

**CREDITORS' RIGHTS TO RETIREMENT, ANNUITY,
AND LIFE INSURANCE BENEFITS**

by

**Albert Feuer, Esq.
Law Offices of Albert Feuer
Forest Hills**

**Retirement, Annuity and Life Insurance Benefit Planning:
Creditors' Rights to Retirement, Annuity, and Life Insurance Benefits**

Table of Contents

Introduction [Page 1 of 56](#)

I. New York State Debtor-Creditor Laws [Page 2 of 56](#)

**A. Protections for Totten Bank Accounts
 and Payable-on-Death Accounts** [Page 2 of 56](#)

**B. Protection of Retirement Plan Benefits
 from Self-Settled-Trust Rules** [Page 4 of 56](#)

C. New York Enforcement of Money Judgments [Page 5 of 56](#)

**D. Protections for Life Insurance and
 Annuity Benefits** [Page 8 of 56](#)

E. Protections of Government Pension Plan Benefits [Page 11 of 56](#)

**F. Domestic Relations Laws Override Debtor
 Protections** [Page 14 of 56](#)

**G. Family Support Obligations Override
 Debtor Protections** [Page 14 of 56](#)

**H. NY State Criminal Law Limited Override
 of Debtor Protections** [Page 15 of 56](#)

**I. NY State Tax Law Does Not Override
 Debtor Protections** [Page 16 of 56](#)

J. Debtor Protections for Beneficiaries of Retirement, Annuity, and Life Insurance Benefits from Debtors of the Benefit Creators	<u>Page 17 of 56</u>
II. Federal Non-Bankruptcy Debtor-Creditor Laws Other than ERISA Governing Retirement, Life Insurance and Annuity Benefits	<u>Page 18 of 56</u>
A. Supremacy Clause	<u>Page 18 of 56</u>
B. Federal Benefit Statutes	<u>Page 19 of 56</u>
1. Explicit Prohibitions on the Enforcement of Claims Other than those of the United States Prevent the Enforcement of State Law Creditor Claims	<u>Page 19 of 56</u>
2. Explicit Prohibitions on the Enforcement of Claims are Not Needed to Prevent the Enforcement of State Law Creditor Claims	<u>Page 21 of 56</u>
C. Standard Equitable Exceptions	<u>Page 22 of 56</u>
1. Domestic Relations and Marital Rights Exception	<u>Page 22 of 56</u>
2. No Fraudulent Transfer Provisions	<u>Page 23 of 56</u>
3. Criminal Law Provisions	<u>Page 23 of 56</u>
4. Federal Tax Collection Mechanisms and Their Limits	<u>Page 24 of 56</u>
D. Federal Non-Tax Collection Mechanisms	<u>Page 26 of 56</u>
III. ERISA non-Bankruptcy Debtor-Creditor Law	<u>Page 29 of 56</u>

A. ERISA Background	<u>Page 29 of 56</u>
B. ERISA Provisions Relevant to Creditor Protections ..	<u>Page 30 of 56</u>
C. Consensus and Discord About State-Law	
Garnishment of ERISA Plan payments	<u>Page 34 of 56</u>
D. Discord About Ability of Creditors to	
Wrest ERISA benefit payments from	
Plan Participants or Beneficiaries	<u>Page 36 of 56</u>
D. Standard Equitable Exceptions	<u>Page 38 of 56</u>
1. Domestic Relations Exception	<u>Page 38 of 56</u>
2. No Fraudulent Transfer Provisions	<u>Page 39 of 56</u>
3. Tax Collection Mechanisms and Their Limits ...	<u>Page 39 of 56</u>
4. Criminal Law Provisions	<u>Page 39 of 56</u>
IV. Bankruptcy	<u>Page 40 of 56</u>
A. Basic Bankruptcy Principles	<u>Page 40 of 56</u>
1. Debtor’s Current Monthly Income that	
Determines Chapter 7 Eligibility	<u>Page 41 of 56</u>
2. Debtor’s Disposable Income that	
Determines Chapter 13 Eligibility	<u>Page 42 of 56</u>
B. Retirement, Life Insurance and Annuity	
Benefit Bankruptcy Exclusions	<u>Page 44 of 56</u>
1. To What Extent are Interests in	
Spendthrift Trusts Excluded from	
the Bankruptcy Estate?	<u>Page 45 of 56</u>
2. To What Extent are ERISA Plan Benefits	
Excluded from the Bankruptcy Estate?	<u>Page 45 of 56</u>

3. To What Extent are New York Government Plan Benefits Excluded from the Bankruptcy Estate? [Page 46 of 56](#)

4. To What Extent are a Debtor’s Interests in IRAs and Pension Plans Funded with Trusts that are Protected from Creditor Claims Under State Law Excluded from the Bankruptcy Estate? [Page 47 of 56](#)

5. To What Extent are Social Security Benefits and Federal Pension Benefits Excluded from the Bankruptcy Estate? [Page 47 of 56](#)

C. Bankruptcy Treatment of Retirement, Life Insurance and Annuity Benefits Not Excluded from the Bankruptcy Estate [Page 48 of 56](#)

D. Bankruptcy Treatment of Retirement, Life Insurance and Annuity Benefits Not Excluded from the Bankruptcy Estate Under New York State Bankruptcy Exemptions . . . [Page 52 of 56](#)

1. New York permits debtors to choose either federal or state exemptions [Page 52 of 56](#)

2. Permissible New York Bankruptcy Exemptions in Addition to Specified Federal Exemptions [Page 53 of 56](#)

Conclusions: [Page 54 of 56](#)

Retirement, Annuity and Life Insurance Benefit Planning Creditors' Rights to Retirement, Annuity, and Life Insurance Benefits

Introduction

Program Questions:

- a) What is the difference in treatment if an individual decides to invest \$10,000 in a (1) bank account, mutual fund, an annuity, a life insurance policy, each in the individual's name, or (2) similar asset through a tax-qualified plan or an IRA?
- b) What is the difference in the treatment between those assets and the annuity most individuals possess, social security benefits?
- c) What is the difference in the treatment of each of those assets if the individual is single, has a non-married partner, or is married?

“New York law recognizes the right of individuals to arrange their affairs so as to limit their liability to creditors,. . .

In re Heller Trust, 613 N.Y.S.2d 809, at 810, 161 Misc. 2d 369, at 370 (Sur. Ct. , N.Y. Co. 1994)

Competing Equitable Principles that Often Create Debtor-Creditor Issues:

Debtors should fully pay all their debts

Debtors should not be compelled to use all their assets to pay all their debts.

Two Distinct Debtor-Creditor Issues Within and Without Bankruptcy:

May a creditor of the benefit creator or of the creator's beneficiary compel the payor of the benefit to pay the benefit to the creditor?

May a creditor of the benefit creator or of the creator's beneficiary wrest a distributed benefit from the Creator/Beneficiary?

Major Asset Types in Apparent Increasing Order of Creditor Protection

Individual Bank Accounts

Individual Mutual Fund Accounts

Individual (Non-qualified) Annuity Benefits

Individual Life Insurance Benefits (Creator and Beneficiary)

Benefits from Tax-Qualified 403 Plans that are not ERISA or Federal Plans

Benefits from Tax-Qualified 401(a) plans that are not ERISA or Federal Plans

Benefits from IRAs not part of SEPs or SIMPLE Plans

Benefits from State and Local Pension Plans

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

Benefits from Federal Life Insurance Plans
Benefits from ERISA Plans Other than Spousal Survivor Benefit Plans
Benefits from Federal Pension Plans
Benefits from Railroad Retirement Plans
Benefits from Social Security
Benefits from ERISA Spousal Survivor Benefit Plans

I. New York State Debtor-Creditor Laws

There are three kinds of New York debtor-creditor laws. First, there are laws setting forth protections for specified kinds of benefits, such as life insurance benefits, payable on death account benefits, or retirement benefits provided by state or local governments. Second, there are laws addressing how debts may and may not be enforced. Many, but not all of the protective laws extend protections to distributed benefits. Third, there are laws that override the specific and general protection laws for equitable reasons. There are four kinds of equitable overrides. First, are family and domestic relations law protections. Second, are laws to prevent fraudulent transfers. Third, are laws to impose criminal sanctions. Fourth, are protections for debts to state and local governments. For convenience, much of the discussion of government benefits will focus on the New York State Teachers Retirement System.

A. Protections for Totten Bank Accounts and Payable-on-Death Accounts

Laws that Protect Payors for Common testamentary substitutes Without Affecting Debtor-Creditor Rights

N.Y. E. P. T. L. § 7-5.4. Effect of payment [Totten Bank Accounts]

A financial institution which, upon the death of a depositor and prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to a beneficiary or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant beneficiary pursuant to section 7-5.3, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the person to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

N.Y. E. P. T. L § 7-5.5. Rights not affected [by Bank payment rules].

This part does not affect:

(1) *The rights of creditors of the depositor or his estate, . . .*

Conclusions from statutory text:

(1) The statute does not affect the rights of creditors of the depositor's beneficiary, although it protects the bank from such claimants.

(2) The financial institution incurs no liability to a claimant to the bank funds if it has knowledge of the claim, but has not received any court process.

N.Y. E. P. T. L § 13-4.8. Protection of registering entity [Payable-on-Death Accounts]

(c) A registering entity is discharged from all claims to a security by the estate, creditors, distributees, legatees or devisees of a deceased owner if it registers a transfer of the security in accordance with section 13-4.7 and does so in good faith reliance (i) on the registration, (ii) on this part, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

Conclusions from statutory text:

(1) This statute provides protection only from claimants that arise through the decedent, not from other claimants, such a creditor of the named beneficiary.

(2) This statute does not extend protection to a payor who receives written notice from any claimant to the beneficiary's interest. No legal process is required for liability to be imposed.

B. Protection of Retirement Plan Benefits from Self-Settled-Trust Rules

N.Y. E. P. T. L § 7-3.1. Disposition in trust for creator void as against creditors [of creator]

(a) A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

(b) [initially introduced in 1987]

(1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either [1] *an individual retirement account plan* which is qualified under section 408 or section 408A of the United States Internal Revenue Code of 1986, as amended, or [2] *a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended*, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes. . . .

(3) *This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.*

(4) [Fraudulent Conveyances override (1)]

Conclusions from statutory text:

(1) The general rule is that creditors may set aside the transfer of a property transfer to a self-settled trust by the trust creator. However, set aside does not mean that the creditor may withdraw the property from the trust at any time, but merely steps into the shoes of the debtor.

See, e.g., Fordyce v. Fordyce, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974). (holding that “Even in the case of a self-settled trust, creditors can only reach the interest the settlor retained for himself.” Thus, the creditor may only obtain self-settled trust assets when the debtor could obtain those assets)

(2) Section (b) sets forth an exception to the general rule. Creditors may not set aside transfers to two kinds of retirement plans, (1) IRAs, whether funded by trusts or custodial accounts, and (2) plans funded by trusts that are tax-qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended (the “Code”). Thus, even though the creator of these plans retains an interest in contributed property by being entitled at some time to plan benefits, the funding vehicles for the plans are not treated as self-settled.

(3) The section (b) exception is not needed to protect a beneficiary who would not otherwise be treated be treated in section (a) as a creator of either type of plan. A beneficiary would not be treated as a creator of the benefits to which he or she is entitled, inasmuch as the benefits are not derived from the beneficiary’s plan contributions. Thus, the general rule of (a) would be inapplicable.

(4) There are two explicit equitable overrides to these protections. The overrides prevent the creator from defrauding creditors or disregarding his domestic relations obligations.

C. New York Enforcement of Money Judgments

N.Y. C. P. L. R. § 5201. Debt or property subject to enforcement; proper garnishee

(b) Property against which a money judgment may be enforced. *A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.* {Traditional Balance of Equities}

N.Y. C. P. L. R. § 5205. Personal property exempt from Application to the satisfaction of money judgments

(c) Trust exemption.

1. *Except as provided in paragraphs four [domestic relations] and five [fraud] of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor [such as the case where the trust beneficiary is not the trust creator], is exempt from application to the satisfaction of a money judgment.*

2. [initially introduced in 1987] For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, [1] either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, [2] a Keogh (HR-10), retirement or *other plan established by a corporation*, which [account or plan] is qualified under *section 401 of the United States Internal Revenue Code of 1986*, as amended, or [3] created as a result of rollovers [to unspecified entities] from such plans [set forth in(2) or (3)] pursuant to *sections 402 (a) (5) [rollovers from Code 401(a) trusts], 403 (a) (4) [rollovers from 403(a)(plans), which do not seem to be such a plan], 408 (d) (3) [rollovers from traditional individual retirement accounts or individual retirement annuities] or 408A [rollovers from Roth individual retirement accounts or individual retirement annuities] of the Internal Revenue Code of 1986* as amended or [4] a plan that satisfies the requirements of *section 457 of the Internal Revenue Code of 1986* [deferred compensation plans of governments or tax-exempts that are not funded with annuities that are tax-qualified under § 403 or with trusts that are qualified under 401(a)], *shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor* even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan [creator], or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan [there is no similar exception for a participant in a 401(a) plan who is not self-employed, a partner or a shareholder of the plan sponsor].

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in *section 414(p) of the United States Internal Revenue Code of 1986*, as amended or under *any order of support, alimony or maintenance of any court of competent jurisdiction* to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as *a court*

determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. [initially introduced in 1987] ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest [described in paragraph two of subdivision (c) of this section] established as part of [1] an individual retirement account plan or as part of [2] a Keogh (HR-10), retirement or [3] other plan described in paragraph two of subdivision (c) of this section, *the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;*

2. *ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment;*

Conclusions from statutory text:

(1) The statute sets forth a general rule that property held in trust for debtor is not subject to execution by the debtor's creditors if the debtor did not create or fund the trust absent domestic relations or fraud issues. Judgments may not be executed against 90% of the funds distributed from the trust, except to extent a court determines the funds are unnecessary for the reasonable requirements of the judgment debtor and his dependents. If there are domestic relations of fraud issues with respect to the trust funds their distribution would not be from a trust exempt under (c). Thus, the distribution would not qualify for the protection of distributions in (d).

(2) This protection is considerably beyond that traditionally provided to persons entitled to benefits from a trust whose interests may not be alienated or assigned, and often are called spendthrift trusts. Creditors may not reach the interests prior to distribution but may reach them after their distribution without having to show that the payments do not meet a reasonable needs standard. *See, e.g.,* Sections 501 and 502 of Uniform Trust Code (last Revised or Amended in 2010) ("UTC"), although support obligations may be enforced against undistributed trust benefits. UTC § 503.

(3) The statute extends the general rule. Property in specified retirement plans, including traditional and Roth IRAs, is not subject to execution by the debtor's creditors absent domestic relations or fraud issues even though the funds were created by the debtor. Moreover, no distributions from such a retirement plan are subject to execution. If there are domestic relations of fraud issues with the retirement funds the distribution would not be from exempt under (c) and could not qualify for the protection of distributions in (d).

(4) Unlike the self-settled-trust provisions, the protection is not limited to IRAs and plans funded by trusts qualified under Code Section 401(a). Protection also applies to (1) rollovers from such plans and IRAs, as well as from 403(a) plans, and 457 plans. Unlike IRAs and 403(a) plans, 457 plans need not be funded.

(5) The protection of current earnings from personal services is subject to a reasonable needs test unlike the protection of earnings for past services from covered retirement and deferred compensation plans, which is subject to no such limitation.

N.Y. C. P. L. R. § 5205. Open Benefit Protection Issues

1) The statute is limited to retirement plans of corporations, which would seem to exclude most government plans, which are not established or maintained by corporations.

2) The statute is also applicable under the general rule to trust-funded plans maintained by tax-exempt 501(c)(3) trusts. The issue will be the extent to which plan participants are treated creators of the plan trust, and thus not subject to the statute's creditor protections.

But see Fordyce v. Fordyce, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974) (holding, before the adoption of this provision, voluntary employee contributions to a corporate pension plan are treated as self-settled trust contributions but employer contributions are not so treated)

3) The statute does not apply to annuity plans because they are not exempt under Code section 401(a). For example, many private plans are annuity plans exempt under Code section 403(a), except perhaps to rollovers from such plans, but not contributions to such plan. May one argue that by permitting rollovers from a 403(a) plan the statute gave similar protection to employer and employee contributions for 403(a) plans, which are generally annuity plans established by private employers?

