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ERISA Plans And IRAs In Bankruptcy Under Pennsylvania Law

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INTRODUCTION

Since the early 1980's, there has been a marked increase in the number of petitions filed by individuals seeking protection under the U.S. Bankruptcy Code (the "Code"). It is unclear whether this rise in personal bankruptcy proceedings is attributable to an era of easy credit and borrowing followed so soon by a period of economic stagnation, or simply is the result of the very reforms of the Code in 1978 that made this legal option more readily available to individuals. Whatever the cause, as more and more individuals filed for protection under the federal bankruptcy laws, one of the most controversial and often litigated issues in this area of the law has been whether a debtor's interest in an Individual Retirement Account ("IRA") or a retirement plan qualified under the Employee Retirement Income Security Act of 1974 ("ERISA") can be reached by creditors in a bankruptcy proceeding.

Non-bankruptcy lawyers may too-readily assume that where creditors cannot reach a debtor's interest in a qualified plan or an IRA under applicable state law, the same result should follow notwithstanding the filing of a petition in a federal bankruptcy court. However, experienced bankruptcy practitioners will recognize that such consistency in legal outcome is not always a characteristic of bankruptcy proceedings. Nevertheless, they too may assume that IRAs and assets in qualified plans are protected and afforded special exemptions, either under state law or by virtue of ERISA itself, and accordingly, conclude that a debtor's interest in such property cannot be reached by creditors of the bankruptcy estate.

While such a position arguably is supported by the plain language of ERISA, as well as the Code and the state law to which the Code so often defers, proceeding upon such an assumption cost a number of debtors their retirement funds as an increasing number of courts since 1983 have held that interests in qualified plans are indeed included in a debtor's estate. As such, these assets are exposed to the reach of creditors, notwithstanding ERISA and the protection that Congress intended to provide to plan participants. The same can be said for the protection afforded IRAs and retirement plans under the laws of many states, which protection may very well vanish once a petition is filed in federal bankruptcy court.

The U.S. Constitution authorized Congress to establish "uniform Laws on the subject of Bankrupcies throughout the United States."[1] However, as this issue came to be litigated in the federal bankruptcy courts, diametrically opposite results were reached under essentially identical facts. By 1991, whether a debtor's interest in an ERISA qualified plan could be reached by creditors in a bankruptcy proceeding was largely a function of the interpretation of the Code by the particular federal court having jurisdiction over the bankruptcy proceeding. Likewise, the related, yet distinct question of whether creditors can reach a debtor's interest in an IRA in a bankruptcy proceeding came to hinge upon state law and the interpretation of the relevant Code provisions adopted

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[1] U.S. Constitution, Article I, Section 8, cl. 4.

by the Circuit Court of Appeals of the debtor's domicile. Far from being a "uniform" bankruptcy law, on this critical issue entirely different law was applied from state to state and Circuit to Circuit.

The Third Circuit only first addressed the issue in the recently decided case of *Velas* v. *Kardanis*.[2] However, many bankruptcy courts in the Circuit had previously grappled with the same issue, coming to very different conclusions among themselves. When the Third Circuit did finally address and resolve the conflict among the bankruptcy courts within the Circuit, the position it adopted was at odds with that embraced by a majority of the other Circuits. This conflict among the Circuits was finally resolved by the United States Supreme Court on June 15, 1992 in the case of *Patterson* v. *Shumate*.[3] In *Shumate*, the Supreme Court embraced the minority position adopted among the Circuit Courts of Appeals. With respect to ERISA plans, the issue is now settled: A debtor's interest in an ERISA plan is always excluded from the bankruptcy estate and can never be reached by creditors.

However, in *Shumate* the Supreme Court decided only the specific issue of whether interests in ERISA qualified plans can be reached by creditors in a bankruptcy proceeding. As such, the law remains as uncertain as before as to whether creditors can reach a debtor's interest in an IRA. For this reason, it remains necessary to decipher the status of the law in the Third Circuit as it had evolved prior to the Supreme Court's decision in *Shumate* in order to fully ascertain current law in Pennsylvania with respect to IRAs.

