

# WEALTH MANAGEMENT ROUNDTABLE

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Present

**PROTECTING RETIREMENT  
ASSETS FROM CREDITORS:  
WHAT YOU MUST KNOW!**



# INTRODUCTION

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- As you are all probably aware the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) has fundamentally changed the bankruptcy rules for debtors and creditors.
- We are also assuming that you are familiar with the most of the rules governing your clients’ funds.
- Today we are only going to tell you what you don’t already know!



# THE PROBLEM

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- The BAPCPA has created large new creditor exemptions for IRA's and qualified plan benefits that previously did not exist.
- However, several types of IRA accounts may still be subject to creditor attachment under BAPCPA.



# THE PROBLEM, CONT.

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- **VIRTUALLY NO ONE IS AWARE OF THE PROBLEM!**
  1. BAPCPA does not cover rollover IRAs from Simplified Employee Pensions (SEPs). The language under the act is unequivocal, a SEP rollover is not covered by 11 USC section 522(n).
  2. SEPs are, however, protected under the \$1million normal IRA exemption.



## “ON THE POSITIVE SIDE”

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If you have at least one dollar of Schedule C income you can create a SEP, rollover all accounts into that SEP, and then all assets in that SEP will be protected, including amounts formerly subjected to the \$1 million dollar limitation.



## ON THE POSITIVE SIDE, CONT.

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- Also, because rollovers are protected regardless of the source of the original account, it also appears that one can “launder” money subject to the \$1 million dollar limitation by rolling it into any type of defined contribution or defined benefit plan, and then rolling it out of that plan into a rollover IRA for now unlimited protection.



# ANOTHER POTENTIAL TRAP

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- The general feeling among asset protection professionals is that “inherited IRAs” will not be subject to exemption from creditors’ claims.



# Inherited IRAs, cont.

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Why?

1. It's hard to argue that inherited funds are retirement assets to a recipient other than a decedent's spouse.
2. The statutory language is ambiguous.
3. The first case will probably hinge on facts something like this:

*"Intoxicated twenty five year old speeds through traffic light killing mother of four and claims mother's family has no rights to the \$2,000,000 IRA he inherited from his father."*



# Solution to Problem

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- Put the inherited IRA in a trust with a spend thrift provision. This will keep the creditors from attaching the proceeds, the debtor can file bankruptcy, and the debt can be eliminated.



# Nonqualified Deferred Compensation Plans

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- BAPCPA never really touches on these types of retirement plans. Many do, however, have anti-alienation provisions that might preclude creditors from gaining access to the funds. These must be examined on a case by case basis and careful review undertaken of the underlying documentation.



# Insurance and Annuities

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- The law with respect to the asset protection strategies for life insurance and annuities has remained, for the most part, unchanged.
- State laws generally provide liberal exemptions for debtors' assets held in life insurance and annuity products.
- Federal bankruptcy exemption laws provide virtually no exemption whatsoever for life insurance or annuity assets held by debtors.



# Insurance and Annuity Suggested Solutions

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- Place such products into intentionally defective grantor asset protection trusts or other trust structures that will preserve the tax and insurance status but provide for creditor protection.



# ASSET PROTECTION TRUSTS

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- Contrary to the prevailing thought most asset protection practitioners believe that BAPCPA really did very little, if anything, to change the asset protection trust landscape.
- Most still believe that domestic asset protection trusts are still very viable. In enacting section 548 Congress simply duplicated a remedy that already existed for creditors under the Uniform Fraudulent Transfer Act, and simply extended the look back time from four to ten years.
- It must be remembered though that asset protection trusts never work if a fraudulent conveyance was involved.



# Foreign vs. Domestic Asset Protection Trusts

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- Both foreign and domestic asset protection trusts will continue to be viable under BAPCPA, however, it is the author's view that, when possible, a debtor should attempt to use foreign asset protection trusts for all of the reasons laid out in previous seminars.



# HOW DO YOU TALK TO CLIENTS ABOUT THE VULNERABILITY OF THEIR ASSETS?

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- FIRST – YOU MUST UNDERSTAND THE TOPIC YOURSELF AND FEEL CONFIDENT IN THE PRESENTATION OF THE ESSENTIAL ELEMENTS
- **YOU DO NOT HAVE TO BE AN EXPERT!**



# THE BASIC ANALYSIS

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- THE KEY TO DEALING WITH THE ISSUE IS DISCLOSURE. BUT WHAT DO YOU DISCLOSE?
- ANYONE CAN FACE FINANCIAL DISASTER REGARDLESS OF THEIR LEVEL OF WEALTH.
- THEREFORE AN ASSET PROTECTION ANALYSIS MUST BE UNDERTAKEN FOR ALL CLIENTS.
- THIS IS NOT SOMETHING THAT IS ONLY APPLICABLE TO YOUR CLIENTS, IT APPLIES TO ALL WHO HAVE ACCOUNTS.



THANKS FOR ATTENDING!

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