4) The statute does not mention 403(b) plans, which are annuity plans used by 501(c)(3) entities and local and state governments. Thus, such plan benefits are not protected by this statute.

5) The statute does not describe how to determine whether a trust funding a plan is tax-qualified under Section 401(a), and who has the burden of making such a showing. To what extent is a determination letter of qualification from the Internal Revenue Service ("IRS") relevant in view of the fact that tax qualification requires both form compliance and operational compliance. IRS determination letters consider only the former.

Cf. Private Capital Investments LLC v Schollard, 2014 U.S. Dist. LEXIS 79103 (W.D.N.Y. June 10, 2014) (retirement plan does not qualify under Code § 401(a) because distributions violated the qualification requirements; thus, plan benefits were not eligible for the N.Y. C. P. L. R. § 5205(c)(2) exemption)

D. Protections for Life Insurance and Annuity Benefits

N.Y. Ins. L. § 3212. Exemption of proceeds and avails of certain insurance and annuity contracts

(b)

(1) If a policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable otherwise to a third person, *such third person shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting the insurance.*

(2) If a policy of insurance has been or shall be effected upon the life of another person in favor of the person effecting the same or made payable otherwise to such person, the latter shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts *of the person insured. If the person effecting such insurance shall be the spouse of the insured, he or she shall be entitled to the proceeds and avails of such policy as against his or her own creditors, trustees in bankruptcy and receivers in state and federal courts.*

(3) If a policy of insurance has been or shall be effected by any person on the life of another person in favor of a third person beneficiary, or made payable otherwise to a third person, such third person shall be entitled to the proceeds and avails of such policy *as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person insured and of the person effecting the insurance.*

(d)

(1) The benefits, rights, privileges and options which, under any annuity contract are due or prospectively due the annuitant, who paid the consideration for the annuity contract, *shall not be subject to execution.*

(2) The annuitant shall not be compelled to exercise any such rights, powers or options contained in the annuity contract, nor shall creditors be allowed to interfere with or terminate the contract, except as provided in subsection (e) hereof and except that *the court may order the annuitant to pay to a judgment creditor or apply on the judgment in installments, a portion of such benefits that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if*

dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders.

(3) The benefits, rights, privileges or options accruing under such contract to a beneficiary or assignee shall not be transferable nor subject to commutation. If the benefits are payable periodically or at stated times, *the same exemptions and exceptions contained herein for the annuitant shall apply with respect to such a beneficiary or assignee.*

(e)

(1) *Every assignment or change of beneficiary or other transfer is valid, except in cases of transfer with actual intent to hinder, delay or defraud creditors, as defined by article ten of the debtor and creditor law. In such cases creditors shall have all the remedies provided by such article ten.*

(2) (A) Subject to the statute of limitations, *the amount of premiums or other consideration paid with actual intent to defraud creditors* as provided in article ten of the debtor and creditor law, together with interest on such amounts, shall enure to the benefit of creditors from the proceeds of the policy or contract.

(f) This section shall likewise apply to group insurance policies or annuity contracts, to the certificates or contracts of fraternal benefit societies, and to the policies or contracts of cooperative life and accident insurance companies.

Conclusions from statutory text:

1) Creditors of the insured are not entitled to any part of the life insurance proceeds unless the insurance premiums were paid with fraudulent intent in which case the creditors are entitled to the premiums plus interest from the proceeds.

In the Matter of King, 196 Misc. 2d 250 (Sur. Ct. Broome Co. 2003)
(Beneficiary designation for non-probate assets, including life insurance, did not make these assets subject to the credit union's claim against the decedent because the decedent was not rendered insolvent by the act of designating a beneficiary of these non-probate assets, and the estate was not rendered insolvent by paying the assets, because they were never part of the estate.

2) The creditors of person effecting the insurance, if such person differs from the insured may obtain the life insurance proceeds, unless the person effecting the insurance is the spouse of the insured.

Travelers Ins. Co. v. Spadaccini, 95 Misc. 2d 699 (Civ. Ct. Queens Co. 1978) (discussing beneficiary rights to life insurance proceeds against beneficiary's creditor under E.P.T.L. § 7-1.5(a) when beneficiary is not both the insured's spouse and the one who effected the life insurance policy).

3) Although creditors of a creator of a life insurance policy are not thereby entitled to life insurance proceeds, courts often enforce assignments of policies as security for a loan to the extent of the outstanding loan at the time of the creator's death. *Males v. New York Life Insurance Co.*, 48 A.D.2d 50 (N.Y. App. Div. 3rd 1975).

4) If the initial annuitant is the person purchasing the annuity, then creditors of the annuitant or of the annuitant's beneficiary may not execute judgment against the annuity unless the premiums were paid with fraudulent intent in which case the creditors entitled to premiums plus interest from the proceeds. However, the court may order the annuitant to pay to a judgment creditor or apply on the judgment in installments, a portion of such benefit that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him.

Insurance Department, Opinions of General Counsel, Opinion Number 02-10-20, 02-04-27, and 03-03-22 (confirming that creditors may obtain annuity distributions either in case of fraud or with court orders described above)

5) The annuity protection is available for purchasers of group annuity contracts, such as those purchased by pension plan sponsors. However, the statute does not clarify the extent to which plan participants are considered the annuity purchasers (creators) who are protected from the execution of judgments by their creditors. For annuities, unlike trusts, such creator characterization leads to creditor protection.

Cf. Fordyce v. Fordyce, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974) (holding before the adoption of the explicit pension plan inclusion in N.Y. E. P. T. L. §§ 5205(c) and (d) voluntary employee contributions treated as self-settled trust contributions and subject to creditor claims, but employer contributions are not so treated).

E. Protections of Government Pension Plan Benefits

N.Y. EDUC. § 524. Exemption from taxation and execution

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

The right of a teacher to a pension, an annuity, or a retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this article, and the moneys in the various funds created hereunder, are hereby exempt from any state or municipal tax, and shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as in this article specifically provided [There are no such specific provisions].

Conclusions from statutory text and case-law:

1) This governs the New York State Teachers' Retirement System benefits.

2) This statute provides implicit post-distribution protection unlike the explicit protection provided by C.P.L.R. § 5205(d) for benefit payments from many private plans.

In re Estate of King, 196 Misc. 2d 250, 764 N.Y.S. 2d 519 (Sur. Ct. Broome Co. 2003) (commercial lender may not enforce judgment against distributed teacher benefits)

Cf. Anthis v Copland, 270 P.3d 574, 173 Wn.2d 752 (Wash. 2012) (similar Washington law does not protect distributed public pension benefits against the enforcement of a judgement for a wrongful death).

The issues in such cases are highlighted in an early 20th century decision and dissent regarding a comparable provision in workers' compensation law.

Workers' Compensation Law § 33 Assignments; exemptions

Compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter [there seem to be no such exceptions], and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived provided, however, that compensation or benefits other than payments pursuant to section thirteen of this chapter shall be subject to application to an income execution or order for support enforcement pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules. . . .

Conclusions from statutory text:

1) The statute and relevant chapter sections have not changed dramatically since its 1913 introduction. In 1928, the statute contained no clause explicitly exempting the enforcement of support obligations.

Surace v. Danna, 161 N.E. 315 (N.Y. 1928) (holding that the workers compensation limitation on creditor claims prohibits enforcement of a creditor's judgment against a lump sum award which the debtor had deposited in a bank). The decision and dissent illustrate the two conflicting approaches (equitable construction vs. literalism) used to determine the extent of a statutory limitations on the enforcement of creditor claims:

By concession the moneys due under the award would have been exempt from the pursuit of creditors before they reached the judgment debtor. The argument is, however, that they became subject to seizure the instant they were paid. If this is so, the exemption is next to futile. All that a creditor has to do is to obtain an order in supplementary proceedings, containing, like the order in this proceeding, the usual provision restraining the judgment debtor from making any transfer or disposition of his property until further directions in the premises. Then, as the installments of an award are paid, the injunction will tie them up. They may be appropriated to the last dollar in satisfaction of an ancient debt. They will no longer be a fund for the support of the indigent and helpless.

So narrow a construction thwarts the purpose of the statute. The Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability . . .

The exemption must have a meaning consistent with the policy behind it. Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity

Id., at 315-16 (Court Opinion, J. Cardozo)

No property is exempt from execution unless some statute makes it so, and the burden is upon the person claiming exemption to bring his property within some statutory exception. The question whether any one shall receive the privilege of escaping payment of a debt is one of policy and, therefore, one essentially for legislative action . . . **The compensation and benefits which are exempt are only those which are "due." The statute does not deal with those which have been paid. . . .**

The purpose of section 33 impresses me as directing a mode of procedure by which the State or the employer may be enabled to get rid of

compensation, which is due and payable, simply by paying it over to the person to whom it has been awarded or to whom it is payable under the statute. The agent, public or private, who makes the disbursement shall not be harassed or obstructed by the imposition of a duty to determine at his peril the validity of assignments, third party orders, executions or any kind of document purporting to constitute legal process.

Id. at 317-18 (Dissenting Opinion (J. O'Brien))

Cf. Board of Educ. of City of N.Y. v Treyball, 63 N.Y. 2d 980 (N.Y. 1984) (Board of Education could enforce judgement against employee who had lawfully retained Board funds against the funds distributed to the employee by the NYC Employees Retirement System, whose provisions are similar to the state teachers system, as contribution refunds, but not against distributed retirement allowances). Thus, NY courts make fine linguistic distinctions, particularly when equitable considerations seem to weigh in favor of the creditor.

F. Domestic Relations Laws Override Debtor Protections

The equitable distribution law set forth in NY Dom Rel § 236 -B, which governs marital dissolutions, explicitly takes into account retirement benefits and life insurance benefits.

Kaplan v. Kaplan, 82 N.Y.2d 300 (N.Y. 1993) (holding that property settlements and separation agreements pursuant to the New York equitable distribution law override the anti-assignment provision of N.Y. EDUC. L. § 524).

G. Family Support Obligations Override Debtor Protections

N.Y. C. P. L. R. § 5441. Income execution for [family] support enforcement

5. "Income payor" includes:

(i) the auditor, comptroller, trustee or disbursing officer of *any pension fund, benefit program, policy of insurance or annuity*;

(ii) the state of New York or any political subdivision thereof, or the United States;
and

(iii) *any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.*

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including *wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.*

Conclusions from statutory text:

1) The statute makes no distinction between public and private payors, or between earned income and unearned income. The statute provides that family support obligations may be enforced in the same way against current compensation, such as wages, or against deferred compensation, such as retirement benefits.

H. NY State Criminal Law Limited Override of Debtor Protections

There is no general criminal law exception from debtor-creditor collection rules. As with the tax law, New York state criminal law relies on ordinary civil procedures for the collection of fines, restitution and reparation.

See generally N.Y. Crim Proced. L. § 420.10.6 Collection of fines, restitution or reparation relies on civil procedures and NY Penal. L. § 60.27.3 Restitution and Reparation.

However, in the case of serious crimes, judgments for payments to crime victims may be enforced without regard to the usual debtor-creditor provisions.

N.Y. EXEC § 632-a: Crime victims [Limited Criminal Law Exception]

1.(c) "Funds of a convicted person" means all funds and property received from any source by a person convicted of a specified crime, or by the representative of such person as defined in subdivision six of section six hundred twenty-one of this article *excluding child support and earned income, where such person [is in criminal justice system] . . . :*

3. . . .Notwithstanding any other provision of law to the contrary, *a judgment obtained pursuant to this section shall not be subject to execution or enforcement against the first one thousand dollars deposited in an inmate account to the credit of the inmate pursuant to section one hundred sixteen of the correction law or in a prisoner account to the credit of the prisoner*

pursuant to section five hundred-c of the correction law. *In addition, where the civil action involves funds of a convicted person and such funds were recovered by the convicted person pursuant to a judgment obtained in a civil action, a judgment obtained pursuant to this section may not be subject to execution or enforcement against a portion thereof in accordance with subdivision (k) of section fifty-two hundred five of the civil practice law and rules.*

Matter of New York State Off. of Victim Servs. v Raucci, 97 A.D 3d 235, 946 N.Y.S.2d 657 (N.Y. App. Div. 3rd Dept. 2012), revd on other grounds 20 NY3d 1049, 985 N.E.2d 917 (2013) (holding that a New York State pension of a person convicted of arson and weapons possession for detonating explosive devices at people’s homes may be used to compensate victims of the crimes because the only exception from the available funds were \$ 1,000 and 10% of specified civil recoveries. Thus, it is reasonable to presume that the prohibition of the application of legal process to state pensions of Retirement and Social Security Law § 110 was inapplicable.) The court did not discuss why the earned income exclusion of N.Y. Exec. L. § 632-a for imprisoned convicts, such as Raucci, was inapplicable.

I. NY State Tax Law Does Not Override Debtor Protections

There is no state tax exception from the debtor-creditor collection rules, although the finance department may rely on warrants that it may issue rather than waiting for court judgments.

NY Tax L. § 1141 (Proceedings to Recover Tax)

The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner.

Conclusions from statutory text:

1) The statute refers to the same enforcement procedures as those applicable to civil judgments by private parties. The only distinction is that the state may issue a warrant which has the same effect as a court judgment.

N.Y. C. P. L. R. § 5232. Levy upon personal property

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

(a) Levy by service of execution. The sheriff or support collection unit designated by the appropriate social services district shall levy upon any interest of the judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. *In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of this article. . . .*

J. Debtor Protections for Beneficiaries of Retirement, Annuity, and Life Insurance Benefits from Debtors of the Benefit Creators

A New York State law explicitly addresses the rights of beneficiaries to retirement, annuity and life insurance benefit that seeks to combine all of the above laws.

N.Y. E. P.T.L. § 13-3.2. Rights of beneficiaries of pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts and of beneficiaries of annuities and supplemental insurance contracts

(a) If a person is entitled to receive (1) payment in money, securities or other property under *a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust* or (2) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under *an annuity or pure endowment contract or a policy of life, group life, industrial life* or accident and health insurance, or if a contract made by such an insurer relating to the payment of proceeds or avails of such insurance designates a payee or beneficiary to receive such payment upon the death of the person making the designation or another, *the rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy.*

(b) This section does not limit article 10 of the debtor and creditor law [*Fraudulent Conveyances*], articles 10-C and 26 of the tax law [Estate Tax], or 2-1.8 [Estate Tax Apportionment], 5-1.1-A [*Right of Election*] or 13-3.6 [*Fraudulent Transfers*].

Conclusions from statutory text:

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

1) The statute has a traditional exception for family law, albeit for marital rights rather than domestic relations rights, fraudulent behavior, and taxes assessed on the transfer at death. Otherwise the beneficiary seems fully protected from the creditors of the creator of the benefit.

2) Unlike **N.Y. C. P. L. R. § 5205** or **N.Y. EST. POWERS & TRUSTS § 7-3.1**, this section is not limited to benefits from trusts.

3) The statute seems to include Section 403 pension plans with annuities, non-qualified pension plans, such as those for executives, and applies to beneficiaries of non-owner-employees.

4) The statute includes no protections of the beneficiary from the beneficiary's creditors, but from the decedent's creditors. The statutory protections are limited to obligations that arise from a "statute or rule of law governing the transfer of property by will, gift or intestacy." However, the beneficiary's creditor obligations are not such obligations.

In the Matter of King, 196 Misc. 2d 250 (Sur. Ct. Broome Co. 2003) (Section 403(b) plan survivor benefit may not be wrested away from the beneficiary by decedent's creditors).

5) The statute governs IRA designations.

Freedman v. Freedman, 116 F. Supp. 2d 379 (E.D. N.Y. 2000) (N.Y. E. P.T.L. § 13-3.2. governs IRA designations, although "a will that specifically disposes of an unambiguously identified IRA or insurance policy may effectively override a beneficiary designation executed prior to the will.")

II. Federal Non-Bankruptcy Debtor-Creditor Laws Other than ERISA Governing Retirement, Life Insurance and Annuity Benefits

Federal laws override conflicting state and local laws. Thus, laws for the collection of federal debts override state and local law protection laws, but do not override laws for the collection of federal debts. There are three kinds of federal debtor-creditor laws, other than ERISA and bankruptcy laws. First, there are laws setting forth protections for specified federal benefits, such as federal employees life insurance benefits or social security benefits. These protections often extend to distributed benefits, although there is uncertainty about the extent of this protection. Second, there are laws addressing how federal debts may and may not be enforced. Third, there are laws that override the specific and general protection laws for equitable reasons. There are three kinds of equitable overrides. First, are family and domestic relations law

protections. Second, are laws to impose criminal sanctions. Third, are protections for debts to the federal government. For convenience, much of the discussion of government benefits will focus on the Civil Service Retirement System.