PRIOR CONFLICT AMONG THE CIRCUITS RE: "QUALIFIED" PLANS

1. *Section 541: Property of the Estate*

The filing of a bankruptcy petition creates an "estate" of the debtor. In 1978, the Code was revised to provide a broad and inclusive definition of the debtor's estate, holding that a debtor's estate is comprised of "all legal or equitable interests" of the debtor in tangible and intangible property "wherever located and by whomever held."[4] The term "equitable interests" generally includes a debtor's interest as a beneficiary in property held in trust.[5] However, Section 541(c)(2) carves out an exception to the general rule for certain property held in trust, holding that:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title."[6]

Thus, the general rule under the Code is that an interest in property held in a trust is treated as property of the debtor's estate, notwithstanding that the interest is subject to a provision that restricts its transfer. However, if the interest is in a trust and the restriction is enforceable under applicable non-bankruptcy law, the restriction also is enforceable in a bankruptcy case, thereby excluding the interest from the debtor's estate. Unfortunately, on account of certain perceived ambiguity in the statute, there has been a significant disagreement among the Circuit Courts as to how to read Section 541(c)(2).

The perceived ambiguity in Section 541(c)(2) lies in the phrase "applicable non-bankruptcy law."[7] A majority of courts oddly enough interpreted the phrase to refer *only* to state spendthrift trust law.[8] This judicial construction was first enunciated by the Fifth Circuit in 1983 in *In re Goff*.[9] This position ulti-

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[2] *Velis* v. *Kardanis*, 949 F.2d 78 (3rd Cir. 1991).

[3] *Patterson* v. *Shumate*, ___ U.S. ___ (No. 91-913, June 15, 1992); 119 LEd 2d 519 (1992).

[4] 11 U.S.C. §541(a)(1).

[5] *See U.S.* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983).

[6] 11 U.S.C. §541(c)(2).

[7] *See generally* Seiden, "Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?," 61 Am. Bankr. Law J'l 219, 236 (1987).

[8] The legislative history to Section 541(c)(2) of the Code states that this exclusion "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law." House Report No. 595, 95th Congress, 2d Sess. 369. This language merely provides an example of the kind of restriction that would apply under Section 541(c)(2), and is not all-inclusive. Certain courts ignored the plain language of the statute in favor of such a faulty reading of the legislative history.

[9] *In re Goff*, 706 F.2d 574 (5th Cir. 1983) (holding that property was excluded from the

mately was adopted by the Seventh, Ninth, Eleventh and Eight Circuits.[10] Prior to the Third Circuit's holding in *Velas*, only the Fourth and Sixth Circuits declined to so read the language of Section 541(c) as referring only to state spendthrift trust law.[11] These Circuits applied a traditional judicial approach to reading the statute,[12] namely they followed the plain language of the statute, and none-too-suprisingly, concluded that ERISA is included within the meaning of "applicable non-bankruptcy law." This literal reading of the statute led to very different results.

Section 206(d)(1) of ERISA holds that every qualified "pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[13] In addition, the U.S. Department of Labor is authorized under ERISA to enforce such "anti-alienation" provisions in a qualified plan.[14] Because every qualified plan will necessarily include an anti-alienation provision enforceable under federal law, to conclude that ERISA is "applicable non-bankruptcy law" inevitably leads to the conclusion that such assets are always excluded from a participant's bankruptcy estated under Section 541(c) of the Code.

