \$18,450 for the claim. The Trustee filed a no asset report and later signed an Affidavit stating that she “investigated the potential medical malpractice action” and determined “that this claim was not worth pursuing on behalf of the bankruptcy estate.” *Slip op.* at 2. The Debtor filed a medical malpractice suit prior to the closing of his bankruptcy case. The Defendants moved for summary judgment, alleging that the Plaintiff lacked the legal capacity to sue them and that court lacked jurisdiction over the Plaintiff’s claim because it failed to meet the minimum amount of \$25,000 for actions filed in the circuit court.

Holding: The trial court found that the estate retained an interest in the medical malpractice action until closing of the bankruptcy estate. The appeals court found otherwise. It determined that the Debtor/Plaintiff properly claimed an exemption in the medical malpractice claim and no one objected to that exemption. As a result, the claim was exempt and the Plaintiff was the proper party to bring the action. *Slip op.* at 5 (citing *Wissman*, 942 F.2d at 870-871, and additional cases).

But see, *In re Livingston*, No. 09-07953, \_\_\_ F. Supp. \_\_\_, (Bankr. W.D. Mich. June 23, 2011), holding the opposite and finding that the Debtor lacked standing to bring a state court lawsuit notwithstanding a proper claim of exemption.

See also, *Young v. Independent Bank*, No. 299192, \_\_\_ Mich. App. \_\_\_; \_\_\_ N.W. 2d \_\_\_ (Mich. App. 2011) (app. for leave pending), holding that if the asset is not listed in the schedules, the Plaintiff has no right to bring the action.

26. *In re Hall*, 453 B.R. 22 (Bankr. D. Mass. 2011).

Facts: The Debtor held a pre-petition claim against her former employer for wrongful termination. She listed the value of the exemption as “unknown.” The Trustee did not object to the exemption, but hired special counsel to pursue the Debtor’s claim. The Debtor did not object to the application to employ and the court approved it. Later, the Debtor hired new counsel and moved to reconsider the court’s decision.

Holding: The court determined that by claiming an “unknown” exemption, the Debtor did not claim an unlimited exemption. Instead, the Debtor’s claimed exemption was equal to the maximum amount permitted under § 522(d)(5). 453 B.R. at 29 (citing *Stoebner v. Wick (In re Wick)*, 276 F.3d 412 (8th Cir. 2002)). When the Debtor’s “scheduled exemption is ambiguous, the ambiguity must be resolved against the Debtor’s limitless interpretation.” *Id.* at 30. The court approved the Trustee’s employment of counsel to pursue recovery of the claim.

27. *In re Keenan*, 443 B.R. 169 (Bank. D. Minn. 2011).

Facts: The Debtor held a pre-petition claim for psychological harm resulting from sexual abuse in his teenage years by his parish priest. The Debtor claimed an exemption under 11 U.S.C. § 522(d)(11)(D) for his personal injury claim against the church for the abuse, listing the value of the exemption as “unknown.” The Trustee objected to the claimed exemption, asserting that the Debtor’s claim is not for “personal bodily injury” as required by the statute.

Holding: The court found that the alleged sexual abuse and resulting psychological harm were not bodily injury within the meaning of § 522(d)(11)(D). 443 B.R. at 175. Instead, the allegations included only psychological claims of damage which were not exemptible under that statute.

#### Reasonably Necessary

28. *In re John*, 459 B.R. 684 (Bank. E.D. Mich. 2011) (Tucker, J.).

Facts: The Debtor purchased her 2005 Mercedes with a “buy out” received from her former employer in exchange for the voluntary termination of her employment. She valued the vehicle at \$9,600 and claimed it as exempt. At the creditors’ meeting Debtor’s counsel admitted that the vehicle was worth more than \$9,600. The Trustee filed a turnover motion, seeking to sell the vehicle so that creditors could receive the benefit of the excess value. The Debtor amended her exemptions to exempt the actual value of the vehicle and to add a claimed exemption under 11 U.S.C. § 522(d)(11)(E) as the vehicle was ““purchased in June, 2008 with buyout funds.”” 459 B.R. at 687. The Trustee argued that the vehicle was not properly exempted under § 522(d)(11)(E) because the vehicle was a luxury vehicle that was not “reasonably necessary” for the support of the Debtor or her dependents. The Trustee further took the position that the Debtor’s § 522(d)(11)(E) exemption - claimed only after the Trustee moved to sell the vehicle – should be denied as tardy.

Holding: The court found that the vehicle was worth less than the amount needed for the Debtor to claim the § 522(d)(11)(E) exemption. Hence, the Trustee’s objection to the Debtor’s exemption was moot.