A. Supremacy Clause

U.S. CONST. art. VI, cl. 2.

This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be *the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Conclusions from statutory text:

The Supremacy Clause implies that federal laws for the collection of federal debt supersede conflicting state law restrictions and federal laws for the protection of federal benefits supersede conflicting state law collection mechanisms. The difficulty is identifying when there is a conflict between the state and federal laws. Some federal statutes explicitly allow state laws to address specified debtor-creditor issues.

B. Federal Benefit Statutes

1. Explicit Prohibitions on the Enforcement of Claims Other than those of the United States Prevent the Enforcement of State Law Creditor Claims

5 U.S.C. § 8346. Exemption from legal process; recovery of payments [Civil Service Retirement]

(a) *The money mentioned by this subchapter [5 U.S.C. §§ 8331 et seq.] is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title [5 U.S.C. § 8345 assignment considered appropriate by the government or domestic relations orders], or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.*

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

Conclusions from statutory text:

1) The statute, like N.Y. EDUC. L. § 524, does not explicitly address the treatment of distributed benefits.

In re Anderson, 410 B.R. 289 (Bankr. W.D. Mo. 2009) (holding that distributed benefits not subject to execution and arguing that this finding is consistent with the most recent case-law).

2) The prohibition on assignments and legal process may explicitly be overridden by other federal laws but only if the statute so provides, although there is no requirement that the other federal statute explicitly reference the prohibition section.

38 U.S.C. § 5301. Nonassignability and exempt status of [veteran's] benefits

(a) (1) *Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.*

(b) [*U.S. shall not collect by setoff or otherwise from any benefits payable any claim other than a claim against a beneficiary for overpayments, illegal payments, or for annuity payment premiums described in 10 U.S.C. §§ 1431 et seq.*]

Conclusions from statutory text:

1) The statute, unlike N.Y. EDUC. § 524, explicitly addresses the treatment of distributed benefits. They are fully protected from claims of creditors other than the federal government unless specifically authorized by federal law.

See also Porter v. Aetna Casualty & Surety Co., 370 U.S. 159 (1962) (holding a veteran's benefits were exempt from executions after deposit in federal savings and loan ass'n and declaring that such legislation should be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof.") The Supreme Court thus took an approach similar to that of Judge Cardozo in *Surace*, who had therein distinguished *McIntosh v Aubrey*, 185 U.S. 122 (1902) (the predecessor

legislation protecting “sum of money due, or to become due, to any pensioner,” did not protect from execution property purchased with veterans benefits).

2) The restrictions on the enforcement of other federal claims arise not from the general alienation prohibition but the later provisions prohibiting the federal government from seeking payment of claims other than for a small explicit list.

42 U.S.C. § 407. Assignment; amendment of section.
[Social Security Act § 207]

(a) The right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable or rights existing under this title* [42 U.S.C. §§ 401 et seq.] *shall be subject to execution, levy, attachment, garnishment, or other legal process*, or to the operation of any bankruptcy or insolvency law.

(b) *No other provision of law*, enacted before, on, or after the date of the enactment of this section [enacted April 20, 1983], *may be construed to limit, supersede, or otherwise modify* the provisions of this section except to the extent that it does so by *express reference to this section*.

Conclusions from statutory text:

1) The statute, unlike **N.Y. EDUC. § 524**, explicitly addresses the treatment of distributed benefits.

2) The prohibition on federal overrides of the prohibitions on assignments and legal process is more stringent than that for civil service benefits. The prohibitions may only be overridden by other federal laws that expressly reference not only social security benefits, but the section with those prohibitions.

2. Explicit Prohibitions on the Enforcement of Claims are Not Needed to Prevent the Enforcement of State Law Creditor Claims

5 U.S.C. § 8705. Death claims; order of precedence; escheat

(a) Except as provided in subsection (e) [pursuant to domestic relations order received by the appropriate office before the death of the insured], the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title [5 U.S.C. §§ 8101 et seq.] as provided by section 8706(b) of this title [5 U.S.C. § 8706(b)], in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.

Second, if there is no designated beneficiary, to the widow or widower of the employee. . .

Conclusions from statutory text and case-law:

1) Life insurance benefits provided to civilian employees of the federal government under the Federal Employees' Group Life Insurance Act of 1954 ("FEGLIA") may be assigned. 5 U.S.C. § 8706(f). However, absent such an assignment state-law creditors of a FEGLIA participant beneficiary do not have the right to obtain the death benefits from the plan because the designation provisions of 5 U.S.C. § 8705 preempts any contrary state law.

See Hillman v. Maretta, 569 U.S. ___, 133 S.Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) (holding that revocation upon divorce state laws may not be used to wrest plan benefits from the plan designee). *Hillman* implies that FEGLIA and the Servicemen's Group Life Insurance Act, the federal military death benefit provisions, similarly preempt any benefit claims arising from state-law contract claims. *See generally* Albert Feuer, *The Supreme Court Finds Federal Life Insurance Rules Preempt State Law in Hillman v. Maretta and Reinforce ERISA Protections for ERISA Plan Participants and Beneficiaries*, 32 TAX MGMT. WEEKLY J. 1040 (Aug. 5, 2013) abstract and link to full article available at <http://ssrn.com/abstract=2306911> (last visited April 15, 2015).

C. Standard Equitable Exceptions

1. Domestic Relations and Marital Rights Exception

42 U.S.C. § 659. Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations.

(a) **Consent to support enforcement.** Notwithstanding any other provision of law (including section 207 of this Act [42 U.S.C. § 407] and section 5301 of title 38, United States Code) [*Veteran's benefits*], effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 466 [42 U.S.C. § 666(a)(1), (b)] and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 U.S.C. §§ 651 et seq.] or by an individual obligee, *to enforce the legal obligation of the individual to provide child support or alimony.*

Deference is not limited to support obligations for some federal benefits. In particular, such obligations may be collected from civil service pensions [5 U.S.C. §§ 8437(e)(2) and 8346(a)], military pensions [10 U.S.C. § 1408], federal thrift insurance plans [5 U.S.C. § 8435] FEGLIA life insurance [5 U.S.C. § 8705(e) and railroad retirement pensions [45 U.S.C. § 231m]. Furthermore, 5 U.S.C. § 8706(e) authorizes the assignment of FEGLIA life insurance policy to a person specified in court order]

2. No Fraudulent Transfer Provisions

There appear to be no fraudulent transfer provision preventing an insolvent employee from making plan contributions to the Federal Thrift Savings Plan or paying off a loan from the plan, which is a federal retirement plan permitting employee contributions [5 U.S.C. § 8432] and participant loans. Nor are there any restrictions on FEGLIA life insurance elections by insolvent employees [5 U.S.C. §§ 8714a-c].

3. Criminal Law Provisions

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid [Federal] fine

(a) Enforcement. The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (*including section 207 of the Social Security Act* [42 U.S.C. § 407]), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that--

(1) *property exempt from levy for taxes* pursuant to section 6334(a) (1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 [26 U.S.C. § 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12)] *shall be exempt from enforcement of the judgment under Federal law*;

(2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law [bankruptcy exemptions are inapplicable]; and

(3) *the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.* [limits garnishments to the lesser of (25% of the debtor's disposable earnings, the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 U.S.C. § 206(a)(1)] [\$7.25/hour as of March 1, 2015] in effect when the earnings are payable).

Conclusions from statutory text:

1) The statute overrides all the federal debtor protections for specific federal payments including explicitly doing so for social security benefits. However, the statute incorporates the general protections of the Consumer Credit Protection Act.

2) The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A-3664 provides that restitution payments for a wide range of crimes may be enforced using these criminal fine provisions. See 18 U.S.C. § 3664(m). *But see* William M. Acker, Jr, *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After Southern Union v. United States?* , 64 U. Ala. L. Rev. 803 (2013) (arguing that the restitution law is unconstitutional because the law relies on a preponderance standard imposed without a jury).

3) The exemptions appear to be a subset of those available under the federal tax collection provisions. However, at least one cited items is not exempt under those provisions. Railroad retirement benefits are exempt under Code § 6334(a)(6), but made subject to tax collections in part pursuant to Code §§ 6331(h)(2)(C) and 6334(f).

4. Federal Tax Collection Mechanisms and Their Limits

Code § 6334. Property exempt from levy.

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

(a) Enumeration. There shall be exempt from levy--

(1) Wearing apparel and school books. Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(6) *Certain annuity and pension payments.* Annuity or pension payments under the *Railroad Retirement Act*, benefits under the *Railroad Unemployment Insurance Act*, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code [10 U.S.C. §§ 1431 et seq. Military pay].

(8) Judgments for support of minor children. If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income. Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d) [standard deductions plus personal exemption].

(c) No other property exempt. *Notwithstanding any other law of the United States (including section 207 of the Social Security Act [42 U.S.C. § 407]), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).*

(f) Levy allowed on certain specified payments. *Any payment described in subparagraph (B) or (C) of section 6331(h)(2) [26 U.S.C. § 6331(h)(2)] shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h) [26 U.S.C. § 6331(h) 15% garnishment limit].*

Code § 6331. Levy and distraint.

(h) Continuing levy on certain payments.

(1) In general. If the Secretary approves a levy under this subsection, the effect of such levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. *Notwithstanding section 6334*

[26 U.S.C. § 6334], such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) Specified payment. For the purposes of paragraph (1), the term "specified payment" means--

(A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

Conclusions from statutory text:

1) The statute provides that the only property against which federal taxes may not be enforced must be included on a list set forth explicitly in Code § 6334(a). Moreover, even some of that exempt property may still be subject to levy pursuant to Code § 6334(f).

2) The IRS right to withdraw funds, like that of creditors of the creator of a self-settled trust, is limited to those possessed by the debtor.

U.S. v. National Bank of Commerce, 472 U.S. 713 (1985) (holding that IRS by asserting a tax levy steps into shoes of a taxpayer and may obtain bank account proceeds that the taxpayer could obtain)

D. Federal Non-Tax Collection Mechanisms

31 § 3716. Administrative Offset [of Federal Debts Against Federal Payments]

(c)(1)

(A) Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, the Department of Health and Human Services, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.

(B) An agency that designates disbursing officials pursuant to section 3321(c) of this title [31 U.S.C. § 3321(c)] is not required to certify claims arising out of its operations to the Secretary of the Treasury before such agency's disbursing officials offset such claims.

(C) Payments certified by the Department of Education under a program administered by the Secretary of Education under title IV of the Higher Education Act of 1965 [20 U.S.C. §§ 1070 et seq., *i.e.*, student loan disbursements] shall not be subject to administrative offset under this subsection.

(3)

(A)

(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)), section 413(b) of Public Law 91-173 (30 U.S.C. 923(b)), and section 14 of the Act of August 29, 1935 (45 U.S.C. 231m)), except as provided in clause (ii), all payments due to an individual under--

(I) the Social Security Act [42 U.S.C. §§ 301 et seq.],

(II) part B of the Black Lung Benefits Act [30 U.S.C. §§ 921 et seq.], or

(III) any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits [those benefits that are not the social security counterpart]), shall be subject to offset under this section.

(ii) An amount of \$ 9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection. In applying the \$ 9,000 exemption, the disbursing official shall--

(I) reduce the \$ 9,000 exemption amount for the 12-month period by the amount of all Federal benefit payments made during such 12-month period which are not subject to offset under this subsection; and

(II) apply a prorated amount of the exemption to each periodic benefit payment to be made to the debtor during the applicable 12-month period.

For purposes of the preceding sentence, the amount of a periodic benefit payment shall be the amount after any reduction or deduction required under the laws authorizing the program under which such payment is authorized to be

made (including any reduction or deduction to recover any overpayment under such program).

(B) The Secretary of the Treasury shall exempt from administrative offset under this subsection payments under means-tested programs when requested by the head of the respective agency. The Secretary may exempt other payments from administrative offset under this subsection upon the written request of the head of a payment certifying agency. A written request for exemption of other payments must provide justification for the exemption under standards prescribed by the Secretary. Such standards shall give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program. The Secretary shall report to the Congress annually on exemptions granted under this section.

Conclusions from statutory text:

1) The statute does not explicitly limit the amount that may be offset from government payments other than the \$9,000 annual. In fact, no more than 15% will be withheld from a monthly payment. 31 C.F.R. § 285.4(e)(1). However, *cf.* 31 C.F.R. § 901.8 (a) declaring that “Whenever feasible, agencies shall collect the total amount of a debt in one lump sum.”

2) The statute has no explicit exemption for government payment programs other than means-tested ones and seems to apply to all federal non-tax debts. However, the head of different agencies may request that the exemptions that the Secretary of Treasury be expanded and other laws may provide for an exemption. Veterans’ benefits and certain railroad retirement benefits are explicitly exempted under 31 C.F.R. §§ 285.5(e)(2). A complete list of the exclusions as of April 2013 appears at the schedule entitled, TREASURY OFFSET PROGRAM, Payments Exempt from Offset by Disbursing Officials (Non-tax Debt Collection) available at <http://www.fms.treas.gov/debt/dmexmpt.pdf> (last visited April 15, 2015). There is no exclusion for social security benefits. In fact, there is a regulatory example of an offset against social security benefits. 31 C.F.R. § 285.4(e)(3). There is no mention of an exclusion for civil retirement benefits, for federal thrift benefits, or military retirement benefits to non-beneficiaries, although the Treasury refers to one for survivor annuity benefits for members of the military, which unlike the other retirement benefits limits offsets for beneficiaries to overpayments of such benefits. 10 U. S. C. § 1450(I) and (I)(3). In contrast, in April 2014 a regulation was issued providing that the offset procedure is applicable to federal thrift plan payments. 5 C.F.R. 1639.60

31 § 3720D. [Administrative Wage] Garnishment [of non-Federal Payments]

(a) Notwithstanding any provision of State law, the head of an executive, judicial, or legislative [federal] agency that administers a program that gives rise to a

delinquent nontax debt owed to the United States by an individual may in accordance with this section garnish the disposable pay of the individual to collect the amount owed, if the individual is not currently making required repayment in accordance with any agreement between the agency head and the individual.

(b) . . . (1) *The amount deducted under this section for any pay period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted with the written consent of the individual.*

(g) For the purpose of this section, the term "disposable pay" means that part of the compensation of any individual from an employer remaining after the deduction of any amounts required by any other law to be withheld.

Conclusions from statutory text:

1) The statute provides a garnishment procedure for federal debts which would seem to override all the state-law debtor-creditor protections, such as the prohibition on the enforcement of creditor claims. However, the statute does not appear to be applicable to retirement, annuity and life insurance benefits.

2) There is a similar statute that provides an alternative procedure for the enforcement of federal student loan obligations. 20 U.S.C. § 1095a. It is even clearer that the mechanism is restricted to current employee compensation because no deductions may be made thereunder until a debtor who involuntarily lost his job is again employed continuously for at least twelve months.

3) Thus, these federal claims would be enforced in the usual manner of federal judgment, *i. e.*, either in the state courts pursuant to Federal Rule of Civil Procedure 60, or in the federal courts pursuant to Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 *et. seq.* Using the state courts would bring in the state exempt property rules, including those applicable to retirement, annuity and life insurance benefits. Using the federal courts would give the debtor the opportunity to invoke those same rules. 28 U.S.C. § 3014(a). However, this law permits the tax collection procedures, and the Mandatory Victim Recovery Act. Both federal statutes disregard state debtor exemptions. 28 U.S.C. §§ 3001(b) and 3003(b).

4) Only 15% limit of the debtor's disposable income is subject to garnishment under this statute, which limit is not applicable to the federal offsets against federal payments.

III. ERISA non-Bankruptcy Debtor-Creditor Law

Those ERISA retirement plans which ERISA requires to provide spousal survivor benefits may not permit the alienation or assignment of benefits. Such plans must disregard state-law creditor attempts to obtain benefit payments, other than certain domestic relations orders. It is unclear to what extent federal creditors may compel the plan to make benefit payments to the creditor. It is unclear whether ERISA, like the governing federal and local retirement plans, generally prevents creditors from reaching distributed plan benefits. It is unclear whether a creditor of a participant in an ERISA plan other than a Spousal Survivor Benefit may compel the plan to make the benefit payments to the creditor of the participant or of the beneficiary.