However, by 1991, the majority of bankruptcy courts in the Third Circuit had adopted the Fifth Circuit's contrary holding in *Goff*, concluding that a debtor's interest in an IRA or a qualified plan is included in property of the bankruptcy estate *unless* the restrictions on such property interest satisfy Pennsylvania spendthrift trust law.[15] Under this standard, ERISA is not "applicable non-bankruptcy law", and thus, plan assets can be excluded from the estate under Section 541(c) *only* if the plan trust instrument satisfies Pennsylvania spendthrift trust law.[16]

Ultimately, whether an ERISA qualified plan satisfies state spendthrift trust law is a question determined by the particular facts and circumstances.[17] For instance, where a debtor is the trustee of a plan, has investment control over plan assets, and can make distributions of plan assets in his own discretion, a bankruptcy court in the Third Circuit will not likely find that

bankruptcy estate of a debtor under Section 541(c)(2) only if restrictions upon a transfer of the debtor's interest in such property would be enforceable under state spendthrift trust law).

[10] *See In re LeFeber*, 906 F.2d 330 (7th Cir. 1990); *Daniel* v. *Security Pacific Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), cert denied; *Lichstrahl* v. *Bankers Trust*, 750 F.2d 1488 (11th Cir. 1985); *In re Graham*, 726 F.2d 1268 (8th Cir. 1983).

[11] *See Anderson* v. *Raine*, 907 F.2d 1476 (4th Cir. 1990) (court refused to read Section 541(c)(2) as including only state spendthrift trust law; federal non-bankruptcy law such as ERISA included as "applicable non-bankruptcy law"); *In re Lucas*, 924 F.2d 597 (6th Cir. 1991) (same).

[12] In his concurring opinion in *Shumate*, Justice Scalia stated that such a reading of the statute:

> calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it no longer makes sense to talk of "a governance of laws, not men." Shumate *supra* at ___.

[13] Section 401(a)(13) of the Internal Revenue Code likewise requires that a qualified plan include such an "anti-alienation" provision.

[14] 29 U.S.C. §§1132(a)(3) and (5).

[15] *See* e.g. *In re Atallah*, 95 B.R. 910, 915 (Bankr. E.D.Pa. 1989) (J. Scholl) ("We are inclined to agree with those courts that have concluded that the term 'applicable non-bankruptcy law' in Section 541(c)(2) refers to state spendthrift trust law. While this issue has not been addressed by the Third Circuit, this appears to be the majority view among the bankruptcy courts in this Circuit."); *In re Hysick*, 90 B.R. 770, 773 (Bankr. E.D.PA. 1988) (J. Twardowski); *In re Roberts*, 81 B.R. 354, 374 (Bankr. W.D.Pa. 1987); *In re Heisey*, 88 B.R. 47 (Bankr. D.N.J. 1988); *In re Babo*, 81 B.R. 389 (Bankr. W.D.Pa. 1988).

[16] *See In re Hysick*, 90 B.R. 770, 777 (Bankrcy. E.D. 1988) (J. Twardowski) ("We conclude that this Plan would constitute a valid spendthrift trust under state law, and thus would not be included in this estate".); *see also In re Roberts*, 81 B.R. 354, 374 (Bankr. W.D.Pa. 1987) (". . . . an ERISA qualified pension plan containing provisions prohibiting alienation and assignment is excluded from the estate only if said plan constitutes a spendthrift trust under Pennsylvania law."); *Atallah*, 95 B.R. at 918 ("A pension plan provided by an employer may be excluded from the debtor's estate if it contains restrictions on transfer which are enforceable under state spendthrift trust law."); *accord In re Heisey*, 88 B.R. 47 (Bankr. D.N.J. 1988); *In re Babo*, 81 B.R. 389 (Bankr. W.D.Pa. 1988).

[17] For a discussion of how to be sure that a trust established pursuant to an ERISA plan will satisfy Pennsylvania spendthrift trust law, see David M. Mosher, "Molding ERISA Plans to Qualify As Spendthrift Trusts Under Bankruptcy Law," Pennsylvania Bar Association Quarterly, Vol. XLI (July 1990), pp. 144-151.

