



## Are Your Retirement Assets at Risk?

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**T**his article was written to make you think. And it is meant to have you talk with your attorney to discuss your situation. You have worked hard to accumulate the assets in your retirement plan and would not wish them lost to creditors or legal claimants. A law took effect on October 17, 2005, that brings this issue into sharp focus.

The Employer Retirement Income Security Act of 1974 (ERISA) had been the guiding federal legislation for retirement asset protection. Retirement plans covered by that act were exempt from claimant attack, while Individual Retirement Accounts (IRAs) were left to state statute and individual court interpretation as to inclusion or exemption in creditor action. Proper planning became problematic as statutes and court decisions varied by jurisdiction.

But that began to change on April 20, 2005, when the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (BAPCPA) was enacted. Its provisions became operative as of October 17, 2005. This new law has created an exemption for all types of retirement plans. The interpretation is now clear and uniform. However, the *type* of retirement plan used may vary the amount of protection. It is important for your successful retirement planning to understand the differences.

Under BAPCPA, all qualified retirement plans are



totally exempt from attack by creditors. Those include plans created under Internal Revenue Code sections 401, 403, 408, 408A, 414, 457 and 501(a). So all defined benefit and defined contribution plans are fully exempt, regardless of amount, from creditor attack. This includes SEP IRAs and SIMPLE IRAs as they are employer plans. Also fully exempt are IRA rollover accounts containing the proceeds from defined benefit or defined contribution plans and the subsequent growth on those proceeds.

It is important to differentiate that traditional (annual contribution) IRAs and Roth IRAs are exempt up to a maximum of \$1 million of value. Any amounts above that are eligible for inclusion in creditor or claimant action. However, given the number of years where contributions were eligible to be made and market growth rates during that period, it is not likely that those accounts would exceed the \$1 million threshold. Further, the law allows courts to stretch the exemption beyond \$1 million on IRAs for cases where the “interests of justice” would be served. The courts will need to determine that definition, as the law is not specific. So do not count on this happening easily or with regularity.

Finally, while SEP IRA and SIMPLE plans are fully exempt from creditor action, an IRA rollover account receiving the proceeds from either of those accounts seems to be exempt only to the \$1 million limit, as the

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rollovers from those two type of plans occur under an IRS code section that is different from other types of retirement plan rollovers and that was not eligible for full exemption under BAPCPA. That may be corrected in future amendments. But for now we must be aware of that anomaly in our planning.

So, with this understanding, let's explore planning opportunities to protect hard-earned retirement assets from creditors and claimants. The following explanation of potential planning opportunities is meant to have you think, and then get you to your attorney to verify details and discuss your unique circumstances.

If you have any defined benefit or defined contribution plan or combination of plans, *including* SEP and SIMPLE IRAs, your assets are exempt from creditors under BAPCPA. If you are retired or will retire, your IRA rollover account containing assets from your previous defined benefit or defined contribution plan (*except* SEP or SIMPLE IRAs) will be fully exempt from creditors. So, if you are retiring and will have any

amount of earned income from self-employment, you can continue or begin a defined contribution plan that contains the rollover proceeds from your previous plan. That includes SEP and SIMPLE IRAs, as they all are fully exempt from creditors regardless of asset amount. Once you no longer have an earned income, you can roll over the proceeds of any defined benefit or defined contribution plan (except SEP and SIMPLE IRAs) into an IRA rollover account and that continues with a full exemption. However, if you are retiring with a SEP or SIMPLE IRA and roll the proceeds into an IRA rollover account, your exemption is limited to \$1 million. Unless and until that anomaly is brought into conformity, it behooves you to avoid SEP and SIMPLE IRA rollovers. But, if you have those plans, simply continue them as they carry a full exemption.

If you have traditional annual and Roth IRAs, your exemption is limited to \$1 million. But, as stated, it is unlikely that they total above that amount unless you

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