A. ERISA Background

The Employee Retirement Income Security Act of 1974, as amended (“ERISA”) governs welfare plans and pension plans other than those of governments, churches, or those limited to owner-employees. ERISA was enacted because existing federal and state law did not adequately protect employee benefit plan participants and beneficiaries. Thus, Title I of the Act, the focus of this material is entitled, “Protection of Employee Benefit Rights,” and provides the most protection for retirement benefits as suggested by words in the title of the statute.

ERISA welfare plans include health care-reimbursement plans, severance plans, and life insurance plans. ERISA does not require any of these plans to provide any spousal benefits.

ERISA pension plans either provide retirement income or result in the deferral of employee income until or after the termination of employment. There are three basic kinds of ERISA Pension Plans. First, are those pension plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. Such plans are often called Top-Hat Plans. Second, are small business plans, known as SIMPLE plans and Simplified Employee Pension plans, that are funded with IRAs rather than trusts or insurance contracts. Neither of these pension plans are required to provide any spousal survivor benefits. Third, are the vast majority of pension plans, which do not have such a limited purpose, and are subject to more extensive requirements. ERISA requires these latter plans to provide spousal survivor benefits, which ERISA permits to be waived with the consent of the spouse. Thus, such plans shall hereinafter be called Spousal Survivor Benefit Plans.

ERISA preempts any state law that “may now or hereafter "relate to any [ERISA] employee benefit plan," other than those explicitly or implicitly excluded. ERISA § 514(a). State law “includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.” ERISA § 514(c)(1). For example, there are explicit exclusions for Medicaid laws

and Qualified Domestic Relations Orders and implicit exclusions for health care regulation. However, there is considerable disagreement about the scope of this preemption.

ERISA preemption does not affect the New York state-law provisions preventing the enforcement of judgments. It may preempt some of the enforcement tools that state law permits, such as those for ERISA plans funded with annuities rather than trusts.

See generally Albert Feuer, “When Do State Laws Determine ERISA Plan Benefit Rights?” 47 J. MARSHALL L. REV. 145, 336-75 (Fall 2013), *available at* <http://ssrn.com/abstract=2440008> (Discussing preemption of state laws pertaining to ERISA benefits rights against creditors).

B. ERISA Provisions Relevant to Creditor Protections

ERISA § 502(a)(1)(B). Civil enforcement [for all ERISA plans]

- (a) Persons empowered to bring a civil action. A civil action may be brought--
 - (1) by a participant or beneficiary--
 - (A) for the relief provided for in subsection (c) of this section [to obtain required ERISA disclosures], or
 - (B) *to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;*
 - (3) by a participant, beneficiary, or fiduciary
 - (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or
 - (B) to obtain other appropriate equitable relief
 - (i) to redress such violations or
 - (ii) to enforce any provisions of this title or the terms of the plan;

Conclusions from statutory text:

1) The statute is applicable not only to all Spousal Survivor Benefit Plans, or to all ERISA pension plans, but to all ERISA plans.

2) This section gives participants and beneficiaries of an ERISA plan the right to enforce their benefit rights, if any, under the terms of the plan. There is no difference in the enforcement rights of participants and those of beneficiaries.

3) The question certified by the Supreme Court in *Hillman* implied that such language may be used to defeat debtor claims to compel the federal government to make FEGLIA life insurance payments to a person other than the participant's beneficiary.

4) The courts do not permit participants to use the equitable relief provisions of ERISA § 502(a)(3) to bring an ERISA benefit claim based on the terms of a plan, but only permits them to use ERISA § 502(a)(1)(B). The Supreme Court declared that such equitable relief is only available "for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), as it was in the case before the court in which a company misrepresented the employee benefit prospects of a corporate transaction. *See also* *Rochow v. Life Ins. Co. of N.A.*, 2015 U.S. App. LEXIS 3532, at *15-*18 Page (6th Cir. March 5, 2015) (discussing why 502(a)(3) claim is not permitted if make-whole relief for a benefit denial is obtained under 502(a)(1)(B))

ERISA § 206(d). Assignment or alienation of [Spousal Survivor Benefit] plan benefits.

(1) Each pension plan shall provide that *benefits provided under the plan may not be assigned or alienated.*

(3) [Domestic Relations Provision] (A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order [*i.e.*, such order is not effective], except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. *Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.* . . . [*i.e.*, such order is effective]

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this Act a beneficiary under the plan.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 303(a) of the Consumer Credit Protection Act [15 U.S.C. § 1673(a)].

(4) [Bad Conduct Provision] Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan . . . [pursuant to a judgment, order, decree or settlement with the Secretary of Labor to compensate the plan for damages inflicted on the plan by the participant]

Conclusions from statutory text:

1) The statute is often called the Alienation Prohibition because it prohibits the alienation of the benefits at issue.

2) The statute is not applicable to all ERISA plans, or to all ERISA pension plans, but only to those that are Spousal Survivor Benefit Plans.

3) The benefit rights created by a qualified domestic relations order are those of an owner of benefits not those of a person garnishing the benefits owned by another person.

4) By declaring in paragraph (4) that paragraph (1) does not apply to an order or offset the statute is determining that the order or offset is not rendered ineffective by the alienation prohibition in paragraph (1). The inapplicability of paragraph (1) does not suffice to make the order effective. That effectiveness requires that the plan terms require compliance with the order or offset. In the case of a qualifying domestic relations order, there is an ERISA mandate that the plan terms provides for such compliance. In contrast, the above bad conduct provision permits but does not require such a plan term.

5) The ERISA alienation prohibition language is similar to the language in the laws pertaining to federal retirement plans, to New York pensions, or to the spendthrift language of N.Y. Est. Powers & Trusts § 7-1.5 discussed above. However, the term alienated does not appear in any of the federal or other government pension laws that limit a creditor's rights to such benefits that explicitly limit the rights of a creditor of a plan participant or beneficiary. Treas. Reg. § 1.401(A)-13 which explains the significance of the ERISA phrase "may not be assigned or alienated" declares that the phrase includes a prohibition on the enforcement of creditor claims in the same manner as those other protective statutes. Treas. Reg. § 1.401(A)-13(b)(1).

ERISA § 404. Fiduciary Duties [For Most ERISA plans Other than Top-Hat Plans].

a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S.C. §§ 1103(c), (d), 1342, 1344], *a fiduciary shall discharge his duties* with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [for the protection of Employee Benefit Rights] and title IV [for the protection of Employee Benefit Rights in the course of a plan termination].

Conclusions from statutory text:

1) The statute is not applicable to all ERISA plans, although applicable to some ERISA pension and welfare plans. It does not apply to those pension plans that are Top-Hat Plans.

2) There is a distinction between the plan terms and the terms of the plan documents. To the extent, if any, that the terms of plan documents are not consistent with ERISA they are not plan terms and do not govern the plan. If there is such an inconsistency, it may be apparent how to correct the inconsistency and establish the plan terms. For example, if the documents of a Spousal Survivor Benefit Plan omit the alienation prohibition would be corrected by the addition of such a prohibition. On the other hand, there are no unambiguous solutions to some inconsistencies. For example, if the documents of a Spousal Survivor Benefit Plan's documents vesting provisions, there are no obvious choices of the plan practice was not consistent with an acceptable choice.

3) As discussed above ERISA benefits claim may only be based on ERISA 502(a)(1)(B) not on a violation of ERISA § 404(a)(1)(D).

C. Consensus and Discord About State-Law Garnishment of ERISA Plan payments

There is a consensus that ERISA preempts (1) the state-law garnishment of benefit payments from a Spousal Survivor Benefit Plan, and (2) those federal garnishment laws that, unlike the federal tax law, do not clearly override the alienation prohibition.

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)
(holding that ERISA does not permit a union to use the other relief provisions of a

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

federal statute to obtain restitution from a union official who embezzled union funds by compelling a Spousal Survivor Benefit Plan co-sponsored by the union to pay the official's plan benefits to the union). The Court declared that there were no equitable exceptions to the alienation prohibition as follows:

*As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress. *Id.* at 376-77*

There is considerable discord about the extent, if any, to which ERISA preempts the state-law garnishment of benefit payments from an ERISA plan that is not a Spousal Survivor Benefit Plan, such as a Top-Hat Plan (maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees), SIMPLE Plan, or a SEP Plan (covering almost all employees and funded with IRAs). If not, state creditor-debtor law discussed above governs.

The Supreme Court decisions are not easy to reconcile.

Cf. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) (holding that ERISA permits state law garnishments of ERISA benefit payments because the plan, a vacation plan, was not a Spousal Survivor Benefit Plan). Court relied on asserted lack of conflict between state-law garnishments and ERISA's requirements. There was no discussion of conflict between the garnishment of benefit payments and the ERISA § 502(a)(1)(B) requirement that benefit payments be made only to participants and beneficiaries set forth in the plan terms.

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) (holding that ERISA prevents state revocation upon divorce statutes from being used to direct plan make benefit distribution to a person other than the designated beneficiary). The Court therein referred the "core ERISA concern" of paying benefits in accord with the plan documents. *Id.* at 147. The plan terms may differ from the plan documents for two reasons. First, plan documents

are not required to establish and maintain an ERISA plan. Second, plan documents may include provisions not permitted by ERISA or omit those required by ERISA, whereas plan terms must be consistent with ERISA.

The *Egelhoff* majority opinion did not discuss explicitly *Mackey*, garnishments, but the dissenting opinion referred to *Mackey* and presented those decision's arguments that there is no direct conflict between the state law and ERISA. *Id.*, at 161.

Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan, 555 U.S. 285 (2009) (holding that ERISA plan must disregard a common-law waiver by beneficiary which was not consistent with the plan documents because ERISA plans may pay benefits only to the person specified in plan documents). Court relied on the conflict between the common-law contract obligation and the ERISA § 404(a)(1)(D) requirement for compliance with plan documents.

The unanimous *Kennedy* Court did not discuss *Mackey*, garnishments, or the conflict between a state-law benefit payment requirements and the ERISA § 502(a)(1)(B) requirement that benefit payments be made only to participants and beneficiaries set forth in the plan terms. However, the *Kennedy* Court observed that it had previously held that a state law inconsistent with the plan documents may not affect the distribution of plan benefits. *Id.*, at 302-03.

The lower court decisions consistently permit state law garnishments of plan benefit payments from ERISA plans that are not Spousal Survivor Benefit Plans.

Ret. Fund Trust of the Plumbing, Heating and Piping Ind. of S. Cal. v. Franchise Tax Bd., 909 F.2d 1266, 1281 (9th Cir. 1990) (ERISA permits state tax levies permitted against vacation benefit payments). This decision relies solely on *Mackey*

AFLAC v. Diaz-Vernon, Jr., 2012 U.S. Dist. LEXIS 73140 (M.D. Ga. May 25, 2012) (ERISA permits commercial creditor of Top Hat Plan participant to apply State-law garnishment to benefit payments). This decision relies solely on *Mackey*, which is used to find that ERISA preempts a state garnishment exemption for ERISA retirement plans.

Sposato v. First Mariner Bank, 2013 U.S. Dist. LEXIS 45806 (D.Md.. March 29, 2013) (ERISA permits commercial creditor of Top Hat Plan participant to apply State-law garnishment to benefit payments). This decision does not rely solely on *Mackey* but also mentions *Egelhoff* but disregards the *Egelhoff* mandate to follow the plan documents, which in this case include a benefit alienation prohibition.

D. Discord About Ability of Creditors to Wrest ERISA benefit payments from Plan Participants or Beneficiaries

There is considerable discord about the ability of creditors to wrest ERISA benefit payments from Plan participants or beneficiaries. The *Guidry* Supreme Court did not have to decide the issue. On remand the 10th Circuit ruled that ERISA did not protect distributed benefits, but ruled that the applicable Colorado law, like N.Y. C. P. L. R. § 5205, did. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994). None of the later Supreme Court decisions considered the issue. However, the Supreme Court has consistently protected distributed benefits that are governed by Federal law with the exception of some dicta.

If ERISA does not prohibit the wresting by creditors of benefits distributed pursuant to the plan terms, state law controls. *Cf. Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) (finding that a Colorado state law similar to N.Y. C. P. L. R. § 5205(d), rather than ERISA, prevented a creditor of the person entitled to an ERISA Spousal Survivor Benefit Plan benefit from wresting the distributed benefit from such person).

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 at 836 (1988) (declaring without explanation that the alienation prohibition for Spousal Survivor Benefit Plans “prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants”)

Boggs v. Boggs, 520 U.S. 833 (1997) (holding that ERISA prevents state community property law from being used to wrest benefit from a designated beneficiary). The Court therein stated:

The axis around which ERISA's protections revolve is [sic] the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted. The judgment of the Fifth Circuit is Reversed.

Id. at 854

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) (holding that ERISA prevents state revocation upon divorce statutes from being used to wrest benefit from a designated beneficiary). The Court therein referred the “core ERISA concern” of paying benefits in accord with the plan documents. *Id.* at 147.

The ambiguity arises from the Court decision in *Kennedy v. Plan Adm’r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285 (2009) that included footnote 10. The Court therein cited the Boggs axis quote and then expressed no opinion on whether state or federal law with respect to disclaimers could be used to wrest the benefit from the designated beneficiary). The impact of that quote on domestic relations disputes and non-domestic relations creditors is unclear. *See, e.g.*, Albert Feuer, *A Misguided Kennedy Offspring from the Third Circuit*, 31 TAX MGM’T WKLY. J. 564 (April 23, 2012) <http://ssrn.com/abstract=2047238> (last visited April 15, 2015)

However, the Court in *Hillman v. Maretta*, 569 U.S. ___, 133 S.Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) asked why there was a federal requirement that FEGLIA death benefits be paid to the employee’s duly designated beneficiary. The Court concluded that the purpose was not merely to “advance administrative convenience by establishing a clear rule to dictate where the Government should direct insurance proceeds,” but to assure that the duly designated beneficiary would obtain and keep the proceeds. Thus, the Court found that FEGLIA preempted a state-law revocation upon divorce statute that permitted the FEGLIA benefits to be wrested from the beneficiary. The *Hillman* decision and its reasoning were endorsed by the entire court in *U.S. v. Windsor*, 569 U.S. ___, 2013 U.S. LEXIS 4921 at *30-*31 (June 26, 2013) (holding same-sex partner may not be excluded from the definition of “spouse” as that term is used in federal statutes but distinguishing federal statutes, such as *Hillman*, that override state family/domestic relations laws, the dissent would have also permitted the federal rules at issue to override state domestic relations laws).

Open Issues:

- 1) Does ERISA prevent some or all creditors of a plan participant or beneficiary from wresting the amount of a cash payment distributed by a Spousal Survivor Benefit Plan?
- 2) If this is the case, and the participant’s estate is the participant’s designated beneficiary, does ERISA prevent some or all of the estate’s creditors from wresting the amount of a payment from the estate?
- 3) Does ERISA prevent some or all creditors of a plan participant or a beneficiary from wresting (a) an annuity contract distributed in satisfaction of a Spousal Survivor Benefit Plan’s benefit obligations or (b) the amount of a payment from such an annuity contract?
- 4) Does ERISA prevent some or all creditors of a plan participant or beneficiary from wresting the amount of a payment distributed by a Top-Hat Plan, a SIMPLE Plan or a SEP plan?

5) To what extent does ERISA overcome the two major deficiencies of N.Y. C. P. L. R. § 5205, the New York law about the execution of judgments? First, the law does not reference ERISA plans. It refers only to tax-qualified plans, which are harder to identify because tax-qualification may be affected by the plan's operations. In contrast, ERISA protections are available whether the plan is tax-qualified or not. Second, the law does not apply to annuity plans, and benefits from annuity contracts are far less protected under New York law than from tax-qualified plans.

D. Standard Equitable Exceptions

1. Domestic Relations Exception

For a Spousal Survivor Benefit Plan, domestic relations orders that are QDROs are treated as plan terms for the relevant plan. There is uncertainty whether domestic relations orders determine entitlements after benefits are paid from such a plan. For non-Spousal Survivor Benefit Plans, we don't know whether domestic relations orders that are QDROs are treated as plan terms for the relevant plan. Nor do we know what the QDRO rules consist of if applicable to an ERISA plan that is not a Spousal Survivor Benefit Plan. All these issues are discussed in more detailed in the materials addressing Family and Domestic Relations Law Rights.

