Newsletter

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Bankruptcy and Estate Planning in Oregon

As songwriters have long lamented, a person's life savings can vanish when misfortune strikes. Think of the gospel singer's poor wayfaring stranger, Woody Guthrie's "Dust Bowl Blues," or the Ray Charles hit, "I'm Busted." In the United States, debtors and their savings often part ways in bankruptcy. Creditors can force a person into bankruptcy to collect unpaid debts. Bankruptcy law can alter the state law protection of a debtor's assets. Bankruptcy trustees have extensive powers to gather and liquidate debtors' assets.

This article examines the collision of bankruptcy and estate planning. It asks: when may assets held in trusts, estates, and retirement accounts survive bankruptcy and remain available for their owners or the owners' heirs? The answer is that, with good planning, substantial assets may be preserved in Oregon.[1]

Bankruptcy Law, Trusts and Estates

In bankruptcy, an asset of a debtor is available to creditors only if (1) the asset is part of the bankruptcy estate, 11 USC § 541(c), and (2) it is not exempt from the bankruptcy estate. The first section discusses property of the estate and the second section discusses bankruptcy exemptions.

Property of the Estate

Interests of trust beneficiaries. Essentially any asset in which the debtor has a legal or an equitable interest, including trust assets of which the debtor is the beneficiary, can be reached by the debtor's trustee in bankruptcy. 11 USC § 541(a)(1). Property of the estate, however, does not include a power that the debtor can exercise only for the benefit of a third party, 11 USC § 541(b)(1), or equitable rights in property in which the debtor has only legal, but not equitable, title. 11 USC § 541(d). Most important, if the debtor's right to reach trust assets is restricted by a provision enforceable under nonbankruptcy law, such as a spendthrift provision, or distributions are subject to the trustee's discretion, the bankruptcy trustee's rights are also so restricted. 11 USC § 541(c)(2).[2]

Thus, for example, if a spendthrift provision is sufficient under applicable state law to prevent a creditor from reaching a beneficiary's interest, the trustee in bankruptcy of that beneficiary cannot reach that interest either. *See In re Daniel*, 771 F.2d 1352, 1360 (9th Cir. 1985). Undistributed income and corpus of a spendthrift trust are not property of the estate. *In re Kragness*, 58 B.R. 939 (Bankr. D. Or. 1986) (applying Hawaiian trust law); *see In re West*, 81 B.R. 22, 25 (B.A.P. 9th Cir. 1987) ("[A] spendthrift provision is effective until distribution is made.").

A spendthrift trust established as part of a debtor's personal injury settlement is treated as self-settled and hence property of the bankruptcy

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estate. *See, e.g., In re Jordan*, 914 F.2d 197, 198 (9th Cir. 1990). However, it may be possible to protect at least part of a personal injury settlement from creditors by purchasing an annuity, *see* ORS 743.049, or by relying on Oregon's exemption statute, ORS 18.345(k), (L).

A contingent beneficiary's interest in a trust is property of the estate under 11 USC § 541(a)(1). *In re Neuton*, 922 F.2d 1379, 1382-83 (9th Cir. 1990). However, if the contingency is that the settlor may revoke the trust (and the settlor is not the debtor-beneficiary), then the beneficiary's interest is not part of the bankruptcy estate, at least in the Ninth Circuit. *In re Schmitt*, 215 B.R. 417, 420-22 (B.A.P. 9th Cir. 1997) (2–1 decision) (applying Oregon and California law). Also, the bankruptcy trustee may have the duty to abandon a contingent trust interest as an asset of the estate, if the interest is of inconsequential value. *See* 11 USC § 554.

Power of appointment; right to revoke; forfeiture on alienation. Although ordinary creditors may not be able to exercise a general power of appointment held by a debtor, the beneficiary of a spendthrift trust with a general power of appointment is deemed to transfer the right to exercise the power to the trustee in bankruptcy. *In re Gilroy*, 235 B.R. 512, 517-18 (Bankr. D. Mass. 1999).

The bankruptcy trustee also acquires the debtor-grantor's right to revoke a trust, even if another person is the income beneficiary. *In re Porras*, 224 B.R. 367, 369-70 (Bankr. W.D. Texas 1998).

A forfeiture-on-alienation clause in a trust terminates the beneficiary's interest when he or she files a voluntary Chapter 11 petition in bankruptcy. *In re Fitzsimmons*, 896 F.2d 373 (9th Cir. 1990); *see* RESTATEMENT (THIRD) OF TRUSTS § 57, cmts b–c (2003).