Pennsylvania spendthrift trust law is satisfied. Where the debtor also is the settlor of the trust, as is the case with a so-called "Keogh" plan (which is a tax-favored ERISA qualified plan for self-employed individuals), Pennsylvania spendthrift trust law clearly will not be satisfied.

Under the relevant test, an IRA will always be included in a debtor's estate, and never qualify for the Section 541(c) exclusion, while an interest in a qualified ERISA plan will or will not be excluded depending upon whether the court is convinced that Pennsylvania spendthrift trust law is satisfied.

2. *Section 522: Exempt Property*

Section 522 of the Bankruptcy Code provides that notwithstanding that property is included in a debtor's bankruptcy estate under Section 541, nevertheless, such property may be "exempt from property of the estate" if certain requirements are satisfied. These requirements pertain to the exemptions allowed the debtor under the Code. A debtor is entitled to choose between certain statutory exemptions specifically enumerated under Section 522(d) of the Bankruptcy Code (the "federal exemptions"), or exemptions provided generally under state or local law of the debtor's domicile (the "state exemptions").[18] State law may preclude or "opt out" of the federal exemptions, thereby allowing a debtor to claim only the applicable state exemptions. Pennsylvania has not so opted out of the federal exemptions.

If under prior law, a debtor's interest in a qualified plan or an IRA was treated as property of a debtor's estate under Section 541 for failure to satisfy applicable state spendthrift trust law, and if the debtor chose the state exemptions, the determination of whether the plan assets or the IRA was exempt property turned on the applicable state exemption statute determined by reference to the debtor's domicile. Under Pennsylvania law, the applicable state exemption is found at 42 Pa.C.S. §§8124(b)(1)(vii) and (viii). This statute provides as follows:

> Exemption of particular property . . .
> (b) Retirement funds and accounts.
> (1) . . . the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment;
> (vii) Any pension or annuity, whether by way of a gratuity or otherwise, granted or paid by any private corporation or employer to a retired employee under a plan or contract which provides that the pension or annuity shall not be assignable;
> (viii) Any retirement or annuity fund of any self-employed person (to the extent of payments thereto made while solvent, but not exceeding the amount actually excluded or deducted as retirement funding for Federal income tax purposes) and the appreciation thereon, the income therefrom and the benefits or annuity payable thereunder.

Originally, this statute only provided that a debtor's interest in a pension plan set up by an employer for employees would be protected from creditors of the debtor.[19] However, the statute was specifically amended by the Pennsylvania legislature in 1978 to clarify that retirement funds for self-employed persons also would be afforded the same protection from creditors.[20] Thereafter, the statute was again amended, effective December 12, 1990, to include an additional provision, 42 Pa.C.S. §8124(b)(1)(ix), specifically applicable to qualified pension plans and individual retirement accounts. Under this new provision, the exemption also applies to:

> (ix) Any retirement or annuity fund provided for under section 401(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code of 1986, . . . the appreciation thereon, the income therefrom and the benefits or annuity payable thereunder. This subparagraph shall not apply to:
> (A) Amounts contributed by the debtor to the retirement or annuity fund within one year before the debtor filed for bankruptcy.
> (B) Amounts contributed by the debtor to the retirement or annuity fund in excess of $15,000 within a one-year period.
> (C) Amounts deemed to be fraudulent conveyances.

While there was uncertainty as to whether ERISA plans and IRAs were originally protected under §8124(b)(1)(viii), this amendment to the statute definitively resolved the issue. Under §8124(b)(1)(ix), a debtor's interest in an ERISA plan or an IRA (which is a retirement fund provided for under Section 408 of the Internal Revenue Code) is clearly exempt from attachment or execution by a judgment creditor.

[18] 11 U.S.C. §522(b).

[19] 42 Pa.C.S. §8124(b)(1)(vii).

[20] 42 Pa.C.S. §8124(b)(1)(viii).