2. No Fraudulent Transfer Provisions

There appear to be no fraudulent transfer provisions preventing an insolvent employee from making plan contributions to an ERISA plan or paying off a loan from the plan.

Cf. Planned Consumer Mktg. v. Coats & Clark, 71 N.Y.2d 442, 450 (N.Y.1988) (ERISA did not preempt judgment creditor's cause of action for turnover of funds deposited into a qualified ERISA plan, the creation of which was in violation of that New York law because the employer was insolvent when making the plan contribution) and *Majteles v. AVL Corp.*, 182 Misc. 2d 140, 145 (Sup. Ct. Kings Co. (1999)) (finding that (1) the Court of Appeals' decision in *Planned Consumer Mktg.* was no longer valid, and (2) a creditor of an ERISA plan participant may not collect the debt from the ERISA pension plan if it is a Spousal Survivor Benefit Plan, but may collect the debt from plan benefits distributed to the participant).

3. Tax Collection Mechanisms and Their Limits

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

ERISA plan benefits are subject to the federal tax collection mechanisms described above. Even if the Alienation Prohibition protects distributed benefits from Spousal Survivor Benefit Plans, it would not prevent the enforcement of judgments for state-tax obligations against distributed benefits. *See generally* Albert Feuer, “When Do State Laws Determine ERISA Plan Benefit Rights?” 47 J. MARSHALL L. REV. 145, 313-336 (Fall 2013), *available at* <http://ssrn.com/abstract=2440008> (Discussing preemption of state laws pertaining to ERISA benefits rights against tax authorities). However, as discussed above New York does not permit such enforcement against ERISA plan benefits subject to N.Y. C. P. L. R. § 5205.

4. Criminal Law Provisions

As with federal taxes, federal criminal fines and restitution claims may be enforced against ERISA plan benefits. ERISA does not preempt generally applicable criminal laws. Thus, New York criminal fines and N.Y. Exec. § 632-a. restitution payments may be enforced against ERISA plan benefits.

IV. Bankruptcy

Benefits from those ERISA retirement plans which ERISA requires to provide spousal survivor benefits, benefits from many local government retirement plans, and benefits from many federal retirement plans including social security may be excluded from the bankruptcy estates but must be considered in determining a payment plan that is part of a bankruptcy plan that does not simply liquidate the debtor’s assets, although some courts permit the exclusion of social security benefits. A debtor may choose whether to use the federal or state bankruptcy exemptions. Both protect interests in IRAs, tax-qualified plans, life insurance policies, and annuities, but the federal bankruptcy protections for IRAs do not apply to a debtor’s beneficiary interest in an IRA, except possibly for a surviving spouse, and may not apply to a debtor’s interest in a tax-qualified plan that is not an ERISA plan, such an owner-employee plan. Similarly, the state bankruptcy exemptions protect IRA and pension distributions, but the federal exemptions may not protect such distributions.

A. Basic Bankruptcy Principles

Individuals, who file for bankruptcy, may divide their property into three groups: (1) property that is excluded from the bankruptcy estate; (2) property that is in the bankruptcy estate but is exempt from creditor claims; and (3) property that is in the bankruptcy estate but is subject

to creditor claims. Exclusions are determined under federal law. Exemptions are determined under either the relevant state's rules augmented by some federal exemptions or, if permitted by the relevant state, an extensive list of federal exemptions.

Individual debtors generally may file under either Chapter 7 or Chapter 13 of the bankruptcy code. In the case of Chapter 7 the debtor's non-exempt assets, if there are any that are not worthless, are used by a bankruptcy trustee to pay the debts that are dischargeable in such a bankruptcy. There is no payment plan. In the case of Chapter 13, there is no trustee, but the debtor must enter into a good faith payment plan. Under such a plan the debtor uses its projected disposable income to pay off some of the non-dischargeable debt, reinstate a home mortgage or car loan, and may retain some of the exempt property.

However, a debtor may generally only use Chapter 7 if (1) the debtor's "current monthly income" for the six months period ending on the last day of the month prior to the filing is below the median income of a family the same size as the debtor's family; and if not, if (2) the debtor's projected re "disposable income" is below a specified level.

The bankruptcy law has extensive protections against fraudulent transfers by debtors. *See, e.g.*, 11 U.S.C. § 544(b) (trustee may avoid any transfers of interest of property by a debtor that is voidable under applicable law, such as state fraudulent conveyances law); *id.* § 547(b)(4)(a) (allowing a trustee to avoid certain transfers of interest by a debtor made on or within 90 days prior to the date of filing the petition for bankruptcy protection); *id.* § 548 (allowing a trustee to avoid any transfer of property made by a debtor within one year of filing a petition for bankruptcy protection if, among other things, the transfer was made with actual intent to defraud or was made in exchange for less than reasonably equivalent value while the debtor was insolvent).

See generally the bankruptcy links at <http://www.nolo.com/legal-encyclopedia/bankruptcy> (last visited April 15, 2015).

There are three key bankruptcy questions about retirement, life insurance and annuity benefits. Are interests in those benefits part of the debtor's "current monthly income" or "disposable income?" Are those benefits excluded from the bankruptcy estate? Are those benefits included in the bankruptcy estate but exempt property?

1. Debtor's Current Monthly Income that Determines Chapter 7 Eligibility

11 U.S.C. § 101. Definitions In this [Bankruptcy] title the following definitions shall apply:

(10A) *The term "current monthly income"--*

(A) *means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--*

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C. § 521(a)(1)(B)(ii)]; or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) [11 U.S.C. § 521(a)(1)(B)(ii)]; and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), *but excludes benefits received under the Social Security Act* [42 U.S.C. §§ 301 et seq.], payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18 [18 U.S.C. § 2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 U.S.C. § 2331]) on account of their status as victims of such terrorism.

Conclusions from statutory text:

- 1) The current monthly income includes all income received by the debtor during the appropriate six-month measuring period other than explicit exclusions.
- 2) There is no exclusion for irregular income.
- 3) The only retirement, life insurance and annuity income that is excluded are social security benefits. There is no exclusion for retirement income from other federal sources, local government sources, or private sources.

See *In re Moose*, 2012 Bankr. LEXIS 1175, 67 Collier Bankr. Cas. 2d (Bankr. M.D. N.C. March 20, 2012) (holding that current monthly income includes civil service retirement service benefits even though such benefits are paid in lieu of excluded social security benefits).

2. Debtor's Disposable Income that Determines Chapter 13 Eligibility

11 U.S.C. § 1325. Confirmation of [Chapter 13] plan

- (a) Except as provided in subsection (b), the court shall confirm a plan if--
- (1) the plan complies with the provisions of this chapter [11 U.S.C. §§ 1301 et seq.] and with the other applicable provisions of this title [11 U.S.C. §§ 101 et seq.];

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

(2) any fee, charge, or amount required under chapter 123 of title 28 [28 U.S.C. §§ 1911 et seq.], or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law; . . .

(b)

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)

(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) [11 U.S.C. § 548(d)(3)]) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4) [11 U.S.C. § 548(d)(4)]) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 U.S.C. § 707(b)(2) which in addition to setting forth abuse presumptions permit judges to override them if debtors show "special circumstances"],. . . .

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Conclusions from statutory text:

1) The current monthly income is used as the basis for the projected disposable income, which is used to establish a Chapter 13 payment plan.

2) Thus, social security payments which are excluded from the current monthly income are also excluded from the projected disposable income. Moreover, retirement income must also be included in the projected disposable income as well as the current monthly income.

See e.g., Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011) (holding that Social security income payments not included in disposable income although debtor decided to devote such funds to the payment of his debts)

3) There is no explicit exclusion for irregular income, although bankruptcy courts may account for known irregularities in the cash monthly income.

See, e.g., Hamilton v. Lanning, 560 U.S. 505, at 524 (2010) (holding that “a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.”)

4) There is division among the courts about whether the courts may require a good faith plan to include social security benefit payments

Cf. In re Canniff, 498 B.R. 213 (Bankr. S.D. Ind. 2013) (a good faith objection to a chapter 13 payment plan could not be based on the failure to treat social security as income available to pay debts because “[t]he manifest purpose of Congress in excluding Social Security benefits from income, like the purpose of exempting them from process, was to protect those benefits.”) and *Mains v. Foley*, 2012 U.S. Dist. LEXIS 23802 (W.D. Mich. Feb. 24, 2012) (there can be no per se rule about including or excluding social as income available to pay debts because “The good faith test simply requires a debtor to demonstrate good faith in its Chapter 13 plan proposal if the Debtor wishes to receive the benefits of Chapter 13.”)

B. Retirement, Life Insurance and Annuity Benefit Bankruptcy Exclusions

11 U.S.C. § 541. Property of the [bankruptcy] estate.

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

(a) The commencement of a case under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case.*

(c) (1) *Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the [bankruptcy] estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--*

(A) that restricts or conditions transfer of such interest by the debtor;

or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) *A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.*

1. To What Extent are Interests in Spendthrift Trusts Excluded from the Bankruptcy Estate?

A debtor's beneficial interests in a spendthrift trust is excluded from the debtor's bankruptcy estate, if the trust is not self-settled. Life insurance policies and non-qualified annuity policies, which are assets of a spendthrift trust, *i.e.*, one in which the interests may not be assigned or otherwise transferred, would be excluded from the debtor's bankruptcy estate. New York permits creditors to void transfers to trusts by the owner of the beneficial interests, N.Y. E. P. T. L. § 7-3.1. Thus, interests in such self-settled trusts would not be excluded from the bankruptcy estate. On the other hand, a participant's or a beneficiary's interest in a retirement plan is not generally assignable. Thus, it may not be similarly transferred to a spendthrift trust, even if the trust were not treated as self-settled. Nor is there a way to assign to a trust an IRA interest of a creator or beneficiary. Thus, it may not be similarly transferred to a spendthrift trust, even if the trust were not treated as self-settled. On the other hand, if a spendthrift trust is named as the beneficiary of a retirement plan or IRA, the beneficiary could exclude the interest from his bankruptcy estate, if any, because the interest would have not been self-settled.

2. To What Extent are ERISA Plan Benefits Excluded from the Bankruptcy Estate?

A debtor's beneficial interest in a Spousal Survivor Benefit Plan funded with a trust is excluded from the debtor's bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). It is not clear whether interests in distributed benefits or in other ERISA plans are also excluded.

Patterson v. Shumate, 504 U.S. 753 (1992) (benefits in trustee Spousal Survivor Benefit Plans are not included in estate because the alienation prohibition is enforceable under applicable non-bankruptcy law).

Yates M.D., P.C. Profit-Sharing Plan v. Hendon, 541 U.S. 1 (2004) (owner-employee, who is a Spousal Survivor Benefit Plan participant, may exclude interest in such plan from bankruptcy estate, but Court expressed no opinion of whether repayment of debtor's plan loan constituted a voidable preference [fraudulent transfer]).

Open Issues:

1) If the Alienation Prohibition is a restriction on the transfer of the debtor's ERISA beneficial trust interest that is enforceable under applicable non bankruptcy law, and the restriction protects distributed benefits from a Spousal Survivor Benefits Plan are the distributed benefits also excluded from the estate?

2) If the restriction on the transfer of the debtor's ERISA beneficial trust interest arises not by the Alienation Prohibition but by the *Kennedy* plan documents rule or *Boggs* plan terms rule so that creditors of a debtor are prevented from obtaining the plan benefit from the plan, then are all undistributed benefits from ERISA plans that do not provide for the assignment of benefits are treated as exempt property? Top-Hat plans must include assignment prohibitions in order to obtain the advantage of tax deferral by complying with Treas. Reg. § 1.409A-3 (f) and thus would also excluded from the estate under this analysis.

3) If the Spousal Survivor Benefit Plan is funded with insurance/annuity contracts rather than a trust is the spendthrift trust bankruptcy exception available?

Skiba v. Laher (In re Laher), 496 F.3d 279 (3rd Cir. 2007) (Interest in employer mandated TIAA Annuity retirement plan excluded from bankruptcy estate because under NY law the annuity is treated as a trust). Moreover, the Supreme Court in *Patterson v Shumate* did not treat Bankruptcy Code 11 U.S.C. § 541 as though the funding source was determinative factor in excluding from the debtor's benefit interest in a Spousal Survivor Benefit Plan.

3. To What Extent are New York Government Plan Benefits Excluded from the Bankruptcy Estate?

New York State and local pension plans customarily prohibit the assignment of benefits as described above. Many are funded with trusts. *See e.g.* N.Y. Ed L. §§ 508-a. Thus, benefit interests in those plans would be excluded on the same basis pursuant to 11 U.S.C. § 541(c)(2) as interests in Spousal Survivor Benefit Plans are excluded. The same question about whether the statutory protection of distributed plan benefits continues in bankruptcy that arises with respect to Spousal Survivor Benefit Plans would arise.

4. To What Extent are a Debtor's Interests in IRAs and Pension Plans Funded with Trusts that are Protected from Creditor Claims Under State Law Excluded from the Bankruptcy Estate?

There is a division of authority about the extent to which a debtor's interest in IRAs and pension plans that are protected from creditor claims under state laws such as N.Y. C.P.L.R. § 5205 are excluded from the debtor's estate pursuant to 11 U.S.C. § 541(c)(2).

Cf. Orr v. Yuhas (In re Orr), 104 F.3d 612 (3rd Cir. 1997) Cert. Den'd. 1997 U.S. LEXIS 3890 (June 23, 1997) (holding in an opinion written by future Supreme Court Justice Samuel Alito that a New Jersey statute, N.J.S.A. § 25:2-1(b), that protects a qualified IRA from claims of creditors constitutes a "restriction on the transfer of a beneficial interest of the debtor in a trust" within the meaning of 11 U.S.C. § 541(c)(2), and thus results in the exclusion of the IRA from a bankruptcy estate); and *Lowenschuss v. Selnick (In re Lowenschuss)*, 171 F.3d 673 (9th Cir. 1999) Cert. Den'd. 1999 U.S. LEXIS 5886 (October 4, 1999) (holding that the restriction being enforced must be in the trust agreement for a non-ERISA tax-qualified plan restricted to owner-employees rather than in state law, and arguing that the required alienation prohibition in a tax-qualified plan/trust agreement was unenforceable because it was part of a self-settled trust).

5. To What Extent are Social Security Benefits and Federal Pension Benefits Excluded from the Bankruptcy Estate?

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

Social security benefits may not be excluded from the bankruptcy estate on the basis of being interests in a spendthrift trust. Rather they are excluded on the basis of 42 U.S.C. §§ 407(a) and (b) which prohibits the operation of any bankruptcy or insolvency law on social security benefits unless the bankruptcy law explicitly overrides such prohibition. There is no such bankruptcy override. Thus, the statutory exclusion remains intact. This is consistent with the fact that social security benefits, unlike benefit interests in spendthrift trusts or retirement plans with assignment restrictions, are excluded from current monthly income as discussed above.

See Carpenter v. Ries (In re Carpenter) 614 F.3d 930 (8th Cir. 2010) (holding within a Chapter 7 bankruptcy that a social security lump sum payment prior the bankruptcy is excluded from debtor's estate and discussing the legislative history of ERISA and the bankruptcy code, including the bankruptcy exception for rights to social security benefits).

Federal pension plans, which prohibit the assignment of benefits are not funded with trusts, which is why federal debts may be offset against federal payments of such benefits. For example, the thrift plan is administered by the Federal Retirement Thrift Investment Board (Agency), an independent Federal agency. 5 U.S.C. § 8472. Thus, interests in those benefits like interests in social security benefits are not subject to an exclusion similar to those for benefit interests in trustee Spousal Survivor Benefit Plans. However, in a manner similar to social security several prohibit the assignment or transfer of benefits “*except as otherwise may be provided by Federal laws.*” *See e.g.*, 5 U.S.C. § 8346 (Civil Service retirement benefits) and 38 U.S.C. § 5301 (veteran's retirement benefits). There is no such bankruptcy provision. Thus, such benefits would also appear to be excluded from the bankruptcy estate.