180-day capture of inheritances. If a debtor goes into bankruptcy and then, within 180 days thereafter, receives an interest in property by bequest, devise, inheritance, or property settlement agreement, or as beneficiary of life insurance, that interest can also be property of the bankruptcy estate and thus be recovered by the bankruptcy trustee. 11 USC § 541(a)(5).

An inheritance under a will is property of the estate under 11 USC § 541(a)(5) if the testator died during the 180-day period after the bankruptcy petition, even if the will is not admitted to probate until the 180 days have run. *In re Chenoweth*, 3 F.3d 1111 (7th Cir. 1993). However, one testator avoided this result by amending her will after her son's bankruptcy petition to disinherit him if she died during the 180-day postpetition period. *In re McGuire*, 209 B.R. 580 (Bankr. D. Mass 1997).

Income distributed from a testamentary spendthrift trust within 180 days after the bankruptcy petition is also property of the estate under 11 USC § 541(a)(5). *In re Kragness*, 58 B.R. 939. However, distributions from an inter vivos spendthrift trust are not "bequests" within the meaning of that section. *See Matter of Newman*, 903 F.2d 1150 (7th Cir. 1990) (distinguishing *Kragness*); *In re Crandall*, 173 B.R. 836, 838-39 (Bankr. D. Conn. 1994); *In re West*, 81 B.R. at 25–26 (postpetition distributions from retirement plan); *cf. In re Gilroy,* 235 B.R. at 518-19 (postpetition lottery winnings channeled by decedent's pourover will to inter vivos trust of which debtor was beneficiary were subject to 11 USC § 541(a)(5)).

> **Practice Tip**: A bankruptcy court may be willing to keep a bankruptcy estate open for a significant amount of time to allow the trustee in bankruptcy to reach trust funds distributable over time to the debtor. Before setting up a trust for a person in, or on the brink of, bankruptcy, consider waiting 180 days after the petition has been filed.

Exempt Assets

Even if an asset is part of the bankruptcy estate, it is protected from creditors if it is exempt. In general, the Bankruptcy Code permits states to opt out of the federal exemptions and instead to supply state exemptions. 11 USC § 522(b)(2). Because Oregon has opted out, ORS 18.300, Oregon's exemptions apply. 11 USC § 522(b)(3)(A).

Most of Oregon's exemptions are listed in ORS 18.300-18.428. Except for retirement accounts and 529 plans, the exemptions tend to be modest. For example, the homestead exemption for real property occupied as a residence is $30,000 for an individual owner and $39,600 for joint owners. ORS 18.395(1), 18.402. Some other states, such as Texas and Florida, have had opulent, even unlimited, homestead exemptions. However, recent amendments to the Bankruptcy Code now restrict the ability of debtors to acquire large exempt homesteads on the eve of bankruptcy. *See* 11 USC § 522(o), (p).

The Oregon Uniform Trust Code does not supersede state exemption statutes. *See The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 283 (2006). This suggests that if an interest

would be exempt from creditors under Oregon nontrust rules, then a beneficiary's interest in a trust consisting of the exempt property is also exempt. However, the issue has not yet been resolved by a reported Oregon case.

Fraudulent Transfers

The Bankruptcy Code has its own fraudulent-transfer statute, 11 USC 548. The statute provides two alternative grounds for setting aside transfers, actual fraud and constructive fraud. In general, the rules are similar to those of the Uniform Fraudulent Transfer Act, ORS 95.200-95.310 ("UFTA").

The trustee in bankruptcy can set aside a transfer that is made with actual intent to hinder, delay, or defraud creditors. 11 USC § 548(a)(1)(A). Actual intent is not defined, so the trustee will look for badges of fraud. 4 COLLIER ON BANKRUPTCY ¶ 548.04[2] (15th ed. 2005).

A transfer can also be set aside for constructive fraud, which occurs if a transferor received less than reasonably equivalent value and (1) was insolvent or became insolvent because of the transfer; (2) was engaged, or about to engage, in a business or transaction with unreasonably small capital; or (3) intended or expected to incur debts beyond the debtor's ability to pay as the debts matured. 11 USC § 548(a)(1)(B).