However, odd as it may be, simply because a creditor cannot reach a debtor's interest in a qualified plan or an IRA under Pennsylvania creditor law does not necessarily mean that a debtor electing the Pennsylvania exemptions will be afforded the same protection from creditors within the context of a bankruptcy proceeding. While that would appear to be the correct reading of the federal statute as it defers to state law, the additional issue must be considered as to whether ERISA as federal law "preempts" such state statutes, ironically thereby negating the intended protection afforded ERISA plans and IRAs under state law.

3. *ERISA Preemption of State Law*

a. Qualified Plans

As if there was not enough complexity already, the additional question of whether ERISA preempts state law exemptions, and if so, to what effect, further muddies these waters. State statutes such as that of Pennsylvania purport to exempt ERISA plan assets and IRAs from the grasp of a debtor's creditors outside the context of a bankruptcy proceeding, and thus, within the context of a bankruptcy proceeding, one would expect the statute to exempt such assets from the debtor's estate where the debtor has elected the state exemptions under Section 522(b)(2) the Code. However, Section 1144(a) of ERISA provides that that statute shall "supercede any and all State laws insofar as they shall now or hereafter relate to any employee benefit plan" subject to ERISA. By virtue of this provision of the statute, state law has been held to be preempted by ERISA to the extent that such law "relates to qualified employee pension plans.[21]

The great irony is that ERISA, a federal statute intended to protect the assets of participants in benefit plans governed by that statute, should place plan participants in a worse position by preempting state statutes intended to provide ERISA-type protection. Of course, in light of the Supreme Court's holding in *Shumate*, the preemption issue is now moot as to ERISA plans since there is no longer any need for a debtor to rely upon state exemptions to protect such an asset. However, the preemption issue remains alive as to IRAs.

b. IRAs

If ERISA preempts state statutes relating to qualified plans, it does not immediately preempt statutes relating to IRAs. That is because IRAs are not subject to, or governed by ERISA, and hence, are not subject to the section 1144(d) preemption provision. The law is well-settled that an IRA is *not* an ERISA qualified plan. For example, a bankruptcy court in the Eastern District of Tennessee considered the question of whether a debtor's interest in an IRA was exempt under the applicable Tennessee statute, or whether ERISA preempted that state law as to an IRA.[22] The applicable Tennessee statute held as follows:

> . . . any funds or assets payable to a participant or beneficiary from, or any interest of any participant in, a retirement plan which is qualified under §§401(a), 403(a), 403(b), and [sic] 408 of the Federal Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the State of Tennessee . . .[23]

The bankruptcy court for the Eastern District of Tennessee held that (1) an IRA established under the Internal Revenue Code, unlike a qualified pension plan, is outside the preemptive scope of ERISA, and (2) in the case of a debtor electing the state exemptions under Section 522(b)(2)(A), an IRA was exempt from execution by creditors under Tennessee law.[24] The same conclusion was reached by bankruptcy

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[21] *See Mackey* v. *Lanier Collections Agency & Services, Inc.*, 486 U.S. 825, 108 S.Ct. 2182 (1988) (U.S. Supreme Court held that a Georgia statute exempting an employee welfare benefit plan from garnishment was preempted by ERISA); *see also* Comment, "ERISA Preemption of State Exemption Laws: The Effects in Bankruptcy," 7 Bankr. Developments J'l 615 (1990).

[22] *In re Martin*, 102 B.R. 639 (Bankr. E.D. Tenn. 1989).

[23] Tenn. Code Ann. §26-2-104 (Supp. 1988).

[24] *In re Martin*, *supra* at 644 (individual retirement accounts under Internal Revenue Service Code are outside pre-exemptive scope of ERISA since IRAs are not "ERISA qualified plans", but rather savings accounts; held that IRA was exempt from execution by creditors under Tennessee law without reference to ERISA).

courts applying the applicable law of Texas and several other states.[25]

Because an IRA is not an ERISA plan, the problem of preemption should not be relevant. However, because a particular state statute may pertain to both ERISA plans and IRAs in a single provision, the additional question may arise as to whether the entire statute is preempted because it "relates" to ERISA, thereby throwing out the statutory protection afforded to IRAs and non-qualified plans as well, or whether only that portion of the statute that relates to ERISA plans will be preempted. A court could decide this issue based upon whether the relevant state statute includes a severability clause, or merely based upon the particular court's willingness to salvage the statutory protection afforded IRAs and non-ERISA plans.