See Whetzal v. Alderson (In re Alderson), 32 F.3d 1302, 1304 (8th Cir.1994) (holding that the right to obtain civil service retirement benefits is excluded from the bankruptcy estate because the restriction on transfer of civil service benefits is similar to that for Spousal Survivor Benefit Plans without discussing whether the federal benefits were in a trust vehicle, but the court discussed the “except as otherwise may be provided by Federal laws” statutory language);

In Re Satterwhite, 271 B.R. 378 (Bankr. W.D. Mo. 2002) (holding that the right of a former spouse of a member of the military to receive pension payments pursuant to an appropriate domestic relations order under the Uniform Services Former Spouse's Protection Act [10 U.S.C. § 1408(c)(2)] is excluded from the bankruptcy estate because the restriction on transfer of civil service benefits is similar to that for Spousal Survivor Benefit Plans without discussing whether the federal benefits were in a trust vehicle, although the court focused on the significance of the “Notwithstanding any other provision of law” statutory language.

C. Bankruptcy Treatment of Retirement, Life Insurance and Annuity Benefits Not Excluded from the Bankruptcy Estate

All the exclusions described in the prior section applied to undistributed benefits, although the question was raised whether if the protection at issue applied to distributed benefits did the bankruptcy exclusion also apply to such benefit distributions. The exemptions broaden the set of undistributed benefits protected in bankruptcy and offer some protection to benefit distributions.

11 U.S.C. § 522. Exemptions.

(b)

(1) Notwithstanding section 541 of this title [11 U.S.C. § 541], an individual debtor may exempt from property of the estate the property listed in either paragraph (2) [*Federal Exemptions listed in (d)*] if permitted by state [as is the case with NY] or, in the alternative, paragraph (3) of this subsection . . . [*Federal exemptions listed in (3) plus state exemptions*].

(3) [Federal Exemptions Added to State Exemptions] Property listed in this paragraph is . . .

(A) . . . any property that is exempt under Federal law [such as social security or federal pension benefits], other than subsection (d) of this section, . . .

(C) *retirement funds 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*

(d) [Federal Exemptions if Permitted by State] The following property may be exempted under subsection (b)(2) of this section:

(7) *Any unmaturred life insurance contract owned by the debtor, other than a credit life insurance contract*

(8) The debtor's aggregate interest, not to exceed in value \$ 10,775 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title [11 U.S.C. § 542(d)], in any accrued dividend or interest under, or loan value of, any unmaturred life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(10) *The debtor's right to receive--*

(A) *a social security benefit, unemployment compensation, or a local public assistance benefit;*

(B) a veterans' benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) *a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract 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, unless--*

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986 [26 U.S.C. § 401(a), 403(a), 403(b), or 408].

(11) The debtor's right to receive, or *property that is traceable to--*

(C) *a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;*

(12) *Retirement funds 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 [26 U.S.C. § 401, 403, 408, 408A, 414, 457, or 501(a)].*

Conclusions from statutory text:

(1) A debtor has two bankruptcy exemption options: (i) the federal exemptions listed in (d) if permitted by the debtor's state, or (ii) the federal exemptions listed in (b)(3) plus the state exemptions.

(2) There are two distinct life insurance federal exemptions if state law is elected: (i) one for a unmatured contracts; and (ii) one for life insurance proceeds, but only if the insured

supported the debtor. The latter protects the life insurance policy and limited dividends but does not provide access to the policy's cash surrender value.

(3) There is no exemption for non-qualified annuities.

(4) The federal exemptions in b(3) refer to funds that are tax-exempt pursuant to sections that do not exempt any funds from tax.

(5) There are two distinct kinds of federal exemptions for tax-qualified retirement benefits. If the state exemptions are used, the federal exemption is limited to the undistributed benefits. If the state exemptions are not used, there is a second exemption for a broader range of retirement and deferred compensation plans of the right to obtain plan benefits "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." Presumably a creditor may exercise the debtor's right to receive the funds that are not needed for support the debtor and thereby obtain such funds.

(6) There are a number of (d)(10) exemptions of the rights to receive payments, for which the debtor would be expected to require the payments, such as unemployment compensation or payments under pension plans to the extent needed for the support of the debtor. However, the exemption do not mention the right to keep such payments. Thus, restricting the exemptions to the right to receive such payments seems to result in exemptions that serve no purpose because if the payments are made, as they must because they are needed for support, they may not be used for support, but must be subject to the claim of creditors. Courts could use their equity powers to find that in such cases benefit payments were protected.

(7) There is a division of authority about whether pension payments, as well as the right to receive such payments are also exempt. The more recent decisions find no such exemption except in "special circumstances," which may mean that the payments were needed for the support of the debtor as set forth in the statute.

Cf. In re Donaghy, 11 B.R. 677 (Bankr. S.D. N. Y. 1981) (d)(10)(E) applies to pension distributions as well as right to distributions for debtor and wife suffering from cancer who withdrew money to provide past and expected high medical expenses) and *In re Cesare*, 170 B.R. 37 (Bankr. D. Conn. 1994) (no protection for plan benefits rolled over from a pension plan to an IRA, which was not then considered entitled to an exemption and the special circumstances of Donaghy requiring the court to exercise its equity powers were not present). *See also Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding that the funds in an IRA was exempt under (d)(10)(E) without discussing the extent to which the funds were needed for the support of the debtor)

Open Issues:

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

1) May the repayment of a loan from a tax-qualified plan be treated as an avoidable fraudulent transfer? The Supreme Court raised this question in *Rousey v. Jacoway*, 544 U.S. 320 (2005).

Cf. Dunbar v. Barber (In re Dunbar), 313 B.R. 430 (Bankr. C.D. Ill. Aug 19, 2004) (Absent proof of fraudulent intent repayment of qualified plan loan is not avoidable but simple return of non-exempt asset to prior exempt status); and *Krudy v. Hoetmer*, 2012 Bankr. LEXIS 4513 (S.D. Ind. Sept. 26, 2012) (Payment of 401(k) loan was avoidable fraudulent transfer where soon after the Chapter 7 bankruptcy filing for investments).

2) The implications of a recent Supreme Court decision: *Clark v. Rameker*, 573 U. S. ____ (2014)(slip opinion No. 13–299, June 12, 2014) (IRA beneficiaries are not entitled to bankruptcy exemption for a debtor who relies on the federal exemption in 11 U.S.C. § 522(d)(10) because the court declared that the benefits payable to a a plan beneficiary, unlike those to a participant, under the minimum distribution rules are not paid because of the beneficiary’s retirement). This is contrary to the ERISA treatment, the federal retirement plan treatment, and the local government treatment outside of bankruptcy. All provide the same protection to beneficiaries and to plan participants.

Issues: Is a participant in a Roth IRA who is not subject to the early or late distribution penalties able to use the bankruptcy exception?

Is a participant in a tax-qualified owner-employee pension plan eligible for the same bankruptcy exemption? Distributions to such a person do not depend upon the participant's retirement.

Is a surviving spouse eligible for the bankruptcy exemption for an IRA or tax-qualified plan? If so, what must the survivor do something to qualify for the exemption? See generally Albert Feuer, *The Supreme Court Disregards ERISA and Goes Farther Astray in Applying Bankruptcy Law to Retirement Assets*, 33 TAX MGM'T WKLY. REP. 995 (July 28, 2014) <http://ssrn.com/abstract=2477546> .

3) What are the implications of *Clark* for the New York treatment of beneficiaries within and without bankruptcy? Are they entitled to less debtor protection than the creator of an IRA?

D. Bankruptcy Treatment of Retirement, Life Insurance and Annuity Benefits Not Excluded from the Bankruptcy Estate Under New York State Bankruptcy Exemptions

1. New York permits debtors to choose either federal or state exemptions

©Albert Feuer 2015 afeuer@ava.yale.edu

Law offices of Albert Feuer
110-45 71st Road-Suite 7M
Forest Hills, NY 11375-4962

April 15, 2015

New York changed its interaction with the federal bankruptcy law effective in 2011, but created confusion by retaining parts of the old law.

N.Y. DEBT & CRED. § 284. Exclusivity of exemptions.

In accordance with the provisions of section five hundred twenty-two (b) of title eleven of the United States Code, debtors domiciled in this state are not authorized to exempt from the estate property that is specified under subsection (d) of such section [Federal Exemptions].

N.Y. DEBT & CRED. § 285. Alternative federal exemptions.

Notwithstanding any inconsistent provision of law, an individual debtor may opt to exempt from property of the estate such property as is permitted to be exempted pursuant to section five hundred twenty-two of title eleven of the United States Code in lieu of such property as is permitted to be exempted pursuant to the applicable provisions of this article [Federal Exemptions]. [Eff. January 21, 2011]

2. Permissible New York Bankruptcy Exemptions in Addition to Specified Federal Exemptions

N.Y. DEBT & CRED. § 282. Permissible [Estate] exemptions in bankruptcy.

Under section five hundred twenty-two of title eleven of the United States Code, entitled "Bankruptcy," an individual debtor domiciled in this state may exempt from the property of the estate, to the extent permitted by subsection (b) thereof, only

(i) personal and real property *exempt* from application to the satisfaction of money judgments under *sections fifty-two hundred five [personal property]* and *fifty-two hundred six [real property]* of the civil practice law and rules,

(ii) insurance policies and annuity contracts and the proceeds and avails thereof as provided in *section three thousand two hundred twelve of the insurance law* and

(iii) the following property: . . .

2. Bankruptcy exemption for right to receive benefits. *The debtor's right to receive or the debtor's interest in: (a) a social security benefit, unemployment*

compensation or a local public assistance benefit; (b) *a veterans' benefit*; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) [Corrupted Bankruptcy § 522(d)(10)(E) in 1989] *all payments under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service* unless (i) such plan or contract, except those qualified under section 401, 408 or 408A of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan [payment] is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one (a), four hundred three (a), four hundred three (b), four hundred eight, four hundred eight A, four hundred nine[?] or four hundred fifty-seven [?] of the Internal Revenue Code of nineteen hundred eighty-six, as amended.

Conclusions from statutory text:

(1) The statute begins with the property exempt from the enforcement of judgments under N.Y. C. P. L. R. § 5205.

(2) The statute gives greater explicit protection to federal government payments than is the case in 11 U.S.C. § 522(d)(10) by referring not only to the right to receive but the debtor's interest in payments such as social security or unemployment compensation.

(3) The statute exempts all benefit payments from retirement plans that are protected by N.Y. C. P. L. R. § 5205, but not all benefit payments from other retirement plans, such as from top-hat plans. Payments on account of death, *i.e.*, to beneficiaries, are always exempt. This is the case even for IRA beneficiaries, whose accounts, are not exempt under the federal exemption. Moreover, retirement payments made because of termination of employment are not exempted if the plan benefits are not protected by N.Y. C. P. L. R. § 5205.

(4) The statute's intended protection applies more broadly than in the similar provisions of the federal tax exemptions. A very broad range of retirement and deferred compensation plan benefits, including apparently 409 plans and 457 plans, is covered. No reasonable needs test is applicable to such payments, unlike alimony where the reasonable needs test of the bankruptcy law is retained.

(5) The protection for an IRA that is not part of SEP, SIMPLE Plans, or a rollover IRA is not limited to \$1,245,475 under state rules. Such a limit applies under the federal rules.

(6) The statute exempts all social security and veteran's benefit payments even if such benefits are not otherwise excluded from the bankruptcy estate. The statute does not mention

other federal retirement benefit payments. However, they are protected under the federal exemptions that are available when the state bankruptcy exemptions are elected. 11 U.S.C. § 522(b)(3).

(7) The statute explicitly includes life insurance policies and annuities without any limit. However, NY Dr. & Cr. § 283 limits the annuity exclusion to \$10,000 for transfers within six months of bankruptcy. Furthermore, the 11 U.S.C. § 522(d)(11)(c) federal exemption pertaining to life insurance unlike the state language applies to non-spousal beneficiaries who are dependents of the insured.

See generally Gideon Rothschild and Daniel S. Rubin *Creditor Protection for Life Insurance and Annuities*, RIA JOURNAL OF ASSET PROTECTION, 05-01-1999 available at <http://www.mosessinger.com/site/files/CreditorProtectionLifeInsuranceAnnuities.pdf>

Conclusions:

There is a consensus that retirement benefits should be protected against the claims of creditors except when equity requires a different result. There are five basic equitable exceptions, although the extent is often unclear. There are four kinds of equitable overrides. First, are family support obligations. Second, are domestic relations law obligations. Third, are obligations that may not be avoided with fraudulent transfers. Fourth, are criminal law obligations. Fifth, are government obligations not arising from the criminal law.

Courts try to harmonize these conflicting principles by looking at the equities, the terms of the benefit plans, and the terms of the relevant statutes. All are often ambiguous. The lack of consensus on the extent of preemption by federal law makes this task particularly difficult. However, the basic principles are clear.

State law prevents creditors of participants and beneficiaries from obtaining retirement plan benefits before or after their distribution unless an equitable override applies. However, there is little protection under those state laws for federal benefit plans, annuity plans, top-hat plans, or retirement plans that are not associated with tax-qualified trusts. There is protection for the beneficiaries of such plans from the creditors of the creators of such plans. Life insurance proceeds are generally protected against creditor claims of the creator of the policy but not the creditors of the beneficiary. Annuity benefits payable to the creator or the creator's beneficiary are not subject to execution until distributed. At such time a court may order payment of the recipient's debts with due regard for the reasonable requirements of the judgment debtor and his family.

Federal collection law may override these state protections and federal law may protect from creditor claims benefits from federal plans and private plans subject to ERISA. There is a

question about the extent to which creditors may compel such federally regulated plans to make benefit payments to them, although there is little question that the social security system, federal retirement plans, and those retirement plans required by ERISA to pay spousal survivor benefits may not be so compelled. There is a question about the extent to which distributed benefits from the federally regulated plans are protected from creditor claims, although a strong case may be made that social security benefits, federal retirement plans, and benefits from those retirement plans required to pay spousal survivor benefits may be so protected.

Bankruptcy estates do not include social security payments to a debtor, a debtor's interests in New York or federal government retirement plans, or in an ERISA plan, but there is considerable ambiguity about whether such estates may exclude or exempt include payments from such plans or the rights to payments from those plans if the federal exemptions are elected by the debtor. However, if the state exemptions are elected such benefit payments made for reasons other than for retirement or termination of employment are exempted together with all payments from those from plans that are otherwise protected from creditors.

As a result of the ambiguity of many of the relevant statutes and federalism principles, a very limited case-law, and the centrality of equity concerns, it is often very difficult to predict how the courts will interpret the interaction of these laws in any particular case. The courts often resolve these disputes by declaring which of two "conflicting" statutes is specific and which is general and then applying the below principle:

It is an elementary tenet of statutory construction that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . ." *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) (holding that the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 did not repeal the employment preference set forth in the Indian Reorganization Act of 1934 for qualified Indians by the Bureau of Indian Affairs).

Retirement, Annuity and Life Insurance Benefit Planning Creditors' Rights to Retirement, Annuity, and Life Insurance Benefits

“New York law recognizes the right of individuals to arrange their affairs so as to limit their liability to creditors,

In re Heller Trust, 613 N.Y.S.2d 809, at 810 (Sur. Ct., N.Y. Co. 1994)

Competing Equitable Principles that Often Create Debtor-Creditor Issues:

Debtors should fully pay all their debts

Debtors should not be compelled to use all their assets to pay all their debts.

Preemption Overlay:

When Does State Law Preempt State Law Debtor-Creditor Statutes?

When Does Federal Law Preempt State Law Relating to Debtor-Creditor Protections?

Major Asset Types in Apparent Increasing Order of Debtor Protection

Individual Bank Accounts

Individual Mutual Fund Accounts

Individual (Non-qualified) Annuity Benefits

Individual Life Insurance Benefits (Creator and Beneficiary)

Benefits from Tax-Qualified 403 Plans that are not ERISA or Federal Plans

Benefits from Tax-Qualified 401(a) plans that are not ERISA or Federal Plans

Benefits from IRAs not part of SEPs or SIMPLE Plans

Benefits from State and Local Pension Plans

Benefits from Federal Life Insurance Plans

Benefits from ERISA Plans Other than Spousal Survivor Benefit Plans

Benefits from Federal Pension Plans

Benefits from Railroad Retirement Plans

Benefits from Social Security

Benefits from ERISA Spousal Survivor Benefit Plans

New York State Debtor-Creditor Laws

N.Y. C. P. L. R. § 5222. Restraining notice (e) State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt." The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Spousal support, maintenance (alimony) or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions;
9. Veterans benefits;
10. Ninety percent of your wages or salary earned in the last sixty days;
11. Twenty-five hundred dollars of any bank account containing statutorily exempt payments that were deposited electronically or by direct deposit . . .