The bankruptcy statute normally covers only transfers occurring within two years before the bankruptcy petition is filed. 11 USC § 548(b). If the transfer occurred before then, the bankruptcy trustee can use Oregon's UFTA and its four-year statute of limitations, 11 USC § 544(b), as well as possibly extending the bankruptcy look-back period by concepts of equitable tolling and continuing concealment. *See In re Hansen,* 114 B.R. 927 (Bankr. N.D. Ohio 1990).

The 2005 amendments to the Bankruptcy Code added an important exception to the two-year limit of § 548(b). Bankruptcy trustees may now sue to avoid transfers to a "self-settled trust or similar device" made within 10 years before the filing of the bankruptcy petition. 11 USC § 548(e)(1)(A). However, the trustee must prove that the transfer was made with intent to hinder, delay, or defraud – in other words, there must be "actual fraud." 11 USC § 548(a)(1)(D). The scope of this exception is unclear, but it likely applies to transfers to self-settled "on-shore" asset protection trusts in states such as Delaware and Alaska and to "off-shore" asset protection trusts in foreign countries.

The release of a right to be named as a taker under a power of appointment may constitute a fraudulent transfer. In *In re Green*, 986 F.2d 145 (6th Cir. 1993), a trust income beneficiary held a testamentary special power of appointment in favor of her issue. To settle a dispute involving the trust, the income beneficiary, her son, and other family members agreed that she would appoint her son to take the remainder. However, after he encountered financial problems, and within one year before he filed for bankruptcy, the mother, with the son's consent, changed her will to appoint him instead as trustee for his children. The court held that the son's release of his right to be named under the power of appointment was a fraudulent transfer under 11 USC § 548 and state law.

A postpetition disclaimer by a bankruptcy debtor is voidable as an unauthorized postpetition transfer under 11 USC § 541(a)(5) even if valid under state law. *In re Cornell*, 95 B.R. 219 (Bankr. W.D. Okla.1989); *accord In re Detlefsen*, 610 F.2d 512, 520 (8th Cir. 1979) (dictum); *In re Lewis*, 45 B.R. 27 (Bankr. W.D. Mo. 1984); *In re Watson*, 65 B.R. 9 (Bankr. C.D. Ill. 1986).

Preferences

Under both bankruptcy law (11 USC § 547) and Oregon's UFTA, the bankruptcy trustee can recover transfers made in consideration for certain antecedent debts as preferential. Such transfers usually do not involve trusts.

Denial of Discharge in Bankruptcy

If a debtor, within one year before going into bankruptcy, transfers or conceals assets with intent to hinder, delay, or defraud a creditor, a bankruptcy court can deny that debtor its discharge of debts. 11 USC § 727(a)(2); *see In re Katz*, 203 B.R. 227 (Bankr. E.D. Pa. 1996) (denying discharge in Chapter 7 to debtor who concealed his trust interests and other assets). Thus the debtor loses all nonexempt assets to the trustee in bankruptcy but keeps the debts. The one-year period can be extended if the debtor has continuously concealed the transfer. *In re Essres,* 139 B.R. 958, 961 (Bankr. D. Colo. 1992); *see also In re Towe,* 147 B.R. 545, 548 (Bankr. D. Mont. 1992); *Matter of Kauffman,* 675 F.2d 127, 128 (7th Cir. 1981). In *In re Woodfield*, 978 F.2d 516 (9th Cir. 1992), the Ninth Circuit denied any discharge because the debtors, 10 days before bankruptcy, transferred the assets of their two restaurant franchises to a new corporation that they had formed. The court found that this was a transfer with intent to hinder, delay, or defraud creditors.

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State Law Claims

The trustee in bankruptcy may assert any claim that a creditor would have under state law (including trust law and the UFTA) or federal nonbankruptcy law to set aside a transaction. 11 USC § 544. *See In re Green*, 986 F.2d 145 (6th Cir. 1993).

Enforcement Proceedings

The proceedings in the bankruptcy court are sometimes by motion (*see* FRBP 9014) and sometimes by adversary proceedings instituted by filing a complaint in the bankruptcy court (*see* FRBP 7001-87), or, when the bankruptcy court does not have jurisdiction over an objecting defendant, in a court of general jurisdiction.