SUPREME COURT RESOLVES THE CONFLICT AMONG CIRCUITS

On June 15, 1992, the Supreme Court resolved the split among the Circuits in the case of *Patterson* v. *Shumate*.[26] In *Shumate* the debtor (Shumate) was a participant along with some 400 other employees in his employer's qualified pension plan which included the required ERISA anti-alienation provision. Shumate's interest in the plan was properly accumulated over the course of many years and was valued at $250,000. The trustee of Shumate's bankruptcy estate sought recovery of Shumate's interest in the plan. At issue before the Court was whether such interest was includable in Shumate's estate as property of the estate.

In an unanimous decision, the Court held that ERISA is included under the plain language of Section 541(c) as "applicable non-bankruptcy law," and accordingly, the Court held that the "anti-alienation" provision required of all ERISA qualified plans constitutes a restriction on transfers of plan assets enforceable under federal law for purposes of satisfying the Section 541(c) exclusion of property from a debtor's bankruptcy estate. In reaching this decision, the Supreme Court sustained the Court of Appeals for the Fourth Circuit which had adopted the minority view that ERISA, and not just state spendthrift trust law, is "applicable non-bankruptcy law" under the plain language of the statute.

Hence, it is now settled law that the restrictions demanded by ERISA of all qualified plans satisfies the statutory exclusion of an asset held in trust from property of the bankruptcy estate under Section 541(c) of the Code. Accordingly, a debtor's interest in an ERISA qualified plan always will be excluded from the debtor's bankruptcy estate. Hence, it is no longer necessary to even consider the question of whether state law exempts an ERISA plan because such property is never includable in the estate in the first place.

INDIVIDUAL RETIREMENT ACCOUNTS

As noted above, because the *Shumate* decision only concerns ERISA plans, and because an IRA is not governed by ERISA, the Supreme Court's holding is not determinative as to IRAs. The relevant test remains whether the contract establishing an IRA account satisfies the applicable spendthrift trust law. If not, the IRA will be property of the debtor's bankruptcy estate. With respect to the typical IRA, the debtor's control and dominion over IRA funds and distributions will strongly dictate against a court finding a qualifying spendthrift trust provision, and thus, the IRA will be property of a debtor's bankruptcy estate.

This likely will be the result under Pennsylvania law inasmuch as an IRA will not satisfy Pennsylvania spendthrift trust law. For instance, in *In re Atallah*,[27] Judge Scholl of the Federal Bankruptcy Court in the Eastern District of Pennsylvania considered whether an IRA exhibits the char-

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[25] *See In re Laxson*, 102 B.R. 85 (Bankr. N.D.Tex. 1989) (holding that the Texas exemption statute for IRAs was not preempted by ERISA, and that the debtor's interest in his several IRAs qualified under the Texas statute as long as they were part of the debtor's overall "plan for retirement"); *see also In re Worthington*, 28 B.R. 736 (Bankr. W.D.Ky. 1983) (IRA exempt under Kentucky law); *In re Fill*, 84 B.R. 332 (Bankr. S.D.N.Y. 1988) (IRA exempt under New York exemption statute); *but see In re Komet*, 104 B.R. 794 (Bankr. W.D.Tex. 1989) (holding that ERISA did preempt the state statute as to a qualified plan, but that the plan was not property of the estate).

[26] *Patterson* v. *Shumate*, ___ U.S. ___ (No. 91-913, June 15, 1992); 119 LEd 2d 519 (1992).