...

N.Y. C. P. L. R. § 5205. Personal property exempt from Application to the satisfaction of money judgments

(c) Trust exemption.

1. Except as provided in paragraphs four [domestic relations] and five [fraud] of this subdivision, all [1987] [Any] property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor [such as the case where the trust beneficiary is not the trust creator], is exempt from application to the satisfaction of a money judgment.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c)

Cf. Spendthrift Protection: To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee.

N.Y. C. P. L. R. § 5205. Personal property exempt from Application to the satisfaction of **money judgments (c) Trust exemption**

2. [initially introduced in **1987**] For purposes of this subdivision, **all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established** as part of, and all payments from,

[1] either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended,

[2] a Keogh (HR-10), retirement or **other plan established by a corporation**, which [account or plan] is qualified under *section 401 of the United States Internal Revenue Code of 1986*, as amended, or

[3] created as a result of rollovers [to unspecified entities] from such plans [set forth in(2) and (3)] pursuant to *sections 402 (a) (5)* [rollovers from Code 401(a) trusts], *403 (a) (4)* [rollovers from 403(a)(plans), which do not seem to be such a plan], *408 (d) (3)* [rollovers from traditional individual retirement accounts or individual retirement annuities] or *408A* [rollovers from Roth individual retirement accounts or individual retirement annuities] of the Internal Revenue Code of 1986 as amended or

[4] a plan that satisfies the requirements of *section 457 of the Internal Revenue Code of 1986* [deferred compensation plans of governments or tax-exempts that are not funded with annuities that are tax-qualified under Code § 403 or with trusts that are qualified under 401(a)],

shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan [creator], or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan [there is no similar exception for a participant in a 401(k) plan who is not self-employed, a partner or a shareholder of the plan sponsor but decides whether to contribute his compensation to the plan].

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided [initially introduced in 1989], however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest [described in paragraph two of subdivision (c) of this section] established as part of [1] an individual retirement account plan or as part of [2] a Keogh (HR-10), retirement or [3] other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;

2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment;

Cf. Fordyce v. Fordyce, 80 Misc. 2d 909, 365 N.Y.S.2d 323 (Sup. Ct. Nassau Co. 1974)
(holding before the 1987 adoption of this provision voluntary employee contributions to a corporate pension plan are treated as self-settled trust contributions and subject to creditor claims but employer contributions are not so treated)

Protections of Government Pension Plan Benefits

N.Y. EDUC. § 524. Exemption from taxation and execution [1947]

The right of a teacher to a pension, an annuity, or a retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this article, and the moneys in the various funds created hereunder, are hereby exempt from any state or municipal tax, and shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as in this article specifically provided [There are no such specific provisions].

In re Estate of King, 196 Misc. 2d 250, 764 N.Y.S. 2d 519 (Sur. Ct. Broome Co. 2003) (commercial lender may not enforce judgment against distributed teacher benefits)

Cf. Anthis v Copland, 270 P.3d 574, 173 Wn.2d 752 (Wash. 2012) (similar Washington law does not protect distributed public pension benefits against the enforcement of a judgement for a wrongful death).

Workers' Compensation Law § 33 Assignments; exemptions [1913]

Compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter [there seem to be no such exceptions], and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt . . .

Post-Distribution Creditor Protection

By concession the moneys due under the award would have been exempt from the pursuit of creditors before they reached the judgment debtor. The argument is, however, that they became subject to seizure the instant they were paid. If this is so, the exemption is next to futile. All that a creditor has to do is to obtain an order in supplementary proceedings, containing, like the order in this proceeding, the usual provision restraining the judgment debtor from making any transfer or disposition of his property until further directions in the premises. Then, as the installments of an award are paid, the injunction will tie them up. They may be appropriated to the last dollar in satisfaction of an ancient debt. They will no longer be a fund for the support of the indigent and helpless.

So narrow a construction thwarts the purpose of the statute. The Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability . . .

The exemption must have a meaning consistent with the policy behind it. Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity

Surace v. Danna, 161 N.E. 315, at 315-16 (N.Y. 1928) (Court Opinion, J. Cardozo)

No Post-Distribution Creditor Protection

No property is exempt from execution unless some statute makes it so, and the burden is upon the person claiming exemption to bring his property within some statutory exception. The compensation and benefits which are exempt are only those which are "due." The statute does not deal with those which have been paid. . . .

The purpose of section 33 impresses me as directing a mode of procedure by which the State or the employer may be enabled to get rid of compensation, which is due and payable, simply by paying it over to the person to whom it has been awarded or to whom it is payable under the statute.

Id. at 317-18 (Dissenting Opinion, J. O'Brien)

EQUITABLE EXCEPTION (1)

Family Support Obligations Override Debtor Protections

N.Y. C. P. L. R. § 5441. Income execution for [family] support enforcement

5. "Income payor" includes:

(i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity;

(ii) the state of New York or any political subdivision thereof, or the United States; and

(iii) any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.

6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.

EQUITABLE EXCEPTION (2)

Domestic Relations Law Overrides Debtor Protections

The equitable distribution law set forth in NY Dom Rel § 236 -B, which governs marital dissolutions, explicitly takes into account retirement benefits and life insurance benefits.

Kaplan v. Kaplan, 82 N.Y.2d 300 (N.Y. 1993) (holding that property settlements and separation agreements pursuant to the New York equitable distribution law override the anti-assignment provision of N.Y. EDUC. L. § 524).

EQUITABLE EXCEPTION (3)

Fraudulent Conveyance Law Law Overrides Debtor Protections

N.Y. C. P. L. R. § 5205. Personal property exempt from Application to the satisfaction of money judgments

(c) Trust exemption

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

N.Y. Dr. & Cr. L. § 273. Conveyances by insolvent

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors **without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.**

EQUITABLE EXCEPTION (4)

NY State Criminal Law Limited Override of Debtor Protections

There is no general criminal law exception from debtor-creditor collection rules. New York state criminal law relies on ordinary civil procedures for the collection of fines, restitution and reparation.

However, in the case of serious crimes, judgments for payments to crime victims may be enforced without regard to the usual debtor-creditor provisions.

EQUITABLE EXCEPTION (5)

NY State Tax Law Does Not Override Debtor Protections

There is no state tax exception from the debtor-creditor collection rules, although the finance department may rely on warrants that it may issue rather than waiting for court judgments. New York state tax law relies on ordinary civil procedures for the collection of fines, restitution and reparation

**Protections for Beneficiaries
of Retirement, Annuity, and Life Insurance Benefits
from Debtors of the Benefit Creators**

N.Y. E. P.T.L. § 13-3.2. Rights of beneficiaries of pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts and of beneficiaries of annuities and supplemental insurance contracts

(a) If a person is entitled to receive (1) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or (2) money payable by an insurance company or a savings bank authorized to conduct the business of *life insurance* under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or if a contract made by such an insurer relating to the payment of proceeds or avails of such insurance designates a payee or beneficiary to receive such payment upon the death of the person making the designation or another, the rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy.

II. Federal Non-Bankruptcy Debtor-Creditor Laws Governing Retirement, Annuity and Life Insurance Benefits

U.S. CONST. art. VI, cl. 2.

This Constitution, and the **Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the **supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Federal Benefit Statutes

5 U.S.C. § 8705. [Federal Employees Group Life] Death claims; order of precedence; escheat

(a) Except as provided in subsection (e) [pursuant to domestic relations order received by the appropriate office before the death of the insured], the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title [5 U.S.C. §§ 8101 et seq.] as provided by section 8706(b) of this title [5 U.S.C. § 8706(b)], in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.

Second, if there is no designated beneficiary, to the widow or widower of the employee . . .

See *Hillman v. Maretta*, 569 U.S. ___, 133 S.Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) (holding that revocation upon divorce state laws may not be used to wrest plan benefits from the plan designee). *Hillman* implies that FEGLIA and the Servicemen's Group Life Insurance Act, the federal military death benefit provisions, similarly preempt any benefit claims arising from state-law contract claims associated with a marital dissolution.

5 U.S.C. § 8346. Exemption from legal process; recovery of payments [Civil Service Retirement]

(a) The money mentioned by this subchapter [5 U.S.C. §§ 8331 et seq.] is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title [5 U.S.C. § 8345 assignment considered appropriate by the government or domestic relations orders], or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

In re Anderson, 410 B.R. 289 (Bankr. W.D. Mo. 2009) (holding that as with N.Y. EDUC. L. § 524 distributed benefits not subject to execution and arguing that this finding is consistent with the most recent case-law).

42 U.S.C. § 407. Assignment; amendment of section. [Social Security Act § 207]

(a) The right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and **none of the moneys paid or payable or rights existing under this title** [42 U.S.C. §§ 401 et seq.] **shall be subject to execution, levy, attachment, garnishment, or other legal process**, or to the operation of any bankruptcy or insolvency law.

(b) **No other provision of law**, enacted before, on, or after the date of the enactment of this section [enacted April 20, 1983], **may be construed to limit**, supersede, or otherwise modify the provisions of this section except to the extent that it does so by **express reference to this section**.

Equitable Exception (1)

42 U.S.C. § 659. Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations.

(a) **Consent to support enforcement.** Notwithstanding any other provision of law (including section 207 of this Act [42 U.S.C. § 407] and section 5301 of title 38, United States Code) [Veteran's benefits], effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 466 [42 U.S.C. § 666(a)(1), (b)] and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 U.S.C. §§ 651 et seq.] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

Equitable Exception (2)

Domestic relations orders addressed above and in provisions for specific federal non-social security benefits

Equitable Exception (3) No Fraudulent Conveyance Exception

Equitable Exception (4)

Criminal Law Provisions

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid [Federal] fine

(a) Enforcement. The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act [42 U.S.C. § 407]), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that--

(1) property exempt from levy for taxes pursuant to section 6334(a) (1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 [26 U.S.C. § 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12)] shall be exempt from enforcement of the judgment under Federal law; . . .

(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law. [limits garnishments to the lesser of (25% of the debtor's disposable earnings, the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 U.S.C. § 206(a)(1)] [\$7.25/hour as of March 1, 2015] in effect when the earnings are payable).

Equitable Exception (5)

Federal Tax Collection Mechanisms and Their Limits

Code § 6334. Property exempt from [tax] levy.

(a) Enumeration. There shall be exempt from levy--

(6) **Certain annuity and pension payments.** Annuity or pension payments under the **Railroad Retirement Act**, benefits under the **Railroad Unemployment Insurance Act**, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (*38 U.S.C. 562*), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code [*10 U.S.C. §§ 1431 et seq.* military pay].

(8) Judgments for support of minor children. If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(c) No other property exempt. **Notwithstanding any other law of the United States (including section 207 of the Social Security Act [*42 U.S.C. § 407*]), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).**

(f) Levy allowed on certain specified payments. **Any payment described in subparagraph (B) or (C) of section 6331(h)(2) [*26 U.S.C. § 6331(h)(2)* RRA or RUIA payments] shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h) [*26 U.S.C. § 6331(h)* 15% garnishment limit].**

E. Federal Non-Tax Collection Mechanisms

31 § 3716. Administrative Offset [of Federal Debts Against Federal Payments]

(c)(1)

(A) Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, the Department of Health and Human Services, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.. .

(3) (A)

(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)) . . . , except as provided in clause (ii), all payments due to an individual under--

(I) the Social Security Act [42 U.S.C. §§ 301 et seq.],

(II) part B of the Black Lung Benefits Act [30 U.S.C. §§ 921 et seq.], or

(III) any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits [those benefits that are not the social security counterpart]), shall be subject to offset under this section.

(ii) An amount of \$ 9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection.. . .

31 § 3720D. [Administrative Wage] Garnishment [of non-Federal Payments]

(a) Notwithstanding any provision of State law, the head of an executive, judicial, or legislative [federal] agency that administers a program that gives rise to a delinquent nontax debt owed to the United States by an individual may in accordance with this section garnish the disposable pay of the individual to collect the amount owed, if the individual is not currently making required repayment in accordance with any agreement between the agency head and the individual.

(b) . . . (1) The amount deducted under this section for any pay period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted with the written consent of the individual.

(g) For the purpose of this section, the term "disposable pay" means that part of the compensation of any individual from an employer remaining after the deduction of any amounts required by any other law to be withheld.

III. ERISA non-Bankruptcy Debtor-Creditor Law

The Employee Retirement Income Security Act of 1974, as amended (“ERISA”) governs welfare plans and pension plans other than those of governments, churches, or those limited to owner-employees. ERISA was enacted because existing federal and state law did not adequately protect employee benefit plan participants and beneficiaries. Thus, Title I of the Act, the focus of this material is entitled, “Protection of Employee Benefit Rights,” and provides the most protection for retirement benefits as suggested by words in the title of the statute.

ERISA welfare plans include health care-reimbursement plans, severance plans, and life insurance plans. ERISA does not require any of these plans to provide any spousal benefits.

However, ERISA requires the vast majority of pension plans to provide spousal survivor benefits, which ERISA permits to be waived with the consent of the spouse. Thus, such plans shall hereinafter be called **Spousal Survivor Benefit Plans**. Those plans may not permit the alienation or assignment of benefits. Top-Hat Plans are pension plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. They are not Spousal Survivor Benefit Plans, but usually, in order to defer income taxes, prohibit the alienation or assignment of benefits. SEP Plans and SIMPLE Plans are ERISA pension plans that are not Spousal Survivor Benefit Plans.

ERISA Provisions Relevant to Benefit Creditor Protections

ERISA § 502(a)(1)(B). Civil enforcement for all ERISA plans]

- (a) Persons empowered to bring a civil action. A civil action may be brought--
(1) by a participant or beneficiary--

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

- (3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan;

Cf. 5 U. S. C. §8705(a) FEGLIA Benefit Payment to Beneficiary Designated By Participant Hillman

ERISA § 206(d). Assignment or alienation of [Spousal Survivor Benefit] plan benefits.

(1) Each pension plan shall provide that **benefits provided under the plan may not be assigned or alienated.**

(3) [Domestic Relations Provision] (A). . . **Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order. . .** .[i.e., such order is effective]

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this Act a beneficiary under the plan.

(4) [Bad Conduct Provision] **Paragraph (1) shall not apply to any offset of a participant's benefits** provided under **[the terms of]** an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan . . . [pursuant to a judgment, order, decree or settlement with the Secretary of Labor to compensate the plan for damages inflicted on the plan by the participant]

ERISA § 404. Fiduciary Duties [For Most ERISA plans Other than Top-Hat Plans].

a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S.C. §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [for the protection of Employee Benefit Rights] and title IV [for the protection of Employee Benefit Rights in the course of a plan termination].

Distinguish terms of an ERISA plan from terms of the plan document of an ERISA plan

State-Law Garnishment of ERISA Plan payments

Benefit Payments from Spousal Survivor Benefit Plans May Not Be Garnished

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) (holding that ERISA does not permit a union to use the other relief provisions of a federal statute to obtain restitution from a union official who embezzled union funds by compelling a Spousal Survivor Benefit Plan co-sponsored by the union to pay the official's plan benefits to the union). The Court declared that:

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. . . . The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress. Id. at 376-77

Benefit Payments from ERISA Plan Other than Spousal Survivor Benefit Plans May Be Garnished

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) (holding that ERISA permits state law garnishments of ERISA benefit payments because the plan, a vacation plan, was not a Spousal Survivor Benefit Plan). Court relied on asserted lack of conflict between state-law garnishments and ERISA's mandates. *There was no discussion of the conflict between garnishment of benefit payments and the ERISA § 502(a)(1)(B) requirement that benefit payments be made only to participants and beneficiaries set forth in the plan terms.*

**State Law inconsistent with an ERISA Plan's governing documents
may not determine who receives the plan's benefit distributions**

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) (holding that ERISA prevents state revocation upon divorce statutes from being used to direct plan to make benefit distribution to a person other than the designated beneficiary). The Court therein referred to the "core ERISA concern" of paying benefits in accord with the plan documents. *Id.* at 147. The *Egelhoff* majority opinion did not discuss explicitly *Mackey*, garnishments, but the dissenting opinion referred to *Mackey* and presented those decision's arguments that there is no direct conflict between the state law and ERISA. *Id.*, at 161.