A bankruptcy court may require the trustee of a spendthrift trust to give notice before making mandatory distributions to a debtor-beneficiary. *In re Moody*, 837 F.2d 719, 724 (5th Cir. 1988). A different result may occur, however, if distributions are discretionary. *In re Bass*, 171 F.3d 1016, 1027-30 (5th Cir. 1999) (dictum). If a beneficiary is one of multiple trustors and contributed only part of the assets of a spendthrift trust, the creditors may reach that beneficiary's interest only to the extent of the assets that he or she contributed. In *Matter of Shurley*, 115 F.3d 333 (5th Cir. 1997), a Chapter 7 bankruptcy trustee obtained an order from the bankruptcy court, affirmed by the district court, that the debtor-beneficiary's half-interest in the income and principal of a spendthrift trust was an asset of the bankruptcy estate. The order enjoined the trustee of the trust from making disbursements on account of the debtor's trust interest other than to the bankruptcy trustee. The debtor and other family members were the trustors, and the debtor had contributed some but not all of the trust assets. The bank trustee had discretion to distribute all of her beneficiary's share of the corpus to the debtor if trust income and outside resources were insufficient for her support. The debtor held a special power of appointment to allocate trust assets to her descendants. She also had the right to petition three "special trustees" to terminate the trust, although that decision was in their sole discretion. The court held that the trust assets contributed by the debtor were part of the bankruptcy estate; to that extent, creditors could reach both income and principal under state law. However, assets contributed by other family members were protected by the spendthrift clause. The debtor's special power of appointment and right to request trust termination were not sufficient to treat her as grantor of those other assets.

If the bankruptcy has been concluded, the bankruptcy court may no longer have jurisdiction to intervene to help collect debts not discharged in the bankruptcy. *See In re Bass,* 171 F.3d 1016 (declining to require that trustee of discretionary spendthrift trust give 72-hour notice to creditors before making distributions to debtor-beneficiary).

Retirement Benefits and Bankruptcy

For many persons, retirement savings are the main bulwark against poverty in old age. Federal and state laws recognize the importance of retirement savings by protecting retirement accounts against claims of creditors. At the same time, federal bankruptcy and state nonbankruptcy laws also recognize the need to make debtors' assets available to satisfy claims of creditors. The interplay between these two principles is the subject of this section.

Nonbankruptcy Law

Federal protection under ERISA. Many retirement accounts, including traditional pensions and 401(k) plans, are protected from creditors outside bankruptcy by federal law. Section 206(d)(1) of ERISA states that each pension plan "shall provide that benefits provided under the plan may not be assigned or alienated." 29 USC § 1056(d)(1). Similarly, IRC § 401 states that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that the benefits provided under the plan may not be assigned or alienated." 26 USC § 401(a)(13)(A); Treas. Reg. § 1.401(a)-13(b)(1). The "anti-alienation" clause thus required is similar to traditional spendthrift trusts: it keeps retirement plan assets beyond the reach of creditors.

The impact of the anti-alienation clause can be dramatic. In *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), the United States Supreme Court ruled that a state court could not reach pension assets of a union official who had embezzled funds of his employer. In a Wisconsin case, a convicted criminal could not be ordered to pay over ERISA retirement funds to his victims as restitution in order to receive probation rather than jail time. *State v. Kenyon*, 593 N.W.2d 491 (Wis. Ct. App. 1999).

Not all retirement plans are covered by ERISA's anti-alienation provision. Certain retirement accounts – notably including IRAs – are not subject to the part of ERISA that mandates the anti-alienation provision.[3] Also, ERISA may not protect (1) retirement plans that are not administered in compliance with the relevant

tax rules; (2) amounts that have been distributed out of plans to the participants; and (3) participants whose debts are to the IRS, or to ex-spouses or children for court-ordered support. *See* Jonathan Levy, *Legal Issues in Retirement Planning and Investing*, ELDER LAW § 3.28A (Supp. 2005). However, as the next paragraphs will explain, Oregon law and the new federal bankruptcy law fill some of these gaps.

Protection of retirement accounts under Oregon law. In Oregon, a broad range of retirement plans are protected by ORS 18.358. Here, Oregon is far more protective than some other states. Under ORS 18.358(1), these exempt plans include pension plans arising under ERISA, 403 and 457 plans, IRAs, Roth IRAs, and state and municipal pensions. As a further safeguard, ORS 18.358(2) creates a conclusive presumption that retirement plans are valid spendthrift trusts under Oregon law, whether or not self-settled.

As with federal law, Oregon law provides a partial exception for alimony and child support. In general, 75 percent of a beneficiary's interest in a retirement plan is exempt from claims. ORS 18.358(3)(b). A related statute, ORS 18.348, protects the proceeds of exempt assets when deposited in an identifiable account of the debtor. This exemption is limited to an accumulation of funds of $7,500 or less. Presumably, the debtor may spend the proceeds on living expenses and then replenish the account from time to time.