[27] *In re Atallah*, 95 B.R. 910, 915 (Bankr. E.D.Pa. 1989).

acteristics of a spendthrift trust. In that case, the debtor had four IRAs, all established by the debtor prior to his filling of a voluntary petition under Chapter 7 of the Bankruptcy Code. Judge Scholl held that the restrictions imposed upon the transferability of the debtor's interest in the IRAs did not constitute restrictions sufficient to qualify under Pennsylvania spendthrift trust law. The language in the trust agreements pertaining to the IRAs at issue was typical of that employed in common bank IRAs. At least one of the IRA agreements contained an "anti-alienation" provision stating that the benefits paid to a participant were not subject to the claims of creditors of the participant. However, Judge Scholl noted that there was no provision under any of the IRA agreements or any law to prohibit the transfer or withdrawal of funds in the IRA.[28] (Although income tax and a penalty would be imposed on a premature distribution, there is no prohibition *per se* on such withdrawal.) In addition, the court stressed that the debtor had control over the funds in his IRAs. As such, Judge Scholl held that the IRAs did not exhibit sufficient characteristics of a spendthrift trust.[29] Accordingly, the IRAs were includable in the debtor's estate, and thus, exposed to the claims of his creditors.

Because an IRA will not likely satisfy Pennsylvania spendthrift trust law, and hence, likely will be included in the bankruptcy estate, the issue of exemptions remains critical. Where the debtor is domiciled in Pennsylvania and elects the state exemptions under Section 522(b)(2) of the Code, 42 Pa.S.C. §8124(b)(1) will govern whether a creditor can reach an IRA owned by the debtor. Thus, it is critical whether courts will hold that ERISA preempts the entire Pennsylvania statute or only that portion that relates to ERISA plans.

There is no certainty as to how a bankruptcy court sitting in the Third Circuit will decide this issue. However, the better view is that ERISA does not preempt all of 42 Pa.S.C. §8124(b)(1), but at most only that portion that applies to ERISA plans (which preemption is now irrelevant on account of the *Shumate* decision). As it relates to IRAs, the statute would survive and control. If this view is adopted, where a debtor elects the state exemptions under Section 522(b)(2) and is domiciled in Pennsylvania, a bankruptcy court in the Third Circuit should hold that: (1) an IRA owned by the debtor is included in property of the bankruptcy estate, (2) ERISA may preempt the state exemption statute as it relates to ERISA qualified plans, (3) ERISA does not preempt the state exemption as it applies to an IRA, and (4) creditors of the debtor cannot attach or levy upon the debtor's IRA under the Pennsylvania exemption statute.

The conclusion that logically should, but may not necessarily follow from those propositions, is that in a bankruptcy proceeding an IRA will be exempt from the bankruptcy estate where a Pennsylvania debtor elects the state exemptions under Section 522(b)(2) of the Code. As such, creditors would not be able to reach the debtor's IRA in a bankruptcy proceeding any more than they could prior to the filing of the petition.

CONCLUSION

The law is now certain and uniform as to the protection afforded a participant's interest in an ERISA qualified plan: Such interest cannot be reached by creditors in a bankruptcy proceeding, just as it could not be reached outside the context of a bankruptcy proceeding. A debtor's interest in an ERISA plan simply is not included in the bankruptcy estate. On the other hand, an IRA likely will be property of the debtor's estate. However, an IRA is exempt from a debtor's creditors under Pennsylvania law. As such, the IRA should be exempt from the debtor's estate where the state exemptions have been elected.

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[28] *Atallah* at 920 ("a valid spendthrift trust must restrict the beneficiary's ability to transfer trust funds as well as the creditor's rights to levy upon such assets").

[29] *Atallah* at 921 ("In light of the degree of control which the Debtor may exercise over the assets in his IRA accounts, we conclude that the IRA Agreements in issue do not place restrictions on the transfer of Debtor's assets which would be enforceable under Pennsylvania spend-