See also *Bierbach v. Walck (In re Walck)*, 459 B.R. 208, 213 (Bankr. M.D. Pa., 2011) (citations omitted), which sets forth the factors relevant in determining whether or not property claimed as exempt is reasonably necessary for a debtor's support:

1. Debtor's present and anticipated living expenses
2. Debtor's present and anticipated income from all sources
3. The age of the debtor and his or her dependents
4. The health of the debtor and his or her dependents
5. Debtor's ability to earn a living
6. Debtor's job skills, education and training
7. Debtor's other assets, including exempt assets
8. The liquidity of these other assets
9. Debtor's ability to save for retirement
10. The special needs of the debtor and his or her dependents
11. Debtor's continuing financial obligations, e.g., alimony or support payments

#### Sale of Exempt Assets

29. *In re Wolf*, No. 11-51327, 2012 WL 32480 (Bankr. E.D. Ky. Jan. 6, 2012)

Facts: Debtors claimed an exemption in real estate. Trustee sought to sell the real estate and pay the exempt sale proceeds to the IRS in partial satisfaction of a non-dischargeable tax claim. Debtors objected.

Holding: Even though a holder of a non-dischargeable tax claim can enforce its claim against exempt property, the Trustee has no right "to thrust himself into the two-party dispute between the Debtors and the IRS" and distribute exempt sale proceeds to the IRS. 2012 WL 32480, at \*2.

#### State Exemptions Apply as of Petition Date

30. *In re LaVictoire*, Nos. 10-10076 and 10-10325, 2011 WL 1168288 (Bankr. D. Ve. 2011).

Facts: Debtors sought to avoid a judgment lien on property based upon a Vermont homestead exemption. The exemption amount had increased since the creditor obtained the judgment. The creditor argued that the maximum exemption amount was the amount that existed at the time the lien was placed on the property. The Debtors argued that the exemption amount was that amount allowed under Vermont law as of the petition date.

Holding: Debtors could choose federal or state exemptions because Vermont was not an opt-out state. Debtors chose state exemptions and were entitled to exempt the amount of the Vermont exemption as it existed on the petition date. The court found that the exemption amounts should be determined as of the petition date - not the levy date. "[W]hile federal law governs the date on which the exemption comes into play, [State] law governs the **nature and scope** of the exemption." 2011 WL 1168288, at \*4 (quoting *CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 259 (2d Cir. 2009) (emphasis added)).

Tax Refunds

31. *In re O'Brien*, 443 B.R. 117 (Bankr. W.D. Mich. 2011) (Gregg, J.).

Facts: The Debtors amended their schedules to include an exemption for undisclosed tax refunds received and spent post-petition. The Debtors had told the Trustee about the tax refunds at their creditors' meeting, but failed to amend the schedules until some time later. The Trustee sought to compel turnover of the tax refunds as "non-exempt".

Holding: An amendment of schedules to claim the right to receive a tax refund as exempt relates back to the petition date. 443 B.R. 117, 131-32 (citations omitted). The Debtors may exempt tax refunds received and spent post-petition, assuming they have not acted in bad faith and the amendment is not prejudicial to the estate. The court found that the Debtors could exempt the tax refunds that they had spent.

But see, *In re Trudell*, 424 B.R. 786 (Bankr. W.D. Mich. 2010) (Hughes, J.) (holding that a Debtor's post-petition expenditure of the tax refund rendered the claimed exemption moot); *In re Davison*, No. DG 10-00374 (Bankr. W.D. Mich. July 15, 2010) (Dales, J.) (same).

Time-Barred Exemptions

32. *In re Bourgault*, No. 10-11054, 2011 WL 1238925 (Bankr. D. Ver. March 30, 2011).

Facts: Debtors filed their petition on August 9, 2010. On October 5, 2010, they moved to avoid a creditors' judicial lien on their residence. In litigating the motion, the Debtors disclosed that their property consisted of two units, including one in which they did not live. The Debtors claimed the property as exempt under Vermont law in their original schedules. In response to the motion, the creditor argued that the Debtors' exemption was not valid.

Finding: The creditor's objection was time-barred because the creditor raised it more than 30 days after the creditors' meeting had concluded. Federal Rule of Bankruptcy Procedure 4003 governs the time for objecting to property claimed as exempt. This rule allows objections to be filed within 30 days after conclusion of the meeting of creditors or within 30 days after an amendment, whichever is later. The court relied on the Supreme Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), where the court stated: "By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" 2011 WL 1238925, at \*3. The creditors' tardy objection was denied. *Id.* at \*4.

Tools of Trade Exemption Limited to Worker

33. *In re Matthews*, 449 B.R. 833 (Bank. M.D. Ge. 2011).