In general, 75 percent of disposable earnings (counting both retirement income and other earnings) is exempt from execution by creditors. ORS 18.385(1). A second, separate limit also exempts disposable earnings if the debtor would otherwise be left with less than $170 per week of net disposable earnings. ORS 18.385(2). This partial exemption does not apply in bankruptcy or protect against collection of federal or certain state tax debts. ORS 18.385(5), (6).

Federal Bankruptcy Law Applied to Retirement Benefits

Assets excluded under applicable nonbankruptcy law. For retirement accounts, like other assets, there are two ways for a debtor to prevent assets from going into the bankruptcy estate. The first is § 541(c) of the Bankruptcy Code (11 USC § 541(c)). Under § 541(a), nearly all of the debtor's property becomes part of the bankruptcy estate. However, § 541(c) excludes the debtor's interest in a trust with a spendthrift provision enforceable under "applicable nonbankruptcy law." 11 USC § 541(c). In the leading case in this area, *Patterson v. Shumate*, 504 U.S. 753 (1992), the Supreme Court decided that "applicable non-bankruptcy law" includes ERISA, with its anti-alienation provision, as well as state law. As a result, retirement plans subject to ERISA's anti-alienation rules are not available to most creditors in bankruptcy.

Exempt assets. A second potential shelter exists for a debtor's assets that are not excluded from the bankruptcy estate by § 541(c): §522 of the Bankruptcy Code permits a debtor to elect to exempt certain property of the bankruptcy estate. For Oregon residents, the relevant provision is § 522(b)(3)(A), which exempts from creditors' claims property that is exempt under Oregon law, and § 522(b)(3)(C), which exempts most retirement accounts. Oregon law was covered above. See below for an explanation of § 522(b)(3)(C). The combined impact is that nearly all retirement assets are exempt in bankruptcy.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 significantly expands the federal protection of retirement accounts in bankruptcy. It amends § 522 of the Bankruptcy Code to create a new general rule that most retirement accounts are exempt assets, even in states, like Oregon, that have chosen their own exemptions. The new rule applies to pension funds exempt under IRC §§ 401, 403, 408, 408A, 414, 457, or 501(a). 11 USC §§ 522(d)(12), 522(b)(3)(C).

There is a $1 million cap to this exemption for IRAs and Roth IRAs. However, the cap does not apply to IRAs in SEPs, in SIMPLE accounts, or that are rollover contributions from other types of retirement accounts. 11 USC § 522(n).

The 2005 Act also clarifies the exemption for retirement plans that may not be in full tax compliance. Funds are exempt if (1) the plan has received a favorable IRS determination letter and the determination is in effect as of the date of the bankruptcy filing; or (2) if there is no favorable determination letter, but either the plan is in substantial compliance with tax rules or the debtor is not materially responsible for the plan's noncompliance. 11 USC § 522(b)(4)(A), (B).

Life Insurance and Annuities

Life insurance on a debtor's life that is not payable to the purchaser's estate (and presumably not to a

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revocable trust set up by the insured) cannot be reached by creditors, even in bankruptcy. ORS 743.046(1), (3). This is also true for a policy of group life insurance payable to a person or persons other than the insured individual's estate. ORS 743.047(1). One rationale is that the deceased debtor's dependents should have preferred status over creditors. *Milwaukie Constr. Co. v. Glens Falls Ins. Co.*, 389 F.2d 364 (9th Cir. 1968).

The insured owner of the policy may change the beneficiary when that right is expressly reserved in the policy. ORS 743.046(5). However, when the insurance proceeds are received by the beneficiary, they may not be exempt from the beneficiary's creditors. *In re McAlister*, 56 B.R. 164 (Bankr. D. Or. 1985). Further, when the owner of the life insurance policy assigns an interest in the policy during his or her life to creditors, they may have priority over the named beneficiaries. *See e.g., Duty v. First State Bank of Or.,* 71 Or. App. 611, 617, 693 P.2d 1308, rev. denied, 278 Or. 822 (1985).

Annuities are also exempt, but not to the extent that payments from all annuity policies exceed $500 per month. ORS 743.049. Qualifying annuities are those with payments for life rather than for a term of years. ORS 731.154; *In re Thompson*, 197 B.R. 326, 327 (Bankr. D. Or. 1996). The exemption does not cover payments to income beneficiaries of charitable remainder trusts. ORS 731.154(2).