**Federal Common law inconsistent with an ERISA Plan's governing documents
may not determine who receives the plan's benefit distributions**

Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan, 555 U.S. 285 (2009) (holding that ERISA plan must disregard a common-law waiver by beneficiary which was not consistent with the plan documents because ERISA plans may pay benefits only to the person specified in plan documents). Unanimous Court relied on conflict between the common-law contract obligation and the ERISA § 404(a)(1)(D) requirement for compliance with plan documents. There was no discussion of *Mackey*, garnishments, or of the conflict between a state-law benefit payment requirements and the ERISA § 502(a)(1)(B) requirement that benefit payments be made only to participants and beneficiaries set forth in the plan terms.

Case-Law About Garnishment of benefit payments from ERISA plans other than Spousal Survivor Benefit Plans

Ret. Fund Trust of the Plumbing, Heating and Piping Ind. of S. Cal. v. Franchise Tax Bd., 909 F.2d 1266, 1281 (9th Cir. 1990) (ERISA permits state tax levies permitted against vacation benefit payments).
Considers only Mackey (1988)

AFLAC v. Diaz-Vernon, Jr., 2012 U.S. Dist. LEXIS 73140 (M.D. Ga. May 25, 2012) (ERISA permits commercial creditor of Top Hat Plan participant to apply State-law garnishment to benefit payments).
Considers only Mackey (1988)

Sposato v. First Mariner Bank, 2013 U.S. Dist. LEXIS 45806 (D.Md.. March 29, 2013) (ERISA permits commercial creditor of Top Hat Plan participant to apply State-law garnishment to benefit payments).
Considers Mackey (1988), Egelhoff (2001), and plan alienation prohibition.

Uncertainty About Ability of Creditors to Wrest ERISA plan benefit payments from Recipients

The *Guidry* Supreme Court did not consider the issue. On remand the 10th Circuit ruled that ERISA did not prevent a participant's creditor from claiming the participant's distributions from a Spousal Survivor Benefit Plan, but the applicable Colorado law did. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994). The Second Circuit in *Robbins v. DeBuono*, 218 F.3d 197, 203 (2d Cir. 2000) reached the same conclusion with respect to a state Medicaid claim.

If ERISA does not prohibit the wresting by creditors of benefits distributed pursuant to the plan terms, state law controls. *Cf. Guidry* 39 F.3d 1078 (finding that a Colorado state law similar to N.Y. C. P. L. R. § 5205(d) prevented a creditor of the person entitled to an ERISA Spousal Survivor Benefit Plan benefit from wresting the distributed benefit from such person) and *Robbins*, 218 F.3d 197 (the C.P.L.R. did not stop the Medicaid claim).

Supreme Court Wrestling Decisions are Difficult to Reconcile

Wresting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 at 836 (1988) (declaring without explanation that the alienation prohibition for Spousal Survivor Benefit Plans "prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants").

No Wrestling *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA prevents state community property law from being used to wrest benefit from a designated beneficiary). The Court therein stated:

The axis around which ERISA's protections revolve is [sic] the concepts of participant and beneficiary. . . . It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are pre-empted. The judgment of the Fifth Circuit is Reversed. Id. at 854

Supreme Court Wrestling Decisions are Difficult to Reconcile

No Wrestling *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding that ERISA prevents state revocation upon divorce statutes from being used to wrest benefit from a designated beneficiary). The Court therein referred the “core ERISA concern” of paying benefits in accord with the plan documents. *Id.* at 147.

Wresting Agnosticism *Kennedy v. Plan Adm’r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285 (2009) included footnote 10 in which the Court disregards *Egelhoff*, but cited the *Boggs* axis quote and then expressed no opinion on whether state or federal law with respect to disclaimers could be used to wrest the benefit from the designated beneficiary).

Most Recent Supreme Court Decision Prevents Wrestling

No Wrestling The Court in *Hillman v. Maretta*, 569 U.S. ____, 133 S.Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) asked why there was a federal requirement that FEGLIA death benefits be paid to the employee's duly designated beneficiary. The Court concluded that the purpose was to assure that the duly designated beneficiary would obtain and keep the proceeds rather than merely to "advance administrative convenience by establishing a clear rule to dictate where the Government should direct insurance proceeds." Thus, the Court found that FEGLIA preempted a state-law revocation upon divorce statute that permitted the FEGLIA benefits to be wrested from the beneficiary. *A fortiori* this would be the case with ERISA whose primary purpose is to protect ERISA plan participants and beneficiaries. The decision and its reasoning were endorsed by the court majority in *U.S. v. Windsor*, 569 U.S. ____, 2013 U.S. LEXIS 4921 at *30-*31 (June 26, 2013) (holding same-sex partner may not be excluded from the definition of "spouse" as that term is used in federal statutes but distinguishing federal statutes, such as *Hillman*, that override state family/domestic relations laws, the dissent would have also permitted the federal rules at issue to override state domestic relations laws).

Standard Equitable Exceptions

For a Spousal Survivor Benefit Plan, domestic relations orders that are QDROs are treated as plan terms for the relevant plan. There is considerable uncertainty as discussed in another segment about the effects of such orders on distributed benefits from Spousal Survivor Benefits. There is even more uncertainty about the effects of domestic relations orders on other ERISA plans.

There appear to be no fraudulent transfer provisions preventing an insolvent employee from making plan contributions to an ERISA plan or paying off a loan from the plan.

Federal criminal fines and restitution claims may be enforced against ERISA plan benefits. ERISA does not preempt generally applicable criminal laws. Thus, New York criminal fines and N.Y. Exec. § 632-a. restitution payments may be enforced against ERISA plan benefits.

ERISA plan benefits are subject to the federal tax collection mechanisms described above. Even if the Alienation Prohibition protects distributed benefits from Spousal Survivor Benefit Plans, it would not prevent the enforcement of judgments for state-tax obligations against distributed benefits. However, New York does not permit such enforcement against those ERISA plan benefits subject to N.Y. C. P. L. R. § 5205.

IV. Bankruptcy

Individual debtors generally may file under either Chapter 7 or Chapter 13 of the bankruptcy code. In the case of Chapter 7 the debtor's non-exempt assets, if there are any that are not worthless, are used by a bankruptcy trustee to pay the debts that are dischargeable in such a bankruptcy. There is no payment plan. In the case of Chapter 13, there is no trustee, but the debtor must enter into a good faith payment plan. Under such a plan the debtor uses its projected disposable income to pay off some of the non-dischargeable debt, reinstate a home mortgage or car loan, and may retain some of the exempt property.

However, generally a debtor may only use Chapter 7 if (1) the debtor's "current monthly income" for the six months period ending on the last day of the month prior to the filing is below the median income of a family the same size as the debtor's family; and if not, if (2) the debtor's projected re "disposable income," which uses the "current monthly income as a starting point, is below a specified level.

A debtor may choose whether to use the federal or state bankruptcy exemptions. Both protect interests in IRAs, tax-qualified plans, life insurance policies, and annuities, but the federal bankruptcy protections for IRAs do not apply to a debtor's beneficiary interest in an IRA, except possibly for a surviving spouse, and may not apply to a debtor's interest in a tax-qualified plan that is not an ERISA plan, such as an owner-employee plan. Similarly, the state bankruptcy exemptions protect IRA and pension distributions, but the federal exemptions may not protect such benefit distributions.

11 U.S.C. § 101. Definitions In this [Bankruptcy] title the following definitions shall apply:

(10A) **The term "current monthly income"--**

(A) **means the average monthly income from all sources that the debtor receives** (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--[specified date]

and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), **but excludes benefits received under the Social Security Act** [42 U.S.C. §§ 301 et seq.], payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18 [18 U.S.C. § 2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 U.S.C. § 2331]) on account of their status as victims of such terrorism.

11 U.S.C. § 1325. Confirmation of [Chapter 13] plan

(a) Except as provided in subsection (b), the court shall confirm a plan for payments from the debtor's disposable income if--

(3) the plan has been proposed in good faith and not by any means forbidden by law; . . .

Retirement, Annuity, and Life Insurance Benefit Bankruptcy Exclusions

11 U.S.C. § 541. Property of the [bankruptcy] estate.

(a) The commencement of a case under section 301, 302, or 303 of this title [11 U.S.C. § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(c) (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the [bankruptcy] estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law— . . .

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

1. Spendthrift Trust Benefits

A debtor's beneficial interests in a spendthrift trust is excluded from the debtor's bankruptcy estate, if the trust is not self-settled. Thus, life insurance policies and non-qualified annuity policies, which are assets of a spendthrift trust, *i.e.*, one in which the interests may not be assigned or otherwise transferred, would be excluded from the debtor's bankruptcy estate. If a spendthrift trust is named as the beneficiary of a retirement plan or IRA, the beneficiary could exclude the interest from his bankruptcy estate, if any, because the interest would have not been self-settled.

2. ERISA Plan Benefits

Patterson v. Shumate, 504 U.S. 753 (1992) (benefits in trustee Spousal Survivor Benefit Plans are not included in estate because the alienation prohibition is enforceable under applicable non-bankruptcy law).

Are Distributed Benefits Protected?

3. New York Government Plan Benefits

New York State and local pension plans are funded with trusts customarily prohibit the assignment of benefits as described above.

The same issue about the protection of distributed benefits arises.

Annuity Benefits are quite common in government plans, thus the applicability of the exclusion to 403(b) trust benefits arises.

4. Benefits from IRAs or Tax-Qualified Pension Plans Funded with Trusts

There is a division of authority about the extent to which a debtor's interest in IRAs and pension plans that are protected from creditor claims under state laws such as N.Y. C.P.L.R. § 5205 are thereby excluded from the debtor's estate pursuant to 11 U.S.C. § 541(c)(2).

Cf. Orr v. Yuhas (In re Orr), 104 F.3d 612 (3rd Cir. 1997) Cert. Den'd. 1997 U.S. LEXIS 3890 (June 23, 1997) (holding in an opinion written by future Supreme Court Justice Samuel Alito that a New Jersey statute, N.J.S.A. § 25:2-1(b), that protects a qualified IRA from claims of creditors constitutes a "restriction on the transfer of a beneficial interest of the debtor in a trust" within the meaning of 11 U.S.C. § 541(c)(2), and thus results in the exclusion of the IRA from a bankruptcy estate); and *Lowenschuss V. Selnick (In re Lowenschuss)*, 171 F.3d 673 (9th Cir. 1999) Cert. Den'd. 1999 U.S. LEXIS 5886 (October 4, 1999) (holding that the restriction being enforced must be in the trust agreement for a non-ERISA tax-qualified plan restricted to owner-employees rather than in state law, and arguing that the required alienation prohibition in a tax-qualified plan/trust agreement was unenforceable because it was part of a self-settled trust).

5. Social Security Benefits and Federal Pension Benefits

Social security benefits may not be excluded from the bankruptcy estate on the basis of being interests in a spendthrift trust. Rather they are excluded on the basis of 42 U.S.C. §§ 407(a) and (b) which prohibits the operation of any bankruptcy or insolvency law on social security benefits unless the bankruptcy law explicitly overrides such prohibition. There is no such bankruptcy override.

(a) The right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title [42 U.S.C. §§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Federal pension plans, are not funded with trusts, which is why federal debts may be offset against federal payments of such benefits, are like IRAs not literally subject to the spendthrift trust exclusion. However, the terms of most federal retirement plans prohibit the assignment of benefits “except as otherwise may be provided by Federal laws” Courts have accepted the idea of an exclusion based on this approach.

Bankruptcy Treatment of Retirement, Life Insurance and Annuity Benefits Not Excluded from the Bankruptcy Estate

11 U.S.C. § 522. Exemptions.

(b)

(1) Notwithstanding section 541 of this title [11 U.S.C. § 541], an individual debtor may exempt from property of the estate the property listed in either paragraph (2) [Federal Exemptions listed in (d)] if permitted by state [as is the case with NY] or, in the alternative, paragraph (3) of this subsection . . . [Federal exemptions listed in (3) plus state exemptions].

(3) [Federal Exemptions Added to State Exemptions] Property listed in this paragraph is . . .

(A) . . . any property that is exempt under Federal law [such as social security or federal pension benefits], other than subsection (d) of this section, . . .

(C) retirement funds 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 [2005]

(d) [Federal Exemptions if Permitted by State as in New York] The following property may be exempted under subsection (b)(2) of this section:

(10) The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit; . . .

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract 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, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986 [26 U.S.C. § 401(a), 403(a), 403(b), or 408].

(11) The debtor's right to receive, or property that is traceable to--

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(12) Retirement funds 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 [26 U.S.C. § 401, 403, 408, 408A, 414, 457, or 501(a)].

Open Issues:

The implications of a recent Supreme Court decision: *Clark v. Rameker*, 573 U. S. ____ (2014)(slip opinion No. 13–299, June 12, 2014) (IRA beneficiaries are not entitled to bankruptcy exemption for a debtor who relies on the federal exemption in 11 U.S.C. § 522(d)(10) because the court declared that the benefits payable to a plan beneficiary, unlike those to a participant, under the minimum distribution rules are not paid because of the beneficiary's retirement). This was based on the conclusion that a participant unlike a beneficiary is subject to early distribution and late distribution penalties and may contribute to the retirement account. This is contrary to the ERISA treatment, the federal retirement plan treatment, and the local government treatment outside of bankruptcy. All provide the same protection to beneficiaries and to plan participants.

Issues: Is a participant in a Roth IRA who is not subject to the early or late distribution penalties able to use the bankruptcy exception? Is a participant in a tax-qualified owner-employee pension plan eligible for the same bankruptcy exemption? Distributions to such a person do not depend upon the participant's retirement.

Is a surviving spouse eligible for the bankruptcy exemption for an IRA or tax-qualified plan? If so, does the survivor need to do something to qualify for the exemption?

**D. Bankruptcy Treatment of Retirement, Life Insurance
and Annuity Benefits Not Excluded from the Bankruptcy Estate
Under New York State Bankruptcy Exemptions**

N.Y. DEBT & CRED. § 282. Permissible [Estate] exemptions in bankruptcy.

Under section five hundred twenty-two of title eleven of the United States Code, entitled "Bankruptcy," an individual debtor domiciled in this state may exempt from the property of the estate, to the extent permitted by subsection (b) thereof, only

(i) personal and real property exempt from application to the satisfaction of money judgments under sections fifty-two hundred five [personal property] and fifty-two hundred six [real property] of the civil practice law and rules,

(ii) [1] insurance policies and annuity contracts and [2] the proceeds and avails thereof as provided in section three thousand two hundred twelve of the insurance law and

(iii) the following property: . . .

2. Bankruptcy exemption for right to receive benefits. The debtor's right to receive or the debtor's interest in: (a) a social security benefit, unemployment compensation or a local public assistance benefit; (b) a veterans' benefit; (c) a disability, illness, or unemployment benefit; (d) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and (e) [Corrupted Bankruptcy § 522(d)(10)(E) in 1989] all payments under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified [?] under section 401, 408 or 408A of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan [payment] is on account of age or length of service, and (iii) such plan or contract does not qualify under section four hundred one (a), four hundred three (a), four hundred three (b), four hundred eight, four hundred eight A, four hundred nine or four hundred fifty-seven of the Internal Revenue Code of nineteen hundred eighty-six, as amended.

Conclusions:

There is a consensus that retirement benefits should be protected against the claims of creditors except when equity requires a different result. There are four basic equitable exceptions, although their extent is unclear. There are five basic equitable exceptions, although the extent is often unclear. There are four kinds of equitable overrides. First, are family support obligations. Second, are domestic relations law obligations. Third, are obligations that may not be avoided with fraudulent transfers. Fourth, are criminal law obligations. Fifth, are government obligations not arising from the criminal law.

Courts try to harmonize these conflicting principles by looking at both the equities and the terms of the relevant statutes. The lack of consensus on the extent of federalism makes this task particularly difficult. In particular, a number of courts do not apply to distributed retirement plan benefits the rule that federal laws generally supersede state-law creditor claims and debtor protections.

There is a consensus that life insurance and annuity benefits creditor protections extend generally curb the debtors of the creator of such benefits, but usually not the creditors of the beneficiaries. There is also a significant federalism question. To what extent must federally governed benefit plans must defer to state-law creditors attempting to garnish such benefits.

As a result of the ambiguity of many of the relevant statutes and federalism principles, a very limited case-law, and the centrality of equity concerns, it is often very difficult to predict how the courts will interpret the interaction of these laws in any particular case.