Facts: The Debtors claimed exemptions in a tractor as a "tool of the trade" under Georgia law. The Trustee objected to the exemption claimed by the non-farming spouse because only her husband actually used the tractor in his small farming operation.

Holding: Debtor who had never farmed and never used a tractor could not claim it as a “tool of the trade” even though her husband had a small farming business. 449 B.R. at 837 (citing *In re Indvik*, 118 B.R. 993, 1007-08 (Bankr. N.D. Iowa 1990) and *In re Bryan*, 126 B.R. 108 (Bankr. D.N.M. 1991) (“doctor’s wife who managed husband’s office could not exempt medical equipment as tools of trade; only the debtor who uses the tools can claim the exemption”)).

#### Workers’ Compensation Lump Sum Payment

34. *In re Holstine*, 458 B.R. 392 (Bankr. E.D. Mich. Oct.11, 2011) (McIvor, J.).

Facts: The Debtor held a workers’ compensation claim of \$138,000 against his employer under which he was entitled to lump-sum payments. He used some of the funds and placed some into a joint account with his spouse. The Debtors claimed the funds were exempt as a right to receive “a payment in compensation of loss of future earnings ... to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” 458 B.R. at 394 (quoting 11 U.S.C. § 522(d)(11)(E)). The Trustee objected, submitting that this section does not allow the exemption of workers’ compensation claims, but is limited to claims based in tort. The bankruptcy court ruled in favor of Debtor. The Trustee appealed and filed a motion for stay pending appeal.

Holding: The bankruptcy court denied the motion for stay pending appeal, finding that the Trustee failed to show a strong likelihood of success on the appeal. The court relied on the decision of the United States Bankruptcy Court in *In re Sanchez*, 362 B.R. 342 (Bankr. W.D. Mich. 2007) (Hughes, J.), which found that a debtor may exempt workers’ compensation under § 522(d)(11)(E) provided “(1) the payment is traceable to a payment in compensation of loss of future earnings of the debtor; and (2) only to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” 458 B.R. 392, 395-96. This court found that the Trustee’s restrictive position was not supported by the clear language of the statute, legislative history or case law.

#### Wreckless Disregard

35. *In re Rice*, 452 B.R. 623 (Bank. E.D. Mich. 2011) (Rhodes, J.).

Facts: After a creditor obtained a judgment, the Debtor received a direct deposit of \$107,552.35 for past retirement benefits from the State of Michigan. The Debtor withdrew the funds and bought a cashier’s check with the monies which he placed into a safe deposit box. After a creditor’s examination at which he disclosed the existence of the funds and the cashier’s check, the Debtor cashed the check, deposited \$5,000 into an account and purchased another cashier’s check with the remainder of the monies. He had the check in his possession when he filed his Chapter 7 case, but did not disclose it on his bankruptcy schedules. A month later, the Debtor cashed the check, put some money into a bank account, paid taxes with a portion of the money and then obtained another cashier’s check in the amount of \$80,000. The Debtor told the Trustee about the check at his creditors’ meeting and amended his schedules to disclose the check. The Debtor sought to exempt the funds as “retirement funds” under 11 U.S.C. § 522(d)(12). The Trustee argued that the funds were not exempt due to the Debtor’s intentional or reckless concealment of property.

Holding: The court sustained the Trustee's objection, finding that the Debtor did not completely review the schedules and "his contention that the omissions were unintentional is not credible. At the very least, the omissions were reckless and demonstrate an improper disregard of his duty of full disclosure." 452 B.R. at 626. The court found that the Debtor could not exempt the funds as "retirement funds" because they were not held in a qualified account as of the petition date.

*Accord: In re Pellegrini*, No. 09-90464, 2012 WL 129842 (Bankr. W.D. Mich. Jan. 17, 2012) (Gregg, J.) (Judgment held by Debtor on petition date and disclosed following the Debtor's discharge was not exempt as a qualified retirement account, even though the Judgment originated from a self-directed IRA that was "lost to con artists.").

### Conclusion

Exemption challenges continue to take up a significant part of the courts' and parties' time in bankruptcy cases. Although some pre-bankruptcy planning is allowed to protect assets, a debtor should choose his or her exemptions carefully and be sure not to cross into the realm of fraudulent activity in attempting to convert assets from non-exempt to exempt prior to filing bankruptcy. Exemption disputes are factually driven and, as a result, one may find it difficult to predict how a court will rule in a particular situation unless all of the facts are known. Counsel would be wise to take the time to inform clients of the scope of property of the estate and proper exemptions before filing in an effort to learn about all property and potential claims of the estate and avoid a nasty dispute over proper exemptions.