The exemption for annuity and life insurance does not apply with payments paid in fraud on creditors. ORS 743.046(4), 743.049(1)(a).

529 Plans

Introduction to 529 Plans

Section 529 of the Internal Revenue Code authorizes states to set up tax-exempt retirement accounts for college savings. Oregon, like other states, has established such a plan. *See* http:\\www.oregoncollegesavings.com; ORS 348.841 – 348.873. Earnings with a contributor's account are free of both Oregon and federal income taxes. Withdrawals for qualified education expenses, such as tuition, books, and room and board, are also not taxed.[4] Withdrawals for other purposes are taxed at ordinary income tax rates, plus an additional 10 percent federal tax.

Oregon's 529 Plan as an Asset-Protection Vehicle

Section 529 plans have been widely publicized as a way to save for children's higher education. What is less well known is that they are useful for asset protection. At least for Oregon residents who set up these accounts, the account balances and the right of withdrawal are exempt from claims of creditors of *both the account owner and beneficiaries*. ORS 348.863(2). In addition, funds, once withdrawn, remain exempt as long as they are deposited in an identifiable account of the debtor that does not exceed $7,500. ORS 18.348(1)(2). Presumably, the debtor-owner or debtor-beneficiary can spend the proceeds (such as for a tuition installment) and then replenish the account from time to time as needed.

The usefulness of 529 plans for asset protection is magnified by their large contribution limits. Oregon's plan permits owners to invest up to $250,000 for future higher education expenses per beneficiary over the life of the plan. Moreover, owners can contribute up to $55,000 per beneficiary in a single year, or $110,000 per couple, to take advantage of five years' worth of annual gift exclusions at once, in advance. IRC § 529(c)(2).

Protection for 529 Plans under the New Bankruptcy Law

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 recently clarified the federal protection of 529 plans in bankruptcy. *See* 11 USC § 541(b)(5), (6). Qualified contributions to these plans are excluded from the bankruptcy estate if certain conditions are met. The designated beneficiary must be a child, stepchild, grandchild, or step-grandchild of the debtor for the tax year in which the funds were placed in the account. The contributions must be made at least 365 days before the date of the debtor's bankruptcy petition. If the contributions were made at least 365 days pre-petition, but less than 720 days pre-petition, the exclusion is capped at $5,000. If the contributions were more than 720 days pre-petition, there is no limit, other than the contribution limits that apply to the 529 plans under tax law and the particular state's rules.

Conclusion

When financial disaster strikes, it is possible, even in bankruptcy, to preserve assets for owners or their heirs. Available tools include spendthrift and discretionary trusts, retirement accounts and 529 accounts. The key is to plan in advance-to set up and fund these arrangements while the sun is still shining, before creditors' claims arise. After the bankruptcy, those who have planned may remember not "I'm Busted," but the words from an old Carter Family song: "Clouds and storms will, in time, pass away. The sun again will shine bright and clear."

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[1] This article draws heavily on two more detailed sources: Jonathan Levy & James Cavanaugh, *Creditors' Rights and Spendthrift Clauses*, ADMINISTERING TRUSTS IN OREGON, ch 10 (OSB CLE 2d ed. 2007), and Jonathan Levy, *Legal Issues in Retirement Planning and Investing*, ELDER LAW, ch. 3 (OSB CLE 2000 & Supp. 2005).

[2] This article does not revisit the enforceability of spendthrift and discretionary trusts outside bankruptcy. For discussions of that subject, see Jonathan Levy, *Creditor Claims and Oregon's New Uniform Trust Code*, OR. EST. PL. & ADMIN. SEC. NEWSLETTER, July 2006, at 7; Levy & Cavanaugh, *Creditors' Rights and Spendthrift Clauses*, supra n. 1.

[3] The lack of ERISA coverage for IRAs has become largely moot. The Supreme Court recently ruled that IRAs are exempt assets in bankruptcy in states where debtors may elect the federal exemptions. *Rousey v. Jacoway*, 544 U.S. 320 (2005). Moreover, as is discussed below, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has created a bankruptcy exemption for IRAs of at least $1 million for all debtors, whether or not they live in a state that has elected to retain the federal exemptions.

[4] Withdrawals for other purposes are taxed at ordinary income tax rates, plus an additional 10 percent federal tax.